

**S265077**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re J.E.,

A minor.

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

J.E.,

Defendant and Appellant.

Supreme Court  
No. \_\_\_\_\_

Court of Appeal  
No. A156839

Contra Costa County  
Sup. Ct. No.  
J1900105

Appeal From Contra Costa County Superior Court  
Honorable John C. Cope, Judge

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**PETITION FOR REVIEW**

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**After the Published Decision of the Court of Appeal, First Appellate  
District, Division Four, Affirming the Judgment**

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

This petition for review follows the published decision of the Court of Appeal, First Appellate District, Division Four, filed on September 8, 2020. A copy of the majority opinion and the dissent are attached to this petition as an appendix.

### **ISSUE PRESENTED**

Petitioner presents the follow issue for full review, pursuant to California Rules of Court, rule 8.500(b)(1):

**May a court overcome Penal Code section 26’s rebuttable presumption of incapacity of a child by considering generic characteristics of a child without considering the child’s individual circumstances, including her race, community, and cognitive ability to self-regulate and make moral judgments.**

### **NECESSITY FOR REVIEW**

Under rules 8.500(b)(1) of the California Rules of Court, this Court may review a Court of Appeal decision “[w]hen necessary...to settle an important question of law.” (Cal. Rules of Court, rule 8.500(b)(1).)

Here, the Court should grant review to reanimate and explicate the individualized circumstances a court should consider when making a determination under Penal Code section 26 that a child under the age of 14 understood the wrongfulness of her conduct. Specifically, rather than relying upon assumptions of expected behavior of a normal child, a court should consider an appellant’s race, community, and the research that children’s cognitive ability to self-regulate and make moral judgments develops at vastly different rates. (See Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in*

*Juvenile Justice Reform* (2013) 98 Cornell L.Rev. 383, 397-401, 419-424.)

In petitioner J.E.’s case, the court relied upon generalizations and speculation as to what the majority of 13-year-olds would understand in finding that she understood the wrongfulness of her conduct when she resisted arrest and committed misdemeanor battery on a police officer. The court emphasized that J.E. was almost 14 at the time of the incident. “But age alone cannot decide the question. Applying the Penal Code section 26 presumption is not like horseshoes, where close is good enough.” (Justice Streeter Dissent at p. 5.)<sup>1</sup> Some other factor must be present to show knowledge. No such factor was present here. The only evidence in the record bearing on whether J.E. understood to obey police officers was her mother’s testimony that she never spoke to J.E. about it and J.E.’s lack of experience in dealing with law enforcement. (*Id.* at p. 6.)

The court spoke generally about other sources of moral instruction, such as J.E.’s grandmother who must have taught her “right from wrong” and school, where she must have learned to respect authority figures through disciplinary actions. (Opn. at p. 7.) “But we are not taking about an encounter with ‘authority figures’ in the generic sense. Nor are platitudes about knowing ‘right from wrong’ helpful here.” (Diss. at p. 6.) In relying on presuppositions about what “most 13-year-olds know is wrong” (Opn. at p. 6), the court failed to consider: (i) that J.E. is Black; (ii) the contemporary relationships between Black youth and the police; and (iii) the research showing that not all 13-year-olds have the same ability to self-regulate and make moral judgments.

Here, when police officers approached J.E., she had just runaway

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<sup>1</sup> Hereinafter, Justice Streeter’s dissent will be cited to as “Diss.” and the majority’s opinion will be cited to as “Opn.”

<sup>2</sup> *In re Manuel L.* (1994) 7 Cal.4th 229 interpreted the requirement in Penal Code section 26 that there be “clear proof” that a child knew the

from a domestic violence incident with her mother, where J.E.'s mother admitted she started the incident and called the police "to scare" her. (Diss. at p. 1.) After the officers placed J.E. in custody, her mother in a fit of rage yelled at her, "I hope you die. I hope they beat your ass in there. I hope they never let you out." (*Id.* at p. 2.) J.E. was so upset after the incident, that the officers had to stop the patrol car to help her calm down. (*Ibid.*)

Furthermore, "[a]t issue in this case is a 13-year-old African-American child's first encounter with law enforcement. If the widespread public tumult of late over police violence in our country has taught anything, it is that many people in minority communities, particularly young people, live in fear of even routine interactions with law enforcement." (*Id.* at pp. 5-6.)

All of these circumstances were relevant to J.E.'s state of mind at the time of the incident and her understanding that she could not walk away and refuse to cooperate with the police officers. "[F]rom the perspective of someone in J.E.'s shoes (not the perspective of 'most 13-year-old[]'), an effort to withdraw or flee is just as likely to be an act of panicked self-preservation as it is of knowing disobedience." (Diss. at p. 8.) Additionally, J.E.'s individual circumstances show that her "kick" at one of the officers as she was placed in the patrol car was not a deliberate effort to commit assault, but rather, reflected "an emotionally distraught child whose actions [were] being governed by the manic sense of grievance we commonly call a tantrum." (*Id.* at p. 9.)

As J.E.'s case illuminates, it is important for the elimination of unconscious bias in our judiciary that courts consider a child's race, community and cognitive ability to self-regulate and make moral judgments when making a determination under Penal Code section 26. These individual considerations "prevent[] judges from calling upon their own presuppositions about expected behavior in children, whose cognitive ability to self-regulate and make moral judgments, modern brain science

now teaches us, develops at vastly different rates well into their teenage years.” (Diss. at pp. 10-11.)

Moreover, this interpretation preserves Penal Code section 26 as a robust and important safeguard against over-criminalizing in the juvenile justice system. To protect children from the grave consequences of wardship, Penal Code section 26 stands as a bulwark between Welfare and Institutions Code sections 601 and 602. (*In re Gladys R.* (1970) 1 Cal.3d 855, 864-867 (*Gladys R.*); see also Diss. at p. 12.) Currently, the majority of published cases finding knowledge under Penal Code section 26 involved serious crimes. (See, e.g., *In re Marven C.* (1995) 33 Cal.App.4th 483 [rape]; *In re Tony C.* (1978) 21 Cal.3d 888 [forced oral copulation]; *In re Harold M.* (1978) 78 Cal.App.3d 380 [conspiracy to burglarize cars]; *People v. Lewis* (2001) 26 Cal.4th 334 [arson]; *In re Joseph H.* (2015) 237 Cal.App.4th 517 [murder].) Finding knowledge in this case, which involved misdemeanor crimes and where there is limited evidence of J.E.’s understanding of the wrongfulness of her conduct, dilutes the purpose of Penal Code section 26 and robs it of any real power to protect against over-criminalization of youth.

Penal Code section 26’s protection against the over-criminalization of juveniles is imperative for two reasons. First, it aligns with the science regarding adolescent brain development: that “children have a ‘lack of maturity and an underdeveloped sense of responsibility’ leading to recklessness, impulsivity, and heedless risk-taking.” (*Miller v. Alabama* (2012) 567 U.S. 460, 471, 132 S.Ct. 2455, 2464. These scientific findings “both lessen[] a child’s ‘moral culpability’ and enhance[] the prospect that, as years go by and neurological development occurs, his ‘deficiencies will be reformed.’” (*Ibid.* [quoting *Graham v. Florida* (2010) 560 U.S. 48, 68, 130 S.Ct. 2011, 2026].) Second, it is imperative to the formation of a more equitable justice system, as the primary causes of racial injustice in the



juvenile court are the over-criminalization, over-policing and over-punishment of people of color. (See Feld and Moriearty, *Race, Rights, and the Representation of Children* (2020) 69 Am. U. L.Rev. 743, 744.)

There has not been a Supreme Court decision regarding the type of evidence courts should consider under Penal Code section 26 since the 1970 decision of *Gladys R.*, *supra*, 1 Cal.3d 855 and the 1978 decision of *In re Tony C.* (1978) 21 Cal.3d 888.<sup>2</sup> Those cases instruct courts to consider a child's age, experience, knowledge and the conduct of a minor when making a determination under Penal Code section 26. (*Gladys R.*, *supra*, 1 Cal.3d at p. 864; *In re Tony C.*, *supra*, 21 Cal.3d at p. 900.) As this case makes clear, courts' consideration of a child's experience and knowledge should include consideration of her race, community, and individual ability to self-regulate and make moral judgments.

### **STATEMENT OF CASE AND FACTS**<sup>3</sup>

#### **A. The Facts Underlying J.E.'s Offenses**

On January 27, 2019 at approximately 12:45 p.m., two Sheriff's Deputies Slater and Spangler responded to a domestic violence report at a home where J.E. lived with her mother, A.R. (Opn. at p. 1.) A.R. was crying and had a small amount of blood under her nose. (*Ibid.*) She told the deputies she and J.E. had an argument about cleaning the house. (*Ibid.*) A.R. started a physical fight when she "shoved" J.E., and then J.E. hit A.R. "a couple times" in the face. (*Id.* at p. 2; Diss. at p. 1.) J.E. then left the house and A.R. did not know where she had gone. (Opn. at p. 2.) A.R.

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<sup>2</sup> *In re Manuel L.* (1994) 7 Cal.4th 229 interpreted the requirement in Penal Code section 26 that there be "clear proof" that a child knew the wrongfulness of her crime to be shown by clear and convincing evidence.

<sup>3</sup> Petitioner provides a brief summary; except where noted, appellant adopts the majority opinion's "Factual and Procedural Background." Petitioner provides more details to certain facts that Justice Streeter included in his dissent. (See Dissent at p. 1.)

signed a citizen's arrest form for battery and provided a physical description of J.E. (*Ibid.*) When asked why she "call[ed] the police" after the altercation with J.E., A.R. replied, "to scare her." (Diss. at p. 1.) While interviewing A.R., the deputies saw J.E. down the street and left by car to speak with her. (Opn. at p. 2.)

J.E. was walking down the street with a friend. (Opn. at p. 2.) The deputies exited the marked patrol car, called to J.E. by name, and identified themselves. (*Ibid.*) Initially, J.E. was calm as the deputies explained that they needed to escort her back home to talk with her mother and "figure out" how to handle the situation. (*Ibid.*)

J.E. had no previous experience in any encounter with law enforcement. (Diss. at p. 1.) She refused to go with the deputies and became upset when they insisted that she go with them back to her mother. At one point J.E. stated, "F you. I'm not going to go with you guys." (Opn. p. 2.) The deputies told J.E. she was not under arrest, but she needed to come with them. (*Ibid.*) J.E. did not initiate any contact with the deputies, but instead tried to walk away. (Diss. at p. 1.) The deputies followed J.E. and told her "five or six" times to stop walking. (Opn. at p. 2.) When J.E. continued to walk away, a deputy grabbed one of J.E. arms from behind and the other deputy grabbed her other arm, with one deputy stating, "We're going to escort you home." (*Ibid.*) J.E. protested, kicking, screaming and "flailing her legs," and tried to twist away as the deputies dragged her by the arms to the patrol car. (*Ibid.*; Diss. at p. 1.) J.E. spit at the deputies and kicked a different vehicle, causing a dent. (Opn. at p. 2.)

The deputies handcuffed J.E., and dragging her by the arms, forced her into the back of their patrol car. (Opn. at p. 2; Diss. at p. 1.) While they were "scooting" J.E. into the backseat, positioned with her legs across the bench, she thrust a foot at a Deputy Slater, touching her in the midriff as the deputy backed away. (Diss. at p. 1.) According to Deputy Slater's

testimony at the jurisdictional hearing, J.E.'s foot "didn't impact my stomach forcefully because I was a far enough distance away." (*Ibid.*)

The deputies drove J.E. back to A.R.'s apartment, where A.R. expressed surprise that rather than simply bringing J.E. home, the deputies were taking her to jail or to juvenile hall. (Diss. at p. 2.) While J.E. was still seated in the patrol car, the deputies allowed A.R. to speak to J.E. through the car window. (*Ibid.*) At some point, J.E. said to the deputies, "I'm done. Can you please have my mom leave?" (*Ibid.*) When the deputies instructed A.R. to back away from the car, she began yelling at J.E. (*Ibid.*) During her tirade, according to Deputy Slater, she yelled, "I hope you die. I hope they beat your ass in there. I hope they never let you out." (Opn. at p. 2; Diss at p. 2.) Upon being instructed to move away, A.R. refused and "continued to yell obscenities. At that point, she yelled, 'F you B' to Deputy Spangler. (Opn. at p. 3; Diss. at p. 2.). The deputies then drove away, but before taking J.E. to the station for booking, they parked and spoke to her. According to Deputy Slater's testimony, "[J.E.] was very upset. She went from being angry at the situation to after all of the comments and things that happened with her mom, she started crying and was visibly upset... We... spoke with [J.E.] and essentially told her that was awful what your mother just said to you. It was uncalled for. It shouldn't have happened." (Diss. at p. 2.)

J.E. is a 13-year-old African-American girl. (Diss. at p. 5.)

## **B. The Trial Court Proceedings**

Following J.E. detention, on January 29, 2019, the Contra Costa County District Attorney's Office filed a Welfare and Institutions Code section 602 juvenile wardship petition alleging J.E. committed misdemeanor battery upon a peace officer and misdemeanor resisting, obstructing, or delaying a peace officer. (Opn. at p. 3.)

A detention hearing was held on January 30, 2019. The Probation

Department's Hearing Information Sheet/Initial Case Assessment, filed prior to the detention hearing, indicated that J.E. was a "Runaway Risk" based on A.R.'s report that "she has left home without permission once previously and her whereabouts [were] unknown for approximately three days." (Diss. at p. 2, fn. 1.) A.R. had reported that there were prior incidents when J.E. hit her with a hanger and threatened to kill her. (Opn. at p. 3.) According to A.R., J.E. rarely followed her commands and consistently skipped school. A.R. quit her job because J.E.'s behavior had "become out of control." (*Ibid.*) A review of J.E.'s school records showed J.E. was suspended twice for being physically aggressive and making threats towards staff, and was disciplined on several occasions for unexcused absences, disrupting class, using profanity, and being under the influence of marijuana. (*Ibid.*) For the then-current academic year at J.E.'s middle school, she had been "suspended for 4 days...and ha[d] accumulated 34 all-day unexcused absences." (Diss. at pp. 2-3, fn. 1.)

At the detention hearing, J.E.'s counsel requested that she be released to A.R., who had agreed to have her daughter come home with an ankle monitor. (Opn. at p. 3.) The probation officer and the People opposed this request and recommended that J.E. be detained, based on evidence that she had been disrespectful to her mother, school staff and police officers, and that she had punched A.R. during the most recent incident. (*Ibid.*) The court followed the probation officer's recommendation, citing concerns about J.E. and A.R.'s volatile relationship and A.R.'s safety if J.E. were allowed back home. (*Ibid.*)

A contested jurisdictional hearing was held on February 26, 2019. In addition to testimony from one of the arresting deputies, A.R. testified about her relationship with her daughter. J.E. was 11 when she began living with A.R., before which she lived with her grandmother. (Opn. at p. 4.) A.R. testified that she never talked to J.E. about the difference between

right or wrong or what constituted good or bad behavior. (*Ibid.*) A.R. further testified:

- Q: Did you ever talk to [J.E.] or teach her about hitting other people?  
A: Yes. I told her to defend herself...  
Q: Did you ever tell her that it was wrong to initially hit somebody, not in defense but initially?  
A: No.  
Q: Did you talk to her about how to interact with police officers?  
A: No.  
Q: Did you ever talk to her about respecting of police officers' commands or authority?  
A: No.  
Q: At no point police officers came up while you were raising [J.E.]?  
A: No.  
Q: At no point did you ever talk to [J.E.] about stopping when a police officer told her to?  
A: No...

(Diss. at pp. 6-7, fn. 4.)

After the witnesses completed their testimony, J.E. moved to dismiss the wardship petition, arguing the prosecution failed to establish that she had the requisite capacity to commit the alleged crimes under Penal Code section 26. (Opn. at p. 4.) The court denied the motion, finding J.E. understood the wrongfulness of her conduct. The court also sustained the wardship petition, finding J.E. committed the alleged offenses. (*Ibid.*) At a dispositional hearing on March 19, 2019, the court declared J.E. ward of the court and placed her on probation. J.E. timely filed a notice of appeal.

On September 9, 2020, the First District Court of Appeal, Division Four, issued its opinion. The Honorable K. Tucher wrote the majority opinion with the Honorable P.J. Pollak concurring. The Honorable J. Streeter issued a concurring and dissenting opinion, which “concurred in one narrow aspect of my colleagues’ reasoning,” but “respectfully

dissent[ed] from most of their opinion and from their disposition. (Diss. at p. 1.) No petition for rehearing was filed.

## ARGUMENT

### **I. Review Is Necessary to Provide Guidance to the Courts that Penal Code Section 26 Must Not Be Applied Mechanically, But Instead, Requires an Individualized Determination of Whether the Child Should Be Handled in the Delinquency System**

#### **A. Introduction**

Penal Code section 26 presumes a child under the age of 14, such as J.E., to be incapable of committing a criminal offense unless the state establishes by clear and convincing evidence that she knew the wrongfulness of her conduct. (Pen. Code § 26; *People v. Cottone* (2013) 57 Cal.4th 269, 280.) The record showed that the People failed to meet its Penal Code section 26 burden here. There was no evidence that J.E. understood that she could not walk away and refuse to cooperate with the officers, nor any evidence of conscious wrongdoing. J.E. had no experience dealing with law enforcement and her mother testified that she never taught her to obey police officers. Moreover, given the objective evidence that J.E. was upset and in light of her race, community, and the science regarding adolescent brain development, it was clear that J.E.’s conduct was driven by fear and reflected a self-preservation impulse, rather than a premeditated action.

The Court of Appeal’s finding to the contrary was based on assumptions and speculation about the understanding of a majority of 13-year-olds. For instance, the court did not consider the higher level of fear of police officers experienced by a Black child, then by a White child, or that according to modern brain science, her ability to self-regulate and make moral judgments could develop at a vastly different rate than other children.

The problem with the court’s reliance on its views of “normal” 13-year-olds is that it allowed unconscious bias and presuppositions about

expected behavior in children to taint its reasoning. Furthermore, its ruling diluted the function of Penal Code section 26 to act as a safeguard against over-criminalizing in the juvenile justice system.

**B. The Court’s Failure to Consider J.E.’s Individual Circumstances, Including Her Race, Community, and Cognitive Ability to Self-Regulate and Make Moral Judgments, Requires Reversal**

In evaluating whether the People rebutted Penal Code section 26’s presumption of incapacity, the court was entitled to infer appreciation of the wrongfulness of the charged conduct from: (i) J.E.’s “age, experience, and understanding” (*Gladys R.*, *supra*, 1 Cal.3d at p. 864); (ii) any warnings or instructions given to J.E. about the offending conduct on prior occasions (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298); and (iii) the “attendant circumstances of the crime.” (*In re Tony C.*, *supra*, 21 Cal.3d at p. 900.) While the court correctly recognized that the juvenile court must consider the individualized circumstances of a child, it failed to properly apply that principal, and resorted to generalizations about what “most 13-year-olds know is wrong.” (Opn. at p. 6.)

The court relied on three primary factors to support its finding. First, the court relied on the fact that J.E. was almost 14-years-old at the time of the incident. (Opn. at p. 6.) While a “child’s age is a basic and important consideration,” age alone cannot decide the question of knowledge. (*In re Cindy E.* (1978) 83 Cal.App.3d 393, 399 [fabrication of innocent motive, shifting blame to others, minimization of role in the offense]; see also, *In re Clyde H.* (1979) 92 Cal.App.3d 338, 344 [“past similar incident of rock throwing where appellant ran away” at the appearance of his mother “suggest[ed] consciousness of guilt”]; *In re Jerry M.*, *supra*, 59 Cal.App.4th at p. 298 [minor “was told and knew of the wrongfulness of his acts: his mother had told him it was wrong to touch girls in certain places, and he appeared to understand it was wrong to touch girls’ breasts or attack

other children”].) As Justice Streeter stated in his dissent, “There must be some other evidence of knowledge; otherwise the legislatively determined cut-off age of fourteen would be meaningless.” (Diss. at p. 5.) Accordingly, while J.E.’s age militated in favor of knowledge, her age cannot be the end of the inquiry under Penal Code section 26. Yet, here, there was no other evidence showing J.E.’s understanding of the wrongfulness of her conduct, other than generalizations about what she should have known.

Additionally, the science regarding a child’s brain development demonstrates that age does not equate to a certain fixed level of maturity. As the United States Supreme Court recognized, “ ‘youth is more than a chronological fact.’” (*Miller v. Alabama, supra*, 567 U.S. at p. 476, 132 S.Ct. at p. 2467 [citing *Eddings v. Oklahoma* 455 U.S. 104, 115, 102 S.Ct. 869].) Juveniles’ immature judgment and limited self-control causes them to act impulsively and without adequate appreciation of consequences. (*Roper v. Simmons* (2005) 543 U.S. 551, 569, 125 S.Ct. 1183, 1195.) Moreover, children’s cognitive ability to self-regulate and make moral judgments develops at vastly different rates. (See Henning, *Criminalizing Normal Adolescent Behavior in Community of Color: The Role of Prosecutors in Juvenile Justice Reform* (2013) 98 Cornell L.Rev. 383, 397-401, 419-424.) A disruptive childhood can lead to a greater immaturity in social-emotional functioning and self-control. (See Tuchinda, *The Imperative for Trauma-Responsive Special Education* (2020) 95 N.Y.U. L.Rev. 766, 792 [“Unsurprisingly, given its toll on social-emotional functioning and self-control, childhood adversity also increases the risk of involvement in the juvenile delinquency and criminal justice systems”]; see also *Miller v. Alabama, supra*, 567 U.S. at pp. 478-479, 132 S.Ct. at pp. 2468-2469.)

Here, evidence that J.E. had a volatile relationship with her mother, and the fact J.E. had lived with her grandmother for the first 11 years of her



life demonstrated that she had a disruptive childhood. Instead of adopting a “one size fits all” view of 13-year-olds’ ability to self-regulate and make rational, moral decisions, the court should have considered these individual factors in light of the science regarding adolescent brain development.

The second factor relied upon by the court was that J.E. “likely [] learned right from wrong” when she lived with her grandmother for the first eleven years of her life. (Opn. at p. 7.) This platitude confuses the issue and is based on speculation. Knowing “right from wrong” is not the same as knowing to respect and obey police officers. Moreover, the evidence in this case was that J.E. did not learn to obey police officers or to expect to receive fair treatment from them from her mother. A.R. testified that she never taught J.E. to respect police officers or to obey their commands, and A.R. showed her lack of respect for police officers when she refused to move away from the patrol car and yelled obscenities at a deputy. (Opn. at p. 6.)

Faced with this direct evidence showing J.E.’s lack of understanding of how to conduct herself with police officers, the court resorted to speculation based on generalizations to justify its holding. There is no evidence in the record as to what, if anything, J.E.’s grandmother taught her. The fact that A.R. testified that J.E. “was basically a good kid” does not mean that J.E. knew to obey police officers. J.E. had never encountered law enforcement in the past, and thus, A.R. could not have derived her belief that J.E. was a good kid from J.E.’s experience with law enforcement. The court could only make the leap that J.E.’s grandmother must have taught her right from wrong by relying on assumptions about what a typical caregiver would teach a 13-year-old or based on its view of the knowledge of a normal 13-year-old.

The court again relied upon generalizations when it stated that due to J.E.’s history of school discipline issues, her school must have taught her

that it was “wrong to disobey and physically assault authority figures.” (Opn. at p. 7.) Yet, here, J.E. did not encounter “authority figures” in the general sense; she faced two uniformed police officers. J.E., a Black 13-year-old child, had no prior experience with police officers. Again, the only evidence in the record bearing on whether J.E. understood how to conduct herself with police officers was her mother’s testimony that she never spoke to J.E. about it. As Justice Streeter recognized in his dissent, “There are no classes in school that offer guidance on how to handle encounters with law enforcement.” (Diss. at p. 7.)

In the absence of proof that J.E. had any guidance on how to handle encounters with police officers, the court should have considered J.E.’s race, community and the current research on the development of a child’s brain in determining J.E.’s: (i) knowledge of how to properly respond to the police officer’s demands; and (ii) whether her actions stemmed from fear rather than from conscious thought. In particular, it should have considered the contemporary relationship between Black youth and police officers, and that Black youth experience a higher level of fear of police officers than White youth. “If widespread public tumult of late over police violence in our country has taught anything, it is that many people in minority communities, particularly young people, live in fear of even routine interactions with law enforcement.” (Diss. at pp. 5-6.) Furthermore, as the United States Supreme Court has recognized in the context of police interrogation, “events that ‘would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens’.” (*J.D.B. v. North Carolina* (2011) 564 U.S. 261, 273.) From the perspective of a Black 13-year-old who had no previous encounters with law enforcement, an effort to flee “is just as likely to be an act of panicked self-preservation as it is of knowing disobedience.” (Diss. at p. 7.)

Instead of considering these individualized circumstances, the court

relied on a generic view of normal 13-year-olds when stated that it should have been evident to J.E. that the police officers were there to try to help her after officers stated that they did not intend to arrest her. (Opn. at p. 9.) As Justice Streeter reasoned in his dissent, “[t]here are some unstated assumptions behind the juvenile court’s finding that J.E. knew it was wrong to attempt to walk away from Deputies Slater and Spangler. The majority adopts these assumptions, declining to look behind them in the name of substantial evidence review.” (Diss. at p. 8.) The court’s reliance on these assumptions was error and imbued its decision with unconscious bias.

**C. The Court Failed to Properly Apply the Substantial Evidence Standard of Review by Neglecting to Take into Account the Clear and Convincing Burden**

The majority opinion recited the appropriate standard of review, but it incorrectly applied the standard. In particular, it relied on speculation rather than credible evidence, and it failed to make an appropriate adjustment to its analysis for the clear and convincing standard of proof applied before the trial court.

The juvenile court’s ruling that a minor understood the wrongfulness of her conduct at the time it was committed under Penal Code section 26 is reviewed under the substantial evidence test. (*In re Marven C.*, *supra*, 33 Cal.App.4th at p. 487.) Substantial evidence “is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citation.] ‘Substantial evidence...is not synonymous with “any” evidence.’ Instead, it is ‘ “substantial” proof of the essentials which the law requires.’” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) “Substantial evidence is ... not merely an appellate incantation designed to conjure up an affirmance. To the contrary, it is essential to the integrity of the judicial process ... ‘The Court of Appeal “was not created ... merely to echo the determination of the trial court. A decision supported by a mere

scintilla of evidence need not be affirmed on review.” ’ ’ (Id. at p. 652.)

In evaluating the sufficiency of evidence in support of a finding, a court is required to take into account the clear and convincing burden applied before the trial court. (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005-1012.) This Court recently described the interplay between the substantial evidence standard of review and clear and convincing burden of proof before the trial court:

[W]hen presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contained substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof.

(*Ibid.*)

Here, the court failed to properly apply the clear and convincing burden of proof before the trial court to its evaluation of the sufficiency of evidence in the record. “J.E.’s lack of experience in dealing with law enforcement and the absence of any evidence of conscious wrongdoing ought to [have been] dispositive here.” (Diss. at p. 11.) Yet, the court relied upon conjecture regarding what J.E.’s grandmother “likely” taught her and what she must have learned from her disciplinary issues at school. (Opn. at pp. 7-8.) This speculative evidence did not amount to sufficient evidence that “the People met their burden of establishing by clear and convincing proof that J.E. should be stripped of her presumptive exemption ‘from the harsh strictures of [Welfare and Institutions Code] section 602.’” (Diss. at p. 11 [citing *In re Paul C.* (1990) 221 Cal.App.3d 43, 50].) Therefore, the court’s affirmance of the trial court’s ruling finding that J.E. understood the wrongfulness of her conduct under Penal Code section 26 was error.

### **CONCLUSION**

It is widely accepted that racial disparities pervade the contemporary

American juvenile justice system. The question thus arises: how can the law be interpreted and applied to create a more equitable juvenile justice system? This case presents an answer to that question. Courts should modify the personalized factors they consider when assessing knowledge under Penal Code section 26 to include race, community and the science regarding adolescent brain development. This approach takes a step toward the elimination of unconscious bias and thus the reduction of racial disparities. By prohibiting the application of Penal Code section 26 in a mechanistic way, this approach also reanimates *Gladys R.*, *supra*, 1 Cal.3d 855 and emphasizes the importance of a trial court's determination as to whether a child should be treated as a criminal. Based on the foregoing, petitioner respectfully requests that the Court grant review in this case.

Dated: October 19, 2020

Respectfully Submitted,

By: \_\_\_\_\_/s/\_\_\_\_\_  
Erin Keefe  
Attorney for Appellant

### **CERTIFICATE OF LENGTH**

I, Erin Keefe, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 5,259 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204. This document was prepared in Microsoft Word, and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Francisco, CA on October 19, 2020.

/s/

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Erin Keefe  
Attorney for Appellant

**DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE**

I, Erin Keefe, reside in the County of San Francisco, California. I am over 18 years of age and not a party to this action. My business address is P.O. Box 401163, San Francisco, CA 94140. On the date below, I served

**PETITION FOR REVIEW**

on the parties listed below by placing true copies enclosed in sealed envelopes with postage fully prepaid in a United States Post Office box.

Contra Costa County Juvenile Court 725 Court Street Martinez, California 94553 Attn: Hon. John C. Cope	Appellant Address of record
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By transmitting a PDF version of the this document via electronic service through TrueFiling on the parties listed below:

Office of the Attorney General (Counsel for Respondent)	First District Appellate Project
Clerk of the Court – Division Four First District Court of Appeal of California	

I declare under penalty of perjury under the laws of the state of California that the above is true and correct and that this declaration was executed at San Francisco, CA on October 19, 2020.

\_\_\_\_\_  
/s/  
Erin W. Keefe

**APPENDIX:**  
**Published Opinion of the First District Court of Appeal**



Filed 09/08/2020

**CERTIFIED FOR PUBLICATION**  
**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**FIRST APPELLATE DISTRICT**  
**DIVISION FOUR**

In re J.E., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
J.E.,  
Defendant and Appellant.

A156839

(Contra Costa County  
Super. Ct. No. J1900105)

J.E. appeals from an order of the juvenile court declaring her a ward and placing her on probation. (Welf. & Inst. Code, § 602.) The court found J.E. committed two misdemeanor violations of the Penal Code, battery on a peace officer (§ 242/243, subd. (b)), and resisting, obstructing or delaying a peace officer (§ 148, subd. (a)(1)). J.E. argues there is insufficient evidence in the record to establish she appreciated the wrongfulness of her conduct, as required for minors under the age of 14. (Pen. Code, § 26.) We affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

On January 27, 2019, at approximately 12:45 p.m., two sheriff deputies responded to a domestic violence report at a home where J.E. lived with her mother, A.R. A.R. was crying and had a small amount of blood under her nose. She told the deputies she and J.E. had an argument about cleaning the

house. During the argument, A.R. “shoved” J.E., and J.E. hit A.R. “a couple times” in the face. J.E. then left the house and A.R. did not know where she was. A.R. signed a citizen’s arrest form for battery and provided a physical description of J.E. While interviewing A.R., the deputies saw J.E. down the street and left by car to speak with her.

J.E. was walking on the sidewalk with a friend. The deputies exited their marked patrol car, called to J.E. by name, and identified themselves. The deputies told J.E. they needed to escort her back home to talk with her mother and “figure out” how to handle the situation. The deputies told J.E. she was not under arrest, but she needed to come with them.

J.E. refused to go with the deputies, stating, “F you. I’m not going to go with you guys,” and began walking away. The deputies followed J.E. and told her “five or six” times to stop walking. J.E. ignored the commands. One of the deputies then grabbed one of J.E.’s arms and the other deputy grabbed her other arm, with one deputy stating, “We’re going to escort you home.” J.E. began “twisting and turning” and “flailing her legs” as the deputies attempted to bring her to the patrol car. The deputies then handcuffed her. As the deputies were bringing J.E. back to the patrol car, J.E. spit at the deputies and kicked a different vehicle, causing a dent. The deputies then placed J.E. in the back of the patrol car. Once there, J.E. kicked one of the deputies in the stomach. The deputy “was able to pull back, so it . . . didn’t impact [her] stomach forcefully.”

The deputies drove to J.E.’s house, where A.R. was waiting out front. The officers allowed A.R. to come up to the vehicle to speak with J.E. After speaking with A.R. briefly, J.E. told the deputies, “I’m done. Can you please have my mom leave.” A.R. then yelled at J.E., “I hope you die. I hope they beat your ass in there. I hope they never let you out.” A deputy then asked

A.R. to step away from the patrol car, and A.R. replied, “F you, B.” The deputies asked a bystander to remove A.R. from the area and took J.E. to juvenile hall.

On January 29, 2019, the Contra Costa County District Attorney’s Office filed a juvenile wardship petition alleging J.E. committed misdemeanor battery upon a peace officer and misdemeanor resisting, obstructing, or delaying a peace officer.

A detention hearing was held on January 30, 2019. At the hearing, the Probation Department submitted an initial case assessment. A.R. had reported that there were prior incidents when J.E. hit her with a hanger and threatened to kill her. According to A.R., J.E. rarely followed her commands and consistently skipped school. A.R. quit her job because J.E.’s behavior had “become out of control.” A review of J.E.’s school records showed J.E. was suspended twice for being physically aggressive and making threats towards staff, and was disciplined on several occasions for unexcused absences, disrupting class, using profanity, and being under the influence of marijuana.

At the detention hearing, J.E.’s counsel requested that she be released to A.R., who had agreed to have her daughter come home with an ankle monitor. The probation officer and the People opposed this request and recommended that J.E. be detained, based on evidence that she had been disrespectful to her mother, school staff and police officers, and that she had punched A.R. during the most recent incident. The court followed the probation officer’s recommendation, citing concerns about J.E. and A.R.’s volatile relationship and A.R.’s safety if J.E. were allowed back home.

A contested jurisdictional hearing was held on February 26, 2019. The People elicited testimony about the incident from A.R. and one of the arresting deputies. A.R. also testified about her relationship with her

daughter. J.E. was 11 when she began living with A.R., before which she lived with her grandmother. A.R. stated she never taught J.E. the difference between right and wrong. She also denied teaching J.E. that it was wrong to hit somebody, testifying that she “told her to stand up for herself.” A.R. testified further that she never taught J.E. how to interact with police officers or to respect the commands of police officers.

After the witnesses completed their testimony, J.E. moved to dismiss the wardship petition, arguing the prosecution failed to establish that she had the requisite capacity to commit the alleged crimes. The court denied the motion, finding J.E. understood the wrongfulness of her conduct. The court also sustained the wardship petition, finding J.E. committed the alleged offenses.

At a dispositional hearing on March 19, 2019, J.E. was declared a ward of the court and was placed on probation.

### DISCUSSION

J.E. contends there is insufficient evidence to support the juvenile court’s jurisdictional findings. J.E. does not dispute that she resisted an officer and committed battery on an officer, but she argues that this conduct was not unlawful because she did not understand that it was wrong.

Penal Code section 26, which applies in juvenile wardship proceedings, creates a presumption that a child under the age of 14 is incapable of committing a crime. (*In re Gladys R.* (1970) 1 Cal.3d 855, 863 (*Gladys R.*)). To overcome this presumption, the prosecution must show by clear and convincing evidence that the child understood the wrongfulness of the charged act at the time of its commission. (Pen. Code, § 26; *In re Manuel L.* (1994) 7 Cal.4th 229, 232; *People v. Cottone* (2013) 57 Cal.4th 269, 280.) Penal Code section 26 “embodies a venerable truth . . . that a young child

cannot be held to the same standard of criminal responsibility as his [or her] more experienced elders.” (*Gladys R.*, *supra*, 1 Cal.3d at p. 864.)

On appeal, we review the juvenile court’s ruling under Penal Code section 26 to determine if it is supported by substantial evidence. (*In re Marven C.* (1995) 33 Cal.App.4th 482, 486 (*Marven C.*)). Substantial evidence is “evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof.” (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.) Under this standard “we review the record in the light most favorable to the court’s determinations and draw all reasonable inferences from the evidence to support the findings and orders.” (*Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 688–689.) “We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court.” (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.) “[T]he trial court’s ruling must be upheld if there is any basis in the record to sustain it.” (*People v. Marquez* (1992) 1 Cal.4th 553, 578.)

Courts consider the age, experience, knowledge and conduct of a minor to determine whether she understood the wrongfulness of her conduct. (*Gladys R.*, *supra*, 1 Cal.3d at p. 867.) Knowledge of wrongfulness cannot be inferred from the offense itself, but the court may consider “the attendant circumstances of the crime, such as its preparation, the particular method of its commission, and its concealment.” (*In re Tony C.* (1978) 21 Cal.3d 888, 900 (*Tony C.*)). The closer a child is to the age of 14, the more likely she is to appreciate the wrongfulness of her conduct. (*In re Paul C.* (1990) 221 Cal. App.3d 43, 53 (*Paul C.*); *Marven C.*, *supra*, 33 Cal.App.4th at p. 487.)

Applying these standards, we conclude that substantial evidence supports the trial court's finding that J.E. knew her conduct was wrongful. J.E. was less than a month from her fourteenth birthday at the time of the incident. When a child is so close to 14, it is more likely she understood the wrongfulness of her conduct. (See *Paul C.*, *supra*, 221 Cal. App. 3d at p. 52; *Marven C.*, *supra*, 33 Cal.App.4th at p. 487.) And we find no evidence of any impairment that might indicate J.E. has a diminished social or mental capacity for her age. (Compare *Gladys R.*, *supra*, 1 Cal.3d at p. 867 [12-year-old girl had "the social and mental age of a 7-year-old."].)

The circumstances surrounding J.E.'s current offenses also provide some evidence that J.E. understood her conduct was wrong. The deputies were in uniform, in a marked patrol car, and identified themselves as deputies when they first contacted J.E. and told her she needed to accompany them. J.E. told the deputies she was "not going to go with you guys," and ignored them telling her to stop walking away. Her words show J.E. understood what was being asked of her and made a conscious choice to resist the deputies, and her resistance was not fleeting or equivocal, but grew as the encounter continued. Even after J.E. was forcibly detained, she continued to resist by kicking at the officers, spitting at them and, ultimately, kicking one officer in the stomach. This is conduct that, whether it is aimed at a peace officer or anyone else, most 13-year-olds know is wrong.

But the capacity determination requires a trial court to consider the particular circumstances and perspective of the individual child before it, rather than to rely on generalizations about what children of a certain age should know. The evidence in this case is that the only parent who may have been a fixture in J.E.'s life did not teach her to respect authority figures or to expect fair treatment from them. Witness, for example, the way J.E.'s

mother lashed out when J.E. told the police she was finished speaking with her mother from the back of the police car. This evidence does not defeat the trial court's capacity determination because J.E.'s mother was not her only moral guide. J.E. lived with her grandmother until the age of 11, and likely there learned right from wrong, as A.R. testified that J.E. was basically a good kid. Also, the probation department's initial case assessment contains evidence that J.E. had been taught—by her school if not at home—that it is wrong to disobey and physically assault authority figures. The assessment reveals that J.E. had a substantial history of disrespecting and being physically aggressive toward authority figures *and* of being disciplined for this conduct. Combining this evidence specific to J.E.'s circumstances with evidence from the incident itself, we conclude there is substantial evidence supporting the trial court's determination that J.E. understood at least some of her conduct to be wrongful.

J.E. argues she did not understand she was required to obey the deputies because they told her she was not under arrest. But if J.E. understood the concept of being arrested she necessarily understood the officers' authority over her. As the juvenile court explained at the contested jurisdiction hearing, the officers clearly communicated to J.E. that she was required to accompany them back to her home so that they could resolve her mother's complaint against her. And even if J.E.'s initial failure to accompany the deputies could be excused on the basis she did not understand this obligation, her later acts of kicking and spitting at the deputies were also acts obstructing a peace officer in the performance of his or her duty, and these later, more aggressive acts provided a sufficient basis for both of the charges against J.E. Any confusion as to whether she needed to accompany

the deputies would not have excused the violent behavior after she was detained.

J.E. contends that A.R.'s testimony compels the conclusion that J.E. did not know her conduct was wrong. We disagree. A.R. did not testify that J.E. does not understand that it is wrong to disrespect, disobey, or strike out physically against a police officer, but only that A.R. did not teach her daughter these lessons. But J.E. lived with her grandmother until she was 11, and nothing in the record indicates that J.E.'s grandmother failed to teach her right from wrong. Moreover, J.E. was in eighth grade at the time of the incident, and part of going to school is learning to respect other people, including teachers and other authority figures. Evidence that J.E. was disciplined at school for her disrespectful and violent conduct shows that she was taught she should respect the commands of authority figures, even if her mother never imparted these lessons.

J.E. argues her kicking was a "self-preservation impulse" because she was confused why the deputies were arresting her and fearful of returning home to a "volatile situation." Evidence that J.E. may have been afraid of her mother does not further her argument that she did not know her actions against the officers were wrongful. We find no evidence that J.E. expressed a fear of the officers, and the circumstances surrounding the encounter give us no reason to believe J.E. was made to feel afraid. Nor do we find any indication in the evidence or testimony that J.E.'s spitting and kicking at the officers was an involuntary impulse or an act of self-defense.

J.E. contends that the circumstances surrounding her offenses do not support an inference that she knew her conduct was wrongful because she did not plan to commit a crime or attempt to cover up criminal conduct, but simply acted out of "instinct and fear." As support for this argument, J.E.



relies on a line of cases in which the minor's knowledge of wrongfulness was established with evidence of the minor's significant preparation for and/or concealment of criminal conduct. (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 540 [minor understood wrongfulness of shooting his father because he had secretly taken the gun and then hid it after the shooting]; *Tony C.*, *supra*, 21 Cal.3d at pp. 900–901 [minor repeatedly threatened woman with deadly force and took her to secluded location before he raped her]; *People v. Lewis* (2001) 26 Cal.4th 334, 379 [minor knew arson was wrongful because he fled crime scene and gave conflicting statements to detectives about the incident].)

J.E.'s authority is inapposite; the fact that J.E.'s offenses did not involve preparation, or a cover-up, does not mean she failed to comprehend what she did was wrong. Nor do the circumstances surrounding J.E.'s interaction with the deputies compel the conclusion that she acted out of instinct and fear or, even if those were her motivations, that she did not understand her conduct was wrong. J.E. was almost 14 years old when two deputies clearly communicated to her that she needed to accompany them because of the physical altercation that she had just had with her mother. Without expressing fear or confusion, J.E. responded to the officers with verbal profanity, physical resistance and, ultimately, physical violence. These circumstances support the trial court's finding that J.E. understood the wrongfulness of her actions.

We understand that the deputies intervened at a moment when J.E. was angry, upset, and in no mood to cooperate, and that because she is still a child her ability to regulate her emotions remains underdeveloped. But none of that gives her the right to resist lawful authority or to kick a peace officer who was lawfully doing her job. We conclude there is substantial evidence to

support the trial court's finding that J.E. knew it was wrong to strike out in this manner.

#### **DISPOSITION**

The judgment is affirmed.

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TUCHER, J.

I CONCUR:

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POLLAK, P. J.

*People v. J.E.* (A156839)

STREETER, J., Concurring and Dissenting.

While I concur in one narrow aspect of my colleagues' reasoning, I must respectfully dissent from most of their opinion and from their disposition.

### **I. Background**

The majority opinion sketches out the events preceding J.E.'s arrest accurately, but omits some of the details surrounding the domestic violence report from A.R. that brought Sheriff's Deputies Slater and Spangler to the scene. Perhaps most importantly, A.R., in her testimony at the contested jurisdictional hearing, made it clear that she started the physical fight with J.E. And when asked why she "call[ed] the police" after the altercation with J.E., A.R. replied "to scare her."

"Scare her," she did. The two deputies, upon spotting J.E. a few blocks from A.R.'s apartment, tried to question her. J.E., who had no previous experience in any encounter with law enforcement officers, tried to walk away, but the deputies insisted she come along with them. J.E. protested, and tried to twist away as she was being led by the arm to a patrol car, kicking and screaming.

The deputies handcuffed J.E., and dragging her by the arms, forced her into the back of their patrol car. While they were "scooting" J.E. into the backseat, positioned with her legs across the bench, she thrust a foot at Deputy Slater, touching her in the midriff as the deputy backed away. According to Deputy Slater's testimony at the jurisdictional hearing, J.E.'s foot "didn't impact my stomach forcefully because I was a far enough distance away."

The final chapter in the events on the day of J.E.'s detention, touched upon by the majority—properly so, because it is relevant to J.E.'s state of mind that day—occurred after Deputies Slater and Spangler drove J.E. back

to A.R.'s apartment, where A.R. expressed surprise that rather than simply bringing J.E. home, the deputies were taking her to jail or to juvenile hall. A few additional details are worthy of note here too.

While J.E. was still seated in the patrol car, the deputies allowed A.R. to speak to J.E. through the car window. At some point, J.E. said to the deputies, "I'm done. Can you please have mom leave." When the deputies instructed A.R. to back away from the car, she began yelling at J.E. During her tirade, according to Deputy Slater, she yelled, "I hope you die. I hope they beat your ass in there. I hope they never let you out." Upon being instructed again to move away, A.R. refused and "continued to yell obscenities. At that point, she yelled, 'F you, B' to Deputy Spangler."

The deputies then drove away, but before taking J.E. to the station for booking, they parked and spoke to her. According to Deputy Slater's testimony, "[J.E.] was very upset. She went from being angry at the situation to after all of the comments and things that happened with her mom, she started crying and was visibly upset. . . . We . . . spoke with [J.E.] and essentially told her that was awful what your mother just said to you. It was uncalled for. It shouldn't have happened."

Following J.E.'s detention, these wardship proceedings on a first petition under Welfare & Institutions Code section 602, subdivision (a), ensued.<sup>1</sup>

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<sup>1</sup> The Probation Department's Hearing Information Sheet/Initial Case Assessment, filed prior to the detention hearing, indicated, among other things, that J.E. is a "Runaway Risk" based on A.R.'s report that "she has left home without permission once previously and her whereabouts [were] unknown for approximately three days" and based on J.E.'s admission that she left "home without permission and while away from home she was under the influence of alcohol." The Hearing Information Sheet/Initial Case

## II. Analysis

### A. *The Charged Offenses*

J.E.'s conduct upon being approached by Deputies Slater and Spangler, which included a profanity-laced refusal to cooperate and an attempt to spit at them, was nasty, rude, and disrespectful, but was it criminal?

Because “ [o]nly a slight unprivileged touching is needed to satisfy the force requirement of a criminal battery’ ” (*People v. Dealba* (2015) 242 Cal.App.4th 1142, 1149), J.E.'s “kick” to Deputy Slater would unquestionably be sufficient to uphold a Penal Code section 243, subdivision (b) conviction if J.E. were an adult. The same would be true for the Penal Code section 148, subdivision (a)(1) charge, since J.E.'s conduct in walking away from and then resisting these two deputies impeded them from carrying out their duties. (*In re Chase C.* (2015) 243 Cal.App.4th 107, 113.) Criminal battery and resisting a peace officer are general intent crimes, requiring only “ ‘an intent to perform an act of such a nature that the law declares its commission punishable as a criminal offense.’ ” (*People v. Rocha* (1971) 3 Cal.3d 893, 899.)

But we are not dealing with an adult. We have a 13-year-old here, and Penal Code section 26 presumes her to be incapable of committing a criminal offense unless the state establishes by clear and convincing proof that she knew the wrongfulness of her acts. For children under age 14, the issue of criminal capacity cuts below mens rea and is of more fundamental significance. Taking the clear and convincing burden into account, as we

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Assessment also indicated that, for the then-current academic year at J.E.'s middle school, she had been “suspended for 4 days . . . and ha[d] accumulated 34 all-day unexcused absences.”

must (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005–1012), I do not think the People met their Penal Code section 26 burden on this record.

*B. Penal Code Section 26*

“ ‘California . . . rebuttably presumes all minors under the age of 14 incapable of committing a crime, but does not totally exclude any child from criminal responsibility.’ [Citations.] ‘Section 26 stands to protect . . . young people . . . from the harsh strictures of [Welfare and Institutions Code] section 602.’ ” (*In re Paul C.* (1990) 221 Cal.App.3d 43, 50; see *In re Gladys R.* (1970) 1 Cal.3d 855, 867 (*Gladys R.*); *People v. Cottone* (2013) 57 Cal.4th 269, 281 [“presumption of incapacity operates to exempt the minor from legal responsibility”]; see generally Walkover, *The Infancy Defense in the New Juvenile Court* (1984) 31 UCLA L.Rev. 503.)

In evaluating whether the People rebutted the presumption of incapacity on this record, the juvenile court was entitled to infer appreciation of the wrongfulness of the charged conduct from J.E.’s “age, experience, and understanding” (*Gladys R., supra*, 1 Cal.3d at p. 864); from any warnings or instructions given to her about the offending conduct on prior occasions (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298); and, since reliance on circumstantial proof is “inevitable” when “the issue is a state of mind” (*In re Tony C.* (1978) 21 Cal.3d 888, 900), from the “attendant circumstances of the crime.” (*Ibid.*)

Because “it is only reasonable to expect that generally the older a child gets and the closer she approaches the age of 14, [and] the more likely it is that she appreciates the wrongfulness of her acts,” a “child’s age is a basic and important consideration.” (*In re Cindy E.* (1978) 83 Cal.App.3d 393, 399.) Most of the cases invoking this precept, to be sure, involve very serious crimes. Of course, a child nearing age 14 can be expected to understand it is

wrong to commit murder (*In re Marven C.* (1995) 33 Cal.App.4th 482), rape (*In re Tony C.*, *supra*, 21 Cal.3d 888), forced oral copulation (*In re Paul C.*, *supra*, 221 Cal.App.3d 43), or conspiracy to burglarize cars (*In re Harold M.* (1978) 78 Cal.App.3d 380). That makes sense, since brutality and advance planning are circumstances that have obvious bearing on knowledge of wrongfulness.

But age alone cannot decide the question. Applying the Penal Code section 26 presumption is not like horseshoes, where close is good enough. If it sufficed to rebut the presumption that a minor is about to turn 14, the legislatively determined cut-off of age 14 would be meaningless. In my view—and as I read the majority’s opinion, my colleagues do not disagree—some other factor must be present in addition to the child’s age. (See, e.g., *In re Clyde H.* (1979) 92 Cal.App.3d 338, 344 [“past similar incidents of rock throwing where appellant ran away” at the appearance of his mother “suggest[ed] consciousness of guilt”]; *In re Jerry M.*, *supra*, 59 Cal.App.4th at p. 298 [minor “was told and knew of the wrongfulness of his acts: his mother had told him it was wrong to touch girls in certain places, and he appeared to understand it was wrong to touch girls’ breasts or attack other children”].)<sup>2</sup>

No such factor is present in this case.

### *C. J.E.’s Lack of Experience with Law Enforcement Officers*

At issue in this case is a 13-year-old African-American child’s first encounter with law enforcement. If the widespread public tumult of late over police violence in our country has taught anything, it is that many people in minority communities, particularly young people, live in fear of even routine

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<sup>2</sup> See also, e.g., *In re Cindy E.*, *supra*, 83 Cal.App.3d at page 400 (fabrication of innocent motive, shifting blame on others, minimization of role in the offense); *In re Clyde H.*, *supra*, 92 Cal.App.3d at page 344 (apology for commission of offense).



interactions with law enforcement. I point to this issue not because I think the deputies involved here did anything wrong—quite to the contrary, their treatment of J.E., especially when they realized she was the victim of abuse at the hands of A.R., was commendably sensitive—but because the only evidence in the record bearing on whether J.E. understood how to conduct herself in these circumstances was A.R.’s testimony that she never spoke to her about it.<sup>3</sup>

Rather than deal with this issue directly, the majority speaks generally of other sources of moral instruction, pointing out that J.E. was taught it was “wrong to disobey and physically assault authority figures” because she had been disciplined at school for being disrespectful and physically aggressive toward teachers. And surely, the majority says, J.E.’s grandmother, with whom she lived for a number of years, taught her to discern “right from wrong.” But we are not talking about an encounter with “authority figures” in the generic sense. Nor are platitudes about knowing “right from wrong” helpful here.<sup>4</sup>

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<sup>3</sup> The Report and Recommendation of the Probation Department, filed after the charges against J.E. were sustained, and before the disposition hearing, summarizes an interview of J.E. in which she stated that her mother had, in fact, spoken to her about what to do in the event she was approached by police. According to J.E., “she was told [by A.R.] not to answer questions asked by police . . . as she is a minor and it was within her rights.”

<sup>4</sup> The apparent reason the majority finds it necessary to resort to generalizations about “authority figures” and discipline at school, and to speculate about things J.E.’s grandmother must have taught her, is the following testimony from A.R. on direct examination by the prosecutor: “Q: While she was living with you, and while you were raising her, did you ever talk to her about the difference between right and wrong? A: I can’t say I really did. Q: Did you ever talk to her or teach her about hitting other people? A: Yes, I told her to defend herself. Q: And what about hitting others as the aggressor? . . . [¶] Q: Did you talk to her about that? A: I just told her

We must not look away from what actually happened here. There are no classes in school that offer guidance on how to handle encounters with law enforcement. These things are typically passed down by a parental figure who is wise enough to provide counsel on the subject. Many parents of children of color, at some point in the course of child-rearing, find it necessary to provide their children self-protective advice to guide them in any future encounters with law enforcement. One version of this advice, commonly known as “The Talk,” emphasizes the importance of showing utmost courtesy and cooperation, willingness to comply with any directions given by an officer, and attentiveness to things that may not be obvious (certainly not to a child), like keeping his or her hands empty and in full view.<sup>5</sup> There was no evidence before the juvenile court that J.E. had any guidance about this uniquely difficult set of issues.

Left to fend for herself, J.E. tried to walk away. Her reaction in doing so was not entirely wrong, since in some circumstances any citizen (not just a minor) may simply “go on his way” when approached by the police (*People v. Souza* (1994) 9 Cal.4th 224, 234), but it was certainly wrong in the particular

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to stand up for herself. That’s it. Q: Did you ever tell her that it was wrong to initially hit somebody, not in defense but initially? A: No. . . . [¶] Q: . . . [W]hen you were raising [J.E.] . . . did you ever talk to her about what good behavior is? A: No. Q: And did you ever talk to her about what bad behavior was? A: No. Q: Never? A: No. She’s—she’s been a good kid . . . . Q: And when you say she was a good kid, did you teach her what those good behaviors were? A: No. She just did it herself.”

This line of questioning, quite plainly designed to lay a foundation for Penal Code section 26 “knowledge of wrongfulness,” obviously backfired, leaving a gap in the record on the issue.

<sup>5</sup> Young, *Deaths Shape How Black Parents Navigate the ‘Talk’* (June 8, 2020) WebMD Health News <<https://www.webmd.com/mental-health/news/20200608/deaths-shape-how-black-parents-navigate-the-talk>> (as of September 3, 2020).

setting we have here. Unquestionably, these deputies were empowered to take J.E. into custody based on the information they had from A.R. and the citizen's arrest warrant she signed. The majority finds significance in J.E.'s understanding of what the deputies told her when they initially said she was not under "arrest," but we can hardly expect J.E. to have appreciated the Fourth Amendment nuances of her situation once the deputies changed their minds and handcuffed her.

In the absence of proof that A.R. was prepared for how to handle encounters with law enforcement, we are left to surmise about how a young person of J.E.'s age, of J.E.'s race, in J.E.'s community, may be expected to react when faced with a sudden show of law enforcement authority. There are some unstated assumptions behind the juvenile court's finding that J.E. knew it was wrongful to attempt to walk away from Deputies Slater and Spangler. The majority adopts those assumptions, declining to look behind them in the name of substantial evidence review. I see things differently. I would respectfully suggest that, from the perspective of someone in J.E.'s shoes (not the perspective of "most 13-year-old[]"), an effort to withdraw or flee is just as likely to be an act of panicked self-preservation as it is of knowing disobedience.

The nastiness that followed J.E.'s attempt to walk away from the deputies is hardly something to be condoned, but it is far from clear to me that any of it was criminal in the sense that must be shown for a child of this age. The only thing that does seem clear on this record is that, when all of the circumstances are taken into account, this 13-year-old, having made the decision to withdraw out of fear, had an emotional meltdown when she suddenly found herself in handcuffs, being frog-marched to a squad car.

#### *D. J.E.'s Reaction to Being Taken into Custody*

Looking at the initial interaction between J.E. and Deputies Slater and Spangler, the juvenile court observed that, once the deputies reassured J.E. they did not intend to arrest her and that all they wanted to do was talk to her about the altercation with her mother and take her home, it should have been evident to J.E. they were there to try to help her. Under the circumstances, the court concluded, J.E. must have understood it was wrong to “fight” with them. The majority concludes, similarly, that J.E. must have understood she was expected to obey and not defy these deputies, for, after all, they were in full uniform and they drove up in a marked patrol car.

But to prepare her for this specific situation, J.E.'s only teacher was her mother, who modelled physically and verbally confrontational conduct when under stress. When J.E.'s attempt to walk away did not work, she expressed her displeasure with all the extravagant drama of a scared 13-year-old, attempting to look “tough.” While the sustained obnoxiousness that followed would strike anyone of ordinary sensibilities as offensive, I question my colleagues' use of the talismanic word “violent” to describe it, with all of the freight that word brings. The specific assaultive conduct we are addressing—and the conduct found to have violated Penal Code section 243, subdivision (b)—is J.E.'s “kick” to Deputy Slater's midriff area, which the deputy described as little more than a touch as she was backing away.

In my view, J.E. deserves a pass for this under Penal Code section 26. Most parents will recall what it is like to encounter a flailing foot, elbow or knee while subduing an emotionally distraught child whose actions are being governed by the manic sense of grievance we commonly call a tantrum. But few, I suspect, would describe the child's mental state in delivering such a blow—if the child was even aware it was a blow—as a deliberate effort to

commit a “violent” assault. I see no reason to treat this situation any differently. The only basis for concluding that J.E.’s “kick” to Deputy Slater was criminal, in my view, appears to be a determination to punish J.E. for crudely disrespecting these two deputies while in the throes of an emotional collapse.

We might say, I suppose, that “most 13-year-old[]” would know it was wrong to behave this way rather than submit quietly when dealing with law enforcement officers, but as the majority rightly acknowledges, a juvenile court must “consider the particular circumstances and perspective of the individual child before it, rather than to rely on generalizations about what children of a certain age should know.” J.E. was still a child in the eyes of the law, and there is no evidence on this record she was streetwise or mature beyond her years. (*In re Harold M.*, *supra*, 78 Cal.App.3d at p. 385 [“evidence support[ed] an inference that [13-year-old] minor knew [auto burglary] . . . was condemned by law enforcement and court officers; that knowledge of the wrongfulness of the conduct was brought directly to his attention through police detention and court appearances; and that, far more effective than moral instruction by parent or teacher, such firsthand experiences had left their imprint on the minor’s conscience”].)

### **III. Conclusion**

I concur in the majority’s view that, when applying Penal Code section 26, juvenile courts must consider the individualized circumstances of the child before it, rather than rely on assumptions about the knowledge of wrongfulness a “normal” child her age would have. That principle, I think, takes a small step toward the elimination of unconscious bias in the juvenile justice system, since it prevents judges from calling upon their own presuppositions about expected behavior in children, whose cognitive ability

to self-regulate and make moral judgments, modern brain science now teaches us, develops at vastly different rates well into their teenage years.<sup>6</sup>

But in applying the criteria set out in the case law under Penal Code section 26, the majority opinion fails to apply the principle it enunciates. J.E.'s lack of experience in dealing with law enforcement and the absence of any evidence of conscious wrongdoing ought to be dispositive here. There is no evidence—none—that J.E. understood she could not walk away and refuse to cooperate when approached by Deputies Slater and Spangler, thereby violating Penal Code section 148, subdivision (a)(1). And given the objective evidence of her frenzied mental state at the time she was taken into custody, there is insufficient proof to support a Penal Code section 243, subdivision (b) violation.

In borderline cases, we should be guarded about over-criminalizing the juvenile justice system, particularly when presented with first petitions. I recognize we generally defer to a juvenile court's fact-finding, but I think the majority's application of the substantial evidence test on this record is insufficiently rigorous in light of the heightened standard of proof. (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at pp. 1005–1012.) Under the circumstances presented, I fail to see how it can be said that the People met their burden of establishing by clear and convincing proof that J.E. should be stripped of her presumptive exemption “from the harsh strictures of [Welfare and Institutions Code] section 602.” (*In re Paul C.*, *supra*, 221 Cal.App.3d at p. 50.)

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<sup>6</sup> See Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform* (2013) 98 Cornell L.Rev. 383, 397–401, 419–424.

Stepping back and considering this case from a broader perspective, we would do well to remember a key distinction drawn fifty years ago in *Gladys R.*, which remains the lodestar opinion construing Penal Code section 26. If a juvenile court must intervene in a child’s life, a wardship may be declared under Welfare and Institutions Code section 601, for status offenses, as well as under section 602, for criminal offenses. (See Welf. & Inst. Code, § 601, subd. (a) [persistent or habitual refusal to obey directions of parent, guardian or custodian], *id.*, subd. (b) [truancy or persistent or habitual refusal to obey directions of school authorities]; § 602 [commission of acts which, if committed by an adult, would be crimes].) “Strictly speaking, [a]n adjudication under section 601 neither requires nor implies a finding of ‘delinquency.’” (*In re W.B.* (2012) 55 Cal.4th 30, 42.)

Central to the *Gladys R.* holding is a recognition that the line drawn by Penal Code section 26 does “not lie at the periphery of the statutory scheme” governing juvenile justice in California. (*Gladys R.*, *supra*, 1 Cal.3d at p. 863.) Justice Tobriner’s opinion for the *Gladys R.* court is very clear that, to protect children from the grave consequences of wardship under Welfare and Institutions Code section 602, with all of the stigma and potentially negative consequences for a child’s life that it brings, Penal Code section 26 stands as a bulwark between sections 601 and 602 of the Welfare and Institutions Code. (*Gladys R.*, *supra*, at pp. 864–867.) Indeed, he points out it is “practically the only special provision for children in the entire legal system.” (*Id.* at p. 863.) Cases like this one, I am sorry to say, dilute it into nonexistence.

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STREETER, J.

Trial Court:	Contra Costa County Superior Court
Trial Judge:	Hon. John C. Cope
Counsel for Appellant:	Law Office of Erin Keefe, Erin W. Keefe, by Appointment of the Court of Appeal under the First District Appellate Project Assisted Case System
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