PACIFIC JUVENILE DEFENDER CENTER

Ensuring excellence in juvenile defense and promoting justice for all children

October 22, 2020

Honorable Tani Cantil-Sakauye, Chief Justice, and
Associate Justices of the California Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: Amicus Curiae Letter in Support of Review for *In re J.E.*, Supreme Court No. S265077; First Appellate District, Div. 4, No. A156839 (Contra Costa County Super. Ct. No. J1900105)

Dear Chief Justice Cantil-Sakauye and Associate Justices of the California Supreme Court:

We write in support of the Petition for Review filed in the above-entitled case. Review is needed to restore the Penal Code section 26 standard for capacity to commit a crime for children under the age of 14 to the foundational place it deserves in our system of justice, and to rescue it from a shallow, mechanical focus on knowing "right from wrong." We agree with Justice Streeter's concurring and dissenting opinion in the court below, that if the Penal Code section 26 standard was met in this case, "it has been diluted into nonexistence." (*In re J.E.*, (Sept. 8, 2020, A156839), conc. and dis. opn. of Streeter J. [p. 12].)

This request is made pursuant to California Rules of Court, rule 8.500, subdivision (g). Counsel for the minor is aware of our interest, and supports the filing of this letter.

I. Pacific Juvenile Defender Center's Interest in Review

The Pacific Juvenile Defender Center is a statewide public interest, nonprofit organization that works to improve legal representation of youth in the justice system and to address important juvenile policy issues. We have long been interested in issues of capacity, competency, and the impact of adolescent development on legal issues in juvenile cases.

We are interested in this case because it demonstrates the way that one of the most fundamental questions in juvenile justice - whether a child should be handled in the delinquency system – has been eviscerated through "evidence" that fails to address the purpose of the underlying Penal Code section 26 determination. The questions presented in the

Petition for Review require the court's attention pursuant to California Rules of Court, rules 8.500(b)(1).)

II. The Trial Court and Court of Appeal Improperly Reduced the Penal Code Section 26 Determination of Capacity to a Mechanical Examination of Whether J.E. Knew the Difference Between "Right and Wrong" Without Considering Whether Her Behavior Merited Handling in the Delinquency System

Penal Code section 26 provides that all persons are capable of committing crimes except, "One—Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." *In re Gladys R.* (1970) 1 Cal.3d 855, 858, framed the capacity issue as, "whether a child appreciates the wrongfulness of her conduct in determining whether the child should be declared a ward under section 602 of the Welfare and Institutions Code (Pen. Code, s 26)." Justice Tobriner, writing for the court, explained that, "Section 26 embodies a venerable truth, which is no less true for its extreme age, that a young child cannot be held to the same standard of criminal responsibility as his more experienced elders. A juvenile court must therefore consider a child's age, experience, and understanding in determining whether he would be capable of committing conduct proscribed by section 602." (*Id.*, at p. 864.)

The *Gladys R.* opinion emphasized that, "section 26 provides the kind of fundamental protection to children charged under section 602 which this court should not lightly discard. Section 602 is clearly distinguishable from sections 600 and 601 with respect to the consequences of their operation upon the child." (*Gladys R.*, *supra*, at p. 864.) In other words, the focus of the capacity decision was whether the child should be handled in the delinquency system (Welf. & Inst. Code § 602), status offender system (Welf. & Inst. Code § 601) or dependency system (previously Welf. & Inst Code § 600, now § 300).

Over time, the capacity determination has devolved into a mechanistic hunt for talismanic words. Parents are called to the stand and asked if they taught their child the difference between "right and wrong." They are asked if they taught their children that it is "wrong" to steal (*In re Richard T.* (1985) 175 Cal.App.3d 248, 250-251), or to point and shoot guns. (*In re Michael B.* (1983) 149 Cal.App.3d 1073, 1087-1088.) Just the fact of being almost 14 years of age weighs heavily in whether children are found to meet the standard. (*In re Paul C.* (1990) 221 Cal. App.3d 43, 53.) Although knowledge of wrongfulness is not supposed to be inferred from the offense itself (*In re Tony C.* (1978) 21 Cal.3d 888, 900), some courts, like the ones in this case, presume that the child knew what they did was

"wrong" simply because they behaved the way they did. (*In re J.E.*, *supra*, at pp. 6-9.)

What is missing in the vast majority of decisions is analysis of the underlying principle that the capacity decision is really about whether, in all the circumstances, the child should be treated as a "criminal." Occasionally a court has recognized this, as for example when the court in *Michael B.* said that the child knew it was "wrong" to play with guns, but did not truly grasp the permanence of death when he shot his playmate. (*In re Michael B.*, *supra*, 149 Cal.App.3d at p. 1088-1089.) Decisions that truly look at the individual child and their circumstances are rare, and what happened in this case exemplifies the need for this court's guidance.

Thirteen-year-old J.E. was found to meet the Penal Code section 26 standard in connection with a verbal argument with her mother over cleaning the house that escalated into a physical altercation. (Reporter's Transcript ("RT") 611-612.) Her mother called the Sheriff to "scare" her daughter (RT 609, 612-613). When the deputies arrived, they determined that J.E.'s mother was the aggressor, but decided to bring her home to resolve the situation with her mother, treating her as a "runaway." (RT 611, 620.) Although J.E. was initially calm, she became upset after they first told her she was not under arrest, but then insisted that she return home to talk to her mother. (RT 621-622, 632.) After J.E. refused repeated demands that she go with them, the deputies physically approached her and basically wrestled her to the patrol car. As she resisted being forced into the patrol car, J.E. kicked one of the deputies in the stomach; there was not a lot of force. (RT 623-624, 633-636.) This behavior was the basis for misdemeanor charges of resisting arrest (Pen. Code, § 148.), and assault on a peace officer. (Pen. Code, § 243).

When the deputies took J.E. home, her mother shouted at her daughter: "I hope you die. I hope they beat your ass in there. I hope they never let you out." (RT 639.) The deputies instructed the mother to move away from the patrol car, but she continued to shout obscenities, and yelled, "F you, B" at one of the deputies. The deputies asked a bystander to remove her from the scene. (RT 639.) The deputies drove the car away some distance and parked to talk with J.E. She was very upset and began to cry. They told her what her mother had said to her was awful, uncalled for, and should not have happened. She asked them to please call her teacher, and the next day, they did. (RT 640-641.)

J.E. is a special education student. (RT 5.) Until the last two or three years, she lived with her grandmother. (RT 606.) At the adjudication, her mother testified that she never taught J.E. the difference between right and wrong. (RT 606.) When

asked whether she talked to her or taught her daughter about hitting other people, she responded, "Yes. I told her to defend herself. (RT 606.) When asked specifically about hitting aggressively, J.E.'s mother said, "I just told her to stand up for herself. That's it." She never told her daughter it was wrong to hit someone first. (RT 606-607.) She never talked to her about respecting police officers' commands or authority. (RT 607.) She never talked to her daughter about stopping if a police officer told her to stop. (RT 607.) She never talked to her daughter about what good behavior is or bad behavior is. (RT 607-608.) And as is evident from the facts, J.E.'s mother did not model behavior that reflected her own appreciation of right and wrong. She was physically assaultive and verbally abusive toward her daughter, and highly disrespectful of the Sheriff's deputies.

The judge, the sheriffs' deputies, and J.E.'s mother all expressed concerns indicating that they did not view her actions as "criminal" behavior. When the Sheriff's deputies contacted J.E., they were treating it as a runaway situation in which they just wanted to make sure she was safe. (RT 621.) At one of the initial hearings, the court asked probation to refer J.E. for a mental health assessment and also asked for probation to refer the case to the Department of Children and Family Services to "determine whether their services could be better for your family than the juvenile justice system. (RT 8-9.) The prosecutor agreed that an evaluation under Welfare and Institutions Code section 241.1 (to determine which system would be more appropriate) was needed. (RT 8.) Nonetheless, on this record, the juvenile court found, and the Court of Appeal upheld the finding that J.E. met the Penal Code section 26 standard.

III. The Trial Court and the Appellate Court Wrongly Concluded That There was Clear Proof that J.E. Met the Penal Code Section 26 Standard for Capacity to Commit a Crime

We recognize that on review, this court must give deference to the lower court ruling. But that ruling must be based on proper evidence of capacity that is not present in this record. Here, the ruling focused on sheer speculation about J.E.'s behavior and superficial attention to what words might have been said to her by other people about "right and wrong."

The Court of Appeal, for example, equated the fact that J.E. behaved as she did with an understanding that it was wrong. (*In re J.E.*, *supra*, at pp. 6-7.) However, J.E. is not "most" 13-year-olds. And surely, simply reciting the behavior that gave rise to the charges (which in themselves appear spurious in the context of the events), is not clear proof that she understood the wrongfulness of her acts. In fact, the opposite inference is equally valid - that if J.E. understood that the way she behaved was wrong, she would not have acted as she did.

Further, the appellate court engaged in rank speculation about other sources of moral instruction: "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." (*In re J.E.*, *supra*, at p. 7, emphasis added.) The court repeated this assertion: "… 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*." (*Id.*, *at* p. 8, emphasis added.) The appellate court also speculated that the fact that J.E. had been disciplined for her behavior at school was evidence that she knew right from wrong in relation to interactions with law enforcement. (*Ibid*.)

To compound its consideration of speculative matters, the appellate court utterly failed to consider the ample evidence that this is a child who has been raised without the kinds of parental instruction or behavioral modeling that would guide her in an interaction with law enforcement. A finding of capacity requires clear proof – that the child knew the wrongfulness of her acts within the meaning of Penal Code section 26, and that was not present here.

Justice Streeter, concurring and dissenting from the majority opinion pointed to the remarkable situation here – an African-American child who by her mother's admission has never had "The Talk" about how to interact with law enforcement officers. (*In re J.E.*, *supra*, conc. and dis. opn. of Streeter, J., at p. 7].) He noted that in the absence of guidance from her mother, "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." (*Id.*, at p. 8.) In Justice Streeter's view, from the perspective of someone in J.E.'s shoes (not the perspective of "most 13-year-old's"), an effort to withdraw or flee is just as likely to be an act of panicked self-preservation as it is of knowing disobedience. (*Ibid*.) And to Justice Streeter, "[t]he 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." (*Ibid*.) And "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." (*Id.*, at p. 9.)

In Justice Streeter's view "we should be guarded about over-criminalizing in the juvenile justice system, particularly when presented with first petitions," and surely in this case, J.E. should not be stripped of her presumptive exemption from "the harsh strictures" of Welfare and Institutions Code section 602. (*In re J.E.*, *supra*, conc. and dis. opn. of Streeter, J., at p. 11, citing *In re Paul C.* (1990) 221 Cal.App.3d 43, 50.) Returning to Justice Tobriner's opinion for the *Gladys R.* court, Justice Streeter noted 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. (*Id.*, at p. 12, citing *In re Gladys R.*, *supra*, 1 Cal.3d at pp. 864–867.)

IV. The Penal Code Section 26 Capacity Finding Represents an Enduring and Fundamental Element in Protecting Against Overcriminalization of Adolescent Behavior, and This Case Demonstrates the Importance of Treating It As More Than a Mere Formality

In the 50 years since *Gladys R.* was decided, the reasons for carefully considering capacity have only grown. We have a much better understanding of adolescent development and, for example, the fact that adolescents exercise poor judgment in emotionally charged, high stress situations. (Nat. Research Council, *Reforming Juvenile Justice: An Adolescent Development Approach*, National Academies of Science (2013), p. 99; Beyer, *A Developmental View of Youth in the Juvenile Justice System*, in Juvenile Justice: Advancing Research, Policy, and Practice (Sherman & Jacobs, edits., 2011), pp. 6-7.) We have a much better understanding of how black children respond in law enforcement interactions. (See, e.g., Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, Amer. U. Law Rev. 1513 (2018); Jackson, et al., *Low Self-Control and Adolescent Police Stop: Intrusiveness, Emotional Response, and Psychological Well-Being*, 66 J. Crim. Justice (2019)), and the role of implicit bias in criminalization of black children – especially girls. (See, e.g., Epstein, et al., *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, Center on Poverty & Inequality, Georgetown Law (2017).) We are also more aware of the lifechanging collateral consequences that flow from an adjudication of delinquency. (Pacific Juvenile Defender Center, *Collateral Consequences of Juvenile Delinquency Proceedings in California* (2011).)

Just three years ago, this court rejected a mother's argument that it was unfair to label her an unfit mother and subject to dependency jurisdiction, when she had done nothing wrong, but her daughter was incorrigible. (*In re RT* (2017) 3 Cal.5th 622.) Writing for the court, Justice Chin observed that the "mother's preferred approach would bring with it demonstrably negative repercussions" for the child, and that the delinquency finding carries with it a stigma that may follow the minor throughout his or her life. (*Id.*, at p. 636, citing *In re Kevin S.* (2003) 113 Cal.App.4th 97.)

The same negative repercussions flow from a Penal Code section 26 determination focused narrowly on whether certain words were said to the child, rather than on

whether the child belongs in the delinquency system. *Gladys R.* emphasized that Section 26 plays a critical role in distinguishing young people who should receive criminal type sanctions from those to be handled in the dependency system in that they "need care because of home conditions or medical deficiencies," and that status offender or dependency jurisdiction "carry far less severe consequences for the liberty and life of the child." (*Gladys R., supra,* 1 Cal.3d at p. 865.) J.E. was surely entitled to have such a meaningful determination of capacity.

Conclusion

This case presents a compelling vehicle for this court to revisit the Penal Code section 26 standard to provide much needed guidance to the lower courts, and correct the manifest injustice in this case.

Sincerely yours,

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Encls. Proof of Service

PROOF OF SERVICE

I, Susan L. Burrell, reside in the County of Marin, California. I am over 18 years of age and not a party to this action. My business address is P.O. Box 151387, San Rafael, California 94915, and my email is sueburrellpjdc@gmail.com.

On October 22, 2020, I served true and correct copies of the attached **Amicus Curiae Letter in Support of Review for *In re J.E.*, Supreme Court No. S265077**, as described below:

On the party listed below by placing true copies enclosed in sealed envelopes with postage fully prepaid in a United States Post Office box:

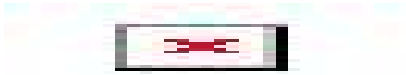
Contra Costa County Juvenile Court
725 Court Street
Martinez, California 94553
Attn: Hon. John C. Cope

By transmitting a PDF version of this document via electronic service through tf3.truefiling.com 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	Erin W. Keefe (Counsel for Appellant)

I declare under penalty of perjury under the laws of the state of California that the above is true and correct.

Dated this 22nd of October, 2020 at San Rafael, California.



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