

NOTICE TO THE BAR

REPORT AND RECOMMENDATIONS OF THE JOINT COMMITTEE ON ASSESSING THE COMPETENCY OF CHILD WITNESSES - PUBLICATION FOR COMMENT

The Supreme Court invites written comments on the Report and Recommendations of the Joint Committee on Assessing the Competency of Child Witnesses (“Joint Committee”), which was developed in response to the Court’s direction in State v. Bueso, 225 N.J. 193 (2016) to develop model questions for assessing the competency of child witnesses. The Report has been endorsed by the Criminal Practice Committee, Evidence Rules Committee, and Family Practice Committee.

Background

The New Jersey Supreme Court in 2016 decided a case involving a very young child witness who alleged sexual abuse by a babysitter when the child-victim was only five years old. State v. Bueso, 225 N.J. 193 (2016). The trial court, after questioning, found the child competent to testify, but the appellate court disagreed, and the matter ultimately reached the Supreme Court. While upholding the determination of competency, the Court directed that “courts and counsel should develop the record on the question of competency by means of thorough and detailed questioning of the child witness.”

To respond to the Court’s direction in Bueso, the Judiciary established a Joint Committee comprised of judges and attorneys (prosecution, defense, and an attorney for children in child welfare proceedings) from the Criminal Practice Committee, Evidence Rules Committee, and Family Practice Committee.

Recognizing the challenges associated with developing questions that would be effective with very young children (as involved in Bueso) and children with developmental delays, disabilities, or trauma, the Court authorized consultation with experts in child development and psychology. Accordingly, the Joint Committee worked with Dr. Thomas D. Lyon, Ph.D., the Judge Edward J. and Ruey L. Guirado Chair in Law and Psychology at the University of Southern California Gould School of Law and Director of the USC Child Interviewing Lab. Three additional experts – Dr. Gail Goodman, Ph.D., Dr. Michael E. Lamb, Ph.D., and Dr. Jodi A. Quas, Ph.D. – served in a second level “peer review” role.

Overview

The Joint Committee recommends that the New Jersey Supreme Court authorize use of (1) a two-part protocol for assessing the competency of child witnesses; and (2) an alternative form of commitment to tell the truth for child witnesses who have been determined to be competent.

Under the protocol, which would be used when the issue of the competency of a child witness is raised, for children aged nine and older, carefully worded questions would be posed orally to probe the child's understanding of (1) the difference between telling the truth and telling a lie, and (2) the negative consequences of telling a lie. For young children and other children unable to accurately answer the oral questions, a picture-based model would be used to assess understanding of the same relevant points. The picture-based method avoids many of the challenges associated with orally assessing the competency of child witnesses, especially children who are young, developmentally delayed, or traumatized. The picture-based module can be administered in hard copy or electronic formats in a traditional, in-person court setting or as supported by technology in a remote setting.

Following a determination of competency through use of the protocol, an alternate form of oath would be administered to the child witness. In place of swearing to an oath or making an affirmation or declaration to tell the truth, the child witness would be asked: "Do you promise that you will tell the truth?"


The Supreme Court invites written comments on the Report and Recommendations of the Joint Committee. Please submit any comments in writing by March 15, 2021 to:

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Assessing the Competency of Child Witnesses
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Comments may also be submitted via e-mail to: Comments.Mailbox@njcourts.gov.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address (and those submitting comments by e-mail should include their name and email

address). Comments are subject to public disclosure upon receipt.



Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: February 9, 2021

**ASSESSING THE COMPETENCY OF CHILD WITNESSES
REPORT AND RECOMMENDATIONS TO THE SUPREME COURT**

Submitted By:

Joint Committee on Assessing the Competency of Child Witnesses

Endorsed and Recommended By:

Supreme Court Criminal Practice Committee
Supreme Court Evidence Rules Committee
Supreme Court Family Practice Committee

December 23, 2020

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INTRODUCTION

This presents the Report and Recommendations of the Joint Committee on Assessing the Competency of Child Witnesses (“Joint Committee”) as established in response to the Supreme Court’s direction in State v. Bueso, 225 N.J. 193 (2016). It reflects the collaborative efforts of the Supreme Court Criminal Practice Committee, Evidence Rules Committee, and Family Practice Committee and the primary expert consultant, Dr. Thomas D. Lyon, Ph.D., whose recommendations were refined through peer review by Dr. Gail Goodman, Ph.D., Dr. Michael E. Lamb, Ph.D., and Dr. Jodi A. Quas, Ph.D.

The Joint Committee recommends that the New Jersey Supreme Court authorize use of (1) a two-part protocol for assessing the competency of child witnesses; and (2) an alternative form of commitment to tell the truth for child witnesses who have been determined to be competent.

Under the protocol, which would be used when the issue of the competency of a child witness is raised, for children aged nine and older, carefully worded questions would be posed orally to probe the child’s understanding of (1) the difference between telling the truth and telling a lie, and (2) the negative consequences of telling a lie. For young children and other children unable to accurately answer the oral questions, a picture-based model would be used to assess understanding of the same relevant points. The picture-based method

avoids many of the challenges associated with orally assessing the competency of child witnesses, especially children who are young, developmentally delayed, or traumatized. The picture-based module can be administered in hard copy or electronic formats in a traditional, in-person court setting or as supported by technology in a remote setting.

Following a determination of competency through use of the protocol, an alternate form of oath would be administered to the child witness. In place of swearing to an oath or making an affirmation or declaration to tell the truth, the child witness would be asked: “Do you promise that you will tell the truth?”

ISSUE: DEVELOPING QUESTIONS TO ASSESS THE COMPETENCY OF CHILD WITNESSES

The New Jersey Supreme Court in 2016 decided a case involving a very young child witness who alleged sexual abuse by a babysitter when the child-victim was only five years old. State v. Bueso, 225 N.J. 193 (2016). The trial court after questioning found the child competent to testify, but the appellate court disagreed, and the matter ultimately reached New Jersey’s highest court. While upholding the determination of competency, the Court directed that “courts and counsel should develop the record on the question of competency by means of thorough and detailed questioning of the child witness.”

BACKGROUND: REFERRAL AND ESTABLISHMENT OF JOINT COMMITTEE

The Supreme Court asked its Criminal Practice Committee to develop model questions for use in assessing the competency of child witnesses. A joint working group involving members of the Criminal Practice Committee and the Supreme Court Evidence Rules Committee started the task by drafting a list of 24 questions for qualifying child witnesses. The list included introductory personal inquiries and questions targeting competency as a witness, including the child's understanding of the difference between right and wrong; the difference between telling the truth and telling a lie; the consequences for doing something wrong; the consequences for telling a lie; and the importance of telling the truth.

In presenting the proposed questions to the Criminal Practice Committee, the working group expressed concerns that the proposed questions would be ineffective with very young children (as involved in Bueso) and children with developmental delays or disabilities. On behalf of the working group, Committee Chair Judge Edward J. McBride, Jr., in 2017 sought guidance from the Court, both as to whether the assignment should be pursued given the likelihood of litigation on the topic and whether the working group of judges and lawyers could seek input from an expert with experience in child development and psychology. The Court affirmed its interest in continuing the ongoing initiative (despite the possibility of litigation) and authorized engagement of an expert.

ENGAGEMENT OF EXPERTS IN CHILD DEVELOPMENT AND PSYCHOLOGY

The Court in 2018 approved collaboration with four specialists with relevant expertise, starting with Dr. Thomas D. Lyon, Ph.D.¹, the Judge Edward J. and Ruey L. Guirado Chair in Law and Psychology at the University of Southern California Gould School of Law and Director of the USC Child Interviewing Lab. Three additional experts – Dr. Gail Goodman, Ph.D., Dr. Michael E. Lamb, Ph.D., and Dr. Jodi A. Quas, Ph.D. – agreed to serve in a second level “peer review” role. All four experts offered to work with the Judiciary without compensation.

Considering the importance of child witnesses in family proceedings,² representatives of the Supreme Court Family Practice Committee were enlisted, yielding a Joint Committee comprised of judges and attorneys (prosecution, defense, and an attorney for children in child welfare proceedings) from the Criminal Practice Committee, Evidence Rules Committee, and Family Practice

¹ Dr. Lyon has both a doctorate in developmental psychology and a law degree from Harvard University School of Law. (<https://gould.usc.edu/faculty/?id=232>)

² The Joint Committee recognizes that children participate in Family Court proceedings in a variety of contexts such as child interviews and other types of non-testimonial communications with judges, court-appointed professionals, attorneys, and child welfare agency representatives. The Joint Committee’s recommendations pertain only to circumstances where a child is being offered as a witness to provide testimony in a proceeding in which the child’s testimonial competency has been questioned and testimonial competency must be assessed in accordance with the Rules of Evidence.

Committee. The expanded Joint Committee commenced work with Dr. Lyon in 2018.

COLLABORATION; PEER REVIEW; AND FINAL EXPERT REPORT

After an initial exchange of materials, the Joint Committee determined that the scope of the task should not be limited to development of a single list of model questions and instead could include recommendations as to a method or protocol for questioning child witnesses. The Joint Committee met by video with Dr. Lyon on several occasions to review the efforts of the earlier working group and answer Dr. Lyon's questions about New Jersey law regarding witness competency and testimony by child witnesses. Dr. Lyon prepared and submitted a series of draft reports, which he refined based on feedback from the Joint Committee.

Dr. Lyon submitted an interim report in September 2019, which the Joint Committee reviewed and endorsed for consideration by the other three experts. Accordingly, Dr. Lyon's report was shared confidentially and separately with Dr. Goodman, Dr. Lamb, and Dr. Quas, each of whom independently reviewed it and provided a written response and recommendations for refinement and revision. The input from the peer reviewers was shared with Dr. Lyon, who considered their

points and either addressed their questions or integrated their suggestions in an updated report.³

Dr. Lyon submitted an updated report shortly before the onset of the COVID-19 pandemic. Given the changed circumstances of court operations in New Jersey and throughout the nation, Judge McBride asked Dr. Lyon to update his report to address applicability during remote court proceedings. Accordingly, Dr. Lyon submitted a final updated report on September 11, 2020, with the only change being the addition of a new final section on administration of the questioning protocol during in-person and remote operations.

³ Dr. Lyon's responses to each of the comments and suggestions of the peer reviewers are set forth in Appendix 2 to his final report. Included among the comments of the peer reviewers are observations about whether a formal child competency assessment (i.e., determining whether the child witness understands the difference between telling the truth and telling a lie and understands the negative consequences of telling a lie) should be required and whether, in place of such an assessment, courts instead should rely solely on a child's promise to tell the truth. As Dr. Lyon noted in his response to these comments, current New Jersey law requires a formal assessment of competency where competency has been challenged. The Joint Committee was not tasked (and did not undertake) to recommend changes to the law to eliminate competency assessments but, rather, was tasked to recommend ways to conduct such assessments informed by the relevant social science research.

SUMMARY: PROPOSED METHOD FOR ASSESSING CHILD WITNESS COMPETENCY

Dr. Lyon's September 11, 2020 report recommends "model questions for assessment of children's truth-telling competency" based on New Jersey law. It begins with an overview of the legal requirements for truth-telling competency under N.J.R.E. 601 and relevant case law. Dr. Lyon notes that in assessing the competency of child witnesses, New Jersey courts consider whether the child (1) appreciates the difference between truth and lies, and (2) anticipates negative consequences in the event of a lie.

For each task, Dr. Lyon provides model questions for use with children aged nine or older and alternative picture-based modules – the Meaning Task and the Consequences Task – for use with children younger than nine years of age or who demonstrate difficulty with standard questioning. Dr. Lyon has refined the use of picture-facilitated questioning of children included in several published studies referenced in the report. Based on those and other studies, Dr. Lyon explains how the pictorial method improves accuracy in competency determinations.

Oral Questions for Children Aged Nine or Older

To assess understanding of the meaning of truth versus lies, a child aged nine or older would be asked "If someone says something that didn't really happen, is that the truth or a lie?" and then would be asked, "And if someone says

something that really did happen, is that the truth or a lie?” If the child answers “lie” to the first question and “truth” to the second question, then the child has demonstrated an understanding of the distinction.

To assess understanding of the negative consequences of telling a lie, an older child would be asked, “What happens to people who tell lies?” If the child describes something negative, then the child has demonstrated an understanding of the negative consequences of lying.

If a child does not answer the oral questions correctly, then the Meaning Task and Consequences Task would be administered to provide a more sensitive test of understanding.

Picture-Based Model: Meaning Task and Consequences Task

The Meaning Task is designed to assess the child’s understanding of the distinction between truth and a lie, and the Consequences Task is designed to assess the child’s understanding of the negative consequences that result from telling a lie. The tests are administered by reading scripted descriptions of a series of scenes, each of which features two children seated before a common object or a questioner (judge, doctor, grandmother, etc.). Thought bubbles above the children illustrate without words each child’s response to a question.

For the Meaning Task, the administrator asks the child to identify an image (e.g., apple) before which the characters are seated and then describes each character's labeling of the image, with one label being accurate and the other inaccurate. The administrator asks the child which of the children told the truth and which one told a lie. The Consequences Task proceeds in the same way, with the characters pictured in front of an adult (e.g., judge, doctor, grandmother). The administrator describes one child as telling the truth and the other child as lying, then asks which child is going to get in trouble. Dr. Lyon's report includes recommendations as to the number and sequence of questions as well as scoring. The report includes three versions each of the Meaning Task and Consequences Task, with images as customized based on feedback from the Joint Committee and the peer reviewers.

Analysis: Use of Meaning Task and Consequences Task

Dr. Lyon's report provides extensive and comprehensively cited reasoning for the picture-based questioning models as an effective alternative to purely oral questioning to assess the competency of child witnesses, especially young children and children with development delays. Among other points, Dr. Lyon explains how the Meaning Task avoids problems with identification questions as identified in Bueso, as well as problems attendant to asking children to answer hypothetical

questions. The picture-facilitated process also avoids the potential for a child to confuse a lie with an immoral action and avoids the use of “do you know” questions that tend to elicit high rates of false negatives and false positives. Lastly, the Meaning Task avoids asking children to define or explain the difference between truth and lies while presenting an observable and measurable process to assess whether the child demonstrates understanding of the difference in meanings.

The Consequences Task similarly avoids the use of “what if” questions and unpleasant imagined scenarios. Dr. Lyon cites studies of children’s behavior in court settings in general and as described in New Jersey case law, noting that children struggle to answer aversive questions and to admit their own capacity for lying. The Consequences Task avoids confusing lies with immoral actions, as discussed in Bueso, and deliberately uses the generic concept of “getting in trouble” to avoid requiring the child to believe in a specific type of punishment.

As noted, the protocol recommended by Dr. Lyon (including both the recommended oral questions and the Meaning Task and Consequences Task) can be administered consistent with the current social distancing requirements associated with COVID-19. It also is technically feasible to administer the protocol remotely, but in the criminal context legal issues such as the right to confront witnesses also would need to be considered.

RECOMMENDATION

The Joint Committee recommends that the Court adopt the protocol described by Dr. Lyon for use when the issue of the competency of a child witnesses has been raised. The Joint Committee recommends use of the carefully worded oral questions that would be posed to children aged nine and older and use of the picture-based method of questioning younger children and children affected by developmental delays, disabilities, and trauma. The Joint Committee further recommends that adoption of this protocol include direction to trial courts to use only the oral questions or the picture-based methods set forth in the protocol to assess the competency of child witnesses. When the competency of a child witness has been established, the Joint Committee also recommends use of the oath alternative (“Do you promise that you will tell the truth?”).

The methodology presented herein reflects decades of research and study by experts in child development and psychology. Dr. Lyon’s approach – which already is used by individual judges in other jurisdictions – has been refined based on the specific requirements of New Jersey law. Beyond those legal adjustments, the protocol has been enhanced through review and commentary by experts with experience in interviewing and assessing the competency of child witnesses. The Joint Committee appreciates the opportunity to respond to the Court’s referral in

Bueso by recommending a scientifically informed and validated approach to assessing the competency of child witnesses.

To: The Joint Subcommittee to Develop Model Questions for Use in Determining the Competency of Child Witnesses

From: Thomas D. Lyon, J.D., Ph.D., Judge Edward J. and Ruey L. Guirado Chair in Law and Psychology, University of Southern California Gould School of Law

Re: Recommended questions for assessing children’s “understanding [of] the duty of a witness to tell the truth.”

Date: September 11, 2020

The purpose of this report is to recommend model questions for assessment of children’s truth-telling competency, with an explanation of how the model questions maximize the likelihood that children’s understanding will be assessed accurately.

In order to identify the legal requirements for competency, I’ve reviewed New Jersey case and statutory law, and discussed it with the Joint Subcommittee. I’ve also reviewed the developmental psychology literature on children’s understanding of the meaning and morality of truth-telling and lying, including a number of experimental studies that we’ve conducted (Lyon, Carrick, & Quas, 2013; Lyon & Saywitz, 1999; Lyon, Saywitz, Kaplan, & Dorado, 2001; Wandrey, Quas, & Lyon, 2012), and an observational study examining children’s performance in court, based on over 2,700 questions asked of 318 child witnesses testifying in U.S. courts (Evans & Lyon, 2012). I’ve reviewed the input provided by three experts in developmental psychology and child witnesses and revised this report in light of their suggestions. I’ve reorganized the materials to highlight the recommended questions, including questions for older children, and added material on the limited purpose of the competency questions, the importance of a child-friendly questioning environment, and an appendix in which I respond to the expert reviews. Most recently, I added a section recommending procedures for questioning children during the pandemic.

Model Questions for Assessing Children’s Truth-Telling Competency

I. The legal requirements for truth-telling competency

Under N.J.R.E. 601, “Every person is competent to be a witness unless...the proposed witness is incapable of understanding the duty of a witness to tell the truth.” The New Jersey Supreme Court noted in *G.C.* that the rules “presume that every person is competent to testify.” *State v. G.C.*, 188 N.J. 118 (2006) at 120. “[A]ll persons should be qualified to testify, and disqualification should be the exception” *G.C.*, 188 N.J. at 133. “[A]ny claim of witness disqualification must be strictly construed against exclusion and in favor of admitting any relevant testimony the witness may offer.” *State v. Bueso*, 225 N.J. 193, 204 (2016).

In order to determine children’s understanding of their duty to tell the truth in court, the court assesses (a) “whether the child witness appreciates the distinction between truth and lies” *State v. Bueso*, 225 N.J. at 207, and (b) anticipates “negative consequences in the event of a lie.” *Id.*, 225 N.J. at 210. Most children understand the difference between truth and lies and the wrongfulness of lying by four years of age.¹

Truth-telling competency is a prerequisite for receiving sworn testimony and not a test of the reliability of the child’s testimony or out-of-court statements. Statements by children who cannot demonstrate their truth-telling competency may nevertheless be reliable, both because children who understand their duty to tell the truth may not be able to articulate their understanding, and because understanding of the truth and lies does not predict greater accuracy.²

The Court in *Bueso* emphasized that trial judges have broad discretion to control the mode of questioning so as to make it “effective for ascertainment of the truth” and to protect witnesses from “undue embarrassment.” 225 N.J. at 206-207, quoting N.J.R.E. 611(a). These guidelines provide questions that are designed to maximize accuracy while minimizing embarrassment. However, the context in which the questions are asked is also important. Children are most likely to perform optimally if they are questioned in a child-friendly environment by a supportive interviewer, and if the interviewer has built rapport with the child before asking the competency questions.³

¹ See Subcommittee notes, Section I.

² See Subcommittee notes, Section II.

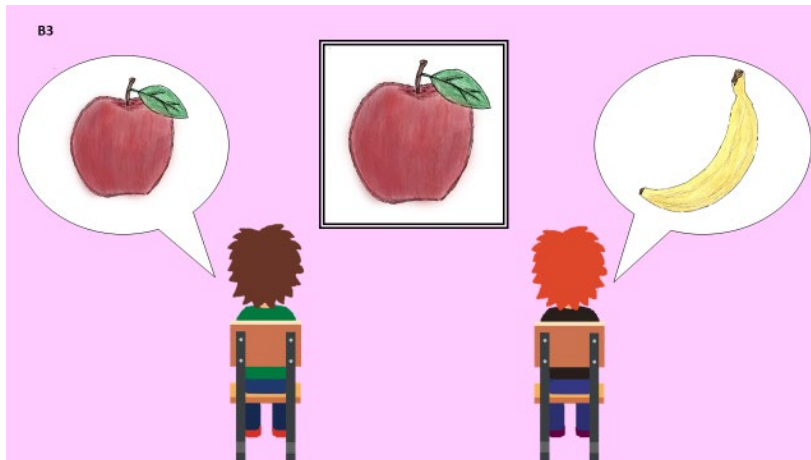
³ See Subcommittee notes, Section III.

II. Model Questions

A. Assessing “whether the child witness appreciates the distinction between truth and lies.” *State v. Bueso*, 225 N.J. 193, 207 (2016).

Children under 9: Administer the Meaning Task.⁴ Ask the child four questions about scenarios in which one story child correctly labels an object and the other story child incorrectly labels the object. For two scenarios, ask which story child told the truth, and for two scenarios, ask which story child told a lie.

A sample scenario is provided here.



The interviewer points to the apple in the center and says “Look at this food. What kind of food is this?”

The child is likely to say “apple” (If the child uses a different label, the interviewer accepts the child’s label).

The interviewer then says, “O.K., that’s an apple. LISTEN to what these children say about the apple. One of them will tell a LIE and one will tell the TRUTH.”

Pointing to the child on the left, the interviewer says, “This child looks at the apple and says it’s an apple.” Pointing to the child on the right, the interviewer says, “This child looks at the apple and says it’s a banana.”

The interviewer then asks, “Which child told the truth?”

⁴ The Meaning Task is provided in Appendix 1, and an interactive version is available. There are three versions of the task (with different objects), so that a child who has previously received the task can be administered a different version.

In order to test understanding of lie, the interviewer follows a similar script with a different item, but asks “Which child told a lie?”

If a child answers four of four Meaning Task questions correctly, this is strong evidence of understanding (approximately 6% of children responding at chance would answer 4/4 correctly). If a child answers three of four questions correctly, this is weak evidence of understanding (approximately 25% of children responding at chance would answer $\frac{3}{4}$ correctly). Answering two or fewer questions correctly suggests the child is guessing.

Children 9 and older: Ask the child, “If someone says something that *didn’t really happen*, is that the truth or a lie?” Then ask the child, “And if someone says something that *really did happen*, is that the truth or a lie?”

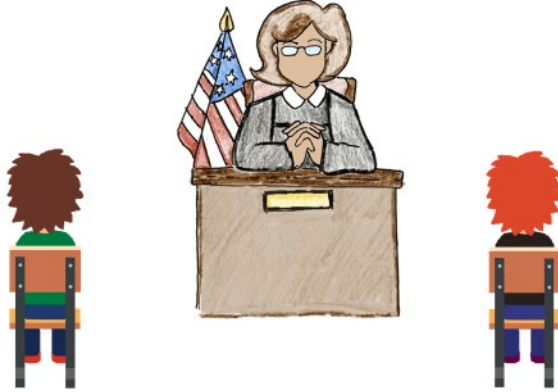
If the child answers “lie” and “truth,” then the child has demonstrated an understanding of the distinction. If the child doesn’t answer the question correctly, administer the “Meaning Task,” because the task will provide a more sensitive test of understanding.

B. Assessing whether the child anticipates “negative consequences in the event of a lie.” *State v. Bueso*, 225 N.J. 193, 210 (2016).

Children under 9: Administer the “Consequences Task.”⁵ Ask the child four questions about scenarios in which one child “tells a lie” and the other child “tells the truth.” For each scenario, ask the child which correctly labels an object and the other child incorrectly labels the object. For two scenarios, ask which child told the truth, and for two scenarios, ask which child told a lie.

The child can be asked to choose which of two child story characters “is going to get in trouble,” a child described as lying or a child described as telling the truth. A sample interaction is provided here.

⁵ The Consequences Task is provided in Appendix 1, and an interactive version is available. There are male and female versions of each of the four types of professional.



The interviewer points to the picture of the judge and says, “Here's a Judge. She wants to know what happened to these children. Well, one of these children is going to get in TROUBLE for what they say, and you will tell me which child is going to get in TROUBLE.”

Pointing to the child on the left, the interviewer says “This child tells the TRUTH,” and pointing to the child on the right, the interviewer says “This child tells a LIE.”

The interviewer then asks, “Which child is going to get in trouble?”

Additional pictures depict a doctor, a social worker (described as someone who visits the children at home), and a counselor (described as someone who talks to the child in an office).

Children 9 and older: Ask the child “What happens to people who tell lies?” If the child describes something negative, then the child has demonstrated an understanding of the negative consequences of lying. If the child doesn’t answer the question correctly, administer the “Consequences Task,” because the task will provide a more sensitive test of understanding.

Subcommittee Notes

I. Children can be presumed competent by four years of age.

A large number of studies have found that by four years of age the average child has acquired a basic understanding of the meaning of truth and lie (Bussey, 1992; Haugaard, Reppucci, Laird, & Naiful, 1991; Lyon, Carrick, & Quas 2013; Peterson, Peterson, & Seeto, 1983; Strichartz & Burton, 1990; Wimmer, Gruber, & Perner, 1984) and the immorality of lying (Bussey, 1992; Lyon, Carrick, & Quas, 2013; Peterson, Peterson, & Seeto, 1983). Even two year olds have an implicit understanding of the importance of telling the truth, routinely rejecting false statements (Hummer, Wimmer, & Antes, 1993; Koenig & Echols, 2003; Lyon, Carrick, & Quas, 2013; Pea, 1980, 1982). Therefore, if an older child struggles with questions about truth-telling and lying in court, this illustrates the difficulties of courtroom questioning rather than the incompetency of children.

II. Children's apparent competency to testify is not a test of their reliability.

The model questions are designed to test children's ability to articulate their understanding of witnesses' duty to tell the truth, and not children's honesty or reliability. As Lyon (2011) noted:

“Several studies have found that children's eyewitness performance is not related to their understanding of truth and lies (Feben, 1985; Goodman, Aman, & Hirshman, 1987; London & Nunez, 2002; Pipe & Wilson, 1994; Talwar, Lee, Bala, & Lindsay, 2002). When research does find a relation between performance and children's understanding, it is in contexts in which children may be motivated to make deliberately false reports and are then urged to tell the truth or asked to promise to do so (Lyon & Dorado, 2008; Lyon, Malloy, Quas, & Talwar, 2008; Talwar, Lee, Bala, & Lindsay, 2004). This suggests that the efficacy of “I promise to tell the truth” depends to some extent on the child's comprehension of “truth”; it does not mean that there is a general relation between understanding of truth and lies and honesty. And even in this context, one should not assume that an apparent failure to comprehend the meaning and morality of truth and lies justifies an assumption that a promise to tell the truth is ineffective. Lyon et al. (2008) found that children who failed to perform well on a truth-lie understanding task were nevertheless more honest after promising to tell the truth. The probable reason for this finding is that comprehension tasks likely underestimate what children

understand....It is fair to conclude that an interviewer's assessment of a child's understanding of truth or lie has virtually no value in assessing the child's honesty, and is likely to make matters worse. Indeed, recent research suggests that children with an incipient understanding of truth and lies are better able to make false statements [Williams, Ahern, & Lyon, 2019; Williams, Leduc, Crossman, & Talwar, 2017]. In other words, it is more difficult for the child who does not know the difference between “truth” and “lie” to tell a lie. This finding should not be surprising, because both the understanding of truth and lies and the ability to lie are related to children's cognitive development. Indeed, adults are probably the best liars, and they are of course quite capable of defining truth and lie.”

III. Children will best demonstrate their competency in a supportive environment.

Questioning in a courtroom rather than in a private room is likely to impair children’s performance (Goodman et al., 1992; Hill & Hill, 1987; Saywitz & Nathanson, 1993). High arousal while answering questions reduces children’s ability to communicate and impairs their accuracy (Quas & Lench, 2007). Conversely, children’s performance is optimized if they are interviewed by a supportive interviewer (Saywitz, Wells, Larson, & Hobbs, 2019) who builds rapport before questioning (Saywitz, Larson, Hobbs, & Wells, 2015).

III. How the Meaning Task improves accuracy and minimizes embarrassment.

A. Asking children to identify truth-telling and lying is most sensitive to early understanding.

The studies cited above finding early understanding of the truth and lies have asked children to identify true and false statements as such. Lyon and Saywitz (1999) questioned 4- to 7-year-old maltreated children exhibiting serious delays in verbal development using scenarios in which one story character correctly labelled an object and the other provided an incorrect label, and asked which character was telling the truth or telling a lie. Four year olds (the youngest children tested) were 69% correct, and five year olds were 80% correct. When the tasks were administered to children attending a university-affiliated preschool, among children with above average verbal abilities, even 3-year-olds showed good comprehension (Lyon, 2000). Utilizing similar tasks, Lyon, Carrick, & Quas (2013) examined children as young as two years of age. Children performed above

chance by 3 years of age, 4-year-olds were 75% correct, and 5-year-olds over 85% correct.

B. The Meaning Task avoids problems encountered in *Bueso* with identification questions.

The Meaning Task is similar to competency questions that children are asked in court. In *Bueso*, the trial court showed the child a book and said, “If I told you that that book is round, would that be a truth or a lie?” and the child answered “a lie.” The judge then asked “why?” and the child responded “because it’s a rectangle.” 225 N.J. at 199.

The Meaning Task overcomes some potential difficulties with the question in *Bueso*. The child’s label or description is elicited first, so that there is no doubt about what the child believes is true. The “why” question could be difficult for children, who might interpret it as a question about the speaker’s motives, which could elicit a “don’t know” response.

The picture tasks facilitate questions about a number of different objects, which can ensure that the questioning extends “beyond a single topic” (*Bueso*, 225 N.J. at 214; noting the judge only asked a single question about the shape of a book). Furthermore, in order to ensure that the trial questions will be “unrehearsed” (*Bueso*, 225 N.J. at 211), the child can be asked about different objects. As noted above, the contains three sets of 4 objects (see Appendix 1).

C. The Meaning Task avoids asking children “what if” questions that ask them to imagine themselves or the questioner telling a lie.

Perhaps the most important difference between the Meaning Task and the identification question in *Bueso* is that the judge’s question forced the child to call the judge’s statement a lie, whereas the picture tasks depict story children telling lies. The judge’s question was a hypothetical: “if I told you...” Young children treat hypothetical “what if” questions as suggestions, and reject the premises when they are undesirable or violate their expectations (Hawkins, Pea, Glick, & Scribner, 1984; Reilly, 1986; Wing & Scholnick, 1981).

Young children will find it difficult to label statements attributed to the adult or to themselves as lies. In their first study, Lyon and Saywitz (1999) asked maltreated children a series of questions identifying whether statements were the “truth or a lie” if spoken by “somebody.” The use of “somebody” might have facilitated performance, but the interviewer prefaced the stories with the instruction that

“sometimes I’ll tell a lie about the picture, sometimes I’ll say something true about the picture. You say when I’m telling a lie and when I’m telling the truth” (p. 18). 4-year-olds were 80% proficient at identifying true statements, but only 53% at identifying lies. Of the 11 children who persistently labelled statements the same, 10 labelled them as the truth. (See also Brown, Lewis, Lamb, Gwynne, Kitto, & Stairmand, in press [5-year-olds only 47% correct when asked true/not true identification question beginning with “If I said...”])

This problem is also evident in court transcripts. Evans and Lyon (2012) found that whereas child witnesses almost never made errors (1%) when asked to identify truth and lies spoken by a third person (using an impersonal pronoun such as “somebody”), they were more likely to err if the hypothetical speaker was the attorney/judge (10%) or the child (22%).

D. The Meaning Task avoids confusing lies with immoral actions.

Interviewers sometimes ask children about true and false statements in the context of wrongdoing. For example, they might ask a child whether true and false statements about stealing are the truth or lies. Some legal commentators have argued that truth-lie competency questions should focus on lies about wrongdoing because this will be more meaningful for children (Home Office, 2001; Hoyano & Keenan, 2007; McCarron, Ridgway, & Williams, 2004), and Bussey (1999) argued that children should be particularly adept at identifying lies about transgressions.

However, recent evidence has shown that this may lead to underestimation of younger children’s competency. Wandrey, Quas, & Lyon (2012) showed that 3- to 5-year-olds’ ability to demonstrate their understanding of the truth and lies was undermined if they were asked about actions (or statements about actions) that were themselves immoral. For example, if a child truthfully disclosed wrongdoing, children were biased to call the statement a lie. “The results are consistent with research finding that children overgeneralize the concept of lies to include bad words (Peterson et al., 1983; Piaget 1932/1965); our findings suggest that those bad words include wrongdoing and claims of wrongdoing.” (Wandrey et al., 2012, at 302).

E. The Meaning Task avoids “Do you know” questions.

“Do you know” questions about the truth and lies are likely to lead to high rates of both false negatives (finding competent children incompetent) and false positives (finding incompetent children competent). Examining transcripts, Evans and Lyon

(2012) found that children were worse at “do you know” questions than identification questions, and erred 30% of the time. They speculated that children may be accustomed to hearing “do you know” as a precursor to information (cf. saying “do you know what?” to elicit attention).

“Do you know” questions about lying may evoke defensive denial, akin to the problem with negative hypotheticals. In Lyon & Saywitz’ (1999) study of maltreated 4- to 7-year-olds, 89% answered “yes” to “do you know what it means to tell the truth?” but only 79% answered “yes” to “do you know what it means to tell a lie?” “It is as if acknowledging knowing what a lie is increases the likelihood that one will be suspected of being a liar” (Lyon & Saywitz, 1999, p. 23). Consistent with these findings is a study examining children’s disclosures of abuse in response to different types of questions: “do you know why you are here” elicited a substantially higher rate of non-responsiveness than “tell me why you are here” (Hughes-Scholes & Powell, 2012).

“Do you know” questions are also likely to lead to high rates of false positives because children may falsely believe that they know the meaning of a word. Lyon and Saywitz (1999) found that children’s responses to the “do you know” questions about truth and lie did not predict whether they were able identify statements as truth and lies.

F. The Meaning Task avoids requiring children to define the words truth and lie.

“Young children are likely to find it difficult to define words, because defining requires an abstract understanding of the proper use of a word across different contexts. ‘Truth’ and ‘lie’ may be particularly difficult to define, because they refer to statements rather than objects. Furthermore, defining necessitates that one generate rather than merely recognize the meaning of a word” (Lyon & Saywitz, 1999, p. 17). In his pioneering work on children’s understanding of lying, the famous Swiss psychologist Piaget noted how “difficult it is for the child to give an adequate definition of the notions he uses owing to his inability to realize them consciously,” arguing that it was preferable to “present to the child a certain number of stories, asking him each time whether a lie has been told or not.” (Piaget, 1932/1965, p. 142-143).

Lyon and Saywitz (1999) asked maltreated 4- to 7-year-old children to define truth and lie, and counted as correct any references to factuality (e.g. “truth is what really happened”) or even defining one term as not the other (e.g. “a lie is not the

truth”). Few children younger than 7 were able to provide even minimally sufficient definitions of either “truth” or “lie.” More than half (61%) of children who consistently were accurate in identifying statements as the truth or lies could not define the terms.

G. The Meaning Task avoids requiring children to explain the difference between the truth and lies.

Explaining the difference between terms entails the same difficulties as defining terms, and adds additional problems. First, the child must know what “different” or “difference” means. Lyon and Saywitz (1999) found that most maltreated 4-year-olds could not correctly use the word “different” to compare objects, and that maltreated 4- and 5-year-olds were at chance in answering that the truth and lies were “different.” (p. 20). Second, many children will define the terms by their opposition (“a truth is not a lie”), which leaves them unable to do more than to assert that the terms are different when asked to explain how they are different. When Lyon and Saywitz (1999) asked children to explain the difference between truth and lie, “very few children younger than 7 years of age were able to provide a minimally sufficient description of the difference between the truth and lies, and only about half of the 7-year-olds were able to do so” (p. 20). More than 2/3rds (69%) of children who consistently were accurate in identifying statements as truth or lies were unable to describe the difference between the terms. Similar difficulties have been observed in older non-maltreated children; Pipe and Wilson (1994) found that although 100% of the 10-year-olds they questioned were able to identify lies as such, 28% could not explain the difference between the terms.

It should be noted that Evans and Lyon (2012) did not find that children testifying in court had the greatest difficulty with difference questions. Rather, they were more accurate in response to difference questions than definition questions, and did no worse on difference questions than identification questions. However, performance was likely confounded by the frequent use of hypothetical identification questions and “do you know” definition questions. Cf. *State v. Krivacska*, 341 N.J.Super. 1, 24 (2001) (child who otherwise performed well was inconsistent in answering whether “he knew the difference between telling the truth and telling a lie”).

IV. How the Consequences Task improves accuracy and minimizes embarrassment.

A. Asking children to identify consequences is most sensitive to early understanding.

The studies cited above finding early understanding of the immorality of lying have asked children to identify true and false statements as good or bad. Lyon and Saywitz (1999) told maltreated 4- to 7-year-old children stories in which child characters spoke to adults and either “told the truth and didn’t tell any lies” or “told a lie and didn’t tell the truth,” and then asked if it was good or bad to do so; 4-year-olds were 74% correct, and the 5-year-olds were 92% correct. In a second study, the authors used pictures similar to the Consequences Task and told children stories in which one child told the truth and the other child told a lie to different adult authority figures; 4-year-olds were 73% correct and 5-year-olds 87% correct in identifying the character who “said something bad.” Examining non-maltreated 2- to 5-year-old’s ability to label true statements as “good” and false statements as “bad,” and “truth” as “good” and “lie” as “bad,” Lyon et al. (2013) found children’s performance similar to their ability to identify truth and lie: Children performed above chance by 3 years of age, 4-year-olds were over 75% correct, and 5-year-olds over 85% correct.

Under New Jersey law, however, children must not merely recognize the wrongfulness of lying but must also anticipate that lying has negative consequences. *State v. Bueso*, 225 N.J. 193, 210 (2016). Therefore, the Consequences Task asks which of two children will “get in trouble” for telling a lie. Lyon & Saywitz (1999) did not find any statistically significant difference in performance when children were asked about “getting in trouble” rather than saying “something bad.”

B. The Consequences Task avoids asking children “what if” questions that ask them to imagine themselves or the questioner telling a lie.

The difficulties with hypothetical “what if” questions asking about the meaning of truth and lies equally applies to questions about the consequences of lying. Lyon and colleagues (2001) asked different groups of 5- and 6-year-old maltreated children what authority figures (a doctor, a judge, a social worker, and God) would do if the child or a story child lied. If children were asked about themselves they were more likely to respond that they didn’t know or be non-responsive. On the other hand, if they did mention consequences, they were no less likely to mention

negative consequences, demonstrating that they didn't have a sense of invulnerability. Rather, the different pattern of results suggested that children found the negative hypotheticals too unpleasant when asked about themselves.

Children are likely to have similar difficulty in describing negative consequences when the adult is the hypothetical speaker. Examining children's performance in court, Evans and Lyon (2012) found that whereas consequence questions referring to a third person or using an impersonal pronoun (e.g., "somebody") elicited a 9% error rate, questions about the child led to 20% errors, and questions about the adult questioner elicited a 50% error rate.

Children often struggle with consequences questions in New Jersey courts, and much of their difficulty might be attributable to the use of aversive "what if" questions. See *Bueso*, 225 N.J. at 198 (7-year-old stated he did not understand "that bad things happen if you tell a lie in court"); *State in interest of R.R.*, 79 N.J. 97,104 (4-year-old inconsistent in answering "if you lie do you believe that God will punish you?"); *State v. Zamorsky*, 159 N.J.Super. 273, 280 (1978) (7-year-old "could not say, however, what would happen if she did not tell the truth"); *State v. Walton*, 72 N.J.Super 527, 530 (1962) (10-year-old failed to respond when asked "What happens if you don't tell the truth, do you know?").

Conversely, children sometimes do better with consequence questions using impersonal pronouns. See *State v. Zamorsky*, 170 N.J.Super. 198, 202 (1979) (6-year-old responded "they get punished" when asked "What happens to little girls that don't tell the truth?"). But see *Walton*, 72 N.J.Super. at 520, in which the 10-year-old continued to struggle with hypothetical questions about "people," perhaps because they were worded as "do you know" questions ("Do you know what happens to people who don't tell the truth?" and "Do you know what happens to people if they swear to tell the truth on the bible and they don't tell the truth?").

B. The Consequences Task avoids asking children if they have ever told a lie.

Of course, all children lie at some point in their lives, and whether a child has ever lied is irrelevant to the competency inquiry. Indeed, their prior history of lying would qualify as inadmissible character evidence. Nevertheless, children are often asked whether they have ever lied by questioners hoping to use the answer as a springboard for inquiring into the consequences of lying (e.g. "and when you lied, what happened to you?").

Asking children whether they have “ever” told a lie elicits high rates of denial, perhaps because children view the question as an implicit assertion that the child is a liar. Peterson, Peterson, and Seeto (1983) found that until 11 years of age, most children denied ever having told a lie. Evans and Lyon (2012) found that 41% of child witnesses who were asked if they had ever lied claimed they had not. Responses of this sort also appear in New Jersey cases. See *R.R.*, 79. N.J. at 104 (4-year-old claimed “that he never did things ‘wrong’ at home”); *Zamorsky*, 159 N.J.Super. at 280 (7-year-old denied ever telling a lie, except “a little white lie, sometimes”).

C. The Consequences Task avoids confusing lies with immoral actions.

If the child is asked about the consequences of telling the truth versus lying about wrongdoing, this can create confusion. In evaluating the scenario, the child must distinguish between the moral evaluation of the transgressor’s statements (good if the truth and bad if a lie) and the moral evaluation of the wrongdoing (always bad). 4-year-olds are clearly capable of evaluating lying as immoral, but have had difficulty in studies asking them about wrongdoer’s honesty (Bussey, 1992; Vendetti, Kamawar, & Andrews, 2019).

As the Court recognized in *Bueso*, this difficulty can arise in competency inquiries. The 7-year-old child testified that he would get an X for failing to do his homework and lying about it, but the Court noted that it was “unclear whether the teacher’s “X” on the homework would be a sanction for M.C.’s failure to perform the assignment, or for lying about it.” *Bueso*, 225 N.J. at 213.

D. The Consequences Task avoids “Do you know” questions.

As with questions about the meaning of truth and lie, children’s answers to questions such as “Do you know what would happen if you told a lie?” are likely poor indicators of their actual understanding, both because a reluctant child is likely to answer “no” despite knowing the consequences, and an immature child may answer “yes” without comprehending the question.

E. The Consequences Task avoids requiring children to believe in specific types of punishment.

By referring to “trouble,” and asking about lying to different adult authority figures (a judge, doctor, social worker, and grandmother), the Consequences Task does not require children to identify a particular type of punishment. It therefore avoids false assumptions about children’s exposure to corporal or divine punishment.

National surveys have revealed wide variability in the likelihood that adults practice corporal punishment with their children (Finkelhor, Turner, Wormuth, Vanderminden, & Hamby, 2019: 37%) or believe that God is punitive (Flannelly, 2017: 46%).

This approach is consistent with New Jersey law. Emphasizing that an understanding of “any kind” of punishment satisfies the competency requirement, the court in *Bueso* noted that a competent child may be “incapable of understanding either the concept of divine punishment or the legal implications of false swearing.” *Bueso* 225 N.J. 193, 204, quoting *State v. R.R.*, 79 N.J. 97 at 110.

V. Special considerations for questioning children during the pandemic.

Because of the pandemic, children may be questioned in unusual circumstances. It may be necessary to maintain social distance with a child questioned in court, or it may be necessary to interview a child remotely. We have created a Powerpoint version of the task, available on request, which can accommodate both socially distanced and remote questioning. The Powerpoint version contains the different types of Meaning and Consequences task, and before interviewing the child, the questioner should cut and paste the questions he or she will use into a new Powerpoint presentation, which can be titled with case information.

If the child is questioned in court with social distancing, the pictures for the task can be projected on a screen while the questioner narrates the task. If the child is questioned remotely on a computer, then the questioner can share his or her screen with the child while running the Powerpoint presentation.

Because the questioner and child may not be able to easily point to the individual story children, and because younger children may not know “left” and “right,” the story child on the left can be referred to as the child with brown hair and the child on the right as the child with red hair.

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Slide 1

USC Gould
School of Law
Child Interviewing Lab

Appendix 1

Assessing children's understanding of the duty of a witness to tell the truth

Materials adapted for use by the New Jersey courts

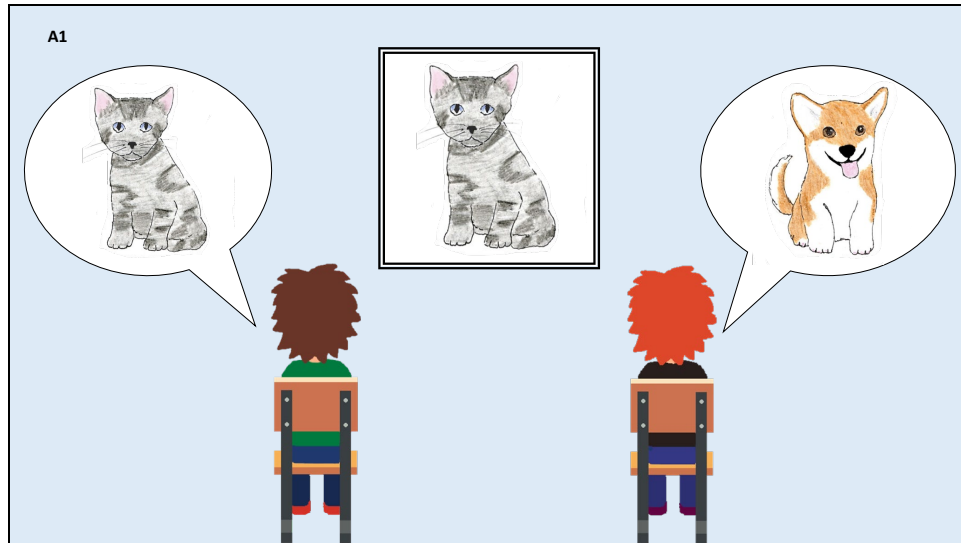
Thomas D. Lyon, University of Southern California Gould School of Law
(based on Lyon & Saywitz, 2000; with thanks to Francisco Serrano Cendejas for the
illustrations)

Slide 2

Meaning Task

Three versions (A, B, and C), with four questions per version, 2 about
"truth" and 2 about "lie"

Slide 3



Here's a picture. Look at this animal--what kind of animal is this?

OK, that's a [child's label].

LISTEN to what these children say about the [child's label]. One of them will tell a LIE and one

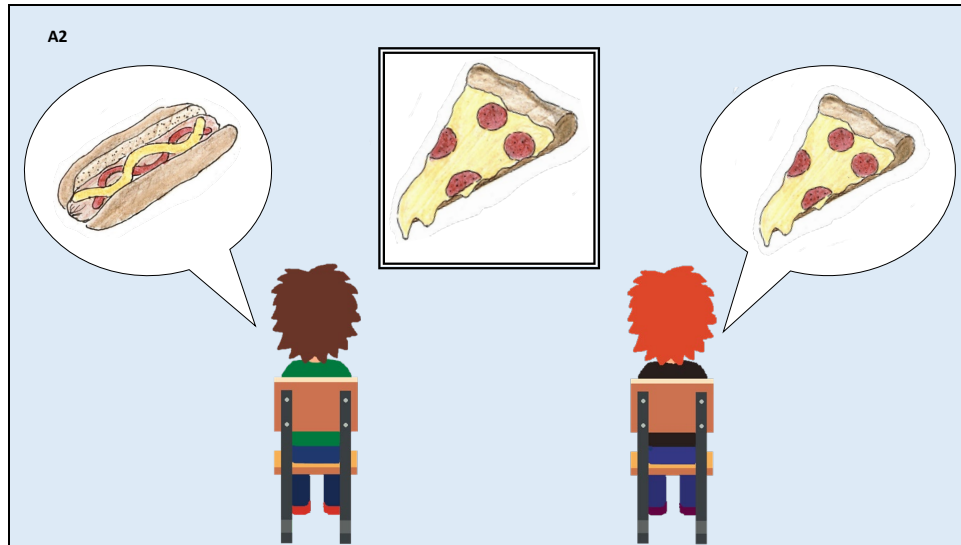
will tell the TRUTH, and YOU'LL tell ME which child tells the TRUTH.

(point to child on the left) THIS child looks at the [child's label] and says (click for animation) "IT'S a [child's label]."

(point to child on the right) THIS child looks at the [child's label] and says (click for animation) "IT'S a PUPPY."

Which child told the TRUTH? (correct answer is child on the left.)

Slide 4



Here's another picture. Look at this food--what kind of food is this?

OK, that's a [child's label].

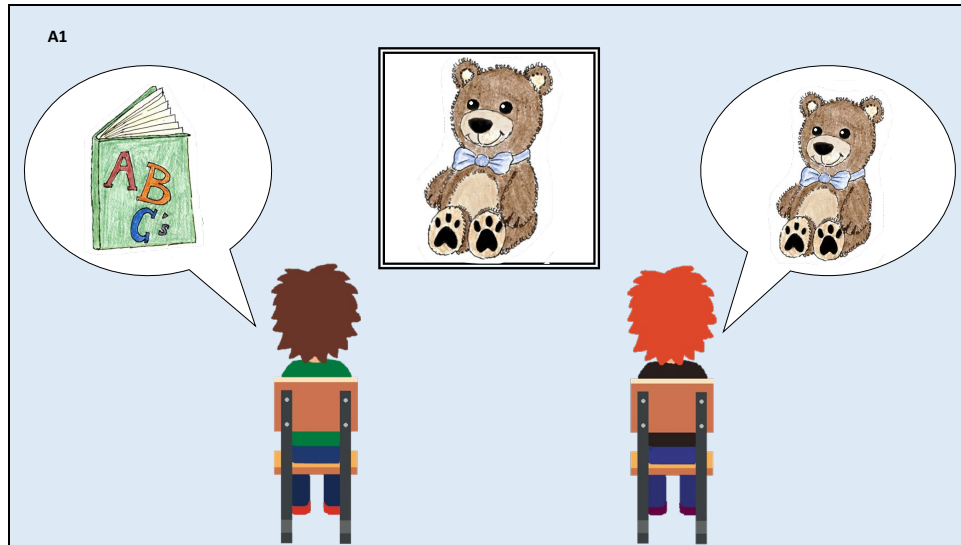
LISTEN to what these children say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to child on the left) THIS child looks at the [child's label] and says (click for animation) "IT'S a HOT DOG."

(point to child on the right) THIS child looks at the [child's label] and says (click for animation) "IT'S a [child's label]."

Which child told a LIE? (correct answer is child on the left)

Slide 5



Here's another picture. Look at this toy--what kind of toy is this?

OK, that's a [child's label].

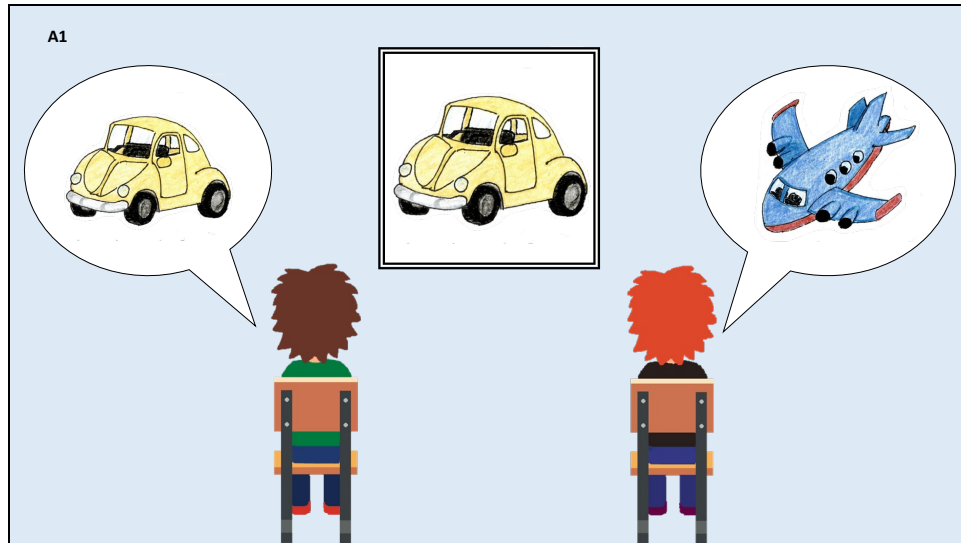
LISTEN to what these children say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to child on the left) THIS child looks at the [child's label] and says (click for animation) "IT'S a BOOK."

(point to child on the right) THIS child looks at the [child's label] and says (click for animation) "IT'S a [child's label]."

Which child told the TRUTH? (correct answer is child on the right)

Slide 6



Here's another picture. Look at this toy--what kind of toy is this?

OK, that's a [child's label].

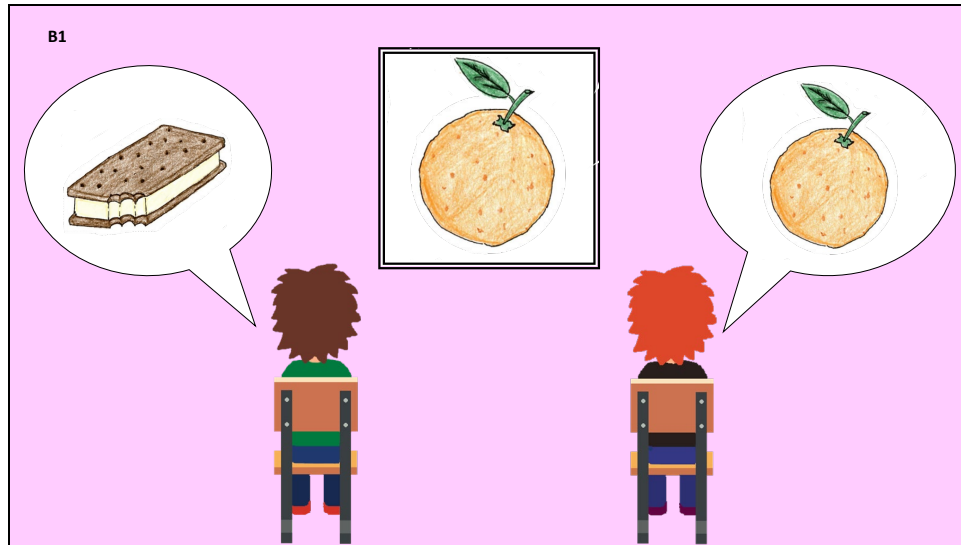
LISTEN to what these children say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH.

(point to child on the left) THIS child looks at the [child's label] and says (click for animation) "IT'S a [child's label]."

(point to child on the right) THIS child looks at the [child's label] and says (click for animation) "IT'S a PLANE."

Which child told a LIE? (correct answer is child on the right)

Slide 7



Here's another picture. Look at this food--what kind of food is this?

OK, that's a [child's label].

LISTEN to what these children say about the [child's label]. One of them will tell a LIE and one

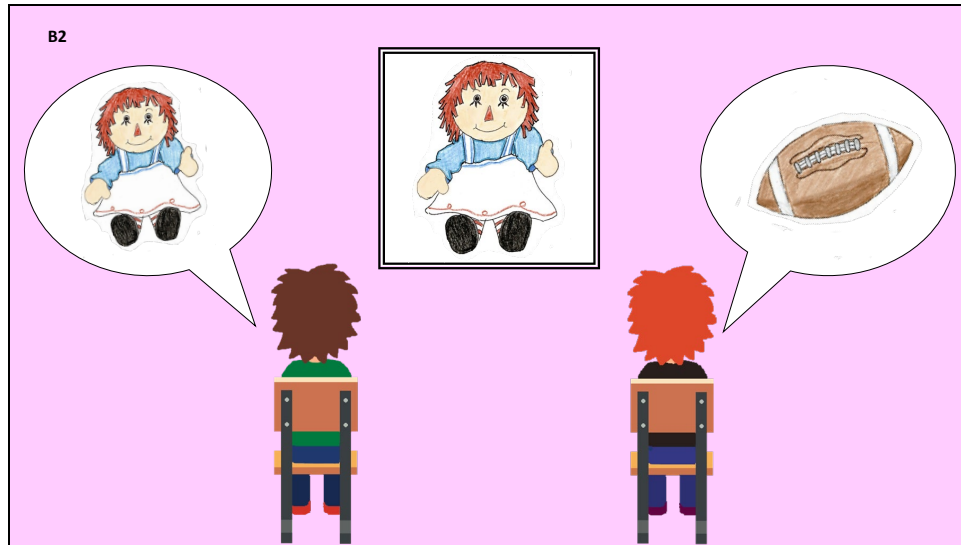
will tell the TRUTH, and YOU'LL tell ME which child tells the TRUTH.

(point to child on the left) THIS child looks at the [child's label] and says "IT'S a COOKIE."

(point to child on the right) THIS child looks at the [child's label] and says "IT'S a [child's label]."

Which child told the TRUTH? (correct answer is child on the right)

Slide 8



Here's another picture. Look at this toy--what kind of toy is this?

OK, that's a [child's label].

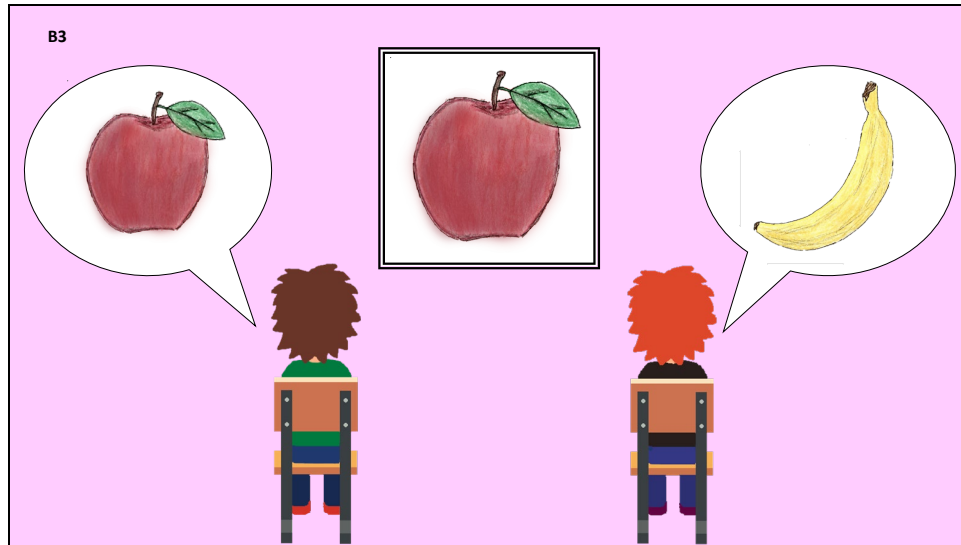
LISTEN to what these children say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to child on the left) THIS child looks at the [child's label] and says "IT'S a [child's label]."

(point to child on the right) THIS child looks at the [child's label] and says "IT'S a FOOTBALL."

Which child told a LIE? (correct answer is child on the right)

Slide 9



Here's another picture. Look at this food--what kind of food is this?

OK, that's a [child's label].

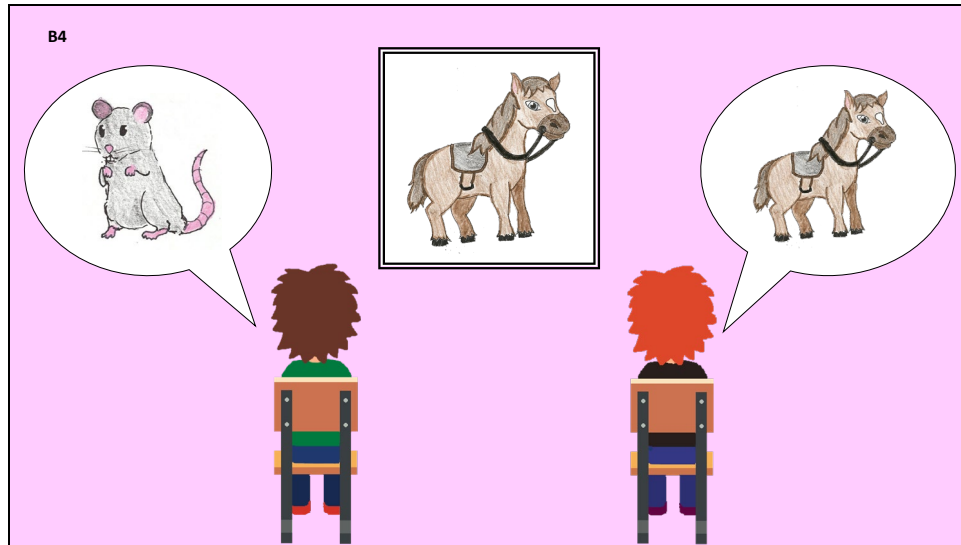
LISTEN to what these children say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to child on the left) THIS child looks at the [child's label] and says "IT'S a [child's label]."

(point to child on the right) THIS child looks at the [child's label] and says "IT'S a BANANA."

Which child told the TRUTH? (correct answer is child on the left)

Slide 10



Here's another picture. Look at this animal--what kind of animal is this?

OK, that's a [child's label].

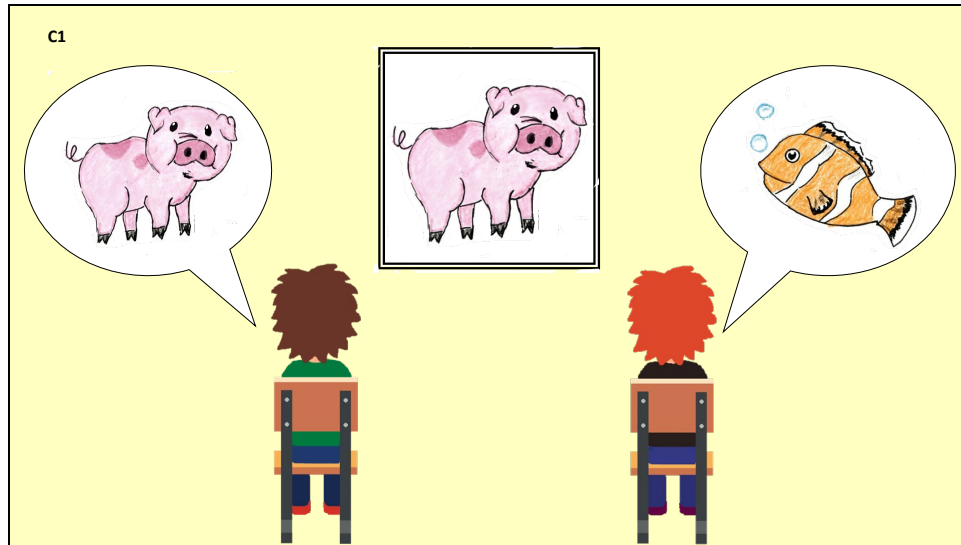
LISTEN to what these children say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH.

(point to left child) THIS child looks at the [child's label] and says "IT'S a MOUSE."

(point to right child) THIS child looks at the [child's label] and says "IT'S a [child's label]."

Which child told a LIE? (correct answer is child on the left)

Slide 11



Here's a picture. Look at this animal--what kind of animal is this?

OK, that's a [child's label].

LISTEN to what these children say about the [child's label]. One of them will tell a LIE and one

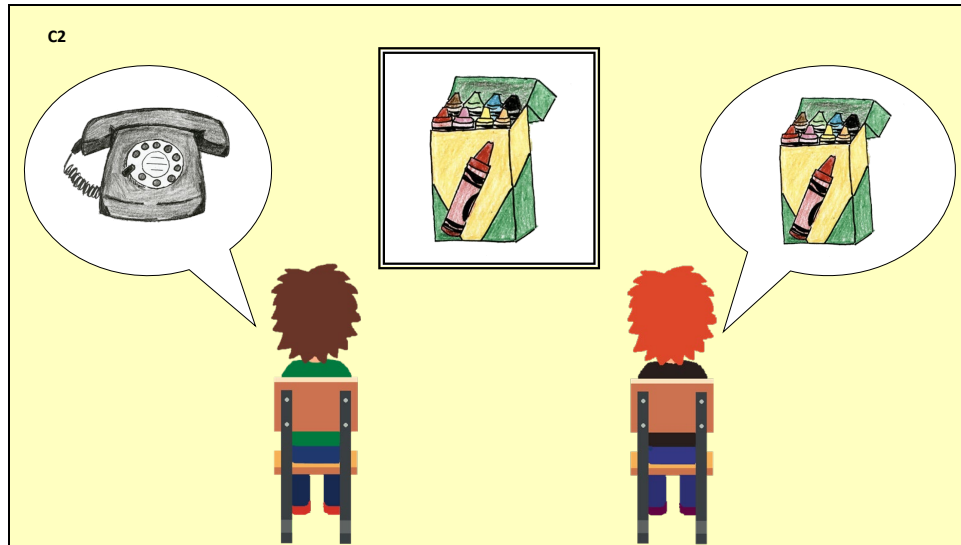
will tell the TRUTH, and YOU'LL tell ME which boy tells the TRUTH.

(point to child on the left) THIS child looks at the [child's label] and says "IT'S a [child's label]."

(point to child on the right) THIS child looks at the [child's label] and says "IT'S a FISH."

Which child told the TRUTH? (correct answer is child on the left)

Slide 12



Here's another picture. Look at this toy--what kind of toy is this?

OK, that's a [child's label].

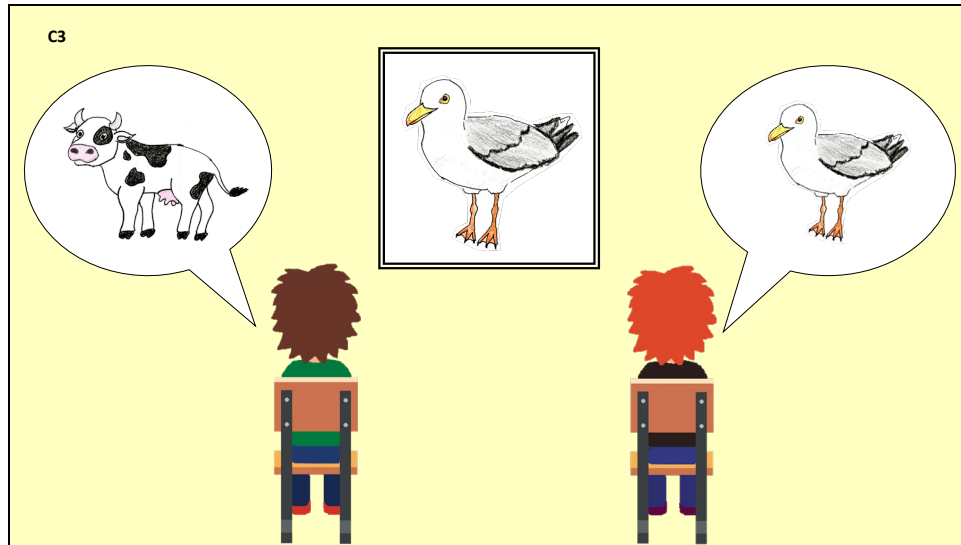
LISTEN to what these children say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to left child) THIS child looks at the [child's label] and says "IT'S a PHONE."

(point to right child) THIS child looks at the [child's label] and says "IT'S a [child's label]."

Which child told a LIE? (correct answer is child on the left)

Slide 13



Here's another picture. Look at this animal--what kind of animal is this?

OK, that's a [child's label].

LISTEN to what these children say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to child on the left) THIS child looks at the [child's label] and says "IT'S a COW."

(point to child on the right) THIS child looks at the [child's label] and says "IT'S a [child's label]."

Which child told the TRUTH? (correct answer is child on the right)

Slide 14



Here's another picture. Look at this food--what kind of food is this?

OK, that's a [child's label].

LISTEN to what these children say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH.

(point to child on the left) THIS child looks at the [child's label] and says "IT'S a [child's label]."

(point to child on the right) THIS child looks at the [child's label] and says "IT'S a CARROT."

Which child told a LIE? (correct answer is child on the right)

Consequences task

Choose four professionals (2 correct on left, 2 correct on right)

Slide 16



Here's a Judge.

She wants to know what happened to these children.

Well, ONE of these children is GONNA GET IN TROUBLE for what they say, and YOU'LL tell ME which child is GONNA GET IN TROUBLE.

LOOK [child's name], (point to left child) This child tells the TRUTH. (point to right child) This child tells a LIE.

Which child is GONNA GET IN TROUBLE? (correct answer is child on the right)

Slide 17



Here's a Judge.

He wants to know what happened to these children.

Well, ONE of these children is GONNA GET IN TROUBLE for what they say, and YOU'LL tell ME which child is GONNA GET IN TROUBLE.

LOOK [child's name], (point to left child) This child tells the TRUTH. (point to right child) This child tells a LIE.

Which child is GONNA GET IN TROUBLE? (correct answer is child on the right)

Slide 18



Here's a Lady who comes to visit these children at home.
She wants to know what happened to these children.
Well, ONE of these children is GONNA GET IN TROUBLE for what they say.
LOOK [child's name], (point to left child) This child tells a LIE. (point to right
child) This child tells the TRUTH.

Which child is GONNA GET IN TROUBLE? (correct answer is child on the left)

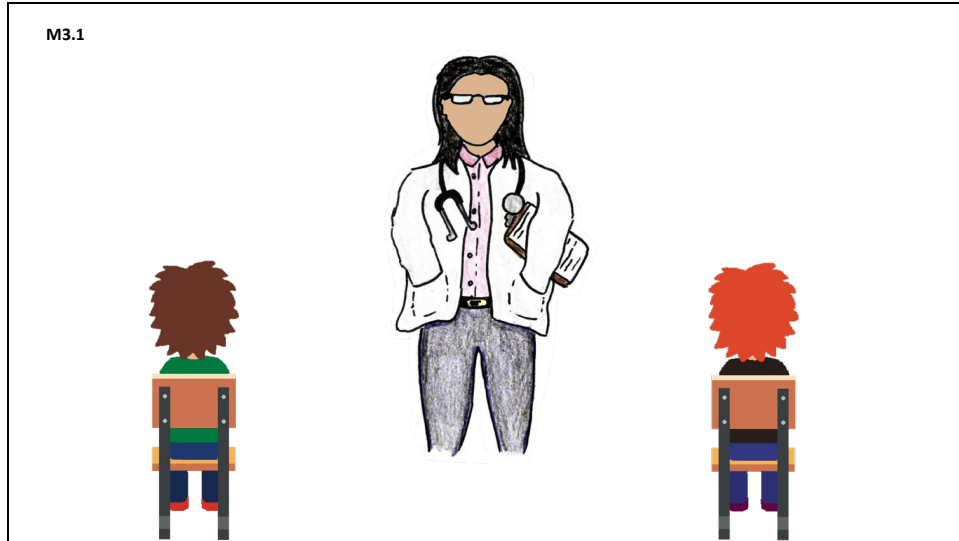
Slide 19



Here's a Man who comes to visit these children at home.
He wants to know what happened to these children.
Well, ONE of these children is GONNA GET IN TROUBLE for what they say.
LOOK [child's name], (point to left child) This child tells a LIE. (point to right child) This child tells the TRUTH.

Which child is GONNA GET IN TROUBLE? (correct answer is child on the left)

Slide 20



Here's a Doctor. She wants to know what happened to these children.
Well, ONE of these children is GONNA GET IN TROUBLE for what they say.
LOOK [child's name], (point to left child) This child tells a LIE. (point to right child) This child tells the TRUTH.

Which child is GONNA GET IN TROUBLE? (correct answer is child on the left)

Slide 21



Here's a Doctor. He wants to know what happened to these children.
Well, ONE of these children is GONNA GET IN TROUBLE for what they say.
LOOK [child's name], (point to left child) This child tells a LIE. (point to right
child) This child tells the TRUTH.

Which child is GONNA GET IN TROUBLE? (correct answer is child on the left)

Slide 22



Here's a Lady who talks to children in her office.
She wants to know what happened to these children.
Well, ONE of these children is GONNA GET IN TROUBLE for what they say.
LOOK, [child's name], (point to left child) This child tells the TRUTH. (point to
right child) This child tells a LIE.

Which child is GONNA GET IN TROUBLE? (correct answer is child on the right)

Slide 23



Here's a Man who talks to children in his office.
He wants to know what happened to these children.
Well, ONE of these children is GONNA GET IN TROUBLE for what they say.
LOOK, [child's name], (point to left child) This child tells the TRUTH. (point to
right child) This child tells a LIE.

Which child is GONNA GET IN TROUBLE? (correct answer is child on the right)

Appendix 2

Annotated comments from expert reviews of the 9-13-19 draft report

Comments from Dr. Michael Lamb:

Thanks for sharing Dr. Lyon's report of competency assessment. I think it is an excellent piece of work and the proposals made therein are very sound, in my opinion. In other words, I think that use of the proposed model questions would greatly assist triers of fact in assessing the competence of young witnesses.

My only disagreement with some of the text (but not with any of the recommendations) is the assertion on page 5, section C, that "The meaning task avoids asking children hypothetical questions about unpleasant premises". In fact the meaning task does involve hypothetical situations, albeit hypotheticals that are much less cognitively challenging than those that begin "If I told you..." or "If I said...". Out of an abundance of caution, and to avoid unnecessary challenges down the road to the Lyon proposals, I think it would be better to make the distinction between what is proposed and what should be avoided without reference to the hypothetical nature of the inquiry.

Lyon: This is a good point. I've reorganized the report so that the recommendations precede a "notes" section explaining the recommendations. I've rewritten the notes to avoid the suggestion that the Meaning Task does not present children with hypothetical situations. The point was that certain kinds of hypothetical questions are difficult for children; namely, those that pose undesirable premises.

Comments from Dr. Jodi Quas:

I was asked to review Professor Thomas Lyon's proposed competency assessment procedures to evaluate children's understanding of the obligation to tell the truth in legal settings. I am currently Professor of Psychological Science and founding member of the Center for Psychology and the Law at the University of California, Irvine, where I have served on faculty since 2000. Before that time, I was a MacArthur Foundation postdoctoral fellow in the Institute of Human Development and School of Public Health at the University of California, Berkeley. I received my Ph.D. in 1998 from the University of California, Davis.

For the past 25 years, I have been conducting research on children's eyewitness memory, suggestibility, and disclosure. I have extensive experience working with

children and identifying the most appropriate methods to determine what they know and experienced. I regularly train social service, law enforcement, and legal professionals on best-practice interviewing approaches for children. I have received both federal and private foundation grants to support my research from such agencies and organization as the National Institute of Child Health and Human Development, National Science Foundation, and the American Psychological Association. My work has been recognized by numerous awards and honors, including the Nicholas Hobbs Career Contributions Award from the Society for Child and Family Policy and Practice of the American Psychological Association (APA), and the Outstanding Community Researcher Award from UCI's Institute for Clinical and Translational Science. Thus, I am highly qualified to comment on competency assessment procedures Professor Lyon described. For transparency, I should note that I have worked collaboratively with Professor Lyon in the past, including on a few of the investigations of children's early understanding of the difference between truths and falsehoods.

I was specifically asked to comment on the report written by Professor Lyon for the New Jersey "Bueso Committee," which was charged with the task of creating age appropriate methods of assessing children's competency. Below I specifically do just this. More generally, though, it is also important for the Bueso Committee, and the New Jersey Courts, to have some general knowledge about children's eyewitness capabilities, specifically in relation to their ability to answer competency questions regarding their understanding of the difference between the truth and a lie and of the consequences of telling a lie. In large part, findings suggest that simple assessments of young children's understanding of truths and lies (e.g., What is a lie? Do you know the difference between the truth and a lie?), are unrelated to the accuracy of their memory of prior events (e.g., Goodman, Hirschman, Hepps, & Rudy, 1991; Huffman, Warren, & Larson, 1999). Likewise, a moral discussion about truths and lies is also unrelated to older children's disclosures of a minor laboratory transgression (Evans & Lee, 2010). In contrast, when children are explicitly asked to promise to tell the truth, such promises are effective at increasing children's disclosures of such transgressions (e.g., Evans & Lee, 2010; Quas, Stolzenberg, & Lyon), although these findings primarily emerge in school-age as opposed to preschool-age children.

In light of these lines of inquiry, I would suggest the Bueso Committee think very critically about whether requiring formal competency assessments for children is necessary to achieve the Court's ultimate goal of pursuing justice. Whether

children can or cannot answer competency questions has very little, if any, bearing on their ability to disclose and recount their experiences accurately and completely. It seems to me that the latter is much more important and relevant to a legal case than basic competency capabilities.

Lyon: I am sympathetic to Dr. Quas' views, which were also expressed quite forcefully by Dr. Goodman (see below). My goal in this report was to identify the most age-appropriate means of assessing children's testimonial competency, and not to suggest changes to New Jersey case or statutory law.

With respect to the limited value of competency questions for assessing children's reliability, I have made very similar arguments to those advanced by Drs. Quas and Goodman (Lyon, 2011), and have added them to the notes.

Insofar as the courts remain intent on having children complete a competency test, though, the Bueso Committee did an outstanding job selecting Professor Thomas Lyon to assist in this regard. He is widely considered the leading psycho-legal scholar in the world with expertise in child development, criminal justice and evidence, and children's competency and participation as witnesses in legal cases.

Overview According to Professor Lyon's report, when a child's competency has been questioned, per New Jersey law, the child must demonstrate understanding of two related notions to be qualified as competent: 1) An appreciation of the difference between the truth and a lie, and 2) Recognition that lying has negative consequences. As professor Lyon describes, there are multiple ways of evaluating these two domains of understanding in children. One approach (question prompts) relies on questions that prompt children to generate their own "narrative" responses based on their ideas and intuitions. The other approach (picture task) relies on pictures and corresponding questions that direct children attention to specific concepts and ideas, thereby reducing cognitive and social demands associated with generating narrative responses. The picture tasks described by Lyon separately tap the two further activities: The *meaning* task is used to ascertain whether a child understands the difference between the truth and a lie. The *consequence* task is used to evaluate whether a child understands negative consequences result from lying.

Lyon distinguishes between school-age and preschool-age children. He explains that question prompts can be used with school-age children and older, and picture tasks can be used with preschool-age children and with school-age children who have difficulty with the question prompts. Specifically, to assess *meaning*, children

who are school-age or older can be asked, “If someone says something that didn’t really happen, is that the truth or a lie.” If a child has difficulty answering or if the child is preschool-age, the picture meaning task can be used. In this task, pictures with characters and corresponding thought bubbles are shown. Some thought bubbles show images that match what is “real,” and some show images that do not.

The child is asked whether characters are saying something that is true or a lie. Based on the child’s answers, a questioner can ascertain whether the child recognizes that truths correspond to that which is real, and lies correspond to that which is false, thereby demonstrating an appreciable understanding of the difference between them.

To assess *consequences*, children who are school-age or older can be given the question prompt, “What happens to people who tell lies?” If a child has difficulty or if the child is preschool-age, the picture consequence task can be used. In this task, two characters are shown, one of whom is described as telling the truth and one of whom is described as telling a lie. Children are asked which character is going to get in trouble. Children’s answers reflect their understanding of the consequences of a lie.

The picture tasks have been tested on large and diverse samples of children, ranging in age from early preschool (e.g., 3-year-olds) to school-age (e.g., age 7-8 years). Samples have included children who have been exposed to maltreatment, ethnically and racially diverse children, and children who are not native English speakers (e.g., Lyon & Saywitz, 1999; Lyon, Carrick, & Quas, 2010). Findings are consistent and replicable. Thus, the tasks have adequate reliability and validity.

Concerns and Application

I have three sets of concerns about the picture tasks. Of critical importance, none of these concerns should be taken as an indication that the tasks are not reliable or valid (or that the tasks should not be used). Such is not the case. My concerns instead reflect the need for (a) greater clarity as to the ages of children who should be given the question prompts versus picture tasks, (b) details regarding phrasing options for the question prompts given to older children, and (c) modifications or flexibility in the phrasing or administration of the picture tasks when making final determinations about whether a child is competent.

Clarity about Age

Perhaps the most significant issue regarding the picture prompt tasks Lyon describes concerns the precise ages when the different types of tasks are appropriate. Lyon distinguishes preschool- and school-age children, which, while heuristically useful, could be problematic. One potential issue is that children's ages across the transition to school varies considerably, including potentially across regions or districts (Grissom, 2004).

Some parents may make decisions to "hold back" the child to repeat preschool or place them in transitional kindergarten ("T-K") programs to improve their academic performance, while other parents (or school districts) may not have these options available. How would one differentiate, across districts, whether children in kindergartners, first grade, or even T-K are preschool- versus school-age children? What about children who are on the younger side of the birthday cut off for their grade? They might, especially in the early school years, be cognitively or developmentally younger than their school-age peers, which could influence their comfort narrating to adults, their understanding of the questions, or their ability to answer). Variability in age and cognitive ability is extremely common, particularly in economically disadvantaged children in the same grade in school (Abenavoli, Greenberg, & Bierman, 2017). This presents potential problems regarding which children in which grade should receive the question prompts versus picture tasks.

Lyon recognizes the potential for variability in school-age children's answers to question prompts. He explains, if school-age children have difficulty answering a questions, they can be administered the picture tasks. However, the only way to ascertain whether a school-age child is going to have difficulty is by administering the open-ended question prompt and waiting for the child to answer. If child answers with an ambiguous or incorrect response, the child's credibility is undermined, making it difficult to shift and give the child alternative types of questions, such as picture task. The child may be confused, and others may evaluate the child negatively given the initial incorrect responses. Even if the picture task is easy, and the child answers the picture task questions accurately, the child's competency could still be challenged. Moreover, asking a child to answer difficult open-ended questions, asking a shy child to narrate answers, or asking a child to answer questions once they have "failed" to answer the open-ended prompts could contribute to increased distress in the child. Evidence indicates that high arousal while answering questions reduces children's ability to communicate and inhibits their accuracy (Goodman et al.,1992; Quas & Lench, 2007). Thus, a school-age child might have considerably difficulty answering even the picture

tasks, regardless of the child's underlying capabilities, simply as a result of anxiety.

Given that the picture tasks have been successfully tested on and shown to be effective with children through age 7, a more straightforward recommendation regarding when to ask open-ended questions versus use the picture tasks could be an age (or even grade) cut-off. For instance, perhaps children age 8 and under (or third grade and under) should be given the picture task. Children age 9 and older (or fourth grade and older) should be asked open-ended questions. In none of the studies Lyon described did the oldest children have trouble with the picture task, seem bored, or annoyed with its concreteness. Thus, erring on the side of administering the picture tasks initially even with some school-age children will not cause problems. Instead, it will eliminate the give open-ended question prompts to children first, wait to see if they have trouble, and then attempt to administer the simpler versions.

Lyon: Dr. Quas makes a very convincing argument for substituting age recommendations for grade recommendations, and I have done so in the revised report, following her suggestions.

Furthermore, Dr. Quas' point about anxiety impairing performance is well-taken, and consistent with Dr. Goodman's admonitions that the questions be asked outside a courtroom setting, if possible. I have added discussion of these issues to the recommendations and the notes.

Question Prompts for Older Children

I have no concerns here with the recommended language to use with older children when giving them question prompts to assess competency. Instead, I have a concern about the way that these questions are presented in Lyon's report. The questions are listed early in each section (meaning, consequence), and it is only later that Lyon explains why the questions are ideal and why other types of prompts can be problematic. Such a format might be confusing for readers who need to know in a straightforward manner precisely what types of questions should be asked, and what questions should be avoided.

Examples of problematic questions are those that ask children to evaluate unpleasant hypothetical acts that they or someone they know (e.g., the judge) committed (If you lied, what would happen?), those that ask children to speculate about others' motives (e.g., follow-up "why" prompts), those that fail to discern

negative actions from truth-telling and lying (e.g., when a child breaks a toy but tells the truth, is that good or bad), and those that ask for open-ended responses from children who have difficulty narrating (e.g., asking a child to define a truth and a lie, or explain the difference between them).

Similar to the picture task instructions, could a list of recommended open-ended prompts be provided? The list could contain several prompt options in bullet format, followed by a list of prompts to avoid, with clear explanations (also in bullet format) about why the latter are developmentally inappropriate. Currently, the explanations are embedded in the document, but there is not a single appendix or description of questions to ask school-age children that can be easily followed in the same way the picture tasks are presented.

Lyon: I've rewritten the report to highlight the recommended questions. The logic and research underlying the recommendations then follow in the notes section.

Picture Task Modifications with Younger Children

Lyon notes that children, especially preschool-age, have more difficulty answering questions about lies than truths. In some cases, this is because of the negative moral connotation of a lie. In some cases, it may also be that young children have less exposure to and do not understand the word, "lie" as well as they understand the word, "truth." Would it be possible to substitute the word, "false" for "lie" on the tasks? Or is it sufficient for a child to be considered competent if the child could identify characters who said the truth even or could identify true statements as good, even if they could not identify false statements as lies? Stated another way, children may, for a variety of reasons avoid answering, have difficulty answering, or simply not understand some pictures or questions. This is more likely to occur when children are asked about lies and falsehoods, but could also emerge with some questions about the truth (e.g., if children do not understand a particular character in the story, they may focus on the character and not on the question itself, thereby failing to answer). Nonetheless, children may still understand overall that the truth refers to what is real and know that it is important to say the truth or say what is real. From a developmental perspective, therefore, the child is competent. Greater clarity as to whether knowledge of the truth is also sufficient to be considered legally competent would help, as would guidance on what to do when children make periodic or even idiosyncratic errors.

Lyon: As a general matter, I certainly agree that children may fail the competency task despite understanding the importance of telling the truth. We have found that children are more likely to tell the truth after promising to do so even if they do not answer competency questions correctly, which suggests that competency tests have some false negatives—they overlook some competent children (Lyon et al., 2008). This is a problem no matter what questions one asks in order to assess competency.

The advantage of asking about lies is that this facilitates demonstration of understanding when one moves to the second part of New Jersey’s competency requirement, which is that children should demonstrate an awareness of the negative consequences of lying. Sophisticated children will recognize that only deliberate falsehoods are subject to punishment, whereas terms like “wrong” or “not the truth” apply equally to mistakes as to lies.

Furthermore, the evidence that children understand “truth” better than “lie” is equivocal. There is some evidence that when asked yes/no questions about truth and lie, young children perform better on truth than on lie (Lyon, Carrick, & Quas, 2010, 2013). However, when asked which of two characters told “the truth” or “told a lie,” children perform equally well (Lyon & Saywitz, 1999), and the Meaning Task utilizes forced choice questions. Children may appear to understand truth better because they exhibit some reluctance to call statements lies (Lyon et al., 2010; 2013). Furthermore yes/no questions about the truth may be easier than yes/no questions about lies because the former are similar to questions even 2-year-olds can answer: “is this a [false label].” The correct response to a false statement (no) is similar to the correct response to “is it the truth that this is a [false label]” (no), but the opposite of the correct response to “is it a lie that this is a [false label]” (yes).

I’m not aware of any research examining children’s understanding of “false,” but it seems quite likely that this word emerges later than “lie.”

Thank you for the opportunity to comment on Professor Lyon’s report for the New Jersey Courts regarding methods of assessing children’s competency. Insofar as the Courts continue to see competency assessments as a necessary hurdle for child witnesses’ statements to be heard in court, the research described by Professor Lyon represents the gold standard in the field in terms of how best to evaluate their understanding of the meaning of truths and lies and knowledge of the

consequences of lying. Professor Lyon's proposed picture task is reliable, valid, and developmentally appropriate. I am extremely pleased that the Bueso Committee is utilizing Professor Lyon and the rigorous scientific research he describes to guide their decisions and conclusions. Please let me know if you need any further information or have any additional questions (jquas@uci.edu).

Comments from Dr. Gail Goodman:

My Qualifications

I am Distinguished Professor of Psychology at the University of California, Davis, and Director of the Center for Public Policy Research. I teach graduate and/or undergraduate courses on memory development, psychology and law, child witnesses, and child maltreatment. While on the faculty of the University of California, I also held a faculty appointment at the University of Oslo, Norway, to help the Psychology Department there build a specialty research program in childhood trauma and forensic interviewing. Before moving to my present position at the University of California, I was a professor at the State University of New York (SUNY), Buffalo and at the University of Denver, Colorado. I obtained postdoctoral training at the University of Denver and the Université René Descartes in Paris, France. I received my PhD in Developmental Psychology at the University of California, Los Angeles (UCLA) in 1977.

I have published approximately 300 empirical articles and chapters on the topics of memory development, trauma and memory in children and adults, forensic interviewing, child sexual abuse, delayed disclosure, and the like. While at the University of Denver, in about 1986, I received the first federal grant given for the scientific study of the accuracy of children's eyewitness testimony, and my research has been continuously funded by federal, state, and/or private foundations and agencies ever since. I served as the President of three Divisions and one Section of the American Psychological Association: Developmental Psychology (Division 7), American Psychology-Law Society (Division 41), Society for Child and Family Policy and Practice (Division 37), and the Section on Child Maltreatment. I am a Fellow of the American Psychological Association and of the Association for Psychological Science, the two major U.S. associations for research and clinical psychologists. I am also a member of the National Academy of Letters and Sciences in Norway.

I have received many national and international awards for my research on child sexual abuse and child witnesses including the James McKeen Cattell Fellow

Award for Lifetime Contributions to Applied Research from the Association for Psychological Science, three Distinguished Contributions Awards from the American Psychological Association, a Distinguished Contributions Award from Division 41 of the American Psychological Association, an Honorary Doctorate from the University of Oslo, and more. I have given hundreds of scientific presentations, keynote addresses, and workshops to a variety of professional audiences, and I was a consultant to Child Protective Services in Sacramento, CA for 20 years. I am a member of many professional organizations, including the Society for Research in Child Development, American Psychological Association, Association for Psychological Science, International Society for the Prevention of Child Abuse and Neglect, and the American Professional Society on the Abuse of Children.

Finally, my research on child sexual abuse and child witnesses has been cited multiple times in U.S. Supreme Court decisions, and I have consulted with many government officials and agencies worldwide (e.g., Brazil, New Zealand, Israel, Canada, Australia, England) on children and adults in the legal system.

Review of Dr. Thomas Lyon's "Recommended questions for assessing children's "understanding [of] the duty of a witness to tell the truth."

Dr. Lyon has proposed a state-of-the-art method for evaluating the competence of child witnesses. The wording of the questions asked and the pictures used have been well researched by Dr. Lyon and his colleagues (e.g., Lyon, 2000; Lyon, Carrick, & Quas, 2010, 2013; Lyon & Saywitz, 1999). His technique has been subjected to peer review. As he holds both a J.D. and a PhD in developmental psychology, he keenly appreciates the issues and requirements regarding children's legal competence.

Are Competence Questions Needed?

Dr. Lyon cites New Jersey decisions that "[A]ll persons should be qualified to testify, and disqualification should be the exception (G.C., 188 N.J. at 133) and "[A]ny claim of witness disqualification must be strictly construed against exclusion and in favor of admitting any relevant testimony the witness may offer." State v. Bueso, 225 N.J. 193, 204 (2016). The Court in Bueso then required that competence questions for child witnesses be developed. It was stipulated that "thorough and detailed questioning of the child witness" should be at hand.

However, assessing children's competence is tricky business both for law and psychology. It is not clear that "thorough and detailed questioning" is to be advised.

A more justifiable approach is to permit children to testify (as one would with adult witnesses) without a competence test and then let the fact-finder determine how much or little weight to place on the child's testimony. Although from a legal perspective, competence (e.g., knowing truth from lie and that there are negative consequences to telling a lie) can be distinguished from accuracy, the truth seeking function of a trial is an ultimate goal. Yet children's answers to truth- lie questions do not predict the accuracy of their memory reports (Goodman, Hirschman, Hepps, & Rudy, 1991). Moreover, very young children can identify and produce true statements, even if they cannot define the concept of a lie.

Children should promise to tell the truth, as research finds such promises to be effective (e.g., Lyon & Dorado, 2008). Many nations have wisely abolished competence questions (Evans & Lyon, 2012).

The legal requirement for children's competence to testify is outdated. As one example, currently many families do not physically or otherwise punish children for lying. In fact, several national organizations (e.g., American Academy of Pediatrics, American Psychological Association, American Professional Society on the Abuse of Children) recommend against physical punishment of children. Many families are not religious, and children are not exposed to the idea that they will "go to hell" or receive other punishments if they lie. They may instead feel it is morally wrong to lie, or perhaps for young children, never thought of lying. Children who say "nothing happens" if they tell a lie may be accurate and just as competent (in the moral sense and when they take the stand) as another child. In fact, physical punishment of children is associated with lying (Talwar & Lee, 2011), so some of the competence questions (the consequence questions) may actually work in the opposite direction as desired. A child who is asked "What happens if you tell a lie?" and then answers "You become President of the USA" may have overheard such talk but be quite competent to differentiate truth from lie him or herself. As Professor Lyon rightly points out in his report, "National surveys have revealed wide variability in the likelihood that adults practice corporal punishment with their children... or believe that God is punitive..."

As another example, researchers report that with age, children's lies become more sophisticated. For example, Talwar et al. (2007) found that, for 6- to 11-year-olds,

older children were more successful at concealment lies (see also Evans & Lee, 2012). Thus, older compared to young children may be able to answer competence questions, but nevertheless, they may be able to lie more successfully. As Dr. Lyon states “Even two year olds have an implicit understanding of the importance of telling the truth, routinely rejecting false statements (Hummer, Wimmer, & Antes, 1993; Koenig & Echols, 2003; Lyon, Carrick, & Quas, 2013; Pea, 1980, 1982).”

Stated another way, children may, for a variety of reasons avoid answering, have difficulty answering, or simply not understand some pictures or questions. This is more likely to occur when children are asked about lies and falsehoods, but could also emerge with some questions about the truth (e.g., if children do not understand a particular character in the story, they may focus on the character and not on the question itself, thereby failing to answer). Nonetheless, children may still understand overall that the truth refers to what is real and know that it is important to say the truth or say what is real. From a developmental perspective, therefore, the child is competent. Greater clarity as to whether knowledge of the truth is also sufficient to be considered legally competent would help, as would guidance on what to do when children make periodic or even idiosyncratic errors.

If competence questions are necessary, perhaps the focus should be on ensuring that children know what the truth is rather than what a lie is. In any case, it is unclear what competence questions accomplish. A significant risk, especially for cases in which young children’s presence on the stand is needed and in which they are to provide crucial eyewitness statements, is that child competence requirements can lead to cases being dropped, less evidence for fact finders to evaluate, and/or young children being unprotected. At the same time, children who are motivated to lie can pass competence examinations and then lie on the stand.

Lyon: Dr. Goodman’s objections to New Jersey’s legal requirements are consistent with the objections raised by Dr. Quas, above. I’ve added an admonition in the recommendation and the notes sections that the model questions are not designed to assess whether the child’s testimony is accurate, but only to test whether the child can demonstrate his or her understanding.

Several studies have found that testifying repeatedly in criminal cases (for child sexual abuse victims) predicts more negative outcomes for children, and “repeated testimony” included in the studies included hearings for competence examinations (e.g., Goodman et al., 1992). Thus holding an additional court appearance, in

addition to testifying in court, places the child victim's emotional wellbeing at greater risk.

Lyon: I've added discussion of the optimal context in which children should be asked the competency questions to the recommendations and the notes section.

The Lyon-Saywitz Picture Task

Assuming the NJ courts still want to develop competence questions, Dr. Lyon's techniques are the best options from a scientific perspective. That said, implementation of Dr. Lyon's technique in the legal/court context raises a variety of questions for the NJ courts to consider.

Information on Extent of Standardization and Representativeness of the Sample:

Children's performance can be influenced by numerous factors. One concerns children's anxiety. Children may be quite nervous when their competence is to be evaluated. Moreover, young children do not understand the legal process or legal terms (Saywitz, Jaenicke, & Camparo, 1990; Warren-Leubecker, Tate, Hinton, & Ozbek, 1989). They often think or fear they are in trouble and might go to jail. The context should be considered when a child's competence is evaluated.

Dr. Lyon's picture test is well researched on children in general and on maltreated children, which is a considerable advantage for the NJ Court's goal. However, the children tested were not about to appear in criminal court (although criminal court transcriptions have been evaluated by Dr. Lyon; see Evans & Lyon, 2012).

Research reveals that children are particularly nervous when being asked to testify in criminal compared to dependency court (Hobbs et al., 2014). This nervousness might affect their ability or willingness to answer competence questions. Ideally the picture test would be validated on children in criminal investigations, at criminal court hearings, or about to appear in criminal court. Furthermore, as far as I know, the questions have not been validated on children about to appear in Family Court.

Although the findings of the Lyon studies are likely to generalize to various contexts, there may also be differences when a child is frightened, is in a specific legal context, or when about to testify against a loved one or a frightening one. Depending on the context and the child, several sessions with the child, first to build rapport and second to administer the test may be necessary, at least for some children.

Lyon: The recommendation and notes now include an admonition that children who understand their duty to tell the truth may nevertheless fail to answer competency questions correctly. Furthermore, the advantages of a child-friendly context in which questions are asked is emphasized.

Maltreated children tested on similar tasks had been removed from their parents' custody because of abuse or neglect and were awaiting a court appearance (albeit not one at which they expected to testify) (Lyon & Saywitz, 1999). Moreover, as Dr. Goodman notes, our work on criminal court transcripts supported many of the wording choices in the recommended tasks (Evans & Lyon, 2012).

In regard to Dr. Lyon's report itself, it would be helpful to know more about the composition of the samples of children in the studies cited, perhaps in an Appendix. Ethnicity is an important consideration, and could be included in an Appendix table. Dr. Lyon's samples are relatively diverse, and this could be noted as a strength. However, the samples, by virtue of being from Los Angeles, CA, likely have a higher percentage of Hispanic children than African American children or then who are victim/witnesses in NJ courts. Each culture can bring unique issues to competence testing. In general, a more complete description of the children tested in Dr. Lyon's studies would enrich his report.

Lyon: We have tested a very diverse group of children on tasks similar to the recommended tasks and have not found ethnic differences in performance (Lyon & Saywitz, 1999; Lyon, Carrick, & Quas, 2013). In Lyon & Saywitz (1999), the sample was 43% African-American, 27% Latino, 27% Caucasian, and 4% other. In Lyon, Carrick, & Quas (2013) (Study 1), the sample was 67% Caucasian, 16% Asian, 10% African-American, 4% Latino, 3% multi-ethnic or unknown.

What Constitutes Success on the Picture Tasks?

Dr. Lyon distinguishes two broad age groups: Preschool children and older children. He suggests (and I agree) that if an older child fails verbal questioning about truth and lie that the Lyon- Saywitz picture task provides a more sensitive measure. Given variability in cognitive development and social anxiety, this suggestion seems quite reasonable.

But, will it be up to the judge's discretion as to how many questions the child needs to "get right" to be found competent? I would recommend that one or at the

most two right answers would be sufficient to qualify, especially in regard to telling the truth in court.

Lyon: I've added explicit guidance with respect to the number of correct answers that would support a competency finding.

However, given young children's limited knowledge of the legal system, they may not know what a judge does, who a judge might be (male or female), the point of a trial, etc. How will this contextual and definitional information be conveyed?

Lyon: It is not necessary for a child to understand the role of a judge in order to qualify as competent. Rather, it is sufficient for the child to recognize "getting in trouble" as a consequence of lying to different adults. Those who administer the Consequences Task are free to choose among the different professionals.

Could Professor Lyon provide more examples of how exactly an older child (beyond the preschool years) should be best questioned?

Lyon: I deliberately suggested few questions for the older child, so that courts would not feel the need to subject older children to extensive questioning.

The Pictures

All else equal, gender matching of the questions to the child would be recommended. Although the pictures are gender-neutral, the wording of the questions is not (e.g., This boy looks at... Which boy told the truth").

Lyon: The recommended task refers to "child" to maintain the gender-neutral nature of the task.

Thus, a simple instruction to the administrator on gender matching would be helpful to include with the picture test. In general, instructions for implementation should be more complete than they are now.

Problematic pictures: The following pictures and associated issues are potentially problematic:

1) The male Social Worker picture is problematic for the legal context. It looks like a possibly scary man has come to the door to get a child in trouble for talking about what really happened ("One of these children is GONNA GET IN TROUBLE for what they say"). This sounds like the kind of statement a perpetrator might make to silence a child. In that case, it would be reasonable for a child to infer that the child

who tells the truth would get in trouble. This runs counter to the goals of the NJ Court relevant to competency and to child protection.

Lyon: Part of the reason that we tested similar tasks with maltreated children was that we worried that they might believe that telling the truth is what leads to trouble. However, we have found that maltreated children, if anything, have a clearer awareness of the wrongfulness of lying than non-maltreated children (Lyon, Carrick, & Quas, 2010).

Note that the content of the child’s statement is not depicted in order to reduce confusion between understanding of the negative consequences of lying (which virtually all children have) and understanding that disclosure of wrongdoing may also lead to trouble (which some children have).

We have created male and female versions of the professionals so that an interviewer can choose among them, and avoid male protagonists (or female protagonists) if it is desirable to do so.

2) The female judge picture might be interpreted by children as a teacher. Has Dr. Lyon ensured that the characters in the pictures can be accurately identified as to their roles, or that young children understand what “Here’s a Judge” means? Even if the administrator tries to explain the roles to a young child, the child may not understand the explanation the first time they hear it, especially from an unfamiliar person in a legal context.

Lyon: As noted above, children do not have to understand the roles of the different professionals in order to correctly describe the negative consequences of lying.

3) About the consequence questions for cases involving family members as defendants, for children who have been in foster care before, they may fear going back and consider it getting in trouble. So they may feel the truth-telling child will get in trouble (returned to foster care) when telling the truth to a social worker or judge. Obtaining clarification from the child, as possible, may help avoid such problems.

Lyon: See my comments above regarding maltreated children’s possible belief that truth-telling is more likely to get them in trouble than lying.

4) Is there a recommended order to the pictures?

Lyon: No.

3) Have photographs rather than drawings been investigated? They would be more realistic and perhaps less easily misinterpreted.

Lyon: I felt that photographs would introduce additional complications, since it would be difficult to make them gender-neutral and ethnic-ambiguous.

6) Are the pictures shown in the report the ones the questions have been validated for?

Lyon: The pictures were modified in several respects. The original child drawings were gendered, and the revised drawings are genderless. The original professional drawings were all women, and the Subcommittee asked that we create both male and female versions. The original objects anecdotally lead to problems (e.g., the pizza didn't look like a pizza to some children).

The Write Up

Overall, Dr. Lyon writes in an accessible fashion—clear and succinct. His analysis of the problems with “Do you know” questions is a case in point. Well done. However, I found some of Dr. Lyon’s wording to be unclear. He is compassionately brief but at times his brevity is at the expense of clarity. An example is, “If the child is asked about the consequences of lying in a context in which the target action it (sic) itself subject to punishment, this can create confusion. In evaluating the scenario, the child must distinguish between the moral evaluation of the wrongdoing and the moral evaluation of the transgressor’s statements about the wrongdoing.” Depending upon the audience for the report, a thorough editing of the document with simplicity in mind is in order.

Lyon: I’ve done so.

From a scientist’s perspective, I would rephrase the sentences that indicate an error rate for child lying during competence hearings, as it cannot be proven that the children ever lied in the past. Similarly the statements by children in NJ cases should not be assumed to be errors. We cannot prove if those statements are errors or not.

Lyon: I’ve used “errors” to refer to statements that suggest the child is not competent, consistent with Evans & Lyon (2012).

Although the report mentions an interactive power point, the interactive part was missing from the materials I received. Thus, I have not been able to evaluate that feature.

Lyon: The interactive version will be identical to the print version, but allow the interviewer to utilize a tablet or other computer monitor to administer the task.

Suggestions For Use

In addition to the issues mentioned above, the following suggestions should be included in the instructions to the administrator of the Lyon-Saywitz Picture Test. There may be more instructions needed, but these come to mind:

1. Before beginning, build rapport with the child.
2. Check if the child is fluent in English, that it is not late in the day, that the child is not hungry, and that the child has slept. Such factors can affect assessments of competence.

Lyon: I would be happy to work with the Subcommittee to develop a Spanish version of the task.

3. Question the child in a child-friendly room. Give the child time to respond to each question; children's retrieval of information often requires more time than an adults'.
4. If the child has been (or can be) interviewed in a Children's Advocacy Center (CAC) by a seasoned child forensic interviewer using the Lyon-Saywitz picture task, this would likely be the more ideal situation than the courtroom, including for the CAC interview then to be used as the official competence evaluation.

Lyon: I've added mention of the need for child-friendly administration of the task to the recommendations and the notes. Some of the specific language seems best suited for a more general guide to eliciting testimony from children.

Or if the NJ Courts want to pilot the Lyon-Saywitz picture test approach further (e.g., on children who might be candidates for actual criminal cases in NJ jurisdictions), pilot testing of the picture test's success in NJ CACs could provide valuable information.

Lyon: Although I think it would be difficult to obtain permission to pilot test the tasks on children who were scheduled to appear as witnesses in New Jersey criminal courts, it would certainly be valuable to track the use and success of the task and to respond to feedback from practitioners and courts, and I would be happy to pursue this work.

In case the administrator is tempted to ask questions that are not part of the Lyon-Saywitz test (e.g., for young elementary school children), administrators need to know to keep the sentences short, the language simple, and the ideas concrete: If additional questions are added, one must be careful not to overwhelm children's short-term or working memory capacities.

Lyon: This is excellent advice for any questioning of children. I'm unsure whether it's advisable to discuss questioning that goes outside the recommended questions, because of the many pitfalls that must be avoided.

5. In the report, the inclusion of examples of responses that "pass muster" would be helpful.

Lyon: Agreed, and I've added material to the recommendations.

Pro se defendants should not be permitted to question the child about competence (Hobbs & Goodman 2018).

Lyon: From a psychological perspective, this is sound advice. I'm unsure of the legal ramifications, and whether commenting on this issue is within the purview of the Subcommittee's charge.

Very Minor Writing Issues:

- 1) "In order" is not usually necessary. For example, "In order to identify" can simply be "To identify"
- 2) The "observational study" seems to be a "review of court decisions." The Evans & Lyon (2011) study is listed as published in 2012 on the Reference List.
- 3) p. 3, "when" should be "then" toward the bottom of the page.
- 4) Children is misspelled in one place
- 5) p. 9, C, 1st sentence: "it" should be "is"

Lyon: I've line edited the report. I've kept the reference to Evans and Lyon (with a corrected date) as an observational study, because it is a systematic examination of competency questions in both court transcripts from one jurisdiction and excerpts from court transcripts in multiple states.

I hope the NJ Committee finds this evaluation helpful. For full disclosure, although I have not worked closely with Dr. Lyon, I have published a chapter with him (see Saywitz, Lyon, & Goodman, 2011, 2017). In any case, I want to again emphasize that Dr. Lyon's research has met high standards and is state-of-the-art within the fields of developmental psychology and psychology and law. It well meets the stipulation ordered by the Court and will support a fair process.

Please do not hesitate to contact me if you have any questions or comments. Thank you for requesting my review.

ADDITIONAL MATERIALS

Superior Court of New Jersey



CHAMBERS OF
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PRESIDING JUDGE, CRIMINAL DIVISION

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MEMORANDUM

TO: Supreme Court

FROM: Edward J. McBride, Jr., P.J.Cr. *EMJB*
Chair, Supreme Court Committee on Criminal Practice

RE: **Development of Model Questions for Competency Determinations of Child Witnesses Pursuant to State v. Bueso**

DATE: October 18, 2017

This memorandum is being prepared on behalf of the Supreme Court Committee on Criminal Practice for guidance on whether the Committee should seek input from child psychologists or other child development specialists to satisfy the Court's request to develop model questions for competency determinations involving child witnesses. See State v. Bueso, 225 N.J. 193, 214, n.6 (2016).

In response to this request, Harry Carroll, J.A.D., former Chair of the Criminal Practice Committee and Carmen Messano, P.J.A.D., Chair of the Committee on the Rules of Evidence, decided a joint subcommittee was needed because of the potential for significant evidentiary issues. A joint subcommittee was subsequently formed consisting of judges and attorneys. Although the subcommittee recognized that it lacked the competence to develop questions that would be suitable for younger children and those with learning disabilities, it felt constrained to follow the examples provided in Bueso. While the Court acknowledged the examination of the five-year-old child witness was "well short of ideal," it ultimately concluded that the examination satisfied *N.J.R.E. 601*, given the plain error standard of review. Id. at 213.

The subcommittee developed a combination of over twenty leading and open-ended questions for consideration by the Criminal Practice Committee. At the outset, members had strong concerns that the questions were not appropriate for younger children (ages 3 through 10) and children with learning and/or developmental disabilities of any age. It was the consensus that these questions may not elicit information from these children that would be useful to determine competency.

For example, one question modeled after one of the questions asked of the child witness in Bueso was to show a book to the child, while verbally expressing the wrong shape as a means to identify whether the child could recognize a hypothetical lie. Id. at 214. While this question was deemed “instructive” in Bueso, members were concerned that a young child may have a difficult time comprehending that question if he or she had not been exposed to formal training on shapes, e.g., those who had not attended preschool.

Another example was the statement in Bueso about the child witness’s unclear comment about spelling homework as an indication that she may not have understood the import of the question for which the “prosecutor should have shifted to alternative examples of falsehoods that a child might tell in the familiar setting of her school.” Id. at 213-14. Members thought this was another area where the efficacy of a school-related hypothetical could be dependent upon the child’s educational level or developmental skills. Additionally, it was suggested that young children may be afraid or intimidated by being questioned in an unfamiliar environment, which could also lead to inexact answers.

One member had asked a preschool teacher for input on the proposed questions. That teacher had strong concerns about a younger child’s ability to comprehend the questions. An example provided was the question concerning whether the child understood what it meant to make something up, like a “story,” as a means to determine if the child understood the concept of telling the truth from a lie. Generally, younger children have positive connotations of a “story,” for example, a bedtime story read by a parent. As such, they may not associate “making up a story” with telling a lie.

Members agreed that a disclaimer would need to be included when the questions were finalized to emphasize that the questions were models, which the parties should modify based upon the facts of the case, i.e., all of the questions may not be necessary. Notwithstanding, there were significant concerns that the parties and judges may feel compelled to follow the questions verbatim if the questions were approved by the Supreme Court or promulgated by an Administrative Directive. It was then acknowledged that this may be an area better suited to development through litigation.

While the Committee decided not to take any action on the questions, it was the consensus that the model questions may be appropriate for children over ten years old depending upon the circumstances. However, members had strong concerns for use on younger children (ages 3 through 10) and children with learning and/or developmental disabilities of any age. Accordingly, the Committee did not feel it had the proficiency to prepare model questions that would satisfy the Court’s expectations without seeking input from child psychologists or other child development specialists.

In light of the reasons set forth above, please advise how the Committee should proceed. Thank you for consideration of this matter.

Cc: Glenn A. Grant, J.A.D.
Sheila A. Venable, P.J.Cr., Vice-Chair
Steven D. Bonville, Chief of Staff
Sue Callaghan, Assistant Director
Maria Pogue, Assistant Chief, Committee Staff
Kya Saunders, Committee Staff

QUALIFYING THE CHILD WITNESS

1. What is your name?
2. How old are you?
3. What is your birthday?
4. Do you go to school?
5. What school do you go to?
6. What grade are you in?
7. Do you have to do homework?
8. Who is your teacher?
9. Do you know the difference between right and wrong?
10. Can you tell me what the difference is?
11. What do you think would happen to you if you did something wrong?
12. Do you know the difference between telling the truth and telling a lie?
13. Can you tell me what the difference is? (What does it mean to tell the truth? What does it mean to tell a lie?)
14. If I told you this book was round, is that true? (Note: Judge should show a book that is not round.)
15. If you did not do your homework but told your parents or teachers that you did would that be the truth or a lie?
16. Do you know what it means to make something up, like a story?
17. If you were to sit here and tell these people a made up story, or something that wasn't true, what could happen to you?

18. [Do you know what it is to tell a lie?] (*proposed for deletion*)
19. What do you think would happen if you told a lie here?
20. Would you get in trouble?
21. Do you know what a promise is?
22. Do you promise to tell the truth and not to lie here?
23. Do you know that it is important to tell the truth here?
24. What do you think would happen if you broke your promise to tell the truth and told a lie here?

CONCLUSION

This Report and Recommendations on Assessing the Competency of Child Witnesses is hereby presented to the Supreme Court for its consideration. The Joint Committee thanks the Court for this opportunity to serve.

Respectfully submitted,

JOINT COMMITTEE ON ASSESSING THE COMPETENCY OF CHILD WITNESSES

Hon. Edward J. McBride, Jr., Chair
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Camden Vicinage

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Endorsed and Recommended By:

Supreme Court Criminal Practice Committee
Supreme Court Evidence Rules Committee
Supreme Court Family Practice Committee