**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PRECLUDE COMPETENCY INQUIRY AND FOREGO ADMINISTRATION OF THE OATH**

##### State of Wisconsin

Section 906.01 of the Wisconsin Statutes provides: “every person is competent to be a witness except as provided in ss. 885.16 and 885.17 or as otherwise provided in these rules.” Sections 885.16 and 885.17 are not germane to our proceedings. The issues at bar do not involve transactions with deceased or insane persons or their agents. Therefore, this child witness must be deemed competent, the same as any adult witness.

In Wisconsin competency is no longer a test for the admission of a witness’ testimony except as provided in the rules. The only question is credibility, which will be resolved when the case is submitted on the merits. *State v. Hanson,* 439 N.W.2d 133 (Wis. 1989). The trial court in *Hanson*, relied on *State v. Davis,* 225 N.W.2d 505 (Wis. 1975). *Davis* established a two-part test for admitting the testimony of young children. First, *Davis* required that the children understand the difference between the truth and a lie, and second, if they have such an understanding, that they feel an obligation to tell the truth. “However, the adoption of the new rules of evidence, effective January 1, 1974 . . . nullified the holdings of *Davis* and previous cases on this issue which were based on the law prior to January 1, 1974. Wis. R. Evid., 59 Wis. 2d R157 (1973).” *Hanson,* *supra* at 135.

At the time § 906.01, Wis. Stats., was adopted, the judicial council in its committee note stated, among other things,:

Adoption of § 906.01 necessitates repeal of § 885.30, and withdrawal of the case law thus removing from judicial determination the question of competency and admissibility; judicial determination of sufficiency and the jury assessment of the weight and credibility survive. The effect of the change is to shift the opponent’s emphasis from *voir dire* attack on competency to a cross-examination and introduction of refuting evidence as to weight and credibility.

*Hanson, supra* at 136. Notwithstanding this clear directive, direct and indirect competency inquiries persist.

Some courts maintain that they have an obligation to insure the child is “minimally credible” before permitting the child to testify. Consequently, courts engage in the same type of questioning used when they conducted competency determinations. The inquiries frequently occur during the administration of the oath. The indirect inquiries occur in the form of cross-examination intended to discredit the child witness.

However, in *Hanson* the Wisconsin Supreme Court determined that it was not a case for the “minimal credibility” standard discussed in *State v. Smith,* 370 N.W.2d 827 (Wis. Ct. App. 1985), *rev’d. on other grounds,* 388 N.W.2d 601 (Wis. 1986). *Hanson*, *supra* at 137. The *Smith* court had relied on 3 J. Weinstein *&* M Berger, *Weinstein’s Evidence* ¶ 601[01] (1982) which provides in part:

If competency is defined as the minimum standard of credibility necessary to permit any reasonable man to put any credence in a witness’ testimony, then a witness must be competent as to the matter to testify about; it is the court’s obligation to insure that he meets the minimum standard. In making this determination, the court will still be deciding competency. It would, however, in view of the way the rule is cast, probably be more accurate to say the court will decide not competency but *minimum credibility.* This requirement . . . is just one aspect of the requirement of minimum probative force—*i.e.,* relevancy. Regardless of terminology, the trial judge may exclude all or part of a witness’ [sic] testimony on the ground that no one could reasonably believe the witness could have observed, remembered, communicated, or told the truth with respect to the event in question. He may use the *voir dire* to make this determination.

(Emphasis added). Competency and minimal credibility are two different concepts and the minimal credibility standard should not be used in direct or cross-examination in an effort to have child witnesses found incompetent to testify.

In the case at hand, the child witness \_\_\_\_\_\_\_\_\_\_\_\_\_ is certainly not deceased or insane. Additionally, she, just like any adult, is able to describe things that happened to her; i.e. sexual abuse. This child witness has personal knowledge of the events about which she is to testify. There is no evidence in the record and none has been submitted by the opposing party to suggest in any way that this child witness is not capable of testifying about what happened to her.

The *Hanson* court also concluded that a child of tender years need not be formally “sworn” to fulfill the requirements of § 906.03. The court recognized that:

[j]udges must be particularly sensitive to children who can testify as to what happened, but due to their tender years and inexperience, they become frightened and confused in the formal atmosphere of the courtroom. The type of questions presented to the witness in this case [*Hanson*] would have been difficult to answer even by a person much more mature. “The true purpose of the oath is not to exclude any competent witness, but merely to add a stimulus to truthfulness where ever such a stimulus is feasible.” (Citation omitted.) *Hanson, supra* at 137.

Thus, with the duty of the trial court so clearly defined with respect to competency determinations, the focus shifts to “indirect” competency inquiries, which occur during cross-examination.

The state does not request preclusion of cross-examination focused on efforts to discredit the child witness; but rather, to limit the method and language employed to developmentally appropriate levels for this particular child. It is within the discretionary power of the trial court to limit the mode and order of interrogation and presentation of witnesses. Section 906.11 of the Wisconsin Statutes provides:

**906.11 Mode and order of interrogation and presentation.** 1) CONTROL BY JUDGE. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(a) make the interrogation and presentation effective for the ascertainment of the truth,

(b) avoid needless consumption of time, and

(c) protect witnesses from harassment or undue embarrassment.

In this regard, direct or cross-examination of child witnesses such as occurred in *Hanson* should not be permitted:

Judge: “Do you know the difference between telling what really happened, and something that didn’t happen? Do you know that? If you don’t, tell me no.”

Child: “No.”

*Hanson*, *supra* at 135.

Furthermore, questions like, “Do you know the difference between a truth and a lie?” should not be permitted during the direct or cross-examination of young children. The average 3-7 year old child does not have the developmental capabilities of understanding, let alone correctly answering, this type of questions.

There are at least three methods by which one can assess whether a child generally understands the concepts of “the truth” and “a lie.” First, the child can be asked to explain the difference between the truth and a lie *(the difference task)*. Second, the child can be asked to explain what it means to tell the truth or to tell a lie *(the definition task)*. Finally, the child may be asked to identify statements as either being the truth or a lie *(the identification task)*. Lyon, *Assessing Children’s Competence to Take the Oath: Research and Recommendations,* APSAC Advisor, Vol. 9, No. 1, Spring 1996. In this article, a copy of which is attached, USC Professor of Law Tom Lyon, who also holds a Ph.D. in developmental psychology, described research conducted with Karen Saywitz, Ph.D., involving children in the Los Angeles County Dependency Court. The research compared different means by which competency was determined with samples of abused and neglected children who appeared in child dependency proceedings. The results involving two different studies are instructive and applicable to the case at bar.

Professor Lyon reports that by age five, abused and neglected children with serious delays in verbal ability, have a good understanding of the meaning and morality of truth-telling and lying. Lyon further reports that this understanding is apparent only if sufficiently sensitive procedures are used to assess children’s developmental capabilities in this regard. Specifically, if children are asked to *identify* the truth and lies from specific examples, they are most likely to appear competent. Professor Lyon and Dr. Saywitz report that most of the children would not have appeared to be competent had they been asked to *define truth and lies* or to *explain the difference between a truth and a lie*. Consequently, Professor Lyon and Dr. Saywitz recommend that professionals avoid asking children to define or explain the difference between truth and lies.

Similarly, it is unwise to ask a child to give an example of a lie both because the child is forced to generate information and because the question may be perceived as a request for the child to tell a lie. Additionally they noted that if an identification question is asked, the professional should be aware that such phrases as “if I said” or “if you said” might trigger motivations in the child to simply deny that a lie was told. In their study, Lyon and Saywitz used a neutral third-person approach employing the phrase “if somebody said” and the four-year-olds were still reluctant to acknowledge lies using this questioning format. Accordingly, Lyon and Saywitz recommended using a questioning format in which two fictional characters - one who lies and one who tells the truth - are presented to the child and the child is then asked to identify which character is telling the truth. Lyon and Saywitz suggest this is the most sensitive type of inquiry to assess the child’s understanding of the difference between a truth and a lie. Lyon, *supra* at 7.

Thus, in the case at bar, given the child’s chronological and developmental age cross-examination strategies employed to undermine the child’s credibility should be regulated pursuant to § 906.11 and tempered with the research done by Professor Lyon and Dr. Saywitz. Cross-examination should be limited to *identification task* inquiries. This is because the child is incapable of understanding and accurately performing the *definitional* and *difference between* tasks. Since § 906.11 presumes all witness are competent, cross-examination strategies using the *definitional* or *difference between* tasks to discredit child witnesses should not be permitted. It is fundamentally unfair to make a child communicate or to judge a child according to adult standards. Section 906.11 provides the court with the discretion and power to insure that the questioning of all witnesses is done in a fair and dignified manner.

DATED at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, County of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and State of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, this \_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_.

Respectfully submitted,

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Assistant District Attorney