

## [Child Likes the Color Red, Court of Appeals Upholds Competency to Testify](#)

*Jones v. State of Maryland*, No. 3, September Term, 2008.

The opinion is available [here](#) (pdf).

In an opinion filed today, the Court of Appeals upheld the finding of a Circuit Court judge that a six-year old child was competent to testify in a trial of child sexual abuse and second-and-third degree sexual offense charges.

In Maryland, trial judges have no discretion to admit the testimony of a witness who is not competent to testify. The traditional standard for competency is this: a witness must have an understanding and appreciation of the nature and obligation of an oath to tell the truth, and an ability to observe and describe the facts the witness is called to testify about. This test has been articulated in a variety of ways, but at its core it has four components: 1) that the witness understand the concept of “telling the truth”; 2) that the witness have a capacity to observe (at least at the time of the underlying event); 3) that the witness have a capacity to recollect the facts observed; and 4) that the witness have an ability to communicate, including the ability to respond to questions about facts in the witness’s testimony itself.

In cases where children are alleged to be victims of crime, their competency to testify is often disputed at trial. It is essential for defense attorneys to closely scrutinize the potential incompetency of a child to testify, particularly in cases tried before juries, where members of the jury may be sympathetic to a child’s inability to precisely recall an event.

As with all determinations of witness competency, and as *Jones* makes clear, trial judges have broad discretion to admit a child’s testimony as competent. The age of a child is not the test in Maryland for competency. Instead, the test is whether the child has enough intelligence to provide testimony of any value, and whether the child feels a duty to tell the truth.

In *Jones*, the trial court conducted a lengthy hearing to determine if the child was competent to testify. During the examination, the child was presented with slides of people holding various objects. The child was told what the people holding the objects were saying, and was asked to state which person was telling the truth. **Without fail, the child chose the person in the picture wearing red.** The trial judge recognized that “he has a very strong preference to red . . . [and] he did poorly.”

In its ruling, the trial court noted that “quite frankly . . . the slide show presentation . . . I’m not being derogatory, but the bell and whistle presentation, quite frankly did poorly.” However, the trial judge determined that the child’s performance on another part of the examination was sufficient to convince him that the child was competent to testify.

Applying the “clearly erroneous” standard of review, the Court of Appeals upheld the Circuit Court’s finding that the child passed the “truth v. lie” and “ability to observe and relate” portions of the competency test, and had a strong understanding of his obligation to tell the truth.

Posted by [Brennan Sullivan and McKenna](#)