**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO LIMIT THE EXAMINATION OF A CHILD WITNESS TO AGE APPROPRIATE LANGUAGE, GRAMMAR AND SENTENCE STRUCTURE**

##### State of Wisconsin

It is within the discretionary power of the trial court to limit the language, grammar, and sentence structure used in the examination of child witnesses so that their examination will be effective for the ascertainment of the truth.

Section 906.11 of the Wisconsin Statutes reads as follows:

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.

If the court limits the language, grammar, and sentence structure used in the examination of C.M.P. to age appropriate concepts, the court will a) increase the likelihood of obtaining accurate information; b) save time by shortening and simplifying her testimony; and c) protect C.M.P. from harassment or undue embarrassment resulting from her inability to understand and respond accurately to adult language, mannerisms and syntax. The arguments in support of this request are as follows.

First, C.M.P. has been in speech therapy classes while attending school in the \_\_\_\_\_\_\_\_\_\_ Unified School District. Recently, she was examined by Speech Therapist G.F. A copy of his report is attached. G.F. details some of C.M.P.’s linguistic abilities and impairments in this report. As a result, the State requests that any questioning of C.M.P.:

(a) Be done in a soft non-intimidating voice since loud, harsh, and/or sarcastic commentary will hinder communicative efforts; and

(b) Be stated in short sentences using simple verbs such as “tell me about,” or “show me,” since they are more effective than longer sentences using complex verbs which would be confusing to C.M.P.; and

(c) Be done at a slow rate of speech and allow sufficient time for C.M.P to answer the questions before attempting to ask additional questions; i.e., preclude “rapid fire” questions which could be confusing and misinterpreted.

Second, C.M.P. is a child who has suffered significant psychological harm at the hands of this defendant, her biological father, and her stepfather, Donald H., who is also charged with similar crimes as set forth in \_\_\_\_\_\_\_\_ County Circuit Court file No. \_\_-CF-\_\_. C.M.P. was approximately three years of age at the onset of abuse. C.M.P.’s older sister, C.E.P., was ten years of age. C.M.P. presented with positive medical findings for physical, as well as sexual abuse. C.M.P. is speech impaired, developmentally delayed, and although almost seven years of age, often functions at the level of a three-and-one-half to a four-and-one-half-year-old. She also has attention deficit disorder. As a result of these disabilities, there are many words, phrases, and concepts that C.M.P. is not capable of understanding. Also, the examination of C.M.P. in a hostile, loud manner will be ineffective in obtaining accurate information. The State is prepared to present expert psychological testimony if necessary to demonstrate the extent of the emotional trauma sustained by C.M.P.

Third, and by analogy, § 967.04(7)(a)(1-10), Wis. Stats., which governs the use of video deposition testimony of children in lieu of live testimony is supportive. In considering whether a court should permit a video deposition of a child, the court must take into account the linguistic and cognitive capabilities, as well as the emotional needs of a child. When scheduling a deposition, the court should take into consideration the child’s maximum energy level and attention span; the place where the deposition is to take place; i.e., private, informal, and comfortable; determine the child’s verbal skills and developmental level in connection with qualifying the child to testify; explain to the child the purpose of the hearing and explain the identity of the people present in order to place the child at ease; permit any party questioning the child to procure the assistance of an advisor who may, with the court’s permission, conduct questioning; and finally, permit the child to testify from a position in the courtroom where the child is comfortable and supervise the spatial arrangements of the room and the location and movement of all people in attendance. These same factors should be taken into consideration when a child is expected to provide live testimony in front of a jury and a courtroom full of spectators.

Fourth, the American Bar Association’s *Guidelines for the Fair Treatment of Child Witnesses in Cases where Child Abuse is Alleged* (July 1985) provides in part:

3. In criminal cases and juvenile delinquency and child protection proceedings where child abuse is alleged, court procedures and protocol should be modified as necessary to accommodate the needs of child witnesses including:

> leading questions may be utilized under direct examination of child witnesses subject to the court’s direction and control;

> to avoid intimidation or confusion of a child witness, examination and cross-examination should be carefully monitored by the presiding judge;

> when necessary, the child should be permitted to testify from a location other than that normally reserved for witnesses who testify in the particular courtroom;

> a person supportive of the child witness should be permitted to be present and accessible to the child at all times during his or her testimony, but without influencing the child’s testimony.

Fifth, it is now axiomatic that a criminal defendant must have the services of an interpreter if the defendant does not understand or speak English well enough to confer with his lawyer or understand the testimony.  *State v. Neave*, 344 N.W. 2d 181 (Wis. 1984).

Fairness requires that criminal defendants have the assistance of interpreters to avoid questions of effective assistance of counsel, whether inability to understand testimony resulted in a loss of the right to effective cross-examination, and to avoid the feeling of having been dealt with unfairly which may arise when language barriers render all or part of the trial incomprehensible. *Neave*, *supra*. It is time, and in the interests of justice to treat child victims and witnesses with equal respect. It is fundamentally unfair to expect a child to communicate in court on an adult level. Younger children are developmentally incapable of effectively communicating on an adult level, especially in a courtroom environment. Just as we provide the means for defendants who do not speak or comprehend English to effectively communicate in court, we should do the same for child victims and witnesses. Indeed, the Florida legislature has enacted a statute permitting “interpreters” to translate for child witnesses “who cannot be reasonably understood or who cannot understand questioning” when they testify. See Fla. Stat. Ann. § 90.606(1) (West 1985).

These positions are amply supported by a variety of research findings and legal commentary involving children as witnesses. Debra Whitcomb, one of the leading commentators in this area succinctly summarized this position in a research brief funded by the U.S. Department of Health and Social Services.

[B]y definition, children are developmentally not on a par with adults. Younger children, in general, have more limited language capacity, shorter attention spans, and less developed comprehension of the criminal justice system and their role as key witnesses. In short, young children are less likely to tolerate lengthy interviews, to understand the questions that are asked, and indeed, to understand why questions are being asked in the first place.

See Whitcomb, D., *Use of Innovative Techniques to Assist Child Witnesses*, Child Victim as Witness Project, Educational Development Center, Inc., Newton, Mass. See also, Myers, J.E.B., Goodman, G.S. & Saywitz, K.J., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 27 Pacific L. J. 1 (1997), summarizing research on these points.

Children’s understanding of language and their developmental capabilities in this area are thoroughly discussed by Dr. Anne Graffam Walker, a forensic linguist, in her widely referenced book *Handbook on Questioning Children: A Linguistic Perspective*, American Bar Association, Washington, DC (2d ed. 1999). Dr. Walker presents numerous examples from actual court transcripts where the failure to use age and developmentally appropriate questioning strategies with younger children led to inaccurate communication and a distortion of the truth.

Research findings also suggest similar concerns. Dr. Nancy Walker Perry, a child psychologist and author of several books and articles on children’s role as witnesses, found that across varying age groups of children, twice as many simply phrased questions were answered correctly as were questions using “lawyerese.” Respondents of all ages accurately assessed their ability to understand and answer questions using “lawyerese” only 55% of the time, a figure that jumped to 90% when questions were simplified. Thus simplified language dramatically increased not only the ability to answer questions, but more importantly, the accuracy of the responses. See Perry, N.W. et al., *When Lawyers Question Children: Is Justice Served?*, 19 Law and Human Behavior 609-629 (1995). See also, Myers, Goodman & Saywitz, *supra* at 52-57.

Dr. Karen Saywitz and Rebecca Nathanson conducted a study in which children were questioned about a staged event in two settings, their own schoolroom and in a law school mock court room. Children interviewed in their own school recalled significantly more information than students interviewed in the courtroom setting, leading the researchers to conclude that the courtroom context and the stress associated with providing information in this less child-friendly environment may interfere with the child’s ability to providing more complete and accurate accounts of events they experienced. See Saywitz, K.J. & Nathanson, R., *Children’s Testimony and Their Perception of Stress in and Out of the Courtroom*, 17 Child Abuse and Neglect 613-622 (1993). Accordingly, the types of questions posed to children in the courtroom should attempt to lessen the stress associated with responding to questions in this environment rather than potentially contributing to children’s lack of understanding and the likelihood they will provide less accurate or less complete testimony.

Still another research study examined the effects of teaching children to anticipate (1) questions they might not know the answer to, and (2) questions where the interviewer might put his or her “guess” into the question. These researchers were able to reduce the rate of erroneous responses to misleading questions by 26% although they were not able to eliminate these errors entirely. See Saywitz, K.J. & Moan-Hardie, S., *Reducing the Potential for Distortion of Childhood Memories*, 3 Consciousness and Cognition 257-293 (1994). This study demonstrated that children may provide an inaccurate response to questions because they do not understand the question but perceive that the adult expects a response, or may assent to a false representation implicit in the adult’s question because it is given by an authority figure whom the child is reticent to contradict. See also, Myers, Goodman & Saywitz, *supra* at 57.

Unfortunately, children seldom spontaneously ask for clarification from adults who ask developmentally inappropriate or confusing questions. See Carter, C., Bottoms, B.L. & Levine, M., *Linguistic and Socioemotional Influences on the Accuracy of Children’s Reports*, 20 Law & Human Behavior 335 (1996). As Myers, Goodman and Saywitz point out:

It is difficult to imagine a five-year-old interrupting direct or cross- examination with, “Pardon me counsel, but I don’t understand.” The responsibility to ensure understanding falls squarely on the adults, not the child.

Myers, Goodman & Saywitz, *supra* at 57. Accordingly, they advocate that trial judges should establish ground rules for attorneys questioning children to facilitate children’s ability to provide accurate testimony. *Id*. at 60-77. These include asking children under eight developmentally appropriate questions employing short sentences, one-to-two syllable words, simple grammar, and concrete, visualizable words. *Id*. at 65. See also, Walker, *supra*, setting forth guidelines for questioning children in a developmentally and linguistically appropriate fashion.

The extensive body of research discussing children’s suggestibility in response to inappropriate questioning formats also strongly suggests that courts should exercise control over the method of questioning children in court to reduce the possibility that children will provide inaccurate information. If researchers are cautioning against the danger of investigative interviewers asking inappropriate questions (e.g. leading and suggestive questions, misleading questions) because of the danger of producing unreliable responses, then similar concerns should be present for courtroom questioning. See generally, Ceci, S. & Bruck, M., *Jeopardy in the Courtroom - A Scientific Analysis of Children’s Testimony*, Washington, DC, American Psychological Association (1997), discussing this body of research. However, the very types of questions which these researchers caution investigative interviewers to avoid are the very types of questions most often utilized during cross-examination in an attempt to impeach child witnesses.

In general, these research findings suggest that if courts are interested in improving the accuracy of information provided by child witnesses, as well as children’s ability to testify, then courts should try to make children’s roles as witnesses easier by reducing stress and making questions more understandable. These practices are consistent with the court’s obligations to further the “truth finding function” of the trial process. Numerous legal commentators support such approaches. See generally, Dziech, B.W. & Schudson, C.B., *On Trial: America’s Courts and Their Treatment of Children*, Boston, Mass., Beacon Press (1989); Perry, N.W. & Wrightsman, L.S., *The Child Witness: Legal Issues and Dilemmas*, Newbury Park, Cal., Sage (1991); Zaragroza, M.S. et al., *Memory and Testimony in the Child Witness*, Thousand Oaks, Cal., Sage (1995); Myers, J.E.B., *Evidence in Child Abuse and Neglect*, New York, John Wiley & Sons, (3d ed. 1997).

Finally, there are sound policy reasons which not only permit, but actually instruct a court to limit the method and mode of interrogating child witnesses to age appropriate concepts. For example, the Wisconsin Supreme Court has opined:

The circuit court should, however, use the tools available to the criminal justice system to eliminate or lessen the burden on B.P. while making her testimony available in the criminal proceeding. . . . B.P. is a child who has suffered greatly. The legal system should not add to her suffering. . . .

A circuit court has power, within constitutional limits, to alter courtroom procedures to protect the emotional well-being of the child witness.

*State v. Gilbert*, 326 N.W.2d 744 (Wis. 1982). *See also*, 3 *Wigmore Evidence*, §781, at 173 (Chadbourne ed. 1970) where

[a]n intimidating manner in putting questions may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. . . . So also questions which . . . cause embarrassment, shame, or anger may unfairly lead him to such demeanor and utterance that the impression produced by his statements does not do justice to his real testimonial value.

(Emphasis in original).

Several cases from other jurisdictions also support the trial court’s exercise of discretion over the method of questioning child witnesses in order to enhance the reliability of such testimony. In *Hicks-Bey v. United States*, 649 A.2d 569 (DC 1994), the appellate court noted “…[T]he trial court has inherent authority . . . to control the conduct of the proceedings before it, in order to ensure that the proper decorum and appropriate atmosphere are established, that all parties are treated fairly, and that justice is done.” Similarly, in *State v. Johnson*, 528 N.E.2d 567 (Ohio App. 1986), the court upheld the trial court’s decision to permit the child witness to testify while seated on an adult’s lap, commenting that “[t]he trial judge did not only what he was authorized, but required, to do. He made a decision to exercise reasonable control over the mode of interrogating the infant-witness with a view to making the interrogation and presentation effective for the ascertainment of truth while protecting the witness from undue embarrassment….” In *State v. Cooper*, 353 S.E.2d 451 (S.C. 1987), the court upheld the use of testimonial procedures that did not involve face-to-face confrontation between the defendant and child victim noting that such procedures were an appropriate exercise of the court’s discretion “to enhance the truth-determining quality which marks a fair trial.” And in *State v. Menzies*, 603 A.2d 419 (Conn. 1992) the court upheld restrictions on the methods used to cross-examine the child witness.

Based upon the authorities set forth herein, the State respectfully requests that the court restrict the manner of questioning C.M.P. to age appropriate language, grammar and sentence structure.

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

Respectfully submitted,

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