**STATE’S MOTION FOR SPECIAL PROCEDURES DURING**

**THE PRESENTATION OF THE TESTIMONY OF CHILD VICTIMS**

**AND MEMORANDUM IN SUPPORT**

**State of Vermont**

NOW COMES the State in the above entitled cause and hereby requests that the following procedures and modifications in the courtroom be used during the child victims’ testimony:

1. That the children’s testimony be scheduled at 9:00 a.m. and replayed to the jury during the afternoon.
2. That each child be able to bring with them a transitional object such as a stuffed animal or a baseball glove.
3. That the Judge be dressed in a shirt and tie without his robe.
4. That each child be able to have crayons and paper on which to draw.
5. That the victim advocate and at least one parent be allowed to be present in the room and that the child be allowed to sit in the lap of the parent or the victim advocate.
6. That frequent breaks be taken as needed to allow the child to focus on the questioning.
7. That objections by any attorney be made by raising a hand and stating in a quiet tone of voice the general nature of the objection (i.e., hearsay, relevancy, prejudicial, etc.) using fewer than 10 words; if a lengthy discussion is necessary for the court to rule on the objection, the State would request that a break be taken to allow the child to leave the room during the discussion; otherwise, the State would ask that the court rule to either sustain or overrule the objection without explanation.
8. That, to the extent necessary to develop the child’s testimony, leading questions be allowed during direct examination.
9. That each child be allowed to utilize anatomically detailed dolls as demonstrative evidence.
10. That J2 be allowed to dress in a paper bag “coat of armor” with a paper “helmet” and that J3 be allowed by wear a cardboard cut-out suit.
11. That D.S. be allowed to stand inside the door when J3 is testifying and outside the door when J2 is testifying.

**MEMORANDUM IN SUPPORT OF THIS MOTION**

**A.** **INTRODUCTION**

Because of the special needs of young children, the adult, formal, adversarial environment of a courtroom may be the very worst environment in which to elicit reliable information from child witnesses. The special procedures and protections requested above are designed to provide for the special needs of these children and obtain the most reliable information possible. As one judge has noted:

To assure a fair trial, judges have special responsibility for child witnesses. The judge may remove robes if a child associates them with witches. Judges should ask about a child’s eating and napping schedule. Judges must remember that a child may be alert and communicative at 9:00 a.m., but sleepy and anxious a few hours later. Judges should appreciate that, for a child, even 15 or 20 minutes on a witness stand may be unmanageable.

Some lawyers carelessly argue that such courtroom techniques take the side of the child. They fail to acknowledge that such techniques help a child communicate, but do not tell a child what to say. The techniques are analogous to providing a Spanish-speaking or hearing-impaired person with a translator, or allowing a disabled veteran to testify from a wheelchair. In fact, many lawyers enthusiastically endorse these evolving laws and techniques, realizing their potential value for child witnesses for the defense, or for plaintiffs in civil lawsuits. None of these techniques supports the substance of the child’s testimony. All of these techniques, however, reduce discrimination that has denied judges and juries the chance to hear a child’s testimony.

Judge Charles B. Schudson, *Making Courts Safe for Children*, 2 Journal of Interpersonal violence 120, 121 (1987).

The power of the court to provide for special procedures involving child witnesses is derived from Vt. R. evid. 661(a) which states:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation orderly and effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

**B. THE USE OF SUPPORT PERSONS**

Numerous courts have allowed support persons to be present and have allowed the child witnesses to sit in their laps, as long as the support person is carefully admonished not to do anything that might influence the child’s answer to a particular question. These courts have recognized that support persons can reassure a child who is thrust into a difficult and strange situation and thereby enable them to better relate events to the court.

An appellate court found no error in a trial court’s allowing a social worker to sit with a child during the competency hearing and at trial. *State v. Daniels*, 484 So. 2d 941 (La. Ct. App. 1986). The court noted that the child was in an unfamiliar setting and was exhibiting hyperactivity. The social worker’s presence had subtle effects on the child’s well-being and ability to concentrate. The child’s ensuing composure may well have been buttressed by her presence. Additionally, the court noted that the social worker neither interacted with nor communicated in any way with the child during his testimony. *Id*. at 945. The nature of the testimony coupled with the presence of the defendant may cause extreme anxiety on the part of the infant witness resulting in confused testimony. *State v. Jones*, 362 S.E.2d 330 (W.Va. 1987). The use of a support person may keep the child from being distracted. *Id*. at 333.

Pennsylvania, citing a court’s broad discretion to conduct the trial, also allows the use of support persons. *Commonwealth v. Pankraz*, 554 A.2d 974 (Pa. Super. Ct. 1989). In allowing a four-year-old child to sit on her grandmother’s lap during testimony, the court observed that the child’s testimony did not appear to be in any way influenced by her grandmother. *Id*. at 979. Neither the child nor the grandmother spoke to each other during the testimony.

A “control” rule such as SC0Vt. R. Evid. 611SC0, in fact mandates the court 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. *State v. Johnson*, 528 N.E.2d 567 (Ohio Ct. App. 1986), *cert. denied*, 111 S. Ct. 81 (1990). In *Johnson*, the court found no constitutional violation nor an abuse of discretion by the trial court in allowing the eight-year-old witness to sit on the lap of a relative during the presentation of testimony. *Id*. at 569.

In *State v. Dompier*, 764 P.2d 979 (Or. Ct. App. 1988), the court allowed the victim to sit on her foster mother’s lap after repeatedly being unable to testify as to the specific details of the sexual abuse. While on her foster mother’s lap, the victim answered both the prosecutor’s and defense attorney’s questions and gave detailed testimony on the claimed sexual abuse. *Id*. at 980; *see also*, *Mosby v. State*, 703 S.W.2d 714 (Tex. Ct. App. 1985) (support person permitted to sit with child); Cal. Penal Code § 868.5 (1985).

Here, the Court has already made detailed findings regarding the emotional difficulties these children are experiencing when asked to recall certain events. Having a trusted adult available for general comfort and support and to provide each child with a basic sense of safety may be necessary if the child is expected to be able to answer any questions at all. For the above foregoing reasons, the State requests that the victim advocate and at least one parent be allowed to be present during each child’s testimony and, if the child wishes, that the child be allowed to sit in the lap of one of these adults while providing testimony.

The State would note that the parents will be called as witnesses prior to the child’s testimony. Thus, the newly amended Vt. R. Evid. 615 does not act to bar their presence. The former rule was used to exclude any witnesses from the courtroom if any party requested sequestration of witnesses. The newly amended rule now provides:

At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion; after a witness’ testimony has been completed, however, the witness may remain in the courtroom, even if the witness subsequently may be called upon by the other party or recalled in rebuttal, unless a party shows good cause for the witness to be excluded. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

The amended rule strikes a balance between the rights of the victims and other witnesses. Little is accomplished by continuing to bar the witness from the courtroom after the witness has testified and been subject to cross-examination. (Reporter’s notes to 1989 amendment of Vt. R. Evid. 615.) As long as the support person is carefully admonished not to attempt to influence the child’s testimony in any way, the presence of such a trusted adult can only enhance the ability of the child to communicate.

**C.** **THE USE OF LEADING QUESTIONS ON DIRECT EXAMINATION OF THE CHILD WITNESSES**

Vt. R. Evid. 611(c) provides:

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony.

Accordingly, the decision to allow leading questions on direct is within the sound discretion of the trial court. Traditionally, leading questions have been allowed on direct examination of embarrassed, reluctant, fearful, or forgetful witnesses.

Leading questions may also be permitted, in the discretion of the court, where the witness is ignorant or forgetful. Youthful witnesses fall in this class, and leading questions find a special usefulness in the trials of sex offenders when young children must testify, the courts sometimes saying that leading questions are justified because of the embarrassing nature of the testimony, or because of the demands of modesty.

Underhill, H.C., *Criminal Evidence*, 1207-1208 (5th ed).

Numerous appellate courts have upheld trial judges’ decisions allowing the use of leading questions of child witnesses in sexual abuse cases because of the sensitive nature of the subject and the understandable hesitancy, embarrassment, anxiety, and shame of the witnesses. See, e.g., *Rotolo v. United States*, 404 F.2d 316 (5th Cir. 1968) (15-year-old-child); *People v. Kosters*, 438 N.W.2d 651 (Mich. Ct. App. 1989) (five-year-old-child); *State v. Chandler*, 376 S.E.2d 728 (N.C. 1989) (two to five-year-old children); *Altmeyer v. State*, 519 N.E.2d 138 (Ind. 1988) (10- and 14-year-old children); *Nash v. State*, 519 A.2d 769 (Md. 1987) (13-year-old child); *People v. Server*, 499 N.E.2d 1019 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 842 (1987) (nine-year-old child); *Commonwealth v. Baran*, 490 N.E.2d 479 (Mass. App. Ct. 1986); *State v. Hawthorne*, 523 S.W.332 (Mo. Ct. App. 1975) (eight-year-old witness); *Wright v. Blakeslee*, 128 A. 113 (1925).

**D. USE OF ANATOMICALLY DETAILED DOLLS**

The use of anatomically detailed dolls as demonstrative evidence can assist young children to describe details of sexual abuse. A number of courts have recognized the value and appropriateness of permitting the use of this kind of demonstrative evidence. *State v. Walker*, 1986 WL 689 (Ohio Ct. App. 1986); *State v. Eggert*, 358 S.E.2d 156 (Va. Ct. App. 1986).

**E. THE TIME, MANNER, SCOPE, AND DURATION OF QUESTIONING**

The ability of children to provide meaningful testimony that is helpful to the ascertainment of the truth can be significantly affected and diminished unless this Court takes a proactive role in limiting time, manner, scope and duration of the questioning. The State has asked the court to assure that the children will testify in the morning, that frequent breaks be taken, that objections be made in a quiet, non-threatening manner, that the duration of the questioning be limited and focused, and that the scope of questioning be limited to areas which are essential.

Vt. R. Evid. 611(a) empowers the court to control the mode and manner in which witnesses will be questioned to (1) assure that such questioning is “effective for the ascertainment of the truth (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” This includes regulation of the manner in which objections are made, *Commonwealth v. Amirault*, 535 N.E.2d 193, 207 (Mass. 1989), the method and duration of cross-examination, *People v. Conyers*, 382 N.Y.S.2d 437, 441 (1976), and the length of questioning, *Commonwealth v. Brusqulis*, 496 N.E.2d 652, 656 (Mass. 1986). Where evidence has already been introduced through other witnesses, it is within the discretion of the court to prohibit questioning of children about relevant, but embarrassing matters. *State v. Catsam*, 534 A.2d 184 (Vt. 1987). There, the Court noted:

[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.

*Id*. at 378, quoting *Delaware v Van Arsdall*, 475 U.S. 673, 679 (1986).

In *Catsam*, the Supreme Court ruled that the trial judge properly restricted cross-examination of the child regarding other sexual activity (as a possible alternative source of PTSD). It ruled that this information had already been elicited during the cross-examination of the expert and the potential harm to the child of allowing such expansive cross-examination outweighed the defendant’s right to ask the witness about this incident given “the availability of alternative means for exploring the cause of the syndrome.” *Id*. at 337.

In *State v. Raymond*, 538 A.2d 164 (Vt. 1987), the Vermont Supreme Court upheld the trial court’s ruling allowing the defense to ask the victim about the existence of a theft investigation in order to establish a possible bias but prohibiting questions about the details of the investigation or the underlying incident.

Even when the information is central to the defense, the United States Supreme Court has authorized some restrictions on the scope of a particular inquiry. In *Davis v. Alaska*, 415 U.S. 308 (1974), the Court ruled that the defendant had a right to ask the State’s principle witness about the limited fact that the witness had been adjudicated delinquent, that this involved a burglary, and that he was on juvenile probation at the time he provided information to the police. This was allowed to explore possible bias. However, cross-examination in this area was limited to just those facts and no more.

Thus, there is ample authority to support the State’s request not only that the Court regulate the mode and manner of examination of these child witnesses, but also that it regulate the substance of what may be asked, even though it may be marginally relevant.

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

Respectfully submitted,

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Assistant District Attorney