**MOTION TO ALLOW CHILD WITNESSES TO TESTIFY BY VIDEOTAPE**

##### State of Utah

The State of Utah, through P., Assistant Attorney General, moves this Court for an order permitting the testimony of J.W. and C.W. to be videotaped and shown to the jury at trial, as provided for in Rule 15.5(3) of the Utah Rules of Criminal Procedure. The language of that Rule is as follows:

“(3) In any case concerning a charge of child abuse . . ., the court may order, upon motion of the prosecution and for good cause shown, that the testimony of any witness or victim younger than 14 years of age be taken outside the courtroom and be recorded. That testimony is admissible as evidence, for viewing in any court proceeding regarding the charges if the provisions of Subsection (2) are observed, in addition to the following provisions:

(a) the recording is both visual and aural and recorded on film or videotape or by other electronic means;

(b) the recording equipment is capable of making an accurate recording, the operator is competent, and the recording is accurate and is not altered;

(c) each voice on the recording is identified; and,

(d) each party is given an opportunity to view the recording before it is shown in the courtroom.

The additional requirements under Rule 15.5(2), which apply to this case, are as follows:

“(a) Only the presiding judge, attorneys for each party, persons necessary to operate equipment, and a counselor or therapist whose presence contributes to the welfare and emotional well-being of the child may be with the child during his testimony. The defendant may also be present during the child’s testimony unless he consents to be hidden from the child’s view, or the court determines that the child will suffer serious emotional or mental strain if he is required to testify in the defendant’s presence, or that the child’s testimony will be inherently unreliable if he is required to testify in the defendant’s presence. If the court makes that determination, or if the defendant consents:

(i) the defendant may not be present during the child’s testimony;

(ii) the court shall ensure that the child cannot hear or see the defendant;

(iii) the court shall advise the child prior to his testimony that the defendant is present at the trial and may listen to the child’s testimony;

(iv) the defendant shall be permitted to observe and hear the child’s testimony, and the court shall ensure that the defendant has a means of two-way telephonic communication with his attorney during the child’s testimony; and,

(v) the conditions of a normal court proceeding shall be approximated as nearly as possible.

(b) Only the presiding judge and attorneys may question the child.

(c) As much as possible, persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror so the child cannot see or hear them.

J.W. is now six years of age and C.W. is five years old. At the time of the crimes alleged in this case, they were five and four, respectively. As illustrated in prior motions filed with this Court, their proposed testimony will include matters they witnessed concerning the victim in this case, B.L., as well as incidents of violence directed against them by the defendants. The State submits that requiring them to testify in an open courtroom with the defendants present would subject them to “severe emotional or mental stress” and would render their testimony “inherently unreliable”, given the stress inherent in a young child having to provide testimony against those who battered that child and that child’s sibling.

The State will offer the testimony of the therapist for J.W. and C.W. to the effect that they would risk suffering extreme emotional damage if forced to testify in the presence of the defendants and would most likely either refuse to say anything, or would limit their testimony to matters which they felt would be “safe” to say in the presence of the defendants. This would so dilute their testimony as to make it worthless during the trial. The State proposes to set a date in advance of the trial on which the videotaped testimony would be obtained, so that each party could review the videotape and make whatever motions might be called for concerning admissibility of the tape or sections thereof prior to the commencement of trial.

The State further submits that the Motion to Exclude Evidence Under Rule 403, previously filed by defendant B.W. and subsequently withdrawn, raises matters that would appropriately be addressed after the testimony of J.W. and C.W. is recorded, rather than in advance of the testimony, which would necessitate a ruling in a factual vacuum. A Memorandum in support of this Motion is attached hereto.

RESPECTFULLY SUBMITTED THIS \_\_\_\_ DAY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Assistant Attorney General