IN THE \_\_\_\_\_\_ JUDICIAL DISTRICT COURT, \_\_\_\_\_\_\_\_\_ DEPARTMENT IN AND FOR THE COUNTY OF [COUNTY], STATE OF UTAH

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| THE STATE OF UTAH,  Plaintiff,  -vs-  [DEFENDANT],  Defendant. | **STATE’S MEMORANDUM IN**  **OPPOSITION TO DEFENDANT’S MOTION IN LIMINE TO EXCLUDE ANY STATEMENTS FROM CHILD WITNESS S.H. AT TRIAL**  Case No.  Judge |

The State of Utah, through its counsel, [DA], Salt Lake County District Attorney, and [ADA], Deputy District Attorney, hereby submits this Memorandum in Opposition to Defendant’s Motion in Limine to exclude any statements from child witness S.H. at trial. Any contention by the defense that S.H., the three-year-old sibling of the alleged victim in this case, should be excluded as a witness is premature and should be deferred until the State decides whether to call S.H. as a trial witness. Given that all witnesses are presumed to be competent under Utah Rule of Evidence 601, and since the prior statements of S.H. may become relevant and useful if S.H. testifies at the trial, the State respectfully asks this Court to deny the Defendant’s Motion in Limine, or at least to defer ruling until the Motion becomes ripe for adjudication. As will be discussed below,

the State does not intend to merely offer the prior videotaped interview with S.H. into evidence unless S.H. is going to be called as a witness by the State, but that decision won’t be made until additional assessments are made concerning the potential testimony of S.H.

# STATEMENT OF THE CASE

[STATEMENT OF PROCEDURAL HISTORY]

# STATEMENT OF MATERIAL FACTS

[STATEMENT OF MATERIAL FACTS]

# ARGUMENT

**S.H. IS A COMPETENT WITNESS AND SHOULD BE ALLOWED TO TESTIFY UNDER UTAH RULE OF EVIDENCE 601 UNLESS THE DEFENSE CAN ESTABLISH A REASON UNDER RULE 403 TO EXCLUDE HIS TESTIMONY**

Utah Code Ann. §78-24-2(2) states that every person is considered competent to be a witness and must be allowed to testify unless the testimony is otherwise excludable under the Utah Rules of Evidence. *State v. Fulton*, 742 P.2d 1208, 1217 (Utah 1987). Utah Rule of Evidence 601 states, “Every person is competent to be a witness unless these rules

provide otherwise.” The current statute and Rules of Evidence changed a previous statutory presumption that children under the age of ten years were incompetent to testify, an antiquated view carried over from the common law. The language of this rule “was meant to abolish age, mental capacity, and other grounds which used to render a person

incompetent as a witness.” *Id.* (citing *State v. Fulton* at 1217). Prior to the adoption of Rule 601 of the Utah Rules of Evidence, and the statutory change, it was common practice for defense attorneys to challenge the testimony of almost any child under the age of ten and proponents of the testimony of children had to prove through a pretrial competency hearing that there were reasons that the child was not, in fact, incompetent. *Fulton* was a sodomy on a child case involving a seven year-old victim. The defendant claimed that the child victim was not a competent witness and should not have been allowed to testify without a competency hearing. The Court of Appeals held that although the Legislature had abolished the need for such competency hearings for children under the age of 10, Rule 403 of the Utah Rules of Evidence still applies and application of that rule might result in a trial court ruling preventing a child from testifying. The factors mentioned by the Court of Appeals include: (1) the child’s ability to function in the courtroom setting, meaning the ability to understand questions, communicate facts to the jury, and to distinguish truth from fantasy or falsehood; (2) the age of the child at the time the relevant events occurred, the amount of time that has elapsed, and the degree of recollection the child demonstrates; (3)

the child’s susceptibility to suggestion and whether the child has been intentionally prepared or unconsciously influenced by adults in such a way that it is likely the child is only parroting what others have said about the relevant events. *Id.* at 1218. Such factors

should be considered if and when the State attempts to call S.H. as a witness at the trial, but the factors really have little applicability to a single interview of the child.

Even prior to the 1984 amendment to the statute, there were cases where young children were allowed to provide testimony. In the case of *State v. Smith*, 401 P.2d 445 (Utah, 1965), the defendant was convicted of assaulting and taking indecent liberties with a child under age 14. The Defendant claimed that the child should not have been allowed to provide testimony because she was incompetent. The Utah Supreme Court rejected this claim, explaining that although there are difficulties inherent in the testimony of a child, those difficulties should not prevent the processes of justice from functioning. The Court stated:

“The testimony of a six-year-old child is not rendered completely incompetent nor entirely discredited solely because of her age. As we have previously observed, no particular age nor any specific standard of mental ability can be set as the qualification for giving testimony, but it is an important fact to be considered, along with others, in determining whether she should be allowed to testify. What is essential is that it appear that the child has sufficient intelligence and maturity that she is able to understand the questions put to her, that she has some knowledge of the subject under inquiry and the facts involved therein; that she is able to remember what happened; and that she has a sense of moral duty to tell the truth.

Whether she meets these tests and is therefore a competent witness is within the sound discretion of the trial court to determine. . .After the trial court is satisfied with the competency of the witness, the final judgment as to the credibility and weight to be given her testimony is for the jury. (Citations omitted.)”

*Id.* at 447. The Supreme Court was satisfied the trial court had not abused its discretion in allowing the child to testify.

The Utah appellate courts have been particularly sensitive to the fact that young children may not have the developmental capacity to identify the exact time that an event occurred, and have often recognized that because child abuse occurs in secrecy if there are any eyewitnesses to abuse they would often be very young children. In *State v. Pullman*, 306 P.3d 827, 2013 UT App 168, the Utah Court of Appeals cited a long line of Utah cases

holding that child abuse victim’s testimony did not have to identify an exact time or exact geographic location of the abuse in order to be admitted. “Responding to the realities of cognitive development, we have been less demanding of exact times and dates when young children are involved.” *Id.* at ¶10, quoting from *State v. Taylor,* 2005 UT 40. In *State v.*

*Wilcox*, 808 P.2d 1028 (Utah 1991), the Utah Supreme Court explained that this lax standard relating to charging exact dates and times when children are the victims was required to avoid leaving the youngest and most vulnerable children without legal protection. *Id.* at 1033.

In the case of *State v. Burke*, 256 P.3d 1102, 2011 UT App 168, the Utah Court of Appeals upheld the trial court’s decision to permit a four year-old victim to testify, despite the defendant’s challenge that the child’s testimony was more prejudicial than probative under Rule 403. The defendant had filed a pretrial motion claiming the child should not be allowed to testify because “child . . . is so susceptible to suggestion” and was not able to communicate to the jury. The State conceded that because of the child’s young age, eliciting the testimony was inherently difficult, but argued the objections went to weight, not admissibility of the evidence. The Court of Appeals noted that: “The testimony of children of such tender years is necessarily less articulate and focused than that of older children or adults, but the legislature has determined that such children are not, for that reason, deemed incompetent to testify.” *Id.* 1120. The child’s competence is subject to testing and the trial court must decide whether the jury should receive the testimony and apply its own common sense to determine its reliability. The Court of Appeals applied the *Fulton* factors and agreed with the trial court that any objections to child’s testimony went to weight, not admissibility. The Court of Appeals also commented about the defendant’s

theory that if any statement by the child had been the result of questioning by adults, it should be excluded because the child was susceptible to suggestion and “adults can easily and unintentionally give nonverbal cues or suggestion to a young child.” *Id*. at 1121-1122. The Court of Appeals rejected that claim, finding it was merely based on speculation and was only a theory.

In the Introduction to the book **International Perspectives on Child Abuse and Children’s Testimony** (Sage, 1996), Bette L. Bottoms and Gail S. Goodman, present a more balanced perspective on the research relating to suggestibility of children, stating that “Children, like adults, have limitations [as witnesses], but they also have wide-ranging competencies that can be maximized with informed interview techniques.” *Id.* p. 6.

Bottoms and Goodman point out that the research conducted by those in their field is often based on the assumptions of the researchers conducting it, such that those who believe that children often make false reports of abuse tend to focus their research on proving that

children are overly suggestible and that use of leading questions with children can forever “taint” their recollections (e.g. Stephen Ceci and Maggie Bruck). It is this group of researchers that Mr. Rosenthal as a defense attorney cites with approval, while being critical of any other views. However, Rosenthal’s statements which are repeated in the Defendant’s memorandum as though they are “science” are not borne out by any actual scientific research. An example is his claim that: “once a child has been subjected to suggestive interviews, there is no way to determine whether the child’s statements are the product of the child’s experience or the interviewer’s bias.” There are actually a number of ways to test the accuracy of a child’s statements and Rosenthal’s claims to the contrary seem motivated by intent to exaggerate the research findings and provide arguments for criminal defendants. In addition, the research makes quite clear that although

“suggestibility and other forms of distortion are inherent in all human remembering”, Bottoms and Goodman, Chapter 1, p. 12, that doesn’t mean that all humans are just waiting for the slightest nudge from a suggestive question to change their recollection of an actual event.

The Defense’s contention that all statements from S.H. should be excluded is premature. From the interview itself, there is sufficient evidence to establish that S.H. understood the questions asked of him, and that he had knowledge of the subject under inquiry. S.H. answered questions as to his age, his hobbies, and his brother with coherent, knowledgeable responses. Martinez asked direct questions that were not suggestive or leading throughout the interview. The Defense contends Martinez couldn’t “verify the level of S.H.’s appreciation of the distinction between reality and fantasy, or truth and fiction.” There is very little information in the recorded interview as to S.H.’s ability to understand

the difference between truth and deception or reality and fantasy. The bigger problem the State concedes concerning the interview is the lack of contextual detail offered by S.H. surrounding the important statements regarding who hurt B.H. While those statements were not in response to leading or suggestive questions, there was no further answer to questions as to when, where or how B.H. had been hurt. The fact that S.H. did identify the Defendant as having hurt B.H. at some unspecified time and denied that the Defendant had hurt S.H. or that anyone else had hurt B.H. is somewhat helpful, but the lack of contextual details is problematic.

While the statements S.H. made in the interview have some probative value, the State does not intend to request the Court to admit that videotaped interview standing alone. Instead, the State intends to have a forensic interviewer talk with S.H. and make an independent determination whether S.H. can be a trial witness as to what happened to B.H. If that process results in a decision to call S.H. as a witness, the State will provide notice to the Defense so that arguments can be made concerning whether Rule 403 prohibits calling

S.H. as a trial witness. However, at this stage, the State requests the Court deny the Defendant’s Motion in Limine or at least defer ruling on the Motion because if S.H. is a trial witness, both parties may wish to have the Court allow some or all of the videotaped interview to be played for the jury.

# CONCLUSION

While the State does not intend to offer the videotaped interview of B.H. conducted by Detective Martinez into evidence at trial, it is not for the reasons stated in the Defendant’s memorandum and the State requests that the Court reject the arguments made by the Defendant. Rather, the State concedes that there was no context offered by 3 year-

old S.H. either because follow-up questions were not asked or because S.H. did not answer questions concerning “when” something had happened or exactly what it was that hurt his little brother. The State, however, does intend to interview S.H. again with the assistance of a well-qualified forensic interviewer, and based on that interview may well attempt to call S.H. as a witness at the jury trial. If that occurs, either or both parties may wish to make reference to the previous interview of S.H. The State requests that the Court deny the Defendants Motion in Limine, or defer ruling until it becomes ripe if and when the State chooses to call S.H. as a trial witness.

RESPECTFULLY SUBMITTED this 19th day of May, 2014.

Deputy District Attorney