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To: Senator Dick Sears, Chair
Senate Committee on Judiciary

From: Domenica Padula, Chief of the Criminal Division, prepared on behalf of Attorney General Clark

Date: January 16, 2024

Re: S.190, An act relating to statements made by a child victim of an offense involving serious bodily injury

Attorney General Clark supports S.190 as it will provide additional protections from further trauma for child victims of serious bodily injury during the litigation process in criminal cases. More specifically, S.190 will extend the same protections currently offered to child victims of sexual abuse to child victims of serious bodily injury. S.190 recognizes our shared responsibility to protect child victims from experiencing unnecessary trauma as their cases progress through the criminal justice system.

I. Why do we need this bill?

S.190 minimizes the risk of unnecessary trauma to child victims who suffered serious bodily injury in a manner that also protects a criminal defendant's constitutional rights. When a child is forced to recount details of their abuse during an inherently confrontational deposition or trial, at times in front of their abuser and strangers, it can be a traumatic experience. Even during the non-confrontational investigation stage of cases, law enforcement and Department of Children and Families (DCF) recognize and strive to minimize the risk of unnecessary trauma by conducting joint investigations to limit the number of times a child victim must tell their experience of abuse. Once a felony criminal charge is filed, child victims are exposed to telling of their abuse again, not only during trial but also during depositions, which present an unnecessarily confrontational setting in front of defendants, strangers, and adversaries, thereby increasing the risk of trauma.

In cases involving serious bodily injury, S.190 would dramatically reduce the likelihood of child victims being exposed to potentially traumatic deposition and further trial testimony.

II. What does this bill do?

S.190 provides specific additional protections to minor victims in cases involving serious bodily injury by (1) limiting depositions of victims under 16 years of age and (2) allowing hearsay statements by victims under 13 years of age to be used in legal proceedings. Since the child victim would still be available to testify in court or under Rule 807 (governing testimony where victim is a minor), the proposed legislation does not run afoul of the Confrontation Clause to the United States Constitution. While the Confrontation Clause provides criminal defendants “the right. . .to be confronted with the witnesses against [them],” there is no constitutional right to pre-trial depositions. In fact, Vermont is in the very small minority of states which permit depositions in criminal cases at all.

Additionally, S.190 offers protections already provided to child victims in sex offense cases to child victims in other types of cases where they suffered serious bodily injury (e.g., aggravated domestic assault, aggravated child abuse). This is a recognition that child victims who experience serious harm, whether sexual or physical, should be afforded the same protections.

(a) Effect on Depositions

S.190’s proposed changes to V.R.Cr.P. 15(e)(5) would establish a presumption that minor victims in cases involving serious bodily injury would not be subjected to depositions absent an agreement by the parties or court approval. That approval would only be granted in cases where the court finds: (1) that the testimony of the child is necessary to assist the trial, (2) that the evidence sought is not reasonably available by any other means, and (3) that the probative value of the testimony outweighs the potential detriment to the child being deposed. In determining whether to approve a deposition, the court would be required to consider the availability of recorded statements of the victim and the complexity of the issues involved.

In practice, most cases involving child abuse include a video recorded interview of the child victim, which heavily weighs against any defense argument in favor of a deposition. Motions to depose a child victim under these circumstances in sex offense cases, which are currently afforded protection under the rule, are routinely denied. Given that deposition scheduling and litigation adds significant delay to an already backlogged judicial system, the presumption of no depositions for another serious category of child victims may help alleviate some of the delay.

(b) Effect on Trials and Evidentiary Hearings

S.190’s changes to V.R.E. 804a (governing the hearsay exception for children age 12 and under) would allow admission of out-of-court statements made by a child under 13 years of age if several factors are met: (1) The statements are offered in a civil, criminal, or administrative proceeding in which the child is a putative victim of an enumerated offense including sex offenses and offenses involving serious bodily injury, (2) the statements were not taken in preparation for a legal proceeding (pre-arraignment), (3) the child is available to testify in court or under V.R.E. 807 and, (4) the time, content, and circumstances of the statements provide substantial indicia of trustworthiness. When considering the question of trustworthiness,” a court may consider such factors as: the circumstances of the initial disclosure, including the setting and

person to whom the disclosures were made; internal consistency and detail of disclosures; timing and conduct of interviews, including whether nonleading questions were asked; freshness and spontaneity of disclosures; appropriate body language; risk of fabrication; evidence of coercion or manipulation; accuracy of peripheral detail; the child's affect, intelligence, memory, and concern for the truth; and corroboration by medical and other evidence.

The rationale behind Rule 804a is that a child victim's early communications are often highly trustworthy, and thus the rule allows admission of the child's statements when there is minimal risk of fabrication. Because child hearsay admitted under V.R.E. 804a is substantive evidence, it can be used to establish the elements of the crime. Even though a defendant can still force the child to testify (Confrontation Clause issue), there is less pressure on the child because the State's case does not solely rely on their trial testimony. It can be difficult, if not traumatic, for anyone, much less a child, to talk about their abuse in front of their abuser and a room full of strangers (such as jurors, attorneys, court staff, observers). In theory, a child could take the stand, not talk about the charged crime(s), and the State could still prevail using the admitted child hearsay evidence. In practice, this child hearsay – often statements to medical providers or statements to DCF during a forensic interview in a child friendly “soft” room – is incredibly compelling evidence for a fact finder. When the State has strong evidence, it increases the likelihood the case will resolve short of trial and without the victim needing to testify.