IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

In the Interest of	§	
	§	Appeal No.
R.B.,	§	ED85549
	§	
	§	

AMICUS CURIAE BRIEF OF JUSTICE FOR CHILDREN

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Dulcie Green Wink
Texas Bar No. 00795725
Haynes and Boone, LLP
One Houston Center
1221 McKinney, Suite 2100
Houston, Texas 77010
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

Of Counsel:

Timothy C. Mooney, Jr.
Missouri Bar No. 49147
Bryan Cave LLP
One Metropolitan Square, Suite 3600
St. Louis, Missouri 63102
Telephone: (314) 259-2374
Telecopier: (314) 259-2020

ATTORNEYS FOR JUSTICE FOR CHILDREN

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II. STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

Friend of the Court, Justice for Children, adopts the Statement of Jurisdiction and Facts as presented in Appellant's Brief.

III. POINTS RELIED ON

A. *Crawford v. Washington* is distinguishable from the decisions protecting the rights of child victims, and does not disturb that line of authority.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Ohio v. Roberts, 448 U.S. 45 (1980).

B. After *Crawford*, the statements are admissible under *White v. Illinois*.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).

C. The videotaped statements are not "testimonial," and thus, are admissible under *Crawford*.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).

D. Both the state and federal governments have a strong public policy interest in protecting child witnesses.

Coy v. Iowa, 487 U.S. 1012, 1025, 108 S.Ct. 2798, 2805, 101 L.Ed.2d 857, 869-70 (1988).

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

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New York v. Ferber, 458 U.S. 747, 757 (1982).

Prince v. Mass., 321 U.S. 158, 168 (1994).

People v. Huddleston, 816 N.E.2d 322, 339 (Ill. 2004).

White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).

IV. ARGUMENT

A. *Crawford v. Washington* does not apply.

In 2004 the Supreme Court barred out-of-court statements as unconstitutional under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In deciding *Crawford*, the Supreme Court abrogated its *Ohio v. Roberts* decision, allowing such testimony subject to a reliability test. *Ohio v. Roberts*, 448 U.S. 45 (1980). A close analysis of *Crawford* reveals that it is inapplicable to decisions pertaining to child victims' out-of-court statements, and is not meant to disturb that line of authority.

Crawford concerned the out-of-court statements of the defendant's adult wife, who witnessed the defendant stabbing another adult, and who was unavailable to testify due to marital privilege. The present case is distinguishable in three crucial ways: the witness is a child, the crime is the sexual abuse of the child, and the child's unavailability is due to significant emotional and/or psychological trauma. While the jurisprudential history cited in *Crawford* understandably assures one adult the opportunity to physically confront another adult who testifies against him or her, it cannot be applied so broadly as to ignore the distinct jurisprudential history protecting child victims. Applying *Crawford* to child victims is illogical and unjust: It fails to protect the youngest, most severely traumatized victims who are psychologically unable to endure cross-examination and allows for the successful prosecution only of those defendants who choose as victims older children who are more mature and psychologically fit.

The *Crawford* opinion is limited to adult witnesses. It does not touch or concern child victim testimony and is inapplicable to this case. Indeed, to extend *Crawford* to exclude a child victim's testimony, this Court must abandon *stare decisis*.

B. *Crawford* did not overrule *White v. Illinois*.

The child victim's statements in the present case are admissible under *White v. Illinois*. *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). In his opinion, Justice Scalia noted the Supreme Court's earlier decision in *White* as being "in tension" with *Crawford*, but declined to overturn *White*. *Crawford*, 541 U.S. at 58-59 & n.8, 124 S. Ct. at 1368-69 & n.8. In *White*, the Court allowed admission of a child victim's statements to an investigating police officer despite the child's unavailability and the defendant's lack of an opportunity to cross-examine. *White v. Illinois*, 502 U.S. at 349-51, 112 S.Ct. at 739-40. In *White*, the child victim's statements were admitted as spontaneous declarations and medical examination hearsay exceptions. *Id.* Lest the reader of *Crawford* be misguided by that factual distinction, however, Justice Scalia explicitly reminded us that the only legal question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the child victim. *Crawford*, 541 U.S. at 58 n.8, 124 S. Ct. at 1368 n.8. It did not. *Id.*

White controls here. *Crawford* speaks only to adult witnesses; *White* speaks to child victim witnesses. While the *Crawford* opinion could have closed the door on *White*, it did not do so. Instead, *Crawford* leaves intact the *White* case's allowance for the admission of child victim statements – statements that are indistinguishable from the

statements at issue here. What the Supreme Court has chosen not to disturb in its *Crawford* analysis, this Court should not disturb.

C. The videotape is admissible because it is not "testimonial" evidence.

The *Crawford* opinion expressly applies to "testimonial" evidence, but *Crawford* "leave[s] for another day any effort to spell out a comprehensive definition of 'testimonial.'" The Court provides that the definition includes prior testimony at a preliminary hearing, before a grand jury or at a former trial, and police interrogations. The statement in question here is not prior courtroom testimony, nor is it interrogation by law enforcement officials. Rather, it is the videotaped storytelling of a *child victim* of sexual abuse. The *Crawford* Court specifically refused to decide whether the child victim's statements to a police investigator, admitted in *White*, come within the definition of "testimonial" evidence. *Crawford*, 124 S. Ct. at 1370. Yet, in discussing *White*, the Court carefully refers to "statements of a child victim to an investigating police officer," as opposed to "police interrogations," which it considers *per se* testimony. The Court's carefully worded analysis suggests a clear intention to exclude the statements of child victims from the definition of testimony.

D. A separate jurisprudential scheme protects children.

The *Crawford* Court's decision to leave *White* undisturbed is supported by a separate body of Confrontation Clause jurisprudence pertaining to child victims. In her concurring opinion in *Coy v. Iowa*, a decision cited in *Crawford* that involved *in court* child victim testimony, Justice O'Connor allows for a particular trial procedure other than face-to-face confrontation if "necessary to further an important public policy . . . [t]he

protection of child witnesses is, in my view, and in the view of a substantial majority of the States, just such a policy." *Coy v. Iowa*, 487 U.S. 1012, 1025, 108 S.Ct. 2798, 2805, 101 L.Ed.2d 857, 869-70 (1988). The "strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Id.*

The government has an interest in protecting children from sexual abuse. *New York v. Ferber*, 458 U.S. 747, 757 (1982) ("[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"); *see also Prince v. Mass.*, 321 U.S. 158, 168 (1994) ("a democratic society rests … upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies"); *People v. Huddleston*, 816 N.E.2d 322, 339 (Ill. 2004) ("Beyond the compassion one must feel for these innocent victims [of child sexual abuse], pragmatism dictates a recognition that the victim's problems are likely to become society's problems … [including] substance abuse, dangerous sexual behaviors or dysfunction, inability to relate to others on an interpersonal level, and psychiatric illness").

Missouri has long recognized the distinction between children and adults and has developed a statutory and common law jurisprudential scheme that treats children, and particularly child victim witnesses, differently. As the Supreme Court of Missouri opined in its decision upholding a statute allowing for the admission of child victim testimony:

> [T]he state has a strong interest in protecting children, and child abuse presents unusual evidentiary problems because the victim's testimony is often the only direct evidence linking the accused to the crime. [The statute] reflects a policy determination that in some child abuse cases the victim's out-of-court statements may possess sufficient probative value to contribute to the judicative process; indeed, such statements may on occasion be *more* reliable than the child's testimony at trial, which may

> suffer distortion by the trauma of the courtroom setting or become contaminated by contacts and influences prior to trial. The defendant has failed to carry his burden of demonstrating that . . . the statute is not rationally related to a legitimate governmental interest.

Missouri v. Wright, 751 S.W.2d 48, 52 (Mo. banc 1988).

If this Court decides that the Confrontation Clause prohibits the admission of videotaped child-victim testimony, it will not only overturn precedent, but will strike a major blow to the prosecution of child abuse in Missouri. The most vulnerable victims and the most heinous perpetrators will be the most affected by this ruling. In effect, under such a rule, abusers who prey upon and terrorize the exceptionally vulnerable will escape the consequences of their crimes and be free to victimize countless others. This Court should not abandon the established precedent that protects innocent child victims.

V. CONCLUSION

Recognizing a need to protect society's most helpless victims, courts have long upheld legal distinctions for child-victim witnesses. *Crawford* is no exception. It does not and should not apply to the out-of-court videotaped statements of a child abuse victim. For this Court to hold otherwise will thwart well-settled statutory and common law Confrontation Clause protection for children. As such, the trial court erred in suppressing the videotaped testimony of A.G., and its order should be reversed.

VI. CERTIFICATE OF SERVICE

I, Dulcie Green Wink, certify that both a printed and electronic copy of the foregoing pleading has this day been served on the below referenced counsel via certified mail, return receipt requested in accordance with Supreme Court Rules of Appellate Procedure 20.04, 30.07. 84.07 and 84.06(g) on this the 13th day of May, 2005:

Charles Schroeder
2268 Bluestone Dr.
Saint Charles, MO 63303
Attorney for Juvenile

John J. Smith
1700 South River Road
Saint Charles, MO 63303
Attorney for Appellant

_____
Dulcie Green Wink

VII. CERTIFICATE REGARDING VIRUS SCAN OF COMPUTER DISKETTE

I, Dulcie Green Wink, certify that the computer diskette containing the Amicus Curiae Brief of Justice for Children was scanned for viruses and found to be virus free.

_____
Dulcie Green Wink