IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 85765
	)	
MICHAEL CRAWFORD,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION TWELVE
THE HONORABLE STEVEN H. GOLDMAN, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT & STATEMENT OF FACTS

Appellant adopts and incorporates the jurisdictional statement and statement of facts from his opening brief.

POINTS RELIED ON

I.

The trial court plainly erred in overruling Mr. Crawford's motion to suppress identification and in 1) allowing Harold Anderson, Beverly Williams, Officer Sheehan and Officer Kardasz to testify about the pretrial lineup identifications; and 2) allowing Harold and Ms. Williams to identify Mr. Crawford in court as the shooter, because this evidence was obtained in violation of Mr. Crawford's right to counsel guaranteed by the 6th and 14th Amendments to the U.S. Constitution, Art. I, § 18(a) of the Missouri Constitution, and Rules 22.07 and 31.02, in that the uncounseled lineup, wherein Harold and Ms. Williams identified Mr. Crawford, took place on November 4, 2000, two days "after the time that adversary judicial proceedings had been initiated against him" and his right to counsel had attached. Not only was Mr. Crawford entitled to his counsel's presence at this "critical stage," but counsel had advised the police not to conduct any lineups in his absence. Nonetheless, the police contacted Mr. Crawford's attorney only after the lineup was a fait d'accompli. Evidence regarding the lineup is excludable *per se* because "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." The trial court was on notice that a constitutional violation had occurred because, upon the prosecutor's request, it took judicial notice of the fact that the uncounseled lineup occurred two days after the arraignment, and manifest injustice will result if this error goes uncorrected.

Brewer v. Williams, 430 U.S. 387 (1977);

United States. v. Wade, 388 U.S. 218 (1967);

Kirby v. Illinois, 406 U.S. 682 (1972);

Manning v. Bowersox, 310 F.3d 571 (8th Cir. 2002);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Section 18(a);

Rules 22.01 & 31.02.

ARGUMENT

I.

The trial court plainly erred in overruling Mr. Crawford's motion to suppress identification and in 1) allowing Harold Anderson, Beverly Williams, Officer Sheehan and Officer Kardasz to testify about the pretrial lineup identifications; and 2) allowing Harold and Ms. Williams to identify Mr. Crawford in court as the shooter, because this evidence was obtained in violation of Mr. Crawford's right to counsel guaranteed by the 6th and 14th Amendments to the U.S. Constitution, Art. I, § 18(a) of the Missouri Constitution, and Rules 22.07 and 31.02, in that the uncounseled lineup, wherein Harold and Ms. Williams identified Mr. Crawford, took place on November 4, 2000, two days "after the time that adversary judicial proceedings had been initiated against him" and his right to counsel had attached. Not only was Mr. Crawford entitled to his counsel's presence at this "critical stage," but counsel had advised the police not to conduct any lineups in his absence. Nonetheless, the police contacted Mr. Crawford's attorney only after the lineup was a fait d'accompli. Evidence regarding the lineup is excludable *per se* because "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." The trial court was on notice that a constitutional violation had occurred because, upon the prosecutor's request, it took judicial notice of the fact that the uncounseled lineup occurred two days after the arraignment, and manifest injustice will result if this error goes uncorrected.

Police officers violated Mr. Crawford's Sixth Amendment right to assistance of counsel by placing him in a live identification lineup in the absence of his counsel. Mr. Crawford's right to counsel attached at the earliest, when the State committed to prosecute him by filing the complaint pursuant to **Rule 22.01**, or at the latest, when Mr. Crawford was arraigned on the complaint at his first appearance on the charges and the court advised him of his Sixth Amendment rights under **Rule 31.02**. Both of these events occurred before the lineup. Mr. Crawford's Sixth Amendment rights were also invoked at the time of the lineup because he had hired a private attorney, Patrick Conroy, to represent him on the murder charge. Mr. Conroy surrendered Mr. Crawford to the police and told the police that he should be contacted prior to any lineup. But despite knowing that Mr. Crawford was both represented by counsel and entitled to counsel at the lineup, the officers conducted the lineup in the absence of counsel. This Court must not permit the knowing circumvention of an accused's right to have counsel present in a confrontation between the accused and the State.

Respondent espouses an examination of State law…

…but fails to discuss Rule 22.01

The Sixth Amendment right to counsel exists at critical stages "at or after the initiation of adversary proceedings," ***Kirby v. Illinois,* 406 U.S. 682, 689 (1972)** (emphasis added). Therefore, the key question for this Court is: What constitutes the "initiation of adversary proceedings" in Missouri? Given this fundamental question, it is

puzzling that Respondent's brief fails to discuss **Rule 22.01**, which states: "Felony proceedings may be initiated by complaint filed in any court having original jurisdiction to try misdemeanors, or by indictment." (emphasis added). The texts of **Rule 22.01** and ***Kirby v. Illinois*** are nearly identical. The absence of **Rule 22.01** from Respondent's brief is particularly glaring given its argument that each state's law is dispositive regarding what constitutes the "initiation of judicial proceedings" (Resp. Br. 24-25).

Respondent's seems to argue that the initiation of "felony proceedings" should not be considered the initiation of "adversary proceedings." Respondent believes that by filing charges by complaint, the prosecutor has not yet made a "commitment to prosecution" (Resp. Br. at 20). But this Court, citing **Rule 22.01**, has held, "In Missouri, a criminal prosecution on a felony charge is commenced by indictment or complaint." ***State ex rel. Kemp v. Hodge***, 629 S.W.2d 353, 358 (Mo. banc 1982) (emphasis added); ***State v. Meinhardt*, 900 S.W.2d 242, 246 (Mo. App., S.D. 1995)** (citing **Rule 22.01**, and acknowledging that for purposes of Sixth Amendment right to counsel analysis, felony proceedings are initiated with the filing of the complaint or indictment); see also ***Arnold v. State*, 484 S.W.2d 68 (Mo. 1972)**, where this Court discussed ***Kirby, supra,*** and ***Wade***, ***supra***, and found that "the filing of a complaint and issuance of a warrant is the initiation of 'adversary judicial proceedings' within the ***Kirby*** case. Thereafter, [the] right to

counsel attaches, including the right, under ***Wade***, to have counsel present in any planned confrontation with witnesses." ***Id.* at 250**.[1]

Any lack of a "commitment to prosecute" on the part of the prosecutor is also belied by the record in this case. Eight days had passed from the time of Mr. Crawford's arrest until the State initiated felony proceedings (i.e., filed a complaint) against him. Why? Because the prosecutor did not believe that he had enough evidentiary support to file formal charges (TR 651-652). It was only after an additional week-long investigation that the prosecutor decided to formally charge Mr. Crawford (TR 651-652). When the prosecutor filed the complaint, he was committed to prosecute Mr. Crawford, and the initiation of adversary proceedings, for purposes of ***Kirby v. Illinois***, ***supra***, had commenced.

Indeed, prosecutors are not constitutionally obligated to file charges against a suspect as soon as they have probable cause but before their investigations are complete. ***United States v. Gouveia***, 467 U.S. 180, 192 (1984). But the Sixth Amendment becomes applicable when the government's role shifts from investigation to accusation. ***Moran v.***

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[1] ***Arnold*** was decided prior to the 1979 adoption of new **Rule 22.01**. As the Rule now makes clear, the filing of a complaint initiates felony proceedings in Missouri. Therefore, subsequent cases purporting to overrule the ***Arnold*** analysis are moot. ***See Morris v. State*, 532 S.W.2d 455 (Mo. 1976)**. ***Arnold*** would have remained good law under **Rule 22.01**.

Burbine, 475 U.S. 412, 430 (1986). Here, after further investigation, the prosecutor's role became accusatory when he filed the complaint pursuant to **Rule 22.01**.

…and Respondent makes only a fleeting reference to Rule 31.02

Respondent spends one paragraph discussing **Rule 31.02** (Resp. Br. 25). The title of Rule 31 is "Misdemeanors or Felonies – Presence of Defendant and Right to Counsel." The introductory language to **Rule 31.02** mirrors **Art. I, Section 18(a)**: "In all criminal cases the defendant shall have the right to appear and defend in person and by counsel." **Rule 31.02** mandates that if any person charged with an offense is without counsel upon his first appearance before a judge, the judge is duty-bound to advise him of his right to counsel. Respondent provides no explanation for why this Court should not apply the literal language of that Rule to find that the right to counsel has attached at this point – at the first appearance on the felony complaint. It is not logically consistent that a defendant is required be told that he has a Sixth Amendment right to counsel at this point, but not also have the right to counsel attach at that time.

Rule 31.02 advisements are not mere ***Miranda*** warnings, as suggested by Respondent (Resp. Br. 25). They advise of Sixth Amendment rights – "In all criminal prosecutions, the accused shall…have the assistance of counsel for his defence." **U.S. Const., Amend 6**. Every case discussing **Rule 31.02** has done so in conjunction with Art. I, Section 18(a) and the right to counsel at all critical stages of the prosecution. *See e.g.*, ***Deline v. Director of Revenue***, 941 S.W.2d 818, 819 (Mo. App. W.D. 1997) ("The right to counsel is required to be afforded to any defendant facing the threat of

imprisonment. Mo. Const. Art. 1, § 18(a); **Rule 31.02(a)**"); ***State v. Bibb***, 922 S.W.2d 798, 803 (Mo. App., E.D. 1996) ("the court must be mindful of a defendant's constitutional right to counsel at all critical stages of the prosecution… **Rule 31.02**"); ***State v. Sparks***, 916 S.W.2d 234, 236 (Mo. App., E.D. 1995) ("The laws of this state ensure that any defendant who faces imprisonment as a result of conviction will have the assistance of counsel if the defendant desires such assistance. *See* Mo. Const. art. 1, § 18(a); **Rule 31.02(a)**"); ***State v. Ehlers***, 685 S.W.2d 942, 945 (Mo. App., S.D. 1985) ("**Rule 31.02(a)** imposes upon the trial judge a duty to inform the defendant of his rights and to find that the defendant has intelligently waived his right to counsel.")

Respondent also provides no response to the fact that the timing of the **Rule 31.02** advisements has changed. It used to be that a defendant was advised of his Sixth Amendment rights "upon arraignment." See Former **Rule 29.01(a)** (1967). But in 1979, **Rule 31.02** changed the wording from "upon arraignment" to "upon his first appearance before a judge... ." Respondent ignores this procedural history and maintains that **Rule 31.02** is irrelevant to the question of when the right to counsel attaches in Missouri (Resp. Br. 25).

Respondent's Statute of Limitations Argument is a Red Herring

Respondent argues that since the filing of a complaint does not toll the statute of limitations on a crime, then a complaint is not a formal charge (Resp. Br. at 21). It is true

that, by statute,[2] "a prosecution commences *for purposes of the statute of limitations* when an information is filed or an indictment returned, and not when the complaint is filed." ***State ex rel. Morton v. Anderson***, 804 S.W.2d 25, 26 (Mo. banc 1991) (emphasis added). But it is also true that, by statute,[3] a criminal defendant has the right to request a speedy trial immediately upon the filing of a complaint and detainer. *See* ***State ex rel. Kemp v. Hodge***, 629 S.W. 2d at 358. Indeed, the 180-day time limit begins ticking, even during the complaint stage of a prosecution, if the defendant files a request for speedy trial during that time. In ***Hodge***, this Court held that "a criminal prosecution on a felony charge is commenced by indictment or complaint. **Rule 22.01**," and noted the absurdity that would obtain if those charged by indictment were given more protection under the statute than those charged by complaint.[4] *Id.* "The law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable ... results ...." ***Id.*** at 359 (*quoting* ***Xerox Corp. v. Travers***, 529 S.W.2d 418, 422 (Mo. banc 1975)).

A similar absurdity would obtain if this Court were to interpret **Rule 22.01** to provide that those defendants, whose felony proceedings are initiated by indictment, enjoy the Sixth Amendment right to counsel, but those whose felony proceedings are

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[2] Section 556.036.

[3] Section 217.450 *et. seq*.

[4] The State urged this Court to read the statute as providing two 180 day periods in which to bring a prisoner charged by complaint to trial (complaint to preliminary hearing, 180 days; information to trial, 180 days).

initiated by complaint will linger without counsel and be subjected to lineups in the absence of counsel. ***Hodge*** simply proves that criminal defendants have constitutional and statutory rights, triggered by the complaint, even before an information is filed.

Further, Respondent's statute of limitations argument would exclude preliminary hearings as a triggering event, because such hearings also occur before an information is filed. But ***Kirby*** does not require the commencement of a formal prosecution in order to trigger a defendant's Sixth Amendment rights. Rather, ***Kirby*** simply requires the "initiation of adversary proceedings." The right to counsel clearly exists at the time of the preliminary hearing. ***Coleman v. Alabama***, 399 U.S. 1 (1970).

Logically, the Supreme Court's use of the term "formal charges" must contemplate the filing of a complaint, such as the procedure provided by **Rule 22.01**. If it were otherwise, the use of the term "formal charge" in ***Kirby*** to designate when adversarial judicial proceedings have been initiated would be meaningless, for the term would not be distinguished from "preliminary hearing, indictment, information, or arraignment." But Respondent maintains that the state was not committed to prosecute when it filed the complaint, and Mr. Crawford was not entitled to counsel, until the return of the indictment on February 1, 2001, three months after the complaint was filed (Resp. Br. 22).

Respondent's caselaw interpretation is flawed…

The Eighth Circuit is not in conflict

Respondent suggests that the Eighth Circuit is in conflict with itself on the question of when the 6th Amendment right to counsel attaches (Resp. Br. 18). But ***Manning v. Bowersox***, 310 F.3d 571 (8th Cir. 2002) (*cert. denied*, 538 U.S. 1035 (2003)), and ***Beck v. Bowersox***, 362 F.3d 1095 (8th Cir. 2004),[5] are not in conflict for one very simple reason: Manning had been formally charged by complaint and his Sixth Amendment rights had attached, whereas, the prosecutor had not filed charges against Beck and his Sixth Amendment right to counsel had not attached.

At the time of Beck's statements to police, absolutely no charges had been filed. ***State v. Beck***, 687 S.W.2d 155, 160 (Mo. banc 1985). Even the dissent was forced to acknowledge that the *ex parte* affidavit was not a "complaint," instead arguing that it was "equivalent to a complaint." ***Beck v. Bowersox***, 362 F.3d at 1106 (Heaney, J., dissenting). Like the defendant in ***Manning***, however, Mr. Crawford had been arrested and charged by complaint; he was not merely under arrest like Beck and adversary proceedings had commenced.

[5] The 8th Circuit decided ***Beck v. Bowersox*** five days after Appellant's opening brief was filed in this Court.

Federal Rule 3 cases are inapposite

The 8th Circuit's ***Beck*** opinion makes clear why Respondent's analogy to Federal Rule 3 cases is inapposite under the facts presented in Mr. Crawford's case (See Respondent's string cite to federal cases at Resp. Br. 19). The 8th Circuit explained that "the prosecutor's affidavit in [***Beck***], like a federal Rule 3 complaint, was filed solely to obtain a warrant for Beck's arrest." ***Beck v. Bowersox*** 362 F.3d at 1102. Federal complaints do not initiate felony proceedings, unlike Missouri complaints filed pursuant to **Rule 22.01**.

In ***Manning v. Bowersox***, *supra*, the defendant argued that the government violated his Sixth Amendment right to counsel by its use of an informant after he was charged by complaint in state court. The State of Missouri argued that Manning's Sixth Amendment rights had not attached because he was charged only by complaint rather than by indictment at the time of his statements (the same argument it makes against Mr. Crawford here). But the 8th Circuit dismissed this distinction, holding that "[t]he right to counsel attached to interrogations conducted after the initiation of adversarial criminal proceedings against the defendant; it is of no import whether the proceedings were initiated by complaint or indictment." *Id.* at 575. ***Manning*** makes clear that a Missouri defendant's 6th Amendment right to counsel attaches following the filing of a complaint or its equivalent. Whereas in ***Beck,*** the Court makes clear that if no charge has been filed, then no adversary proceedings have commenced, and no 6th Amendment right to counsel has attached. In Mr. Crawford's case, the prosecutor initiated adversary

proceedings by filing formal charges via complaint. The investigatory stage had turned accusatory and Mr. Crawford's Sixth Amendment rights had attached.

Out of state cases with dissimilar procedures are also inapposite

Respondent criticizes Mr. Crawford for citing cases from other jurisdictions that have similar procedural rules, and which have held that an "initial appearance" constitutes the initiation of adversary judicial proceedings (Resp. Br. 24-25). *See* ***Brewer v. Williams***, 430 U.S. 387 (1977), ***State v. Jackson***, 380 N.W.2d 420 (Iowa 1986), and ***State v. Johnson***, 318 N.W.2d 417 (Iowa 1982); ***Michigan v. Jackson***, 475 U.S. 625 (1986); and ***McNeil v. Wisconsin***, 501 U.S. 171 (1991). However, Respondent also employs other jurisdictions to support its argument that "the filing of a complaint does not constitute the institution of adversarial judicial proceedings." (Resp. Br. 22). But the cases chosen by Respondent are not helpful because they are dissimilar to Missouri procedure.

For example, Respondent cites two South Carolina cases for the proposition that "Sixth Amendment rights only attach post indictment." (Resp. Br. at 22). This is not surprising since South Carolina has no complaint/preliminary hearing/information procedure. Rather, according to South Carolina law, felony offenses shall only be prosecuted upon grand jury indictment. See S.C. Code Ann. § 17-19-10. Similarly, Respondent cites Alabama cases for the proposition that "adversary prosecutorial proceedings do not begin until indictment filed." (Resp. Br. at 22). What Respondent

fails to mention, however, is that one of those cases explains that, "[i]n Alabama, the filing of an indictment is the mechanism by which felony prosecutions are initiated. Ala. Const. of 1901, Art. I, § 8, as amended by Amend. 37 (1939)." ***Gilchrist v. State***, 585 So.2d 165, 168 (Ala.Cr.App. 1991). Alabama does not have a procedure like Missouri's whereby felony proceedings are initiated by complaint or indictment. **Rule 22.01**.

Respondent also cites one Illinois case, ***People v. Wheeler***, 590 N.E.2d 552 (Ill.App.1991), which, not only seems to be somewhat of an aberration in Illinois law, but also does not stand for the broad proposition that Respondent suggests. Respondent cites ***Wheeler*** for the sweeping proposition that the "filing of a complaint does not constitute a commitment to prosecute." (Resp. Br. at 22). But that is not what ***Wheeler*** says. Wheeler says, "we conclude that <u>in this case</u> the complaint for preliminary hearing did not constitute a commitment by the State to prosecute the defendant. *Id.* at 555. For the general rule, it cites to an Illinois Supreme Court opinion one year earlier, which states: "whether an accused's sixth amendment right to counsel attaches upon the filing of a criminal complaint depends on "the degree to which the State's prosecutorial forces have focused upon the accused." *Id.* (*citing* ***People v. Hayes***, 564 N.E.2d 803 (Ill. 1990) (abrogated on other grounds by ***People v. Tisdel***, 775 N.E.2d 921 (Ill. 2002)). If there is significant prosecutorial involvement in securing the complaint, the defendant's right to counsel will attach. ***People v. Young***, 558 N.E.2d 1287, 1294 (Ill. App. 1990).

In ***Hayes***, the complaint did not trigger Sixth Amendment rights because it was presented in an *ex parte* proceeding by a police officer, rather than an assistant State's Attorney; and second, that the complaint, upon which the warrant was issued, charged the

defendant with the offense of attempted armed robbery rather than the murder of which the defendant was ultimately convicted. ***Hayes***, 564 N.E.2d at 818. Numerous Illinois appellate court decisions continue to acknowledge the United States Supreme Court's holding in ***Moore v. Illinois***, 434 U.S. 220, 228 (1977), which said the prosecution was "commenced under Illinois law when the victim's complaint was filed in court." *See e.g.*, ***People v. Coleman***, 534 N.E.2d 583, 589 (Ill.App.1989). If Respondent is arguing for a test like Illinois, that asks whether or not there was significant involvement by the prosecutor in the filing of the complaint, such involvement is certainly present in Mr. Crawford's case. Mr. Crawford's Sixth Amendment rights had attached.

Mr. Crawford invoked his right to counsel…

He hired a <u>private attorney</u>, Patrick Conroy.

Respondent erroneously asserts that Mr. Crawford's trial attorney was a public defender (Resp. Br. at 15, 27). In reality, Mr. Conroy is a private attorney and has not been employed by the Public Defender System for over a decade.[6] Mr. Crawford retained Mr. Conroy to represent him in this first degree murder case (TR 45-46, 67-69, 72-73). Mr. Conroy surrendered Mr. Crawford to the police (TR 45-46, 67-69, 72-73). The police were fully aware that Mr. Conroy had been hired to represent Mr. Crawford, and in fact, the police officers were told that if they conducted a line-up with Mr. Crawford, that Mr. Conroy should be present (TR 72-73). Certainly Mr. Conroy does not spend his time turning random people into the police and asking to be present at their

[6] According to a check of internal Public defender records.

lineups if he does not engaged in an attorney-client relationship. Mr. Crawford had invoked his right to counsel.

Simply because Mr. Conroy had not entered his appearance until later does not mean that he did not have an attorney-client relationship with Mr. Crawford. It is often several weeks after appointment before appellate attorneys enter their appearance in an appeal. This does not mean that they do not have an attorney-client relationship with the Appellant long before their entries of appearance are filed. Additionally, when Mr. Crawford was brought to the initial appearance on the complaint, he was not referred to the Public Defender's office (Supp. LF 1, Appendix to opening brief A-1). This is because he already had counsel, Mr. Conroy. Rather, the cause was continued for the appearance of counsel (Supp. LF 1).

As Respondent acknowledges in its brief, Mr. Crawford could invoke his Sixth Amendment rights by hiring a lawyer (Resp. Br. 26). And, in fact, he did. Once Mr. Crawford's Sixth Amendment rights had attached and he had invoked them, the police could not conduct a lineup in the absence of his counsel. Respondent mistakenly applies Fifth Amendment cases to suggest that Mr. Crawford had to ask for his counsel to be present at the lineup (Resp. Br. at 28). But acquiescence in a police-initiated procedure after the right to counsel has been invoked is insufficient to show a waiver of Sixth Amendment rights. ***Michigan v. Jackson***, 475 U.S. 625, 635 (1986).

Conclusion

Mr. Crawford's Sixth Amendment right to counsel had attached and been invoked before he was subjected to a line-up in the absence of counsel, either by the filing of the complaint, **Rule 22.01**, or through the initial appearance/arraignment on that complaint, **Rule 31.02**. His Sixth Amendment right to counsel was violated when the police conducted the uncounseled line-up. Mr. Crawford's opening brief fully explicated the prejudice resulting to his trial as a result of the admission of the line-up evidence, and he will not repeat it here. It is sufficient to say that the State's case was built solely upon witness identification. Mr. Crawford must receive a new trial which excludes the illegally-obtained evidence.

The process of live line-up identifications, compelled by the State between the accused and the victim or witnesses to a crime, is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. ***United States v. Wade***, 388 U.S. 218, 228 (1967). The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. ***Id.*** Mr. Crawford's line-up is a textbook example of how to conduct a suggestive lineup. Moreover, (i)t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may, for all practical purposes, be determined there and then, before the trial. ***Id.*** at 229.

But by guaranteeing to defendants the skill and knowledge of counsel, the Sixth

Amendment "minimize[s] the imbalance in the adversary system." ***United States v. Ash***, 413 U.S. 300, 309 (1973). Its role in leveling the playing field between the state and the defendant is "critical to the ability of the adversarial system to produce just results." ***Strickland v. Washington***, 466 U.S. 668, 685 (1984). Counsel can hardly impede legitimate law enforcement; on the contrary, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence. ***Wade***, 388 U.S. at 238. That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice. ***Id.***

CONCLUSION

Because Mr. Crawford was subjected to a post-charge, post-arraignment lineup in the absence of counsel, the trial court plainly erred in allowing the admission of evidence regarding the lineup and identifications based on the lineup (Point I). Further, because the roadside show-up and the subsequent lineup were tainted by suggestive practices, the trial court abused its discretion in allowing the in-court identifications that were based on these tainted procedures as they were inherently unreliable (Point II). And finally, the trial court failed to employ a sufficient procedure to insure that the deliberating jury was not tainted by a newspaper article that implicated Mr. Crawford in the crime (Point III). For all of these reasons, Mr. Crawford respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,

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Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **4,814** words, which does not exceed the 7,750 words allowed for appellant's opening brief.
- ✓ The floppy disc filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which is updated every Sunday (i.e., last updated on June 20, 2004). According to that program, the disc is virus-free.
- ✓ True and correct copies of the attached brief and floppy disc were mailed, this **24th day of June, 2004**, to Karen Kramer, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Amy M. Bartholow