IN THE SUPREME COURT OF THE STATE OF MISSOURI

IN RE THE INTEREST OF:	)
	)
R.B., a male juvenile,	) Appeal No. SC86979

RESPONDENT'S BRIEF ON APPEAL

On Appeal from St. Charles County Juvenile Court
On Transfer from the Eastern District Court of Appeals

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POINTS RELIED ON

I

[Juvenile Officer has no authority to appeal under § 211.261 and

Double Jeopardy bars this appeal]

The Juvenile Officer's right to appeal is purely statutory and the Juvenile Officer lacks standing and thus has no right to appeal this final judgment under Mo. Rev. Stat. § 211.261 because the Juvenile Officer's right to appeal is only as set forth in the statute and the procedural posture of this case is not an enumerated matter permitting the Juvenile Officer to appeal. In addition, the Juvenile Officer's appeal of this matter violates the Double Jeopardy provisions of both the Missouri and Federal Constitutions (U.S.C.A. Const. Amend. 5 and Mo. Const. Art. I, § 19) in that the petition for delinquency, filed under Mo. Rev. Stat. § 211.031, was for two criminal offenses and the Court found that the Juvenile Officer did not meet its burden of proving "beyond a reasonable doubt" that the offenses referenced in the petition had been committed by the Respondent Juvenile .

Mo. Rev. Stat. § 211.261

Mo. Rev. Stat. § 547.200

State v. Puckett, 146 S.W.3d 19 (Mo. Ct. App. 2004)

J.I.S. v. Waldon, 791 S.W.2d 379 (Mo. 1990)

II

[Juvenile Officer's Points Violate Rule 84.04]

Assuming, *arguendo*, the Juvenile Officer has standing on this appeal, this Court should dismiss the appeal since Appellant's points relied on fail to meet the standards set forth in Rule 84.04 and therefore this Court lacks appellate jurisdiction to review the allegations of error raised by the Appellant.

Murphy v. Aetna Cas. & Sur. Co., 955 S.W.2d 949 (Mo. Ct. App. 1997)

Draper v. Aronowitz, 695 S.W.2d 923, 924 (Mo. 1985)

Thummel v. King, 570 S.W.2d 679 (Mo. 1978)

Shochet v. Allen, 987 S.W.2d 516, 518 (Mo. Ct. App. 1999)

III

[Crawford results in Mo. Rev. Stat. § 491.075 being unconstitutional in this case]

The Juvenile Court correctly held that the introduction of the forensic interview of the alleged victim, under Mo. Rev. Stat. § 491.075, as the only substantive evidence of the Juvenile's delinquency was unconstitutional under Crawford v. Washington in that the juvenile was denied his right to cross-examine the witnesses against him, as guaranteed under U.S. Const. Amend. 6 (applicable to the states via the 14th Amendment) and Article I Sec. 18 (a) of the Missouri Constitution.

In re Gault, 387 U.S. 1, 13 (1967)

Crawford v. Washington, 124 S. Ct. 1354 (2004)

Breed v. Jones, 421 U.S. 519, 530 n.12 (1975)

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OBJECTIONS TO APPELLATE JURISDICTION

Respondent (Juvenile) challenges whether the Juvenile Officer has the right to appeal this petition under Mo. Rev. Stat. § 211.261 and the basis for this challenge is set forth in Respondent's first point relied on which is incorporated in this objection. Juvenile Officer's jurisdictional statement and points relied on fail to comply with Rule 84.04.

Assuming, *arguendo*, that the Juvenile Officer does have the right to appeal, Respondent (Juvenile) concurs that this matter falls within the exclusive jurisdiction of the Missouri Supreme Court since the key issue on appeal is whether the Circuit Court of St. Charles County was correct in holding that the application of Mo. Rev. Stat. § 491.075 to a juvenile matter to provide substantive evidence of an offense is unconstitutional in light of the recent holding of the United States Supreme Court in Crawford v. Washington, 124 S. Ct. 1354 (2004). This Court has original appellate jurisdiction under Article V § 3" \s "Art. V § 3" \c 7 of the Missouri Constitution, and thus the transfer of this case to the Supreme Court by the Eastern District Court of Appeals via Article V § 11 of the Missouri Constitution was appropriate.

As a result of the challenges under Mo. Rev. Stat. § 211.261 and Rule 84.04, this Court lacks jurisdiction over this matter and this appeal should be dismissed.

STATEMENT OF FACTS

A. Nature of the case

This is an appeal by the Juvenile Officer in a delinquency proceeding brought under Mo. Rev. Stat. § 211.031. The Juvenile Officer is challenging the Judgment denying his petition for delinquency.

B. Issue on appeal

There are two key issues on appeal: First, does the Juvenile Officer have the statutory and constitutional right to appeal the Judgment in favor of the Juvenile? Second, whether the Juvenile Court erred as a matter of law in holding that Mo. Rev. Stat. § 491.075 was unconstitutional in light of Crawford v. Washington.

C. Facts relevant to issues on appeal

The Juvenile, R.B., is a male born on December 12, 1986 who is now 19 years old. (L.F. 2). The Juvenile Officer for St. Charles County filed a petition against Juvenile, alleging two counts of delinquency. (L.F. 3). These counts included one count of child molestation in the first degree and one count of sexual misconduct involving a child. (L.F. 3). This matter was set for an adjudication hearing on October 26, 2004 and, after taking evidence, the Court took the matter under advisement. (L.F. 1).

On November 29, 2004, the Family Court Commissioner issued its Findings and Recommendations Denying the Petition for Delinquency for the Juvenile. (L.F. 6-9). The Juvenile Officer filed his Notice of Appeal on December 1, 2004. (L.F. 11).

The allegations against the Juvenile were of the nature that the alleged victim's sworn testimony was required. The Juvenile Officer called the alleged victim to the stand and the alleged victim was unable to provide any competent testimony regarding the charges in this matter (Tr. 4-7). The Juvenile was unable to cross-examine the alleged victim regarding the allegations made against him, despite requesting leave to cross-examine the alleged victim. (Tr. 6).

The Juvenile Officer submitted its case by laying a foundation for a forensic interview of the alleged victim and introducing a videotape of the forensic interview into evidence pursuant to Mo. Rev. Stat. § 491.075 and Mo. Rev. Stat. § 492.304. The Juvenile timely objected to the introduction of the videotape into evidence under Crawford v. Washington, 124 S. Ct. 1354 (2004) and the Court overruled the objections. Later, following submission, the Court reconsidered its holding, found Crawford to be applicable, and accordingly held Mo. Rev. Stat. § 491.075 to be unconstitutional and based on its revised conclusions of law, found that the Juvenile Officer failed to present sufficient evidence of the juvenile's delinquency and therefore denied the petition. (L.F. 6-8). This appeal follows.

SUMMARY OF THE ARGUMENT

The Juvenile Officer of St. Charles County filed a delinquency petition against the Respondent, alleging two criminal counts, including sexual abuse of a child. At trial on the petition, the Juvenile Officer called the 10 year old witness to the stand and she was unable to testify in any manner about the charges in this case. On the Juvenile Officer's motion, and over the Juvenile's objection, the alleged victim was declared unavailable to testify. The Juvenile Officer attempted to make a submissible case relying on the forensic interview conducted with the alleged victim. The Juvenile objected to the introduction of this evidence as a violation of his right to confrontation and the trial court denied the objection. After the Court took the matter under submission, the Court denied the petition and excluded the forensic interview as substantive evidence of delinquency against the Juvenile, based on the Confrontation Clause. The Court ruled that Mo. Rev. Stat. § 491.075 is unconstitutional in light of Crawford v. Washington. The Juvenile Officer now appeals.

The Juvenile Officer's appeal should be dismissed by this Court for lack of standing. A juvenile petition is analogous to a criminal "information" charging a criminal offense. The Juvenile Officer was required to prove, beyond a reasonable doubt, that the Juvenile was "guilty" of the alleged offenses. The Juvenile Officer submitted evidence to the Juvenile Court, but its only substantive evidence of the Juvenile's "guilt" was a videotaped forensic interview of the alleged victim. The alleged victim never testified for

the Juvenile Officer and was never subject to cross-examination, although present in Court.

Upon rendering its decision, the Juvenile Court excluded the forensic interview evidence. After exclusion of that evidence, the Juvenile Court found that the Juvenile Officer failed to prove beyond a reasonable doubt that the Juvenile was delinquent (i.e. "guilty") and therefore the Juvenile Court denied the petition which was the equivalent of "acquitting" the Juvenile of the crimes charged.

The Juvenile Officer is now appealing, arguing that this ruling was a "suppression" of evidence ruling which entitles him to have the right to file an interlocutory appeal on suppression issues. However, a review of the statutory and constitutional framework reveals that the trial court's ruling was an evidentiary "exclusion" ruling which is not appealable and Double Jeopardy now bars the Juvenile Court from prosecuting this appeal. In addition, the right to appeal is purely statutory and there is nothing in Mo. Rev. Stat. § 211.261 which authorizes a Juvenile Officer to appeal decisions when a final ruling denying the petition after a finding of insufficient evidence, is authorized. Based on these arguments, the Juvenile Officer's appeal should be dismissed.

Assuming, arguendo, that the Juvenile Officer is permitted to appeal, the Juvenile Officer's appeal should be denied because the Juvenile Court correctly ruled that Mo. Rev. Stat. § 491.075 was unconstitutional. The Juvenile's argument that the Juvenile looses his substantial constitutional right to confront the witnesses against him is contrary to the constitutional rulings of the Supreme Court of the United States.

ARGUMENT

I. [Juvenile Officer has no authority to appeal under § 211.261 and Double Jeopardy bars this appeal]

I. The Juvenile Officer's right to appeal is purely statutory and the Juvenile Officer lacks standing and thus has no right to appeal this final judgment under Mo. Rev. Stat. § 211.261 because the Juvenile Officer's right to appeal is only as set forth in the statute and the procedural posture of this case is not an enumerated matter permitting the Juvenile Officer to appeal. In addition, the Juvenile Officer's appeal of this matter violates the Double Jeopardy provisions of both the Missouri and Federal Constitutions (U.S.C.A. Const. Amend. 5 and Mo. Const. Art. I, § 19) in that the petition for delinquency, filed under Mo. Rev. Stat. § 211.031, was for two criminal offenses and the Court found that the Juvenile Officer did not meet its burden of proving "beyond a reasonable doubt" that the offenses referenced in the petition had been committed by the Respondent Juvenile .

A. Standard of Review

This Court has a duty, *sua sponte*, to determine whether it has appellate jurisdiction. Committee for Educational Equality v. State, 878 S.W.2d 446 (Mo. 1994). The issue of this Court's jurisdiction is *de novo*.

B. Facts in support of Point

In this case, the Juvenile Officer filed a petition alleging that the Juvenile had committed the offense of child molestation and sexual misconduct. The Juvenile Officer was unable to secure the testimony of the ten-year old alleged victim. The only evidence admitted by the Juvenile Officer which addressed the evidence of the offense was the videotape of the forensic interview made by law enforcement and the alleged victim. The victim, although present in Court, was unable to testify regarding the allegations and, therefore, the Juvenile was unable to cross-examine the alleged victim. The forensic interview evidence was introduced, over the Juvenile's objection. When the Juvenile Court issued its judgment, the Juvenile Court reversed its evidentiary ruling and held that the use of the forensic interview videotape under Mo. Rev. Stat. § 491.075 to prove the substantive offense was unconstitutional under Crawford v. Washington, 124 S. Ct. 1354 (2004). The Juvenile Court then held that Mo. Rev. § 491.075, to the extent it permits out of court statement to be used to prove a substantive offense, was unconstitutional in light of Crawford, supra._(L.F. 7-8). Since the Juvenile Officer failed to introduce sufficient evidence of the Juvenile's offenses, the Juvenile Officer's petition was denied (L.F. 9).

C. Argument

The Juvenile Officer's appeal should be dismissed on two separate, yet interrelated grounds: 1) The Juvenile Officer lacks standing to prosecute this appeal and 2) the Double Jeopardy protections afforded to juveniles under the United States Constitution

bar the Juvenile Officer from challenging a trial court's finding which denied a delinquency petition under an insufficiency of the evidence finding.

1) Double Jeopardy protections require dismissal of this appeal

Although this case originates in the Juvenile Court, the delinquency allegations against the Juvenile are criminal in nature. Since juvenile proceedings alleging delinquency via criminal charges are criminal in nature, the Court must protect the Juvenile's state and federal constitutional rights. The United States Supreme Court, in In re Gault, 387 U.S. 1 (1967), held that the constitutional protections and privileges afforded to criminal defendants must be afforded to juveniles. Id. at 49 (holding "juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' . . .").

The double jeopardy protections apply to delinquency proceedings. See generally Breed v. Jones, 421 U.S. 519 (1975) (holding that jeopardy attaches after an adjudication proceeding which precludes trial in criminal court) and Durant v. State, 523 S.W.2d 837 (Mo. Ct. App. 1975) (discussing the double jeopardy protections in the context of the juvenile code when the juvenile court exercised jurisdiction over an assault and then the victim died and a new petition was filed asking for relinquishment of jurisdiction to try the juvenile for murder under the general law).[1] An acquittal, in a criminal case, is final

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[1] During the course of the original oral argument held in front of this Court on November 8, 2005, counsel for the Juvenile Officer admitted that double jeopardy has attached for the juvenile. Oral argument feed for SC86979, www.missourinet.com.

and bars all further efforts of prosecution for the same offense. "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal . . ." United States v. DeFrancesco, 449 U.S. 117, 129 (1980).

In this case, the Juvenile Court denied the Juvenile Officer's petition after a finding of an insufficiency of evidence. While this may leave the Juvenile Officer without the right to appeal certain evidentiary rulings, the problem still remains that the Juvenile, once vindicated of the charges against him, has a right to be free of the Juvenile court's resumption of proceedings against him.

2) The Juvenile Officer lacks standing to prosecute this appeal

A parties' right to appeal in juvenile cases is purely statutory. In the Interest of R.M.P., 811 S.W.2d 61 (Mo. Ct. App. 1991). See also Mo. Const. Art. V § 5 and Mo. R. Civ. Pro. R. 81.01. Mo. Rev. Stat. § 211.261 sets forth the rights of the parties to appeal a judgment of the Juvenile Court, and the Juvenile Officer has no right to appeal the judgment entered in this case. See also Mo. R. Civ. Pro. R. 120.01 ("An appeal shall be allowed as provided by statute).

Specifically, Section 211.261 limits the right of a juvenile officer to appeal a final determination of a petition. This statute has been strictly applied in all contexts to which it applies. See generally J.I.S. v. Waldon, 791 S.W.2d 379 (Mo. 1990) (holding that the prior version of § 211.261 did not authorize the Juvenile Officer to appeal despite the effect of rendering a trial court's judgment unreviewable), In re T.P.S., 595 S.W.2d 320 (Mo. Ct. App. 1980) (holding that the right of appeal under the juvenile code is purely statutory and can not be enlarged by the appellate courts).

A juvenile officer may not appeal a final determination of its petition filed under § 211.031.1(3), unless evidence was suppressed. Mo. Rev. Stat. § 211.261.1-2. See also Mo. R. Civ. Pro. R. 129.13 (prohibiting the juvenile officer from filing motions for rehearing in cases of this nature). Section 211.261 then directs that the time frames applicable to appeals of criminal cases are to be used. See Mo. Rev. Stat. § 547.200 (setting forth the State's very limited rights to appeal in criminal matters).

Like Mo. Rev. Stat. § 211.261, Mo. Rev. Stat. § 547.200 sets forth the very limited circumstances where a prosecutor may appeal a judgment. While "suppression of evidence" rulings are appealable by the State, without offending double jeopardy concerns, a trial court's exclusion of evidence is not. When a trial court determines evidence was illegally obtained (i.e., obtained without an appropriate warrant, illegal search, etc.) then the evidence is deemed "suppressed" by the trial court. A decision which excludes evidence, based on evidentiary rules or statutory grounds, is not appealable. See State v. Puckett, 146 S.W.3d 19 (Mo. Ct. App. 2004) (distinguishing between orders "suppressing" evidence and orders "excluding" evidence). See also State v. Dwyer, 847 S.W.2d 102 (Mo. Ct. App. 1992). "Suppression" of evidence relates to rulings on "motions to suppress" filed by the defendant. See State v. Swope, 939 S.W.2d 491 (Mo. Ct. App. 1997).

In State v. Puckett, supra, the Court held that a prosecutor had no right to appeal an order excluding evidence under a hazardous waste statute since the evidence was not found to be illegal, merely inadmissible. Applying the same analysis in Puckett to this case, yields the same result.

The Juvenile Officer attempts to circumvent these appellate limitations by characterizing the trial court's ruling as a ruling "suppressing evidence." However, this is not an accurate description of the trial court's ruling. The trial court's ruling was clear "The out-of-court statements are inadmissible as substantive evidence against the juvenile." In this case, no "motion to suppress" was filed by the Juvenile. See Mo. Rev. Stat. § 542.296 (detailing the available grounds for a motion to suppress).

Like the defendant in Puckett, the Juvenile did not contend that the forensic interview was obtained illegally. The Juvenile's objections were that the use of the videotape against him, as substantive evidence of guilt, violated his constitutional rights to confront witnesses against him. This is an "exclusion of evidence" ruling and not a "suppression of evidence" ruling. This important distinction is crucial for a determination of whether the Juvenile Officer may appeal its loss.

There are no cases which address the Juvenile Officer's right to appeal orders amounting to "suppression of evidence" in a juvenile case under Mo. Rev. Stat. § 211.261. However, there is ample case law under the analogous Mo. Rev. Stat. § 547.200, the criminal statute, addressing this limited right of appeal for state prosecutors.

In this case, the Juvenile did not file a motion to suppress, and the Juvenile would have not had any legal basis to file a motion to suppress in this case as there was no search and seizure issue. The juvenile did not argue the evidence was obtained in a matter which was illegal. Even the catch-all provisions of Mo. Rev. Stat. § 542.296.5 only apply to unlawful searches and seizures. Instead, the juvenile argued, and ultimately the trial court agreed, that the forensic interview could not be used as substantive

evidence against the juvenile without affording the juvenile a right to cross-examine the alleged victim. After excluding this evidence, the trial court determined there was insufficient evidence of delinquency and denied the petition. As a result of the procedural posture of this case, the Juvenile Officer has no right to appeal the trial court's decision in this matter under Mo. Rev. Stat. § 211.261 and to permit an appeal of a judgment in favor of the juvenile would violate the juvenile's protections against double jeopardy.

II. [Juvenile Officer's Points Violate Rule 84.04]

II. Assuming, *arguendo*, the Juvenile Officer has standing on this appeal, this Court should dismiss the appeal since Appellant's points relied on fail to meet the standard set forth in Rule 84.04 and therefore this Court lacks appellate jurisdiction to review the allegations of error raised by the Appellant.

A point relied on must meet three requirements: 1) it must state the action of the lower court which is being challenged; 2) it must state why the lower court's ruling was wrong; and 3) it must state what was before the lower court that supports the ruling Appellant argues should have been made. Murphy v. Aetna Cas. & Sur. Co., 955 S.W.2d 949 (Mo. Ct. App. 1997). The requirements for a point relied on under Rule 84.04 are mandatory and essential for the appellate courts to function. Draper v. Aronowitz, 695 S.W.2d 923, 924 (Mo. 1985). The Juvenile Officer's "points relied on" are deficient in many respects. The Juvenile Officer's second through fourth points relied on do not state the ruling of the trial court being challenged or the "wherein and why" the Juvenile Court erred and do not follow the mandatory format of Rule 84.04. After stating the action of the lower court that is being challenged, "the court then must be informed wherein the testimony or evidence gives rise to the ruling for which appellant contends." Thummel v. King, 570 S.W.2d 679 (Mo. 1978) See also Shochet v. Allen, 987 S.W.2d 516, 518 (Mo. Ct. App. 1999). Based on the foregoing, Appellant's appeal should be dismissed.

III. [Crawford results in Mo. Rev. Stat. § 491.075 being unconstitutional in this case]

III. The Juvenile Court correctly held that the introduction of the forensic interview of the alleged victim, under Mo. Rev. Stat. § 491.075, as the only substantive evidence of the Juvenile's delinquency was unconstitutional under Crawford v. Washington in that the juvenile was denied his right to cross-examine the witnesses against him, as guaranteed under U.S. Const. Amend. 6 (applicable to the states via the 14th Amendment) and Art. I Sec. 18 (a) of the Missouri Constitution.

A. Standard of Review

The Juvenile Officer argues that the standard of review in this matter should be the standard applied to appellate court review of issues pertaining to "suppression of evidence." However, as set forth above, the trial court did not "suppress" evidence, but instead excluded the evidence at trial. Thus, the standard of review is as set forth in juvenile proceedings.

In juvenile proceedings, the trial court's order is sustained unless no substantial evidence supports it, it is against the weight of the evidence, or it erroneously declares or applies the law. In re T.B., 936 S.W.2d 913, 914 (Mo. Ct. App. 1997). The trial court's decision on whether to admit or exclude evidence is reviewed under the abuse of discretion standard of review. State v. Strughold, 973 S.W.2d 876, 887 (Mo. Ct. App. 1998) See also State v. Bullock, 2005 WL 3434389 (Mo. S.D. 2005) (holding that the

standard of review for determining compliance with Mo. Rev. Stat. § 492.304 is "abuse of discretion."). In the event this Court finds that the Juvenile Court's ruling was equivalent to a ruling on a motion to suppress, then the trial court's ruling on a motion to suppress may be reversed only if it is clearly erroneous. State v. McFall, 991 S.W.2d 671, 673 (Mo. Ct. App. 1999). To the extent the Juvenile Officer's challenges are viewed as challenging whether § 491.075 and § 492.304 are unconstitutional, Juvenile concurs the standard of review is *de novo*.

B. Factual Basis for Point

The Juvenile Officer introduced a forensic interview tape of the alleged minor victim, over the Juvenile's timely objection and pursuant to Mo. Rev. Stat. § 491.075, after the alleged victim was unable to testify in the proceedings against the juvenile. When the Juvenile Court issued its opinion, the Juvenile Court found that the Juvenile's right to confront the witnesses against him was violated by relying solely on the videotape and, after excluding that evidence from its consideration, denied the Juvenile Officer's delinquency petition. The Juvenile Court ruled that the witness, although on the stand and testifying, was unavailable as if she were out of state. There was no evidentiary support, on the record, for the alleged victim to be deemed unavailable to testify.

C. Argument

"[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."

In re Gault, 387 U.S. 1, 13 (1967).

The Sixth Amendment, part of those 'Bill of Rights,' guarantees a state criminal defendant the right to cross-examine and confront witnesses against him. Davis v. Alaska, 415 U.S. 308, 315 (1974) (detailing why the ability to cross-examine witnesses is critical to the confrontation process). See also State v. Hester, 801 S.W.2d 695, 697 (Mo. 1991) (noting that the protections afforded by Mo. Const. Art. I, § 18(a) are coexistent with the Sixth Amendment protections). At the time of the enactment of the Bill of Rights, there was no Juvenile Court. "Before the nineteenth century, common law did not differentiate between adults and children charged with crime." Kristin Henning, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel, 81 NOTRE DAME L. REV. 245, 249 (Nov. 2005)[2]

In 2004, the United States Supreme Court redefined the Confrontation Clause jurisprudence in Crawford v. Washington, 124 S. Ct. 1354 (2004). Crawford addressed the introduction of an out of court statement made by defendant's wife to a police officer while the police were investigating charges against the Defendant. Id. The Court, relying on a defendant's right to confront witnesses, barred the use of the Wife's

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[2] The concept of a Juvenile Court is a little over 100 years old. Henning, 81 NOTRE DAME L. REV. at 249.

testimonial out-of-court statements at trial, unless the witness is unavailable *and* the defendant previously had an opportunity to cross-examine that witness. Id. at 68. The applicability of this case to a Juvenile Court proceeding is at issue here.

1. Juveniles facing commitment at the Division of Youth Services have the same constitutional right to confront witnesses as adult criminal defendants.

The Juvenile Officer begins his analysis by arguing that the Sixth Amendment should not be applied to Juvenile proceedings where incarceration in the Division of Youth Services is possible and where the burden of proof for the Juvenile Officer is beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 368 (1970) (holding the burden of proof in a delinquency proceeding is "beyond a reasonable doubt."). Such an argument offends the traditional notions of justice long established in our judicial system. Even the Juvenile Officer recognizes that commitment to DYS is a "sanction" for the juvenile. (Appellant's Brief at 23). The Juvenile Officer is correct that this is a case of first impression in Missouri. However, this case can be resolved on well-established standards of constitutional law and due process.

The Juvenile Officer's attempt to characterize the commitment option as purely rehabilitative negates the fact that commitment is still commitment, even if disguised with stuffed animals and brightly colored doors. The reality is that juvenile delinquents do not get sent to foster care like abuse and neglect victims (who are also adjudicated

under Mo. Rev. Stat. § 211.031), they get sent to a place where their freedoms are curtailed.

The Juvenile Officer's rehabilitative argument was explicitly rejected by the United States Supreme Court in Breed v. Jones, 421 U.S. 519, 530 n.12 (1975) when the Court held that the rehabilitative purpose of a Juvenile's commitment does not change the nature of juvenile adjudications. "Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration. The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken." Id. The Court went on to hold that "there is little to distinguish an adjudicatory hearing such as was held in [Breed] from a traditional criminal prosecution." Id. at 530.

A juvenile's freedom is curtailed well beyond the "substitute parent" argument advanced under the *parens patrriae* provisions of Missouri's code. The Juvenile Officer's reliance on In re R.L.C., Jr., 967 S.W.2d 674 (Mo. Ct. App. 1998), is not applicable in this case for several reasons. First, R.L.C. addressed a post-adjudication commitment to DYS, rather than the adjudication phase of commitment. Second, given the hybrid nature of juvenile proceedings, it is not persuasive that the constitutional analysis of ex post facto issues should be applied to Sixth Amendment issues. Third, R.L.C. directly contradicts the Supreme Court's holding in Breed v. Jones, supra.

Until Gault, supra, the idea of courts protecting the rights of juveniles was foreign. After Gault, the fundamental rights of juveniles in an adjudicative proceeding are paramount. Now, because of Crawford v. Washington, supra, these fundamental

constitutionals rights should include the right to confront an accuser, just like adult criminal defendants or certified juveniles being prosecuted under the general law.

The Supreme Court recognized the subtle, yet necessary, differences between the juvenile adjudication process and the criminal adjudication process. Gault, 387 U.S. at 14. "Under our Constitution, the condition of being a boy does not justify a kangaroo court." Id. at 28. Recognizing that the right of confrontation is absolute, the Juvenile Court in this case correctly applied the full panoply of constitutional rights afforded a criminal defendant to the Juvenile in this matter, as required under In re Gault, 387 U.S. 1 (1967) (holding a juvenile is entitled to "due process" rights) and Kent v. United States, 383 U.S. 541 (1966) (holding that a juvenile is entitled to a certification hearing but declining to rule on whether juveniles are entitled to all constitutional guarantees applicable to adults). .

The Juvenile Officer incorrectly argues that the hybrid nature of the juvenile adjudication process requires a finding that the juvenile is not granted a right to confront the witnesses against him. The Juvenile Officer relies on statutory construction standards for determining whether a statute is criminal or civil. However, the answer does not rest with statutory construction, but with a full exploration of the juvenile's constitutional rights as afforded under both the federal and state constitutions.

The Supreme Court has not afforded a juvenile all of the federal constitutional rights of an adult defendant. In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Supreme Court held that a juvenile, charged with delinquency, is not entitled to a trial by jury during the adjudicative stage of the juvenile proceedings. However, as the McKeiver

Court noted "Due process . . . was held to embrace adequate written notice; advice as to the right to counsel, retained or appointed; *confrontation; and cross-examination*." Id. at 531 (citing Gault, supra) (emphasis added). While recognizing the unique nature of juvenile proceedings, the McKeiver Court stated "Some of the constitutional requirements attendant upon the state criminal trial have equal application to that part of the state juvenile proceeding that is adjudicative in nature. Among these are the rights to appropriate notice, to counsel, to confrontation and to cross-examination, and the privilege against self-incrimination." McKeiver, supra at 533. Despite the holding in McKeiver that there is no right to a jury trial in a juvenile adjudication proceeding, the McKeiver court does reaffirm the holdings in Gault and its progeny.

The conclusion that juveniles have Confrontation Clause rights is consistent with rulings in other states which have addressed the applicability of the Confrontation Clause to adjudication proceedings. See In re A.L. 2006 WL 9511 (N. Ca. App. Jan. 3, 2006) (stating "In a juvenile adjudicatory hearing, the [juvenile] is entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults."), In re T.T., 351 Ill. App. 3d 976 (Ill. Ct. App. 2004) (holding that the Confrontation Clause applies to juvenile adjudication proceedings to bar the admission of a forensic interview when child victim unable to testify), People ex rel. R.A.S. 111 P. 3d 487 (Col. Ct. App. 2004) (holding that the state's use of a videotaped statement of a child victim, in a juvenile adjudication proceeding, violated the juvenile's rights under the Confrontation Clause). But see In re Brian B.,689 N.W.2d 184, 189 (Neb. 2004) (holding that the

"heightened standards" of the Confrontation Clause do not apply to juvenile court proceedings).

Missouri clearly recognized the juvenile's rights to cross-examine a child victim when it enacted Mo. Rev. Stat. § 491.699 (part of the "Child Victim Witness Protection Law"). Under § 491.699, the juvenile officer may use a deposition of a child victim in lieu of live testimony if the juvenile is given at least two opportunities to cross-examine the child victim and the court oversees the deposition testimony of the alleged victim and ensures that the rules of evidence have been honored. As a result of the juvenile's constitutional right to confrontation and the protections afforded the juvenile under § 491.699, it is undeniable that a Missouri juvenile offender has a right to confront his accusers and that such a right would be denied the Juvenile in this case if the premise of the Juvenile Officer's appeal is accepted.

2. The forensic interview is testimonial as defined under Crawford

Once this Court accepts the premise that an alleged juvenile delinquent is entitled to confront his accusers, the next question is whether the forensic interview is of the testimonial nature barred under the Confrontation Clause. The Eighth Circuit has held when an alleged child victim makes an allegation of abuse to a government agent or during a forensic interview, the statements are testimonial. United States v. Bordeaux, 400 F. 3d 548 (8th Cir. 2005). In Bordeaux, the Eighth Circuit held that the admission of a videotape forensic interview of a child victim who was only available by closed circuit

television for cross-examination violated a defendant's rights under the Confrontation Clause.

The Juvenile Officer does not argue that the forensic interview of the alleged victim is not the type of testimonial statement now excluded under Crawford. Crawford is clearly meant to cover this type of forensic interview. "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard . . ." Crawford, supra at 52-53. "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 68. Thus, the videotaped forensic interview is clearly the type of statement governed by Crawford. Other states agree.

The Colorado Court of Appeals has ruled that a forensic interview admitted against a juvenile when the victim was unavailable to testify, violates the juveniles right to confrontation. In re R.A.S., 111 P. 3d 487 (Col. Ct. App. 2005). Here, like in R.A.S., the juvenile was denied the rights afforded to him under the Constitution of the United States and, as a result, the petition for adjudication was dismissed. Id. The Illinois Court of Appeals has ruled, in a case closely analogous to this one, that an alleged child victim's statements to a detective and forensic interviews were testimonial in nature and could not be used, in light of Crawford, when the alleged victim was too traumatized to testify. In re T.T., 351 Ill. App. 3d 976, 989 (Ill. Ct. App. 2004). See also State v. Mack, 101 P. 3d 349 (Or. 2004) (holding statements of three year old to social worker during police directed interview testimonial); People v. Sisavath, 13 Cal. Rptr. 3d 419 (Cal. App. 2004) (holding child's statements to forensic interviewer are testimonial); A.G.G. v.

Commonwealth, 2005 WL 1703599 (Ky. App. July 22, 2005), review granted Nov. 16, 2005(holding statements to private counselor are testimonial). Thus, the forensic interview of the alleged victim was "testimonial" and thus triggers Crawford protections.

3. Mo. Rev. Stat. § 491.075 and Mo. Rev. Stat. § 492.304 do not survive a Crawford challenge

In 1990, the United States Supreme Court adopted a 4 factor test for determining the "indicia of reliability" of child abuse hearsay statements. The Court's factors were: "1) spontaneity and consistent repetition; 2) the mental state of the declarant; 3) use of terminology unexpected of a child of a similar age; and 4) lack of motive to fabricate." Idaho v. Wright, 497 U.S. 805, 821-22 (1990) Following this ruling, Mo. Rev. Stat. § 491.075 was amended to authorize the admission of hearsay statements of a child victim. Now, under Crawford, when a hearsay statement is 'testimonial,' the confrontation clause bars the prosecution from using it against a criminal defendant unless the declarant is available to testify at trial, or the Defendant had a previous opportunity to cross-examine the declarant. Most testimonial hearsay is now inadmissible regardless if the statement falls within a state law hearsay exception or bears indicia of reliability.

The principles articulated in Crawford v. Washington, supra, which involve a criminal defendant's right to confront witnesses against him under the Sixth Amendment, alters the due process analysis of the admissibility of child victim hearsay statements. In light of Crawford, the application of the "reliability test" set forth in Idaho v Wright violates the due process guarantees of confrontation afforded to juveniles in delinquency

proceedings. Specifically, the Wright Court heavily relied on Ohio v. Roberts in formulating its standards for admitting child victim statements. Now that Ohio v. Roberts is no longer good law, the viability of Idaho v. Wright remains questionable. See Erin Thompson, Child Sexual Abuse Victims: How will their stories be heard after Crawford? 27 CAMPBELL L. REV. 279 (2005)(providing a detailed list of sexual abuse cases across the country which have been affected by Crawford).

Crawford's ruling is not entirely inconsistent with the Court's holding in Maryland v. Craig, 497 U.S. 836 (Mo. 1990). In Maryland v Craig, the Supreme Court held that an alleged child victim's testimony via one-way closed circuit television would not violate the defendant's right to confrontation. In so ruling, the Court held that Maryland's standards that the child be competent to testify, that the child testify under oath, that the defendant had the ability to cross-examine the witness, and the fact-finder was able to view the witness' demeanor were constitutionally sound under the Confrontation Clause of the Sixth Amendment. Id. at 851-52.[3]

Recognizing the sensitivity of child victims, Missouri has enacted the "Child Victim Witness Protection Law", Mo. Rev. Stat. § 491.675 to Mo. Rev. Stat. § 491.705. This statutory scheme sets forth detailed procedures for protecting the alleged victim's psychological well-being and the same provisions are used by prosecutors under Mo.

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[3] Missouri, for whatever reason, has chosen not to join the other states that have enacted rules authorizing the use of one-way closed circuit television testimony in child abuse cases. See Maryland v. Craig, supra, at 854 n.2 & n.3.

Rev. Stat. § 491.680 which is also part of the same act. Here, the Juvenile Officer did not seek to secure the testimony of the alleged child victim under this statutory scheme in this trial, as he is specifically permitted to do under Mo. Rev. Stat. § 491.699. The Juvenile Officer's failure to secure the alleged victim's testimony in a manner which would protect the constitutional rights of the juvenile should not cause the juvenile to lose his constitutional rights.

The Juvenile Officer's reliance on Mo. Rev. Stat. § 492.304 does not address the Crawford concerns, nor does it comply with the requirements of Mo. Rev. Stat. § 491.699. In addition, Mo. Rev. Stat. § 492.304 states that the videotape forensic interview is only admissible if the tape is admissible under § 491.075. Section 491.075, by its terms, is limited to "criminal proceeding in courts of this state." Mo. Rev. Stat. § 491.075.1 (2004). The Juvenile Officer has failed to demonstrate that Mo. Rev. Stat. § 492.304 satisfies the Crawford factors for permitting the introduction of the forensic interview.

4. The trial court had authority to change its mind regarding the admissibility of the forensic interview

The Juvenile Officer argues that the Court deprived him of his right to a full and fair hearing by excluding the forensic interview after admitting the forensic interview. The Juvenile Officer has cited no authority for this proposition and has not explained the absence of authority. As stated in the standard of review, evidentiary decisions with a trial court are discretionary. The Juvenile Officer made his decision to rest his case

without any substantive evidence of the Juvenile's offense. The trial court appropriately used its discretion in this matter to exclude the evidence upon final judgment.

CONCLUSION

The Juvenile Officer's appeal should be dismissed for lack of standing and for violation of the Juvenile's right to protections under the Double Jeopardy clause. In the alternative, the judgment of the Juvenile Court should be affirmed on the basis that Mo. Rev. Stat. § 491.075 and Mo. Rev. Stat. § 492.304 are unconstitutional in light of Crawford v. Washington.

MANDATORY CERTIFICATIONS

I, Benicia Baker-Livorsi, counsel for the Juvenile, do hereby certify that this brief complies with Rule 84.06 and that this brief contains 7548 words. I further certify that all electronic copies of the brief were scanned for viruses and were reported to be virus free.

I also certify that the above brief was served, via email, on John Smith, Counsel for the Juvenile Officer of St. Charles County, at "John.Smith@courts.mo.gov" and Timothy Mooney, via email, at tcmooney@bryancave.com.

_____

Benicia Baker-Livorsi #45077

IN THE SUPREME COURT OF THE STATE OF MISSOURI

IN RE THE INTEREST OF:	)	
	)	
R.B., a male juvenile,	)	Appeal No. SC86979

RESPONDENT'S APPENDIX TO BRIEF

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State Statutes

Mo. Rev. Stat. Sec. 211.031 1

Mo. Rev. Stat. Sec. 211.261 4

Mo. Rev. Stat. Sec. 491.075 5

Mo. Rev. Stat. Sec. 491.675 6

Mo. Rev. Stat. Sec. 491.680 6

Mo. Rev. Stat. Sec. 491.699 7

Mo. Rev. Stat. Sec. 491.705 8

Mo. Rev. Stat. Sec. 492.304 8

Mo. Rev. Stat. Sec. 542.296 10

Mo. Rev. Stat. Sec. 547.200 12

Constitutional Provisions

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Mo. Const. Art. I § 19 13

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211.031. Juvenile court to have exclusive jurisdiction, when--exceptions

1. Except as otherwise provided in this chapter, the juvenile court or the family court in circuits that have a family court as provided in sections 487.010 to 487.190, RSMo, shall have exclusive original jurisdiction in proceedings:

(1) Involving any child or person seventeen years of age who may be a resident of or found within the county and who is alleged to be in need of care and treatment because:

(a) The parents, or other persons legally responsible for the care and support of the child or person seventeen years of age, neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his or her well-being; except that reliance by a parent, guardian or custodian upon remedial treatment other than medical or surgical treatment for a child or person seventeen years of age shall not be construed as neglect when the treatment is recognized or permitted pursuant to the laws of this state;

(b) The child or person seventeen years of age is otherwise without proper care, custody or support; or

(c) The child or person seventeen years of age was living in a room, building or other structure at the time such dwelling was found by a court of competent jurisdiction to be a public nuisance pursuant to section 195.130, RSMo;

(d) The child or person seventeen years of age is a child in need of mental health services and the parent, guardian or custodian is unable to afford or access appropriate mental health treatment or care for the child;

(2) Involving any child who may be a resident of or found within the county and who is alleged to be in need of care and treatment because:

(a) The child while subject to compulsory school attendance is repeatedly and without justification absent from school; or

(b) The child disobeys the reasonable and lawful directions of his or her parents or other custodian and is beyond their control; or

(c) The child is habitually absent from his or her home without sufficient cause,

permission, or justification; or

(d) The behavior or associations of the child are otherwise injurious to his or her welfare or to the welfare of others; or

(e) The child is charged with an offense not classified as criminal, or with an offense applicable only to children; except that, the juvenile court shall not have jurisdiction over any child fifteen and one-half years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony, or any child who is alleged to have violated a state or municipal ordinance or regulation prohibiting possession or use of any tobacco product;

(3) Involving any child who is alleged to have violated a state law or municipal ordinance, or any person who is alleged to have violated a state law or municipal ordinance prior to attaining the age of seventeen years, in which cases jurisdiction may be taken by the court of the circuit in which the child or person resides or may be found or in which the violation is alleged to have occurred; except that, the juvenile court shall not have jurisdiction over any child fifteen and one-half years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony, and except that the juvenile court shall have concurrent jurisdiction with the municipal court over any child who is alleged to have violated a municipal curfew ordinance, and except that the juvenile court shall have concurrent jurisdiction with the circuit court on any child who is alleged to have violated a state or municipal ordinance or regulation prohibiting possession or use of any tobacco product;

(4) For the adoption of a person;

(5) For the commitment of a child or person seventeen years of age to the guardianship of the department of social services as provided by law.

2. Transfer of a matter, proceeding, jurisdiction or supervision for a child or person seventeen years of age who resides in a county of this state shall be made as follows:

(1) Prior to the filing of a petition and upon request of any party or at the discretion of the juvenile officer, the matter in the interest of a child or person seventeen years of age may be transferred by the juvenile officer, with the prior consent of the juvenile officer of the receiving court, to the county of the child's residence or the residence of the person seventeen years of age for future action;

(2) Upon the motion of any party or on its own motion prior to final disposition on the pending matter, the court in which a proceeding is commenced may transfer the proceeding of a child or person seventeen years of age to the court located in the county of the child's residence or the residence of the person seventeen years of age, or the county in which the offense pursuant to subdivision (3) of subsection 1 of this section is alleged to have occurred for further action;

(3) Upon motion of any party or on its own motion, the court in which jurisdiction has been taken pursuant to subsection 1 of this section may at any time thereafter transfer jurisdiction of a child or person seventeen years of age to the court located in the county of the child's residence or the residence of the person seventeen years of age for further action with the prior consent of the receiving court;

(4) Upon motion of any party or upon its own motion at any time following a judgment of disposition or treatment pursuant to section 211.181, the court having jurisdiction of the cause may place the child or person seventeen years of age under the supervision of another juvenile court within or without the state pursuant to section 210.570, RSMo, with the consent of the receiving court;

(5) Upon motion of any child or person seventeen years of age or his or her parent, the court having jurisdiction shall grant one change of judge pursuant to Missouri Supreme Court Rules;

(6) Upon the transfer of any matter, proceeding, jurisdiction or supervision of a child or person seventeen years of age, certified copies of all legal and social documents and records pertaining to the case on file with the clerk of the transferring juvenile court shall accompany the transfer.

3. In any proceeding involving any child or person seventeen years of age taken into custody in a county other than the county of the child's residence or the residence of a person seventeen years of age, the juvenile court of the county of the child's residence or the residence of a person seventeen years of age shall be notified of such taking into custody within seventy-two hours.

4. When an investigation by a juvenile officer pursuant to this section reveals that the only basis for action involves an alleged violation of section 167.031, RSMo, involving a child who alleges to be home schooled, the juvenile officer shall contact a parent or parents of such child to verify that the child is being home schooled and not in violation of section 167.031, RSMo, before making a report of such a violation. Any report of a violation of section 167.031, RSMo, made by a juvenile officer regarding a child who is being home schooled shall be made to the prosecuting attorney of the county where the child legally resides.

211.261. Appeals

1. An appeal shall be allowed to the child from any final judgment, order or decree made under the provisions of this chapter and may be taken on the part of the child by its parent, guardian, legal custodian, spouse, relative or next friend. An appeal shall be allowed to a parent from any final judgment, order or decree made under the provisions of this chapter which adversely affects him. An appeal shall be allowed to the juvenile officer from any final judgment, order or decree made under this chapter, except that no such appeal shall be allowed concerning a final determination pursuant to subdivision (3) of subsection 1 of section 211.031. Notice of appeal shall be filed within thirty days after the final judgment, order or decree has been entered but neither the notice of appeal nor any motion filed subsequent to the final judgment acts as a supersedeas unless the court so orders.

2. Notwithstanding the provisions of subsection 1 of this section, an appeal shall be allowed to the juvenile officer from any order suppressing evidence, a confession or an admission, in proceedings under subdivision (3) of subsection 1 of section 211.031.

3. The appeal provided for in subsection 2 of this section shall be an interlocutory appeal, filed in the appropriate district of the Missouri court of appeals. Notice of such interlocutory appeal shall be filed within three days of the entry of the order of trial court; the time limits applicable to such appeal shall be the same as in interlocutory appeals allowed to the state in criminal cases.

491.075. Statement of child under twelve admissible, when

1. A statement made by a child under the age of fourteen relating to an offense under chapter 565, 566 or 568, RSMo, performed with or on a child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if:

> (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
> (2) (a) The child testifies at the proceedings; or
> (b) The child is unavailable as a witness; or
> (c) The child is otherwise physically available as a witness but the court finds that the significant emotional or psychological trauma which would result from testifying in the personal presence of the defendant makes the child unavailable as a witness at the time of the criminal proceeding.

2. Notwithstanding subsection 1 of this section or any provision of law or rule of evidence requiring corroboration of statements, admissions or confessions of the defendant, and notwithstanding any prohibition of hearsay evidence, a statement by a child when under the age of fourteen who is alleged to be victim of an offense under chapter 565, 566 or 568, RSMo, is sufficient corroboration of a statement, admission or confession regardless of whether or not the child is available to testify regarding the offense.

3. A statement may not be admitted under this section unless the prosecuting attorney makes known to the accused or the accused's counsel his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the accused or the accused's counsel with a fair opportunity to prepare to meet the statement.

4. Nothing in this section shall be construed to limit the admissibility of statements, admissions or confessions otherwise admissible by law.

491.675. Citation of sections 491.675 to 491.705

The provisions of sections 491.675 to 491.705 shall be known and may be cited as the "Child Victim Witness Protection Law".

491.680. Court may order video recording of alleged child victim, when--procedure--transcript--exclusion of defendant from proceedings, opportunity to review--cross examination

1. In any criminal prosecution under the provisions of chapter 565, 566 or 568, RSMo, involving an alleged child victim, upon the motion of the prosecuting attorney, the court may order that an in-camera videotaped deposition of the testimony of the alleged child victim be made for use as substantive evidence at preliminary hearings and at trial.

2. If the court finds, at a hearing, that significant emotional or psychological trauma to the child which would result from testifying in the personal presence of the defendant exists, which makes the child unavailable as a witness at the time of the preliminary hearing or trial, the court shall order that an in-camera videotaped deposition of the testimony of the alleged child victim be made for use as substantive evidence at the preliminary hearings and at trial. Such recording shall be retained by the prosecuting attorney and shall be admissible in lieu of the child's personal appearance and testimony at preliminary hearings and at trial, conflicting provisions of section 544.270, RSMo, notwithstanding. A transcript of such testimony shall be made as soon as possible after the completion of such deposition and shall be provided to the defendant together with all other discoverable materials.

3. Upon a finding of trauma as provided for in subsection 2 of this statute, the court may also exclude the defendant from the videotape deposition proceedings in which the child is to testify. Where any such order of exclusion is entered, the child shall not be excused as a witness until the defendant has had a reasonable opportunity to review the videotape deposition in private with his counsel and to consult with his counsel; and until his counsel has been afforded the opportunity to cross-examine the child following such review and consultation.

4. The court shall preside over the depositions, which shall be conducted in accordance with the rules of evidence applicable to criminal cases.

5. The attorney for the defendant shall have at least two opportunities to cross-examine the deposed alleged child victim: once prior to the preliminary hearing and at least one additional time prior to the trial.

6. Prior to the taking of the deposition which is to be used as substantive evidence at the trial pursuant to sections 491.675 to 491.693, the defendant's attorney shall be provided with such discoverable materials and information as the court may, on motion, direct; shall be afforded a reasonable time to examine such materials; and shall be permitted to cross-examine the child during the deposition.

7. If the defendant is not represented by counsel and if, upon inquiry, it appears to the court that the defendant will be unable to obtain counsel within a reasonable period of time, the court shall appoint the public defender or other counsel to represent the defendant at the deposition.

491.699. Juvenile court hearings--court may order video recording of alleged child victim, when--procedure--cross-examination--counsel appointed for perpetrator, when

1. Upon the motion of the juvenile officer, the court may order that an in-camera videotaped recording of the testimony of the alleged child victim be made for use as substantive evidence at a juvenile court hearing held pursuant to the provisions of chapter 211, RSMo. The provisions of section 491.075 relating to the admissibility of statements made by a child under the age of twelve shall apply to proceedings in juvenile court.

2. In determining whether or not to allow such motion, the court shall consider the elements of the offense charged and the emotional or psychological trauma to the child if required to testify in open court or to be brought into the personal presence of the alleged perpetrator. Such recording shall be retained by the juvenile officer and shall be admissible in lieu of the child's personal appearance and testimony at juvenile court hearings. A transcript of such testimony shall be made as soon as possible after the completion of such deposition and shall be provided to all parties to the action.

3. The court shall preside over the depositions, which shall be conducted in accordance with the rules of evidence applicable to civil cases.

4. In any prosecution under either subdivision (2) or (3) of subsection 1 of section 211.031, RSMo, the attorney for the alleged perpetrator shall have at least two opportunities to cross-examine the deposed alleged child victim.

5. Prior to the taking of the deposition which is to be used as substantive evidence at the hearing pursuant to sections 491.696 to 491.705, the attorney for any party to the action shall be provided with such discoverable materials and information as the court may, on motion, direct; shall be afforded a reasonable time to examine such materials; and shall be permitted to cross-examine the child during the deposition.

6. In any prosecution under either subdivision (2) or (3) of subsection 1 of section 211.031, RSMo, if the alleged perpetrator is not represented by counsel and if, upon inquiry, it appears to the court that he or she will be unable to obtain counsel within a reasonable period of time, the court shall appoint the public defender or other counsel to represent the alleged perpetrator at the deposition.

491.705. Court may order videotaped reexamination, when--testimony to be under oath

1. At any time prior to a hearing, and for good cause shown, the court may, upon motion of any party, order a videotaped reexamination of the child where the interests of justice so require.

2. All testimony taken under sections 491.696 to **491.705** shall be under oath.

492.304. Visual and aural recordings of child under twelve admissible, when

1. In addition to the admissibility of a statement under the provisions of section 492.303, the visual and aural recording of a verbal or nonverbal statement of a child when under the age of fourteen who is alleged to be a victim of an offense under the provisions of chapter 565, 566 or 568, RSMo, is admissible into evidence if:

(1) No attorney for either party was present when the statement was made; except that, for any statement taken at a state-funded child assessment center as provided for in subsection 2 of section 210.001, RSMo, an attorney representing the State of Missouri in a criminal investigation may, as a member of a multidisciplinary investigation team, observe the taking of such statement, but such attorney shall not be present in the room where the interview is being conducted;

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

(3) The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;

(4) The statement was not made in response to questioning calculated to lead the child to make a particular statement or to act in a particular way;

(5) Every voice on the recording is identified;

(6) The person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party; and

(7) The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence.

2. If the child does not testify at the proceeding, the visual and aural recording of a verbal or nonverbal statement of the child shall not be admissible under this section unless the recording qualifies for admission under section 491.075, RSMo.

3. If the visual and aural recording of a verbal or nonverbal statement of a child is admissible under this section and the child testifies at the proceeding, it shall be admissible in addition to the testimony of the child at the proceeding whether or not it repeats or duplicates the child's testimony.

4. As used in this section, a nonverbal statement shall be defined as any demonstration of the child by his or her actions, facial expressions, demonstrations with a doll or other visual aid whether or not this demonstration is accompanied by words.

542.296. Motion to suppress, grounds for

1. A person aggrieved by an unlawful seizure made by an officer and against whom there is a pending criminal proceeding growing out of the subject matter of the seizure may file a motion to suppress the use in evidence of the property or matter seized. For the purposes of this section, a pending criminal proceeding shall mean any criminal investigation being conducted with the intention of using the seized subject matter in seeking an indictment or information or when an information has been issued or an indictment returned.

2. The motion to suppress shall be in writing. It shall be filed with the court in which there is pending against the moving party a criminal proceeding growing out of the subject matter of the seizure.

3. The motion shall be made before the commencement of the trial of the moving party on the charge arising out of the seizure unless he was unaware of the grounds or had no opportunity to do so before the trial. In that event the motion may be made during the trial. However, the trial judge may in his discretion entertain a motion any time during trial.

4. Notice shall be given to the prosecuting attorney of the date, time, place and nature of the hearing.

5. The motion to suppress may be based upon any one or more of the following grounds:

> (1) That the search and seizure were made without warrant and without lawful authority;
>
> (2) That the warrant was improper upon its face or was illegally issued, including the issuance of a warrant without proper showing of probable cause;
>
> (3) That the property seized was not that described in the warrant and that the officer was not otherwise lawfully privileged to seize the same;
>
> (4) That the warrant was illegally executed by the officer;
>
> (5) That in any other manner the search and seizure violated the rights of the movant under section 15 of article I of the Constitution of Missouri, or the fourth and fourteenth amendments of the Constitution of the United States.

6. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. The burden of going forward with the evidence and the risk of nonpersuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled.

7. If the motion is sustained, the judge shall order the property or matter delivered to the moving party, unless its retention is authorized or required by section 542.301, or by any other law of this state.

547.200. Appeal by state

1. An appeal may be taken by the state through the prosecuting or circuit attorney from any order or judgment the substantive effect of which results in:

(1) Quashing an arrest warrant;

(2) A determination by the court that the accused lacks the mental capacity or fitness to proceed to trial, pursuant to section 552.020, RSMo;

(3) Suppressing evidence; or

(4) Suppressing a confession or admission.

2. The state, in any criminal prosecution, shall be allowed an appeal in the cases and under the circumstances mentioned in section 547.210 and in all other criminal cases except in those cases where the possible outcome of such an appeal would result in double jeopardy for the defendant. The supreme court shall issue rules governing such appeals.

3. The appeal provided in subsection 1 of this section shall be an interlocutory appeal, filed in the appropriate district of the Missouri court of appeals, unless the proceedings involve a charge of capital murder or murder in the first degree, pursuant to the provisions of section 565.001 or 565.003, RSMo, in which case notices of appeal shall be filed in the supreme court of Missouri.

4. Notices of appeal involving appeals under subsection 1 of this section shall be filed in the appropriate court within five days of the entry of the order of the trial court. In such appeals, the time requirements of section 545.780, RSMo, shall be tolled until the decision is rendered by the appropriate appellate court.

5. The supreme court shall issue appropriate rules to facilitate the disposition of such appeals, balancing the right of the state to review the correctness of pretrial decisions of a trial court against the rights of the defendant to a speedy trial, including measures to facilitate these appeals by shortening of the time to file appellant's brief under supreme court rule 30.06(K) to ten days, and eliminations of motions for rehearing or transfer under supreme court rules 30.26 and 30.27.

Article I **§ 18(a). Rights of accused in criminal prosecutions**

That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.

Article I § 19. Self-incrimination and double jeopardy

That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law.

Article V § 3. Jurisdiction of the supreme court

The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

Article V § 5. Rules of practice and procedure--duty of supreme court--power of legislature

The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Mo. R. Civ. Pro. R. 120.01. Appeals

a. An appeal shall be allowed as provided by statute.

b. Neither the filing of a notice of appeal nor the filing of any motion subsequent to the judgment shall act to stay the execution of a judgment unless the court enters an order staying execution.

Mo. R. Civ. Pro. R. 129.13. Motion for Rehearing--When Filed--When Overruled

(a) Unless waived by the parties in writing, a party to a case or proceeding heard by a commissioner, within fifteen days after the mailing of notice of the filing of the judgment of the court, may file a motion for rehearing by a judge of the court. The juvenile officer shall have no right to file a motion for rehearing of any judgment of the court in proceedings under subdivisions (2) or (3) of subsection 1 of section 211.031, RSMo.

(b) The judge shall rule on the motion for rehearing promptly. If the motion for rehearing is not ruled on within forty-five days after the motion is filed, it is overruled for all purposes.

Mo. R. Civ. Pro. 81.01. Right of Appeal

The right of appeal shall be as provided by law.

Mo. R. Civ. Pro. 84.04. Briefs--Contents

(a) Contents. The brief for appellant shall contain:

(1) A detailed table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with reference to the pages of the brief where they are cited;

(2) A concise statement of the grounds on which jurisdiction of the review court is invoked;

(3) A statement of facts;

(4) The points relied on;

(5) An argument, which shall substantially follow the order of the points relied on; and

(6) A short conclusion stating the precise relief sought.

(b) Jurisdictional Statement. Bare recitals that jurisdiction is invoked "on the ground that the construction of the Constitution of the United States or of this state is involved" or similar statements or conclusions are insufficient as jurisdictional statements. The jurisdictional statement shall set forth sufficient factual data to demonstrate the applicability of the particular provision or provisions of Article V, section 3, of the Constitution whereon jurisdiction is sought to be predicated. For example: "The action is one involving the question of whether the respondent's machinery and equipment used in its operations in removing rock from the ground are exempt from the state sales tax law as being machinery and equipment falling within the exemption provided by Section 144.030.3(4), and hence involves the construction of a revenue law of this state."

(c) Statement of Facts. The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument. Such statement of facts may be followed by a resume of the testimony of each witness relevant to the points presented.

(d) Points Relied On.

(1) Where the appellate court reviews the decision of a trial court, each point shall:

(A) identify the trial court ruling or action that the appellant challenges;
(B) state concisely the legal reasons for the appellant's claim of reversible error; and
(C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.
The point shall be in substantially the following form: "The trial court erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*]."

(2) Where the appellate court reviews the decision of an administrative agency, rather than a trial court, each point shall:

(A) identify the administrative ruling or action the appellant challenges;
(B) state concisely the legal reasons for the appellant's claim of reversible error; and
(C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: "The [*name of agency*] erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error, including the reference to the applicable statute authorizing review*], in that [*explain why, in the context of the case, the legal reasons support the claim of reversible error*]."

(3) In an original writ proceeding, each point shall:

(A) state what relief the petitioner or relator seeks from the appellate court;
(B) identify the action that the petitioner or relator challenges;
(C) state concisely the legal reasons for the challenge to respondent's action; and
(D) explain in summary fashion why, in the context of the case, those legal reasons support the challenge.

For an action in prohibition, the point shall be in substantially the following form: "Relator is entitled to an order prohibiting Respondent from [*describe challenged action*], because [*state the legal reasons for the challenge*], in that [*explain why, in the context of the case, the legal reasons support the challenge*]." For other remedial writs, the introductory language should be altered appropriately.

(4) Abstract statements of law, standing alone, do not comply with this rule. Any reference to the record shall be limited to the ultimate facts necessary to inform the

appellate court and the other parties of the issues. Detailed evidentiary facts shall not be included.

(5) Immediately following each "Point Relied On," the appellant, relator, or petitioner shall include a list of cases, not to exceed four, and the constitutional, statutory, and regulatory provisions or other authority upon which that party principally relies.

(6) If a party asserts error relating to damages, the party may assert its material effect on the judgment, including that the judgment is inadequate or excessive, in the same "Point Relied On."

(e) Argument. The argument shall substantially follow the order of "Points Relied On." The point relied on shall be restated at the beginning of the section of the argument discussing that point. The argument shall be limited to those errors included in the "Points Relied On." The argument shall also include a concise statement of the applicable standard of review for each claim of error. If a point relates to the giving, refusal or modification of an instruction, such instruction shall be set forth in full in the argument portion of the brief. Long quotations from cases and long lists of citations should not be included.

(f) Respondent's Brief. The respondent's brief shall include a detailed table of contents and table of authorities as provided by Rule **84.04**(a)(1) and an argument in conformity with Rule **84.04**(e). If the respondent is dissatisfied with the accuracy or completeness of the jurisdictional statement or statement of facts in the appellant's brief, the respondent's brief may include a jurisdictional statement or statement of facts.

The argument portion of the respondent's brief shall contain headings identifying the points relied on contained in the appellant's brief to which each such argument responds. The respondent's brief may also include additional arguments in support of the judgment that are not raised by the points relied on in the appellant's brief.

(g) Reply Briefs. The appellant may file a reply brief but shall not reargue points covered in the appellant's initial brief.

<Text of subd. (h) effective until January 1, 2006>

(h) Appendix. A party's brief shall contain or be accompanied by an appendix containing the following materials, unless the material has been included in a previously filed appendix:

(1) The judgment, order, or decision in question, including the relevant findings of fact and conclusions of law filed in a judge-tried case or by an administrative agency;

(2) The complete text of all statutes, ordinances, rules of court, or agency rules claimed to be controlling as to a point on appeal; and

(3) The complete text of any instruction to which a point relied on relates.

An appendix also may set forth matters pertinent to the issues discussed in the brief such as copies of exhibits, excerpts from the written record, and copies of new cases or other pertinent authorities.

The appendix shall have a separate table of contents. If the appendix contains fewer than 30 pages, it shall be bound into the back of the party's brief. If the appendix is 30 pages or more, it shall be separately bound.

The pages in the appendix shall be numbered consecutively beginning with page A1. The pages in the appendix shall not be counted as a part of the brief. An appendix shall not be subject to rule 84.05(g) relating to disks.

The inclusion of any matter in an appendix does not satisfy any requirement to set out such matter in a particular section of the brief, except that instructions set out in the appendix need not be included in the brief.

(i) Page References in Briefs. All statements of fact and argument shall have specific page references to the legal file or the transcript.

(j) Cross Appeals. If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for purposes of this Rule **84.04,** unless the parties otherwise agree or the court otherwise orders. The appellant's initial brief shall be filed as otherwise provided in this Rule **84.04** and Rule 84.05. The respondent's initial brief shall contain the issues and argument involved in the respondent's appeal and the response to the brief of the appellant. The appellant may file a second brief in response to the respondent's brief setting forth respondent's appeal and in reply to the respondent's brief opposing appellant's appeal. The respondent may file a reply brief in reply to appellant's response to the issues presented by respondent's appeal. The briefs otherwise shall comply with Rule 84.06. No further briefs shall be filed without leave of the court.