

IN THE SUPREME COURT OF MISSOURI

In the Interest of: )  
 )  
N.D.C., ) Case No. SC88163  
Date of Birth: December 14, 1993 )  
 )  
A male child under seventeen years of age. )

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**APPELLANT'S BRIEF**

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Dated November 26, 2006  
~Oral Argument Requested~

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## STATEMENT OF JURISDICTION

This matter involves an appeal from the ruling of the Honorable John W. Sims, Circuit Judge of the Webster County Circuit Court, Juvenile Division, 30<sup>th</sup> Judicial Circuit suppressing the statements of a 4 year old J.C. made to her mother in a delinquency case in which N.D.C. was alleged to have sodomized J.C. pursuant to Section 566.062, RSMo.<sup>1</sup> The statements were made to J.C.'s and N.D.C.'s step-mother immediately following the alleged act. J.C. then made the same statements to her father, sister and step-sister but refused to speak with a social worker, law enforcement officer or Child Advocacy Center interviewer. The Court suppressed the evidence as a violation of the N.D.C.'s Sixth Amendment right to confrontation, holding that the United States Supreme Court decision in Crawford v. Washington, 541 U.S. 36 (2004), prohibited the admission into evidence of the statements. Appellant has challenged the suppression of this evidence pursuant to Section 211.261.2, RSMo. This case does not involve the validity of the Constitution of this State however the constitutional right to confrontation contained in both the United States and Missouri Constitutions, as generally applicable to proceedings under the Juvenile Code and as specifically applicable to Section 491.075, RSMo., is implicated. This case involves the

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<sup>1</sup> All statutory references are to RSMo 2000, unless otherwise indicated.

validity of Section 491.075, RSMo., and the Missouri Supreme Court has jurisdiction.

## STATEMENT OF FACTS

The underlying action is a juvenile delinquency action filed on September 10, 2006, pursuant to Section 211.031, RSMo., in which N.D.C. was alleged to have sodomized his 4 year old sister<sup>2</sup> J.C. pursuant to Section 566.062, RSMo. (LF 13-14) After waiving his detention hearing, an adjudication hearing was scheduled for October 20, 2006. (LF 2) On that date, and prior to the presentation of evidence, the parties and the Court discussed the fact that J.C. was starting to refuse to speak to anyone about the incident and the admissibility of her out-of-court statements. (LF 2,6) Apparently J.C. had disclosed the facts surrounding the alleged incident to her mother (N.D.C.'s step-mother) (hereinafter "A.C."), father, sister and step-sister but then later refused to speak with the Children's Division investigator, the Webster County Sheriff's deputy, and the Child Advocacy Center interviewer.

During that discussion, the Juvenile Office stated that J.C. would ordinarily be competent to testify pursuant to Section 491.060, RSMo., J.C. but that due to her refusal the Juvenile Office would seek to introduce J.C.'s statements through her mother, A.C. as permitted by Section 491.075, RSMo. N.D.C. argued that the admission of such testimony would be considered inadmissible hearsay. (LF 2,6) The Court then attempted to determine whether J.C. was competent or available to

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<sup>2</sup> Sometimes referred to as "step-sister" in the Judgment and transcript.

testify. (LF 2,6) In an in-chambers hearing conducted in the presence of the Court, the Court Reporter, J.C.'s parents and the parties' attorneys, the Court attempted to question J.C. about the alleged incident. (LF 2,6) Despite its best efforts, the only response that the Court was able to obtain from J.C. was the nod of her head yes when asked if she was four years old. (LF 2,6) No other responses were obtained from J.C. as she completely refused to speak. Based upon the in-chambers interview, the Court then determined that although Section 491.060, RSMo., would permit to J.C. testify that her refusal to testify caused her to be unavailable for testimony. (LF 6) (TR 3) The Juvenile Office then sought to have A.C. testify to J.C.'s statement pursuant to Section 491.075, RSMo. (LF 6)

The Court questioned whether Section 491.075, RSMo., applied to juvenile delinquency proceedings given that such proceedings in the state of Missouri are governed by equity. (LF 7) The Court noted that Section 491.075, RSMo., stated specifically that it applied in criminal proceedings. The Court granted the parties time to research whether juvenile proceedings were strictly civil or criminal in nature or quasi-criminal in nature and whether Section 491.075, RSMo., applied. (LF 7) (TR8) The Court then requested that the parties return on October 31, 2006, for further proceedings.

On October 31<sup>st</sup>, the parties appeared and announced ready to present evidence. (LF 3,8) (TR 2) The Juvenile Office first called Children's Division

Social Worker Amanda Macrelli who testified that she responded to the house in response to a hotline call regarding the alleged incident. (TR 3-4) She testified that J.C. refused to talk with her regarding the alleged incident. (TR 8)

The Juvenile Office called A.C. who testified that she went upstairs to check on N.D.C. and J.C. (TR 20) She testified that when she opened the door to N.D.C.'s room she observed N.D.C. and J.C. in bed together watching a movie. (TR 20) She testified that J.C. held the covers up which permitted her to see underneath the bed covers. (TR 21) She testified that she noticed that J.C. had on a dress which was different than the clothes she was wearing when she went upstairs with N.D.C. and that she did not have any panties, shorts or pants on underneath the dress. (TR 22) She also noticed that N.D.C. was lying on his stomach and that his pajama pants were about halfway down with his buttocks exposed. (TR 21-22) A.C. went on to testify that she noticed that J.C. was acting in an unusual manner in that J.C. was looking back and forth between her and N.D.C.'s bottom. (TR 23) A.C. questioned N.D.C. about what they were doing and he responded that they were laughing about his "butt crack" and watching a movie. (TR 23) When A.C. questioned N.D.C. about J.C.'s unusual behavior, he stated he did not know why she was acting that way that she was while attempting to pull up his pajama bottoms. (TR 23) A.C. then testified that she went out into the hallway and called J.C. into the hallway. (TR 22)

When A.C. was asked about J.C.'s response to her question N.D.C. objected stating that the statements were inadmissible hearsay and violated his Sixth Amendment right to confrontation pursuant to Crawford v. Washington, 541 U.S. 36 (2004). (TR 23) The Court sustained the objection and suppressed J.C.'s statements. (TR 37) After a long discussion regarding the research presented by both parties, the Court came to the conclusion that Section 491.075, RSMo., on its face, does apply to juvenile proceedings because juvenile proceedings were civil in nature and that Section 491.075, RSMo., only applied to criminal proceedings. (TR 37) The Juvenile Office then requested and was granted a continuance of the proceedings for purposes of pursuing an interlocutory appeal. (TR 37) The court then scheduled a hearing for November 8, 2006, for the purposes of reviewing N.D.C.'s detention status.

On November 2, 2006, after beginning research for the appeal, the Juvenile Office and N.D.C. discovered Section 491.699, RSMo., which specifically applied Section 491.075, RSMo., to juvenile delinquency proceedings and advised the Court of their findings. (LF 1) On November 3, 2006, the Court set aside its orders and/or rulings of October 31, 2006, and agreed to reopen the issue at the hearing on November 8, 2006. (LF 1)

On November 8, 2006, the parties appeared again. After reviewing Section 491.699, RSMo., the Court stated it would allow J.C.'s statements, except for the

application of *Crawford v. Washington*. The Juvenile Office then requested and was granted the opportunity to make an offer of proof and placed A.C. back on the stand. (TR 42) A.C. testified that J.C. voluntarily disclosed that N.D.C. had put his “thing” in her butt. (TR 46) A.C. testified that she was surprised and asked J.C. again what she said to which J.C. gave her the same response. (TR 46) A.C. then testified that she asked J.C. and N.D.C.’s father to come upstairs and asked J.C. one more time to what she had said. (TR 46) She testified that J.C. responded again that N.D.C. had put his “thing” in her butt. (TR 46) A.C. testified that she asked J.C. what she meant by N.D.C.’s “thing”. (TR 46) J.C. disclosed that it was the thing that N.D.C. used to pee with. (TR 46) A.C. then testified that J.C. had not made any similar and/or serious statements before regarding N.D.C. or any other person nor had she made any similar statements or other serious statements which were later determined to be a fabrication. (TR 46) The Juvenile Office then ended its offer of proof and sought to have J.C.’s statements entered into evidence pursuant to Section 491.075, RSMo. (TR 49)

At the conclusion of the offer of proof, the Court found that J.C. was unavailable; that her statements were reliable; and, that the statements could come into evidence pursuant to Section 491.075, RSMo. (TR 50) However, the Court then determined that *Crawford v. Washington* applied to this case and invalidated the provisions of Section 491.075, RSMo., and therefore sustained the sixth

amendment objection to Cook's testimony. (TR 50) The Juvenile Office then requested Findings of Facts and Conclusions of Law with regard to the Judge's suppression of the statements. (TR 51)

On November 14, 2006, the Court filed its Findings of Fact, Conclusions of Law and Judgment finding that the rulings in *Crawford v. Washington* invalidated the provisions of Section 491.075, RSMo. (LF 1, 6-7) In its analysis, the Court determined that after proper application of Section 491.075, RSMo., J.C.'s statements were admissible into evidence through the testimony of her mother due to her refusal to testify. (LF 1, 6-7) However, the Court went on to suppress the evidence as a violation of the juvenile's Sixth Amendment right to confrontation holding that the United States Supreme Court decision in *Crawford v. Washington* prohibited the admission of J.C.'s statements into evidence through A.C. This appeal follows. (LF 1, 6-7)

**POINTS RELIED ON AND AUTHORITIES - POINT I**

**THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING J.C.'S STATEMENTS BY SUPPRESSING THE TESTIMONY OF J.C.'S MOTHER WHEN IT SUSTAINED AN OBJECTION TO THE APPLICATION OF SECTION 491.075 RSMO AS UNCONSTITUTIONAL DUE TO APPLICATION OF CRAWFORD V. WASHINGTON IN JUVENILE PROCEEDINGS BECAUSE CRAWFORD V. WASHINGTON ONLY APPLIES TO CRIMINAL PROCEEDINGS IN THAT JUVENILE PROCEEDINGS IN MISSOURI ARE CONSIDERED CIVIL PROCEEDINGS.**

**In Re Gault, 387 U.S. 1 (1967)**

**In Re Winship, 397 U.S. 358 (1970)**

**United States v. Ward, 448 U.S. 242, (U.S. 1980)**

**Kansas v. Hendricks, 521 U.S. 346 (1997)**

211.011, RSMo.

211.059.1(3), RSMo.

211.063, RSMo.

211.063.1(1-3), RSMo.

211.061, RSMo.

211.071.6, RSMo.

211.151, RSMo.

211.171.7, RSMo.

211.211, RSMo.

211.261.2, RSMo.

491.060, RSMo.

491.075, RSMo.

Child Victim Witness Protection Law in 1985 (Sections 491.675, RSMo., *et seq.*)

566.062, RSMo.

595.209 RSMo.

Rule 111.03 (c))

Rule 116.01

Rule 119.02 (5)

Rule 122.05

Kan. Stat. Ann., Article 29, Section 59-29a01 (1994)

Mo. Const. Art. I, § 32

**POINTS RELIED ON AND AUTHORITIES - POINT II**

ASSUMING ARGUENDO THAT CRAWFORD APPLIES TO JUVENILE DELINQUENCY PROCEEDINGS, THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING J.C.'S STATEMENTS BY SUPPRESSING THE TESTIMONY OF J.C.'S MOTHER BECAUSE CRAWFORD DOES NOT APPLY UNDER THE FACTS OF THE CASE IN THAT J.C.'S STATEMENTS ARE NON-TESTIMONIAL IN NATURE AND WERE ADMISSIBLE UNDER SECTION 491.075, RSMO., AND AS TESTED AGAINST THE FRAMEWORK OF OHIO V. ROBERTS, 448 U.S. 56, (1980).

*Davis v. Washington*, 126 S. Ct. 2266, (2006)

*State v. R.F.*, 825 N.E.2d 287 (Feb. 2005)

*Crawford v. Washington*, 541 U.S. 36 (2004)

*Ohio v. Roberts*, 448 U.S. 56, 66 (1980)

211.021(2), RSMo.

211.031, RSMo.

491.060, RSMo.

491.075, RSMo.

491.699, RSMo.

566.062, RSMo.

## **ARGUMENT**

### **The Standard of Review**

Ordinarily, when reviewing a trial court's order suppressing evidence, the appellate court should consider the facts and reasonable inferences favorably to the order challenged on appeal. *State v. Bibb*, 922 S.W.2d 798, 802 (Mo.App.E.D. 1996). If neither party disputes the facts, whether the trial court was correct in its ruling must be "measured solely by whether the evidence is sufficient to sustain the findings." *State v. Franklin*, 841 S.W.2d 639, 641 (Mo. 1992). However, as this is an order based upon an alleged violation of the Sixth Amendment to the Constitution of the United States, it is respectfully submitted that the Court should consider the ruling in light of the proper application of the precepts of that Amendment. *State v. Stevens*, 845 S.W.2d 124, 128 (Mo.App.E.D. 1993); *State v. Taylor*, 965 S.W.2d 257, 260-2 61 (Mo. Ct. App., 1998). The issue of whether the Amendment was violated is a question of law which is reviewed *de novo*. *State v. Shaon*, 145 S.W.3d 499 (Mo. App., W.D.2004).

## **POINT I**

**ASSUMING ARGUENDO THAT CRAWFORD APPLIES TO JUVENILE DELINQUENCY PROCEEDINGS, THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING J.C.'S STATEMENTS BY SUPPRESSING THE TESTIMONY OF J.C.'S MOTHER BECAUSE CRAWFORD DOES NOT APPLY UNDER THE FACTS OF THE CASE IN THAT J.C.'S STATEMENTS ARE NON-TESTIMONIAL IN NATURE AND WERE ADMISSIBLE UNDER SECTION 491.075, RSMO., AND AS TESTED AGAINST THE FRAMEWORK OF OHIO V. ROBERTS, 448 U.S. 56, (1980).**

The first issue that must be reached in this case is whether juvenile delinquency proceedings are civil or criminal by nature for the application of Crawford v. Washington, 541 U.S. 36 (2004).

Historically, the juvenile process has been considered a civil process due to the stated purpose of acting in the “best interest of the child” compared to the criminal process which acts to deter, or punish, the activity alleged. “The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help ‘to save him from a downward career.’” In Re Gault, 387 U.S. 1 (1967).

The U.S. Supreme Court has recognized and supported the differences between criminal courts and juvenile courts by portioning out due process protections for juveniles under the U.S. Constitution not collectively, but rather through an examination of each due process protection and each juvenile proceeding. For example, in *Gault*, the U.S. Supreme Court addressed the issue of a juvenile's protection from self-incrimination. In *In Re Winship*, 397 U.S. 358 (1970) the court applied the standard of reasonable doubt to juvenile adjudications.

While these cases stand for the proposition that juveniles facing a loss of liberty must be afforded some of the same due process rights and privileges as criminal defendant's such as a right to counsel, opportunity for cross-examination and right to confront the accuser, equally these cases clearly stop short of declaring juvenile cases, even those resulting in a loss of liberty, wholly criminal actions. These cases leave juvenile offenders, even those facing the possibility of a loss of liberty, without other due process rights and privileges of criminal defendants such as the right to indictment by grand jury, the right to a public trial, or the right to trial by jury.

On the other end of the spectrum, *Crawford* recently expanded the due process protections of criminal defendant's by establishing a new rule for determining whether the admission of hearsay statements violates a criminal defendant's constitutional right to be confronted with the witnesses against him.

While expanding the protections provided to criminal defendants Crawford does not go so far as to expand its protections directly or indirectly to civil defendants simply because they might be subject to a loss of liberty.

In the United States v. Ward, 448 U.S. 242, (U.S. 1980), the Gault analysis was expanded to include monetary penalties. At question in Ward was a statutory fine set at \$5,000 per violation of a federal regulatory statute. The Ward Court determined that the penalty was civil therefore it did not trigger the protections afforded by the Constitution to a criminal defendant. To make this determination the Court created a two part test. First it looked at the statutory construction, including the text itself to find the intention of the legislature to make a civil or criminal penalty. If the penalty is designated as a criminal penalty, then end of discussion, the defendant is afforded the protections of criminal defendants. If the penalty was designated as civil then the court must go on to extract the nature of the resulting penalty. If it is punitive in nature then it must be ascertained whether it is so punitive as to override the intention of the designated statute. The Court required that “only the clearest proof could suffice to establish unconstitutionality of a statute on such a ground.” Ward, *supra* at 249.

Later cases such as Kansas v. Hendricks, 521 U.S. 346 (1997), Seling v. Young, 531 U.S. 250 (2001), Smith v. Doe, 538 U.S. 84 (2003), which considered

civil commitments and sex offender registries, refined the test as it should be applied today.

It is necessary to consider the relevant cases leading to the current test for determining whether a criminal protection or privilege is required to be afforded to a defendant.

### **The Gault Decision**

The major concern of the Supreme Court in the **Gault** case was the failure of the juvenile court system to provide even basic due process protections to juveniles. Gault, a 15 year old boy already on probation for stealing a wallet with another child, had been accused of making lewd phone calls. The delinquency petition was written in general terms; it was not served on the child or his parents; neither the child nor his parents were notified of the child's right to be represented by counsel; the accuser had not been called as a witness therefore the child had been denied the rights of confrontation and cross-examination; the child's confession was obtained without the presence of his parents, counsel or a Miranda warning, resulting in a denial of his privilege against self-incrimination.

Discussing early cases the Court stated, “[a]ccordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” **Gault**, *supra* at 13.

The Court goes on to state, “[f]ailure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.” *Gault*, supra p.20.

The *Gault* Court restricted its discussion to only those facts and those rights and privileges which were presented to them. “We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile ‘delinquents.’ For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a ‘delinquent’ as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.” *Gault* supra at 13.

Eventually, *Gault* was determined on the basis that the possibility of commitment to a “state institution” was a deprivation of liberty equivalent to

criminal incarceration requiring the application of constitutional protections afforded criminal proceedings to juvenile proceedings.

**In Re Winship**

At the time that **In Re Winship**, 397 U.S. 358 (1970) was heard by the Supreme Court, courts could convict a juvenile of a criminal act resulting in a loss of liberty by using a standard of preponderance of evidence, similar to civil courts, rather than the criminal standard of “beyond a reasonable doubt.”

In **Winship**, the juvenile had been charged with committing acts that, had they been done by an adult, would have been larceny. The juvenile court made its determination based on a preponderance of the evidence presented and ordered him to a training school for 1 1/2 years, with possible extensions to his 18th birthday.

The laws the youth was being charged under were considered civil proceedings, ergo they used civil standards. The **Winship** Court acknowledged that “civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts” (Supra p. 366)

Finally, the **Winship** Court held that “the observance of the standard of proof beyond a reasonable doubt ‘will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.’” **Winship**, supra at 387.

**United States v. Ward**

By the time that the Court was deciding U.S. v. Ward, 448 U.S. 242 (1980), incarceration was not the sole test from which due process rights were afforded to defendants in cases deemed as civil by statute or practice. Ward considered the application of a federal statute which required the operator of a vessel in navigable water to notify certain authorities if oil or other contaminants were released into the waterway. The statute clearly stated that it was intended to be a civil penalty thereby invoking civil procedures and safeguards. The Court first reviewed the statute to determine whether the language had codified a preference for civil penalty or criminal penalty. Then it reviewed the affect of the penalty. The Court found in Ward that the penalty was not sufficiently punitive as to override the codified intention of the statute. Finally the Court provided that "[o]nly the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." Ward, *supra* p. 249.

**Kansas v. Hendricks; Seling v. Young; Smith v. Doe**

Kansas v. Hendricks, 521 U.S. 346 (1997) is a review of the U.S. Supreme Court of the Sexual Violent Predator Acts enacted and enforced in almost every state under the title of ‘civil commitment’. These statutes set up a process of having a hearing immediately upon release from prison to determine the perpetrator’s propensity to commit a future sexually violent act, whereby the result

could be further interment. Initial challenges included whether the act violated the prohibition against creating ex post facto law and principles of double jeopardy.

The *Kansas* Court, quoting *Allen v. Illinois*, 478 U.S. 364 (1986) determined that the categorization of a particular proceeding as civil or criminal "is first of all a question of statutory construction." *Allen supra* at 368. The initial determination must be whether the legislature meant the statute to establish civil proceedings. If so, the court must defer to the legislature's stated intent. Kansas had placed its Sexually Violent Predator Act in the Kansas probate code, instead of the criminal code with the apparent intention to create a civil proceeding. Kansas codified its intention by describing the Act as "civil commitment procedure." Kan. Stat. Ann., Article 29, Section 59-29a01 (1994) ("*Care and Treatment for Mentally Ill Persons*")<sup>3</sup>. The statute provided nothing else on its face to suggest that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm. *Kansas, supra* at 515.

The Court recognized that a civil label is not always dispositive, and provided that a rejection of the legislature's manifest intent can only be had where

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<sup>3</sup> Note that this statute is referred to as the "Care and Treatment for Mentally Ill Persons" in the *Allen* case but Kansas has since repealed that title (and accompanying statute) and the correct title for this statute should be "Commitment of Sexually Violent Predators"

a party challenging the statute provides the “‘clearest proof” that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention’ to deem it ‘civil.’” Quoting Ward *supra* at 249.

In Seling v. Young, 531 U.S. 250 (2001), the Court reiterated the above described test while steadfastly rejecting the notion that a statute can be deemed unconstitutional when the commitment conditions are reviewed “as applied” to a sole individual.

Finally, Smith v. Doe, 538 U.S. 84 (2003) takes up Sex Offender Registries, which also have been enacted in almost every jurisdiction. The Court in Smith reviewed a much more complicated issue as the Alaska legislature did not follow the typical patterns that most states followed in creating their civil commitment laws. The Alaska legislature placed the sex offender registry statute within the criminal administration statutes; required the criminal court to inform defendants of the possibility that a conviction will lead to being required to register as a sex offender; and, placed the authority to promulgate and regulate the registry under an agency charged to enforce both civil and criminal regulatory laws.

The Court still found that the legislative intent was to enact a civil regulation, rather than a criminal penalty because the legislature described its own intent as one to protect the public health and safety, and placed its notice requirements under the state’s Health, Safety and Housing Code. *See also*,

*Flemming v. Nestor*, 363 U.S. 603, 616 (1960). The court stated, “[w]here a legislative restriction is an incident of the State's power to protect the public health and safety, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.” *Smith*, *supra* at 94-95.

In finding that the Alaska statute was civil in nature the Court in *Smith* held that “a statute's location and labels do not by themselves transform a civil remedy into a criminal one.” *Smith* *supra* at 90.

Missouri directly followed the *Kansas* and *Smith* tests in *In re Thomas*, 74 S.W.3d 789 (2002), and *R.W. v. Sanders*, 168 S.W.3d 65 (2005).

### **Analysis of Juvenile Proceedings in Missouri**

In a criminal proceeding, the purpose is solely **punitive**. A person who commits a criminal act must “pay for his crime.” Conversely, the purpose of juvenile proceedings is to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. Section 211.011, RSMo.

To further codify this sentiment the statute goes on to say, “[t]his chapter shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control as will conduce to the child's welfare and the best interests of the state, and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by

them. The child welfare policy of this state is what is in the best interests of the child.” The Legislature added the last sentence in 1995 to make clear that a child’s best interest is the paramount consideration in administering the Juvenile Code. Furthermore, Section 211.171.7, RSMo., states that “the practice and procedure customary in proceedings in equity shall govern all proceedings in the juvenile court . . . .”

Juvenile delinquency proceedings are *sui generis*. They are presided over by a single judicial officer in the role of *paren patrie*. Juvenile delinquent acts are often committed by juveniles against other juveniles, such as happened in the underlying case. Courts must balance the interests of the juvenile charged with the delinquent offense as well as the rights of the juvenile’s victims. A juvenile charged with delinquent acts has significant protections.

The Legislature enacted legislation meant to balance the rights of defendants and child witnesses and victims when it passed the Child Victim Witness Protection Law in 1985 (Sections 491.675, RSMo., *et seq.*). Section 491.075, RSMo., allows out of court statements of a child victim to be used in criminal proceedings. In 1992, a constitutional amendment was passed affording certain rights to victims of crime. Mo. Const. Art. I, § 32. Section 595.209 RSMo., was enacted as enabling legislation to provide for those rights. Given the significant constitutional and statutory enactments, it is clear that the public policy of this state

requires significant consideration to be given to victims of crimes, especially child victims. “It should also be remembered that proceedings under the juvenile code are civil, not criminal. Thus, the emphasis of the juvenile code is on continuing care, protection and rehabilitation of the juvenile.” *H. v. Juvenile Court of St. Louis County*, 508 S.W.2d 497, 500 (Mo., 1974)

A juvenile judge sits in a unique position. His or her primary consideration is for the best interests of the juvenile that comes before the court. The Judge must also function as both the finder of fact and the arbiter of law. Where there are conflicting public policies such as are presented here a balance must be made. A juvenile court judge can achieve this balance but only if allowed the necessary discretion to do so. “Since the rules of exclusion in the law of evidence as applied in a court of law are largely as a result of the jury system, the purpose of which is to keep from the jury all irrelevant and collateral matters which might tend to confuse them or mislead them from a consideration of the real question involved, when an action is to the court sitting without a jury, the rules of exclusion are less strictly enforced” *In Interest of C.K.G.*, 827 S.W.2d 760, 767 (Mo. Ct. App., 1992).

In this case, the child victim was four years old. The Juvenile was charged with a crime pursuant to Section 566.062, RSMo. Section 491.060, RSMo., states that a child under fourteen years of age is considered incompetent to testify in

court proceedings. However, an exception is carved out for Chapter 566 proceedings. In those cases, there is no minimum age at which a child is automatically determined incompetent to testify. J.C. was interviewed by the Court in an in-camera proceeding with only the parties' counsel, the child victim's parents and the Court Reporter present. The purpose of the in-camera proceeding was to determine the child's availability to testify. After repeated attempts, the only response the Court could elicit from J.C. was the nod of a head. Afterwards, the Court determined that J.C. was unavailable to testify.

There is no formulaic solution to the proper disposition of juveniles in such proceedings nor should there be. Each disposition is tailored to the needs of the juvenile and society. For example, a juvenile who steals a pack of gum may be committed to the Missouri Division of Youth Services while a juvenile who commits a brutal assault may be placed on probation. It is the totality of circumstances of the juvenile's life (family, school, friends and associations, mental, physical and emotional health, previous contacts with the juvenile system, etc.) as well as the delinquent act or acts that are considered in constructing an appropriate disposition. With this information at its disposal, a court will have the information necessary to craft an appropriate disposition to provide the treatment and services that will assist the juvenile and his family to avoid future contacts with the juvenile and criminal judicial systems.

In Missouri, by both statute and rule, juveniles receive a plethora of due process rights and privileges, some of which exceed those of adults charged with crimes. Many examples of those protections include some of the following:

- Detained juveniles must be housed in detention facilities that are segregated from adults, Sections 211.063, RSMo., and 211.151, RSMo., and Rule 111.03(c);
- A juvenile must be released from detention within twenty four hours of being arrested unless a judge determines the necessity of continued detention and, if detention is continued, then the juvenile has a right to a detention hearing within three business days of being taken into custody, Section 211.061, RSMo.;
- The juvenile and their custodian have statutory rights to counsel, Section 211.211, RSMo., Rule 116.01;
- The standard and burden of proof are identical to those in criminal proceedings;
- No juvenile charged with a delinquent offense may be compelled to testify against himself.
- The juvenile has a right to a trial, Section 211.171, RSMo., Rule 119.02(5); and,

- Illegally obtained evidence may be suppressed in the same manner as criminal proceedings, Section 211.261.2, RSMo.

In some areas of juvenile proceedings, the rights given to a juvenile prior to custodial interrogation actually *exceed* those of adults charged with the same offense. For instance, juveniles have a right to have a responsible adult advise them during any such questioning, a right unavailable to a criminal defendant. Section 211.059.1(3), RSMo., Rule 122.05. Juveniles who are not accused of law violations (i.e. status offenders and child abuse/neglect victims) may not remain in secure detention unless certain findings are made. Section 211.063.1(1-3), RSMo. And, finally no juvenile may be sentenced and confined in the Department of Corrections unless the Juvenile Court has dismissed the petition to allow prosecution under the general law, a process that requires significant findings prior to its execution. Section 211.071.6, RSMo.

### **Application of Crawford to Juvenile Courts**

It would be inappropriate and against current case law to apply Crawford to juvenile proceedings in Missouri. Applying the Kansas test to the case at bar would find that the legislature intended to provide only civil protections to juveniles in adjudicatory proceedings by both specific language and separate codification from criminal proceedings. Even though the juvenile in the case at bar would be subject to a loss of liberty if found delinquent, he would be interred in a

juvenile facility in order to receive treatment and care. Therefore, the first and second portions of the Kansas test have been satisfied. Finally, in order to find that Section 491.075, RSMo., is invalid, the defendant would have to show by “clearest proof” its unconstitutionality. The holding in Crawford stops short of providing “clear proof” that the Court intended to equally restrict the admission of evidence in juvenile proceedings by limiting its instruction to clearly criminal cases. Similarly, the Courts in Gault and Winship stopped short of providing “clear proof” that juveniles required all the same due process protections of criminal defendants.

Finally, assuming arguendo that juvenile proceedings are quasi-criminal affording the application of Crawford to them, the rule established in Ohio v. Roberts, 448 U.S. 56 (1979) provided that statements such as are at issue here are admissible “if the statement bears "adequate 'indicia of reliability,'" a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness.” Crawford, *supra* at 8. The Missouri Legislature has enacted specific procedural and substantive statutes, such as Section 491.075, RSMo., to insure that basic due process is provided. The disregard of the Crawford Court of these carefully considered evidentiary procedures enacted by numerous state legislative bodies over decades should be

limited to criminal proceedings where the purpose is punitive. It should not be applied to rehabilitation and treatment of children.

The fact is that the application of Crawford to juvenile proceedings will remove necessary reasonable discretion from the juvenile courts as to the admissibility of evidence in these court-tried delinquency cases. This will force upon the juvenile courts an inflexible rule that robs the juvenile court of the ability to balance the rights and best interests of a juvenile perpetrator against the rights and best interests of a juvenile victim. Such inflexibility goes against the entire purpose of the Juvenile Code in Missouri. A juvenile court should be able to hear evidence and make a determination as to its sufficiency without an artificially imposed and undefined distinction of whether the evidence is “testimonial” vs. “non-testimonial”. The imposition of Crawford would severely limit the ability of the juvenile court to effectively and appropriately administer treatment to a juvenile who has a problem that needs to be addressed.

As stated by the U.S. Supreme Court, “[the] essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold”. Allen supra. To apply Crawford to juvenile courts in delinquency proceedings would force the juvenile court into such a common uniform mold. Imposition of such a rule does not take into consideration of what is in a juvenile’s best interest. It would require that in certain circumstances, a

juvenile's problem go untreated while at the same time he or she may be free to possibly re-victimize the person who has been injured by the juvenile.

It is respectfully suggested that the holding in *Crawford v. Washington*, 541 U.S. 36 (2004), upon which the trial court based its findings, should not apply to juvenile delinquency proceedings therefore the trial court abused its discretion by excluding J.C.'s statements by suppressing the statements of J.C.'s mother.

WHEREFORE, the Relator/Petitioner respectfully requests that this Court overturn the Trial Court's ruling that *Crawford* applies to juvenile proceedings thereby permitting the introduction of J.C.'s statements into evidence through her mother's testimony; and, for such other and further relief as the Court deems just and proper.

[Toc102284407](#) **POINT II**

**ASSUMING ARGUENDO THAT CRAWFORD APPLIES TO JUVENILE DELINQUENCY PROCEEDINGS, THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING J.C.'S STATEMENTS BY SUPPRESSING THE TESTIMONY OF J.C.'S MOTHER BECAUSE CRAWFORD DOES NOT APPLY UNDER THE FACTS OF THE CASE IN THAT J.C.'S STATEMENTS ARE NON-TESTIMONIAL IN NATURE AND WERE ADMISSIBLE UNDER SECTION 491.075, RSMO., AND AS TESTED AGAINST THE FRAMEWORK OF OHIO V. ROBERTS, 448 U.S. 56, (1980).**

Without conceding that Crawford is applicable to juvenile delinquency proceedings, assume *arguendo* that it is applicable in the instant case. Even based upon such an assumption, it is respectfully submitted that J.C.'s statements are non-testimonial in nature and therefore do not implicate Crawford or violate the Sixth Amendment.

In Crawford, the Court determined that the defendant's spouse's statements to a detective were testimonial in nature and therefore the admission of those statements into evidence violated the defendant's Sixth Amendment right to confrontation. The Court held that the admission of testimonial hearsay at trial, absent the unavailability of the declarant and a prior opportunity for cross-

examination by the defendant, violates the defendant's confrontation right under the Sixth Amendment to the United States Constitution. *Crawford, supra*.

Abrogating its previous decision of *Ohio v. Roberts*, the Court held that in order to admit "testimonial" hearsay statements of an unavailable witness, the accused must have had an opportunity to confront, i.e., cross-examine, the witness. *Crawford, supra* at 42, 68. The Supreme Court, however, left undecided the "comprehensive definition of 'testimonial,'" but did say that "at a minimum," the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* The witness' statements – made and recorded while the witness was interrogated in police custody – were undoubtedly testimonial. *Id.* at 65-68. The Supreme Court held that, at a minimum, statements are testimonial if made at a preliminary hearing, before a grand jury, at a former trial, or during police interrogations. In addition, the Court discussed three core classes of statements that may be testimonial: (1) ex parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements that were made under circumstances which would lead an objective witness reasonably to believe

that the statement would be available for use at a later trial.” *Id.* See also *People v. Gash*, 2006 Colo. App. LEXIS 1919 (Ct. App. November, 2006). In comparing the facts of this case to the core classes of testimonial hearsay found in *Crawford*, the Appellant would respectfully submit that J.C.’s statements are non-testimonial in nature and admissible into evidence.

In reviewing the case law across the land, there appears to be an established trend to consider similar statements made in similar circumstances to be non-testimonial. Overall, the types of cases wherein the states have analyzed *Crawford* in the context of hearsay statements seem to fall within approximately four different categories - statements made during a 911 call; statements made to officials during the course of an investigation; statements made by children; and, statements made to family, friends or acquaintances. Although none of the cases sets out a bright-line rule to follow in determining how and whether to apply *Crawford*, and, in fact, there are differences in how some of the Courts reach the same result, the Courts do seem to be setting up, at a minimum, trends in each area of the different testimony. Following is a discussion of those types of cases. The Appellant does not want to mislead this Court into believing that this is an exhaustive list of cases dealing with these types of issues. However, the cases appear to be a good representation of those cases. Plus, the Appellant has chosen

to not include those cases which deal with written testimony such as autopsy reports or expert witnesses (as has been found in relation to gang cases).

### **Statements made during 911 call**

Although several courts have analyzed 911 calls the U.S. Supreme Court recently ruled on two different situations involving 911 calls. In **Davis v. Washington**, 126 S. Ct. 2266, (2006) case, the U.S. Supreme Court consolidated two appeals - **State v. Davis**, 154 Wn.2d 291, 111 P.3d 844, 2005 Wash. LEXIS 462 (2005) and **Hammon v. State**, 829 N.E.2d 444, 2005 Ind. LEXIS 541 (Ind., 2005) which questioned how statements made during a 911 call were to be handled. The **Davis** case was defined by the Court as an emergency situation whereas the **Hammon** was defined as a non-emergency situation. In **Davis**, the victim had just been attacked by former boyfriend and as he was running out of the victim's apartment she phoned 911. During that telephone call, she identified Davis as the individual who had attacked her. The Court concluded that this was an emergency and that the events being described in the telephone call were current events that were actually happening while she was on the phone with the 911 operator. Therefore, the Court determined that even if the 911 operator was an employee of a law enforcement agency that the statements were made for the purpose of determining how to deal with an on-going emergency and not as part of an investigation. In the **Hammon** case, the police were called out to a house where

the defendant and his wife had been fighting. When they arrived, the wife was sitting on the porch and Hammon was in the kitchen. Both individuals explained that they had been in a fight but that everything was ok by the time the officers arrived. They later then went to the police station for further questioning after which Hammon was charged with domestic battery and violating his probation. At the trial, Hammon's wife, who was subpoenaed, failed to appear for trial. The Court permitted the introduction of the statements made by Hammon's wife to the officers into evidence. The Court determined that those statements were testimonial in nature because they were made during the course of an investigation and interrogation about a past event.

The states that have dealt with 911 calls and have determined that the situation was an on-going emergency have reached the same results although decided prior to the Davis portion of the case. State v. Mizenko, 127 P.3d 458 (Jan. 2006); People v. Moscat, 3 Misc. 3d 739, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004); People v. Corella, 122 Cal. App. 4th 461, 18 Cal.Rptr. 3d 770 (Cal. Ct. App. 2004); Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004); Pitts v. State, 612 S.E.2d 1, (Ga. App. 2005); State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004); and, People v. West, 823 N.E.2d 82 (Ill. App. Ct. 2005). The other states that have dealt with 911 calls that were not during the course of an emergency or were made for the purposes of invoking an investigation and possible prosecution

have reached the same conclusion as the Court's holding in the Hammon portion of the case. People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. Bronx Co. 2004); and, State v. Powers, 99 P.3d 1262 (Wash. Ct. App. 2004).

**Statements made to Police Officers**  
**or other officials during the course of an investigation**

As in the Davis case, the Courts have held that statements made to officials must also be examined to determine if they were made in the course of an emergency or were in the nature of an interrogation for use in an investigation. The Courts also generally looked to see whether the declarant knew or reasonably should have known that the statements would be used prosecutorially. U.S. v. Jordan, 2005 U.S. Dist. Lexis 3289 (March, 2005); Lopez v. State, 888 So. 2d 693 (Fla. Dist. Ct. App. 2004) (statements made to police for purposes of gaining facts and identification of defendant); Moody v State, 594 S.E.2d 350 (Ga. 2004) (statements by victim made to police two years prior); Bell v. State, 597 S.E.2d 350 (Ga. 2004); Brawner v. State, 602 S.E.2d 612, 613 (Ga. 2004); Jenkins v. State, 604 S.E.2d 789, 795 (Ga. 2004). Conversely, just like with 911 calls, if the statements were made during the course of an emergency then the Courts generally found the statements to be non-testimonial if the statements fell under the excited utterance or state of mind exceptions to hearsay or and if the questions and answers lacked the formalities of a police interrogation. Compan v. People, 121 P.3d 876

(Colo., 2005); *People v. Mackey*, 5 Misc. 3d 709, 785 N.Y.S.2d 870 (N.Y. Crim. Ct. 2004) (victim made statements in an effort to keep the defendant from taking her children.); and, *In the Interest of J.A.*, 897 A.2d 119 (May, 2006).

### **Statements by children**

The tougher area of victim/witness statements are those statements made by children. In the adult situations, many courts have looked to determine whether the adult making the statement would reasonably believe that the statements would be used later at trial. Initially, several courts started out using this line of reasoning in dealing with child statements but most, if not all courts, are now veering away from that reasoning and looking at the person to whom the statement is made; what capacity the person was in when the statements were made; and, whether the person was conducting an investigation or was eliciting the information for other reasons.

As this Court is fully aware, Missouri has already dealt with statements made to a social worker in the *State v. Justus*, 2006 Mo. LEXIS 136 (Dec., 2006) case (which is an *adult criminal* case). In this case, like those across the United States, this Court looked to see whether the statements made to the Children's Division investigator and the hospital counselor who conducted forensic interviews (with this one being videotaped) were testimonial. This Court determined that the statements were made to a person conducting or furthering an investigation on

behalf of or in connection with a law enforcement investigation and therefore the statements were testimonial and should have been excluded from evidence.

Missouri appears to be following a trend set up nationally when reviewing child statements. See *In the Interest of R.A.S.*, 111 P.3d 487 (June, 2004) (videotaped statements made to police officer were held to be testimonial); *D.G.B. v. State*, 833 N.E.2d 519 (August, 2005) (videotaped statement made in connection with a police interrogation were held to be testimonial); *Anderson v. State*, 833 N.E. 2d 119 (Ct. App. August, 2005) (child's statements to a detective were testimonial); *State v. Snowden*, 867 A.2d 314 (2005) (statements made to a social worker in the course of an investigation and at the request of law enforcement were testimonial); *State v. Siler*, 843 N.E.2d 863 (2005) (statements made to police officer held to be testimonial); *State v. Mack*, 101 P.3d 349 (2004) (videotaped statements made to a social worker who conducted the questioning at the request of law enforcement were held to be testimonial); and, *State v. Pitt*, 2006 Ore. App. LEXIS 1785 (February, 2006) (videotaped statements made during the course of a Child Advocacy Center interview were held to be testimonial. The Court declined to decide whether the statements made by the child to the mother and doctor were testimonial). It should be noted that in *Justus* the admission of the statements made by the child to the child's mother and grandmother into evidence was not appealed.

In other situations, when the statements were made for the purposes of a medical diagnosis then the Courts generally held that the statements were non-testimonial in nature. *People v. Vigil*, 127 P.2d 916 (January, 2006) (statements made to a doctor for purposes of medical diagnosis); *In the Matter of A.J.A.*, 2006 Minn. App. Unpub. LEXIS 988 (August, 2006) (statements made to a nurse not acting in accordance with a Child Advocacy Center interview or in the course of a Sexual Assault Forensic Exam); *State v. Edinger*, 2006 Ohio 1527 (March, 2006) (statements made to a social worker were not the functional equivalent of a police interrogation); *In re D.L.*, 2005 Ohio 23200 (Ct. App. May, 2005) (statements made to a nurse practitioner fell under medical exception because nurse was not a government employee nor acting in conduction with a government agent conducting an investigation although police did observe the interview); and, *State v. Washington*, 128 P.3d 87 (2006) (statements made to individual who normally acted as a government informant but was not working for any government agency in this case were non-testimonial and based the ruling upon the reasonable child standard.).

#### **Statements made to family, friends or acquaintances**

Finally, the fourth class of cases that the Courts have generally dealt with involve those statements made by the victim/witness to a family member, a friend or an acquaintance. This instant case falls into this category because J.C.

voluntarily disclosed the statements to her mother and later to her father, step-sister and sister about N.D.C. putting his “thing” in her butt. In these types of cases, in very nearly every situation, the Courts have concluded that such statements were non-testimonial in nature and permitted the introduction of the statements into evidence. *People v. Griffin*, 93 P.3d 344 (Ca. July, 2004) (statements made by victim to a friend at school were held to be non-testimonial); *State v. Aaron*, 2005 Conn. LEXIS 39 (February, 2005) (statements made by child to her mother were held to be non-testimonial); *Herrera-Vega v. State*, 888 So.2d 66 (Fla. Dist. Ct. App. 2004) (spontaneous statements made by victim to her parents describing the sexual abuse were held to be non-testimonial); *In the Interest of John Doe*, 103 P.3d 967 (Ct. App. Dec. 2004) (statements made by victim to her mother and grandmother were held to be non-testimonial); *Purvis v. State*, 829 N.E.2d 572 (February, 2005) (statements made to the child’s mother and the mother’s boyfriend were held to be non-testimonial); *State v. Van Leonard*, 910 So.2d 977 (July, 2005) (victim’s statements to girlfriend were held to be non-testimonial); *State v. Blackstock*, 598 S.E.2d 412 (Ct. App. July, 2004) (victim’s statements to wife and daughter were held to be non-testimonial but Court then determined that the hearsay exception that the statements were introduced under was erroneously applied); *State v. Davis*, 613 S.E.2d 760 (March, 2005) (statements made by one witness to another held to be non-testimonial); *State v. Washington*, 128 P.3d 87

(2006) (child's statements to her mother were held to be non-testimonial); Horton v. Allen, 370 F.3d 75 (1<sup>st</sup> Cir., 2004) (victim's statements to another individual in a private conversation were held to be non-testimonial); and, People v. Gash, 2006 Colo. App. LEXIS 1919 (Ct. App. November, 2006) (victim's statements to a nephew were held to be non-testimonial). Even Crawford said that casual remarks made to acquaintances were generally not testimonial statements because they were not made in contemplation of bearing formal witness against the accused. Crawford, *supra* at , See also, Davis v. Washington, *supra*.

One of the few and possibly lone exceptions to this trend is Illinois. At the time the notice of appeal was filed in this case Illinois had reached completely different conclusions in two different cases decided within a month of each other. In January, in the State v. E.H., 823 N.E. 2d 1029 (Jan., 2005), the Court was faced with a juvenile delinquency case where a child disclosed possible sexual allegations to her grandmother. The Court reviewed the facts and immediately determined that were the statements testimonial and that the statute which would have permitted their admission into evidence was unconstitutional without any further analysis. One month later in a criminal proceeding in the State v. R.F., 825 N.E.2d 287 (Feb. 2005) case, the same Court reviewed similar facts where a child made disclosures to a mother and a grandmother and determined that those statements were non-testimonial in nature. It should be noted that the E.H. case

was a juvenile delinquency case and the R.F. case was an adult criminal case and that the Judge who wrote the majority opinion in the E.H. case wrote the dissent in the R.F. case. In December (at the time of the writing of this brief), the Illinois Supreme Court vacated and remanded E.H. back to the appellate court for a determination of whether the case could be decided on non-constitutional grounds. The R.F. ruling has not been disturbed.

Two Courts have recognized a parent's right to question a child about his or her whereabouts or to inquire as to his or her safety and well-being. "Parents of young children constantly question them about their activities, often to ensure that the children are behaving safely. When parents find illegal activity or victimization, they naturally contact appropriate authorities. The fact that parents turn over information about crimes to law enforcement does not transform their interactions with their children into police investigations." See Purvis v. State, 829 N.E.2d 572, 579 (Ind. Ct. App. 2005) and Anderson v. State, 833 N.E. 2d 119 (Ct. App. August, 2005).

### **Analysis of J.C.'s statements**

"The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." U.S. Const. Amend. VI The Missouri Constitution has a similar guarantee that "in criminal prosecutions the accused shall have the right

to...meet the witnesses against him face to face." Mo. Const. art. I, sec. 18(a) "The confrontation rights protected by the Missouri Constitution are the same as those protected by the Sixth Amendment of the United States Constitution."” *State v. Justus*, 2006 Mo. LEXIS 136 (Dec., 2006).

*Crawford* now holds that testimonial statements made by an unavailable witness can only be entered into evidence when the defendant has had an opportunity to cross-examine the witness prior to court. Although *Crawford* did not set out a comprehensive or clear-cut definition of what is testimonial evidence, it did state that at a minimum there were three core classes of testimony that would be considered testimonial - prior testimony at a preliminary hearing, testimony before a grand jury, or at a former trial; and statements made during the course of police interrogations are testimonial. *Crawford* goes on to say that non-testimonial statements are still subject to the test as set out in *Ohio v. Roberts*.

After being asked if she and N.D.C. were indeed watching a movie, J.C. voluntarily disclosed to her mother that N.D.C. had put his thing in her butt. She then made these same or similar statements to her father, her sister and her step-sister. Those statements were made while J.C. was at her home. She then later refused to speak with the Children’s Division investigator and the Sheriff’s Deputy that responded to the house. Based upon J.C.’s statements, N.D.C. was charged

with the commission of a crime under Section 566.062, RSMo. and a petition was filed pursuant to Section 211.031, RSMo.

Pursuant to Section 491.060, RSMo., J.C. would be considered incompetent to testify because she is only four years old. However, Section 491.060., RSMo. goes on to carve out an exception for Chapter 566 proceedings. Therefore, any child<sup>4</sup> with communication skills would be considered competent to testify. At the trial in this matter, the Court attempted to question J.C. in an in-camera setting. However, J.C. refused to communicate either verbally or nonverbally with the exception of nodding her head when asked if she was four years old. Consequently, the Court determined that J.C. was unavailable to testify. Section 491.075, RSMo., permits the statements of a child to come into evidence in criminal proceedings. Section 491.699, RSMo., specifically applies Section 491, 075, RSMo., to juvenile proceedings filed under Section 211.031, RSMo. Based upon J.C.'s refusal to testify, the Juvenile Officer attempted to enter J.C.'s statements in through the testimony of her mother as provided for in Section 491.075, RSMo. N.D.C. objected to the testimony stating that the admission of the statements would violate his Sixth Amendment rights which guarantees him the right and opportunity to confront the witnesses against him. His objection was

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<sup>4</sup> Pursuant to Section 211.021(2), RSMo., a child is defined as a person under seventeen years of age.

based upon the facts that he had not been able to cross-examine J.C. prior to court nor would he be able to do so at court due to her refusal to testify. After sustaining N.D.C.'s objection, the Court then listened to the offer of proof submitted by the Juvenile Officer wherein J.C.'s mother testified that J.C. had not made these same or similar statements about N.D.C. or any other person before and that J.C. had not fabricated a story with these ramifications which had been determined to be false at a later time. Based upon the offer of proof, although the Court still refused to admit J.C.'s statements into evidence, it did find that the time, content and circumstances of J.C.'s statements provided sufficient indicia of reliability. At no time did N.D.C. have an opportunity to cross-examine J.C. as to her statements.

J.C.'s statements were not made during the course of a police interrogation. She had not testified at a prior preliminary hearing or before a grand jury. Therefore, J.C.'s statements were non-testimonial and should have been admitted into evidence pursuant to Section 491.075, RSMo. Consequently, Crawford has no application in this case.

**Ohio v. Roberts**

In looking at all of these cases and comparing them to the facts of this case, the Appellant would respectfully submit that Crawford does not apply in this case because J.C.'s statements are non-testimonial and are admissible into evidence

pursuant to Sections 491.060, RSMo., and 491.075, RSMo., and as tested against the framework of the *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) case.

Since *Crawford* does not prohibit the admission of J.C.'s statements into evidence, then the statements should be measured against the *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) test. *Roberts* sets out that "for purposes of the *confrontation clause*, 'hearsay statements are admissible if (1) the declarant is unavailable to testify, and (2) the statement bears adequate indicia of reliability. "A statement is presumptively reliable if it falls within a firmly rooted hearsay exception. A hearsay exception is firmly rooted if it rests upon such solid foundations that admission of virtually any evidence within [it] comports with the substance of constitutional protection. Evidence admitted under such an exception thus is presumed to be so trustworthy that adversarial testing would add little to its reliability. *Roberts*, *supra* at 66.

"In evaluating the trustworthiness of a child's statements, the Court in *State v. Merriam*, 835 A.2d 895 (2003), considered the five factors suggested by the United States Supreme Court in *Idaho v. Wright*, 497 U.S. 805 (1990). These factors included: "(1) the degree of spontaneity inherent in the making of the statements; (2) consistent repetition by the declarant; (3) the declarant's mental state; (4) use of terminology not within the average ken of a child of similar age; and (5) the existence of a motive to fabricate or lack thereof." *State v. Merriam*,

supra, 639. The Supreme Court in Wright "emphasized that the 'unifying principle' underlying the enumerated factors is that they 'relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.' . . . The court further noted, however, that the list of factors it had identified was not exclusive, that it was not endorsing any particular 'mechanical test for determining particularized guarantees of trustworthiness under the [Confrontation] Clause' . . . and that 'courts have considerable leeway in their consideration of appropriate factors.'" Anderson v. State, 833 N.E. 2d 119 (Ct. App. August, 2005).

In applying these principles to this case, it is clear that J.C.'s statements were spontaneous. The statement, "He put his thing in my butt" was not a logical response to the question "were you guys watching a movie?" Indeed, "the more spontaneous the statement, the less likely it is to be a product of fabrication, memory loss, or distortion." Doe v. United States, 976 F.2d 1071, 1080 (7th Cir. 1992). Here, the mother testified that J.C. had not made the same or similar statements about N.D.C. or any other individual in the past. No motive to lie was offered by the mother. Finally, J.C. used the terms "thing", "butt" and "pee" which are terms normally associated with a 4 year old child. Such "childish terminology" has been considered to have "the ring of veracity and is entirely appropriate to a child of . . . tender years." United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979).

Based upon all of the following, although the Court was correct in concluding that J.C.'s statements were reliable in time, content and circumstances, the Court was incorrect in concluding that Crawford would have prohibited the admission of those statements into evidence. Therefore, J.C.'s statements should have been admitted into evidence pursuant to Section 491.075, RSMo. Furthermore, because the statements are non-testimonial, the Appellant would respectfully submit that this Court does not need to reach the question of whether Section 491.075, RSMo., is unconstitutional as applied to these facts.

### CONCLUSION

This case is one of first impression on this particular issue and presents an almost mirror image of the circumstances that concerned the United States Supreme Court when it issued its ruling in Gault in 1967. At that time, unfettered discretion by Juvenile Court judicial officers coupled with the lack of any form of procedural requirement to supply basic due process to the juvenile and his parents were the impetus for that Court's decision. Today, this Court is faced with the prohibition of the exercise of any judicial discretion in the admission of relevant, material and probative evidence despite decade's long established procedural and substantive due process safeguards. Appellant is not arguing that the Court disregard the Supreme Court's Crawford decision but respectfully requests that this Court acknowledge the difference between juvenile and criminal cases and

hold that it is not a distinction without a difference. It is respectfully suggested that the Crawford rule does not apply to juvenile delinquent proceedings in Missouri and that the trial court erred in so holding. However, should this Court determine that Crawford does indeed apply to juvenile delinquency proceedings then the Appellant would respectfully suggest that the Crawford rule does not apply to statements such as these because they are nontestimonial in nature and the holdings of Ohio v. Roberts apply instead.

WHEREFORE, the Relator/Petitioner respectfully requests that this Court overturn the Trial Court's ruling excluding J.C.'s statement through the suppression of her mother's testimony thereby admitting the statement for proof of the matter being asserted; and, for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSOURI

In the Interest of: )  
 )  
N.D.C., ) Case No. SC88163  
Date of Birth: December 14, 1993 )  
 )  
A male child under seventeen years of age. )

**CERTIFICATE OF SERVICE AND COMPLIANCE**

The undersigned hereby certifies that two (2) true and accurate copies of Appellant’s Brief and Appendix were forwarded via Federal Express; via first class mail, postage-prepaid; facsimile transmission with confirmation printed on this day to: to Dewayne Perry, 800 East Aldrich Road, Suite E, Bolivar, Missouri, 65613; Betty Wirsen, 2141 North Main Avenue, Springfield, Missouri, 65803; and, Donald Cook, 1094 Huckleberry Road, Strafford, Missouri, 65757, on this \_\_\_\_ day of December, 2006.

The undersigned hereby certifies that Respondent’s brief complies with the word and line limitations as prescribed by Rule 84.06(b) in that there are less than 31,000 words in that there are 11,908 words and less than 2200 lines in that there are 1141 lines in Appellant’s brief as established by the word and line count of the Microsoft Word 2003 word processing system used to create it excluding the cover; certificate of service; virus certificate; signature block and appendix.

The undersigned hereby certifies that one (1) floppy disk was provided to each of the above-listed parties as required by Rule 84.06(g) and that the floppy

disk(s) being filed in this matter have been scanned for viruses and to the undersigned's best knowledge, the disk(s) is/are virus free.

Respectfully submitted,

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\*\*\* THIS SECTION IS CURRENT THROUGH ALL 2005 LEGISLATION \*\*\*  
\*\*\* MOST CURRENT ANNOTATION JULY 28, 2006 \*\*\*

TITLE 12. PUBLIC HEALTH AND WELFARE (Chs. 188-215)  
CHAPTER 211. JUVENILE COURTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 211.011 R.S.Mo. (2006)

§ 211.011. Purpose of law--how construed

The purpose of this chapter is to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control as will conduce to the child's welfare and the best interests of the state, and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them. The child welfare policy of this state is what is in the best interests of the child.

**HISTORY:** L. 1957 p. 642 § 211.010, A.L. 1995 H.B. 232 & 485 merged with S.B. 174

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TITLE 12. PUBLIC HEALTH AND WELFARE (Chs. 188-215)  
CHAPTER 211. JUVENILE COURTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 211.021 R.S.Mo. (2006)

§ 211.021. Definitions

As used in this chapter, unless the context clearly requires otherwise:

- (1) "Adult" means a person seventeen years of age or older;
- (2) "Child" means a person under seventeen years of age;
- (3) "Juvenile court" means the juvenile division or divisions of the circuit court of the county, or judges while hearing juvenile cases assigned to them;
- (4) "Legal custody" means the right to the care, custody and control of a child and the duty to provide food, clothing, shelter, ordinary medical care, education, treatment and discipline of a child. Legal custody may be taken from a parent only by court action and if the legal custody is taken from a parent without termination of parental rights, the parent's duty to provide support continues even though the person having legal custody may provide the necessities of daily living;
- (5) "Parent" means either a natural parent or a parent by adoption and if the child is illegitimate, "parent" means the mother;
- (6) "Shelter care" means the temporary care of juveniles in physically unrestricting facilities pending final court disposition. These facilities may include:
  - (a) "Foster home", the private home of foster parents providing twenty-four-hour care to one to three children unrelated to the foster parents by blood, marriage or adoption;
  - (b) "Group foster home", the private home of foster parents providing twenty-four-hour care to no more than six children unrelated to the foster parents by blood, marriage or adoption;

(c) "Group home", a child care facility which approximates a family setting, provides access to community activities and resources, and provides care to no more than twelve children.

**HISTORY:** L. 1957 p. 642 § 211.020, A.L. 1978 H.B. 1634, A.L. 1982 S.B. 497

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TITLE 12. PUBLIC HEALTH AND WELFARE (Chs. 188-215)  
CHAPTER 211. JUVENILE COURTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 211.031 R.S.Mo. (2006)

§ 211.031. Juvenile court to have exclusive jurisdiction, when -- exceptions --  
home schooling, attendance violations, how treated

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.

**HISTORY:** L. 1957 p. 642 § 211.030, A.L. 1976 S.B. 511, A.L. 1980 S.B. 512, A.L. 1983 S.B. 368, A.L. 1989 H.B. 502, et al., A.L. 1990 H.B. 1030, A.L. 1991 H.B. 202 & 364, A.L. 1993 H.B. 346, A.L. 1999 S.B. 1, et al., A.L. 2002 S.B. 923, et al., A.L. 2004 H.B. 1453 merged with S.B. 945 and S.B. 803 & 1257 merged with S.B. 1211, A.L. 2005 H.B. 353

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TITLE 12. PUBLIC HEALTH AND WELFARE (Chs. 188-215)  
CHAPTER 211. JUVENILE COURTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 211.059 R.S.Mo. (2006)

§ 211.059. Rights of child when taken into custody (Miranda warning) -- rights of child in custody in abuse and neglect cases

1. When a child is taken into custody by a juvenile officer or law enforcement official, with or without a warrant for an offense in violation of the juvenile code or the general law which would place the child under the jurisdiction of the juvenile court pursuant to subdivision (2) or (3) of subsection 1 of section 211.031, the child shall be advised prior to questioning:

- (1) That he has the right to remain silent; and
- (2) That any statement he does make to anyone can be and may be used against him; and
- (3) That he has a right to have a parent, guardian or custodian present during questioning; and
- (4) That he has a right to consult with an attorney and that one will be appointed and paid for him if he cannot afford one.

2. If the child indicates in any manner and at any stage of questioning pursuant to this section that he does not wish to be questioned further, the officer shall cease questioning.

3. When a child is taken into custody by a juvenile officer or law enforcement official which places the child under the jurisdiction of the juvenile court under subdivision (1) of subsection 1 of section 211.031, including any interactions with the child by the children's division, the following shall apply:

- (1) If the child indicates in any manner at any stage during questioning involving the alleged abuse and neglect that the child does not wish to be

questioned any further on the allegations, or that the child wishes to have his or her parent, legal guardian, or custodian if such parent, guardian, or custodian is not the alleged perpetrator, or his or her attorney present during questioning as to the alleged abuse, the questioning of the child shall cease on the alleged abuse and neglect until such a time that the child does not object to talking about the alleged abuse and neglect unless the interviewer has reason to believe that the parent, legal guardian, or custodian is acting to protect the alleged perpetrator. Nothing in this subdivision shall be construed to prevent the asking of any questions necessary for the care, treatment, or placement of a child; and

(2) Notwithstanding any prohibition of hearsay evidence, all video or audio recordings of any meetings, interviews, or interrogations of a child shall be presumed admissible as evidence in any court or administrative proceeding involving the child if the following conditions are met:

(a) Such meetings, interviews, or interrogations of the child are conducted by the state prior to or after the child is taken into the custody of the state; and

(b) Such video or audio recordings were made prior to the adjudication hearing in the case. Nothing in this paragraph shall be construed to prohibit the videotaping or audiotaping of any such meetings, interviews, or interrogations of a child after the adjudication hearing; and

(3) Only upon a showing by clear and convincing evidence that such a video or audio recording lacks sufficient indicia of reliability shall such recording be inadmissible.

The provisions of this subsection shall not apply to statements admissible under section 491.075 or 492.304, RSMo, in criminal proceedings.

**HISTORY:** L. 1989 H.B. 502, et al., A.L. 2004 H.B. 1453

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TITLE 12. PUBLIC HEALTH AND WELFARE (Chs. 188-215)  
CHAPTER 211. JUVENILE COURTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 211.061 R.S.Mo. (2006)

§ 211.061. Arrested child taken before juvenile court -- transfer of prosecution to juvenile court -- limitations on detention of juvenile -- detention hearing, notice

1. When a child is taken into custody with or without warrant for an offense, the child, together with any information concerning him and the personal property found in his possession, shall be taken immediately and directly before the juvenile court or delivered to the juvenile officer or person acting for him.

2. If any person is taken before a circuit or associate circuit judge not assigned to juvenile court or a municipal judge, and it is then, or at any time thereafter, ascertained that he was under the age of seventeen years at the time he is alleged to have committed the offense, or that he is subject to the jurisdiction of the juvenile court as provided by this chapter, it is the duty of the judge forthwith to transfer the case or refer the matter to the juvenile court, and direct the delivery of such person, together with information concerning him and the personal property found in his possession, to the juvenile officer or person acting as such.

3. When the juvenile court is informed that a child is in detention it shall examine the reasons therefor and shall immediately:

(1) Order the child released; or

(2) Order the child continued in detention until a detention hearing is held. An order to continue the child in detention shall only be entered upon the filing of a petition or motion to modify and a determination by the court that probable cause exists to believe that the child has committed acts specified in the petition or motion that bring the child within the jurisdiction of the court under subdivision (2) or (3) of subsection 1 of section 211.031.

4. A juvenile shall not remain in detention for a period greater than twenty-four hours unless the court orders a detention hearing. If such hearing is not held within three days, excluding Saturdays, Sundays and legal holidays, the juvenile shall be released from detention unless the court for good cause orders the hearing continued. The detention hearing shall be held within the judicial circuit at a date, time and place convenient to the court. Notice of the date, time and place of a detention hearing, and of the right to counsel, shall be given to the juvenile and his custodian in person, by telephone, or by such other expeditious method as is available.

**HISTORY:** L. 1957 p. 642 § 211.050, A.L. 1978 H.B. 1634, A.L. 1989 H.B. 502, et al.

LEXISNEXIS (R) MISSOURI ANNOTATED STATUTES

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TITLE 12. PUBLIC HEALTH AND WELFARE (Chs. 188-215)  
CHAPTER 211. JUVENILE COURTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 211.063 R.S.Mo. (2006)

§ 211.063. Secure detention, limitations -- probable cause hearing required, when -- definitions -- application of law

1. A child accused of violating the provisions of subdivision (2) of subsection 1 of section 211.031 shall not be held in a secure detention placement for a period greater than twenty-four hours, excluding Saturdays, Sundays and legal holidays, unless the court finds pursuant to a probable cause hearing held within that twenty-four-hour period, that the child has violated the conditions of a valid court order and that:

(1) The child has a record of willful failure to appear at juvenile court proceedings; or

(2) The child has a record of violent conduct resulting in physical injury to self or others; or

(3) The child has a record of leaving a court-ordered placement, other than secure detention, without permission.

2. As used in this section, the following terms mean:

(1) "Secure detention", any public or private residential facility used for the temporary placement of any child if such facility includes construction fixtures designed to physically restrict the movements and activities of children held in the lawful custody of such facility;

(2) "Valid court order", an order issued by a court of competent jurisdiction regarding a child who has been brought before the court, which sets forth specific conditions of behavior for the child and consequences of violations of such conditions.

3. This section shall not apply:

(1) To a child who has been taken under the jurisdiction of the court pursuant to subdivision (3) of subsection 1 of section 211.031; or

(2) To a child who was adjudicated pursuant to subdivision (3) of subsection 1 of section 211.031 after being taken under the jurisdiction of the court; or

(3) To a child who is currently charged with a violation under subdivision (3) of subsection 1 of section 211.031.

**HISTORY:** L. 1989 H.B. 502, et al., A.L. 1993 S.B. 88

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\*\*\* THIS SECTION IS CURRENT THROUGH ALL 2005 LEGISLATION \*\*\*  
\*\*\* MOST CURRENT ANNOTATION JULY 28, 2006 \*\*\*

TITLE 12. PUBLIC HEALTH AND WELFARE (Chs. 188-215)  
CHAPTER 211. JUVENILE COURTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 211.071 R.S.Mo. (2006)

§ 211.071. Certification of juvenile for trial as adult--procedure--mandatory hearing, certain offenses--misrepresentation of age, effect

1. If a petition alleges that a child between the ages of twelve and seventeen has committed an offense which would be considered a felony if committed by an adult, the court may, upon its own motion or upon motion by the juvenile officer, the child or the child's custodian, order a hearing and may, in its discretion, dismiss the petition and such child may be transferred to the court of general jurisdiction and prosecuted under the general law; except that if a petition alleges that any child has committed an offense which would be considered first degree murder under section 565.020, RSMo, second degree murder under section 565.021, RSMo, first degree assault under section 565.050, RSMo, forcible rape under section 566.030, RSMo, forcible sodomy under section 566.060, RSMo, first degree robbery under section 569.020, RSMo, or distribution of drugs under section 195.211, RSMo, or has committed two or more prior unrelated offenses which would be felonies if committed by an adult, the court shall order a hearing, and may in its discretion, dismiss the petition and transfer the child to a court of general jurisdiction for prosecution under the general law.

2. Upon apprehension and arrest, jurisdiction over the criminal offense allegedly committed by any person between seventeen and twenty-one years of age over whom the juvenile court has retained continuing jurisdiction shall automatically terminate and that offense shall be dealt with in the court of general jurisdiction as provided in section 211.041.

3. Knowing and willful age misrepresentation by a juvenile subject shall not affect any action or proceeding which occurs based upon the misrepresentation. Any evidence obtained during the period of time in which a child misrepresents his

age may be used against the child and will be subject only to rules of evidence applicable in adult proceedings.

4. Written notification of a transfer hearing shall be given to the juvenile and his custodian in the same manner as provided in sections 211.101 and 211.111. Notice of the hearing may be waived by the custodian. Notice shall contain a statement that the purpose of the hearing is to determine whether the child is a proper subject to be dealt with under the provisions of this chapter, and that if the court finds that the child is not a proper subject to be dealt with under the provisions of this chapter, the petition will be dismissed to allow for prosecution of the child under the general law.

5. The juvenile officer may consult with the office of prosecuting attorney concerning any offense for which the child could be certified as an adult under this section. The prosecuting or circuit attorney shall have access to police reports, reports of the juvenile or deputy juvenile officer, statements of witnesses and all other records or reports relating to the offense alleged to have been committed by the child. The prosecuting or circuit attorney shall have access to the disposition records of the child when the child has been adjudicated pursuant to subdivision (3) of subsection 1 of section 211.031. The prosecuting attorney shall not divulge any information regarding the child and the offense until the juvenile court at a judicial hearing has determined that the child is not a proper subject to be dealt with under the provisions of this chapter.

6. A written report shall be prepared in accordance with this chapter developing fully all available information relevant to the criteria which shall be considered by the court in determining whether the child is a proper subject to be dealt with under the provisions of this chapter and whether there are reasonable prospects of rehabilitation within the juvenile justice system. These criteria shall include but not be limited to:

(1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction;

(2) Whether the offense alleged involved viciousness, force and violence;

(3) Whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted;

(4) Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;

(5) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements;

(6) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;

(7) The age of the child;

(8) The program and facilities available to the juvenile court in considering disposition;

(9) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court; and

(10) Racial disparity in certification.

7. If the court dismisses the petition to permit the child to be prosecuted under the general law, the court shall enter a dismissal order containing:

(1) Findings showing that the court had jurisdiction of the cause and of the parties;

(2) Findings showing that the child was represented by counsel;

(3) Findings showing that the hearing was held in the presence of the child and his counsel; and

(4) Findings showing the reasons underlying the court's decision to transfer jurisdiction.

8. A copy of the petition and order of the dismissal shall be sent to the prosecuting attorney.

9. When a petition has been dismissed thereby permitting a child to be prosecuted under the general law, the jurisdiction of the juvenile court over that child is forever terminated, except as provided in subsection 10 of this section, for an act that would be a violation of a state law or municipal ordinance.

10. If a petition has been dismissed thereby permitting a child to be prosecuted under the general law and the child is found not guilty by a court of general jurisdiction, the juvenile court shall have jurisdiction over any later offense committed by that child which would be considered a misdemeanor or felony if committed by an adult, subject to the certification provisions of this section.

11. If the court does not dismiss the petition to permit the child to be prosecuted under the general law, it shall set a date for the hearing upon the petition as provided in section 211.171.

**HISTORY:** L. 1957 p. 642 § 211.070, A.L. 1983 S.B. 368, A.L. 1989 H.B. 502, et al., A.L. 1995 H.B. 174, et al.

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TITLE 12. PUBLIC HEALTH AND WELFARE (Chs. 188-215)  
CHAPTER 211. JUVENILE COURTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 211.151 R.S.Mo. (2006)

§ 211.151. Places of detention--photographing and fingerprinting, restrictions

1. Pending disposition of a case, the juvenile court may order in writing the detention of a child in one of the following places:

- (1) A juvenile detention facility provided by the county;
- (2) A shelter care facility, subject to the supervision of the court;
- (3) A suitable place of detention maintained by an association having for one of its objects the care and protection of children;
- (4) Such other suitable custody as the court may direct.

2. A child shall not be detained in a jail or other adult detention facility pending disposition of a case.

3. Law enforcement officers shall take fingerprints and photographs of a child taken into custody for offenses that would be considered felonies if committed by adults, without the approval of the juvenile judge. A child taken into custody as a victim of abuse or neglect or as a status offender pursuant to subdivision (1) or (2) of subsection 1 of section 211.031 or for an offense that would be considered a misdemeanor if committed by an adult may be fingerprinted or photographed with the consent of the juvenile judge. Records of a child who has been fingerprinted and photographed after being taken into custody shall be closed records as provided under section 610.100, RSMo, if a petition has not been filed within thirty days of the date that the child was taken into custody; and if a petition for the child has not been filed within one year of the date the child was taken into custody, any records relating to the child concerning the alleged offense may be expunged under the procedures in sections 610.122 to 610.126, RSMo.

4. (1) As used in this section, the term "jail or other adult detention facility" means any locked facility administered by state, county or local law enforcement and correctional agencies, a primary purpose of which is to detain adults charged with violating a criminal law pending trial, including facilities of a temporary nature which do not hold persons after they have been formally charged, or to confine adults convicted of an offense. The term "jail or other adult detention facility" does not include a juvenile detention facility.

(2) As used in this section, the term "juvenile detention facility" means a place, institution, building or part thereof, set of buildings or area, whether or not enclosing a building or set of buildings, which has been designated by the juvenile court as a place of detention for juveniles and which is operated, administered and staffed separately and independently of a jail or other detention facility for adults and used exclusively for the lawful custody and treatment of juveniles. The facility may be owned or operated by public or private agencies. A juvenile detention facility may be located in the same building or grounds as a jail or other adult detention facility if there is spatial separation between the facilities which prevents haphazard or accidental contact between juvenile and adult detainees; there is separation between juvenile and adult program activities; and there are separate juvenile and adult staff other than specialized support staff who have infrequent contact with detainees.

**HISTORY:** L. 1957 p. 642 § 211.150, A.L. 1982 S.B. 497, A.L. 1984 H.B. 1255, A.L. 1995 H.B. 174, et al.

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TITLE 12. PUBLIC HEALTH AND WELFARE (Chs. 188-215)  
CHAPTER 211. JUVENILE COURTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 211.171 R.S.Mo. (2006)

§ 211.171. Hearing procedure -- notification of current foster parents, preadoptive parents and relatives, when -- public may be excluded, when -- victim impact statement permitted, when

1. The procedure to be followed at the hearing shall be determined by the juvenile court judge and may be as formal or informal as he or she considers desirable, consistent with constitutional and statutory requirements. The judge may take testimony and inquire into the habits, surroundings, conditions and tendencies of the child and the family to enable the court to render such order or judgment as will best promote the welfare of the child and carry out the objectives of this chapter.

2. The hearing may, in the discretion of the court, proceed in the absence of the child and may be adjourned from time to time.

3. The current foster parents of a child, or any preadoptive parent or relative currently providing care for the child, shall be provided with notice of, and an opportunity to be heard in, any hearing to be held with respect to the child. This subsection shall not be construed to require that any such foster parent, preadoptive parent or relative providing care for a child be made a party to the case solely on the basis of such notice and opportunity to be heard.

4. All cases of children shall be heard separately from the trial of cases against adults.

5. Stenographic notes or an authorized recording of the hearing shall be required if the court so orders or, if requested by any party interested in the proceeding.

6. The general public shall be excluded and only such persons admitted as have a direct interest in the case or in the work of the court except in cases where the child is accused of conduct which, if committed by an adult, would be considered a class A or B felony; or for conduct which would be considered a class C felony, if the child has previously been formally adjudicated for the commission of two or more unrelated acts which would have been class A, B or C felonies, if committed by an adult.

7. The practice and procedure customary in proceedings in equity shall govern all proceedings in the juvenile court; except that, the court shall not grant a continuance in such proceedings absent compelling extenuating circumstances, and in such cases, the court shall make written findings on the record detailing the specific reasons for granting a continuance.

8. The court shall allow the victim of any offense to submit a written statement to the court. The court shall allow the victim to appear before the court personally or by counsel for the purpose of making a statement, unless the court finds that the presence of the victim would not serve justice. The statement shall relate solely to the facts of the case and any personal injuries or financial loss incurred by the victim. A member of the immediate family of the victim may appear personally or by counsel to make a statement if the victim has died or is otherwise unable to appear as a result of the offense committed by the child.

**HISTORY:** L. 1957 p. 642 § 211.190, A.L. 1989 H.B. 502, et al., A.L. 1995 H.B. 174, et al., A.L. 1998 H.B. 1822 merged with S.B. 674, A.L. 1999 H.B. 136, A.L. 2004 H.B. 1453

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TITLE 12. PUBLIC HEALTH AND WELFARE (Chs. 188-215)  
CHAPTER 211. JUVENILE COURTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 211.211 R.S.Mo. (2006)

§ 211.211. Right to counsel--appointed, when--waiver

1. A party is entitled to be represented by counsel in all proceedings.
2. The court shall appoint counsel for a child prior to the filing of a petition if a request is made therefor to the court and the court finds that the child is the subject of a juvenile court proceeding and that the child making the request is indigent.
3. When a petition has been filed, the court shall appoint counsel for the child when necessary to assure a full and fair hearing.
4. When a petition has been filed and the child's custodian appears before the court without counsel, the court shall appoint counsel for the custodian if it finds:
  - (1) That the custodian is indigent; and
  - (2) That the custodian desires the appointment of counsel; and
  - (3) That a full and fair hearing requires appointment of counsel for the custodian.
5. Counsel shall be allowed a reasonable time in which to prepare to represent his client.
6. Counsel shall serve for all stages of the proceedings, including appeal, unless relieved by the court for good cause shown. If no appeal is taken, services of counsel are terminated following the entry of an order of disposition.
7. The child and his custodian may be represented by the same counsel except where a conflict of interest exists. Where it appears to the court that a conflict exists, it shall order that the child and his custodian be represented by separate counsel, and it shall appoint counsel if required by subsection 3 or 4 of this section.

8. When a petition has been filed, a child may waive his right to counsel only with the approval of the court.

9. Waiver of counsel by a child may be withdrawn at any stage of the proceeding, in which event the court shall appoint counsel for the child if required by subsection 3 of this section.

**HISTORY:** L. 1957 p. 642 § 211.215, A.L. 1989 H.B. 502, et al.

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TITLE 33. EVIDENCE AND LEGAL ADVERTISEMENTS (Chs. 490-493)  
CHAPTER 491. WITNESSES  
GENERAL PROVISIONS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 491.060 R.S.Mo. (2006)

§ 491.060. Persons incompetent to testify -- exceptions, children in certain cases

The following persons shall be incompetent to testify:

(1) A person who is mentally incapacitated at the time of his or her production for examination;

(2) A child under ten years of age, who appears incapable of receiving just impressions of the facts respecting which the child is examined, or of relating them truly; provided, however, that except as provided in subdivision (1) of this section, a child under the age of ten who is alleged to be a victim of an offense pursuant to chapter 565, 566 or 568, RSMo, shall be considered a competent witness and shall be allowed to testify without qualification in any judicial proceeding involving such alleged offense. The trier of fact shall be permitted to determine the weight and credibility to be given to the testimony;

(3) An attorney, concerning any communication made to the attorney by such attorney's client in that relation, or such attorney's advice thereon, without the consent of such client;

(4) Any person practicing as a minister of the gospel, priest, rabbi or other person serving in a similar capacity for any organized religion, concerning a communication made to him or her in his or her professional capacity as a spiritual advisor, confessor, counselor or comforter;

(5) A physician licensed pursuant to chapter 334, RSMo, a chiropractor licensed pursuant to chapter 331, RSMo, a licensed psychologist or a dentist licensed pursuant to chapter 332, RSMo, concerning any information which he or she may have acquired from any patient while attending the patient in a

professional character, and which information was necessary to enable him or her to prescribe and provide treatment for such patient as a physician, chiropractor, psychologist or dentist.

**HISTORY:** RSMo 1939 § 1895, A.L. 1977 H.B. 175, A.L. 1983 S.B. 44 & 45, A.L. 1984 H.B. 1255, A.L. 1985 H.B. 366, et al., A.L. 1988 S.B. 640, A.L. 1999 H.B. 570

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TITLE 33. EVIDENCE AND LEGAL ADVERTISEMENTS (Chs. 490-493)  
CHAPTER 491. WITNESSES  
GENERAL PROVISIONS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 491.075 R.S.Mo. (2006)

§ 491.075. Statement of child under fourteen 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.

**HISTORY:** L. 1985 H.B. 366, et al., A.L. 1992 S.B. 638, A.L. 2004 H.B. 1453

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TITLE 33. EVIDENCE AND LEGAL ADVERTISEMENTS (Chs. 490-493)  
CHAPTER 491. WITNESSES  
CHILD VICTIM WITNESS PROTECTION LAW

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 491.675 R.S.Mo. (2006)

§ 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".

**HISTORY:** L. 1985 H.B. 366, et al. § 7, A.L. 1987 H.B. 598

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TITLE 33. EVIDENCE AND LEGAL ADVERTISEMENTS (Chs. 490-493)  
CHAPTER 491. WITNESSES  
CHILD VICTIM WITNESS PROTECTION LAW

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 491.699 R.S.Mo. (2006)

§ 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.

**HISTORY:** L. 1987 H.B. 598

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TITLE 38. CRIMES AND PUNISHMENT; PEACE OFFICERS AND PUBLIC  
DEFENDERS (Chs. 556-600)  
CHAPTER 566. SEXUAL OFFENSES

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 566.062 R.S.Mo. (2006)

**STATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT  
CHANGES TO THIS DOCUMENT LEXSEE 2006 Mo. HB 1698 -- See section  
A.**

§ 566.062. Statutory sodomy, first degree, penalties

1. A person commits the crime of statutory sodomy in the first degree if he has deviate sexual intercourse with another person who is less than fourteen years old.

2. Statutory sodomy in the first degree is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless in the course thereof the actor inflicts serious physical injury on any person, displays a deadly weapon or dangerous instrument in a threatening manner, subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, or the victim is less than twelve years of age, in which case the authorized term of imprisonment is life imprisonment or a term of years not less than ten years.

**HISTORY:** L. 1994 S.B. 693

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TITLE 38. CRIMES AND PUNISHMENT; PEACE OFFICERS AND PUBLIC  
DEFENDERS (Chs. 556-600)  
CHAPTER 595. VICTIMS OF CRIMES, COMPENSATION AND SERVICES  
VICTIM'S AND WITNESS'S RIGHTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

§ 595.209 R.S.Mo. (2006)

§ 595.209. Rights of victims and witnesses -- written notification, requirements

1. The following rights shall automatically be afforded to victims of dangerous felonies, as defined in section 556.061, RSMo, victims of murder in the first degree, as defined in section 565.020, RSMo, victims of voluntary manslaughter, as defined in section 565.023, RSMo, and victims of an attempt to commit one of the preceding crimes, as defined in section 564.011, RSMo; and, upon written request, the following rights shall be afforded to victims of all other crimes and witnesses of crimes:

(1) For victims, the right to be present at all criminal justice proceedings at which the defendant has such right, including juvenile proceedings where the offense would have been a felony if committed by an adult, even if the victim is called to testify or may be called to testify as a witness in the case;

(2) For victims, the right to information about the crime, as provided for in subdivision (5) of this subsection;

(3) For victims and witnesses, to be informed, in a timely manner, by the prosecutor's office of the filing of charges, preliminary hearing dates, trial dates, continuances and the final disposition of the case. Final disposition information shall be provided within five days;

(4) For victims, the right to confer with and to be informed by the prosecutor regarding bail hearings, guilty pleas, pleas under chapter 552, RSMo, or its successors, hearings, sentencing and probation revocation hearings and the right to

be heard at such hearings, including juvenile proceedings, unless in the determination of the court the interests of justice require otherwise;

(5) The right to be informed by local law enforcement agencies, the appropriate juvenile authorities or the custodial authority of the following:

(a) The status of any case concerning a crime against the victim, including juvenile offenses;

(b) The right to be informed by local law enforcement agencies or the appropriate juvenile authorities of the availability of victim compensation assistance, assistance in obtaining documentation of the victim's losses, including, but not limited to and subject to existing law concerning protected information or closed records, access to copies of complete, unaltered, unedited investigation reports of motor vehicle, pedestrian, and other similar accidents upon request to the appropriate law enforcement agency by the victim or the victim's representative, and emergency crisis intervention services available in the community;

(c) Any release of such person on bond or for any other reason;

(d) Within twenty-four hours, any escape by such person from a municipal detention facility, county jail, a correctional facility operated by the department of corrections, mental health facility, or the division of youth services or any agency thereof, and any subsequent recapture of such person;

(6) For victims, the right to be informed by appropriate juvenile authorities of probation revocation hearings initiated by the juvenile authority and the right to be heard at such hearings or to offer a written statement, video or audio tape in lieu of a personal appearance, the right to be informed by the board of probation and parole of probation revocation hearings initiated by the board and of parole hearings, the right to be present at each and every phase of parole hearings and the right to be heard at probation revocation and parole hearings or to offer a written statement, video or audio tape in lieu of a personal appearance, and the right to be informed by the custodial mental health facility or agency thereof of any hearings for the release of a person committed pursuant to the provisions of chapter 552, RSMo, the right to be present at such hearings, the right to be heard at such hearings or to offer a written statement, video or audio tape in lieu of personal appearance;

(7) For victims and witnesses, upon their written request, the right to be informed by the appropriate custodial authority, including any municipal detention facility, juvenile detention facility, county jail, correctional facility operated by the department of corrections, mental health facility, division of youth services or agency thereof if the offense would have been a felony if committed by an adult,

postconviction or commitment pursuant to the provisions of chapter 552, RSMo, of the following:

- (a) The projected date of such person's release from confinement;
- (b) Any release of such person on bond;
- (c) Any release of such person on furlough, work release, trial release, electronic monitoring program, or to a community correctional facility or program or release for any other reason, in advance of such release;
- (d) Any scheduled parole or release hearings, including hearings under section 217.362, RSMo, regarding such person and any changes in the scheduling of such hearings. No such hearing shall be conducted without thirty days' advance notice;
- (e) Within twenty-four hours, any escape by such person from a municipal detention facility, county jail, a correctional facility operated by the department of corrections, mental health facility, or the division of youth services or any agency thereof, and any subsequent recapture of such person;
- (f) Any decision by a parole board, by a juvenile releasing authority or by a circuit court presiding over releases pursuant to the provisions of chapter 552, RSMo, or by a circuit court presiding over releases under section 217.362, RSMo, to release such person or any decision by the governor to commute the sentence of such person or pardon such person;
- (g) Notification within thirty days of the death of such person;
- (8) For witnesses who have been summoned by the prosecuting attorney and for victims, to be notified by the prosecuting attorney in a timely manner when a court proceeding will not go on as scheduled;
- (9) For victims and witnesses, the right to reasonable protection from the defendant or any person acting on behalf of the defendant from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts;
- (10) For victims and witnesses, on charged cases or submitted cases where no charge decision has yet been made, to be informed by the prosecuting attorney of the status of the case and of the availability of victim compensation assistance and of financial assistance and emergency and crisis intervention services available within the community and information relative to applying for such assistance or services, and of any final decision by the prosecuting attorney not to file charges;
- (11) For victims, to be informed by the prosecuting attorney of the right to restitution which shall be enforceable in the same manner as any other cause of action as otherwise provided by law;

(12) For victims and witnesses, to be informed by the court and the prosecuting attorney of procedures to be followed in order to apply for and receive any witness fee to which they are entitled;

(13) When a victim's property is no longer needed for evidentiary reasons or needs to be retained pending an appeal, the prosecuting attorney or any law enforcement agency having possession of the property shall, upon request of the victim, return such property to the victim within five working days unless the property is contraband or subject to forfeiture proceedings, or provide written explanation of the reason why such property shall not be returned;

(14) An employer may not discharge or discipline any witness, victim or member of a victim's immediate family for honoring a subpoena to testify in a criminal proceeding or for participating in the preparation of a criminal proceeding;

(15) For victims, to be provided with creditor intercession services by the prosecuting attorney if the victim is unable, as a result of the crime, temporarily to meet financial obligations;

(16) For victims and witnesses, the right to speedy disposition of their cases, and for victims, the right to speedy appellate review of their cases, provided that nothing in this subdivision shall prevent the defendant from having sufficient time to prepare such defendant's defense. The attorney general shall provide victims, upon their written request, case status information throughout the appellate process of their cases. The provisions of this subdivision shall apply only to proceedings involving the particular case to which the person is a victim or witness;

(17) For victims and witnesses, to be provided by the court, a secure waiting area during court proceedings and to receive notification of the date, time and location of any hearing conducted by the court for reconsideration of any sentence imposed, modification of such sentence or recall and release of any defendant from incarceration.

2. The provisions of subsection 1 of this section shall not be construed to imply any victim who is incarcerated by the department of corrections or any local law enforcement agency has a right to be released to attend any hearing or that the department of corrections or the local law enforcement agency has any duty to transport such incarcerated victim to any hearing.

3. Those persons entitled to notice of events pursuant to the provisions of subsection 1 of this section shall provide the appropriate person or agency with their current addresses and telephone numbers or the addresses or telephone numbers at which they wish notification to be given.

4. Notification by the appropriate person or agency utilizing the statewide automated crime victim notification system as established in section 650.310, RSMo, shall constitute compliance with the victim notification requirement of this section. If notification utilizing the statewide automated crime victim notification system cannot be used, then written notification shall be sent by certified mail to the most current address provided by the victim.

5. Victims' rights as established in section 32 of article I of the Missouri Constitution or the laws of this state pertaining to the rights of victims of crime shall be granted and enforced regardless of the desires of a defendant and no privileges of confidentiality shall exist in favor of the defendant to exclude victims or prevent their full participation in each and every phase of parole hearings or probation revocation hearings. The rights of the victims granted in this section are absolute and the policy of this state is that the victim's rights are paramount to the defendant's rights. The victim has an absolute right to be present at any hearing in which the defendant is present before a probation and parole hearing officer.

**HISTORY:** L. 1986 H.B. 873 & 874 § 15, A.L. 1992 S.B. 638, A.L. 1993 S.B. 19 § 595.209 subsecs. 1, 3, 4, A.L. 1994 S.B. 554 § 595.209 subsecs. 1, 2, 3, A.L. 1996 S.B. 884 & 841, A.L. 2003 S.B. 5, A.L. 2005 H.B. 353

LEXISNEXIS (R) MISSOURI ANNOTATED CONSTITUTION

\*\*\* THIS SECTION IS CURRENT THROUGH ALL 2005 LEGISLATION \*\*\*  
\*\*\* MOST CURRENT ANNOTATION JULY 28, 2006 \*\*\*

CONSTITUTION OF MISSOURI  
ADOPTED 1945  
ARTICLE I. BILL OF RIGHTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

Mo. Const. Art. I, § 18(a) (2006)

§ 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.

**HISTORY:** Const. of 1875, Art. II, 22.

LEXISNEXIS (R) MISSOURI ANNOTATED CONSTITUTION

\*\*\* THIS SECTION IS CURRENT THROUGH ALL 2005 LEGISLATION \*\*\*  
\*\*\* MOST CURRENT ANNOTATION JULY 28, 2006 \*\*\*

CONSTITUTION OF MISSOURI  
ADOPTED 1945  
ARTICLE I. BILL OF RIGHTS

**GO TO MISSOURI STATUTES ARCHIVE DIRECTORY**

Mo. Const. Art. I, § 32 (2006)

§ 32. Crime victims' rights

1. Crime victims, as defined by law, shall have the following rights, as defined by law:

(1) The right to be present at all criminal justice proceedings at which the defendant has such right, including juvenile proceedings where the offense would have been a felony if committed by an adult;

(2) Upon request of the victim, the right to be informed of and heard at guilty pleas, bail hearings, sentencing, probation revocation hearings, and parole hearings, unless in the determination of the court the interests of justice require otherwise;

(3) The right to be informed of trials and preliminary hearings;

(4) The right to restitution, which shall be enforceable in the same manner as any other civil cause of action, or as otherwise provided by law;

(5) The right to the speedy disposition and appellate review of their cases, provided that nothing in this subdivision shall prevent the defendant from having sufficient time to prepare his defense;

(6) The right to reasonable protection from the defendant or any person acting on behalf of the defendant;

(7) The right to information concerning the escape of an accused from custody or confinement, the defendant's release and scheduling of the defendant's release from incarceration; and

(8) The right to information about how the criminal justice system works, the rights and the availability of services, and upon request of the victim the right to information about the crime.

2. Notwithstanding section 20 of article I of this Constitution, upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may deny bail or may impose special conditions which the defendant and surety must guarantee.

3. Nothing in this section shall be construed as creating a cause of action for money damages against the state, a county, a municipality, or any of the agencies, instrumentalities, or employees provided that the General Assembly may, by statutory enactment, reverse, modify, or supercede any judicial decision or rule arising from any cause of action brought pursuant to this section.

4. Nothing in this section shall be construed to authorize a court to set aside or to void a finding of guilt, or an acceptance of a plea of guilty in any criminal case.

5. The general assembly shall have power to enforce this section by appropriate legislation.

MISSOURI RULES OF COURT

\*\*\* THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED THROUGH  
MARCH 1, 2006 \*\*\*

SUPREME COURT RULES  
RULES OF PRACTICE AND PROCEDURE IN JUVENILE COURTS  
RULE 111. CUSTODY AND DETENTION

S.Ct. Rule 111.03 R.S.Mo. (2006)

Review Court Orders which may amend this Rule

111.03. Designation of Detention Facility

**a.** Each court shall by order designate the detention facility or facilities to which juveniles shall be taken when within judicial custody. Copies of the order shall be made available to all law enforcement agencies within the territorial jurisdiction of the court.

**b.** Pending disposition of the case, the court may order in writing the detention of the juvenile in one of the following places:

- (1) A juvenile detention facility;
- (2) A shelter care facility, subject to the supervision of the court;
- (3) A suitable place of detention maintained by an association having for one of its objects the care and protection of children;
- (4) Such other suitable custody as the court may direct.

**c.** A juvenile under the age of seventeen years shall not be detained in a jail or other adult detention facility.

**d.** A detention facility shall be operated to provide for:

- (1) housing and physical spaces for each juvenile consistent with the physical and emotional needs of the juvenile;
- (2) the continued availability of adequate personnel capable, by training or experience, of maintaining the purposes of the facility;
- (3) the educational, moral, medical, physical and mental well-being of the juvenile;

(4) the protection of the juvenile from physical and emotional harm from other juveniles, from themselves, and from other reasonably anticipated dangers; and

(5) the preservation and protection of the legal rights of the juvenile.

### **Comment**

Rule 111.03a authorizes the court by order to specify the detention facilities to which juveniles shall be taken and is consistent with current practice. The order should distinguish between juveniles who are taken into custody in connection with proceedings under subdivision (2) or (3) of subsection 1 of section 211.031, RSMo, and those who are taken into custody in connection with proceedings under subdivision (1) of subsection 1 of section 211.031, RSMo. The purpose of the order is to provide guidance and direction to court staff and others concerning where a juvenile shall be held pending a specific detention order of the court. A jail or other adult detention facility shall not be designated as a place of detention for a juvenile unless the juvenile is seventeen years or older. Definitions for "jail or other adult detention facility" and "juvenile detention facility" are provided in section 211.151.4, RSMo.

Rule 111.03c restates the content of section 211.151.2, RSMo.

A detention facility operated in accordance with the attached appendix is a detention facility that complies with Rule 111.03d.

**HISTORY:** Adopted Dec. 9, 1975, eff. Aug. 1, 1976. Amended June 25, 1985, eff. Jan. 1, 1986; June 24, 1986, eff. Jan. 1, 1987; Sept. 11, 1990, eff. July 1, 1991; Dec. 9, 1997, eff. Jan. 1, 1999.

MISSOURI RULES OF COURT

\*\*\* THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED THROUGH  
MARCH 1, 2006 \*\*\*

SUPREME COURT RULES  
RULES OF PRACTICE AND PROCEDURE IN JUVENILE COURTS  
RULE 116. REPRESENTATION BY COUNSEL

S.Ct. Rule 116.01 R.S.Mo. (2006)

Review Court Orders which may amend this Rule

116.01. Right to Counsel

- a. A party is entitled to be represented by counsel in all proceedings.
- b. The court shall appoint counsel for a juvenile prior to the filing of a petition if a request is made therefor to the court and the court finds that the juvenile is subject to juvenile proceedings and that the juvenile making the request is indigent.
- c. When a petition has been filed, the court shall appoint counsel for the juvenile when necessary to assure a full and fair hearing.
- d. When a petition has been filed and the juvenile's custodian appears before the court without counsel, the court shall appoint counsel for the custodian if it finds:
  - (1) that the custodian is indigent; and
  - (2) that the custodian desires the appointment of counsel; and
  - (3) that a full and fair hearing requires appointment of counsel for the custodian.
- e. Counsel shall be allowed a reasonable time in which to prepare to represent the client.
- f. Counsel shall serve for all stages of the proceedings, including appeal, unless relieved by the court for good cause shown. If no appeal is taken, services of counsel are terminated following the entry of an order of disposition.
- g. The juvenile and the juvenile's custodian may be represented by the same counsel except where a conflict of interest exists. Where it appears to the court that a conflict exists, it shall order that the juvenile and the juvenile's custodian be represented by separate counsel, and it shall appoint counsel if required by Rule

116.01c or Rule 116.01d.

h. When a petition has been filed, a juvenile may waive the right to counsel only with the approval of the court.

i. Waiver of counsel by a juvenile may be withdrawn at any stage of the proceeding, in which event the court shall appoint counsel for the juvenile if required by Rule 116.01c.

j. Where the services of a public defender or legal aid society are available, the court may appoint counsel therefrom to represent any indigent juvenile or custodian. In all cases where counsel is appointed for the juvenile, the court may assess a reasonable attorney fee and any reasonable and necessary expenses of counsel as costs in the case. In the discretion of the court such costs may be adjudged against the custodian of the juvenile or the informing witness as provided by law, or as otherwise provided by law.

### **Comment**

Rule 116.01 makes full provision for counsel for the juvenile and the juvenile's custodian.

If the court has appointed a guardian ad litem, who is an attorney, for the juvenile, that person may also be appointed counsel for the juvenile unless a full and fair hearing requires additional counsel for the juvenile.

[Amended Dec. 9, 1997, eff. Jan. 1, 1999.]

**HISTORY:** Adopted Dec. 9, 1975, eff. Aug. 1, 1976. Amended May 28, 1981, eff. Jan. 1, 1982; Dec. 9, 1997, eff. Jan. 1, 1999.

MISSOURI RULES OF COURT

\*\*\* THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED THROUGH  
MARCH 1, 2006 \*\*\*

SUPREME COURT RULES  
RULES OF PRACTICE AND PROCEDURE IN JUVENILE COURTS  
RULE 119. HEARING ON PETITION

S.Ct. Rule 119.02 R.S.Mo. (2006)

Review Court Orders which may amend this Rule

119.02. Order of Proceedings

a. The order of proceedings should be as follows:

(1) First, the court shall determine that the juvenile and the juvenile's custodian have been informed of the substance of the petition.

(2) Second, if the juvenile has appeared without counsel the court shall explain to the juvenile the right to counsel under Rule 116.01 and shall assign counsel if required by Rule 116.01.

(3) Third, if the petition alleges that the juvenile has violated a state law or municipal ordinance and the juvenile is not represented by counsel, the court shall explain to the juvenile the juvenile's right to remain silent.

(4) Fourth, the court may inquire:

(A) of the juvenile as to whether the juvenile admits or denies any of the allegations in the petition that the behavior of the juvenile is injurious to the juvenile's welfare or to the welfare of others or that the juvenile has violated a state law or municipal ordinance; or

(B) of the juvenile and the juvenile's custodian in any other case, whether they admit or deny any or all of the allegations of the petition.

(5) Fifth, if the facts admitted are sufficient to authorize the court to act under the Juvenile Code, the court may make a finding that the allegations of the petition have been established by admissions or may receive evidence to corroborate the admissions.

(6) Sixth, if no allegations are admitted or those admitted are insufficient to authorize the court to act under the Juvenile Code, the court shall receive evidence

upon the allegations of the petition.

(7) Seventh, when the evidence has been received upon the allegations of the petition, the court shall determine whether the allegations of the petition have been established in accordance with the appropriate standard of proof.

(A) If the allegations of the petition have not been so established, the court shall enter a judgment dismissing the petition.

(B) If the allegations have been established, the court shall make a finding upon which it exercises its jurisdiction over the juvenile.

(8) Eighth, when the court finds that the allegations of the petition have been established, the court may order the submission of a social study or supplemental social study pursuant to Rule 119.05. The court may continue the hearing until a later date pending receipt of the social study; provided that, when the juvenile is in detention or protective custody, the court may not continue the hearing for more than thirty days unless a further continuance is agreed to by counsel for the juvenile.

(9) Ninth, the court shall receive evidence and other relevant data offered concerning disposition or treatment that should be ordered for the juvenile.

(10) Tenth, the court shall enter a judgment directing the action that shall be taken regarding the juvenile.

b. The parties shall in all proceedings under this Rule 119.02 be afforded the opportunity to cross-examine witnesses, to testify, to present evidence, and to present arguments to the court concerning the weight, credibility, and effect of the evidence.

## **Comment**

This Rule 119.02 provides that evidence is first heard upon the allegations of the petition to determine whether the court has authority to act under the Juvenile Code. When this finding is made, evidence may then be received upon the issue of disposition or treatment. While the first, or adjudicatory, phase is to be kept separate from the second, or dispositional, phase, there is no requirement that any period of time elapse between the completion of the first phase and the initiation of the second. Thus, the dispositional phase may immediately follow the adjudicatory phase unless the court determines for cause to continue the dispositional phase until a later date, as it would do if it wishes to order a new or supplemental social study.

See Rule 128.17 for a recommended form for finding of jurisdiction following

adjudication.

**HISTORY:** Adopted Dec. 9, 1975, eff. Aug. 1, 1976. Amended May 28, 1981, eff. Jan. 1, 1982; Dec. 9, 1997, eff. Jan. 1, 1999 Apr. 2, 1998, eff. Jan. 1, 1999.

MISSOURI RULES OF COURT

\*\*\* THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED THROUGH  
MARCH 1, 2006 \*\*\*

SUPREME COURT RULES  
RULES OF PRACTICE AND PROCEDURE IN JUVENILE COURTS  
RULE 122. RIGHTS OF JUVENILES

S.Ct. Rule 122.05 R.S.Mo. (2006)

Review Court Orders which may amend this Rule

122.05. Notification of Rights

Prior to in-custody interrogation, the juvenile shall be advised by the juvenile officer or by a designee trained by the juvenile officer that the juvenile has the right to remain silent, that the juvenile has the right to an attorney and if the juvenile is unable to afford an attorney that one will be provided, that whatever the juvenile says to the juvenile officer or court personnel can be used in later proceedings, that if the juvenile does talk the juvenile has the right to stop talking at any time and that whatever the juvenile says to the police or persons other than the juvenile officer or court personnel may be used against the juvenile if the juvenile is prosecuted as an adult.

**Comment**

The purpose of this Rule 122.05 is to provide that a juvenile in custody shall be advised of certain rights and the scope of such advice. It also recognizes the limitations on the use of admissions, confessions and statements by the juvenile to the juvenile officer or court personnel.

**HISTORY:** Added May 28, 1981, eff. Jan. 1, 1982. Amended by L.1995, S.B.No. 268, § H, eff. Aug. 28, 1995. Amended Dec. 9, 1997, eff. Jan. 1, 1999.

LexisNexis (R) KANSAS ANNOTATED STATUTES

\*\*\* THIS DOCUMENT IS CURRENT THROUGH THE 2005 SUPPLEMENT  
\*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH NOVEMBER 17, 2006 \*\*\*

CHAPTER 59. PROBATE CODE  
ARTICLE 29A. COMMITMENT OF SEXUALLY VIOLENT PREDATORS

**GO TO KANSAS STATUTES ARCHIVE DIRECTORY**

K.S.A. § 59-29a01 (2006)

59-29a01. Commitment of sexually violent predators; legislative findings; time requirements directory.

The legislature finds that there exists an extremely dangerous group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder. Because the existing civil commitment procedures under K.S.A. 59-2901 et seq. and amendments thereto are inadequate to address the special needs of sexually violent predators and the risks they present to society, the legislature determines that a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators is necessary. The legislature also determines that because of the nature of the mental abnormalities or personality disorders from which sexually violent predators suffer, and the dangers they present, it is necessary to house involuntarily committed sexually violent predators in an environment separate from persons involuntarily committed under K.S.A. 59-2901 et seq. and amendments thereto. Notwithstanding any other evidence of legislative intent, it is hereby declared that any time requirements set forth in K.S.A. 59-29a01 et seq., and amendments thereto, either as originally enacted or as amended, are intended to be directory and not mandatory and serve as guidelines for conducting proceedings under K.S.A. 59-29a01 et seq., and amendments thereto.

**HISTORY:** L. 1994, ch. 316, § 1; L. 1999, ch. 140, § 1; L. 2003, ch. 152, § 1; July 1

IN THE SUPREME COURT OF MISSOURI

In the Interest of: )  
 )  
N.D.C., ) Case No. SC88163  
Date of Birth: December 14, 1993 )  
 )  
A male child under seventeen years of age. )

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**APPENDIX FOR APPELLANT'S BRIEF**

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