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## **JURISDICTIONAL STATEMENT**

Appellant was convicted of child molestation in the first degree, Section 566.067,<sup>1</sup> following a jury trial in the Circuit Court of Daviess County, Missouri. The Honorable Barbara G. Lame sentenced appellant to ten years imprisonment. The Missouri Court of Appeals, Western District, affirmed appellant's conviction. This Court took transfer of this cause on application of the appellant, and therefore has jurisdiction pursuant to Rule 83.04. Article V, Section 10, Mo. Const. (as amended 1976).

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<sup>1</sup> Statutory citations are to RSMo 2000.

## STATEMENT OF FACTS

Appellant was charged by information filed May 6, 2003, with child molestation in the first degree, Section 566.067 (L.F. 10). The state filed a motion to admit the statement of a child victim pursuant to Section 491.075 (L.F. 14-15). Defense counsel filed a companion motion objecting to the admission of hearsay testimony from Joyce Estes, Cynthia Debey or Bernice Fields regarding what the child, Sara Justus, had told them (L.F. 16-28). The motion alleged that to admit the statements “would be a violation of [appellant’s] right to be confronted with the witnesses against him” (L.F. 22).

The parties appeared regarding Sara’s availability to testify and for a reliability determination on the hearsay statements under Section 491.075 (Tr. 2-6). The prosecutor informed the court that “this case is one that I had filed, and then because the child victim was not in a position to testify, I ended up dismissing it. And then at a later point in time, I had refiled it” (Tr. 5).

Rene McCreary testified that she was a sexual abuse therapist at Parkside Counseling (Tr. 11-12). She was counseling Sara and had had about twenty visits with her between November 2002 and the hearing (Tr. 14-15). Sara had just turned four in November, 2002 (Tr. 15).

Ms. McCreary testified that Sara’s anxiety goes up and she becomes fearful when there is the possibility that she would be visiting her father, appellant (Tr. 18). Ms. McCreary believed that Sara would not be able to testify successfully

(Tr. 21). She would not be able to talk very much, it would retraumatize her, and it would be psychologically detrimental for her to testify (Tr. 21-22).

Joyce Estes testified that she worked at the Northwest Missouri Children's Advocacy Center in St. Joseph (Tr. 50-51). She met Sara only once, when she did a videotaped interview with her at the center (Tr. 54). Ms. Estes took Sara to the playroom, and when Sara began to disclose to her, Ms. Estes stopped and took her to the videotape room (Tr. 55-56). The videotape, State's Exhibit 2, was played for the court (Tr. 57-60, Ex. 2). Ms. Estes asked Sara on the tape, "did you tell me in the other room that daddy kissed your pee pee?" (Ex. 2).

Bernice Fields is Sara's grandmother (Tr. 77). She testified that in August, 2002, she had a conversation with Sara and Sara was rubbing her privates (Tr. 77-78). Ms. Fields asked her if she itched, and Sara said she was playing (Tr. 78). Ms. Fields said "that's not nice," and Sara said "my daddy does it" (Tr. 78). Ms. Fields asked, "to himself?" and Sara responded, "no, to me." (Tr. 78). Sara then said that daddy kissed her pee pee and daddy let her kiss his pee pee (Tr. 78-79). Ms. Fields asked Sara if daddy's pee pee looked like hers, and Sara said it looks like the horse's but it has hair around it (Tr. 79). Sara moved her hand "up and down" and told her grandmother that yellow stuff came out (Tr. 79). Ms. Fields made a hotline call and told Sara's mother (Tr. 79, 83).

Cindy Debey of Daviess County DFS talked to Sara after the hotline call (Tr. 85-88). Ms. Debey asked Sara if she had anything to tell about her father, and Sara said her father licked and kissed her "pee pee" (Tr. 90-91). Sara said she had

to kiss, love and shake his pee pee and she moved her hand with a closed grip up and down like masturbation (Tr. 92-93). Ms. Debey asked Sara if his pee pee looked like her pee pee and Sara said it looked like a tail, but it was not a tail because it was in front (Tr. 93-94). The tail had a knob on it that she could not turn and white and yellow pee came out of it (Tr. 94-95). Ms. Debey testified that Sara was not able to express the difference between the truth and a lie very well, so she did not push her on that (Tr. 97). Sara's grandmother had told Sara to tell Ms. Debey and she would make her father stop (Tr. 98).

The court found Sara to be unavailable to testify at trial due to emotional trauma (Tr. 114). The court further found compliance with Section 491.075 and ruled that it would admit the hearsay statements of Sara to those witnesses (Tr. 114-123). The judge stated that she had read the recent case of *Crawford v. Washington*,<sup>2</sup> and that it did not change her ruling (Tr. 123). The cause proceeded to trial and the following was adduced.

Debbie Justus is the mother of Sara Justus, and the ex-wife of appellant (Tr. 224). Sara was born October 20, 1998 (Tr. 227). Ms. Justus and appellant divorced March 13, 2002, and appellant had visitation with Sara from 6:00 on Thursday evenings until 6:00 on Sunday evenings (Tr. 225-226). He picked Sara up and dropped her off (Tr. 226). This arrangement continued from March through August of that year (Tr. 226).

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<sup>2</sup> 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Ms. Justus testified that Sara was three when she was visiting appellant (Tr. 228). On nights after she would come back from his house, Sara would wet the bed and have nightmares (Tr. 228). At first she was excited about visiting appellant, but later she would cling and cry and not want to go (Tr. 228). She would also come back with yeast infections, which stopped after she stopped visiting appellant (Tr. 228-229).

Ms. Fields testified about the conversation she had with Sara when Sara was rubbing her private area (Tr. 233-237). Defense counsel objected to the hearsay, and that was overruled (Tr. 234, 237). Ms. Fields conveyed the incident to the jury (Tr. 234-238). She testified that she called the hotline and took Sara to the office, where Sara met with Cynthia Debey (Tr. 239-240). Ms. Fields said that she told Sara that she needed to “tell someone what your daddy did” (Tr. 250).

Ms. Debey testified to the statements Sara made to her as well (Tr. 261-272). Hearsay objections by defense counsel were overruled (Tr. 263, 264, 265, 266, 267, 268, 270).

Ms. Estes testified that she performs forensic interviews for the Northwest Missouri Children’s Advocacy Center (Tr. 289-292). She defined a forensic interview as an official legal interview done for law enforcement (Tr. 292). Sara came in to talk with another interviewer, but ended up meeting with Ms. Estes (Tr. 294). Sara started talking “pretty freely” so Ms. Estes told her they needed to go where the tape recorder was (Tr. 296). Ms. Estes turned on the tape and interviewed Sara (Tr. 298). Defense counsel objected to the tape, which was

overruled, and the tape was played for the jury (Tr. 300-301). Ms. Estes testified that the taped interview was a forensic interview (Tr. 306).

Appellant testified in his own defense and denied molesting Sara (Tr. 321-322).

The jury returned a verdict of guilty (Tr. 358, L.F. 43). Defense counsel filed a motion for new trial which raised the hearsay issues, and alleged that “the defense was unable to cross-examine the victim” (L.F. 45). On August 20, 2004, the Honorable Barbara G. Lame sentenced appellant, who had waived jury sentencing, to ten years imprisonment (Tr. 361, 382, L.F. 47-49). Appellant appealed to the Court of Appeals, Western District (L.F. 51).

The Court of Appeals affirmed appellant’s conviction. *State v. Justus*, No. WD 64495 (Mo. App., W.D., filed February 21, 2006). This Court transferred this appeal on appellant’s application.

### **POINT RELIED ON**

**The trial court erred and abused its discretion in overruling defense counsel's objections, admitting the hearsay statements of the alleged child victim, Sara Justus, to DFS child abuse and neglect investigator Cynthia Debey and forensic examiner Joyce Estes, and admitting the videotaped interview of Sara by Ms. Estes, because admission of that hearsay violated appellant's right to confront and cross-examine the witnesses against him, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the face-to-face confrontation guaranteed by Article I, Section 18(a) of the Missouri Constitution, in that the statements were testimonial hearsay and defense counsel had no prior opportunity to cross-examine Sara, the child declarant; or in the alternative, in that there were insufficient indicia of reliability to admit the out-of-court statements under Section 491.075 since the statements were the result of leading questions.**

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

(2004);

*State v. Snowden*, 867 A.2d 314 (Md. 2005);

*State v. Mack*, 101 P.3d 349 (Ore. 2004) (en banc);

*State v. Flores*, 120 P.3d 1170 (Nev. 2005);

U.S. Const., Amends. VI and XIV;

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

Sections 491.075, 565.566 and 565.568;

Il. Comp. Stat. Ann. 5/115-10 (2003); and

Md. Code (2001), Section 11-304.

## ARGUMENT

The trial court erred and abused its discretion in overruling defense counsel's objections, admitting the hearsay statements of the alleged child victim, Sara Justus, to DFS child abuse and neglect investigator Cynthia Debey and forensic examiner Joyce Estes, and admitting the videotaped interview of Sara by Ms. Estes, because admission of that hearsay violated appellant's right to confront and cross-examine the witnesses against him, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the face-to-face confrontation guaranteed by Article I, Section 18(a) of the Missouri Constitution, in that the statements were testimonial hearsay and defense counsel had no prior opportunity to cross-examine Sara, the child declarant; or in the alternative, in that there were insufficient indicia of reliability to admit the out-of-court statements under Section 491.075 since the statements were the result of leading questions.

### Standard of review

In general, Missouri courts have reviewed a trial court's decision to admit hearsay testimony for an abuse of discretion. *State v. Bell*, 950 S.W.2d 482, 484 (Mo. banc 1997). However, the United States Supreme Court indicated in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), that the standard of review is different in the case of testimonial hearsay which directly implicates the Confrontation Clause. 124 S.Ct. at 1373-1374. In

*Snowden v. State*, 846 A.2d 36 (Md. Ct. Spec. App. 2004), a Maryland court examined a similar hearsay question and applied a *de novo* standard of review to the issue of whether the Confrontation Clause was violated, as it was considered a mixed question of law and fact. 846 A.2d at 39, n. 4.<sup>3</sup> Appellant asserts that this is the appropriate standard of review in this appeal since in the case of testimonial hearsay, the trial court has less discretion than in a common law hearsay analysis. *See argument following.*

### **The Confrontation Clause and Crawford v. Washington**

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him...." U.S. Const. Amend. VI; *see State v. Glaese*, 956 S.W.2d 926, 930 (Mo. App., S.D. 1997). The Sixth Amendment is applicable to criminal proceedings in state courts through the Fourteenth Amendment to the United States Constitution. *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Glaese*, 956 S.W.2d at 930. The Missouri Constitution goes further and provides that "in criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face...." Mo. Const. Art. I, §

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<sup>3</sup> The highest court of *Maryland* affirmed the Maryland Court of Appeals. *State v. Snowden*, 867 A.2d 314 (Md. 2005). The Maryland Supreme Court's opinion does not mention the standard of review.

18(a); *State v. Schaal*, 806 S.W.2d 659, 662 (Mo. banc 1991). The confrontation rights protected by the Missouri Constitution are the same as those protected by the Sixth Amendment to the United States Constitution. *Id.*; *State v. Hester*, 801 S.W.2d 695, 697 (Mo. banc 1991).

Prior to *Crawford*, the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). *Crawford* held that in cases of "testimonial hearsay," this test had strayed away from the original meaning of the Confrontation Clause. 124 S.Ct. at 1374. According to Justice Scalia, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 1371. Therefore, where testimonial hearsay is at issue, the Sixth Amendment demands that (1) the declarant is unavailable and (2) the appellant had a prior opportunity to cross-examine the declarant. *Id.* at 1374. Reliability is no longer the test.

This Court has not yet decided the implications of the *Crawford* decision for child victim hearsay. Section 491.075 provides, in pertinent part,

1. A statement made by a child under the age of twelve 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 as the time of the criminal proceeding.

Appellant asserts that the admission of the testimony of Joyce Estes and Cynthia Debey regarding the hearsay statements of Sara Justus, and the admission of the videotaped interview of Sara by Ms. Estes, violated his rights to confront and cross-examine Sara under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, despite the trial court's reliance on Section 491.075. Other states have reached a similar conclusion. *See, State v. Snowden*, 867 A.2d 314 (Md. 2005); *People v. Sisavath*, 118 Cal. App. 4<sup>th</sup> 1396, 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004); *State v. T.P.*, 911 So.2d 1117 (Ala. Crim. App. 2004); *In re T.T.*, 815 N.E.2d 789 (Ill.

App. 5 Dist. 2004); *State v. Mack*, 101 P.3d 349 (Ore. 2004) (en banc); *State v. Flores*, 120 P.3d 1170 (Nev. 2005).

The issue of whether this statute is constitutional under *Crawford* does not have to be reached by this Court. As the highest courts of Maryland, Oregon and Nevada recognized, their statutes still have applicability where the child testifies at trial. *Snowden*, 867 A.2d at 330;<sup>4</sup> *Mack*, 101 P.3d at 593; *Flores*, 120 P.3d at 1179-1180.<sup>5</sup> *But see, In re E.H.*, 823 N.E.2d 1029 (Ill. App. 2005) (appeal to Ill. Sup. Ct. pending) (since section 115-10 seeks to admit a declarant's out of court statement into evidence, without the declarant being present in court, as long as there is some other corroborative evidence of the act, section 115-10 is unconstitutional under *Crawford*).

### **Facts and preservation**

The state filed a motion to admit the statement of a child victim pursuant to Section 491.075 (L.F. 14-15). Defense counsel filed a companion motion

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<sup>4</sup> The *Snowden* Court of Appeals decision listed in a footnote a helpful review of various state statutes. Appellant attaches it here at Appendix A-5.

<sup>5</sup> *Flores* is a murder case, not a sex case, but involves the out of court testimony of a child witness. The Nevada Supreme Court held that they would affirm under *Ohio v. Roberts*, but must reverse under *Crawford v. Washington*. 120 P.3d at 1179.

objecting to the admission of hearsay testimony from Joyce Estes, Cynthia Debey or Bernice Fields regarding what the child, Sara Justus, had told them (L.F. 16-28).<sup>6</sup> The motion alleged that to admit the statements “would be a violation of [appellant’s] right to be confronted with the witnesses against him” (L.F. 22).<sup>7</sup>

The parties appeared regarding Sara’s availability to testify and for a reliability determination on the hearsay statements under Section 491.075 (Tr. 2-6). The prosecutor informed the court that “this case is one that I had filed, and then because the child victim was not in a position to testify, I ended up dismissing it. And then at a later point in time, I had refiled it.” (Tr. 5).

Rene McCreary, Sara’s counselor, testified that Sara’s anxiety goes up and she becomes fearful when there is the possibility that she would be visiting her father; that Sara would not be able to testify successfully; and it would be psychologically detrimental for her to testify (Tr. 11-12, 18, 21-22). The court found Sara to be unavailable to testify at trial due to emotional trauma (Tr. 114). Appellant does not challenge this ruling.

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<sup>6</sup> Appellant does not claim herein that Sara’s statement to Bernice Fields was testimonial hearsay.

<sup>7</sup> In defense counsel’s motion for new trial, which raised the hearsay issues, counsel further alleged that “the defense was unable to cross-examine the victim” (L.F. 45).

Joyce Estes testified that she worked at the Northwest Missouri Children's Advocacy Center in St. Joseph (Tr. 50-51). She met Sara only once, when she did a videotaped interview with her at the center (Tr. 54). Ms. Estes took Sara to the playroom, and when Sara began to disclose to her, Ms. Estes stopped and took her to the videotape room (Tr. 55-56). The videotape, State's Exhibit 2, was played for the court (Tr. 57-60, Ex. 2).

Cindy Debey of Daviess County DFS interviewed Sara after her grandmother made a hotline call (Tr. 85-88). Ms. Debey asked Sara if she had anything to tell about her father, and Sara described manual-genital and oral-genital contact between her and appellant (Tr. 90-98).

The court found those statements to be in compliance with Section 491.075 and ruled that it would admit the hearsay statements of Sara to those witnesses (Tr. 114-123). The judge stated that she had read *Crawford v. Washington*, which had just been handed down, and that it did not change her ruling (Tr. 123). At trial, Ms. Debey testified to the statements Sara made to her (Tr. 261-272). Hearsay objections by defense counsel to the testimony of both witnesses were overruled (Tr. 263, 264, 265, 266, 267, 268, 270).

Ms. Estes testified at trial that she performs forensic interviews for the Northwest Missouri Children's Advocacy Center (Tr. 289-292). She defined a forensic interview as an official legal interview done for law enforcement (Tr. 292). Sara came in to talk with another interviewer, but ended up meeting with Ms. Estes (Tr. 294). Sara started talking "pretty freely" so Ms. Estes told her they

needed to go where the tape recorder was (Tr. 296). Ms. Estes turned on the tape and interviewed Sara (Tr. 298). Defense counsel objected to the tape, which was overruled, and the tape was played for the jury (Tr. 300-301). Ms. Estes testified that the taped interview was a forensic interview (Tr. 306).

**Sara’s oral and videotaped statements to Ms. Debey and Ms. Estes are testimonial hearsay**

While *Crawford* did not define “testimonial,” it did provide some guidance. A “testimonial” statement is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” 124 S.Ct. at 1364. “Testimonial statements” might include: affidavits, custodial examinations, depositions, confessions, prior testimony that the defendant was unable to cross-examine, “pretrial statements that declarants would reasonably expect to be used prosecutorially,” “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,” and “statements taken by police officers in the course of interrogations.” *Id.* These formulations each involve a formal or official statement made or elicited with the purpose of being introduced at a criminal trial. *Crawford* itself involved the defendant’s wife’s recorded statement to a police officer. *Id.* at 1374.

In *Snowden*, the highest state court of Maryland examined whether statements made by child abuse victims to a social worker may be admitted at a

criminal trial through the social worker under Maryland's "tender years" statute, Md. Code (2001), Section 11-304. The Court held that they may not. 867 A.2d at 316. Similarly to Missouri's statute, Maryland's statutory scheme allowed the prosecution to substitute a health or social work professional's testimony for that of the children if, among other things, the trial court made a finding on the record that the statements possessed specific guarantees of trustworthiness. *Id.* at 319.

Key to the Court's analysis, as in this case, was whether the child victims' statements to the social worker were "testimonial hearsay." The *Snowden* Court found that they were, based on several factors: the interviews were initiated and conducted as part of a formal law enforcement investigation; the social worker knew of the allegations and the identity of the suspect; and most importantly, the express purpose of bringing the children to the facility to be interviewed was to develop their testimony for possible use at trial. *Id.* at 325-327. The social worker's "dual roles as interviewer and ultimate witness for the prosecution confirm her function as an arm of the police investigation in this case." *Id.* at 327. *See also, In re E.H., supra* (child victim's statement to her grandmother was testimonial hearsay because through it she "bore accusatory testimony against E.H. which was offered to prove the truth of the matter asserted").

Sara's statements to Cynthia Debey and Joyce Estes, both oral and videotaped, were testimonial hearsay. Both interviewed Sara as part of an official investigation of the allegations, in order that her father be prosecuted. Ms. Debey testified that she "works with law enforcement to interview the children" and that

her investigations are initiated through the hotline calls to Jefferson City (Tr. 35-37). Ms. Estes testified that she performs “forensic interviews” which she defined as “an official legal interview done for law enforcement” (Tr. 292). She met with Sara only once: to tape an interview for use at appellant’s trial (Tr. 53-56). She testified that the taped interview was a forensic interview (Tr. 306). As in *Snowden*, Ms. Debey’s and Ms. Estes’ roles as ultimate witnesses for the prosecution confirm their function as an arm of the police investigation. See *Snowden*, 867 A.2d at 327.

**Sara was unavailable**

The trial court found that Sara was unavailable based on the testimony of Ms. McCreary (L.F. 114). Appellant does not challenge this finding.

**Appellant had no prior opportunity to cross-examine Sara**

A question left open by *Crawford* is whether the defendant must have had an opportunity to cross-examine the declarant *when the statement was made*, as in admission of a preliminary hearing or deposition transcript, or whether any prior cross-examination will suffice. See *Mack*, 101 P.3d at 593, n.6. Appellant reads *Crawford* to require the former. This is the “testing in the crucible of cross-examination” to which Justice Scalia refers in the Court’s holding. 124 S.Ct. at 1370. Yet here, this question is purely academic. Sara did not testify at the preliminary hearing, the 491 hearing, or at trial. The prosecutor informed the trial

court pretrial, that “this case is one that I had filed, and then because the child victim was not in a position to testify, I ended up dismissing it. And then at a later point in time, I had refiled it.” (Tr. 5).

Sara’s statements to Ms. Debey and Ms. Estes were testimonial. Appellant had no opportunity to confront Sara face to face to challenge her accusations.

Sara’s hearsay statements were inadmissible under *Crawford*.

**Sara’s statements are not reliable under Section 491.075**

Only in the event that this Court finds that Sara’s statements to Ms. Debey and Ms. Estes were not testimonial hearsay to be analyzed under *Crawford*, appellant asserts as an alternative basis for relief that the statements did not present sufficient indicia of reliability to be admitted, and the trial court abused its discretion in admitting them under Section 491.075. This Court reviews to determine whether the trial court abused its discretion. *State v. Costa*, 11 S.W.3d 670, 678 (Mo. App., W.D. 1999). In applying a totality of the circumstances test for admission of the statements, Missouri courts consider, among other factors; spontaneity, consistency, the declarant’s state of mind, and motive to fabricate. *State v. Gillard*, 986 S.W.2d 194, 196-197 (Mo. App., S.D. 1999).

Ms. Debey began by asking Sara if she had anything to tell about her father (Tr. 90). She also indicated that Sara’s grandmother had told Sara to tell Ms. Debey and she would make her father stop (Tr. 98). Ms. Debey testified that Sara

“did not do well” when she was asked the difference between the truth and a lie (Tr. 97).

Sara’s interview with Ms. Estes was even more leading and suggestive. A review of Exhibit 2, the videotaped statement, shows a woman impatiently trying to get the child to say what she wanted her to say (Ex. 2). She asks leading questions throughout (Ex. 2). At one point, Ms. Estes even tells Sara she cannot go to the bathroom until she tells her what she wants to hear (Ex. 2). She also says, “talk to me so we can go play. We can’t go play with the house until we do this job” (Ex. 2).

### **Prejudice**

Appellant was prejudiced by permitting the state’s witnesses to tell Sara’s version of events over and over through the use of hearsay statements. The jury was not only permitted to hear Sara testify through those witnesses without appellant’s having the opportunity to cross-examine her, but they were permitted to see her tell her story on videotape. Appellant was denied his right to confront and cross-examine the witnesses against him, in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution. “The principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.” *Crawford*, 124 S.Ct. at 1363. Ms. Estes’ and Ms. Debey’s interviews with Sara

were effectively indistinguishable from those *ex parte* examinations. *See, Mack*, 101 P.3d at 353. This Court must therefore reverse appellant's conviction of first degree child molestation and remand for a new trial.

## CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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### **Certificate of Compliance and Service**

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,874 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in May, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 19<sup>th</sup> day of May, 2006, to Shaun Mackelprang, Chief Counsel, Criminal Appeals Division, P.O. Box 899, Jefferson City, Missouri, 65102.

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Ellen H. Flottman

# **APPENDIX**

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*Snowden v. State*, 846 A.2d 36, 39, n. 7 (Md. App., 2004):

FN7.

Although at least forty states have tender years statutes, no other state allows the statements to be admitted regardless of whether the child testifies. Twenty-seven states require a child to either testify at trial (sometimes by closed circuit TV) or be declared unavailable to testify. Ala. Code §15-25-32 (2003); Ariz. Rev. Stat. Ann. §13-1416 (2003); Cal. Evid. Code §1228 (2003); Colo. Rev. Stat. Ann. §13-25-129 (2003); Del. Code Ann. tit. 11, §3513 (2003); Fla. Stat. Ann. §90.803(23) (2003); Haw. R. Evid. 804(b)(6) (2003); Idaho Code §19-3024 (2003); 725 Ill. Comp. Stat. Ann. 5/115-10 (2003); Ind. Code Ann. §35-37-4-6 (2003); Kan. Stat. Ann. §60-460(dd) (2003); Mass. Gen. Laws Ann. ch. 233, §81 (2003); Miss. R. Evid. 803(25) (2003); Mo. Rev. Stat. § 491.075 (2003); Nev. Rev. Stat. Ann. §51.385 (2003); N.J. R. Evid. 803(27) (2003); N.D. R. Evid. 803(24) (2003); Ohio Rev. Code Ann. Evid. 807 (2003); Or. R. Ct. 803(18a) (2003); 42 Pa. Cons. Stat. Ann. §5985.1 (1997); S.C. Code Ann. § 19-1-180 (2003); S.D. Codified Laws § 19-16-38 (2003); Tenn. R. Evid. 803(25); Va. Code Ann. §63.2-1522 (2003); Wash. Rev. Code Ann. §9A44-120 (2003).

Michigan requires that the child testify before the statement is admitted. Mich. R. Evid. 803A (2003). Maine requires that (1) the child be unavailable at trial, and (2) upon motion of the other party, the statement be given under oath, subject to all rights of Confrontation secured to an

accused by the Constitution of Maine and the United States Constitution.

Me. Rev. Stat. Ann. tit. 15, §1205 (2003).

Other states require that the child either be available to testify at trial or be unavailable. Iowa Code Ann. §232.96 (2003); N.H. Rev. Stat. Ann. §516:25a (2003); Okla. Stat. Ann. tit. 12, §2803.1 (2003); R.I. Gen. Laws § 14-1-69 (2003); Utah Code Ann. §76-5-411 (2003); N.Y. Fam. Ct. Act. §1046 (2003). Still others require the child to either testify or be available to testify at trial. Alaska Stat. §12.40.110 (2003); Ark. R. Evid. 803(25) (2003); Ga. Code Ann. §24-3-16 (2003); Tex. Code Crim. P. Ann. art. 38.072 (2003); Vt. R. Evid. 804a(a) (2003).