

No. 87604

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

SAMUEL L. JUSTUS,

Appellant.

Appeal from the Circuit Court of Daviess County, Missouri
The Honorable Barbara G. Lane, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for child molestation in the first degree, §566.067, RSMo 2000,¹ obtained in the Circuit Court of Daviess County, and for which appellant was sentenced to ten years imprisonment. The Missouri Court of Appeals, Western District, affirmed appellant's conviction and sentence. *State v. Samuel Justus*, No. WD 64495 (Mo.App.W.D., February 21, 2006). It denied appellant's motion for rehearing on March 28, 2006.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On May 2, 2006, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

¹All statutory citations are to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

Appellant, Samuel L. Justus, was charged by amended information with child molestation in the first degree (LF 1, 12-13). On May 26, 2004, this cause went to trial before a jury in the Circuit Court of Daviess County, the Honorable Barbara Lane presiding (LF 5; Tr. 218).

Appellant does not challenge the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

Appellant and Debbie Justus were married just short of four years, and divorced on March 13, 2001 (Tr. 224-225). They had a daughter, S.J., who was born October 20, 1998 (Tr. 227). As part of the divorce decree, custody arrangements were made so that appellant would have custody of their daughter, S.J., from 6:00 p.m. Thursday evening to 6:00 p.m. Sunday evening every weekend until kindergarten started (Tr. 225). Appellant lived in Lock Springs, Missouri, and he would pick up and drop off S.J. (Tr. 226).

In late summer, 2002, Debbie Justus noticed when S.J. would return from visits with appellant, she would wet the bed, resist going to sleep because she was afraid, and have nightmares (Tr. 228). While S.J. used to be excited about seeing appellant, she got to the point where she would cling to Debbie Justus and cry, not wanting to go with appellant (Tr. 228). Debbie Justus sent her because she thought she was legally obligated to let S.J. visit appellant due to the divorce decree (Tr. 229). Every time S.J. would come home from appellant's house, she would have a yeast infection (Tr. 228). The infection would clear up, but would return again when S.J. visited appellant (Tr. 228). When S.J. stopped seeing appellant in August, 2002, she no longer had yeast infections (Tr. 228-229).

In August, 2002, S.J. was visiting her grandmother, Bernice Fields (Tr. 232-233). Fields also noted that S.J. had begun bed-wetting and that S.J. would wake up crying and not tell her grandmother why, saying only that she had nightmares (Tr. 242). On August 16, 2002, Fields was sitting on the couch, brushing S.J.'s hair (Tr. 233). S.J. was squirming and playing with or rubbing her private area (Tr. 234). Fields asked S.J. if she had an itch (Tr. 234). S.J. said, "No, I'm playing." (Tr. 234). Fields said, "Well, that's not nice." (Tr. 234). S.J. said that appellant did it (Tr. 234). Fields said, "Your daddy rubs his self?" (Tr. 234). S.J. said, "No. He rubs me there." (Tr. 234). Fields told S.J. that that was not nice and appellant should not do that (Tr. 236-237). S.J. said, "Well, daddy kisses my pee-pee." (Tr. 237). Fields said, "What?" and S.J. said, "Well, I kiss his pee-pee too." (Tr. 237). Fields asked, "Well does daddy's pee-pee look like yours?" (Tr. 237). S.J. said, "Well, no, grandma. It looks like the horsy's pee-pee." (Tr. 237). S.J. pointed out the window to a horse in the pasture in front of the house (Tr. 237). S.J. continued, "But the horsy don't have hair around it." (Tr. 238). While S.J. described this, she held up her hand and moved it in a manner which suggested to Fields that S.J. was masturbating appellant (Tr. 238). S.J. said that "yellow stuff" came out while she was doing that (Tr. 238). S.J. said that she did not tell her mother because appellant had told her that if she did, she would get a "whooping" and be put in the corner (Tr. 241). Fields knew that S.J. was talking about appellant, as opposed to S.J.'s mother's boyfriend, Richard, because S.J. called appellant "father" and called Richard "Daddy Richard." (Tr. 242).

Fields was upset and did not want to push with anymore questions (Tr. 238). The day that S.J. told Fields, there was a visit scheduled with appellant (Tr. 242). There were several times that S.J. had not wanted to go with appellant (Tr. 243). They left to go to the auction

they had planned on attending, at which Fields told her husband what S.J. had told her; they called the DFS hotline (Tr. 239).

They took S.J. to the DFS office, but S.J. did not want to talk to the DFS worker, who was male (Tr. 239, 260). A female DFS worker, Cynthia Debey, came to talk to her, and Fields and her husband left S.J. with her (Tr. 240-241, 249, 254). Debey met with S.J. alone in the visitation room (Tr. 261). S.J. was only 3 years old at the time (Tr. 262). They spoke for about 30 minutes (Tr. 262). Once S.J. appeared comfortable, Debey asked S.J. if she had something to tell her, something that her father had done to her (Tr. 263). S.J. said that her father had licked her pee-pee (Tr. 264). They played a bit more, and then S.J. said, “He kisses my pee-pee.” (Tr. 264). Debey asked S.J. what she meant by her pee-pee, and S.J. pointed to her vaginal area (Tr. 265). S.J. also told Debey that she had to kiss, lick, and shake appellant’s pee-pee (Tr. 265). S.J. held up her hand and indicated that she had masturbated him, cupping her hand and moving it up and down (Tr. 266). S.J. described appellant’s pee-pee, saying that it looked like a tail (Tr. 266). S.J. said that on the end of appellant’s pee-pee, there was a knob (Tr. 267). Debey asked S.J. if anything came out of appellant’s pee-pee, and she said it did, and that it was yellow and white (Tr. 267-268). S.J. said that her clothes were off, and that she took her clothes off during the encounters (Tr. 268). S.J. said these incidents occurred at appellant’s house (Tr. 268). Appellant lived in Lock Springs, which was in Daviess County (Tr. 269-270). Debey asked S.J. if her mother’s boyfriend did that to her, and S.J. said that he would not do that (Tr. 272). Debey saw no signs of coaching (Tr. 274). S.J. told Debey that she had been told that if she told Debey, Debey could protect her from appellant (Tr. 270).

Joyce Estes worked at the Northwest Missouri Children’s Advocacy Center (“CAC”) (Tr. 289). At the Advocacy Center, they did forensic interviews, assessments, and

evaluations, and provided counseling (Tr. 289-290). Estes had 18 years of working with children who had been alleged to have been victims of sexual abuse (Tr. 304). Cindy Debey called Estes and talked to her about S.J. (Tr. 294). S.J. had been to the Children's Advocacy Center (CAC) before to talk to Carol Jo Cumming, but had refused to talk to her (Tr. 294). Estes decided that she would try to do an interview, so S.J. returned to the CAC on October 24, 2002 (Tr. 294). S.J. arrived with her mother (Tr. 294). At first, S.J. was very shy and did not want to talk (Tr. 294). Estes played with S.J. for a while, and after getting basic biographical information from S.J.'s mother, Estes took S.J. to another room to play with her and talk to her (Tr. 295). No one else was in the room (Tr. 295). Once they were in that environment, S.J. began talking more freely (Tr. 295). S.J. explained that she had two daddies, and that she did not like appellant (Tr. 296). S.J. said that she did not want to visit appellant because he was mean and he made her upset (Tr. 296-297). When Estes asked S.J. how appellant was mean, S.J. said, "He kisses me on the pee-pee." (Tr. 297).

Estes then told S.J. that they needed to go down to another room (Tr. 297). This was so the conversation could be taped (Tr. 297). No one else was in the room (Tr. 298).

Estes told S.J. that they were tape recording what was being said (St.Exh. 2). When asked her name, S.J. shrugged (St.Exh. 2). When asked if her name was "[S.]", she nodded, but would not say it out loud when she was asked to say it out loud (St.Exh. 2). When asked her father's name, she shook her head (St.Exh. 2). Estes showed her a picture, and S.J. said that it was a picture of a girl (St.Exh. 2). Estes asked S.J. several body parts and S.J. just shrugged (St.Exh. 2). Estes reminded S.J. that she had said earlier that she did not like her daddy and that he had kissed her pee-pee (St.Exh. 2). When asked if she had made that statement, S.J. shook her head (St.Exh. 2). When asked how old she was, S.J. said she was 4 (St.Exh. 2). S.J. said her birthday was October 20, which would have been four days prior

to the interview (St.Exh. 2). S.J. told Estes what she got for her birthday (St.Exh. 2). Estes and S.J. colored a picture and talked about other innocuous things (St.Exh. 2). When asked about the colors of the crayons, S.J. would only whisper (St.Exh. 2). S.J. said that she lived with her mother and Richard (St.Exh. 2). She said that her other dad was Sam and that he lived in Chillicothe (St.Exh. 2). S.J. said that she like Richard, that he was nice, and that he wasn't mean, but that sometimes when she was bad, Richard or S.J.'s mother would "whoop" her with their hands (St.Exh. 2). S.J. said she liked appellant, but that she did not like him now because he kissed her pee-pee when she was at his house (St.Exh. 2). S.J. said he just kept kissing and kissing and kissing it (St.Exh. 2). S.J. said she told appellant to kiss it (St.Exh. 2). S.J. was able to identify the "pee-pee" as the vagina on the drawing of the girl (St.Exh. 2). S.J. said appellant didn't kiss her anywhere else (St.Exh. 2). S.J. said she told appellant to kiss her "butt" as well and that he did (St.Exh. 2). S.J. said appellant did nothing to her "boobies" (St.Exh. 2). S.J. identified the penis on the drawing of the boy as a "little tail" (St.Exh. 2). S.J. said that appellant had one but that it was big (St.Exh. 2). S.J. said it looked like a water pump (St.Exh. 2). S.J. said a "water pump" came out when she touched appellant's "tail." (St.Exh. 2). S.J. drew a picture of appellant's penis (St.Exh. 2). S.J. said she kissed appellant's penis (St.Exh. 2). S.J. said she did not like to kiss it (St.Exh. 2). S.J. then said, "Actually, it's his pee-pee." (St.Exh. 2). S.J. said it tasted like a tree (St.Exh. 2). S.J. said she was in appellant's room when these acts would occur (St.Exh. 2). S.J. said that appellant had kissed her "pee-pee" six times (St.Exh. 2). S.J. said that it was bad to tell a lie (St.Exh. 2). S.J. said that what she was telling the truth (St.Exh. 2). S.J. said that she would tell the judge that appellant had kissed her pee-pee (St.Exh. 2). S.J. said that the judge would say, "[S.J.], your father didn't do that' and I'm like, yes he did.'" (St.Exh. 2).

Estes did not see any red flags that made her think that S.J. was not telling the truth (Tr. 305). S.J. had turned 4 just four days before the interview (Tr. 305). S.J.'s ability to communicate was consistent with that of a four-year-old (Tr. 305). S.J. did not use any words that one would not expect from a four-year-old (Tr. 305). No one else was in the room when the interview was conducted (Tr. 305). After the interview, Estes returned S.J. to her mother and told her that they were finished (Tr. 303).

Appellant testified in his defense and denied doing anything to S.J. (Tr. 321, 322).

At the close of evidence, instructions, and argument by counsel, the jury found appellant guilty of child molestation in the first degree (LF 7, 43; Tr. 358). Appellant waived jury sentencing (LF 6; Tr. 120, 361). The trial court sentenced appellant to ten years (LF 8, 47-49; Tr. 382).

The Missouri Court of Appeals, Western District, affirmed appellant's conviction and sentence. *State v. Samuel Justus*, No. WD 64495 (Mo.App.W.D., February 21, 2006). It denied appellant's motion for rehearing on March 28, 2006. On May 2, 2006, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court.

ARGUMENT

The trial court did not err, plainly or otherwise, in admitting the hearsay statements of the child victim, S.J., to Cynthia Debey and Joyce Estes, nor in admitting the videotaped interview of S.J. by Estes, because there was sufficient indicia of reliability to admit the statements under §491.075, and the statements in question did not violate the confrontation clause because the statements were not testimonial in nature and, in any event, appellant forfeited any right to confrontation in that it was his actions that caused S.J. to be unavailable as a witness.

Appellant contends that the trial court erred in admitting S.J.'s statements to Cynthia Debey and Joyce Estes and in admitting the videotaped interview of S.J. by Estes (App.Br. 12).² Appellant asserts that there was insufficient indicia of reliability to admit the statements under §491.075 (App.Br. 12). Alternatively, appellant asserts that admission of the statements violated the Confrontation Clause under the dictates of *Crawford v. Washington*, 541 U.S. 36 (2004) (App.Br. 12).

A. Standard of review.

Review of the trial court's decision to admit the hearsay statements of a child victim under §491.075 is limited to a determination of whether such admission was an abuse of discretion. *State v. Mattic*, 84 S.W.3d 161, 169 (Mo.App.W.D. 2002). The trial court has broad discretion in deciding whether to admit or exclude evidence. *State v. Gerhart*, 129 S.W.3d 893, 895-896 (Mo.App.W.D. 2004). A trial court will be deemed to have abused its discretion only where its ruling is clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of

²Appellant does *not* assert any error regarding the admission of S.J.'s hearsay statements to her grandmother, Bernice Fields.

careful consideration. *Id.* at 896. If reasonable persons can differ about the propriety of the trial court’s action, it cannot be said that the trial court abused its discretion. *Id.*

Appellant, in his brief, suggests that *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004), states that the standard of review “is different,” without stating what standard of review *Crawford* allegedly created (App.Br. 12-13). *Crawford* does not explicitly change the standard of review. Moreover, inasmuch as *Crawford* only purports to change the longstanding hearsay analysis as it applies to testimonial hearsay, there is no reason to apply any standard of review different than that which existed prior to *Crawford*. Testimonial hearsay or not, there is nothing in *Crawford* to suggest that it is still not within the trial court’s discretion to determine, under the totality of the circumstances, whether a given statement is testimonial hearsay or not.

Appellant asserts that this Court should apply a *de novo* standard of review as to the issue of whether the Confrontation Clause was violated, citing a Maryland case, *Snowden v. State*, 846 A.2d 36 (Md.Ct. Spec.App. 2004) in support of this assertion (App.Br. 13). As appellant notes, the *Snowden* case cited was later affirmed by the Maryland Supreme Court, which would be the controlling case, but the Maryland Supreme Court opinion does not mention a standard of review (App.Br. 13, n. 3). *State v. Snowden*, 867 A.2d 314 (Md. 2005). Aside from this, and the fact that a Maryland case is not controlling precedent, respondent notes that as far as the record reflects, the only objections raised at the time the evidence was offered at trial were hearsay objections.³ Respondent does not see that

³Unfortunately, the record contains numerous “indiscernible” remarks, many of these occurring during objections (See, e.g., Tr. 263, 264, 266). Respondent notes that appellant, in his brief, refers to his objections as “hearsay objections.” (App.Br. 8). Respondent also notes that it is appellant’s burden to provide a sufficient record to address the issues on

appellant ever objected to the admission of the evidence at the time of the witnesses' testimony on the grounds that their testimony violated his rights to confrontation. As such, respondent submits that appellant's claim as to the violation of the confrontation clause is unpreserved and subject only to plain error review, requiring appellant to prove a manifest injustice or miscarriage of justice from admission of the testimony in question.

For example, in *State v. Pieron*, 755 S.W.2d 303 (Mo.App.E.D. 1988), the defendant objected to the testimony solely as hearsay, and did not raise a confrontation claim until the motion for new trial. *Id.* at 307. The Court of Appeals, Eastern District, noted that constitutional claims, including confrontation clause claims, must be raised at the earliest opportunity *and* "kept alive during the course of the proceedings." *Id.* Thus, Pieron's claim was reviewable only for plain error. *Id.*

Hence, in the present case, because appellant did not "keep alive during the course of the proceedings" any Confrontation Clause claim by raising that specific objection to the testimony in question, his claim is reviewable only for plain error.

B. Relevant facts.

On July 17, 2003, the state filed a motion to admit the statement of a child victim pursuant to §491.075 (LF 2, 14-15). In the motion, the state noted that the victim was four years old and was unavailable as a witness due to suffering severe emotional distress (LF 14-15). Appellant filed an objection to admission of the hearsay evidence (LF 16-25). On August 22, 2003, evidence was heard on the motion, and the motion was continued (LF 3-4). On October 7, 2003, the rest of the 491 hearing was done (LF 4).

At the hearing, Rene McCreary, a counselor at Parkside Counseling who worked at Two Rivers Hospital in the sex abuse program, testified (Tr. 11). She was a therapist in the

appeal, *State v. East*, 976 S.W.2d 507, 510 (Mo.App.W.D. 1998).

sexual abuse trauma adult unit at the hospital (Tr. 11). At Parkside Counseling, she specialized in working with sexual abuse cases (Tr. 11-12). She had worked with sexual abuse victims for about 14 years (Tr. 14). S.J. was referred to McCreary by DFS for treatment (Tr. 14). She had had 20 visits with S.J., between November 19, 2002, when she first saw her, and the time of McCreary's testimony (Tr. 14-15). S.J. was four years old at the time McCreary began to see her (Tr. 15).

McCreary testified that S.J. displayed behavioral problems congruent with symptoms of sexual abuse, and McCreary worked to decrease the anxiety and depression (Tr. 15). Sometimes S.J.'s mother or grandmother sat in, passively, on a session (Tr. 16). McCreary did not encourage any disclosure (Tr. 17). McCreary testified that S.J.'s anxiety would increase when there was a possibility of her seeing appellant (Tr. 18). McCreary said that based on her understanding of what happened, on her sessions with S.J., and on her own background and experience, she did not believe that S.J. would be able to testify successfully (Tr. 21). She did not believe S.J. would be able to "talk very much" and that the experience would be retraumatizing to her "very much" (Tr. 22). McCreary believed it would be psychologically detrimental to S.J. if she testified (Tr. 23). It would cause her to deteriorate psychologically, and could affect her ability to learn and do well at school (Tr. 23). McCreary also said that S.J. had fear of appellant and that if appellant were in the room it would be "really frightening" for S.J. (Tr. 29). S.J. had nightmares, and instead of talking, she would "buzz." (Tr. 30).

Cynthia Debey, a DFS worker, testified at the hearing that at a prior court appearance,⁴ S.J. became very fearful when she learned that appellant was in the courtroom

⁴The record does not reflect what this court appearance was.

(Tr. 41). S.J. did not want to go into the courtroom when she learned that appellant was there (Tr. 43).

The hearing was then continued until October 7, 2003, at which time Joyce Estes, who worked at the Northwest Missouri Child Advocacy Center in St. Joseph, testified (Tr. 49, 51). Estes testified that S.J. had refused to do an interview with Carol Jo Cumming, the Child Advocacy Center interviewer (Tr. 54). Estes said that S.J. was “very, very shy; very timid” (Tr. 54-55). Estes played with S.J. and they talked about her birthday and with whom she lived in order to build rapport (Tr. 55-56). When Estes felt that S.J. could talk to her, they went to the videotape room (Tr. 56). S.J. did not want to go, but Estes told her that for her to help S.J., she needed her to talk and tell her whatever she had to tell on videotape (Tr. 56). After lunch, they went into the videotape room (Tr. 57). Only Estes and S.J. were in the room (Tr. 57, 65). During the interview, Estes used anatomically correct diagrams of a boy and a girl (Tr. 60). She also had S.J. draw a picture of appellant’s penis on the back of the picture of the boy (Tr. 61). After the interview, Estes took S.J. back out to the waiting room to her mom and dad, and told them that someone would be in touch with them (Tr. 62). Estes told them that S.J. did okay and that she had talked with her, but Estes did not discuss what had been said (Tr. 62). Estes had 17 years experience dealing with children who claimed to be victims of abuse (Tr. 63). Estes said she thought S.J. was very believable, once one got her talking (Tr. 64). S.J. was only four years old when this interview took place (Tr. 64). There was nothing out of the ordinary regarding the words S.J. used (Tr. 65). No one else was in the room with them (Tr. 65).

The tape of the interview of S.J. was played for the court. To avoid unnecessary repetition, respondent notes that the contents of that videotape are set out in the Statement of Facts, *supra*, at 6-7.

S.J.'s grandmother, Bernice Fields, also testified at the hearing. She testified that in August, 2002, she was sitting on the couch in her house, brushing S.J.'s hair (Tr. 78). S.J. kept rubbing her privates (Tr. 78). Fields asked "[W]hy are you doing that? Do you itch?" (Tr. 78). S.J. said, "No, I'm playing." (Tr. 78). Fields said, "Well, that's not nice." (Tr. 78). S.J. said, "My daddy does it." (Tr. 78). Fields said, "Your daddy does that to himself?" (Tr. 78). S.J. replied, "No, my daddy does that to me." (Tr. 78). "That's not nice," said Fields as she continued to brush S.J.'s hair (Tr. 78-79). S.J. then said that appellant also kissed her "pee-pee." (Tr. 79). To test S.J.'s knowledge, Fields asked, "[D]oes daddy's pee-pee look like yours?" (Tr. 79). "No, grandma," said S.J. (Tr. 79). S.J. went on, "The horsy out there, it looks like that, but daddy's has hair around it." (Tr. 79). As S.J. talked about kissing appellant's "pee-pee", she moved her hand in an up and down motion and reported that "yellow stuff" came out of appellant's "pee pee." (Tr. 79). Fields asked S.J. if she had told her mother, but S.J. said that she could not because appellant said that if she told her mother, he would put her in time-out and "whip her butt." (Tr. 82). Later that evening, Fields and her husband called the DFS hotline (Tr. 79-80).

Cindy Debey testified again at the hearing. She testified that S.J.'s case was initially assigned to Robert Kendall, but S.J. would not speak to Kendall, so they decided perhaps S.J. would be more comfortable talking to a woman, so Debey took over (Tr. 87-88). Debey asked S.J. if she had anything to tell her about appellant (Tr. 90). S.J. said that appellant had licked her pee-pee (Tr. 91). She also said appellant kissed her pee-pee (Tr. 91). Debey asked where her pee-pee was, and S.J. touched her vagina (Tr. 91). S.J. also said that she had to shake appellant's pee-pee (Tr. 92). When Debey asked S.J. what she meant, S.J. moved her hand up and down in a closed, but not tight, grip, in a motion which resembled masturbation (Tr. 93). Debey asked S.J. if appellant's pee-pee looked like hers (Tr. 93). S.J. said

appellant's pee-pee looked like a tail (Tr. 93). S.J. said it wasn't a tail because it was in front, but it looked like a tail (Tr. 94). S.J. said that the "tail" had a knob on the end, but she couldn't turn it (Tr. 94). S.J. said that white and yellow pee came out of it (Tr. 95). Debey asked S.J. if appellant had touched her breasts; S.J. looked at her as though she were not sure what Debey meant (Tr. 95). Debey put her hand on her chest (Tr. 95). S.J. said that appellant had "pinched her boobies" and that it hurt (Tr. 95). S.J. said that she was unclothed when this occurred and that she had undressed herself (Tr. 96). S.J. said these incidents occurred in her father's house in the room where the TV was (Tr. 96). S.J. told Debey that she had told her grandmother, who had told S.J. that if she told Debey, Debey would make appellant stop (Tr. 97). S.J. did not do well with the words "lie" and "truth." (Tr. 97). S.J.'s language was age appropriate (Tr. 99). Debey determined that S.J. had been sexually maltreated, based on S.J.'s words, descriptions used, and the fact that she felt that Debey was going to protect her (Tr. 100).⁵

On October 10, 2003, appellant again objected to the admission of the hearsay evidence, and the state filed a brief in support of its motion to admit the child victim's statement (LF 4). On October 14, 2003, the trial court sustained the state's motion (LF 5, 26). Specifically, the trial court found that S.J. was unavailable as a witness due to the "significant emotional and psychological trauma which would result" if she had to testify in the personal presence of appellant (LF 26). The child was three at the time of the abuse, and was 4 years old at the time of trial; the child had been in counseling, and requiring the child to testify could re-traumatize the child; the child had issues with being non-verbal and requiring the child to testify could cause the child to become non-verbal; and the child

⁵This, of course, was the testimony that came out during the 491 hearing. Not all of these details came out in Debey's trial testimony.

showed excessive stress at the possibility of being in appellant's presence (LF 26).

The trial court further found that S.J.'s statements to Joyce Estes, Cindy DeBey, and Berniece Fields each had sufficient indicia of reliability within the meaning of §491.075 (LF 26). Specifically, the court found that the statements made by S.J. to the child's grandmother, Berniece Fields, were made spontaneously and with many details (LF 26-27). The court found that S.J.'s statements to all three witnesses were not coerced and each showed consistency (LF 27). The statements to all three witnesses were the product of conversation, not leading questions (LF 27). The statements were not the product of improper interviewing technique by either DeBey or Estes (LF 27). The statements to Estes were accompanied by demonstrative evidence involving anatomically correct pictures drawn on by S.J. (LF 27). S.J.'s statements contained information, words, and details that would not be within the common knowledge of a child three to four years of age (LF 27). S.J.'s statements were consistent with language that might be used by a 3-4 year old (LF 27). There was no motive for any of the witnesses to fabricate the information presented in the child's statements (LF 27).

Prior to trial, the court reviewed its October 14, 2003 ruling in light of *Crawford* and found "that the issue of out of court statement presented at trial has been adequately addressed by the said statute with sufficient criteria to determine the availability of the witness and the reliability of the statement offered. The Court finds that the evidence was sufficient to meet the statutory criteria" and the court therefore reaffirmed its October 14 order (LF 6; Tr. 123).

C. S.J.'s statements were reliable under §491.075.

To begin with, S.J.'s statements were admissible under §491.075. Section 491.075, RSMo 2000, provides in relevant part as follows:

1. A statement made by a child under the age of twelve relating to an offense under chapter . . . 566, RSMo, performed with or on a child by another, . . . 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.

Missouri courts have adopted a totality of the circumstances test to determine the reliability of a child's out-of-court statements for the purposes of section 491.075, including consideration of several non-exclusive factors, such as: (1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) the lack of a motive to fabricate; (4) knowledge of subject matter unexpected of a child of similar age; and (5) lapse of time between acts and when the victim reported them. *State v. Sprinkle*, 122 S.W.3d 652, 661 (Mo.App.W.D. 2003).

The totality of the circumstances show that S.J.'s statements to Debey were admissible under §491.075. The statements were spontaneous and consistent with her statements made to her grandmother. While appellant points out that Debey began by asking S.J. if she had

anything to tell about her father (App.Br. 22, citing (Tr. 90)), this is not a leading question such that S.J.'s disclosure was prompted. *See State v. Worrell*, 933 S.W.2d 431 (Mo.App.W.D. 1996) (finding that question if defendant "had touched him in any way that made him feel uncomfortable" merely directed the line of inquiry and did not suggest a specific response and thus was not leading). Debey's questioning was not leading. Debey asked S.J. if she had anything to tell her about appellant (Tr. 90). S.J. said that appellant had "licked her pee-pee" (Tr. 91). She also said appellant kissed her "pee-pee" (Tr. 91). Debey asked where her pee-pee was, and S.J. touched her vagina (Tr. 91). S.J. also said that she had to shake appellant's pee-pee (Tr. 92). When Debey asked S.J. what she meant, S.J. moved her hand up and down in a closed, but not tight, grip, in a motion which resembled masturbation (Tr. 93). Debey asked S.J. if appellant's pee-pee looked like hers (Tr. 93). S.J. said appellant's pee-pee looked like a tail (Tr. 93). S.J. said it wasn't a tail because it was in front, but it looked like a tail (Tr. 94). S.J. said that the "tail" had a knob on the end, but she couldn't turn it (Tr. 94). S.J. said that white and yellow pee came out of it (Tr. 95).

Appellant also points out that S.J. said that Bernice Fields told S.J. that if S.J. spoke with Debey, Debey would make appellant stop (Tr. 97). Again, this did not lead to particular answers or disclosures by S.J.; in fact, this statement by Fields would be meaningless unless appellant were actually doing something to S.J. It was appellant's acts, not Fields's statement, that would have prompted S.J. to say something to Debey.

In addition, S.J. expressed knowledge of sexual activity beyond what the average four-year-old should know, as she was able to describe appellant's penis, visually demonstrated masturbation, and described ejaculation. In so doing, however, S.J. used language that was age appropriate (Tr. 99). Finally, absolutely no motive to lie was ever propounded or demonstrated.

Similarly, S.J.'s statements to Estes were admissible under the totality of circumstances. The statements were consistent with S.J.'s prior statements and there was no motive to fabricate apparent. While true that initially, S.J. was reluctant to talk about anything at all, not even wanting to say her name or birthdate, a review of State's Exhibit 2 does not show "a woman impatiently trying to get the child to say what she wanted her to say," as appellant suggests (App.Br. 23). Actually, Estes was quite patient, and when it became apparent that S.J. was not going to talk about anything at all, Estes opened up a coloring book and they started coloring pictures (St.Exh. 2). S.J. then started talking about how old she was, her recent birthday, what she received for her birthday, her family, and where she lived (St.Exh. 2). S.J. volunteered that she did not like appellant anymore because he "kissed her pee-pee." (St.Exh. 2). Even if some of Estes's questions could be considered leading, the fact remains that S.J.'s statements were consistent with her statements to Fields and Debey, which were not the product of leading questions, S.J. demonstrated an awareness of sexual acts beyond what a normal 4-year-old would know – and these acts were *not* suggested by any questions, S.J. used age-appropriate language, and there was no indication by anyone at anytime that S.J. had any motive to lie, nor that anyone else had a motive to encourage S.J. to lie.

In short, given the totality of the circumstances, it cannot be said that the trial court abused its discretion in admitting S.J.'s statements under §491.075.

D. Constitutionality of §491.075 is not at issue.

While appellant, in his motion for transfer, asserted that "the continued viability of Section 491.075 after *Crawford* is of general interest, and it is vitally important," appellant acknowledges in his brief that there is no need for this Court to reach the constitutionality of §491.075 (App.Br. 16). The statute is clearly still applicable where the defendant has had

an opportunity to confront – i.e., where the child has testified either at trial or via deposition or a pretrial hearing. The statute is also still applicable where the statements are not deemed testimonial, as in the present case regarding the child’s statements to her grandmother.⁶ *Crawford* does not purport to change the analysis of the admissibility of such out-of-court statements where the defendant had the opportunity to confront or where the statements were not testimonial.

In any event, at no point during this case has appellant challenged the constitutionality of §491.075. Appellant acknowledged in his motion for transfer that no direct challenge to the statute was ever raised in the trial court, nor was it raised in the appeal. In fact, appellant expressly conceded that the constitutionality of §491.075 was not an issue in his initial brief before the Court of Appeals, Western District. See Appellant’s original brief, filed in the Court of Appeals, Western District, at p. 14: “The issue of whether this statute is constitutional under *Crawford* is not before this Court.”

Given that appellant is not challenging the constitutionality of §491.075 and that this issue was not preserved for appeal, any claim regarding the statute’s constitutionality is waived. *State v. Strong*, 142 S.W.3d 702 (Mo.banc 2004); *State v. Entertainment Ventures I, Inc.*, 44 S.W.3d 383 (Mo.banc 2001).

D. S.J.’s statements are not barred under the Confrontation Clause.

Appellant also argues that S.J.’s statements to Debey and Estes should not have been admitted because his right to confrontation was violated in that he did not have the opportunity to cross-examine S.J. (App.Br. 12). As noted above, because appellant did not

⁶In this very case, for example, appellant does not claim that S.J.’s statements to her grandmother, Bernice Fields, were testimonial hearsay (See App.Br., p. 17, n. 6). Thus, the admissibility of said statements would be governed by §491.075.

object based on the Confrontation Clause when this evidence came in at trial, appellant's claim is reviewable only for plain error.

1. *Crawford* – what it says and what it does not say.

The basis for appellant's claim is the United States Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Whereas under *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), an unavailable witness's statement against a defendant was admissible if the statement bore "adequate indicia of reliability," *Crawford* determined that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 1374. Simply put, testimonial statements are no longer admissible unless the witness takes the stand or the defendant has had a prior opportunity to cross-examine the witness.

It is important to note, however, what the United States Supreme Court did not do in *Crawford*:

(1) The Supreme Court did not forever abrogate the indicia of reliability test or any of the hearsay exceptions as they are applied to non-testimonial out-of-court statements. Thus, if a statement is non-testimonial, courts should carry on as before in analyzing and determining the admissibility of such statements.

(2) The Supreme Court *did not* adopt a definition of "testimonial" to be applied by the lower courts. In fact, the Supreme Court specifically stated that it would "leave for another day any effort to spell out a comprehensive definition of testimonial," fully aware that this would create uncertainty. *Id.* at 1374. The Supreme Court noted that "[v]arious formulations of this core

class of ‘testimonial’ statements exist,” citing to the petitioner’s brief, *White v. Illinois*, 502 U.S. 346 (1992), and an amici curiae brief submitted by the National Association of Criminal Defense Lawyers. *Crawford*, 124 S.Ct. at 1364. However, the Supreme Court did not adopt any of these formulations. Nor did the Supreme Court compile a list of what constituted testimonial statements, except to say that the term applies, “at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* at 1374. The Supreme Court noted that these were “the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.” *Id.*

(3) The Supreme Court did not make any sort of ruling that a child’s statements to a social worker or counselor or the like would be testimonial statements. In fact, it should be noted that while the Supreme Court did overrule *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), at least with reference to testimonial statements, the Supreme Court did not go so far as to overrule cases such as *Idaho v. Wright*, 497 U.S. 805 (1990) (which said that child hearsay statements could be admitted under the residual hearsay exception without the child testifying) and *Illinois v. White*, 502 U.S. 346 (1992) (which held that the Confrontation Clause was satisfied where the hearsay in question came within a firmly rooted exception to the hearsay rule, and that proof of unavailability was not required).⁷

⁷Respondent is aware that both *Wright* and *White* rely on *Roberts*, and it is questionable as to what extent they may be relied on, but the fact remains that the Supreme Court, while mentioning *Wright* in the concurring opinion and *White* in the majority opinion, did not

In short, while *Crawford* does change the analysis with regard to admission of testimonial statements, *Crawford* does not *mandate* that a child’s statements to a social worker or counselor be excluded from evidence. On the contrary, reviewing courts must study the facts of each individual case and determine whether, based on the totality of the circumstances, the statements at issue in each case are “testimonial” in nature. Indeed, this is the analysis courts around the country have applied in examining the admissibility of statements under *Crawford*, as can be seen in the cases applying *Crawford*, cited *infra*. Only if the courts find that the statements are testimonial under the facts in the case does *Crawford* apply.

2. What constitutes “testimonial?”

The threshold question then, under *Crawford*, is whether the statements at issue are testimonial.⁸ As noted above, the *Crawford* court held that, at a minimum, testimonial statements covered prior testimony at a preliminary hearing, prior testimony before a grand jury, prior testimony at a former trial, and police interrogations. S.J.’s statements do not fall within any of these categories, but rather consist of statements to a Division of Family Services employee and a counselor with a Child Advocacy Center. The question then is whether under the totality of the circumstances in this particular case, those statements can be considered testimonial.

overrule either case.

⁸An optional threshold question would be whether or not the witness is available since *Crawford* does not apply if the witness is available for cross-examination. In the present case, S.J. was not available, and appellant does not challenge the trial court’s determination that S.J. was not available (App.Br. 21).

Black's Law Dictionary defines testimony as "evidence given by a competent witness under oath or affirmation." Black's goes on to note that testimony "properly means only such evidence as is delivered by a witness on the trial of a cause, either orally or in the form of affidavits or depositions." BLACK'S LAW DICTIONARY 1476 (6th ed. 1990). Webster's defines testimony as "a solemn declaration usually made orally by a witness under oath in response to interrogation by a lawyer or authorized public official." MERRIAM-WEBSTER ONLINE DICTIONARY, www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=testimony, accessed July 11, 2006.

In *Crawford*, the Court, in addressing the question of testimonial statements, first noted that the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, that is, examination of witnesses in private *by judicial officers*. *Crawford* at 1359, 1363. The Supreme Court noted that "[v]arious formulations of this core class of 'testimonial' statements exist." *Id.* at 51. The defendant in *Crawford*, in his brief, considered *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. *Id.* at 1364. In *White v. Illinois*, the Supreme Court considered "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Crawford*, 124 S.Ct. at 1364. The *Crawford* court also cited to the amicus brief filed by the National Association of Criminal Defense Lawyers, which apparently defined testimonial statements as "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.* at 52.

Rather than adopting any of these, the Supreme Court merely noted that “[t]hese formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction.” The Supreme Court emphasized the significance of the necessity of government involvement in a testimonial hearsay statement. Indeed, one of the reasons the Court ultimately held that statements taken in the course of a police interrogation were testimonial was that “[i]nvolvement of government officers in the production of testimony with an eye towards trial presents unique potential for prosecutorial abuse” *Id.* at 1367, n. 7, and “[t]he involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.” *Id.* at 1365.

With these criteria in mind, it appears that the common nucleus shared by all of the aforementioned types of statements is that all of those types of statements involve formal out-of-court statements, made in response to questioning by a government agent acting in an essentially prosecutorial capacity⁹ (that is, to enforce the criminal code) for the purpose of producing a statement to be used at a criminal trial, *and* which the declarant would reasonably believe would subsequently be used in a criminal trial.

In making a determination as to whether any given statement is testimonial, courts consider the totality of the circumstances surrounding the statement in question. For example, the United States Supreme Court, in *Davis v. Washington*, 126 S.Ct. 2266 (2006), looked at statements made in 911 calls in two different cases and found the statements to be

⁹The *Crawford* court noted, for example, that questioning by police officers bore a striking resemblance to examination by “justices of the peace” in England. *Id.* at 1364. The Court further noted that justices of the peace in England served an “essentially investigative and prosecutorial function” given that England did not have a professional police force until the 19th century.

non-testimonial in one case but testimonial in the other, based on the circumstances of the statements and their making. In *Davis v. Washington*, for example, the statements made by the declarant to the 911 operator were found to be non-testimonial were made by the victim while the events were actually happening during an ongoing emergency for the purpose of getting help, and thus the circumstances indicated that the interrogation was to enable police assistance to meet an ongoing emergency, not to produce testimony for use at trial. *Id.* at 2276-2277. However, the totality of the circumstances in the companion case, *Hammon v. Indiana*, indicated that the statements were testimonial because there was no emergency in progress, the declarant was separated from the defendant, and the questioning took place well after the incident was over. *Davis, supra*, at 2278.

3. S.J.'s statement to Debey was not testimonial.

S.J.'s statements made to Cynthia Debey were not testimonial for the purposes of *Crawford*. While true that the statements to Cynthia Debey were made to a government agent, in that she was an employee of the Division of Family Services, this does not *per se* make the statement testimonial. *See, e.g., Davis v. Washington, supra* (statements made to 911 operator not testimonial due to totality of circumstances).

In *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006), for example, the Minnesota Supreme Court found that statements made by a three-year-old victim to a child protection worker from the Family Service Department were not testimonial. In making this determination, the Minnesota Supreme Court looked at whether the facts in the given case indicated that both the government questioner and the declarant were, to a substantial degree, acting with an eye toward trial; if so, then the statements are likely testimonial. *Id.* at 251. But when the questioner and the declarant are not, to any substantial degree, acting with an

eye toward trial, courts have consistently held that the declarant's statements are not testimonial. *Id.*

The Court in *Bobadilla* noted that questioners and declarants often have multiple purposes, but where preservation of a statement for trial is merely incidental to other purposes, such as assessing and responding to an immediate danger, the statement will not be deemed testimonial. *Id.* at 252. The Minnesota Supreme Court determined that in making a determination as to whether a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial, the court must ask whether a reasonable government questioner or reasonable declarant in the relevant situation would exhibit that purpose. *Id.* at 253.

Ultimately, in *Bobadilla*, the Minnesota Supreme Court found that neither the child-protection worker nor the child declarant were acting, to a substantial degree, in order to produce a statement for trial. *Id.* at 254. The interview of the child was initiated by a child-protection worker in response to a report of sexual abuse for the “overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child.” *Id.* at 255. The main purpose of the interview was to assess and respond to imminent risks to the child's health and welfare. *Id.* In addition, given the child's very young age, the Minnesota Supreme Court found that it was doubtful that the child was even capable of understanding that his statements would be used at a trial. *Id.*

The Court in *Bobadilla* also relied on Minnesota statutes which stated that the purpose of the report and investigation was to protect the health and welfare of children. *Id.* at 254-255. The Minnesota Supreme Court noted cases from other states where such statements had been found testimonial, but distinguished them.

A similar rationale lies behind the Supreme Court's ruling in *Davis v. Washington*, *supra*. In *Davis*, the victim's statements to a 911 operator (presumably a governmental agent) were not testimonial because, under the circumstances, they were made for the purpose of obtaining help to protect the health and safety of the victim, who was in an unsafe situation and to enable the police to respond to an ongoing physical threat to the victim.

Like *Bobadilla*, in the present case, given the totality of the circumstances, it cannot be said that Debey's interview with S.J. was testimonial hearsay. Like the child protection worker in *Bobadilla*, Debey interviewed S.J. in response to a report of sexual abuse for the purpose of determining whether abuse occurred and whether steps were necessary to protect the health and welfare of S.J.. Debey was not interviewing S.J. at the behest of law enforcement but rather because of the victim's grandmother's call reporting the alleged abuse, thus distinguishing this case from the cases appellant cites (see discussion thereof below). Nor was there evidence that Debey was attempting to obtain a statement for use at a criminal trial. Debey interviewed S.J. in her capacity as a DFS social worker; the primary job of state social workers such as Debey is to advocate for the children who come in their door and determine whether they are in need of assistance or not, be it counseling, protection, medical care, etc. When a report of abuse is made to the Department of Social Services Hotline, a worker must initiate an investigation, the purpose of which being "to detect cases of actual or potential abuse or neglect so as to help the family and the child." Missouri Department of Social Services website: www.dss.mo.gov/cd/cani.htm, last accessed on July 11, 2006. The purpose of DFS¹⁰ is not law enforcement or enforcement of the criminal code and the goal of their interviews is not prosecution. The purpose of DFS is to help families

¹⁰Respondent notes that the Division of Family Services (DFS) is now officially referred to as the Children's Division (CD).

and children. Debey's purpose in performing the initial interview was not to get a statement to be used by the prosecutor; it was to determine whether any steps needed to be taken to protect the child.

Section 210.109, RSMo 2000, which establishes the child protection system under the Division of Family Services, states:

The child protection system shall promote the safety of children and the integrity and preservation of their families by conducting investigations or family assessments and providing services in response to reports of child abuse or neglect. The system shall coordinate community resources and provide assistance or services to children and families to be at risk, and to prevent and remedy child abuse and neglect.

Section 210.109.3(5) states that the child protection division shall

provide protective or preventive services to the family and child and to others in the home to prevent abuse or neglect, to safeguard their health and welfare, and to help preserve and stabilize the family whenever possible.

These statutes, like the Minnesota statutes referenced in *Bobadilla, supra*, at 254, indicate that the purpose of interviews by the child protection workers are to protect the child, not produce evidence for trial.

And, just like the three year old victim in *Bobadilla, S.J.*, in the present case, would not have understood that her statement would be used at trial. S.J. was only three years old when she made her statement to Debey. A child that young is not likely to understand that her statements will be used to prove that the perpetrator was guilty of a crime and thereby subject the perpetrator to punishment. Psychological research has shown that children ages 4-7 (and sometimes even older children) do not have a genuine understanding of the court

and court procedures. John E.B. Myers, Karen J. Sawywitz & Gail S. Goodman, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interview and Courtroom Testimony*, 28 PACIFIC L. JOURNAL 1, 68-69 (1996). One study showed that the majority of four to seven year olds demonstrated no awareness that a goal of the court process is to gather evidence and determine whether or not it is the truth. *Id.* at 69. It can hardly be said that a three-year-old child who does not even understand the purposes of a trial would understand that a statement made to a counselor or social worker would, in the words of *Crawford*, “be available for use at a later trial.”

A child like S.J., in speaking with Debey under the circumstances present in the case at bar, would not reasonably believe that her statements would be used at trial, or would be used to send her father to prison, or the like. There is no reason why a child of S.J.’s tender years would view someone like Debey as the equivalent of a police officer or judicial officer, let alone have any idea that her statements to Debey would be used in a court of law. There is nothing in the record to suggest that anything occurred or was said during the interview which would have led S.J. to believe that her father would be punished or that the police would be involved or that a court would be involved or anything else. S.J. merely believed that Debey would be able to “protect” her from appellant and stop him from abusing her. All this means is that S.J., or an objective witness in S.J.’s position, would believe that Debey could make the abuse stop somehow.

While true that apparently a Daviess County deputy witnessed the interview through a one-way glass window (Tr. 89), this fact does not transform the interview into a testimonial statement, given that there is no evidence whatsoever that the deputy participated in any way in the interview. He was not visible to Debey and S.J. in the interview room, and thus S.J. (Or any other interviewee, for that matter), would not be aware that a law enforcement officer

was witnessing any of her statements. Nor did the deputy take part in or direct any of the questioning, and the interview was not conducted at his request, which again distinguishes the present case from those cited by appellant. Notably, a plain clothes police detective observed, but did not participate, in the interview in *Bobadilla* as well, but this did not render the interview testimonial. *See also, State v. Edinger*, 2006 WL 827412 (Ct.App.Oh. 2006) (statements to Child Advocacy Center social worker were non-testimonial where social worker was not a governmental officer, police did not control interview, and police were not overtly present, nor was child aware of their presence).

Finally, the totality of the circumstances demonstrate that Debey's interview of S.J. was not akin to "the abuses at which the Confrontation Clause was directed." *Crawford, supra*, notwithstanding her employment with the state.

First of all, S.J.'s statements to Debey were not the result of formal, structured questioning. Debey asked S.J. if she had something to tell her about her father, and then let S.J. disclose (Tr. 90, 258). Nor were the statements recorded in any way. Nor was there a suspect under arrest or a trial contemplated at the time of the statements, given that no complaint had yet been filed, let alone formal charges. (S.L.F. 1). These cut against a finding that the statements were being obtained for the purpose of use in subsequent criminal litigation.

Secondly, as discussed above, Debey was not acting in a law enforcement capacity in speaking with S.J. as Debey's interview with S.J. was not conducted for the primary purpose of a criminal prosecution. Debey was not interviewing S.J. at the behest of law enforcement but rather because of the victim's grandmother's call reporting the alleged abuse, thus distinguishing this case from the cases appellant cites (see discussion thereof below).

And, as noted above, S.J. would not have reasonably believed that her statement to Debey would be used later in a criminal trial. There was no particular formality to the proceedings surrounding S.J.'s interview, no suspect was under arrest, no trial was contemplated at the time of the statement, the statement was made at a neutral place, as opposed to the police station or a court, there was no structured questioning but rather an open-ended invitation for the declarant to tell her story (Tr. 90, 258), and the statement was not recorded. *See, e.g., People v. Cage*, 15 Cal.Rptr. 3d 846, 848 (Cal.Ct.App. 4 2004).

One might contrast this case with the facts in *People v. Vigil*, 104 P.3d 258 (Colo.App. 2004), in which the court found a seven-year-old's statements to a police officer testimonial. The Colorado Court of Appeals rejected the state's argument that the child would not understand that his statements could be used a trial because the child knew that it was possible that the defendant could go to jail, and because the child was told that he needed to talk to someone at the district attorney's office, who would make sure the defendant went to jail for a long time. This, in combination with emphasis at the beginning of the interview that it was important to tell the truth, would indicate to an objective person in the child's position that the statements were intended for use at a later proceeding to punish the defendant. *Id.* at 263.

None of these factors are present here. A police officer was not involved in the questioning. There was no discussion about appellant's going to jail. S.J. did not make her statements to people she would recognize as law enforcement officers. The record does not reflect that S.J. was told to tell the truth prior to her interviews. There were no factors that would tell an objective person in S.J.'s position that this statement was to be used as testimony.

While it is certainly *possible* that statements made to a DFS worker, under the proper circumstances, might be found testimonial, as evidenced by cases from other jurisdictions (see below), those circumstances are not present here. An informal, unrecorded disclosure by a three or four-year-old girl to a social worker (albeit employed by the state), based upon a hotline call by a parent – not law enforcement – when a case is not even pending, let alone determined to be filed – is simply not sufficiently akin to statements taken by a judicial officer or a justice of the peace in order to preserve a statement for use in a criminal prosecution, which was the risk with which the Framers of the Constitution were concerned in adopting the Confrontation Clause. There were no indicia which would have indicated to a child in S.J.’s position that her statements were intended for use at a later proceeding that would lead to punishment of appellant.

In sum, given the totality of the circumstances, it cannot be said that S.J.’s statement was testimonial or that the trial court plainly erred in allowing the statement in to evidence. The totality of the circumstances indicate that S.J.’s statement to Debey was not “a formal or official statement made or elicited with the purpose of being introduced at a criminal trial.” (App.Br. 19). Rather, they were statements made and obtained in an effort to aid and protect a young child’s health and welfare.

4. S.J.’s statement to Joyce Estes was not testimonial.

Nor was S.J.’s statement to Joyce Estes testimonial, under the totality of the circumstances. Estes, a counselor with the Northwest Missouri Children’s Advocacy Center (“CAC”), is not an employee of the state, as the Children’s Advocacy Center is a nonprofit corporation, not a government agency. See the Northwest Missouri Children’s Advocacy Center website at www.ponyexpress.net/~nwmcac/. This is no minor distinction, given that the *Crawford* court repeatedly emphasized the significance of government involvement in

a testimonial hearsay statement. As discussed earlier, the *Crawford* court held that statements taken in the course of a police interrogation were testimonial in part because “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse” *Id.* at 1367, n.7 and “[t]he involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.” *Id.* at 1365. Indeed, in *People v. Geno*, 683 N.W.2d 687, 692 (Mich.App. 2004), one of the reasons the Michigan Court of Appeals determined that the child’s statement was *not* testimonial was precisely because it was made to the executive director of the Children’s Assessment Center, and the director was not a government employee.

The Advocacy Center’s mission is to prevent, investigate, protect, refer for prosecution, and treat cases of child abuse. The Center employs a multi-disciplinary approach that provides victims and their families with medical, social services, and legal services to deal with the trauma of abuse. See the Northwest Missouri Children’s Advocacy Center website at www.ponyexpress.net/~nwmcac/servicesprovided.htm. Thus, the center serves primarily the child, as the team’s primary concern is to act in the best interest of the child. *Id.* Interviews performed by a child advocacy center serve the needs of treating physicians, treating therapists, and civil child protection professionals, as well as potentially *but not necessarily* serving the needs of prosecutors. And while it is certainly within the realm of possibilities that a CAC examination may end up being used by the state, this frankly can be said of any statement made to anyone if the statement is logically and legally relevant to prove the state’s case, thus potentially rendering any statement “testimonial.”

But *Crawford* is not that broad; the Supreme Court expressly noted that not all hearsay implicates the Confrontation Clause. *Id.* at 1364. Its ultimate holding defined

testimonial statements as those made in a court proceeding, deposition, or to police officers during interrogation, and its rationale turned on the “investigative and prosecutorial function” performed by justices of the peace and police. Had it wished to include any statement of evidentiary value, it could have, but did not. Thus, the issue of whether or not a statement is testimonial cannot be determined simply by the fact that the state may have later used the statement at trial. The issue must be determined by examining the totality of the circumstances as to who elicited the statement, how and why the statement was elicited, and whether a reasonable person would understand that their out-of-court statement would be used in a criminal court. *See, e.g., Davis v. Washington*, 126 S.Ct. at (finding that victim’s frantic answers provided over phone to 911 operator did not objectively indicate that victim was making statements to provide testimony; rather, she was seeking help). Given the variety of purposes for which interviews may and are conducted at child advocacy centers, it cannot be said that a statement made to a child advocacy center counselor or interviewer is, by definition, always a testimonial statement.¹¹

Not only was Estes not a state actor, but also law enforcement was not involved with S.J.’s interview. Again, unlike the cases cited by appellant, law enforcement officers did not request the interview, nor did they participate in the interview. Given the lack of government officers participating in the interview, it should not be said that such an interview presents the same risks or potential for prosecutorial abuse as those present when the police, magistrates, or the justices of the peace produce testimonial evidence.

¹¹Nor, for that matter, can it be said that a statement made to a child advocacy center counselor is *never* a testimonial statement. Rather, the totality of the circumstances of any given statement must be examined to determine whether any given statement is or is not testimonial.

That being said, respondent is compelled to note that in the present case, Joyce Estes, the counselor who met with S.J., did testify that she conducted a “forensic interview” and that a forensic interview is “an official legal interview done for law enforcement.” (Tr. 292, 306).¹²

Be that as it may, even if one accepts Estes’s professed belief of the nature of the interview and her role therein as definitive in the present case, S.J.’s statements should still not be ruled testimonial because her statements were not made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. S.J. had only just turned four years old when she made her statements to Estes. A child that young is not likely to understand that her statements will be used to prove that the perpetrator was guilty of a crime and thereby subject the perpetrator to punishment. As set forth above, psychological research has shown that children ages 4-7 (and sometimes even older children) do not have a genuine understanding of the court and court procedures. John E.B. Myers, Karen J. Sawyitz & Gail S. Goodman, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interview and Courtroom Testimony*, 28 PACIFIC L. JOURNAL 1, 68-69 (1996). One study showed that the majority of four to seven year olds demonstrated no awareness that a goal of the court process is to gather evidence and determine whether or not it is the truth. *Id.* at 69. Again, it can hardly

¹²Estes also testified that she herself did not normally perform forensic interviews (Tr. 292). Rather, she did assessments, which consist of her talking with the child in a relaxed way, perhaps coloring and playing as they talk, to see if there was anything for the child to disclose (Tr. 292-293). However, while the videotape of Estes’s meeting with S.J. would appear to be more of a non-structured assessment, Estes testified on cross-examination that what she conducted was a forensic interview (Tr. 306).

be said that a four-year-old child who does not even understand the purposes of a trial would understand that a statement made to a counselor or social worker would, in the words of *Crawford*, “be available for use at a later trial.”

In *People v. Sharp*, 2005 WL 2877807 (Col.Ct.App. 2005), the Colorado Court of Appeals, relying on *People v. Vigil, supra*, determined that in determining whether a child’s statement is testimonial, one must look at whether an objective person in the child’s position would believe her statements would lead to punishment of the defendant. Factors to be considered in determining whether a child declarant would reasonably believe his or her statements could be used include the declarant’s age, the declarant’s awareness of government involvement, and the declarant’s awareness that the defendant faces the possibility of criminal punishment. *Sharp, supra, citing State v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005) (a statement is testimonial if a reasonable person in the declarant’s position would objectively foresee that his statement might be used in the investigation or prosecution of a crime); *Vigil, supra; State v. Hembertt*, 696 N.W.2d 473, 482 (Ne. 2005); *State v. Brigman*, 615 S.E.2d 21, 25 (N.C.Ct.App. 2005) (finding that five year old was less likely to understand potential for statements to be used prosecutorially; and child did not make statements indicating he understood consequences of his statements or how they might be used to put defendant in jail).

Thus, in *Sharp*, the Colorado Court of Appeals found a child’s statement to a child advocacy center to be non-testimonial where the five-year-old child was interviewed at an advocacy center outside the presence of police and prosecutors, and the child made no statement indicating she understood the consequences of her statements or how they might be used to put the defendant in jail. *Id.* at 6.

Similarly, a child like S.J., in speaking with Estes under the circumstances present in the case at bar, would not reasonably believe that her statements would be used at trial, or would be used to send her father to prison, or the like. There is no reason why a child of S.J.'s tender years would view someone like Estes as the equivalent of a police officer or judicial officer, let alone have any idea that her statements to Estes would be used in a court of law. In the present case, for example, S.J. was told by Estes that she needed to tell her what happened so Estes could help her (St.Exh. 2).

To contrast, again examine *People v. Vigil*, 104 P.3d 258 (Colo.App. 2004), in which the court found a seven-year-old's statements to a police officer testimonial. The Colorado Court of Appeals rejected the state's argument that the child would not understand that his statements could be used a trial because the child knew that it was possible that the defendant could go to jail, and because the child was told that he needed to talk to someone at the district attorney's office, who would make sure the defendant went to jail for a long time. This, in combination with emphasis at the beginning of the interview that it was important to tell the truth, would indicate to an objective person in the child's position that the statements were intended for use at a later proceeding to punish the defendant. *Id.* at 263.

Such characteristics are absent here. There was no discussion about appellant's going to jail. S.J. did not make her statements to people she would recognize as law enforcement officers. The record does not reflect that S.J. was told to tell the truth prior to her interviews.¹³ S.J. was three years younger than the child in *Vigil*. There were no indicia which would have indicated to a child in S.J.'s position that her statements were intended for use at a later proceeding that would lead to punishment of appellant. On the contrary, S.J.'s case is more like the facts in *Sharp* than the facts in *Vigil*, and consequently, S.J.'s statement

¹³It was, however, discussed at the *end* of the interview (St.Ex. 2).

to Estes should be deemed non-testimonial. *See also, State v. Edinger*, 2006 WL 827412 (Ct.App.Oh. 2006) (statements to Child Advocacy Center social worker non-testimonial where social worker was not a governmental officer, police did not control interview, and police were not overtly present, nor was child aware of their presence).

5. Appellant's cases are distinguishable.

Appellant cites to cases from other jurisdictions that have found that interviews with state social workers or child advocates resulted in testimonial statements. These cases all turn on their facts, of course, and have facts which are not present in the case at hand. For example, in *State v. Snowden*, 867 A.2d 314 (Md. 2005), the Maryland Supreme Court found statements made to a social worker by three children were testimonial because the children were interviewed for the expressed purpose of developing their testimony by Ms. Wakeel, the social worker, who interviewed the children after receiving a police report saying that the defendant had sexually abused the children. In that case, the investigation was initiated by a phone call to the police. *Id.* at 316. There was evidence that a joint investigation by the Montgomery County Police Department and the Child Protective Services for Montgomery County. *Id.* The children were interviewed by a sexual abuse investigator for the Montgomery County Department of Health and Human Services at the request of the detective involved in the case. *Id.* at 317. The detective was present for the interviews of all three victims. *Id.* at 317. Each victim at the beginning of the interview indicated that she knew she was being interviewed because of the accusations she had made against the defendant. *Id.*

Critical to the Maryland Court of Appeal's decision was the fact that the social worker's participation "was initiated and conducted as part of a formal law enforcement investigation." *Id.* at 325. The Court noted that the children were interviewed at the behest

of the detective of the Montgomery County Police Department, which was actively involved in the investigation. *Id.* The *Snowden* court distinguished its facts from those cases where statements to investigators were deemed nontestimonial because they were made in the course of ascertaining whether a crime had been committed. *Id.* In *Snowden*, however, the children's statements were elicited subsequent to them having been initially questioned by the police. *Id.* The Maryland Court of Appeals found the social worker to be an agent of the state as she was "performing her responsibilities in response and at the behest of law enforcement." *Id.* at 326. In fact, the social worker testified with a police report in hand, and the children's responses indicated that they knew and understood the purpose of the questioning. In addition, the detective was present, and the children knew that the detective was present. *Id.* at 327. Thus, the facts in *Snowden* were substantially different from the statements in the present case made to Debey and Estes, where law enforcement was not closely involved.

In *People v. Sisavath*, 13 Cal.Rptr.3d 753 (Call.App.4th 2004), the court found that a videotaped interview of a child victim by a trained interviewer at Fresno County's Multidisciplinary Interview Center was testimonial because the statement was made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. However, *Sisavath* differs from the present case. The court in *Sisavath* noted that the interview took place after a preliminary hearing had already been held and an information filed, which is not the case here. Moreover, the prosecutor and a prosecution investigator were present at the interview, which was not the case here. It must also be noted that the *Sisavath* court expressly stated that it did *not* hold that statements made in every MDIC interview were testimonial under *Crawford*. *Sisavath*, 13 Cal.Rptr. 3d at 758.

In *State v. Mack*, 101 P.3d 349 (Or. 2004), the three-year-old child was interviewed by a DHS caseworker at the behest of the investigating police officer. The police officers were present for and videotaped the interviews. *Id.* The first interview took place at the police station. *Id.* The Oregon Supreme Court found that under those facts, the DHS worker was merely serving as a proxy for the police, given that she conducted the interviews for the police and with the police present.

In *Flores v. State*, 120 P.3d 1170 (Nev. 2005), the child's statements were made to an investigator with the Las Vegas Police Department and a child abuse investigator, whom the court declared to be "police operatives" or people tasked with reporting instances of child abuse for prosecution, and thus, according to the court, a reasonable person would anticipate their statements being used for prosecutorial purposes. These statements were made by a child witness of a murder to officers investigating a murder. There was clearly law enforcement involvement and it was not merely a situation where government personnel were trying to determine whether the declarant was at risk, but rather to gain information to convict the defendant.

All of these cases involved active involvement of law enforcement in the interview process, either in participating in the interview or setting up the interview. There is no evidence in this case of active involvement of law enforcement in the interviews conducted by either Debey or Estes, except for the sheriff's deputy's passive viewing of Debey's interview behind a one-way window where he was not visible to anyone, including the child.

The only case that appellant cites that appears not to involve a law enforcement officer is *In Re T.T.*, 815 N.E.2d 789 (Ill.App.Ct. 2004). Inherent in the court's ruling, however, was its belief that the DCFS worker was working "at the behest of and in tandem with the State's Attorney." *Id.* at 801-802. The Illinois Court relied on the fact that the DCFS worker

did not immediately interview the child within 24 hours of the hotline report. *Id.* at 802. In any event, Illinois's position as it appears *In Re T.T.* appears to be anomalous. *See* Major Robert Wm. Best, *To Be or Not To Be Testimonial? That is The Question: 2004 Developments in the Sixth Amendment*, ARMY LAWYER, April, 2005, at 72 (noting, in discussing cases regarding statements to social workers, that *In Re T.T.* was "the one case that did not involve a referral or direct involvement by law enforcement").¹⁴

In short, the totality of the circumstances indicate that S.J.'s statements to Debey and Estes were not testimonial. S.J.'s statement to Debey was made pursuant to a hotline call, law enforcement was not involved, the statement was not recorded, and the statement was not "a formal or official statement made or elicited with the purpose of being introduced at a criminal trial." (App.Br. 19). The statement to Estes was not made to a government employee. As to both statements, they were not made under circumstances which lead a child like S.J. to understand that her declarations could be later used in a criminal trial.

E. Appellant forfeited right to confront.

However, even if S.J.'s statements to either Debey or Estes could be considered testimonial, appellant's confrontational rights were not abridged because appellant forfeited

¹⁴Appellant also cites *In re E.H.*, 823 N.E.2d 1029 (Ill.Ct.App. 2005), which held that a child's statement to a grandmother was testimonial. This is clearly wrong, given the obvious lack of government involvement. Appellant also cites *State v. T.P.*, 911 So.2d 1117 (Ala.Crim.App. 2004). It too involved direct involvement of law enforcement of officials, in that the Department of Human Resources contacted the Sheriff's Department, and an investigator from the Sheriff's Department took part in the interview of the child. It should be noted that admission of the statements was deemed harmless because even without the statements, there was sufficient evidence to convict the defendant.

those rights in that it was his own misconduct that caused S.J. to be unavailable to testify. *Crawford* itself recognizes that the “rule of forfeiture by wrongdoing . . . extinguishes confrontation claims . . .” 124 S.Ct. at 1370. Simple equity and common sense justify a defendant’s forfeiture of his confrontation rights when he has caused a witness to absent himself because of defendant’s threats or violence. *See United States v. Dhinsa*, 243 F.3d 635, 651-652 (2nd Cir. 2001); *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997); *United States v. Colon-Miranda*, 992 F.Supp.82, 83-84 (D.Puerto Rico 1997); *State v. Hallum*, 606 N.W.2d 351, 356 (Iowa 2000) (misconduct is not limited to threats or force, but includes persuasion and control by a defendant); *State v. Sheppard*, 484 A.2d 1330 (N.J.Super.L. 1984) (forfeiture rule applied where defendant threatened child victim with violence if she told). *Cf. State v. Jarzbek*, 529 A.2d 1245, 1253 (Conn. 1987) (noting that while threats made to minor can result in forfeiture, threats made during actual commission of the crime should not count). This is true even in cases where the defendant’s misconduct causing the absence of the witness was the same conduct for which the defendant was on trial. *See United States v. Emery*, 186 F.3d 921 (8th Cir. 1999) (statements of victim were properly admitted in prosecution for killing a federal informant where defendant forfeited his hearsay and confrontation clause objections by killing the victim/informant); *People v. Moore*, 2004 WL 1690247 (Colo.App. 2004) (homicide defendant forfeited confrontation claim regarding out-of-court statements of his deceased wife as her death was caused by defendant)¹⁵.

In the present case, appellant does not challenge the trial court’s finding that S.J. was unavailable to testify (App.Br. 21). The evidence established that S.J. was unavailable

¹⁵This case has not yet been released for publication because a petition for rehearing or petition for certiorari may be pending.

because of her fear of appellant. S.J.'s anxiety would increase when there was just a possibility of her seeing appellant, appellant's presence in the room would be "really frightening" for S.J., and testifying would be retraumatizing and cause her to deteriorate psychologically (Tr. 18, 22-23, 29, 41, 43). Additionally, appellant had threatened his three-year-old daughter with a whipping if she told her mother what had happened between them (Tr. 82, 241).

The law will not allow a person to take advantage of his own wrongdoing. *Diaz v. United States*, 223 U.S. 442, 458, 32 S.Ct. 250, 56 L.Ed.2d 500 (1912). Here appellant preyed upon his three-year-old daughter, a child so young that it should come as no surprise to anyone that it would be difficult, if not impossible, for her to testify at trial in front of him. On top of this, appellant threatened her if she told her mother what happened (Tr. 82, 241). Appellant cannot be heard to complain about an inability to confront the witness against him when he himself chose a witness who would be unlikely to be able to confront him, and whom he threatened to make sure there would be no confrontation.

"[J]ustice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 29 U.S. 97 (1934). The right to confrontation is not an absolute right. The Framers of the Constitution, in addressing the concerns with the right to confrontation, did not contemplate such problems involving the statements of small children. And a defendant should not be allowed to avoid responsibility for his acts against the smallest and most helpless of society for the very reason that the smallest and most helpless of society are unable to confront the defendant face to face.

F. Appellant suffered neither manifest injustice nor prejudice.

Finally, even if either Debey's or Estes's testimony was not admissible, and even if appellant had not forfeited his right to confrontation, appellant is not entitled to relief in this matter because he can show neither manifest injustice nor prejudice. When reviewing questions involving the admission of evidence, the appellate courts review for prejudice, not mere error. *State v. Moore*, 88 S.W.3d 31, 36 (Mo.App.E.D. 2002). Appellants must show that there was a reasonable probability that without the admission of the evidence, the verdict would have been different. *Id.* Potential confrontation clause violations are also subject to harmless error analysis. *United States v. Chapman*, 356 F.3d 843,846 (8th Cir. 2004). And of course, in the present case, as appellant did not object to the evidence on the grounds of a Confrontation Clause violation, he must show not mere prejudice, but rather a manifest injustice or miscarriage of justice. *State v. Roberts*, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied*, 118 S.Ct. 711 (1998).

In the present case, even had the evidence in question been absent, there was not a reasonable probability that the verdict would have been different, and certainly not a miscarriage of justice. S.J.'s mother testified that S.J. started having behavioral problems, did not want to visit appellant, resisted visiting appellant, had nightmares, crying spells, and bed-wetting problems when returning from visiting appellant, and, particularly telling, S.J. developed yeast infections when she returned from visiting appellant – yeast infections that stopped occurring when S.J. stopped visiting appellant (Tr. 228-229). And, of course, there is S.J.'s voluntary, unprompted and detailed disclosure to her grandmother that appellant kissed her “pee-pee” and had her kiss his “pee-pee,” said disclosure including an accurate description of what appellant's penis looked like and the fact that appellant ejaculated (Tr. 233-238). Given S.J.'s behavioral changes and physical symptoms that were inextricably tied to visiting appellant, and given S.J.'s disclosure to her grandmother regarding what

appellant had been doing to S.J., a disclosure that arguably was the most credible statement of them all, appellant cannot show prejudice nor manifest injustice. Moreover, respondent notes that appellant himself relied heavily on the videotape of S.J.'s interview to argue that her disclosure was *not* credible (Tr. 343, 345, 347, 349-350), which weighs against a finding that admission of the videotape of her interview with Estes resulted in a miscarriage of justice. *See State v. Collins*, 163 S.W.3d 614, 622-623 (Mo.App.S.D. 2005) (finding no error, plain or otherwise, when state's expert's testimony, even if inadmissible, was used by defense to bolster defendant's trial strategy in child sex case).

In any event, appellant's assertion of prejudice is essentially his unadorned claim that his confrontation rights were violated (App.Br. 23-24). But even if they were, mere violation does not require per se reversal. As noted above, confrontation clause violations are also subject to harmless error analysis (or in this case, plain error analysis), and in the present case, given the other evidence against him, appellant has not shown, nor even argued, that the result of his trial would have been different if the statements and/or the videotape had not come in.

In short, S.J.'s statements were properly admitted under §491.075. S.J.'s statements were not testimonial, and thus did not implicate the confrontation clause per *Crawford*. Moreover, appellant had forfeited his rights to confrontation as he rendered S.J. unavailable. In any event, appellant has failed to demonstrate prejudice or manifest injustice. Appellant's claims thus are without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of July, 2006.

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RESPONDENT'S APPENDIX

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