

IN THE SUPREME COURT OF MISSOURI

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

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**APPELLANT’S REPLY BRIEF**

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Dated February 26, 2006  
~Oral Argument Requested~

Submitted by:

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## **STATEMENT OF JURISDICTION**

Appellant would respectfully incorporate herein by reference its original statement of jurisdiction and makes no changes thereto as Appellant continues to maintain the accuracy of its original statement of jurisdiction.

## **STATEMENT OF FACTS**

Appellant would respectfully incorporate herein by reference its original statement of facts and makes no changes thereto as Appellant continues to maintain the accuracy of its original statement of fact.

**POINTS RELIED ON AND AUTHORITIES**

**RESPONDENT'S POINT I - APPELLANT'S REPLY AND AUTHORTIES**

**THE TRIAL COURT DID ISSUE AN ORDER SUPPRESSING THE STATEMENT'S OF J.C. RATHER THAN SIMPLY SUSTAINING AN OBJECTION TO THE ADMISSION OF J.C.'S STATEMENTS THROUGH AMY COOK AND THE TRIAL COURT'S REFUSAL TO ADMIT EVIDENCE IS A RULING THAT IS APPEALABLE THROUGH AN INTERLOCUTORY APPEAL.**

*In re R.B.*, 186 S.W.3d 255 (MO en banc 2006)

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

*State ex rel Hawkings v. Harris*, 304 Mo. 309 (Mo. 1924)

*State v. Galazin*, 58 S.W.3d 500 (Mo. 2001)

491.075, RSMo

211.261, RSMo

542.296, RSMo.

**RESPONDENT'S POINT II & APPELLANT'S POINT I**

**THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING J.C.'S STATEMENTS BY SUPPRESSING THE TESTIMONY OF J.C.'S MOTHER WHEN IT SUSTAINED AN OBJECTION TO THE APPLICATION OF SECTION 491.075 RSMO AS UNCONSTITUTIONAL**

**DUE TO APPLICATION OF CRAWFORD V. WASHINGTON IN  
JUVENILE PROCEEDINGS BECAUSE CRAWFORD V. WASHINGTON  
ONLY APPLIES TO CRIMINAL PROCEEDINGS IN THAT JUVENILE  
PROCEEDINGS IN MISSOURI ARE CONSIDERED CIVIL  
PROCEEDINGS.**

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

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

**State v. Justus, 2006 Mo. LEXIS 136 (Dec., 2006)**

491.075, RSMo.

491.699, RSMo.

211.031, RSMo.

211.462, RSMo.

**RESPONDENT'S POINT III & APPELLANT'S POINT II**

**ASSUMING ARGUENDO THAT CRAWFORD APPLIES TO JUVENILE  
DELINQUENCY PROCEEDINGS, THE TRIAL COURT ABUSED ITS  
DISCRETION BY EXCLUDING J.C.'S STATEMENTS BY SUPPRESSING  
THE TESTIMONY OF J.C.'S MOTHER BECAUSE CRAWFORD DOES  
NOT APPLY UNDER THE FACTS OF THE CASE IN THAT J.C.'S  
STATEMENTS ARE NON-TESTIMONIAL IN NATURE AND WERE**

**ADMISSIBLE UNDER SECTION 491.075, RSMO., AND AS TESTED  
AGAINST THE FRAMEWORK OF OHIO V. ROBERTS, 448 U.S. 56, (1980).  
Crawford v. Washington, 541 U.S. 36 (2004)**

## **ARGUMENT**

### **The Standard of Review**

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

**POINTS RELIED ON - RESPONDENT'S POINT I - REPLY**

**THE TRIAL COURT DID ISSUE AN ORDER SUPPRESSING THE STATEMENT'S OF J.C. RATHER THAN SIMPLY SUSTAINING AN OBJECTION TO THE ADMISSION OF J.C.'S STATEMENTS THROUGH AMY COOK AND THE TRIAL COURT'S REFUSAL TO ADMIT EVIDENCE IS A RULING THAT IS APPEALABLE THROUGH AN INTERLOCUTORY APPEAL.**

Respondent characterizes Appellant's Brief as being superfluous by using terms such as 'excluding', 'suppressing', and 'unconstitutional' and "muddying the waters" with a discussion of Section 491.075, RSMo., and civil versus criminal proceedings. Then Respondent goes on to say that the Juvenile Office does not have the right to appeal under Section 211.261, RSMo., notwithstanding the fact that these are the terms expressly used by this Court in *In re R.B.*, 186 S.W.3d 255 (MO en banc 2006) under substantially similar facts, which left open the possibility of the appeal now at hand.

The alleged victim in *R.B.* was videotaped in a forensic interview prior to the court hearing. The day of court the victim was brought to the stand to testify but eventually became so emotional that the court found her unable to continue to testify. The Juvenile Office sought to introduce the lawfully gained videotape in lieu of testimony. *R.B.* objected on the basis of the Sixth Amendment Right to

Confrontation as determined in *Crawford v. Washington*, 541 U.S. 36 (2004). The court issued a dismissal of the petition in the case, ruling that the videotape was inadmissible under *Crawford v. Washington*. The ruling, made by a commissioner, was subsequently adopted by the judge of the court and entered as a judgment.

This Court dismissed the appeal because Section 211.261, RSMo., did not provide a right to appeal a final judgment by the Juvenile Office. Yet, this Court expressly opened the door for an appeal such as this case when it stated, “we leave the resolution of whether the evidence was properly suppressed or excluded for another day”. *Id.*, at 232. Today is ‘another day.’

Respondent suggests that Section 542.296, RSMo., encompasses the breadth of the definition of suppression in Missouri Courts. Appellant respectfully suggests that Section 542.296, RSMo., only stands for one small provision relating to suppression, and is entirely irrelevant to this case. There is nothing in the record to suggest that Respondent filed a “Motion To Suppress” as defined and permitted under Section 542.296, RSMo. Respondent did not file any pretrial motions requesting a ruling on the admissibility of evidence, included, but not limited to evidence gained in violation of Respondent’s Fourth Amendment protection against unlawful search and seizure. The Respondent did not suggest in argument during trial that the evidence being offered violated his Fourth Amendment

protection from illegal search and seizure. Finally, Respondent did not suggest that the court entertain an oral motion to suppress the evidence due to surprise. Respondent knew who was going to testify and the substance of the testimony being offered.

Previous cases have acknowledged that the definition of suppression is somewhat fluid, and not settled in law.

“Somewhat varying definitions of the word "suppress" are given in the law and other dictionaries. Thus, Bouvier: "Suppress: To put a stop to when actually existing." Anderson: "To prevent; never, therefore, to license or sanction." Standard: "To put down or put an end to by force; over-power; crush, subdue." Century: "To overpower; subdue; put down; quell; crush; stamp out.”” *State ex rel. Hawkins v. Harris*, 304 Mo. 309, 318 (Mo 1924)

Even in criminal law the rules governing a motion to suppress are broader than the mere application of Section 542.296, RSMo., as succinctly stated by Justice White in his dissent in *State v. Galazin*, 58 S.W.3d 500, (Mo 2001):

“The principal opinion treats section 542.296, RSMo, and Rule 24.05 as if they were interchangeable, which they self-evidently are not. The statutory provision defines a motion to suppress as a motion by a criminal defendant "to suppress the use in evidence of the property or matter seized" illegally.

Defined this narrowly, the principal opinion is correct that defendant did not

file a motion to suppress; but defendant was not seeking to have evidence of any illegally seized "property or matter" suppressed. The principal opinion (grudgingly) concedes that the statute has no application here, but nevertheless continues to rely on the terms of the statute as if they were identical to the rule. Only the statute contains the requirements that a motion to suppress (as defined in the statute) be made in writing and be made before commencement of the trial unless the defendant was unaware of the grounds for the motion.” *Supra* at 511.

And in civil cases the term is even broader as noted by the Western District Court of Appeals in *Alberswerth v. Alberswerth*, 184 S.W.3d 81 (WD 2006) which states that “[i]n limine” is defined as “in or at the beginning” and a motion in limine is traditionally used as a way of suppressing testimony or evidence at the beginning of litigation.” *Supra* at 99. Nowhere in *Alberswerth* is there a suggestion that the evidence being sought to be suppressed was illegally acquired. Appellant instead objected that it would constitute allowing a witness to appear ‘*in absentia*’.

In light of these cases, and the fact that there appear to be no cases to the contrary, the term suppression is broad enough to include the sustaining of an objection to testimony, as described herein, sufficient to allow an appeal by the Juvenile Office under Section 211.261.2, RSMo.

**RESPONDENT’S POINT II & APPELLANT’S POINT I - REPLY**

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

**B. Response to Respondent’s Argument Not in Compliance with Rule 84.04**

Respondent argues that the trial court did not raise the question of the constitutionality of Section 491.075, RSMo. Clearly the trial court raises this issue in the “Findings of Fact, Conclusions of Law and Judgment” filed on Nov. 14, 2006 when it states (LF 12 & 13):

“18. The Court then determined that the child was unavailable; that her statements were reliable; and, that the statements would come into evidence pursuant to [Section] 491.075 RSMo.

19. However, the Court then determined that Crawford v Washington applied to this case and invalidated [Section] 491.075., and therefore sustained the sixth amendment objection to Cook’s testimony.

[And . . .]

30. That post-Crawford although J.C.’s statements would ordinarily be admitted into evidence through her mother’s testimony that the admission of such statements through the proper application of [Section] 491.075, RSMo., is in direct conflict with the sixth amendment right to confrontation pursuant to the rulings contained within Crawford v. Washington, 541 U.S. 36 (2004).”

**C. Response to Respondent’s Argument Regarding Labels of Civil/Criminal /**

**D. Response to Respondent’s Sixth Amendment Discussion**

Respondent suggests Appellant’s discussion of the decidedly civil nature of juvenile proceedings is unnecessary because the statute allowing the child victim’s testimony in this case is criminal. Respondent’s argument seriously oversimplifies the issue at hand. Because Section 491.075, RSMo., authorizes certain types of evidence in criminal trials we only get to it in this case through Section 491.699, RSMo., which specifically applies Section 491.075, RSMo., to juvenile proceedings filed under Section 211.031, RSMo. Therefore, we are not discussing whether Section 491.075, RSMo., is a criminal statute, but whether the application

of Section 491.075, RSMo., by way of Section 491.699, RSMo., in a juvenile proceeding is civil or criminal in nature. Both statutes can be found under “Title 33: Evidence and Legal Advertising” which includes all rules of evidence; civil, criminal and otherwise. This Title even includes directions on how to publish rules of evidence. It is overly apparent from the fact that the legislature deemed it necessary to create Section 491.699, RSMo., that juvenile proceedings did not naturally fall into “criminal prosecutions” under Section 491.075, RSMo. Therefore, it should be just as obvious that the legislature did not consider these proceedings to be “criminal” in nature.

Respondent equally over simplifies the holding in *In Re Gault*, 387 U.S. 1 (1967) which did not apply the entire Sixth Amendment to juvenile proceedings. The Sixth Amendment in its entirety states:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” *U.S. Constitution - Sixth Amendment.*

Appellant has been unable to find any example of a jury being empanelled in a juvenile trial in Missouri. In fact the “Sixth Amendment” is not directly mentioned in *In Re Gault*, 387 U.S. 1 (1967) until Justice Black’s Concurrence. Instead *Gault* concerns itself with “due process” rights by stating that “[a]s to these proceedings, there appears to be little current dissent from the proposition that the Due Process Clause has a role to play. The problem is to ascertain the precise impact of the due process requirement upon such proceedings.” *Id* at 538.

Specifically addressing the right to confront witnesses, the *Gault* Court states that “[t]he recommendations in the Children's Bureau's "Standards for Juvenile and Family Courts" are in general accord with our conclusions. They state that testimony should be under oath and that only competent, material and relevant evidence under rules applicable to civil cases should be admitted in evidence.” *Supra* at 562

Therefore, it is not an unequivocal right to confront a witness in trial, but rather a right which can be limited by the rules of evidence applicable to civil cases. Later, as described in Appellant’s Brief, the Supreme Court in *Ohio v. Roberts*, 448 U.S. 56, (1980), sets forth the applicable test as to hearsay evidence presented by unavailable child witnesses. The format set forth therein was strictly followed by Appellant in the hearing being appealed. (TR 47 & 48)

**E. Response to Respondent's Argument Regarding 491.075 and  
Confrontation Clause**

Respondent suggests that Appellant is asking this Court to ignore its ruling in State v. Justus, 2006 Mo. LEXIS 136 (Dec., 2006), when Appellant clearly stated the holding in Appellant's Brief. Appellant respectfully asks the Court to take judicial notice of Appellant's argument of this issue.

**F. Response to Respondent's Argument Regarding Material Affect**

Respondent suggests that Appellant failed to show the material affect of the suppression or exclusion of the testimony at question herein. Respondent further suggests that to show materiality requires allowing the hearing to go to a final judgment. Of course Respondent wants this to go to a final hearing. If this matter were to be dismissed then Appellant would lose all rights to appeal. Appellant has a right to interlocutory appeal under Section 211.462.2, RSMo., based on the suppression of evidence. Materiality of the evidence being offered is self-evident from the transcript. The evidence being offered is the eye witness testimony of the victim as to a purportedly illegal act that was allegedly committed against her by Respondent. (TR 24) The transcript further shows that she was the only witness to the act; that she made the same statements to other members of her family (TR 46); she would not make them to law enforcement and social services personnel (TR 7 - 8); and a SAFE exam could not be conducted to corroborate her statement. (TR 10)

If protection of a child victim is not material then Appellant is at a loss as to what exactly would be material in Respondent's eyes.

**RESPONDENT'S POINT III & APPELLANT'S POINT II - REPLY**

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

**B. Response to Respondent's Argument Regarding Theories**

Respondent suggests that Appellant failed to raise the point in trial that Appellant's evidence was admissible under Crawford v Washington because it was non-testimonial as opposed to testimonial. Appellant respectfully suggests that a thorough review of the transcript will prove that although Appellant never used the word(s) non-testimonial Appellant queried the witness/recipient of the evidence being offered to illicit sufficient facts to put Respondent on notice that the child's testimony was non-testimonial, i.e., was spontaneously given immediately following the incident in question to a family member who was questioning the victim to identify if the victim needed help and how to best help the victim and not during the course of an investigation. (TR 21-22) Furthermore, the transcript is

clear that Appellant offered the evidence in light of the holdings in *Crawford v Washington*. (TR 41 - 42)

Assuming arguendo that this Court does not accept that the questioning, and subsequent argument, provided sufficient notice to allow Respondent to prepare objections on appeal, Appellant respectfully suggests that Respondent did not clarify that Respondent's objections at trial were based on the testimonial nature of the statement being offered. Therefore, by the same measure Respondent would be precluded from arguing that the evidence being offered was testimonial. If both of these conditions are true then the appeal herein would solely revolve around whether juvenile cases and procedures are criminal in nature and therefore *Crawford v Washington* applies to them.

### **C. Response to Respondent's Argument Regarding Material Affect**

This argument has already been brought up and addressed and therefore Appellant would respectfully refer this Court back to page 17 of this Reply Brief for a response to this argument.

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

Respectfully submitted,

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IN THE SUPREME COURT OF MISSOURI

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

**CERTIFICATE OF SERVICE AND COMPLIANCE**

The undersigned hereby certifies that two (2) true and accurate copies of Appellant’s Reply Brief and Appendix were forwarded via Federal Express; via first class mail, postage-prepaid; facsimile transmission with confirmation printed on this day to: to Dewayne Perry, 800 East Aldrich Road, Suite E, Bolivar, Missouri, 65613; Betty Wirsén, 2141 North Main Avenue, Springfield, Missouri, 65803; and, Donald Cook, 1094 Huckleberry Road, Strafford, Missouri, 65757, on this 26<sup>th</sup> day of February, 2007.

The undersigned hereby certifies that Respondent’s brief complies with the word, line and page limitations as prescribed by Rule 84.06(b) in that there are less than 7,750 words (which is 25% of 31,000 words); less than 550 lines (which is 25% of 2,200) and 25 pages in that there are 3,176 words, 338 lines, and 25 pages in Appellant’s Reply Brief as established by the word, line and page count of the Microsoft Word 2003 word processing system used to create it excluding the cover; certificate of service; virus certificate; signature block and appendix as it applies to the word and line counts.

The undersigned hereby certifies that one (1) floppy disk was provided to each of the above-listed parties as required by Rule 84.06(g) and that the floppy disk(s) being filed in this matter have been scanned for viruses and to the undersigned's best knowledge, the disk(s) is/are virus free.

Respectfully submitted,

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### **Certificate of Service**

The undersigned hereby certifies that a true and accurate copy of the foregoing document was forwarded via [  ] first class mail, postage-prepaid; [  ] facsimile transmission at approximately \_\_\_\_\_ .m. with confirmation printed on this day; [  ] United Parcel Service; [  ] hand delivery to Dewayne Perry, 800 East Aldrich Road, Suite E, Bolivar, Missouri, 65613 (facsimile (417) 777-3082); Betty Wirsen, 2141 North Main Avenue, Springfield, Missouri, 65803; and, Donald Cook, 1094 Huckleberry Road, Strafford, Missouri, 65757, on this 26<sup>th</sup> day of February, 2007.

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Teresa Rieger Housholder

## **APPENDIX**

### **United States Constitution: Sixth Amendment**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

\*No other statutes, rules or constitutional provisions are being provided as they have already been provided in Appellant's original appendix and Respondent's appendix as provided for in Rule 84.04(h).