

**IN THE SUPREME COURT OF MISSOURI**

**STATE OF MISSOURI,**                    )  
  )  
                          **Respondent,**            )  
  )  
**v.**    ) **No. SC90775**  
  )  
**GEORGE BIGGS,**                    )  
  )  
                          **Appellant.**            )

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**Appeal from the Circuit Court of Greene County  
The Honorable Thomas Mountjoy, Circuit Judge**

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**APPELLANT'S BRIEF**

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**MICHAEL BAKER  
Attorney at Law  
Missouri Bar No. 19893  
3432 Culpepper Court, Suite A  
Springfield, MO 65804  
(417) 883-8200  
(417) 883-3165 (Facsimile)**

**ATTORNEY FOR APPELLANT**

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## **JURISDICTIONAL STATEMENT**

This appeal is from the judgment of the Circuit Court of Greene County, Missouri, Thomas Mountjoy, Circuit Judge, wherein after a jury trial Appellant was convicted of the Class C felony of abuse of a child (568.060) and sentenced to seven (7) years in the Department of Corrections. This appeal is one involving Appellant's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Section 10 and 18(a) of Article One of the Constitution of the State of Missouri to due process and equal protection of law and right to confrontation by admitting into evidence pursuant to 491.075 R.S.Mo hearsay testimony of what the alleged victim said and basing the conviction on said hearsay. This it involves whether 491.075 R.S.Mo is constitutional.

## STATEMENT OF FACTS

On October 22, 2007, the Greene County Prosecuting Attorney filed a Complaint charging the Appellant with the Class C felony of abuse of a child in that on or between the 17<sup>th</sup> day of June, 2007, and the 27<sup>th</sup> day of July, 2007, the Appellant knowingly inflicted cruel and inhumane punishment upon L.J.Y., a child less than seventeen years old, by striking him with a belt (LF 1, 6-9). On January 18, 2008, Appellant pled not guilty to the charge (LF 2).

On September 10, 2008, the State filed its Notice of Intention to Use and Motion to Admit Hearsay Statements of a Child Under Fourteen Pursuant to Section 491.075 R.S.Mo. and Notice of Hearing (LF 3, 9-10). Prior to the hearing on September 26, 2008, Appellant filed Objections to the State's Motion (LF 3, 11). The hearing on the State's Motion was scheduled for February 5, 2009. On that date the Trial Court overruled Appellant's objections as to the constitutionality of 491.075 R.S.Mo. (LF 3, TR p 3).

At the 491.075 hearing, the State offered the testimony of Rachel N. Happel, Sheree Young and Officer Curt Ringgold of the Springfield Police Department. Prior to the testimony of the witnesses, Appellant supplemented his objections to the hearsay evidence on the basis that it

was unconstitutional because hearsay came in as substantive evidence, which meant that a Defendant could be convicted solely on hearsay evidence (TR p 2). The Court overruled the objection contingent on the child testifying (TR p 3).

Rachel Happel testified that she was a forensic interviewer at the Child Advocacy Center (TR p 4); that she conducted a video recorded interview of L.J.Y. on August 22, 2007. This interview was introduced into evidence over Appellant's objection as State's Exhibit 13 (TR p 337). Ms. Happel testified as to how she conducted the interview (TR p 4-25).

Sheree Young testified that she was the mother of L.J.Y. (TR p 27). She testified as to what L.J.Y. had said during the ride to her friend's house after they had picked him up from Appellant (TR p 26-42).

Detective Curt Ringgold of the Springfield Police Department testified concerning his interview with L.J.Y. on July 27, 2007 (TR p 43-55).

On June 1, 2009, the Trial Court ruled that the hearsay statements as related by the witnesses had sufficient indicia of reliability to be admissible under 491.075 R.S.Mo. (TR p 69).

On October 22, 2009, a hearing on pretrial motions was held where Appellant advised that he would be objecting to the 491.075 R.S.Mo.

evidence at trial and that he would set the objections out in a new written motion which would be filed prior to trial (TR p 73).

On October 26, 2009, prior to the trial starting, Appellant filed Objections to the Admissions of Hearsay Statements of a Child Under Fourteen Pursuant to 491.075 R.S.Mo. (LF 4, 15-16; TR p 91). Appellant requested that his objections to 491.075 be made a continuing objection and this was granted by the Trial Court (TR p 92). The Trial Court overruled the objections as previously ruled (TR p 92).

Prior to the presentation of evidence, an additional 491.075 motion hearing was held. This hearing concerned the testimony of Gayla Hancock. She offered testimony of what L.J.Y. had said when she and his mother, Sheree Young, picked him up from his father's residence (TR p 101-118). Appellant renewed his objection to the hearsay evidence and that it was improper bolstering of a witness who has not been impeached. The objection was overruled and the Trial Court found that there was sufficient indicia of reliability for its admissions subject to the child being available for cross-examination during trial (TR p 119-120).

Also prior to the presentation of evidence, Appellant objected to Appellant's agreeing to take a polygraph test at the request of the police

and which was never given being redacted from the statement (TR p 122-123). The objection was overruled.

On October 27, 2009, the State presented its evidence. The first witness called was Gayla Hancock. She testified that she was L.J.Y.'s godmother and saw him and his mother on a regular basis (TR p 153-154). She lived across the street from L.J.Y.'s mother. She testified that L.J.Y. had bowel movements where he soiled himself (TR p 154-155); that she and Sheree Young had gone to pick up L.J.Y. at Appellant's house; that she did not know where the house was, but they found it by looking for Appellant's truck (TR p 157). When they arrived Appellant also pulled up. L.J.Y. was in the house. He came out to be with everyone. Appellant told Sheree Young that L.J.Y. was grounded; that L.J.Y. had poo-pooed on himself or pooped his pants (TR p 159). They put L.J.Y. in the car and Appellant told Sheree Young that he wanted L.J.Y. to go to a different school (TR p 160). After they had driven away approximately 30-45 seconds, L.J.Y. asked if he could lie down, that his bottom hurt, that he had bruises. Later he said, "I have bruises on my bottom, my dad whopped my butt." (TR p 161-163). When they got to her house she viewed the bruises on L.J.Y. (TR p 163). At this point the state introduced into evidence photographs of L.J.Y., Exhibits 1 through 8. They were admitted over

Appellant's objection (TR p 164-165). They were passed to the jury. She stated that when she was in the room with L.J.Y. he said "that he boo-booed on himself" and his daddy made him go take a shower to get cleaned up and he said that he was made to come into the bedroom naked, to bend down over the bed and daddy whopped his bottom with a belt (TR p 166). On cross-examination Ms. Hancock did not recall saying anything to the police (TR 171). She did know L.J.Y. had bowel problems and that he was potty trained (TR p 170-173).

The next witness called by the State was Sheree Young. She is the mother of L.J.Y. and Appellant is his father (TR p 175). She stated that L.J.Y. went to visit Appellant on Father's Day, June 17, 2007, and she did not pick L.J.Y. up until July 27, 2007 (TR p 176-177). She was not worried about L.J.Y.'s safety (TR p 178). That she and Gayla Hancock went to pick up L.J.Y. She picked L.J.Y. up without any problems; that Appellant told her that L.J.Y. was grounded (TR p 183). On the drive back to Gayla's house, L.J.Y. made the statement that he had a bruise (TR p 184). She said that she thought he had hurt himself falling off the bike or skateboard he had at his father's house (TR p 184). When she examined L.J.Y., it was in Gayla's bedroom by herself. She did not find bruises on L.J.Y.'s arms or

legs (TR p 186). She identified State's Exhibits 1 through 8 as pictures of the bruises on L.J.Y. (TR p 187). L.J.Y. told her that daddy whopped me with a belt because he had an accident on himself (TR p 188). She testified that L.J.Y. had had problems with bowel movements since birth and that he was still having them when he went to his father's home (TR p 192). That she called the police and set with L.J.Y. until they arrived. That she was present when the police talked to L.J.Y. (TR p 193-195). At a later time, she took L.J.Y. to the Child Advocacy Center for an interview (TR p 196). On cross-examination Sheree denied that there were any problems concerning the custody of L.J.Y. between herself and Appellant (TR p 201). That when she had picked up L.J.Y. he said he had a bruise and did not say anything about lying down in the seat (TR p 206). She testified that she examined L.J.Y. on his legs, arms, thighs, his back, his front, no bruises (TR p 209). She testified that she disciplined L.J.Y. by time out and did not spank him (TR p 215).

The next witness called was L.J.Y. who testified confirming what some of what Gayla Hancock and Sheree Young had testified to, but as to issues of what he told them he could not remember or that he did not show them any bruises (TR p 221-226). L.J.Y.'s testimony is set out in the Appendix 24-28. Because of L.J.Y.'s unresponsiveness and lack of

memory, Appellant objected that he was being denied his right to confrontation by L.J.Y. testifying "I don't remember," which was overruled (TR 230-232).

The State next called Appellant's wife, Allena Biggs. She testified that L.J.Y. had come to stay with her and the Appellant on June 17, 2007, and he was picked up by Sheree Young on July 27, 2007. That during his stay she knew of one time that Appellant spanked L.J.Y. on his butt with a belt; that Appellant had spanked him twice, but she only knew of that one of the times a belt was used (TR p 241-242). She stated that both times that L.J.Y. had been spanked was because he soiled himself. That he had been doing this whole time he was there; that they tried various types of discipline to stop him from soiling himself; that they would ask if L.J.Y. if he did not know he had to go to the bathroom and he said he did, but did not want to stop playing or doing what he was doing (TR p 246). That she was in the living room when Appellant took L.J.Y. into the bedroom and spanked him (TR p 245). Again the reason for spanking L.J.Y. was for pooping on himself the second time that day (TR p 246). That they had not cleaned L.J.Y. up prior to him being spanked. Mrs. Biggs stated the Appellant's attitude or demeanor when taking L.J.Y. to be spanked was one of disappointment and was not anger (TR p 246); that she went into

the bedroom afterwards and she observed a little poop on the comforter and on the belt, and a drop or two on the floor (TR p 246-248).

On cross-examination, Mrs. Biggs testified that she did not hear any crying or yelling coming from the bedroom; that prior to the period of June 17, 2007, that while they had L.J.Y. he would play with the kids in the neighborhood, doing what kids generally do and L.J.Y. appeared happy (TR p 254). That they had a happy family life. On redirect she again stated that Appellant had only spanked L.J.Y. two times (TR p 265).

Prior to the State calling any other witnesses to testify as to what L.J.Y. had said, Appellant objected to their testimony based on the fact that L.J.Y. had testified that it did not happen or that he could not remember and that this deprived the Appellant of his right of confrontation (TR p 268-270), which was overruled.

The next witness called was Officer Curt Ringgold of the Springfield Missouri Police Department. He testified that on July 27, 2007, he had been dispatched to 1119 West Elm, Springfield, Missouri, to investigate child abuse. When he arrived he talked to Sheree Young. He also talked to L.J.Y. in Ms. Young's presence (TR p 273-276). That his purpose in talking to L.J.Y. was to get information; that L.J.Y. "indicated that he often gets spankings because he has accidents." He said that he "is told to take

a bath or shower, put pajamas on, sit on a couch. And then, when his father calls him to his room, he goes into his father's room and receives a spanking." That the spankings occurred every day and he was spanked with a belt (TR p 277). That he observed bruises on L.J.Y.'s legs and buttocks. That he took pictures of the bruises (State's Exhibit 1 through 8) (TR p 277). He further testified that L.J.Y. also had some scratches and cut marks on his legs; that these were consistent with being struck by a belt based on his police experience (TR p 280-282). On cross-examination, he testified that outside of being a little nervous at the start, L.J.Y. was not reluctant in talking to him. That as to the bruises, they could have come from roughhousing or falling down. He could not say what object made them. He also testified that some people bruise more easily than other people (TR p 284-286).

The next witness called was Corporal Randall Rugar of the Springfield Missouri Police Department. He testified that he was assigned to investigate the alleged abuse of L.J.Y. That during his investigation he interviewed Sheree Young and took a video recorded statement from Appellant on August 11, 2007 (TR p 293-294). That Appellant was cooperative and signed a right's waiver (TR p 297-298). The State's Exhibit 11 was admitted into evidence (TR p 300). It was played to the

jury. Corporal Rugar testified that he got State's Exhibit 10, the belt that Appellant was wearing during the interview, and Appellant told him that he had spanked L.J.Y. with it (TR p 301-302), but denied he had caused the bruises. The officer also interviewed Appellant's wife, Allena Biggs. He also was present at the Child Advocacy Counsel for their interview with L.J.Y. (TR p 304-305). That after the interview on August 22, 2007, he observed some faint scarring on L.J.Y.

On cross-examination the officer stated that Sheree Young was aware that Appellant was trying to get custody of L.J.Y. (TR p 308). That the Appellant had come voluntarily and talked to him.

The next day prior to the offering of any evidence Appellant renewed his 491 objection relating to hearsay evidence and violating the Appellant's right of confrontation and supplemented orally that since L.J.Y. could not remember being interviewed by the police or the interview at the Child Advocacy Center, Appellant was unable to cross-examine him about it and this denied him his right to confrontation. In addition, Appellant moved to strike Officer Ringgold's testimony and that of Sheree Young and Gayla Hancock based on the same reason and to prohibit the introduction into evidence the video made at the Child Advocacy Center (TR p 313-314). It was overruled.

Sheree Young was recalled concerning L.J.Y.'s condition and at what age he started visiting Appellant (TR p 316-318).

The next witness was Rachel Happel, a forensic interviewer at the Child Advocacy Center. She described her training and how she conducts an interview, including how she wears an earpiece during the interview so that she could communicate with people running the recording equipment and other persons watching who could suggest questions to ask (TR p 323-326). Ms. Happel conducted an interview with L.J.Y. on August 22, 2007. State's Exhibit 13, which was introduced into evidence over Appellant's objection (TR p 337-338), the video recording of the interview, was then played to the jury. During the interview L.J.Y. stated he was last spanked two days ago, which the State tried to explain away by this being natural for a child his age (TR p 339-344). On cross-examination, Ms. Happel admitted that someone else was suggesting the questions that she was asking L.J.Y. (TR p 346). At the conclusion of Ms. Happel's testimony the State rested (TR p 352).

Appellant filed his Motion for Judgment of Acquittal at the Close of the State's Case in Chief, which was overruled (TR p 353-354).

The Appellant presented evidence from witnesses who testified from their personal knowledge as to how Appellant treated L.J.Y. when in their

presence and that L.J.Y. appeared to them to be a normal happy child (TR p 355-366, 377-379). They never saw Appellant spank L.J.Y.; that Appellant disciplined L.J.Y. by talking with him. The Appellant chose not to testify (TR p 376).

At the conclusion of all the evidence Appellant filed his Motion for Judgment of Acquittal at the Close of all the Evidence, which was overruled (LF p 4). An instruction conference was held prior to the last witness testifying. During the conference, Appellant offered a lesser included offense instruction on Third Degree Assault, Instruction "A" (LF 30-31), which was refused by the Trial Court (TR p 369-372).

During closing argument, the State almost exclusively argued to the jury the statements that L.J.Y. had made to others, which had been admitted into evidence over the Appellant's objection (TR p 389-406).

After deliberation, the jury returned a verdict of guilty. The Trial Court sentenced Appellant to seven years in the Department of Corrections (TR p 456). Appellant filed a timely Notice of Appeal (LF p 5).

## **POINTS RELIED ON**

### **POINT I**

**The trial court erred in overruling Appellant's Objections to the admission of hearsay evidence pursuant to Section 491.075 R.S.Mo. and admitting into evidence over said objection State's Exhibits 13 and the testimony of Sheree Young, Gayla Hancock, Officer Marvin Curtis Ringgold and Rachel Happel, as the testimony pertained to statements made by L.J.Y. to them or in their presence, for the reason that said exhibit and statements were hearsay and Section 491.075 is unconstitutional both facially and as applied in the following respects:**

- (a) Section 491.075 R.S.Mo. provides for the admission of hearsay statements of a child under the age of fourteen as substantive evidence in the trial of a defendant charged under Chapters 565, 566, 568 and 573 R.S.Mo. and that in admitting these statements subjects a defendant so charged of being convicted on hearsay evidence alone and also on evidence admitted in the case that improperly bolsters the testimony of a witness who has not been impeached or discredited, thus depriving a defendant so charged of his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article One Section 10 of the Missouri Constitution.

(b) Section 491.075 R.S.Mo. provides for the admission of hearsay statements of a child under the age of Fourteen as substantive evidence in the trial of a defendant charged under Chapters 565, 566, 568 and 573 R.S.Mo. and in so doing establishes a separate class of criminal defendants who would be convicted on the basis of hearsay evidence alone thus depriving a defendant so charged of equal protection of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

In re Winship, 397 U.S. 358, 364 90 S.Ct. 1068, 1073, 25 L.Ed 2nd 3689 (1970)

State v. Seever, 733 S.W.2d 438, 441 (Mo. banc 1987)

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979)

State v. Pierce, 906 S.W. 2d 729, 735 (Mo. App. W.D. 1995)

## **POINT II**

**The trial court erred in admitting into evidence over Appellant's objection the testimony of Officer Curt Ringgold, Rachel Happel, State Exhibit 13 (video taped interview of L.J.Y.), for the reason that prior to their introduction L.J.Y. had testified he could not remember whether a police officer had come to his house and denied even meeting a girl named Rachel; and in not striking the testimony of Sheree Young and Gayla Hancock because L.J.Y. could not remember what he told Sheree Young and that neither Sheree**

**Young nor Gayla Hancock had looked at anything on his body and his father had not hit him (TR 222-225), and his lack of memory and denials deprived Appellant of his right to confrontation as guaranteed by the Sixth Amendment of the Constitution of the United States and Article One Section 18(a) of the Missouri Constitution.**

State v. March, 216 S.W.3d 663, 664-665 (Mo. banc 2007)

Crawford v. Washington, 541 U.S. 36, 123 S.Ct. 1354, 158 L.Ed. 177 (2004)

Sutton v. Esterly, 189 S.W.2d 284,289 (Mo. 1945)

State v. Jankiewicz, 831 S.W. 2d 195, 197-99 ( Mo. banc 1992)

SIXTH Amendment to the United States Constitution

Article One Section 18(a) of the Missouri Constitution

### **POINT III**

**The trial court erred in admitting into evidence over the objection of Appellant the testimony of Sheree Young, Gayla Hancock, Officer Curt Ringgold, Rachel Happel and State's Exhibit 13 for the reason that said testimony and Exhibit 13 improperly bolstered the testimony of L.J.Y. and each other.**

State v. Madorie, 156 S.W.3d 351, 355 (Mo. banc 2005)

State v. Seever, 733 S.W.2d 438 (Mo. banc 1987)

**POINT IV**

**The trial court erred in not giving Appellant's Instruction "A" on the lesser included offense of third degree assault which was in proper form and supported by the evidence.**

State v. Pond, 131 S.W.3d 792, 794 (Mo. banc 2004)

State v. Hibler, 5 S.W.3d 147, 151 (Mo. banc 1999)

## **POINT V**

**The trial court erred in overruling Appellant's motions for judgment of acquittal at the close of the State's case in chief and at the close of all the evidence for the reason that the State did not produce sufficient evidence to prove beyond a reasonable doubt that Appellant had inflicted cruel and inhumane punishment on L.J.Y., a child less than seventeen years old, by striking with a belt, and for the further reason that the majority of the evidence presented was hearsay improperly admitted because of the unconstitutionality of Section 491.075 R.S.Mo.**

State v. Simmons, 955 S.W.2d 752 [23] (Mo. banc 1997) cert. denied, \_\_\_\_ U.S. \_\_\_\_, 118 S.Ct. 1081 (1998)

## ARGUMENT

### POINT I

**The trial court erred in overruling Appellant's Objections to the admission of hearsay evidence pursuant to Section 491.075 R.S.Mo. and admitting into evidence over said objection State's Exhibits 13 and the testimony of Sheree Young, Gayla Hancock, Officer Marvin Curtis Ringgold and Rachel Happel, as the testimony pertained to statements made by L.J.Y. to them or in their presence, for the reason that said exhibit and statements were hearsay and Section 491.075 is unconstitutional both facially and as applied in the following respects:**

- (a) Section 491.075 R.S.Mo. provides for the admission of hearsay statements of a child under the age of fourteen as substantive evidence in the trial of a defendant charged under Chapters 565, 566, 568 and 573 R.S.Mo. and that in admitting these statements subjects a defendant so charged of being convicted on hearsay evidence alone and also on evidence admitted in the case that improperly bolsters the testimony of a witness who has not been impeached or discredited, thus depriving a defendant so charged of his right to Due Process of Law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article One Section 10 of the Missouri Constitution.
- (b) Section 491.075 R.S.Mo. provides for the admission of hearsay statements of a child under the age of Fourteen as substantive evidence in the trial of a defendant charged under Chapters 565, 566, 568 and 573 R.S.Mo. and in so doing establishes a separate class of criminal defendants who would be convicted on the basis of hearsay evidence alone thus depriving a defendant so charged of equal

protection of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Standard of Review.

In construing a statute as to its constitutionality, the court reviews de novo. A “statute” is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision. Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2<sup>nd</sup> 338, 340 (Mo. banc 1993).

(a) Substantial evidence is evidence from which the trier of fact could reasonably find issues in harmony with verdict. State v. Pittman, 1675 S.W.3d 232, 234 (Mo. App. SW 2005).

Section 491.075 R.S.Mo. reads in part:

“A statement made by a child under the age of fourteen relating to an offense under Chapter 565, 566, 568 or 573 R.S.Mo. performed with or on a child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceeding in the courts of this state as substantive evidence to prove the truth of the matter asserted if...” (See Complete Statute, Appendix A-2-3).

It is this portion of the statute that invalidates the statute as unconstitutional both facially and as applied. It is established law in Missouri that hearsay admitted without objection may properly be considered as evidence by the trier of fact. State v. Goodwin, 43 S.W.3d 805, 818 (Mo. banc 2001). However, in this case Appellant began objecting to its admission prior to the hearing based on its reliability (LF 3, 11). Prior to the testimony of the witnesses offered under Section 491.075 Appellant filed a written objection to their testimony based on the constitutionality of Section 491.075 in that it permitted Appellant to be convicted on hearsay evidence alone (LF 3, 11, 15-16) (TR p 2), which was overruled by the Court (TR p 3). The

Appellant requested that his objections to Section 491.075 and the testimony offered pursuant to said statute be made a continuing objection, which was granted by the Court (TR p 92). State v. Baker, 103 S.W.3d 711, 716-17 (Mo. banc 2003).

The testimony objected to was that of Gayla Hancock (TR p 152-169), Sheree Young (TR p 174-200), both of whom testified as to what L.J.Y. had told them about bruises and that his father, Appellant, had spanked him with a belt. Also objected to was the testimony of Officer Curt Ringgold, the initial investigating officer who questioned L.J.Y. and who reported that L.J.Y. told him that Appellant had spanked him with a belt every day and he observed some bruising on L.J.Y. (TR p 271-284) and Rachel Happel, a forensic interviewer at the Child Advocacy Center in Springfield. She testified as to conducting a video taped interview with L.J.Y. (State Exhibit 13), which had been objected to (TR p 313-314), which was overruled.

When L.J.Y. testified he stated he either could not remember what he told the witness or that he did not show any of them his body and denied ever meeting a girl named Rachel (TR p 221-224) and stated his father never got angry with him and did not remember anybody hitting him with a belt (TR p 225). A copy of the pertinent testimony of L.J.Y. is in Appendix 24-28).

Besides the objected to testimony, the State presented the testimony of Appellant's wife, Allena Biggs, who testified that Appellant had spanked L.J.Y. two times for messing on himself and that one time was with a belt (TR 238-265) and the testimony of Detective Randal Rugar, who took a video statement from Appellant (State Exhibit 11) in which Appellant admitted to spanking L.J.Y. with a belt, but denied causing the bruise observed on L.J.Y.

In another point of this brief, Appellant contends that there was insufficient evidence to convict Appellant of the charge of knowingly inflicting cruel and inhumane punishment upon L.J.Y. by striking him with a belt, but for the sake of argument, Appellant contends that the

evidence that might be used for conviction is that which was admitted pursuant to Section 491.075 R.S.Mo. thus subjecting Appellant to being convicted on hearsay evidence alone.

In this case the admitted hearsay statements turned out to be prior consistent statements because of the testimony of L.J.Y. that he did not remember or that it did not happen. The Western District of the Missouri Court of Appeals considered a similar situation where the prosecutrix recanted her out of court statement when she testified, and the court held the conviction could not be upheld without corroborating evidence and conviction could not be supported where prior consistent statement is sole evidence of prosecution. State v. Pierce, 906 S.W.2d 729, 735 (Mo. App. W.D. 1995). As the Court pointed out, the language of the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed 2<sup>nd</sup> 560 (1979), “looms like a cloud over the idea that, somehow, a conviction based solely on an out of court inconsistent statement satisfies due process.” Pierce at 235. The due process clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction “except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged,” In re Winship, 397 U.S. 358, 364 90 S.Ct. 1068, 1073, 25 L.Ed 2<sup>nd</sup> 368; that proof beyond a reasonable doubt has traditionally been regarded as the decisive difference between criminal culpability and civil liability, Id., at 358-362, 90 S.Ct. at 1068-1072.

By mandating that hearsay evidence be considered substantial evidence, Section 491.075 offends the principles set out in Winship, and is unconstitutional in that it violates the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article One, Section 10 of the Constitution of the State of Missouri.

The Fifth Amendment to the United States Constitution provides in part:

“No person shall be deprived of life, liberty or property without due process of law.”

The Fourteenth Amendment to the Constitution of the United States reads in part:

“Nor shall any State deprive any person of life, liberty or property, without due process of law.”

Article 1, Section 10 of the Missouri Constitution reads in part:

“That no person shall be deprived of life, liberty or property without due process of law.”

In re Winship held that it was part of due process of law as guaranteed by the Fourteenth Amendment that a criminal conviction can only be upheld upon proof beyond a reasonable doubt of each and every fact necessary to constitute the crime with which he is charged. Winship at 397 U.S. 364 90 S.Ct. at 1073. Jackson v. Virginia, held that the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. Jackson at 443 U.S. 318. This presumes reliable and competent evidence.

Proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged is the decisive difference between criminal culpability and civil liability. In re Winship, at 358-362. Comparing hearsay in the civil law with it in the criminal cases covered by Section 491.075 R.S.Mo. demonstrates that a civil litigant has more protection from hearsay than does a criminal defendant. In the area of administrative law, hearsay is generally admissible, but hearsay which is timely objected to shall not constitute competent evidence which, by itself, will support a finding of fact. 8 C.S.R 10-5.015 (10)(B)4.

Also, criminal defendants other than those charged under Chapter 565, 566, 568 and 573 R.S.Mo. have greater rights when it comes to the admission of hearsay such as the rule against impeaching one's own witness. The state is permitted under 491.075 without a showing of surprise or hostility, but other criminal defendants and civil litigants are not permitted to do so

for the fear of opening the floodgates for the admission of hearsay testimony serving as substantial evidence should the parties be permitted to impeach own witness. State v. Kinne, 372 S.W.2d 62, 67 (Mo. 1963). Section 491.075 also permits the admission of prior inconsistent statements of the child as substantial evidence against a defendant when charged under 565, 566, 568 and 573 R.S.Mo., when in the case of other criminal defendants and civil litigants they can be used for rehabilitation and not as substantive evidence. State v. McMillin, 783 S.W.2d 82, 98 (Mo. banc 1990).

Hearsay is not competent and substantial evidence. Hill v. Norton & Young, Inc., E093010 (Mo. App. 3/2/2010) (Mo. App. 2010). A litigant fired because he refused to slice tomatoes has greater rights than Appellant who stands convicted of a felony is a good illustration of how Section 491.075 violates Appellant's due process rights and the rights of other similarly charged. Mr. Hill gets to draw his unemployment compensation because the evidence against him was hearsay, but Appellant is convicted based on hearsay. A criminal defendant should have greater rights than a civil litigant and it is a violation of due process of law when hearsay is used to prove beyond a reasonable doubt each and every element of the crime charged, and for this reason Section 491.075 is unconstitutional both facially and as applied to this Appellant.

In addition, the effect of Section 491.075 R.S.Mo. is to set up in a criminal prosecution a child victim less than fourteen years of age as a super witness. By mandating the admission of out of court statements, the statute circumvents the rules of evidence. Not only does objected to hearsay come in as substantial evidence, but so does impeaching evidence without the showing of surprise and hostility. But perhaps the most egregious is the allowing the admission of consistent statements where the witness has not been impeached. Enhancement and rehabilitation of a witness who has not been impeached is considered improper bolstering for the

reason “that the party who can present the same testimony in multiple forms may obtain on undue advantage.” State v. Seever, 733 S.W.2d 438, 441 (Mo. banc 1987).

Section 491.075 R.S.Mo. violates due process of law because it diminishes the requirement that a criminal defendant's guilt must be proved beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged by making it easier to convict certain defendants and by giving the State an unfair advantage in being able to pile on by allowing the State to get the same testimony in evidence multiple times. This gives the State in certain criminal trials an easier task than it would have in trying to prove a murder or bank robbery, or what a civil litigant would have in a civil case.

The Supreme Court stated in In re Winship, 397 U.S. 358, 362 (1970),<sup>2</sup> quoting from Brinegar v. United States, 338 U.S. 160, 174 (1949), that

“guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in common law tradition to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standards. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.”

Not only is proof beyond a reasonable doubt of every element of the crime charged a part of due process of law, but the evidence used as proof is also part of due process. Section 491.075 makes a shamble of the rules of evidence and gives the State an unfair advantage and makes it easier to convict certain criminal defendants, thus it is facially unconstitutional because it so violates due process of law.

(b) The Fourteenth Amendment to the Constitution of the United States provides in part

that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”

Equal protection of law requires that laws “operate on all alike and not subject the individual to arbitrary exercise of the power of government.” Kansas City v. Webb, S.W. 2<sup>nd</sup> 817, 823 (Mo. banc 1972). A law may not treat similarly situated persons differently unless such differentiation is justified. Creason v. City of Washington, 435 F.3d 820, 823 (8<sup>th</sup> Cir. 2006). If the law disadvantages a suspect class or affects a fundamental right, a court must apply strict scrutiny to determine “whether the statute is necessary to accomplish a compelling state interest.” In re Marriage of Woodson, 92 S.W.3d 780, 784 (Mo. banc 2003) and whether the chosen method is narrowly tailored to accomplish that purpose. In re Norton, 123 S.W. 3d 170, 173 (Mo. banc 2003).

Appellant's preceding argument and authorities concerning Section 491.075 R.S.Mo.'s violation of due process of law is just as applicable in determining whether said statute violates the Fourteenth Amendment right of an individual to equal protection of the law. By setting up a class of defendants (those charged under 565, 566, 568 and 573 R.S.Mo.) who could be convicted on hearsay evidence, the legislature has affected a fundamental right, that being proven guilty beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364. Section 491.075 not only subjects a criminal defendant of being convicted on objected to hearsay evidence alone which would not be so as to other defendants charged under the criminal code, but in addition it permits the bolstering of a child witness by admitting prior consistent statements even when the child has not been impeached, and on the other hand it permits the impeaching of the State's own witness without a showing of hostility or surprise. That this would not be permitted for civil litigants and this affects fundamental fairness of a criminal proceeding. If the justification for this is “that a

child as a witness is easily confused, has poor memory, lacks communication skills, is subject to intimidation or is not a reliable witness," that the rules of evidence as they existed prior to the enactment of Section 491.075 were sufficient to these situations. Because Section 491.075 was not necessary to prosecute those individuals charged under Chapters 565, 566, 568 and 573 R.S.Mo. the statute is both facially and as applied to this Appellant, unconstitutional.

## POINT II

**The trial court erred in admitting into evidence over Appellant's objection the testimony of Officer Curt Ringgold, Rachel Happel, State Exhibit 13 (video taped interview of L.J.Y.), for the reason that prior to their introduction L.J.Y. had testified he could not remember whether a police officer had come to his house and denied even meeting a girl named Rachel; and in not striking the testimony of Sheree Young and Gayla Hancock because L.J.Y. could not remember what he told Sheree Young and that neither Sheree Young nor Gayla Hancock had looked at anything on his body and his father had not hit him (TR 222-225), and his lack of memory and denials deprived Appellant of his right to confrontation as guaranteed by the Sixth Amendment of the Constitution of the United States and Article One Section 18(a) of the Missouri Constitution.**

### Standard of Review.

Ordinarily an Appellant Court Standard of Review on the admission of evidence is abuse of discretion. State v. Madorie, 156 S.W.3d 351, 355 (Mo. banc 2005). However, whether a criminal defendant's rights were violated under the confrontation clause by the admission of evidence is a question of law that an Appellant Court reviews de novo. State v. March, 216 S.W.3d 663, 664-665 (Mo. banc 2007).

The Sixth Amendment to the Constitution of the United States and Article One Section 18(a) of the Missouri Constitution provides in part that in all criminal prosecutions the accused shall have the right to confront the witnesses against him.

Prior to the testimony of Office Curt Ringgold and Rachel Happel and the admission into evidence of State's Exhibit 13, Appellant objected to their admission because L.J.Y. had testified that it did not happen or that he could not remember, and that this deprived Appellant of his right

to confrontation (TR p 268-270), which said objection was overruled. Subsequently Appellant also moved to strike the testimony of Sheree Young and Gayla Hancock and to prohibit the admission of State's Exhibit 13 for the same reason, which said objection was overruled (TR p 315-315).

In Crawford v. Washington, 541 U.S. 36, 123 S.Ct. 1354, 158 L.Ed. 177 (2004) the Supreme Court of the United States held that the confrontation clause of the Sixth Amendment demands that all testimonial evidence be excluded unless the person who made the statement is unavailable to testify and the defendant had a prior opportunity for cross-examination.

Although L.J.Y. did testify, and thus was available for cross-examination, his answers on direct examination as to the essential elements of the State's case that it did not happen, he could not remember, or he did not know (TR p 222-225) essentially made him unavailable and deprived Appellant of meaningful cross-examination.

A witness is unavailable whenever that testimony of the witness is unavailable as a practical proposition (witness taking the 5<sup>th</sup>), Sutton v. Easterly, 189 S.W.2d 284, 289 (Mo. 1945). A witness was unavailable when unresponsive when testifying. State v. Jankiewicz, 831 S.W.2d 195, 197-199 (Mo. banc 1992).

When a witness does not remember or says some event did not happen, counsel would have a difficult, if not impossible task and find it probably unwise to cross-examine and attempt to get him to admit that someone put him up to making statements he could not remember or that someone told him to say something about something he says never happened. Because of 491.075 the State had already gotten evidence in which was highly prejudicial and was able to get in evidence where it was aware that Appellant would be unable to cross-examine about. Because of the lack of memory or denial of events, Appellant was denied confrontation as

guaranteed by the Sixth Amendment to the United States Constitution and Article One Section 18a of the Missouri Constitution.

### **POINT III**

**The trial court erred in admitting into evidence over the objection of Appellant the testimony of Sheree Young, Gayla Hancock, Officer Curt Ringgold, Rachel Happel and State's Exhibit 13 for the reason that said testimony and Exhibit 13 improperly bolstered the testimony of L.J.Y. and each other.**

#### Standard of Review.

The Standard of Review on the admission of evidence is abuse of discretion. State v. Madorie, 156 S.W.3d 351, 355 (Mo. banc 2005).

Prior to the presentation of evidence, Appellant filed his objection to admission of hearsay statements of a child under fourteen pursuant to Section 491.075 R.S.Mo. (LF p 4, 15-16). The motion contained an objection that the admission of the above mentioned testimony and Exhibit 13 was the bolstering of a witness which had not been impeached or discredited. The motion was overruled (TR p 91-92). Appellant moved to make it a continuing objection which was granted by the court (TR p 92).

In State v. Seever, 733 S.W.2d 438 (Mo. banc 1987) this Court ruled in similar circumstances as the ones presented in this case; that it was improper enhancement and rehabilitation of a witness to allow a video statement of the witness in evidence when the witness testified and was not impeached and that this was not harmless error but prejudicial and required reversal. Id., at 441.

In a previous point Appellant contends that because Section 491.075 R.S.Mo. authorizes bolstering of a witness, it violates due process of law and the Court is referred to that argument and authorities.

This cause is somewhat different from the one in Seever, in that there are four witnesses

plus a video which was expressly made for Court. This was really piling it on. As pointed out in Seever, “the party who can present the same testimony in multiple forms may obtain an undue advantage,” Id., at 441. The State may argue that this was rehabilitation. The prosecutor, when responding to the objection that he was impeaching his witness, responded that he was “not trying to impeach him, because I don’t think it’s going to be appropriate in this situation,” (TR p 231). This indicates that the State was using the out of court statements to establish its case, which is raised in a previous point.

Clearly by being able to present the same evidence six times gives the State a great advantage over a Defendant who for the most part must rely on the presumption of innocence and burden of proof in defending against the charge.

From the evidence and statements made at trial the objected to evidence was intended to and did constitute an improper and rehabilitation of the statements and testimony of L.J.Y.; The trial judge abused his discretion and the error was

prejudicial and Appellant’s conviction should be reversed.

#### **POINT IV**

**The trial court erred in not giving Appellant's Instruction "A" on the lesser included offense of third degree assault which was in proper form and supported by the evidence.**

##### Standard of Review,

Rule 28.02 of the Rules of Criminal Procedure provides the Standard of Review on the giving or refusing to give instruction, and the Trial Court has the duty to instruct the jury in writing upon all questions of law arising in the case that are necessary for their information in giving the verdict 28.02(a). It shall be the duty of the parties to submit requests for instructions in writing 28.02(b) and the Appellate Court shall determine whether the giving or failing to give an instruction was error and its prejudicial effect, provided that objection was timely made 28.02(f).

At the instruction conference Appellant requested that the jury be instructed on the lesser included offense of third degree assault and offered Instruction "A: (TR p 369; LF 30-36; Appendix 4-5 ). The Trial Court refused the instruction.

Appellant was tried on an Information charging him with abuse of a child in that he knowingly inflicted cruel and inhumane punishment upon L.J.Y., a child less than seventeen years old, by striking him with a belt (LF p 6) The charge was a violation of Section 568.060 R.S.Mo. The statute does not define cruel and inhumane punishment, but the State's Information alleged it was cruel and inhumane by striking with a belt. This alleged an assault.

Appellant offered Instruction "A" on third degree assault based on Section 565.070(1) R.S.Mo. as a lesser included offense of abuse of a child by knowingly inflicting cruel and inhumane punishment on L.J.Y., a child less than seventeen years old, by striking him with a belt.

Section 565.070(1) R.S.Mo. reads as follows:

1. A person commits the crime of assault in the third degree if:

(1) The person attempts to cause or recklessly causes physician injury to another person.

MAI- CR 3d 304.11.h provides as follows:

Instructions on lesser included offenses and lesser degree offenses require a written request by one of the parties. Section 565.025(3) R.S.Mo. Supp. 2004.

Moreover, such an instruction will not be given unless there is a basis for acquitting the defendant of the higher offense. Section 556.646 R.S.Mo. Supp. A defendant is entitled to an instruction on any theory the evidence establishes. A jury may accept part of a witnesses' testimony, but disbelieve other parts. If the evidence supports differing conclusions, the judge must instruct each.

In this case, the evidence established that the bruising to L.J.Y. could have been caused by reckless conduct. State's Exhibit 11, the video taped statement of Appellant, provides sufficient evidence for the giving of the lesser include offense instruction. In the video, Appellant admits to spanking L.J.Y. with a belt, but emphatically denies that he caused the bruising (State's Exhibit 11). Also the testimony of Allena Biggs, when she testified that Appellant had spanked L.J.Y. twice during the month he was with her and Appellant and that only once was with a belt (TR p 241-242). She further testified that she was in the living room when Appellant took L.J.Y. into the bedroom and spanked him (TR p 245). When asked what Appellant's demeanor was when taking L.J.Y. to be spanked she stated it was not anger, but of disappointment (TR p 246). The type of injury sustained was not life threatening, in fact, the State did not offer any medical evidence as to injury.

There was evidence if believed that would have supported an acquittal of the offense of abuse of a child by knowingly inflicting cruel and inhumane punishment upon L.J.Y., a child less than seventeen years old, by striking with a belt, and convicting on the third degree assault offense. “A defendant is entitled to an instruction on any theory the evidence establishes.” State v. Pond, 131 S.W.3d 792, 794 (Mo. banc 2004). Assault in the third degree has been held to be a lesser included offense of first degree assault. State v. Hibler, 5 S.W.3d 147, 151 (Mo. banc 1999). Because third degree assault is a lesser offense of abuse of a child by knowingly inflicting cruel and inhumane punishment on L.J.Y., a child less than seventeen years old, by striking him with a belt, Appellant’s Instruction “A” should have been given.

## POINT V

**The trial court erred in overruling Appellant's motions for judgment of acquittal at the close of the State's case in chief and at the close of all the evidence for the reason that the State did not produce sufficient evidence to prove beyond a reasonable doubt that Appellant had inflicted cruel and inhumane punishment on L.J.Y., a child less than seventeen years old, by striking with a belt, and for the further reason that the majority of the evidence presented was hearsay improperly admitted because of the unconstitutionality of Section 491.075 R.S.Mo.**

### Standard of Review.

In reviewing the sufficiency of the evidence to support a criminal conviction, an Appellate Court does not weigh the evidence but accepts as true all evidence tending to prove guilt along with all reasonable inferences that support the decision of the jury and ignores all contrary evidence and inferences. Review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found defendant guilty beyond a reasonable doubt. State v. Simmons, 955 S.W.2d 752 [23] (Mo. banc 1997) cert. denied, \_\_\_\_ U.S. \_\_\_\_, 118 S.Ct. 1081 (1998).

The State bears the burden of proof in a criminal prosecution. Its burden is to present evidence to prove a defendant guilty beyond a reasonable doubt of all the elements of a crime charged. In this case the State had to prove that Appellant spanking L.J.Y. with a belt was cruel and inhumane treatment. The only direct evidence of Appellant spanking or striking L.J.Y. with a belt came from Appellant's statement (State Exhibit 11) and the testimony of Allena Biggs, Appellant's wife. Appellant told the police officer that he had spanked L.J.Y. with a belt he was

wearing (State Exhibit 10), but Appellant denied this caused any injury or bruises on L.J.Y. Allena Biggs testified that Appellant had spanked L.J.Y. twice and one time with a belt (TR p 242-248). When L.J.Y. testified, he could not remember if anyone ever hit him while he was staying with Appellant, and that Appellant did not get angry with him (TR p 225). This constituted the direct evidence that Appellant had spanked L.J.Y. with a belt, but there was no direct evidence that Appellant's striking of L.J.Y. with a belt caused any injury to L.J.Y. The testimony of Officer Curt Ringgold was that in his opinion based on his experience as a police officer that the marks on L.J.Y. were consistent with being hit with a belt (TR 280). On cross-examination he admitted the bruising could have come from something other than a belt and that some people bruise more easily than others (TR p 285-286). The officer also testified that L.J.Y. told him that he was spanked every day (TR p 277). There was no medical evidence presented. The rest of the evidence as to whether the bruise or bruising was caused by being struck with a belt was the hearsay statements of Sheree Young, Gayla Hancock, Officer Ringgold and Rachel Happel and State's Exhibit 13. It should also be noted that the only<sup>8</sup> time that it was mentioned that the spankings took place every day was in Officer Ringgold's statement and the interview conducted by Ms. Happel. It was not mentioned by Sheree Young or Gayla Hancock. There was no evidence that Appellant knew he was inflicting cruel and inhumane punishment. Corporal punishment is legal, some parents may believe in it and others do not. Appellant did not try to hide that he had spanked L.J.Y. and in fact fully cooperated with the investigation (TR p 310). There was no evidence either direct or offered by way of hearsay that Appellant knew he was inflicting cruel and inhumane treatment. In fact, the bulk of the evidence consisted of hearsay as to what L.J.Y. had told the witness and should not have been admitted.

Because of the foregoing, Appellant's conviction should be reversed because of

insufficient evidence.

**CONCLUSION**

For the foregoing reasons, Appellant's conviction should be reversed and remanded for a new trial, or if the facts permit, that the conviction be reversed and Appellant be discharged.

Respectfully submitted,

G. MICHAEL BAKER  
Missouri Bar No. 19893

ATTORNEY FOR APPELLANT

Michael Baker  
Attorney at Law  
3432 Culpepper Court, Suite A  
Springfield MO 65804  
(417) 883-8200  
(417) 883-3165 (facsimile)

**CERTIFICATE OF SERVICE**

I hereby certify that two (2) copies of Appellant's brief was served on the Missouri Attorney General's Office, Supreme Court Building, PO Box 899, Jefferson City, MO, 65102, by hand delivery of the same, this 17th day of September, 2010.

**MICHAEL BAKER**  
Missouri Bar No. 19893  
**ATTORNEY FOR APPELLANT**

## **CERTIFICATE OF COMPLIANCE**

I, Michael Baker, hereby certify the following:

That in filing Appellant's brief, Appellant's argument is not presented or maintained for any improper purpose and that the legal contentions contained therein are warranted by existing law and that there is evidentiary support in the record and that any denials of factual contentions are warranted on the evidence.

That this brief complies with the limitations contained in Rule 84.06(b); and that the number of words in the brief are 9,904 and the number of lines of monospaced type are 934. This was determined by using word and line count of the word processing system used in preparing the brief.

I further certify that the floppy disk submitted herein was scanned for viruses and that it is virus-free.

MICHAEL BAKER  
Missouri Bar No. 19893  
ATTORNEY FOR APPELLANT

## Appendix