IN THE MISSOURI SUPREME COURT

SC88787

STATE OF MISSOURI,

Plaintiff-Respondent,

vs.

JESSICA D. REED,

Defendant-Appellant.

Appeal from the Circuit Court
for St. Charles County
District Court No. 0611-CR-08867

Honorable Lucy D. Rauch, Judge Presiding

BRIEF FOR DEFENDANT-APPELLANT JESSICA D. REED

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JURISDICTIONAL STATEMENT

Jurisdiction of the Missouri Supreme Court is invoked pursuant to Article V, Section 3 of the Missouri Constitution since this appeal involves, inter alia, the issue of whether R.S.Mo. §491.074, as amended by L.2000, SB Nos. 757 and 602, which permits an alleged prior inconsistent statement of any witness testifying in the trial of any criminal offense to be received as substantive evidence, violates the United States Constitution and the Missouri Constitution in light of the opinions of the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 547 U.S. 813 (2006) and the opinions of this Court in State v. Justus, 205 S.W.3d 872 (Mo. banc 2006) and State v. March, 216 S.W.3d 663 (Mo. banc 2007).

STATEMENT OF THE FACTS

Defendant/Appellant Jessica Reed was prosecuted and convicted by a jury in the Circuit Court of St. Charles County on a "Second Amended Information" charging her with attempting to manufacture a controlled substance in violation of R.S.Mo. §§195.211, 562.036 and 562.041: (L.F. 54)

> In that on or about September 11, 2006, … the defendant possessed crushed tablets containing ephedrine stereoisomer together with lithium and other chemicals and items used in the manufacturing process of methamphetamine and that such conduct was a substantial step toward the commission of the crime of manufacture of methamphetamine. (L.F. 54)

Defendant/Appellant was also charged as a prior drug offender pursuant to R.S.Mo. §195.275 since she had previously pled guilty to possession of methamphetamine precursors.

Notably, Defendant/Appellant was not charged with being an accessory after the fact to a crime committed by others and was not charged with allowing others to use her property (or her father's property) to manufacture methamphetamine.

The evidence presented by the state concerned a methamphetamine lab

which was found in a horse trailer adjacent to the residence of Defendant Reed's father, Donald Reed, located in Foristell, Missouri. There was no testimony at trial that Defendant Jessica Reed was observed to be in the horse trailer, although two male subjects were chased from the trailer by Donald Reed shortly before police arrived at the scene.

However, beginning with its first witness, police officer Brandon Anderson, the prosecutor elicited alleged out of court statements of Adam McCauley and Donald Reed that Jessica Reed had been observed in the horse trailer "possibly cooking meth." (T.227, 231, 232). Defense counsel's objections to these hearsay statements were overruled (T.228, 231) despite the fact that at that point neither Adam McCauley nor Donald Reed had been called as witnesses, and, consequently, these alleged hearsay statements could not have been considered as "prior inconsistent statements."

The state's case was based primarily on these alleged statements and the later testimony of Adam McCauley, the boyfriend of Defendant Reed's sister, Elizabeth. Adam testified that on September 11, 2006 at about 12:30 in the afternoon he and Elizabeth went to visit Jessica, who was living at her father's residence in Foristell, Missouri (T.243) in order to exchange birthday presents between Elizabeth and Jessica. When they arrived they observed her father's large

horse trailer parked near the house and a white Mustang automobile in the driveway (T.244).

Adam described the horse trailer as having horse pens and living quarters in it including a kitchen area (T.245). However, Adam and Elizabeth visited with Jessica at her father's home, not at the horse trailer. Nevertheless, the prosecutor persisted throughout the trial to imply that Adam had observed Jessica to be in the horse trailer, an allegation that Adam denied.

When asked several times by the prosecutor whether Jessica was staying in the horse trailer Adam stated "no, I don't know if she was or not" (T.246).

McCauley said he did not find anything unusual about either the Mustang or the horse trailer when he and Elizabeth arrived, but when they were leaving, after visiting with Jessica for about thirty minutes in the house, they smelled a strong order of ammonia emanating from the horse trailer (T.247).

They then proceeded down the driveway to the street where they stopped to call Donald Reed to tell him that there was an unfamiliar car in the driveway and a smell of ammonia coming from the horse trailer (T.247).

Donald arrived on the scene in about five minutes and went back to the house with Adam and Elizabeth (T.247). Adam testified that "when we got back to the house, two guys came out of the horse trailer. And one of them was carrying

a black bag, the other was carrying a pitcher, and they got into their car and left. And I called the police." (T.248)

The individual, who was carrying the pitcher got into the Mustang, drove across the neighbor's property and left (T.249). The other individual, who had a backpack, followed on foot for a while and was then picked up and also left in the Mustang (T.250). It was then that Adam called the police, and after doing so he saw Jessica come out of the house with a black garbage bag, pick up some items from outside the door of the horse trailer and take the bag into the woods (T.251). Jessica then came back to the house where Adam, Elizabeth and Donald were seated on the outside waiting for the police to arrive (T.252).

When the police arrived, Adam described what he had observed and assisted the officers in finding the garbage bag that Jessica had taken into the woods (T.253). He then went with the officers to the horse trailer and across the property to a pole barn and in the course of that found a drivers license in the name of Justin Cardwell, which he gave to the officers (T.255). Donald Reed later identified the picture of Mr. Cardwell as one of the individuals who ran from the horse trailer.

After finding the trash bag and the driver's license, Adam was asked by the police to write a statement as to what he had observed. This statement was later received in evidence as State's Exhibit 30, and is attached hereto as Appendix A-2.

There was nothing in this statement written by Adam at the scene which even alluded to Jessica being observed in or living in the horse trailer. Nevertheless, the prosecutor insisted that Adam had orally made such a statement to the police.

Detectives Don Hovis and Deric Dull also testified regarding the police response to the call from either Adam McCauley or Donald Reed and each of them testified as to the meth manufacturing devices found in the trash bag, the horse trailer and the pole barn and identified various pictures taken at the scene (T.225-238; 260-312, 329-366). Defendant/Appellant does not dispute the state's contention that Justin Cardwell and another man were attempting to manufacture methamphetamine in the horse trailer and that precursor chemicals were found in the horse trailer and in the trash bag. Accordingly, that testimony will not be summarized here.

However, during detective Dull's testimony the prosecutor again asked him "what, if anything, did Adam McCauley tell you" (T.269). Defense counsel immediately objected and, over his continuing objection, Dull testified as follows:

> "Mr. McCauley advised me that when he came home – or came to, I'm sorry, excuse me, came to the Reed's address, he observed Jessica Reed in the trailer and observed her with another subject and I asked him what

> he was – what he observed and which he stated that he believed … he believed that Jessica Reed was making methamphetamine inside the trailer.
>
> * * *
>
> We observed a license, a driver's license. We found one inside the horse trailer. I showed him the license because he did mention that there were other subjects involved. And he stated that the picture in the license, Justin Cardwell is what the license came back to, that that was one of the subjects he observed in the trailer with her." (T.271)

At the conclusion of detective Dull's direct examination, defense counsel moved for a mistrial based upon the improper admission of Anderson and Dull's testimony regarding the statements allegedly made by Adam McCauley.

> Your honor, while we are at side bar, I'm going to have to move for a mistrial on the basis of the hearsay statements made by Adam McCauley - - that this officer said Adam McCauley said. That is the substance in this case. If this jury believes that Adam McCauley observed

> Jessica manufacturing meth, we are dead in the water and the only evidence is that blatant hearsay, which has been denied by Adam McCauley.
>
> THE COURT: Why don't we deal with this after we let the jury go. Let's finish cross-examination. I'm going to deny it at this time.

On cross-examination, officer Dull acknowledged that none of the items which were thought to be meth making devices, including cans, canisters and a fish bowel (which was affirmatively tested for fingerprints) contained any fingerprints of Defendant Jessica Reed (T.360, 362).

Finally, after agent Dull had been permitted to testify about the statements allegedly made by Adam McCauley, he was cross-examined regarding the statement that Adam had written at the scene at the direction of the police officers, which had said nothing about his seeing Jessica in the horse trailer: (Appendix A)

> Q. (By Mr. Fleming) You testified something to the effect of what Adam McCauley told you. Were you present when Adam McCauley wrote out a statement right there at the scene?
>
> A. I was at the time searching for the trash bag and for

the - - for the trash bag in the back of the residence.

Q. Do you have any - - do you have any accounting for the fact that nothing in this statement that Adam McCauley wrote out for the police at that time said anything about seeing Jessica in that horse trailer?

A. I have no account for that, sir. (T.316)

The Court recessed for the evening after the testimony of detective Dull and the next morning the prosecutor announced that she was going to call additional witnesses regarding the "inconsistent statements" that were made by McCauley, which she asserted were admissible as substantive evidence "pursuant to Section 491.074." The following discussion occurred:

MR. FLEMING: And, of course, I will object to that and renew my motion which I made yesterday for a mistrial based upon what has already been heard by the jury. First of all, Mr. McCauley is a State's witness, not a defense witness, and there was no surprise as to what Mr. McCauley said because his testimony was entirely consistent with his statement made at the scene of the investigation. Thirdly, his testimony was - -

THE COURT: What a minute. What did you say about the scene?

MR. FLEMING: He wrote up a statement at the request of the police at the scene of the investigation. His testimony was entirely consistent with that statement, that he had wrote up. There was no surprise on the part of the State as to what Mr. McCauley was going to testify to. They had not only the original statement that he made at the scene - -

THE COURT: Which didn't say anything either way; is that right?

MS. SCHNEIDER: It said she changed her clothes. It's in his written statement.

MR. FLEMING: The State also had the advantage of an affidavit which Mr. McCauley submitted saying that he did not observe Jessica in the trailer. They also had the advantage of his depositions now. I don't think the State can use a prior inconsistent statement as a way of getting into evidence before the jury something they want to use

as substantive evidence. If they characterize it as impeachment then they are trying to impeach their own witness.

THE COURT: Go ahead.

MR. FLEMING: But I believe the Supreme Court has very recently addressed the use of hearsay as substantive evidence in the Crawford decision and I think and it's very clear that you can't use hearsay as a substantive evidence except under very limited circumstances, and this is not one of them.

MS. SCHNEIDER: Well, this is Chapter 491.074 says, "Notwithstanding any other provision of law to the contrary, a prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence and the parties offering the prior inconsistent statement may argue the truth of such statement."

THE COURT: It didn't say anything about surprise and I think this is a prior inconsistent statement and I'm going

> to - - I'll allow it. The objection is overruled. This may be a continuing objection.
>
> MR. FLEMING: A continuing objection. And just so the record is clear on this I moved for a mistrial yesterday.
>
> THE COURT: Right, and I denied that yesterday and it's denied again today. (T.382)

However, the Court did indicate that it would not allow the State's next proposed witness to testify about the alleged statement of McCauley regarding where Jessica had been staying. (T.384).

Officer Anderson was recalled as a witness and identified State's Exhibit 30 as the written statement made and signed by Adam McCauley at the scene (T.389). The written statement was received in evidence without objection and was read to the jury (T.390).

Anderson agreed that the statement as completed by McCauley contained "all of the pertinent information that he told you relevant to your investigation" (T.393). Anderson also agreed that "there is nothing in that statement that says Adam McCauley saw Jessica in that horse trailer at any time." (T.393)

The prosecutor then recalled detective Deric Dull as her last witness and the

following occurred:

> Q. Did you receive information that the defendant, Jessica Reed, stayed in the horse trailer?
>
> A. Yes, I did.
>
> Q. What was that information?
>
> MR. FLEMING: Objection as I previously stated, your Honor. I think my record is clear on this. This would be blatant hearsay.
>
> THE COURT: Let's step to the bench.
>
> (Counsel approach the bench an the following proceedings were had:)
>
> THE COURT: Is there a prior inconsistent statement?
>
> MS. SCHNEIDER: It's an inconsistent statement of Donald Reed, but I guess this probably would be premature at this point.
>
> THE COURT: So I'll sustain the objection at this point.
>
> (T.395)

After filing his motion for judgment of acquittal, which motion was denied without an opportunity for argument (T.397), defense counsel called Donald Reed

as the first defense witness.

Mr. Reed testified that he is a union carpenter and that prior to September 11, 2006, his daughter Jessica had been living with him in the basement of his home for about four or five weeks (T.401). The upper portion of the home was rented to an individual named Dennis McAdams, but that he did not know much about Mr. McAdams (T.401). He testified that he recalled being home on September 10, 2006, because it was Sunday, and that he walked around the grounds but did not see anything unusual at either the horse trailer or the poll barn (T.402).

He was also home the night of September 10, 2006 and recalls that Jessica slept on the futon in his living room that night (T.403) where she was still sleeping when he left on the morning of September 11, 2006 at about 6:30 a.m. (T.404).

Mr. Reed said that Jessica sometimes used the horse trailer to listen to music but she did not live there (T.405).

He testified that at about noon time on September 11, 2006, he was at work a short distance away when he received a phone call from his other daughter, Elizabeth, advising that there was a strange car at the house and chemical smells coming from the horse trailer (T.405). He immediately went to his address where he met Elizabeth and Adam in the street and immediately proceeded up his

driveway to the horse trailer. (T.406).

He opened the door to the horse trailer and observed “this guy right there in my face.” He told him to get out and that he was calling the police whereupon the man ran out, jumped in the car and “headed across the backyard.” (T.407). He saw a bottle in the horse trailer which was emitting smoke, so he began to grab what he could and throw items out of the trailer (T.407).

He testified that when he drove up and approached the horse trailer, he did not see Jessica anywhere around but that shortly after he had thrown the items out of the trailer, Jessica come by with a trash bad, loaded the items into the bag and took them to the woods. She then came back and went into the house (T.409). Donald signed consent to search forms allowing the police, who arrived shortly, to search his house, the horse trailer and the pole barn.

Shortly thereafter he saw that the police had put Jessica in a patrol car, but he did not know if she was under arrest at that point, although he did see her exit the patrol car and return to the house (T.410).

On cross-examination, Donald Reed was asked about the statement he had allegedly made to detective Dull to the effect that Jessica stayed in the horse trailer in exchange for her keeping the trailer clean. He denied making that statement (T.417), and reiterated on redirect that Jessica stayed in his basement living room

and slept on the futon where he had observed her on the morning of September 11, 2006, before he left for work. (T.423).

The second defense witness was Elizabeth Reed, the Defendant's sister. She testified that on September 11, 2006, her sister Jessica called her and asked her to come to her father's house where she had been staying to exchange birthday presents with her (T.427). Elizabeth drove to the house with her boyfriend Adam McCauley and found her sister in the basement bathroom where she was washing her hair. (T.429). They visited for about 30 minutes and then left the house (T.429). As they were walking out the back door they smelled ammonia and discussed whether they should call Donald Reed as they drove down the drive. They decided to call him when they reached the end of the driveway and waited for him to arrive (T.430). As soon as Donald arrived they drove up the driveway and Donald approached the horse trailer and opened the door (T.431). At this time two people exited the trailer, jumped into a Mustang and drove off (T.432). At that time, she saw her sister Jessica in the window of the house looking through the glass door. (T.434). Contrary to the assertions of State witnesses, she testified that her father Donald was present for the entire police investigation. He never left 130 Croom after he arrived. (T.446).

She further testified that during her visit with her sister there was nothing

unusual about her and she was wearing pajamas (T.437). She also testified that she did not note any unusual smell coming from the horse trailer or the Mustang automobile when she first approached the house and that she did not find it unusual that a strange car would be parked there since her father's workers often park their cars at this house and go to job sites with him. (T.441).

As a rebuttal witness, the prosecutor again called detective Dull (for his third appearance) who stated that during his investigation "Donald Reed advised that Jessica had been staying in the horse trailer, and that during her stay in the horse trailer she was to keep it clean, and that was the rent she would be paying or act as rent to stay in the horse trailer." (T.461).

On cross-examination, however, detective Dull admitted that in his four to five page report of his investigation, he had made no mention of this purported statement by Donald Reed. He said "I didn't find it to be any kind of important information at the time." (T.462).

At the conclusion of all the evidence, defense counsel renewed his motion for judgment of acquittal (LF.86) and provided the Court and prosecutor with copies of this Court's opinion in State v. Withrow, 8 S.W.3d 75 (Mo. banc 1999) and the Court of Appeals opinion in State v. West, 21 S.W.3d 59 (Mo. App. 2000). (T.476).

The Court overruled this motion noting particularly "McCauley's statement to the police that she was staying at the trailer, and, well, the fact that the operation was being conducted in the trailer and was ongoing until it was interrupted by the arrival of the father." (T.477)

The jury found Defendant guilty and Defendant filed a timely Renewed Motion for Judgment of Acquittal or in the Alternative Motion for New Trial (L.F.107-111). This pleading renewed all motions and objections made at trial and specifically asserted the constitutional issues raised in this appeal citing the United States Supreme Court opinion in Crawford v. Washington, 541 U.S. 36 (2004) and this Court's opinion in State v. Justus, 205 S.W.3d 872 (Mo. banc 2006).

The Court denied the post trial motions and sentenced Defendant to six years in the Missouri Department of corrections on August 27, 2007. Defendant/Appellant filed her timely Notice of Appeal on August 31, 2007.

This appeal is taken from the judgment and sentenced entered on August 27, 2007.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND MOTIONS AND IN ALLOWING, AS SUBSTANTIVE EVIDENCE, THE ALLEGED HEARSAY STATEMENTS OF ADAM MCCAULEY AND DONALD REED TO THE EFFECT THAT APPELLANT WAS LIVING IN OR SEEN IN THE HORSE TRAILER WHERE METHAMPHETAMINE WAS BEING MANUFACTURED, AND TO THE EXTENT THAT §491.074 R.S.MO PERMITS, AS SUBSTANTIVE EVIDENCE, AN ALLEGED PRIOR INCONSISTENT STATEMENT OF A WITNESS, WHICH STATEMENT WAS NOT UNDER OATH, AND WHICH STATEMENT THE WITNESS DENIES MAKING, AND WHICH STATEMENT IS UNCORROBORATED BY OTHER EVIDENCE, THE STATUTE PERMITS AN UNCONSTITUTIONAL DEPRIVATION OF A DEFENDANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18 OF THE MISSOURI CONSTITUTION TO DUE PROCESS, INCLUDING THE RIGHTS OF CONFRONTATION AND CROSS-EXAMINATION AS WELL AS DEFENDANT'S RIGHTS TO EQUAL PROTECTION OF THE LAW.

APPELLANT WAS THEREBY DEPRIVED OF HER CONSTITUTIONAL RIGHTS IN THIS CASE, AND §491.074 R.S.MO. IS UNCONSTITUTIONAL AS APPLIED TO THIS APPELLANT, AND IS VIOLATIVE OF THE PRINCIPLES SET OUT BY THE UNITED STATES SUPREME COURT IN CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004), AND BY THE MISSOURI SUPREME COURT IN STATE V. JUSTUS, 205 S.W.3d 872 (MO. BANC 2006) AND STATE V. MARCH, 216 S.W.3d 663 (MO. BANC 2007).

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

State v. Justus, 205 S.W.3d 872 (Mo. banc 2006)

Rowe v. Farmers Insurance Co, Inc., 699 S.W.2d 423 (Mo. Banc 1985) (Dissenting Opinions)

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

II. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT/APPEALLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL IN THAT THE EVIDENCE PRESENTED WAS CLEARLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR THE OFFENSE CHARGED SINCE THERE WAS NO EVIDENCE TO SHOW THAT DEFENDANT EITHER ACTUALLY OR CONSTRUCTIVELY POSSESSED CRUSHED TABLETS CONTAINING STEROISOMER OR ANY OTHER CHEMICALS USED IN THE MANUFACTURING PROCESS OF METHAMPHETAMINE AND THAT THE DEFENDANT ALSO MADE A SUBSTANTIAL STEP TOWARD THE MANUFACTURE OF METHAMPHETAMINE.

State v. Withrow, 8 S.W.3d 75 (Mo. Banc 1999)

State v. West, 21 S.W.3d 59 (Mo.App.2000)

STANDARD OF REVIEW

ARGUMENT I

Appellant review of evidentiary rulings, such as admission of hearsay statements is generally limited to whether the trial court abused its discretion, State v. Wolfe, 13 S.W. 248, 258 (Mo. banc 2000). However, the issue of whether a criminal defendant's rights were violated under the United States or Missouri Constitution or whether a state statute is unconstitutional, as applied, is a question of law that is reviewed de novo, State v. Justus, 205 S.W.3d 872, 878 (Mo. banc 2006).

ARGUMENT II

Claims of insufficiency of the evidence to sustain a conviction are reviewed de novo, but facts are reviewed in a light most favorable to the verdict State v. Clark, 981 S.W.2d 143, 145 (Mo. banc 1998).

ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND MOTIONS AND IN ALLOWING AS SUBSTANTIVE EVIDENCE THE ALLEGED HEARSAY STATEMENTS OF ADAM MCCAULEY AND DONALD REED TO THE EFFECT THAT APPELLANT WAS LIVING IN OR SEEN IN THE HORSE TRAILER WHERE METHAMPHETAMINE WAS BEING MANUFACTURED, AND TO THE EXTENT THAT §491.074 R.S.MO PERMITS, AS SUBSTANTIVE EVIDENCE, AN ALLEGED PRIOR INCONSISTENT STATEMENT OF A WITNESS, WHICH STATEMENT WAS NOT UNDER OATH, AND WHICH STATEMENT THE WITNESS DENIES MAKING, AND WHICH STATEMENT IS UNCORROBORATED BY OTHER EVIDENCE, THE STATUTE PERMITS AN UNCONSTITUTIONAL DEPRIVATION OF A DEFENDANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18 OF THE MISSOURI CONSTITUTION TO DUE PROCESS, INCLUDING THE RIGHTS OF CONFRONTATION AND CROSS-EXAMINATION AS WELL AS DEFENDANT'S RIGHTS TO EQUAL PROTECTION OF THE LAW.

APPELLANT WAS THEREBY DEPRIVED OF HER CONSTITUTIONAL RIGHTS IN THIS CASE, AND §491.074 R.S.MO. IS UNCONSTITUTIONAL AS APPLIED TO THIS APPELLANT, AND IS VIOLATIVE OF THE PRINCIPLES SET OUT BY THE UNITED STATES SUPREME COURT IN CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004), AND BY THE MISSOURI SUPREME COURT IN STATE V. JUSTUS, 205 S.W.3d 872 (MO. BANC 2006) AND STATE V. MARCH, 216 S.W.3d 663 (MO. BANC 2007).

Section 491.074 R.S.Mo, as amended in 2000, provides as follows:

> Notwithstanding any other provisions of law to the contrary, a prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement.

This statute had previously allowed such "prior inconsistent statement" evidence only in cases involving crimes against persons under Chapters 565, 566 or 568 R.S.Mo., but was expanded in 2000 to encompass all criminal cases. The statute contains no requirement that the alleged statements of a witness be shown to be reliable or that there be other corroborating evidence to show its truthfulness.

Effectively then, the State may call one or more investigating officers to testify that a witness told them something that would be incriminating to the Defendant and a conviction can rest solely on such alleged statements even if those statements are denied under oath by the person who allegedly made them.

However, this Court has not previously addressed the constitutionality of the amended statute. The prior version of this statute was upheld against a constitutional challenge in State v. Bowman, 741 S.W.2d 10 (Mo. banc 1987), a felony murder case in which the witness acknowledged making the inconsistent, and incriminatory statement, but asserted that it was a lie brought on by the police mistreatment. State v. Bowman, supra, was a split opinion in which Judge Donnelly dissented citing the very strong disagreements in Rowe v. Farmers Insurance Co., Inc., 699 S.W.2d 423 (Mo. banc 1985). Writing the Court's opinion in Bowman, Judge Blackmar acknowledged that "the question of extrajudicial statements as substantive evidence has been sharply debated in our courts", 741 S.W.2d at 13, but noted that "the confrontation clause has never been held to preclude the recognition of exceptions to the hearsay rule", citing Ohio v. Roberts, 448 U.S. 45 (1980) as the basis for this conclusion.

However, by its landmark opinion in Crawford v. Washington, 541 U.S. 36 (2004) **the United States Supreme Court has now overturned Ohio v. Roberts,**

supra and held that even if such out of court statements are deemed reliable by the Court, they cannot be used under the confrontation clause unless the declaring witnesses are unavailable and the Defendant had a prior opportunity to cross examine the witnesses.

This Court has recognized the important change brought about by Crawford, supra in the more recent opinions in State v. Justus, 205 S.W.3d 872 (Mo. banc 2006) and State v. March, 216 S.W.3d 663 (Mo. banc 2007). In Justus, supra, the Court addressed a child's statement which was received as substantive evidence under R.S.Mo. 491.075 and found error in their admission. However, the Court specifically declined to rule on the constitutionality of that statute since the issue had not been raised by Appellant. (205 S.W.3d at 878). The Court went on to note, however, that two post Crawford opinions of the U.S. Supreme Court had defined what type of statements must be considered "testimonial" and therefore subject to the Crawford constitutional restrictions. (205 S.W.3d at 879).

> Following Crawford, the Supreme Court in 2006, in Davis v. Washington [FN8] and its companion case Hammon v. Indiana said, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary

> purpose of the interrogation is to enable police assistance to meet an ongoing emergency." 126 S.Ct. at 2273. By contrast, the Court said, such out-of-court statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*. At 2273-74.

In State v. March, supra, this Court, again following Crawford, supra, abrogated State v. Taylor, 486 S.W.2d 239 and held that laboratory reports, even sworn reports, are hearsay and cannot be used as substantive evidence.

Indeed the dangers of allowing out-of-court statements to be repeated at a trial and used as substantive evidence were very extensively and eloquently set out by Judge Billings in his dissent in Rowe, supra, part of which is particularly pertinent to the present case: (699 S.W.2d at 434)

> When Congress conducted hearings on the Proposed Federal Rules of Evidence, they wisely solicited the views of dozens of leading lawyers, respected jurists, law professors and professional associations. Mr. Herbert

Semmel, representing the Washington Council of Lawyers, directed part of his testimony to the Advisory Committee's version of Rule 801(d)(1)(A), which as then proposed, would have made any prior inconsistent statement non-hearsay and thus, admissible as substantive evidence. Mr. Semmel articulated with chilling eloquence the unreliability of and dangers inherent in coloring any prior inconsistent statement as substantive evidence.

There are substantial dangers in allowing any prior inconsistent statement to be introduced in evidence.

1. Inaccurate repetition of oral statements made months or years before the trial.
2. Misleading statements subject to unintended interpretations made when the witness had no appreciation for the necessity for accurate reporting.
3. Incomplete statements leading to unintended meaning, made when the witness had no appreciation for the necessity of complete reporting.

4. Inaccurate or unintended statements made by a witness as a result of suggestion or coercion.

Trials occur months and often years after the events sought to be recreated at trial. Memory lapses are an obvious problem in the trial process. The problem becomes more acute when a witness tries to repeat what are often casual remarks by another person at a time when the listener may not have even been aware of the importance of the remarks or that he will later be called upon to repeat them. Moreover, people often hear what they want to hear and remember what they want to remember. A perfectly "honest" witness who favors one party to a lawsuit may have a distorted memory of what a witness for the other party said months or years before trial. And, of course, there are cases of out-right perjury by one witness testifying as to prior statements by an earlier witness. These dangers are not entirely alleviated because both the principal witness and the secondary witness, who testifies as to the former's alleged

> inconsistent statements, are both present at trial and available for corss-examination [sic]. The jury becomes diverted from the principal issues of the case to collateral questions of what one witness said on a prior occasion.

In the instant case, the prosecutor elicited testimony about the alleged out-of-court statements of McCauley and Reed before either were even called as witnesses (T.227-232), and the Court allowed this testimony over defense counsel's objections. Both Adam McCauley and Donald Reed were available to testify and, ultimately, both witnesses denied making the statements which the police witnesses attributed to them. McCauley denied that he saw Defendant Jessica Reed in the horse trailer and Donald Reed denied that his daughter Jessica had been living in the trailer. However, the initial hearsay statements were elicited before either McCauley had testified as a State's witness or Donald Reed had testified as a defense witness, and were repeated in the State's "rebuttal" case.

Moreover, there was no evidence to corroborate these alleged out-of-court statements. No fingerprints of Defendant Reed were found on any of the items which had apparently been used for the production of methamphetamine and no clothing or other personal items of Defendant Reed were found in the horse trailer. Both Adam McCauley and Elizabeth Reed testified that they met and visited with

Jessica Reed in her father's house while the meth cook was apparently going on in the trailer. The statement McCauley wrote at the scene at the request of the police said nothing of observing Jessica in the horse trailer and the four or five page investigative report said nothing of any statement by Donald Reed that Jessica had been living in the horse trailer. Consequently, there was absolutely no corroboration of the alleged witness statements and no indicia of reliability.

Nevertheless, in overruling the Motions for Judgment of Acquittal, the Court relied almost exclusively on these out-of-court statements as proof of Defendant's guilt. (T.477) Similarly, the prosecutor relied heavily on these alleged out-of-court statements when arguing her case to the jury. "You heard the credible testimony of detective Dull, and that again, Jessica was in the trailer with Justin Cardwell and that Donald told him she lived there" (T.507).

Appellant, therefore, submits that this case is uniquely appropriate to address the impact that Crawford v. Washington, supra, has on Missouri's statutory exception to the hearsay rule which now permits prior alleged out-of-court and unsworn statements of witnesses to be used as substantive evidence, no matter how those statements may be denied by the alleged declarent or impeached by other evidence.

Appellant submits that R.S.Mo. §491.074 should be declared

unconstitutional as it has been applied in this case and that her conviction should, therefore, be reversed.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT/APPEALLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL IN THAT THE EVIDENCE PRESENTED WAS CLEARLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR THE OFFENSE CHARGED SINCE THERE WAS NO EVIDENCE TO SHOW THAT DEFENDANT EITHER ACTUALLY OR CONSTRUCTIVELY POSSESSED CRUSHED TABLETS CONTAINING STEROISOMER OR ANY OTHER CHEMICALS USED IN THE MANUFACTURING PROCESS OF METHAMPHETAMINE AND THAT THE DEFENDANT ALSO MADE A SUBSTANTIAL STEP TOWARD THE MANUFACTURE OF METHAMPHETAMINE.

This case is strikingly similar to State v. Withrow, 8 S.W.3d 75 (Mo. banc 1999) in which this Court held that evidence that Defendant occupied a house in which methamphetamine precursors were found in a locked closet did not satisfy the requirements of actual or constructive possession of precursors which constituted a "substantial step" toward the completed crime of manufacturing.

Under the State's theory in Withrow, the Defendant had constructive possession of the bedroom and locked closet where the precursor chemicals were found. Rejecting this theory, the Court reasoned as follows: (8 S.W.3d at 80)

Constructive possession requires, at a minimum, evidence that the Defendant had access to and control over the premises where the materials were found. State v. Purlee, 839 S.W.2d 584, 588 (Mo. banc 1992). Exclusive possession of the premises containing the materials raises an inference of possession and control. *Id*. When the accused shares control over the premises, as here, further evidence is needed to connect him to the manufacturing process. *Id*. The mere fact that a Defendant is present on the premises where the manufacturing process is occurring does not by itself make a submissible case. State v. Barber, 635 S.W.2d 342, 344-45 (Mo.1982). Moreover, proximity to the contraband alone fails to prove ownership. State v. Bowyer, 693 S.W.2d 845, 847 (Mo.App.1985). There must be some incriminating evidence implying that the Defendant knew of the presence of the manufacturing process, and that the materials or the manufacturing process were under his control. Purlee, 839 S.W.2d at

588.

* * *

> In the absence of constructive possession or that the Defendant actually placed the pills in the liquid or otherwise possessed the materials used to commence the drug-making process, the evidence is insufficient to demonstrate his participation in a substantial step necessary to demonstrate an attempt to manufacture the drug. Therefore, the trial court erred in submitting the case to the jury and overruling Defendant's motion for judgment of acquittal.

Of course, the evidence in the instant case was even less incriminating then that against Defendant Withrow. There was certainly no evidence that Defendant Reed had any control, much less exclusive control, over the horse trailer in which the manufacturing process was taking place. The only testimony was that during this time she was in her father's house. Both the State's witness, Adam McCauley and the defense witness, Elizabeth Reed testified that they had been with the Defendant in her father's house for at least 30 minutes before they left the house and smelled ammonia emanating from the horse trailer. The only evidence of

Defendant's participation in the events was that some time after the two individuals were discovered and ran from the horse trailer Defendant picked up the smoking items her father had thrown from the trailer and put them in a plastic bag which she brought to the woods behind the house. Obviously, there could have been other reasons for disposing of these items, such as safety concerns, but even if her intent is assumed to be to dispose of evidence this does not prove her guilty of an attempt to manufacture methamphetamine under the criteria recognized in Withrow, supra.

An even closer analogy to the instant case is that addressed by the Court of Appeals in State v. West, 21 S.W.3d 59 (Mo.App.2000) which turned on whether there had been evidence of Defendant intent to control precursor chemicals even if he was shown to be aware of those chemicals. In the West case precursor chemicals and manufacturing devices were found in a shed behind Defendant West's house and additional chemicals were found in a freezer in the home. The Court found this evidence to be insufficient to sustain a conviction for attempting to manufacture under §564.011. The Court of Appeals concluded as follows: (21 S.W.3d at 67)

> For Ms. West to be convicted of possession of the methamphetamine and materials and equipment for

methamphetamine production, the state must provide evidence not only that Ms. West had knowledge of the methamphetamine and other items, but also that Ms. West intended to possess those items. *See Withrow*, 8 S.W.3d at 80 (stating that to infer possession of material used in the manufacturing process of drugs where the defendant lacks exclusive possession of the premises, defendant must have knowledge of the materials and control over them); and *Wiley*, 522 S.W.2d at 292 (stating that to infer possession of a controlled substance where the defendant lacks exclusive possession of the premises, defendant must have knowledge of the substance and control over it). There was sufficient evidence to conclude that Ms. West knew of the existence of the methamphetamine and the materials and equipment for manufacturing methamphetamine. However, considering the totality of the circumstances, the state did not present sufficient evidence to reasonably infer that Ms. West intended to control the

methamphetamine or the manufacturing items. *See McClain*, 968 S.W.2d at 227.

In the instant case there was absolutely no evidence that Defendant Reed intended to possess the items found in the horse trailer other than the act of bagging the items after her father had thrown them out of the trailer. Of course, at that point the "possession", for whatever the reason could not be deemed to be a "substantial step" toward the manufacture of methamphetamine. Even if it is assumed that Defendant had some unlawful reason for disposing of these items, she was not charged with obstruction of justice or any after the fact type offense. She was charged with attempt to manufacture methamphetamine based on her alleged "possession" of precursors and having made a "substantial step" toward the commission of that crime. (*See* Second Amended Information L.F.54)

Consequently, even if the alleged out-of-court statements addressed in the prior argument are considered as substantive evidence, there was still not sufficient evidence to prove that Appellant was guilty of the crime charged in the second amended information.

For the foregoing reasons, there was insufficient evidence presented to convict Appellant of the crime charged and the trial court erred in failing to grant a Judgment of Acquittal.

CONCLUSION

For the foregoing reasons, the Court should declare that §491.074 R.S.Mo. is unconstitutional on its face and as applied to Appellant and that the trial court erred by admitting alleged out-of-court hearsay statements and remand the case for a new trial. Alternatively, the Court should find that the evidence presented was insufficient for a conviction and order a Judgment of Acquittal to be entered and Appellant to be discharged.

Dated:_____

Respectfully Submitted,

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PROOF OF SERVICE

I, the undersigned, certify that the original and ten copies of Appellant's Brief-in-Chief as well as a floppy disk of same were filed with the Clerk of the Court for filing, and two copies of Appellant's Brief-in-Chief and a floppy dist containing the word processing file of same in WORD 2003 and "saved as" WORD __ formats were served by U.S. Mail this ____ day of December, 2008, on:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations of Mo.Sup.Ct.R. 84.06(b) and Mo.E.D.Ct.App.R 360. It contains no more than 15,500 words of text (specifically, containing 7,383 words). It was prepared using Microsoft Word 2003 for WINDOWS. The enclosed floppy disk also complies with the Mo.Sup.Ct.R. 84.06(g) and Mo.E.D.Ct.App.R. 361 in that it has been scanned and is virus free. The files on the floppy disk contain the brief in both Microsoft Word for WINDOWS and "saved as" MSWord ____ formats.

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