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
Circuit Court No. 0611-CR-08867

Honorable Lucy D. Rauch, Judge Presiding

DEFENDANT-APPELLANT'S REPLY BRIEF

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COUNTER STATEMENT OF FACTS

Respondent's statement of facts is very misleading in that it implies that the testimony at trial indicated that Adam McCauley, accompanied by Elizabeth Reed, had seen Jessica Reed in the horse trailer on the Reed property on the date of the alleged offense. Respondent's brief states: (at p.6)

> "When he arrived at the house, McCauley had seen a white Mustang parked in the driveway. (T.244) **He also saw Appellant in the trailer with someone else (T.270)** McCauley smelled a strong odor of ammonia coming from the trailer (T.246-47) He went down the street and called Appellant's father to tell him that a strange car was parked in the driveway, and that he smelled ammonia (T.247) Appellant's father arrived five or six minutes later (T.247)"

As the non-sequential transcript references might indicate, the statement that McCauley had seen Appellant in the horse trailer **did not come from McCauley's testimony**, which occurs at pp.242-259 of the transcript. Rather it came from the testimony of Detective Deric Dull who testified, over Defendant's continuing objections, that McCauley had told him that 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 that Jessica Reed was making methamphetamine inside the trailer." (T.270) The prosecutor insisted that this hearsay statement was admissible under Section 491.074 as a "prior inconsistent statement," and it was the primary basis for the State's case against Appellant.

However, during McCauley's testimony, the prosecutor, in fact had refrained from asking him whether he had seen Jessica Reed in the horse trailer and defense counsel, who sought to avoid opening the door for any "prior inconsistent statement", similarly did not ask him any questions in that regard. (T.256) Consequently, the alleged statement to which Detective Dull testified **was not inconsistent with any testimony of Adam McCauley at trial**. Nevertheless, the prosecutor was allowed to elicit this alleged hearsay statement not only after McCauley had testified, but also before he testified. This was done during the testimony of the State's first witness, Police Officer Brandon Anderson:

> Q. And what, if any, information did you get from Adam about the horse trailer?
>
> MR. FLEMING: Objection, calls for hearsay.
>
> THE COURT: For what purpose are you asking him?

MS. SCHNEIDER: For the purpose of his subsequent conduct I'm asking him.

THE COURT: For that limited purpose I'll allow it but I'll expect this to be a real brief recitation. The objection is overruled at this point.

Q. (By Ms. Schneider) What information did you get from Donald and also from Adam regarding the horse trailer?

A. That she was living in the horse trailer at the time. (T.231)

The prosecutor's insistence on using the alleged statements of Adam McCauley as "prior inconsistent statements", and substantive evidence under Section 491.074, continued throughout the trial when she recalled both Officer Anderson and Detective Dull to testify that they had been told that Jessica Reed was living in the horse trailer. (T.395, 461) Detective Dull was also called, for the **third** time, as a "rebuttal" witness to testify that Donald Reed, Appellant's father, had told him "that Jessica had been staying in the horse trailer, and that during her stay in the horse trailer she was to keep in clean, and that was the rent she would be paying or act as rent to stay in the horse trailer." (T.461) This was, admittedly,

contrary to what Donald Reed stated during his sworn testimony, and may have been admissible as impeachment. But, for the reasons set out herein it was not admissible as substantive evidence under the criteria imposed by the United States Supreme Court in Crawford, infra, and as specifically recognized by this court in State v. Justus, infra. **Significantly, the purported statement of Donald Reed that Appellant had been living in the horse trailer does not appear anywhere in the extensive report prepared by the police**. When questioned about this "omission" Detective Dull testified "there are many things that occur during an investigation, and I only put the pertinent information regarding what we are investigating" (T.463). He claimed that at the time he did not believe the purported statement by Appellant's father was significant. (T.463) Specifically, Dull testified "I didn't find it to be any kind of important information at the time." (T.462)

However, the fact is **no witness testified** that they had seen Appellant in the horse trailer on the date of the offense or that she had been living in the horse trailer. Nevertheless, Respondent's brief continues to assert that "McCauley, the boyfriend of Appellant's sister told the detectives that he had seen the person pictured on that license (which had been found at the scene) with Appellant in the horse trailer. (p.9, Resp. Brief) and further that "McCauley's testimony implied

that Appellant was inside the house when he and Elizabeth arrived on the property." (p.16, Resp. Brief) Yet a careful examination of record will indicate that the prosecutor never asked McCauley the direct question as to whether he had seen Appellant inside the horse trailer. Consequently, there was no testimony of McCauley which could be deemed "inconsistent" with the statement he allegedly made to Detective Dull and no basis whatsoever for invoking the hearsay exception which Section 491.074 appears to allow even if the statute is deemed to be constitutional.

Nevertheless, this hearsay testimony was cited by the trial court as the basis for denying Appellant's motions for Judgment of Acquittal (T.477) and is again cited in Respondent's Brief when arguing the sufficiency of the evidence. "Appellant argues that there was no evidence that she was actually in the trailer while the manufacturing process was taking place. That ignores the evidence that Adam McCauley had told officers about seeing Appellant in the trailer with the suspect who left his driver's license in the trailer." (p.39, Resp. Brief)

Consequently, the hearsay statements which were admitted over the objections and motions of Appellant were the only indications that Appellant was either living in the horse trailer or was in the horse trailer at the time of the alleged offense. **There simply is no direct testimony to show this, and the implication**

in Respondent's brief to the contrary is very simply false.

The prosecutor's obvious avoidance of a direct question to McCauley on this issue and attempt to circumvent what she knew would be the answer to that question in sworn testimony can be explained tactically by the fact that the prosecutor had been provided with a copy of the affidavit submitted by McCauley which the judge read into the record verbatim at a pre-trial hearing a week before the trial commenced. The affidavit reads, in part,:

> "**I Adam McCauley, did not observe Jessica Reed on September 11, 2006, at 130 Croom Drive, Foristell, Missouri, in a horse trailer attempting to manufacture methamphetamine as stated in the incident report by St. Charles County Regional Drug Task Force" (H.T.21 Emphasis Supplied)**

This affidavit was shown to prosecution witness McCauley during the prosecutor's redirect examination and he was questioned about his preparation of the affidavit. (T.257-258). No objection was made to this inquiry even though it clearly exceeded the scope of the very brief cross examination. However, even then, the prosecutor did not have the affidavit read to the jury or marked as an exhibit or even ask the witness about the content of the affidavit so that there

would be some statement made before the jury to invoke the Section 491.074 hearsay evidence. (T.257-258) Rather, Detective Deric Dull was simply called as the next witness to testify about his recollection of the statements allegedly made by McCauley that Appellant had been seen in the horse trailer manufacturing methamphetamine. This hearsay testimony was also received over Appellant's continuing objection. (T.270-271)

Finally, the only written statement received in evidence was that written by McCauley at the scene at the direction of the police. This was received in evidence as State's Exhibit 30 and is attached as Appendix A-1 to Appellant's opening brief. Notably, this statement says nothing about McCauley observing Appellant in the horse trailer. Detective Anderson admitted that he had reviewed McCauley's statement at the time it was written to assure that it contained all of the pertinent information McCauley had given him, but that "there is nothing in that statement that says that Adam McCauley saw Jessica in that horse trailer at any time." (T.393) In fact, it says nothing one way or another on this issue and, therefore, is not a basis for receipt of hearsay testimony as a "prior inconsistent statement." Although the prosecutor had the affidavit which McCauley had submitted denying that he had seen Appellant in the horse trailer, she did not produce that affidavit before the jury or have any witness read from it. Consequently, since the

prosecutor intentionally did not elicit either sworn testimony or a prior written statement about whether Appellant was seen in the horse trailer, there was no testimony or evidence presented such that contrary hearsay statements of Adam McCauley could be admitted under Section 491.074.

ARGUMENT

I. THE UNITED STATES SUPREME COURT'S ANALYSIS 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) CLEARLY ESTABLISH THAT IN ORDER FOR OUT OF COURT STATEMENTS OF A WITNESS TO BE ADMISSIBLE AS SUBSTANTIVE EVIDENCE: (1) THE DECLARENT MUST BE "UNAVAILABLE" FOR TRIAL AND (2) THE DEFENDANT MUST HAVE HAD AN IMMEDIATE OPPORTUNITY TO CROSS EXAMINE AN ADULT WITNESS ON THE ISSUES TO WHICH THE PRIOR ALLEGED STATEMENTS REFER. NEITHER OF THOSE FACTORS EXIST IN THIS CASE, AND SECTION 491.074 SHOULD BE DECLARED UNCONSTITUTIONAL AS IT HAS BEEN APPLIED TO APPELLANT.

The use of unsworn and out of court statements by witnesses has not been favored in our judicial system, and it has only been in extraordinary circumstances that the courts have allowed consideration of such statements as substantive evidence. However, each of these circumstances assumes that the witness is either physically or legally unavailable and, therefore, unable to testify about the matters asserted under oath and before the jury. Of course, one such circumstance of

"legal unavailability" are statements by a child witness in a child abuse case under Section 491.075.1 where the court finds that:

> (c) The child is otherwise physically available as a witness but the court finds that the significant emotional or psychological trauma which would result from testifying in the personal presence of the defendant makes the child unavailable as a witness at the time of the criminal proceeding.

Similarly, under Section 491.075(1) and 2(a) a prior statement of a testifying child witness is "admissible as substantive evidence to prove the truth of the matter asserted" if it presents "sufficient indicia of reliability." These very limited exceptions are made with the particular recognition of the difficulties attendant to a child of tender age testifying in open court.

However, no such special circumstance exists with the application of Section 491.074 to this case. There is not even a requirement under the statute that there be found an "indicia of reliability."

Consequently, unlike the case of the child witness recently presented to this Court in State v. Perry, No. SC89240 (2009) where the Court approved the admission of prior statements of a child who had testified, there is no overriding

reason in the instant case to deviate from the requirements clearly articulated in Crawford, supra, at 57.

> Our later cases conform to *Mattox's* holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See Mancusi v. Stubbs, 408 U.S. 204, 213-216, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); California v. Green, 399 U.S. 149, 165-168, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); Pointer v. Texas, 380 U.S., at 406-408, 85 S.Ct. 1065; cf. Kirby v. United States, 174 U.S. 47, 55-61, 19 S.Ct. 574, 43 L.Ed 890 (1899). **Even where the defendant had such and opportunity, we excluded the testimony where the government had not established unavailability of the witness**. See Barber v. Page, 390 U.S. 719, 722-725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); cf. Montes v. United States, 178 U.S. 458, 470-471, 20 S.Ct. 993, 44 L.Ed. 1150 (1900). (451 U.S. at 57, emphasis supplied)

* * *

> Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. **Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination**. (451 U.S. at 68, emphasis supplied)

This two part requirement was repeated by Justice Wolff writing for a unanimous Court in State v. Justus, 205 S.W.3d 872, 881 (Mo. banc 2006):

> The circumstances of this case objectively indicate the primary purpose of the interrogations was to establish past events relevant to a later criminal prosecution. S.J.'s statements to both witnesses were testimonial. Testimonial statements may nevertheless be admitted if **two conditions** articulated in Crawford have been met: (1) witness unavailability, and (2) the defendant's **prior**

opportunity to cross-examine the witness. (205 S.W.3d at 881, emphasis supplied)

Under Section 495.075(1), the victim in Justus was deemed "unavailable" because the court found that testifying in court would be deleterious to the child's emotional health. The court also found that there was the required indicia of reliability to the prior statement. However, this Court very clearly recognized that there are two criteria for the admission of out of court statements as substantive evidence – (1) the witness must be unavailable and (2) there must be an immediate opportunity to cross-examine the witness. To the extent that the application of Section 491.074 in this case did not recognize both of these criteria it was unconstitutionally applied to Appellant.

In the instant case, there is no question that Adam McCauley was not "unavailable". In fact, he testified in the State's case, but he did not testify to the issue which the State sought to put before the jury. That, of course, was the prosecutor's call and, obviously, she did not want him to reiterate what he had stated in his affidavit – that he had not observed Appellant in the horse trailer on the date of the offense. His sworn testimony before the jury denying such an observation would not have assisted the State's case but would have opened the door for use of the prior inconsistent statement, at least for purposes of

impeachment. In effect, however, the prosecutor wanted "to have her cake and eat it too". It appears that she wanted to avoid any live testimony about whether McCauley had observed Appellant in the horse trailer, but wanted to use his alleged statement to the police as substantive evidence.

In this respect, the second criteria for use of such statements under Crawford was not met either because Appellant did not have the opportunity to cross-examine McCauley on the statement he allegedly made since the direct examination had not mentioned it. In fact, the cross-examination consisted of only three very perfunctory questions so as not to open any doors on this issue. (T.256)

Obviously, if defense counsel had questioned McCauley on cross-examination about whether he had observed Appellant in the horse trailer, he would have opened the door for the alleged "prior inconsistent statement" to come in, at least for impeachment purposes. His cross-examination, therefore, could not include any mention of this issue even if that cross-examination were not limited to the scope of the direct examination. Effectively, Appellant did not have an opportunity to cross-examine the witness **on the issue to which the prior alleged statement referred** and the second requirement of Crawford was, therefore, not met.

II. ALLOWING A "PRIOR INCONSISTENT STATEMENT" WHICH HAS NOT BEEN MADE UNDER OATH AND HAS NOT BEEN SUBJECTED TO CROSS-EXAMINATION AT THE TIME IT WAS MADE TO BE RECEIVED AS SUBSTANTIVE EVIDENCE VIOLATES THE MOST BASIC PRECEPTS OF THE ADVERSARY SYSTEM, AS WELL AS THE UNITED STATES AND MISSOURI CONSTITUTIONAL PROVISIONS ON THE RIGHT OF CONFRONTATION AND DUE PROCESS OF LAW.

It is one thing to allow the prior statement of an "unavailable" witness to be received in evidence in extraordinary circumstances such as the prior statements of a child recently addressed by this Court in State v. Perry, supra. It is quite another to allow an alleged out of court statement of a witness who is available to testify to be used as substantive evidence simply because a police officer or deputy sheriff is willing to assert that the witness made the statement at the scene of a crime or other event, particularly when there is no indicia of the reliability of that statement and, most particularly, when the witness has denied even making the statement. To put it bluntly, where a case is weak on reliable witnesses Section 491.074 fulfills a police-state dream of evidence that can be created by the police in the form of purported statements by whomever they may find at the scene of a crime.

The statute does not even require that the Court find an indicia of reliability to the prior and disputed statement as does the statute pertaining to child witnesses, nor does it require that the purported statement be recorded or reduced to writing, or that it be made in a reflective context rather than in the heat of an event under pressure of law enforcement officials.

Would that all law enforcement officers were honest and reliable reporters of what is told to them such that all could be sure that statements they allege to have heard were, in fact, made and accurately recalled without spin or modification. Unfortunately, too many such officers see as their primary duty to prepare a report which will result in prosecution and conviction of persons they genuinely believe are guilty. In their zeal to fulfill this duty they not only may hear things as they want to hear them, but also embellish what they hear so as to make the case they want to make. They may also suggest things to witnesses to which a distraught witness may merely aquess. Obviously, that is why we have courtrooms and rules of evidence, and particularly cross-examination when and where the statement is made. However, Section 491.074 turns the long honored rules regarding hearsay on their heads, and emasculates protections that have been afforded to criminal defendants for centuries.

This was the problem extensively addressed by Judge Billings in his dissent

in Rowe v. Farmers Ins. Co. Inc., 699 S.W.2d 423 (Mo. banc 1985) which is quoted at length in Appellant's opening brief. In that opinion Judge Billing's also quoted from congressional testimony which more specifically addressed the problems here presented: (699 S.W.2d at 435)

> *It is one thing to admit such extra-judicial statements for impeachment purposes and quite another to allow a finding of guilt or a determination of liability or non-liability to rest on such statements*. Use of prior inconsistent statements to impeach is an inherent part of the adversary system. Each party may make its own judgment as to whether the value of a witness's [sic] testimony at trial will be outweighed by adverse consequences when a prior inconsistent statement is introduced to impeach. On the other hand, under the Rules as proposed by the Advisory Committee and pronounced by the Supreme Court, any party to litigation could call a witness whose testimony at trial might be vague, incomplete or who might even be unable to recall the events in issue after the passage of considerable time.

> At that point, any prior statement, oral or written, inconsistent with testimony at trial could be introduced as substantive evidence. (Proposed Federal Rules of Evidence, promulgated November 20, 1972, Rule 801(d)(1)(A)). In theory, a criminal conviction or civil liability could rest solely on such evidence. (Emphasis the Courts)

Moreover, in the same set of opinions Judge Donnelly, concurring with the majority in the context of the civil case before the Court, pointed out the dangers, and, indeed, unconstitutionality of applying the "prior inconsistent statement" rule in a criminal case, **even where the alleged declarant was available for cross-examination at trial**. (699 S.W.2d at 433)

> It is a little consolation to such an accused to say that he may cross-examine the witness at trial as to the prior statement. It would be impossible to recapture, at that late date, the demeanor and appearance of the witness at the time of the declaration. Yet, it is precisely those observations that are critical to evaluating the credibility of the *statement*. But not only is it important for the jury

> to see the witness, it is equally important for the witness to see the jury and confront the accused when he makes damning testimony. It is only then that he can fully appreciate the impact of his words and properly contemplate their ultimate consequences for human life and liberty.
>
> My present view is that neither this Court nor the General Assembly (§ 491-074, Laws of Mo. 1985 notwithstanding) has power to abrogate the common law protections given constitutional stature by Mo. Const. art. I, § 18(a).

Obviously, a different case may be presented if the "prior inconsistent statement" had been made under oath in a preliminary hearing or deposition where there was an opportunity for immediate cross-examination at the time the statement was made. Of course, that is not the situation presented here.

Again, Appellant's argument here is not inconsistent with this Court's recent decision in State v. Perry, supra because Perry involved the application of different statute, one pertaining specifically to a **child victim** where the court has made a finding that the prior statement provides "sufficient indicia of reliability" (Section

491.075.1(2)) and where more relaxed rules must be afforded to statements of children.

In this case, particularly the incriminating out of court statement attributed witness McCauley should not have been admitted and considered by the court as substantive evidence because: (1) McCauley was certainly not physically unavailable or legally unavailable as may be a child witness, (2) McCauley was not subject to cross-examination on the purported statement at the time it was allegedly made, (3) McCauley was not subject to cross-examination on the purported statement at trial since the prosecutor never asked him about it on direct examination and (4) there was no finding, and could not have been a finding, that the statement presented "sufficient indicia of reliability". Recall that McCauley's alleged observation of Appellant in the horse trailer is nowhere found in the written statement he prepared at the scene at the direction of the police (State's Ex. 30, Appendix A). Additionally, such a statement would have been absolutely contrary to the sworn testimony of Elizabeth Reed. Recall also that none of Appellant's clothing, makeup or toiletries were found in the horse trailer in which the prosecutor asserted she had been living contrary to the sworn testimony of her father. Nevertheless, statements which the police attributed to her father, which, significantly, were nowhere reflected in the police reports, were used as

substantive evidence of the prosecutor's assertions.

Clearly, then, the application of Section 491.074 R.S.Mo. to allow for the receipt of the purported statements as substantive evidence violated Appellant's constitutional rights as noted above, since this application did not comply with the requirements specifically recognized by the United States Supreme Court in Crawford, supra, and by this Court's unanimous opinion in Justus, supra.

III. EVEN IF THE COURT DOES NOT FIND SECTION 491.074 TO BE UNCONSTITUTIONAL AS APPLIED TO APPELLANT, THE TRIAL COURT, NEVERTHELESS ERRED, IN ADMITTING THE PURPORTED STATEMENTS OF WITNESS McCAULEY SINCE THE STATEMENT WAS NOT "INCONSISTENT" WITH McCAULEY'S TRIAL TESTIMONY AND THE STATUTE, THEREFORE, DID NOT APPLY TO CREATE A HEARSAY EXCEPTION.

As detailed in the Counter Statement of Facts, above, this case is unusual in that at trial the prosecutor did not question its witness, McCauley, about whether he had observed Appellant in the horse trailer on the date of the alleged offense. Surely, the prosecutor wanted to avoid a direct answer to that question in light of the affidavit submitted by McCauley denying that he had made any such observation. (H.T.21)

However, not having asked that question or obtained the expected answer, the prosecutor was simply not in a position to claim that the purported statement made to the police was a "prior inconsistent statement" either as substantive evidence under Section 491.074, or as impeachment evidence.

Appellant's continuing objections on the basis of hearsay were, nevertheless, overruled and her motions for mistrial were denied both before and after McCauley

testified. Then the Court went on to rely almost exclusively on the hearsay evidence of the purported statements when denying Appellant's Motion for Judgment of Acquittal. (T.477)

This was error whether or not Section 491.074 is deemed unconstitutional and provides an alternative basis for the Court to reverse Appellant's conviction.

IV. THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT A CONVICTION, PARTICULARLY IF THE PURPORTED McCAULEY STATEMENT ABOUT APPELLANT BEING OBSERVED MANUFACTURING METHAMPHETAMINE IN THE HORSE TRAILER IS DEEMED INADMISSIBLE AS SUBSTATIVE EVIDENCE, BUT EVEN IF THE STATEMENT IS DEEMED ADMISSIBLE IT IS NOT ALONE SUFFICIENT TO SUSTAIN THE CONVICTION.

Respondent's brief argues that "even without the prior inconsistent statements, the jury had sufficient evidence of Appellant's guilt. (p.29 Resp. Br.) This is simply not correct.

It must be recalled that under the statute and instructions applicable to this case the State had to prove that Appellant took a substantial step toward the manufacture of methamphetamine by possessing items used in the manufacture of methamphetamine. (L.F.75)

The State argues that this requirement was satisfied by evidence that Appellant ran into the woods with a black trash bag which she threw into the pond and that the trash bag contained methamphetamine precursors. It is obvious, however, that whatever Appellant's intent was in carrying those items into the woods this act did not constitute a "substantial step toward the manufacture of

methamphetamine." The meth lab in the horse trailer had already been discovered and substantially dismantled by her father, Donald Reed, and police had already been called when she began picking up the items for disposal in the woods. Her purpose in briefly possessing these items could not have been to take a "substantial step toward the manufacture of methamphetamine."

Unlike the cases cited by the Respondent, State v. Cramer, 29 S.W.3d 423 (Mo. App. 2000), State v. Belton, 1085 S.W.3d 171 (Mo. App. 2003) and State v. McLane, 136 S.W.3d 170 (Mo. App. 2004) Appellant was not charged with the mere possession of contraband. Rather she was charged with the attempted manufacture of methamphetamine. Even if, as the Respondent asserts, Appellant was trying to dispose of evidence to cover up illegal activity, that is not the crime with which she was charged and on which the jury was required, under the instructions, to decide.

Nor was there evidence, other than the purported statement of McCauley, that Appellant was even in the horse trailer, much less that she constructively possessed any of the items found there. In fact, even if there had been evidence that she has at some point been in the horse trailer, this alone is not sufficient to prove constructive possession of everything found therein. State v. Withrow, 8 S.W.3d 75 (Mo. banc 1999), State v. West, 21 S.W.3d 59 (Mo. App. 2000).

Contrary to the Respondent's argument "routine access" to an area where illegal chemicals are found is not sufficient to establish constructive possession of those chemicals, particularly where Defendant does not have exclusive access. State v. West, supra.

Finally, Respondent argues that "given the large amount of materials and equipment on the property that were related to meth manufacturing it would be naïve for the jury to believe that two strangers suddenly appeared on the property that day and began making meth without Appellant's knowledge." (p.39 Resp. Brief) First, there was no expert testimony or other evidence that this meth lab could not have been set up during the morning hours of September 11, 2006, before it was discovered in the early afternoon. Secondly, there was no evidence that Justin Caldwell, who's driver's license picture was identified by Donald Reed as one of the individuals who ran from the horse trailer, was a stranger to either Appellant or to Dennis McAdams who occupied the upper portion of the home. (See T.401) (In fact, the State's investigation strangely omits any reference to any attempt to locate Justin Cardwell or to interview Dennis McAdams, and to counsel's knowledge Cardwell had not been charged with any offense arising out of this incident.)

Moreover, even if there had been evidence that Appellant knew about, but

did not attempt to stop or report the meth manufacturing by Cardwell and another individual, that is not enough to convict her of an attempt to manufacture, again the only crime with which she was charged.

It cannot be disputed that the State's case was based almost entirely upon the proposition that Adam McCauley observed Appellant in the horse trailer, manufacturing methamphetamine, a proposition which was denied by McCauley in his affidavit and which was contrary to the testimony of Elizabeth Reed who visited with Appellant in her home with McCauley.

This case stands out, therefore as "poster child" as to how a conviction can be obtained without any direct evidence or testimony of a Defendant's participation in a crime through the unrestrained use of Section 491.074 R.S.Mo. and the characterization of a purported statement of a witness as "prior inconsistent statement."

At least one Appellate Court in Missouri has very carefully reviewed opinions of the courts of other states with evidentiary rules similar to Section 491.074 and has concluded that the due process clause does not permit a conviction to be sustained based on the purported uncorroborated out of court statement of a witness even if that statement is deemed to be substantive evidence.

In State v. Pierce, 906 S.W.2d 729 (Mo. App. 1995) the Court reviewed a

statutory rape conviction which had been based on an out of court statement made by the prosecutrix which she had recanted prior to trial. As in the instant case, the trial court held that the statements were admissible under Section 491.074 R.S.Mo. The case was appealed prior to the Supreme Court's opinion in Crawford, supra or this Court's opinion in Justus, supra. Nevertheless, the Appellate Court held that the statement, although admissible, was not sufficient to sustain the conviction.

In doing so, the Court reviewed similar cases in Utah, Alaska, Florida, Delaware, Montana and Louisiana as well as a then recent Sixth Circuit opinion. The Court concluded as follows: (906 S.W.2d at 735)

> The United States Supreme Court's language in Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed2d 560 (1979), looms like a cloud over the idea that, somehow, a conviction based solely on a out-of-court inconsistent statement, satisfied due process. Due process limits the jury's ability to convict. *Id*. at 319, 99 S.Ct. at 2789. The Court has long acknowledged that due process prohibits a criminal conviction except on proof beyond a reasonable doubt. *Id*. at 316, 99 S.Ct. at 2789. This rule requires more than a ritualistic trial. *Id.*

> It is clear to this court today, that because there is an absence of adequate safeguards to assure reliability, a conviction based solely on a prior statement, though admissible via statute, falls short of due process protection.
>
> One reason for this is lack of trustworthiness in the atmosphere where the prior out-of-court statement was procured. A less than impartial questioner could, hypothetically, maneuver the witness into giving an inaccurate statement. See 4 J. Weinstein and M. Burger, Weinstein on Evidence, §801(d)(1)(A)[01], at 801-807 (1985).

Clearly then, even if this Court declines to declare Section 491.074 unconstitutional as applied to Appellant and further fails to find any other error in the admission of the alleged prior out of court statements, the Court should nevertheless find that the evidence was insufficient to sustain the conviction.

CONCLUSION

For the foregoing reasons, the arguments advanced in the Respondent's brief are not valid or persuasive and for the reasons stated in Appellant's opening brief and in this responsive brief, the Court should reverse Appellant's convictions.

Dated:_____

Respectfully Submitted,

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PROOF OF SERVICE

I, the undersigned, certify that the original and ten copies of Appellant's Reply Brief as well as a floppy disk of same were filed with the Clerk of the Court for filing, and two copies of Appellant's Reply Brief and a floppy disk containing the word processing file of same in WORD 2003 and "saved as" WORD __ formats were served by U.S. Mail this 10th day of February, 2009, on:

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/s/
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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). It contains no more than 7,750 words of text (specifically, containing 5,912 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) 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.

/s/
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