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STATE OF WASHINGTON

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No. 84204-3

THE SUPREME COURT OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

vs.

STEVEN BEADLE

Petitioner.

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***SUPPLEMENTAL BRIEF OF RESPONDENT***

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### ISSUE PRESENTED

Whether in a child molestation prosecution the trial court properly found that the distraught child victim was "unavailable" and unable to testify via closed-circuit television for purposes of admitting the child's hearsay statements under RCW 9A.44.120 after the four-year-old child became hysterical and refused to testify during the child hearsay proceedings.

### BRIEF ANSWER

The trial court' ruling is correct. Four-year-old B.A. was rendered "unavailable" and unable to testify via closed-circuit t.v. after she began to scream and cry and curled up into a corner on the floor of the courthouse hallway and refused to testify at the child hearsay proceedings. "Good faith efforts" do not require the State to carry a despondent young child to the witness stand to testify. Such "herculean" and futile efforts are not constitutionally required, and are contrary to the purposes of the still-constitutional child hearsay statute. This four-year-old child made consistent, detailed, nontestimonial statements to at least four people, and her statements are remarkable for their "ring of truth." Under these facts, the child's hearsay statements were properly admitted. Should this Court find any error, it should be harmless for the reasons just stated, and because this case cannot be retried since the jury acquitted on one of the identically-charged counts of child molestation.

### SUPPLEMENTAL FACTS

Petitioner Steven Beadle was charged with three counts of first degree child molestation for molesting B.A.<sup>1</sup> she was under the age of three (date of birth 2/3/2003). CP 69-70; 11/20/07 RP 16. The State sought to admit B.A.'s hearsay statements under the "child hearsay statute," RCW 9A.44.120; 11/16/07 RP 3. Child hearsay proceedings

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<sup>1</sup> The trial court referred to the child as "B.R.A.,"--Respondent refers to the same child as "B.A."

were held over three different days, due to various scheduling problems.

*See* transcripts of proceedings, 11/16/07 RP; 11/20/07 RP; 12/19/07 RP.<sup>2</sup>

B.A. was four years old at the time of the child hearsay proceedings.

11/20/07 RP 16.

B.A. is the daughter of Lisa Burgess, Beadle's off-and-on girlfriend. 11/16/07 RP 15. Beadle and Lisa Burgess lived together from approximately November of 2004 to April of 2005, and for a time in 2006. Id. 15,16. During this time, B.A. considered Steven Beadle "her daddy." 11/20/07 RP 18. In early 2006, when Lisa Burgess was in the shower, then three-year-old B.A. told her mother (Ms. Burgess) that "her potty hurt," because "my daddy tried to put his tail in me." 11/20/07 RP 20. Lisa Burgess confronted Beadle, and Beadle "freaked out" and cried and screamed at B.A. and said to B.A.: "You can't say those things to anybody. Daddy will go to jail forever." 11/20/07 RP 21. This occurred just before Beadle was to go to prison on an unrelated matter, so Lisa Burgess kind of "just gave him the benefit of the doubt." 11/20/07 RP 21, 22. Lisa eventually married Damon Burgess. 11/20/07 RP 17.

In February of 2007, four-year-old B.A. drew a picture of a "tail" and showed it to her stepfather Damon Burgess. 11/16/07 RP 40, 41;

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<sup>2</sup> Because the issues in this case involve the trial court's findings made after hearing evidence at the pre-trial child hearsay proceedings—only the transcripts of those proceedings are cited in this supplemental statement of facts. The trial transcripts are cited elsewhere in the briefing filed below, and elsewhere in this supplemental brief, when relevant to the arguments.

11/20/07 RP 23. Burgess asked B.A. whose "tail" it was, and B.A. said it was "Steve's tail." 11/16/07 RP 41. B.A. said she had seen Steve's "tail" and that Steve [Beadle] helped her wash her hands because they got sticky and slimy after she touched his tail. 11/16/07 RP 42. B.A. showed Burgess how she touched Steve's tail by cupping her hand around Burgess' finger and moving her hand back and forth on it. 11/16/07 42. B.A. repeated these same details to her mother, Lisa Burgess. 11/20/07 24,25. Lisa Burgess said that B.A. had been drawing pictures of a "tail" since Beadle moved out in 2006. 11/16/07 RP 20,24; Ex. 3; 11/20/07 RP 24, 25; (Ex. 9--Trial). B.A. told her mother Lisa about several incidents where Beadle sexually touched her. 11/20/07 RP 35, 36, 42. B.A. said Beadle had her touch his tail when they were lying in Lisa and Beadle's bed, and once when B.A. sat on Beadle's lap "under a shelf" in the bedroom, and another time on the bed when B.A. sat on Beadle's lap "and he needed a towel." 11/20/07 35, 36,42. Lisa Burgess called law enforcement, and in an interview, B.A. repeated the same details of the molestation to social worker Ronnie Jensen and Detective Karl Buster. 11/16/07 RP 24,41,42; 11/20/07 RP 3-9.

After B.A. began having behavioral and sleep problems, and "boundary issues", she was enrolled in therapy. 12/19/07 RP 9,10. B.A. told her therapists that Steve had her touch his tail and that her hands got

sticky so she had to wash them. 11/16/07 RP 23,24; 12/19/07 RP 8,9.

B.A. was diagnosed with post-traumatic stress disorder and sexual abuse of a child. 12/19/07 RP 8,9; Ex. 4. B.A. told her therapists that "Steven hurt her potty" and B.A. used dolls to demonstrate how Beadle had B.A. sit on his lap "with his tail in the middle." 11/16/07 RP 16,17,18,24; 12/19/07 RP 8,9. Without prompting, B.A. removed the clothes from a "Ken" doll and a baby doll, and had a bean bag for a towel. 11/16/07 RP 18. B.A. started to put the "towel" on the Ken doll's lap, but then said, "wait, I don't need that yet." 11/20/07 RP 37. B.A. sat the baby doll on the Ken doll's lap, chest-to-chest, and then took the dolls under a table. 11/20/07 RP 36,37. When B.A. brought the dolls back up on the table she said, "[n]ow I need the towel . . . . okay, I'm done." 11/20/07 RP 37. One therapist noted that B.A. was sexually precocious for her age. 11/16/07 RP 16.

#### *Distraught Four Year Old*

On the first day of the child hearsay proceedings, it became apparent that the prosecutor was having problems getting four-year-old B.A. to come into the courtroom to testify. 11/16/07 RP 6. At the start of the hearing, the prosecutor asked if the victim advocate could sit with B.A. while she testified. 11/16/07 RP 6. Then, the prosecutor requested a brief recess because he was "having problems with [his] first witness." *Id.* In

fact, four-year-old B.A. was hysterical, and was crying and screaming and had crawled into a corner in the hallway and refused to come into court to testify. 11/20/07 RP 41,42. Lisa Burgess described B.A.'s "meltdown": "she had a complete just [sic] meltdown, is what I called it. She ran into the corner and she was there over an hour. . . She cried for at least half an hour. . . . She was on the floor in the corner . . . ." 11/20/07 RP 41,42. Social worker Jensen also witnessed this scene: "[w]hen I got here, [B.A.] had resigned herself to a corner and was down on her knees and hunched over, kind of in a fetal position. An advocate . . . was trying to engage her . . . Her mom was trying. . . eventually she came out of it . . . but she said that she—she didn't want to—she didn't want to talk. She was scared." 11/16/07 RP 32. B.A.'s crying and screaming could be heard by those inside the courtroom. 12/19/07 RP 24; CP 41-44. Eventually, the prosecutor said, "I just wanted to check and see one more time if we'd be able to get [B.A.] to testify today." 11/16/07 RP 45. But B.A. again refused. 11/16/07 RP 45, 46. However-- just as the trial court was to move on to other matters--the prosecutor said, "now I'm told that she [B.A.] is willing to come into the courtroom." 11/16/07 RP 47. Due to scheduling issues, the court was not able to set the case over later that same day Id. Therefore, the child hearsay hearing was continued to November 20, 2007. Id.

At the November 20<sup>th</sup> hearsay hearing, the State again tried to get B.A. to testify, telling the court, "I will attempt to see if I can get [B.A.] to come in the courtroom and see how that goes." 11/20/07 RP 45. However, B.A. once again refused to testify, so the State rested. 11/20/07 RP 46. But when the defense raised an issue about a report done by another of B.A.'s therapists, Ms. McAdams, the State asked to continue the hearing solely to take McAdams' testimony. 11/20/07 RP 45-50. On December 19, 2007, the court heard testimony from B.A.'s therapist, Ms. McAdams, and then heard arguments from the parties. 12/19/07 RP 24. The State asked the trial court to find B.A. unavailable, based on her hysterical behavior and refusal to testify during the proceedings. Id. Beadle did not object to the State's request to find B.A. unavailable, nor did Beadle request that the child give testimony via closed-circuit television. 12/19/07 RP 24. The trial court found B.A. "unavailable," and expressly noted that B.A.'s screaming and crying had been heard from inside the courtroom:

when the child was here for the purpose of testifying, there was a substantial amount of crying and screaming coming from the public portion of the hallway outside the courtroom door" and "it was not disputed by [defense counsel] or Mr. Beadle—that this yelling and screaming that was coming in was coming from the child, and she was doing it in resisting. . .—any and all attempts to bring her into the courtroom. That was not remedied at any one of the three hearings that we've had with respect to the admissibility of this evidence. Consequently, as far as the Court's concerned, she's unavailable as a witness.

12/19/07 RP 24. Based on these facts, the trial court found B.A.

"unavailable" and also entered a written finding that "the evidence does not suggest that B.R.A. may be able to testify by the use of closed-circuit television pursuant to RCW 9A.44.150." CP 42. As to the reliability of B.A.'s statements, the trial court remarked:

what really stands out . . . [is] her hands were sticky and that the defendant Steve helped her wash her hands because of the substance that was on her hands as a result of what came out of his tail. That . . . had a very profound effect on the Court. . . There is simply no way that a child who's four years old would make something like that up unless, in fact, there was something sticky on their hands, and it was something that someone in the position of Mr. Beadle did, in fact, help her clean off of her hands. It's extremely telling testimony."

12/19/2007 RP 28-30. The court ruled that all of B.A.'s hearsay statements were admissible at trial. CP 41-44.

Beadle was ultimately convicted by a jury of two counts of first degree child molestation, but was acquitted on the third count. CP 47,49,51. The jury also found the sentencing aggravators of "abuse of trust" and "ongoing pattern of abuse." CP 45, 46, 48,50. The trial court imposed an exceptional sentence based upon those aggravating factors. CP 20-37. Beadle appealed, and the Court of Appeals affirmed in an unpublished decision. This Court granted Beadle's petition for review.

## ARGUMENT

### A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND FOUR-YEAR-OLD B.A. "UNAVAILABLE" AND ADMITTED HER HEARSAY STATEMENTS PURSUANT TO THE "CHILD HEARSAY STATUTE.

The trial court found four-year-old B.A. unavailable after she became hysterical, crawled into a corner on the floor of the courthouse hallway and refused to enter the courtroom during the child hearsay proceedings. CP 41-44. Under these facts, and given the special treatment accorded child victims via our still-constitutional child hearsay statute, the trial court did not abuse its discretion when it found B.A. "unavailable" and unable to testify via closed-circuit television, and admitted her hearsay statements at trial. CP 41-44. This Court should affirm.

The determination of admissibility of a child's hearsay statements under RCW 9A.44.120 is within the sound discretion of the trial court, and its ruling will not be overturned unless there is a manifest abuse of discretion.<sup>3</sup> The trial court's determination that the witness is "unavailable" is also reviewed for abuse of discretion.<sup>4</sup> Great deference is given to the trial court's determination regarding such evidentiary

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<sup>3</sup> State v. Cooley, 48 Wn.App. 286, 293, 738 P.2d 705, *rev. den.* 109 Wn.2d 1002 (1987).

<sup>4</sup> *See e.g.*, Muhammad v. State 934 A.2d 1059, 1123 (Md.App. 2007).

matters.<sup>5</sup> The "burden is on the appellant to prove an abuse of discretion."<sup>6</sup>

RCW 9A.44.120, the "child hearsay statute," provides for the admission at trial of the hearsay statements of young children if the child is "unavailable" for trial, and if the statements meet additional tests of reliability and corroboration.<sup>7</sup> To date, this child hearsay statute remains constitutional post-Crawford.<sup>8</sup> With this child hearsay statute, the legislature expressly established prerequisites for allowing child hearsay in a criminal trial at which the child does not testify.<sup>9</sup> "Unavailability for purposes of the child hearsay statute is defined under ER 804(a), which provides in part: '[u]navailability as a witness' includes situations in which the declarant: . . . (2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so . . . ."<sup>10</sup> But, "there are unique problems associated with the in-court testimony of child victims that suggest a number of possible meanings for unavailability."<sup>11</sup> Accordingly, a child witness may be rendered "unavailable" because she is so emotionally distraught she becomes

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<sup>5</sup> State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)

<sup>6</sup> Williams, 137 Wn.App. at 743.

<sup>7</sup> RCW 9A.44.120; State v. Hopkins, 137 Wash.App. 441, 451, 154 P.3d 250 (2007); State v. Ryan, 103 Wash.2d 165, 169, 691 P.2d 197 (1984)

<sup>8</sup> State v. Shafer, 156 Wash.2d 381, 128 P.3d 87 (2006)

<sup>9</sup> State v. Hopkins, 137 Wash.App. 441, 451, 154 P.3d 250 (2007)

<sup>10</sup> State v. Hirschfield, 99 Wn.App. 1, 3-4, 987 P.2d 99 (1999)(citing ER 804(a)).

<sup>11</sup> People v. Rocha, 547 N.E.2d 1335, 1339-1342 (Ill.App. 1989).

unresponsive or refuses to testify.<sup>12</sup> Unavailability in the constitutional sense additionally requires the prosecutor to make a good faith effort to obtain the witness's presence at trial.<sup>13</sup> But, “[t]he rule is not that the government must do everything it can to get a witness to testify, rather only that it make a reasonable, good faith effort to get the witness into court.”<sup>14</sup> This means that “herculean efforts are not constitutionally required,” nor does “[t]he law . . . require the doing of a futile act.”<sup>15</sup>

Confrontation clause errors may be harmless.<sup>16</sup> Under the “overwhelming untainted evidence” test, if the untainted evidence is overwhelming, the error is deemed harmless.<sup>17</sup> If there is no “reasonable probability that the outcome of the trial would have been different had the error not occurred,” the error is harmless.<sup>18</sup> Here, the trial court did not err when it found the four-year-old child unavailable and unlikely to be able to testify via closed-circuit television after her emotional breakdown and refusal to testify at the child hearsay proceedings. Her hearsay

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<sup>12</sup> Rocha, 547 N.E.2d at 1339-1342 (discussing child hearsay statute and holding that “the legislature's intent was to include within the meaning of “unavailable” witnesses those children who are unable to testify because of fear, inability to communicate in the courtroom setting, or incompetence)

<sup>13</sup> Ryan, 103 Wn.2d at 171.

<sup>14</sup> Reed v. Hathaway (emphasis added) (citing United States v. Reed, 227 F.3d 763, 767 (7th Cir.2000)); State v. Smith, 148 Wash.2d 122, 59 P.3d 74 (2002);

<sup>15</sup> Christian v. Rhodes, 41 F.3d 461, 467 (9<sup>th</sup> Cir. 1994); Roberts, supra.

<sup>16</sup> State v. Mason, 160 Wash.2d 910, 927, 162 P.3d 396 (2007) (citing State v. Davis, 154 Wash.2d 291, 304, 111 P.3d 844 (2005)).

<sup>17</sup> Mason, 160 Wash.2d at 927, 162 P.3d 396 (citing Davis, 154 Wash.2d at 305, 111 P.3d 844).

<sup>18</sup> Mason, 160 Wash.2d at 927.

statements were thus properly admitted. Alternatively, should this Court find any error, it should be deemed harmless.

***1. The Child Hearsay Statute Remains Constitutional And This Court Should Find That Protecting Child Victims In the Prosecution of Sexual Abuse Cases Remains a Compelling State Interest Undiminished by Crawford.***

There are important policy considerations to keep in mind when addressing the admission of child hearsay statements admitted under RCW 9A.44.120, our still-constitutional "child hearsay statute." The statements made by the child victim in the present case were admitted under this statute--a statute designed to provide certain evidentiary exceptions for admitting hearsay statements made by young children who are unable to testify at trial.

The Legislature's declared purpose for enacting RCW 9A.44.120 states, in part, that "*the protection of child witnesses in sexual assault and physical abuse cases is a substantial and compelling interest of the state. . . a child victim may suffer serious emotional and mental trauma from exposure to the abuser or from testifying in open court. . . The creation of procedural devices designed to enhance the truth-seeking process and to shield child victims from the trauma of exposure to the abuser and the courtroom is a compelling state interest.*"<sup>19</sup> In other words, "our

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<sup>19</sup> RCW 9A.44.120 (emphasis added)(Legislative declaration—1990 c 150); See also, State v. Jones 112 Wash.2d 488, 493-494, 772 P.2d 496, 499 (1989)( "RCW 9A.44.120

Legislature has clearly established prerequisites for allowing child hearsay in a criminal trial at which the child does not testify herself.”<sup>20</sup> Perhaps most importantly, this child hearsay statute remains constitutional--so far, at least--*despite* the landmark United States Supreme Court’s landmark "Confrontation Clause" Crawford decision.<sup>21</sup> In State v. Shafer, this Court concluded that, “RCW 9A.44.120 is constitutional to the extent it permits the admission of a child’s nontestimonial statements.”<sup>22</sup>

That said, it is also true that the extent to which Crawford impacts the admissibility of child hearsay statements in child sex abuse cases continues to be debated by scholars and nearly everyone else involved in the prosecution and appeal of such cases.<sup>23</sup> That being true, and this case being a “child hearsay” case, this Court has some opportunity here to further define the reach of Crawford. In particular, the extent to which Crawford --itself a non-child-hearsay case---should be used to, in essence,

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is principally directed at alleviating the difficult problems of proof that often frustrate prosecutions for child sexual abuse.”)

<sup>20</sup> State v. Hopkins, 137 Wn.App. 441, 451, 154 P.3d 250 (2007).

<sup>21</sup> Crawford v. Washington, 541 U.S. 36 (2004).

<sup>22</sup> State v. Shafer, 156 Wn.2d 381, 392, 128 P.3d 87 (2006)

<sup>23</sup> See, e.g., Eileen A. Scallen, “*Coping With Crawford: Confrontation of Children and Other Challenging Witnesses*,” 35 Wm. Mitchell L. Rev. 1558 (2009); Note, Stephanie McMahon, “*The Turbulent Aftermath of Crawford v. Washington: Where do Child Abuse Victims’ Statements Stand*,” 33 Hastings Const. L.Q. 361, 389 (2006); Daniel Monnat & Paige Nichols, *The Kid Gloves Are Off: Child Hearsay After Crawford v. Washington*, The Champion (January/February 2006); Note, Matthew M. Staab, “*Child’s Play: Avoiding the Pitfalls of Crawford v. Washington In Child Abuse Prosecution*,” 108 W. Va. L. Rev. 501, 539 (Winter, 2005); Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, Crim. Just., Summer 2005 at 24.

extinguish the legislatively-declared "compelling state interest" of protecting young child victims in the prosecution of sex abuse cases like this one.<sup>24</sup> To this end, this " Court should continue to acknowledge the compelling interest of the state to protect child abuse victims from further trauma in court, even under the new Crawford framework. Nothing has changed to make children less susceptible to emotional damage from having to face the accused in court."<sup>25</sup> Indeed, until the United States Supreme Court has before it a child abuse case with a young child victim too traumatized to testify--we should not agree that the non-child hearsay Crawford decision reaches so far beyond its facts. To date, our child hearsay statute stands, and so does its purpose of protecting young child victims of sexual abuse from being further traumatized in the courtroom. With the purposes of this still-constitutional statute in mind, this Court should affirm.

***2. The State's Efforts to B.A.'s Testimony Were Reasonable Because Four-Year-Old B.A. Became Hysterical and Crawled Into a Corner and Refused to Testify During the Child Hearsay Proceedings and The Constitution Does Not Require "Herculean" or "Futile" Efforts Before Finding a Child Witness "Unavailable."***

The State showed reasonable, good faith efforts to secure B.A.'s testimony, and the trial court did not err when it found B.A. unavailable under the facts presented in this case. Here, the State did everything it

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<sup>24</sup> RCW 9A.44.120; Crawford, supra.

<sup>25</sup> McMahon, 33 Hastings Const. L.Q. 361, 389 (2006)(emphasis added).

could to bring four-year-old B.A. into court to testify ---short of physically carrying the child to the witness stand. Surely, that is not the standard for "good faith efforts." Here, the child's distraught behavior while waiting in the courthouse hallway shows that forcing this four-year-old child to come into the courtroom to testify would have been an exercise in futility. It was apparent to all who could hear the child's cries and protestations that she was not going to be able to "testify" in any "responsive" sense of the term--hence, the trial court's finding that the child was "unavailable" and that the evidence did "not suggest that [B.A.] may be able to testify by the use of closed-circuit television pursuant to RCW 9A.44.150." CP 42(emphasis added). Other courts have found a child unavailable in similar circumstances.<sup>26</sup>

In an Indiana case, a child was properly found unavailable after she became hysterical, repeatedly asked for her mother, and refused to answer questions about the molestation.<sup>27</sup> In another case, an eight-year-old child victim appeared for trial, but began to cry, and was unresponsive, and was

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<sup>26</sup> See e.g., State v. Robinson, 735 P.2d 801 (Ariz. 1987) (uncommunicative child is incapable of testifying and thus unavailable); State v. Giles, 772 P.2d 191 (Id. 1989) (three-year-old child was incapable of communicating to the jury and was thus unavailable); State v. Chandler, 376 S.E.2d 728 (NC 1989) (child witness became unresponsive during testimony and was ruled unavailable); State v. McCafferty, 356 N.W.2d 159 (SD 1984) (child victim present in courtroom but unable to testify effectively deemed unavailable); Guy v. State, 755 N.E.2d 248, 254-255 (Ind.App. 2001) (child properly found unavailable after she began to cry and refused to answer questions).

<sup>27</sup> Guy, 755 N.E.2d at 254-255.

properly ruled "unavailable."<sup>28</sup> In yet another similar case, the court properly deemed the child unavailable after the child cried and begged that he not be asked any questions--and the court noted, "[t]he child was totally distraught."<sup>29</sup> There are also some post-Crawford cases which have held that emotional trauma and a child's "tender years" may render the child "unavailable" as contemplated in Crawford.<sup>30</sup>

In the present case, as she waited in the courthouse hallway, four-year-old B.A. became hysterical, and was crying and screaming, and curled into a fetal position in the corner and refused to enter the courtroom during the hearsay proceedings. 11/20/07 RP 41,42. Lisa Burgess described B.A.'s breakdown, stating, "she had a complete just [sic] meltdown, is what I called it. She ran into the corner and she was there over an hour. . . She cried for at least half an hour. . . ." 11/20/07 RP 41,42. Several people tried to get B.A. to go into the courtroom. 11/20/07 RP 42; CP 41-44. Social worker Jensen said, "[w]hen I got here, [B.A.] had resigned herself to a corner and was down on her knees and hunched over, kind of in a fetal position. An advocate . . . was trying to engage her . . . Her mom was trying. . . eventually she came out of it . . . but she said

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<sup>28</sup> State v. Drusch, 407 N.W.2d 328 (Wis. App. 1987).

<sup>29</sup> State v. Lonergan 505 N.W.2d 349, 353 (Minn. 1993).

<sup>30</sup> See e.g., State v. Contreras, 969 So.2d 896, 905-908 (Fla., 2008) (agreeing that a child witness can be "unavailable" under Crawford due to mental or emotional harm caused by testifying), citing People v. Sisavath, 118 Cal.App. 4th 1396, 13 Cal.Rptr. 3d 753, 756 (2004) and Herrera-Vega v. State, 888 So.2d 66, 67 & n.1 (Fla. 5th DCA 2004). This Court's Shafer decision is also post-Crawford.

that she—she didn't want to—she didn't want to talk. She was scared.”

11/16/07 RP 32. The State tried again during the first hearing to get the child to testify, but B.A. again refused to come into the courtroom.

11/16/07 RP 45,46. Then-- just as the trial court was moving on to other matters--the prosecutor said, “now I'm told that she [B.A.] is willing to come in to the courtroom,” but did not say whether B.A. was willing to answer questions. 11/16/07 RP 47. But because there was no time to hear this case later that same day, the child hearsay hearing was continued to November 20, 2007. Id. At the November 20th hearing, the State again tried to get B.A. to testify, but the child once again refused to come into the courtroom. 11/20/07 RP 45, 46. Accordingly, the State “rested” by telling the court it had no further witnesses. 11/20/07 RP 46. Then, after an issue was raised about a non-testifying therapist's report, another hearing date was set solely to take testimony from the author of the report, B.A.'s other therapist, Cary McAdams. 11/20/07 RP 45-50. On December 19, 2007, McAdams testified, and afterwards the State asked the trial court to find B.A. “unavailable due to the testimony you heard about what happened when we tried to bring her in the courtroom and her age. Basically going into the corner for an hour, not coming out for anyone, laying on the ground with her face right into a corner, being coaxed by

people for about an hour. . .to bring her into court would obviously cause her a lot of trauma, and she doesn't want to come in. . ." 12/19/07 RP 18.

The trial court acknowledged that B.A. could be heard screaming when she was in the hallway on November 16th, stating, "the child's cries were heard from inside the courtroom--as noted by the trial court when it commented, "when the child was here for the purpose of testifying, there was a substantial amount of crying and screaming coming from the public portion of the hallway outside the courtroom door" and "it was not disputed by [defense counsel] or Mr. Beadle—that this yelling and screaming that was coming in was coming from the child, and she was doing it in resisting. . .—any and all attempts to bring her into the courtroom." 12/19/07 RP 24. The trial court found B.A. unavailable based on B.A.'s emotional breakdown and because, "[t]hat was not remedied at any one of the three hearings that we've had with respect to the admissibility of this evidence." 12/19/07 RP 24(emphasis added); CP 41-44. The trial court also found that B.A. was not likely to be able to testify via closed-circuit television. CP 42. B.A. was properly found "unavailable," just as other courts have found in similar circumstances.<sup>31</sup>

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<sup>31</sup> State v. Lonergan, 505 N.W.2d 349,353 (Minn. 1993)(child properly found unavailable after child going into courtroom and immediately refusing to testify--crying and begging that he not be questioned.)

But Beadle now further claims that the State did meet the "good faith efforts" standard, apparently claiming that the State did nothing to determine whether B.A. could testify via closed-circuit pursuant to RCW 9A.44.150, and this Court's Smith decision. Yet, in the trial court, Beadle did not object to the State's request to find B.A. unavailable, nor did Beadle raise any issue about whether the child could testify via closed-circuit television. 12/19/07 RP 18-24; CP 41-44; 12/19/07 18-24.<sup>32</sup> Nonetheless, given B.A.'s hysterical demeanor and refusal to go into court to testify, it is difficult to see how the State could have done *anything more* to bring the already-traumatized child into court during the child hearsay proceedings--short of *physically carrying* the crying, kicking, four-year-old child to the stand. CP 41-44; 11/20/07 RP 41,42,45. Surely, this *cannot be* what is required to meet the "*reasonable*, good faith efforts" standard--especially where that witness is a sobbing, four-year-old child, who refuses to enter the courtroom. 11/20/07 RP 40-42. Even this Court's Smith decision notes that the issue of "good faith efforts" is a question of what is "reasonable" under the circumstances.<sup>33</sup> And again, "herculean" and obviously-"futile" efforts are not constitutionally

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<sup>32</sup> See e.g., In re Tayler F. 995 A.2d 611, 629 (Conn.,2010)(noting that the respondent did not ask the trial court to consider any alternatives to in-court testimony and finding the children were properly found "unavailable").

<sup>33</sup> Smith, supra.(also see State's supplemental briefing filed in the Court of Appeals).

required to meet the "good faith efforts" standard.<sup>34</sup> After all, this is not a situation in which the State did *nothing* to get the witness to the courthouse at all--as has occurred in other cases where the court refused to find "good faith efforts" on the part of the State.<sup>35</sup>

Ultimately, what all of the facts here show is that *even if* the State had physically carried four-year-old B.A. to the witness stand, there is *nothing* in the record to indicate that the child--having at that point been *forced* to explain "why" she didn't want to testify--could have actually pulled herself together enough to speak. 11/16/07 RP 32; 11/20/07 RP 41,42. This was obvious to the trial judge--who could hear from *inside* the courtroom the crying, screaming child--who was *out in the hallway*. *Id.*; Under what possible interpretation of existing law--including the distinguishable State v. Smith<sup>36</sup>--would *anyone* hearing this hysterical four-year-old think she would be able to testify in *any* "structured" setting--closed-circuit television or otherwise? Indeed, Beadle's trial counsel's *silence* when the prosecutor asked the court to find B.A. unavailable on this basis--speaks volumes. 12/19/07 RP 18-24. Beadle's trial counsel surely understood that *forcing* this already-distraught four-year-old child into the courtroom in an attempt to question her would only have further

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<sup>34</sup> Reed v. Hathaway (emphasis added) (citing United States v. Reed, 227 F.3d 763, 767 (7th Cir.2000));

<sup>35</sup> State v. Kevin L.C. 576 N.W.2d 62, 67 - 69 (Wis.App.,1997)

<sup>36</sup> State v. Smith, 148 Wn.2d 122, 137, 59 P.3d 74 (2002)

traumatized the child. Isn't this scenario exactly what our still-constitutional child hearsay statute was enacted to prevent?<sup>37</sup>

*State v. Smith*

The State refers this Court to its supplemental brief filed below on the issue of the applicability of this Court's Smith decision. As stated in that brief, this Court's ruling in Smith is quite narrow and only applies to situations where there is *some* evidence that the child might be able to testify via closed-circuit television.<sup>38</sup> There is no such evidence here.

Additionally, in Smith defense counsel requested that the child testify via some alternative means.<sup>39</sup> Beadle made no such request here. 12/19/07 18-24. Smith is distinguishable, and does not apply to these facts.

*Closed-Circuit Television Testimony--"Crawford-Proof"?*

Finally, regarding closed-circuit television testimony, we might also consider that *even if* the child in this case *had* testified via closed-circuit television--that would not necessarily insulate this case from a Crawford challenge--as many commentators have noted.<sup>40</sup> This seems to be true---notwithstanding the pre -Crawford United States Supreme Court decision in Maryland v. Craig, which held that testimony by a child

<sup>37</sup> RCW 9A.44.120; Hopkins, supra.

<sup>38</sup> Smith, 148 Wn.2d 122(2002).

<sup>39</sup> Smith 148 Wn.2d at 126, 127

<sup>40</sup> See citations listed in n. 41 below.

witness via closed-circuit television is constitutionally permissible.<sup>41</sup> The continued viability of Craig is being questioned in part because Justice Scalia—the author of the Crawford opinion—“wrote a vigorous dissent to the majority holding in Craig, “arguing that video conference testimony ‘improperly substitute[s] ‘virtual confrontation’ for the real thing required by the Confrontation Clause in a criminal trial.”<sup>42</sup> Although there *have* been post-Crawford cases finding testimony via closed-circuit television constitutionally permissible,<sup>43</sup> it appears that this alternative method of taking testimony is not necessarily “Crawford -proof” either.<sup>44</sup>

### *The "Ring of Truth"*

In the end, though, there are other reasons to believe in the "righteousness" of this case, and to passionately defend the trial court's admission of B.A.'s hearsay statements. Aside from the policy implications of requiring more of the State than was done here to bring an

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41 Maryland v. Craig, 497 U.S. 836 (1990).

42 Sophia Rowlands, *Cole's Law Confronts Constitutional Issues: Expanding the Availability of Closed-Circuit Child Testimony In The Face of The Confrontation Clause*, 37 McGeorge L. Rev. 294, 302(2006)(citation omitted); see also Note, Hadley Perry, *Virtually Face-To-Face: The Confrontation Clause and The Use of Two-Way Video Testimony*, 13 Roger Williams U.L. Rev. 565 (Spring 2008); Note, Jon Simon Stefanuca, *Crawford v. Washington: The Admissibility of Statements to Physicians and the Use of Closed-Circuit Television in Cases of Child Sexual Abuse*, 5 U. Md. L.J. Race, Religion, Gender & Class 411 (Fall 2005).

43 See, e.g., United States v. Kappell, 418 F.3d 550 (6th Cir. 2005), cert. denied 547 U.S. 1056, 126 S.Ct. 1651, 164 L.Ed.2d 398 (2006); State v. Henriod, 131 P.3d 232 (Utah 2006)(Maryland v. Craig controls propriety of closed-circuit t.v. testimony, not Crawford); Williams v. United States, 859 A.2d 130 (D.C. 2004)(taking 5-yr.old victim's testimony via closed-circuit television was proper).

44 *Id.*

already-distraught child into court, and the purposes of the child hearsay statute, there is something else to consider. And that is the fact that four-year-old B.A.'s statements in this case carry a stunning, unmistakable "ring of truth." 12/19/07 RP 29. This phenomenon about hearsay statements in child sex cases has been eloquently described by our Courts:

[s]ome of the most powerful potential evidence ... lies in the child's prior out-of-court statements. When a child first reveals that there has been sexual abuse, the content and manner of the revelation is often striking in its clarity and ring of truth. . . . "[t]he simplicity, innocence and unselfconsciousness of [the young child's] behavior and identification of the defendant *belie calculation or fabrication* and carry just this ring of truth." <sup>45</sup>

Such statements are, "valuable and trustworthy in part because they exude the naiveté and curiosity of a small child, and were made in circumstances very different from interrogation or a criminal trial."<sup>46</sup> As such, they "are usually irreplaceable as substantive evidence."<sup>47</sup> Accordingly, "[a]dmitting this type of reliable, highly probative evidence is consistent with the purposes of the rules of evidence and the interests of justice."<sup>48</sup>

Like the cases just discussed, all of B.A.'s hearsay statements in the present case "are consistent and the child-like description of the act

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<sup>45</sup> State v. Aaron L. 830 A.2d 776, 791 (Conn.App.,2003)(internal quotations and citations omitted).

<sup>46</sup> State v. Robinson, 735 P.2d 801, 812(Ariz., 1987); *accord v. State*, 536 So.2d 206, 209 n. 5 (Fla.1988).

<sup>47</sup> Perez v. State, 536 So.2d at 209n. 5.

<sup>48</sup> Robinson 735 P.2d at 812 (Ariz.,1987).

gives [her] statements the ring of truth." <sup>49</sup> Indeed, the trial court in this case was profoundly moved by the content B.A.'s statements, expressly noting that, "what really stands out . . . [is] her hands were sticky and that the defendant Steve helped her wash her hands because of the substance that was on her hands as a result of what came out of his tail. That . . . had a very profound effect on the Court. . . . There is simply no way that a child who's four years old would make something like that up . . . . It's extremely telling testimony. . . ." 12/19/2007 RP 28-30(emphasis added). In other words, there is nothing about four-year-old B.A.'s statements to indicate they are anything but reliable. Her statements plainly describe in graphic-yet- childlike detail, acts and anatomical functions that adults immediately recognize as accurate--things that no four-year-old child should know. Then we have her drawings of the "tail." Id.; 11/16/07 RP 41,42; Ex. 3 & 9. Respondent hopes this Court will keep this "ring of truth" concept in mind when deciding the issues in this case.

***Remedy-- This Case Cannot Be Retried***

For the reasons discussed here and in previous briefs filed in this case, Respondent asks this Court to affirm this case in all respects.

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<sup>49</sup> Perez v. State 536 So.2d at 211 (Fla.,1988); People v. Bowen, 699 N.E.2d 577, 585 (Ill.,1998)

However, should this Court find any error, it should be harmless.<sup>50</sup> This Court should adopt in full the Court of Appeals' analysis of the harmless error issue in its decision in the present case.<sup>51</sup> Respondent briefed the harmless error issue below, so will not repeat it in detail here. A harmless error analysis has particular urgency here because this case cannot be retried.<sup>52</sup> That is because all three counts of child molestation first degree were charged identically in this case, and the jury acquitted on one identically-charged count. Therefore, under the reasoning of State v. Heaven, Double Jeopardy principles prevent the State from retrying this case.<sup>53</sup>

Given the fact that Beadle had the opportunity to commit these crimes when he lived with Lisa Burgess, and considering that B.A. made consistent statements to six people (B.A.'s statements to four people are clearly nontestimonial), and because her statements are remarkable for their stunning "ring of truth," the evidence here is overwhelming. Furthermore, this case should be decided with the purposes of the still-constitutional child hearsay statute in mind--a statute enacted to protect young victims like four-year-old B.A. from being further traumatized in

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<sup>50</sup> State v. Mason 160 Wash.2d 910, 927, 162 P.3d 396 (2007)(Confrontation Clause errors may be harmless using the "overwhelming untainted evidence" test) (citing State v. Davis, 154 Wash.2d 291, 304, 111 P.3d 844 (2005))

<sup>51</sup> State v. Beadle WL 282405, 6 -7 (2010)(*unpublished* lower-court decision in the present case). Respondent also discussed harmless error in its briefing filed below.

<sup>52</sup> State v. Heaven, 127 Wn.App. 156, 110 P.3d 835 (2005).

<sup>53</sup> *Id.*

the courtroom in these cases. And under the facts of this case, B.A. was undoubtedly traumatized by the very idea of having to enter the courtroom to testify. Accordingly, this Court should affirm but if any error is found, it should be considered harmless beyond a reasonable doubt.

CONCLUSION

For the reasons stated herein, together with the reasons set out in the State's briefing submitted below, this Court should affirm.

RESPECTFULLY SUBMITTED THIS 22nd day of September,  
2010.



LORE ELLEN SMITH, WSBA 27961  
Deputy Prosecuting Attorney  
LEWIS COUNTY PROSECUTOR'S OFFICE

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury that on this date a copy of the document to which this declaration is attached was served upon the attorney for the petitioner by United States mail, postage prepaid, addressed to Eric Nielsen, Nielsen, Broman & Koch, P.L.L.C. 1908 East Madison Street, Seattle, WA 98122.

Dated this 22nd day of September, 2010, at Chehalis, WA

