[CAPTION]

MOTION TO EXCLUDE HEARSAY STATEMENTS OF CHILD

The Defendant, by counsel, respectfully requests this Court to exclude from evidence any out-of-court statements made by the complaining witness, a child. In support of the Motion, the Defendant states the following:

1. The State has charged the Defendant with [insert offenses].

2. This cause is scheduled for a trial on [insert date].

3. The Defendant has reason to believe that at the trial of this cause, the prosecutor intends to introduce out-of-court statements made by the complaining witness. Specifically, [insert statements].

4. The out-of-court statements are inadmissible into evidence because:

    a. Each statement is a hearsay that does not fall under any exception to hearsay specified in the Indiana Rules of Evidence. Indiana Rules of Evidence 801; 802; 803 and 804.

    b. There has been no hearing concerning any of the statutory requirements, including unavailability of the complaining witness, which the State must prove before the hearsay statements can be admissible under I.C. 35-37-4-6. A party may not introduce testimony via the protected person statute if the complaining witness testifies in open court as to the same matters. Tyler v. State, 903 N.E.2d 463 (Ind. 2009). To allow both the hearsay and the testimony would create cumulative evidence which can be unfairly prejudicial. Id.

c. Even if the State were to attempt to meet the requirements for admissibility under I.C. 35-37-4-6, I.C. 35-37-4-6 is unconstitutional, as applied in this case, as it violates the Defendant's rights to equal protection of the law, his Sixth Amendment rights as outlined in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), his Article I, Section 13 right to confront his accuser and is in conflict with the Indiana Rules of Evidence.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to grant the Motion in Limine, exclude from evidence any out-of-court statements made by the complaining witness, a child, and for all other relief just and proper in the premises.

(Signature)

REFERENCES **CASBANK O.9.c.17**

I.C. 35-37-4-6(g) (requiring notice of intent to use statements within ten (10) days of trial).

CASE LAW

Crawford v. Washington, 124 S.Ct. 1354 (2004) (overturning Ohio v. Roberts, 448 U.S. 56 (1980), testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine; other "indicia of reliability" are not an adequate substitute for cross-examination. The Confrontation Clause commands "that reliability be assessed in a particular manner: by testing in the crucible of cross-examination"; "dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

Howard v. State, 853 N.E.2d 461 (Ind. 2006) (because there was no showing that a child witness was unavailable for trial within the meaning of the protected person statue, the trial court erred in allowing a deposition of the child witness into evidence. Because child was not properly found unavailable under I.C. 35-37-4-6, it was error to admit into evidence her pre-trial discovery deposition).

Anderson v. State, 833 N.E.2d 119 (Ind.Ct.App. 2005) (in child molesting prosecution, complaining witness's out-of-court statements to her great-grandmother were admissible under Indiana's Protected Person statute and Crawford v. Washington, but statements she made to detective and caseworker were "testimonial" and not admissible; Crawford held that Sixth Amendment prohibits introduction of testimonial statements in a criminal trial where the Defendant had no opportunity to cross-examine the person who made the statements). See also D.G.B. v. State, 833 N.E.2d 519 (Ind.Ct.App. 2005).

Perry v. State, 956 N.E.2d 41 (Ind.Ct.App. 2011) (admission of statements made to forensic nurse during an examination not only for medical treatment but also to collect evidence did not violate the Sixth Amendment right to confrontation when declarant was unavailable for trial).

State v. Velasquez, 944 N.E. 2d 34 (Ind.Ct.App. 2011) (statements to social worker were admissible as statements for purposes of medical diagnosis).

Carpenter v. State, 786 N.E.2d 696 (Ind. 2003) (in child molesting prosecution, hearsay testimony recounting three year-old complaining witness's statements to her mother and grandfather, and her subsequent videotaped interview failed to exhibit sufficient indicia of reliability to be presented to jury under Indiana's protected person statute, I.C. 35-37-4-6; hearsay testimony was unreliable because there was no indication the statements were made close in time to alleged molestations, statements themselves were not sufficiently close in time to each other to prevent implantation or cleansing, and during competency hearing, the complaining witness was unable to distinguish between truth and falsehood).

Miller v. State, 531 N.E.2d 466 (Ind. 1988) (under IC 35-37-4-6, requirement of corroborative evidence is separate from requirement of indications of reliability, and corroborative evidence cannot be used to bolster reliability; focus of the court should be upon time, content, and circumstances surrounding making of statement itself, not upon outside occurrences; while complaining witness' inability to understand nature and consequences of oath does not render statement inadmissible, it is significant negative factor; circumstances surrounding statements in this cases were not sufficiently reliable to make statements admissible).

Brady v. State, 575 N.E.2d 981 (Ind. 1991) (Indiana's confrontation right includes both right to cross-examine, and to meet witnesses "face to face"; videotape procedures where children do not have to see defendants violates Article I, Section 13 of the Indiana Constitution). See also Casada v. State, 544 N.E.2d 189 (Ind.Ct.App. 1989).

Harris v. State, 964 N.E.2d 920 (Ind.Ct.App. 2012) (in child molesting prosecution, trial court did not err in permitting complaining witness (CW) to testify at trial via two-way closed-circuit television. Based on testimony of a psychiatrist, a behavioral clinician and CW's grandmother, State was able to show that CW was a protected person who, if required to testify in physical presence of D, could suffer serious emotional harm. Although CW was not present in the courtroom, the defense was still able to cross-examine her via closed-circuit television).

Taylor v. State, 735 N.E.2d 308 (Ind.Ct.App. 2000) (finding of complaining witness' unavailability must be made, at least in part, on "testimony of psychiatrist, physician, or psychologist" and not solely on a trial court's observations).

Norris v. State, 53 N.E.3d 512 (Ind.Ct.App. 2016) (in deciding whether to declare complaining witness (C.W) unavailable to testify at D's trial for Level 5 battery, trial court did not err in considering additional testimony from a person who is not a psychiatrist, physician, or psychologist ("Evaluation Professionals") because the Protected Person Statute allows a Tr.Ct. to consider "other evidence," and this evidence may include testimony from a person who is not an Evaluation Professional. See Ind. Code 35-37-4-6(e)(2)(B)(i)).

J.V. v. State, 766 N.E.2 d 412 (Ind.Ct.App. 2002) (protected person statute applies in juvenile proceedings despite language in statute that states it applies to criminal action). But see Jordan v. State, 512 N.E.2d 407 (Ind. 1987) (construing the language limiting the post-conviction rules to criminal convictions to exclude juvenile adjudications).

L.H. v. State, 878 N.E.2d 425 (Ind.Ct.App. 2007) (juvenile court erred in incorporating all the testimony, evidence and exhibits from the child hearsay hearing into the fact-finding hearing; the protected persons statue contemplates a dual proceeding).

Pierce v. State, 677 N.E.2d 39 (Ind. 1997) (IC 35-37-4-6 does not require a trial court affirmatively to offer the defendant opportunity to cross-examine complaining witness after finding her to be incompetent; statute requires that the complaining witness be available for cross examination at admissibility hearing, if separate hearings are conducted, or combined hearing if that procedure is followed; here, complaining witness was available for cross- examination at

combined competency and admissibility hearing as required by IC 35-37-4-6, and the defendant waived his right to question her).

Nunley v. State, 916 N.E.2d 712 (Ind.Ct.App., 2009) (trial court abused its discretion by admitting a child victim's hearsay statement via videotape of her interview which occurred a year after the alleged molestation and initial disclosure of the molestation).

Horton v. State, 936 N.E.2d 1277 (Ind.Ct.App. 2010), *summarily aff'd on this issue,* 949 N.E.2d 346 (Ind. 2011) (in trial on nine counts of child molesting - six A felonies and three C felonies B trial court did not err in admitting a videotaped interview of R.M. under the recorded recollection exception to the hearsay rule).

NOTE

The Supreme Court in Tyler v. State, 903 N.E.2d 463 (Ind. 2009) dramatically changed the law in the area of child hearsay. Prior to Tyler, I.C. 35-37-4-6 permitted the trial court to introduce reliable hearsay statements of a complaining witness even if the witness testified at trial. The Tyler Court disapproved of this practice and held that when a complaining witness testifies, only hearsay statements that are admissible under the Rules of Evidence shall be admitted. In other words, hearsay statements are only admissible through I.C. 35-37-4-6 when the State alleges and proves the complaining witness is unavailable due to the trauma of testifying. Because the Tyler rule was implemented by use of supervisory power, the rule only applies prospectively.

Cox v. State, 937 N.E.2d 874 (Ind.Ct.App. 2010) (trial court abused its discretion allowing State to call child to the stand and play recorded interview in lieu of testimony and then allowing cross-examination; even if the procedure did not directly violate the letter of Tyler, it violated its spirit and the general principles announced in that opinion).
Kindred v. State, 973 N.E.2d 1245 (Ind.Ct.App. 2012) (drumbeat repetition of child's accusations made to investigators, grandfather and mother constituted fundamental error when considered with effect of improper vouching testimony).