

**COPY**

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**NO. 2007-KA-00579-SCT**

**FILED**

**MAY 23 2008**

**SYLVESTER BRANCH**

**APPELLANT**

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS  
**VERSUS**

**STATE OF MISSISSIPPI**

**APPELLEE**

**APPEAL FROM THE CIRCUIT COURT OF THE 1<sup>ST</sup> JUDICIAL DISTRICT OF  
HINDS COUNTY, MISSISSIPPI**

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**REPLY BRIEF BY APPELLANT**

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**Appellant Seeks Oral Argument**

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*Sylvester Branch v. State of Mississippi*

2007-KA-00579-SCT

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## ARGUMENT

Comes now Sylvester Branch, Appellant herein and pursuant to MISSISSIPPI RULE OF APPELLATE PROCEDURE 28(C) makes this, his *Reply to Brief of the Appellee* on assignment of error I. In so doing, however, Mr. Branch reiterates all errors, arguments and citation of authority in *Brief on the Merits by Appellant*, incorporated herein by reference, and in no way abandons other errors and issues not specifically addressed in this *Reply*.

**I. The trial court erred to the fatal prejudice of Mr. Branch when it permitted Bryan Irving, a self-described forensic interviewer, to testify as to the credibility of BB, as his testimony was irrelevant and inadmissible hearsay subject to no exceptions, and**

Mr. Branch respectfully disagrees with the arguments and authority submitted by learned counsel for the State on the basis such authority is inapplicable to the facts posed by this record. Mr. Branch would also most humbly submit that the testimony of Bryan Irving affirming the credibility of the child is of the type most jurisdictions prohibit due to its hearsay nature and impermissible bolstering.

Honored counsel for the state cites *Jones v. State*, 606 So.2d 1051 (Miss. 1992) for the proposition that Bryan Irving's testimony regarding witness credibility is acceptable.

Mr. Branch would disagree and respectfully ask this Court to look carefully at *Jones*, in which this Court found the testimony by Dr. Harriet Hampton, a duly licensed and practicing physician testifying as an expert, in error. "To the extent that Dr. Hampton's testimony may have been an opinion of M.J.'s truthfulness, allowing it was error." *Id.*, at 1058. The Court goes on to say that the proper question and response by Dr. Hampton was whether Hampton had a professional opinion as to whether the complainant in that case had been sexually abused. The physician's professional response was also found proper by this Court. *Jones* also recites long-standing Mississippi case law regarding testimony that becomes an impermissible comment on

→ Bad arg. - used case

truthfulness or improper bolstering as Mr. Branch submits occurred here. “In Williams v. State, 539 So.2d 1049 (Miss. 1989), we noted that opinion testimony as to a witness’s truthfulness is of ‘dubious competency.’ *Id.*, at 1051.

In the case at bar, however, Irving was not qualified as an expert pursuant to MISS.R.EVID. 702. Irving under cross examination admitted he lacked any personal knowledge of the events described by BB as required by MISS.R.EVID. 701 or 602. Finally, contrary to the ruling of the trial court, Irving was not a physician to whom BB had been referred for treatment; Irving’s own statements demonstrate clearly the primary purpose was to assess whether or not BB was telling the truth. T. 145. Mr. Branch submits Irving’s testimony regarding the credibility of BB’s accusations is outside the ambit of *Jones* and *Williams*, *supra*. Irving he was not testifying as an expert, BB was seen by a physician, Dr. Sorey for assessment and treatment, and by his own admission, Irving’s primary purpose was to assess BB for credibility and veracity. T. 142-143; RE 16.

But Branch never objected!

Nevertheless, as shown below, Irving, clearly neither offered nor qualified as an expert, commented often as to the credibility of BB, in violation of this Court’s long-standing case law and policy.

THE COURT: Yes, sir.

MR. POWERS: With respect to Mr. Irving, we believe that he should not be able to testify as to whether he thinks BB is *credible* or not because that’s obviously a jury question.

MS. NELSON: *Your Honor, he’s not going to testify as to whether she’s telling the truth. But at the Children’s Advocacy Center, they do assess for **credibility**.* [emphasis added]

THE COURT: In their own sense. Yes, that can come in. And the jury can make its own determination of credibility, but they can also look at other things in making their

determination. So, I'm not going to exclude him. But if you have any objections during it, you can certainly make them, and I'll rule on them then.

MR. POWERS: Okay. Thank you, your Honor.

THE COURT: But I think under the law he can come in and tell and give information regarding his assessment of her, and you can cross-examine him on his assessment or raise any objections at the appropriate time. Anything else?

T. 142-143; RE 16.

\* \* \* \* \*

Q. [BY MS. PURNELL] Okay. And what are you assessing for when you interview the child?

A. Well, several things. We're assessing one to see what type of referrals we need to make for the child, be they medical, psychological testing or whatever. You know, even educational a lot of times. We're also assessing for their **credibility** because an agency has referred them to us as the child is alleging some type of abuse, and they want more information. And they're wanting to know how **credible** their disclosure is. [emphasis added]

T. 145

\* \* \* \* \*

Q. Okay. And are there any factors that you look at to determine whether a child needs a referral or whether they're **credible** or not?

A. Well, as far as the referral goes, I mean if a child has made some kind of claim of abuse that could have caused physical damage, then definitely we refer them to a medical – for medical. If the child seems excessively traumatized or if there seems to be other issues that could be related to like attention deficit disorder or whatever, we'll refer them out for a psychological evaluation.

But as far as **credibility** is concerned, we look for things such as was the child consistent, did the story stay the same throughout the interview, was their logical sequencing is what we call it. In other words, you know, did the child say A to B to C. You know, did everything make sense. Did it go along with lines of what you would expect to have happened what she was saying.

We also look for contextual details. The more details the child can give, the more credible the report is. And we also look for things like suggestibility, you know, how suggestible is the child. Were I to make a mistake and ask her a question, or like if she made a comment and said one name and I said the other name, is the child capable of correcting me, you know. So, we look for that.

T. 147

\* \* \* \* \*

Q. Did you find BB to be **credible** in her disclosure?

A. *Yes, I did.*

Q. And what in particular did you note that made her **credible**?

A. Well --

MR. POWERS: Objection, Your Honor. That's a jury question.

THE COURT: Objection Overruled.

A. What I referred to awhile ago is what we look for, **credibility**. I talked about consistency. Throughout the interview she was consistent. Her story never changed. Her story was the same when she spoke to me as what I was later informed what she said when she left the hospital -- or DHS, excuse me. Her story didn't change there. She gave numerous contextual details.

T. 150-151; RE 19-10

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[CROSS-EXAMINATION]

Q. Correct. So, everything you know is based on what BB has told you, correct?

A. Everything I know is based on my experience and training and gaining information from children, correct.

Q. And you conducted this interview June 23, 2003, correct?

A. Correct.

Q. And that's 11 days after the incident allegedly occurred, correct?

A. Yes.

Q. So you don't know whether she had been coached or if anybody talked to her about what happened before you interviewed her, correct?

A. Well, as far as I was with her the whole time, no. However, you know, a lot of the things that I look for during the interview, the way she was able to tell the story about what occurred came directly from experience and not from someone telling her how something happened.

Q. But you can't say for a fact that she hadn't been coached, can you?

A. I can say, based on my experience and my training and *what I look for, for credibility*, she gave a *credible* report of what occurred.

T. 152-153.

Furthermore, Irving by his own admission saw BB once, unlike the therapist in *Hobgood*, 926 so.2d 847 (Miss. 2006), who testified only after providing extensive treatment and therapy to the complaining witness and who also had several years of doctoral level training. See *Brief on the Merits by Appellant*, pgs. 8-9.

In *United States v. Azure*, 801 F.2d 336 (8<sup>th</sup> Cir., 1986), the Eighth Circuit reversed and remanded the conviction of Anthony Azure for carnal knowledge of a female under the age of 16 for the abuse of discretion in admitting the testimony of a pediatrician as a child abuse expert

who opined the complainant was “believable.” *Id.*, at 339. In so doing, the Court declared “[c]redibility, however, is for the jury – the jury is the lie detector in the courtroom.” The effect of such evidence “may cause juries to surrender their own common sense in weighing testimony ...” *Id.*, at 340. [citing *United States v. Barnard*, 490 F.2d 907 (9<sup>th</sup> Cir. 1973); upheld the exclusion of expert testimony that a government witness was a sociopath who would lie under oath]. In *Snowden v. Singletary*, 135 F.3d 732 (11<sup>th</sup> Cir. 1998), the Court in a habeas corpus action reversed and remanded the child abuse convictions of Harold Snowden because of the admission of testimony by an expert that 99.5 % of children tell the truth and that he had never personally encountered a child who lied about abuse. *Id.*, at 737. Finding scant evidence otherwise supported the case against Snowden, the Court held “[p]ermitt[ing] an expert to vouch forcefully for the children’s credibility in this case was a ‘crucial, critical, highly significant factor.’” In addition, there was no adequate means to counter such a content; it truly was this expert’s opinion that child witnesses in sexual abuse cases tell the truth.” *Id.* at 739.

Irving did not testify as an expert, although the prosecutor certainly following a commonly used protocol of questions in establishing his *vita*. By his own admission, he lacked personal knowledge of the events he related. Irving was not in a treatment capacity; Dr. Sorey had treated the girl and a Dr. Berryman had earlier seen her. T. 118; 154. Nicole Branch had threatened her husband in efforts to end their marriage; by the time of trial, she was remarried. T. 171- 174. The allegations of BB came at the end of an acrimonious relationship Mr. Branch sought to save.

Finally, in BURTON’S LEGAL THESAURUS, among the many synonyms for the noun “credibility” are “appearance of truth,” “believability, believableness,” ... “reliability,” ✱ “trustworthiness, truthfulness,” ... “veracity.”


For these reasons, the significant testimony of Bryan Irving vouching for the credibility of BB, which goes beyond the limits set by this Court in prior case law, the cause of Mr. Branch should be reversed and remanded.

### CONCLUSION

Based on the authority cited herein and the authority and arguments recited in *Brief on the Merits by Appellant*, incorporated herein by reference, Mr. Branch respectfully asks this honorable Court to reverse his conviction due to the abuse of discretion by the trial in misapplication of the MISS.R.EVID. 803(4) exception to the rule against the use of hearsay and impermissibly invading the function of the jury.

Therefore, Mr. Branch humbly asks this honorable Court to vacate this conviction and remand this matter for a new trial.

Respectfully submitted,

  
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**Certificate of Service**

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the following:

Honorable Robert Shuler Smith,  
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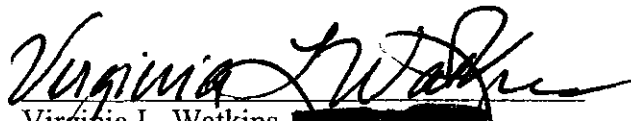
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So certified, this the 23<sup>rd</sup> day of May, 2008.

  
Virginia L. Watkins,  
Certifying Attorney