

**COPY**

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI  
NO. 2007-KA-00691-COA

BRYANT CARTER

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

**FILED**  
DEC 13 2007  
OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

**APPELLANT'S REPLY BRIEF**

**Oral Argument Requested**

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
George T. Holmes, MSB No. [REDACTED]  
301 N. Lamar St., Ste 210  
Jackson MS 39201  
601 576-4200

Counsel for Appellant

## **TABLE OF CONTENTS**

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REQUEST FOR ORAL ARGUMENT	1
REPLY ARGUMENT	1
Issue No. 1	1
Issue No. 2	2
Issue No. 3	3
Issue No. 4	3
Issue No. 5	4
CERTIFICATE OF SERVICE	5

## **TABLE OF AUTHORITIES**

### **CASES:**

<i>Brooks v. State</i> , 209 Miss. 150, 46 So.2d 94 (1950) .....	1
<i>Lattimer v. State</i> , 952 So. 2d 206 (Miss. Ct. App. 2006). ....	1
<i>Magee v. State</i> , 542 So.2d 228 (Miss.1989) .....	2-4
<i>Ross v. State</i> , 954 So.2d 968 (Miss. 2007) .....	1
<i>Scarborough v. State</i> , 893 So.2d 265 (Miss. App. 2004) .....	1, 4
<i>Sumrall v. State</i> , 758 So.2d 1091, 1094 (Miss. Ct. App.2000) .....	2-4
<i>Whigham v. State</i> , 611 So.2d 988 (Miss. 1992) .....	1, 4
<i>Williams v. State</i> , 539 So.2d 1049 (Miss. 1989) .....	3

### **STATUTES**

none

### **OTHER AUTHORITIES**

5th Amend. U. S. Const. ....	4
6th Amend. U. S. Const. ....	4
8th Amend. U. S. Const. ....	5
14th Amend. U. S. Const. ....	5
Mississippi Constitution Article 3 §28 .....	5
M. R. A. P. Rule 34 .....	1
Miss. R. Evid. 401 .....	2

## **REQUEST FOR ORAL ARGUMENT**

Pursuant to M. R. A. P. Rule 34, Appellant respectfully requests oral argument because this could be an important case in the area of expert witness testimony in suspected child abuse. The testimony of two state witnesses admitted as experts not only conflicted at trial, but more importantly for the Court, also appears to conflict with quoted testimony from a prior reported case from this Court.

This case also involves fundamental rights of due process and fair trial standards in the admission and exclusion of evidence. There is also a significant Constitutional fair sentencing issue here where the appellant was sentenced to life, to be served without parole.

## **REPLY ARGUMENT**

### **ISSUE NO. 1: *Expert Witness Issue***

The state failed to challenge the appellant's demonstration that the experts in the present case not only contradicted each other, which confirms their unreliability, but also ignored the state witness' contradiction of themselves as quoted from *Lattimer v. State*, 952 So. 2d 206, 220 (Miss. Ct. App. 2006).

Under the techniques and evaluative "art" of the two state "expert" witnesses, a child giving details and not giving details both indicate credibility, veracity and truthfulness. The state does not address the strong argument that the decision in *Ross v. State*, 954 So.2d 968, 996-97 (Miss. 2007), controls this issue and that since that the

accuracy of the witness' technique could not be substantiated in this case, the testimony was not any aid to the jury and was not relevant under Miss. R. Evid. 401 since the testimony did not have any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

Finally, in defense of being accused of mis-characterizing testimony, here is what witness Stovall's said after being asked how he determines if he is ever wrong about an evaluation, "But I can tell you to my knowledge, I've never been wrong." [T. 413-14]. When defense counsel then asked, "Has a jury ever disagreed with you?", Stovall's answer was "yes". *Id.*

The jury here was left with the impression that this witness is never wrong, "if we the jury disagree with him, we would be wrong." The Court should not, and surely will not, fall victim to the same fallacious logic.

#### ISSUE NO. 2: *Abuse of the tender years exception*

The state takes the position that the appellant did not cite authority and in doing so failed to respond to any of the appellant's arguments under this issue. According to the controlling authority, the state has, therefore, waived all opposition to the claimed error. *Sumrall v. State*, 758 So.2d 1091, 1094 (Miss. Ct. App.2000) and *Magee v. State*, 542 So.2d 228, 234 (Miss.1989). Under the authority cited initially, a reversal would be

required.

#### ISSUE NO. 3: *Coaching the witness*

The state did not address the appellant's argument. The appellant's complaint is that the witness was coached and led into identifying the appellant just like the witness was coached in *Williams v. State*, 539 So.2d 1049, 1052-53 (Miss. 1989). The state incorrectly argues "adequacy and sufficiency" of the identification. Once again, the appellant must suggest that the state has waived all opposition to the claimed error. *Sumrall v. State*, 758 So.2d 1091, 1094 (Miss. Ct. App.2000) and *Magee v. State*, 542 So.2d 228, 234 (Miss.1989). Under the authority cited initially, a reversal would be required.

#### ISSUE NO. 4: *Cumulative Evidentiary Errors*

The state's position in response to the appellant's claimed errors was that the arguments and authorities were "too absurd to warrant a response." The state fails to offer a legal or logical basis for this scurrility.

The state makes the suggestion that the claimed errors address no "substantial right" and refuses to respond to the appellant's argument. A reading of the appellant's brief proves the contrary. In addition to the so called "absurd" limiting of cross-examination argument affecting the "substantial right" of under the 6th Amendment, the

claimed errors concern basic due process and the prevention of Carter being allowed to respond to character evidence of the state as well as other claimed errors supported by sound legal precedent. If the right to respond to a charge is not substantial, American jurisprudence needs to be rewritten.

Once again, the state has failed, and on this issue, utterly refused, to respond to the appellant's arguments. There ought to be a consequence. According to the controlling authority, the state has waived all opposition to the claimed errors. *Sumrall v. State*, 758 So.2d 1091, 1094 (Miss. Ct. App.2000) and *Magee v. State*, 542 So.2d 228, 234 (Miss.1989). Under the authority cited initially, a reversal would be required.

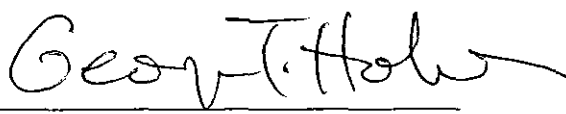
#### ISSUE NO. 5: *Sentencing*

The state claims that Carter's argument of a disproportionate sentence is procedurally barred. In response, the appellant would remind the court that the established principle reiterated in *Whigham v. State*, 611 So.2d 988, 995-96 (Miss. 1992) that "[a] trial error ... involving violation of a Constitutional right may reach such serious dimension, however, that this Court is required to address it, though first raised on appeal. [citing *Brooks v. State*, 209 Miss. 150, 46 So.2d 94, 97 (1950)]." The *Whigham* court addressed a closing argument issue raised for the first time on appeal because it concerned an improper comment on defendant's Fifth Amendment right to remain silent. *Id.* See also *Scarborough v. State*, 893 So.2d 265, 271 (Miss. Ct. App. 2004).

The appellant respectfully urges the court that this issue involving Carter's constitutional right not be subjected to cruel and unusual punishment under the 8th and 14th Amendments and Article 3 §28 of the Mississippi Constitution is of such constitutional import as to allow, and arguably require, the Court to address the issue.

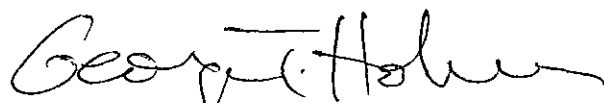
Respectfully submitted,

BRYANT CARTER

BY:   
GEORGE T. HOLMES,  
Mississippi Office of Indigent Appeals

**CERTIFICATE**

I, George T. Holmes, do hereby certify that I have this the 13<sup>th</sup> day of December, 2007, mailed a true and correct copy of the above and foregoing Reply Brief to Brief Of Appellant to Hon. Michael M. Taylor, Circuit Judge, P. O. Box 1350, Brookhaven MS 39602, and to Hon. Rodney Tidwell, Dist. Atty., 284 E. Bay St., Magnolia MS 39652, and to Hon. La Donna C. Holland, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid. all by U. S. Mail, first class postage prepaid.

  
George T. Holmes

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
George T. Holmes, MSB No. [REDACTED]  
301 N. Lamar St., Ste 210  
Jackson MS 39201  
601 576-4200