IN THE SUPREME COURT OF MISSISSIPPI

PAUL CLARK VALMAIN

v.

STATE OF MISSISSIPPI

NO. 2007-KA-01062-SCT

Appeal from Circuit Court of Neshoba County, Mississippi

BRIEF FOR APPELLANT

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Oral Argument **IS** Requested.

CERTIFICATE OF INTERESTED PERSON

PAUL CLARK VALMAIN

v.

STATE OF MISSISSIPPI

NO. 2007-KA-01062-SCT

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

Hon. Jim Hood
Attorney General
State of Mississippi

Hon. Mark Duncan
District Attorney

PAUL CLARK VALMAIN
Appellant

Edmund J. Phillips, Jr.
Attorney of Record for Paul Clark Valmain

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STATEMENT OF THE CASE

Paul Clark Valmain appeals his conviction from the Circuit Court of Neshoba County, Mississippi where he was convicted of Sexual Battery and sentenced to serve twenty-five (25) years in the custody of the Mississippi Department of Corrections.

At the time of the incident for which Appellant was indicted, the alleged victim, Cansas Faye Allen, was five years old (T-22). At the time of the trial she was six. She was the first witness called for the prosecution.

On objection to Cansas Allen's competency as a witness by Appellant's trial counsel, the Court held a competency hearing out of the presence of the jury. During the hearing, she sat in the lap of her grandmother, Mary Clark.

The following is part of the direct examination of Cansas Allen by the prosecutor (T-24, 25):

> Q. Have you got a birthday coming up pretty soon?
> A. (Affirmative nod)
> Q. You have to say it.
> A. Yes, sir.
> BY MS. CLARK: Open your mouth and talk.
> A. Yes, sir.
> Q. You see this lady here?
> A. Yes, sir.
> Q. She's writing down everything you say. She can't look up and see you nod your head. We need you to say it. Okay?
> BY MS. CLARK: She might be a little hard of hearing, so you might need to talk a little louder. Okay?

Q. (Mr. Brooks) Okay. Now, Cansas, how old did you say you were?
A. Five.
Q. Cansas, do you know what it means to tell the truth?
A. Yes, sir.
Q. And do you know what it means to tell a story that's not true?
A. Yes, sir.
Q. What is the difference?
A. Tell the truth.
Q. Is that what you're supposed to do?
A. Yes, sir.

The prosecutor covered the incident alleged in the indictment, leading continually (T-27, 28, 29):

Q. While you was taking a bath, he touched you on the private parts. Is that right?
A. Right.
Q. What did he touch you with?
A. With the bath cloth.
Q. With the bath cloth. What was in the bath cloth?
A. Nothing, just he touched me with the bath cloth with his finger.
BY THE COURT: I didn't understand what she said.
(Court Reporter reads back the answer.)
Q. What, if anything, did he do with his fingers?
A. He touched me with the bath cloth on my private parts.
Q. But did he just touch you or did he go further?
A. He just touched me, go a little farther.
Q. What did he do with his fingers?
A. He had the bath cloth in his hand.
Q. I can't quite hear you.
A. He had the bath cloth.
Q. he had the bath cloth.
A. (Affirmative nod)
Q. I'll ask you whether or not the bath cloth had any holes in it.
A. Yes, sir.
Q. You say it did?
A. (Affirmative nod)
Q. How was his fingers as to the hole?
A. It was to put it in there. He put it in there.

Q. You're going to have to speak up. I can't hear you.
A. He put his fingers in it.
Q. Put his fingers in the hole?
A. Yes, sir.

The Court overruled the objection on the ground that the child seemed to recollect the events well and no suggestive techniques were used to elicit her testimony.

In the presentation of the State's case-in-chief, Appellant objected to the grandmother sitting on the stand with the child and the Court overruled the objection (T-36):

> BY MR. MANGUM: I would object to the grandmother sitting up here, not that I'm adverse to someone sitting with her. I would be scared if one question or another was asked by Mr. Brooks and she was going to reply, that the grandmother could, through some sort of body language or holding or pulling her hand, could elicit any testimony from the child.
>
> BY THE COURT: I'm going to overrule your objection. This is a five-year-old child who is called upon to testify to a sexual act on her. It has got to be emotional to this child, certainly her being presented to the Court. The grandmother is called to sit by her, not the mother, but the grandmother is called to sit with her to give this child some comfort in a strange proceeding with about a hundred people in the courtroom including the ugly lawyers. I'll observe personally the conduct of the grandmother and I will assure you this Court will take it on its own to stop any prompting or prodding she give the small child.

After Cansas completed her testimony, Christy Allen, Cansas Allen' mother, testified that Cansas had spent the night with her brother (then age 6) in Paul Valmain's mobile home (T-56) and the next day was whiney and urinated on herself, that she told

this to the school counselor, Dusty Brown, who interviewed Cansas and referred her to Mary Judon of the Department of Human Services of the State of Mississippi who also interviewed her. Christy testified then that she took Cansas to Rush Hospital in Meridian.

She testified that Paul Valmain (T-60) had cared for her children many times.

Daniel Ferguson, Cansas' half-brother, was called and Appellant likewise objected to his testifying because of his youth. The Court denied the objection. He testified that he had gone into the bathroom while Appellant was bathing his sister.

On cross-examination he further testified (T-76, 77):

Q. Before you started doing your own baths, did somebody else give you a bath?
A. My mama.
Q. Did she use a rag?
A. Yes, sir.
Q. She washed your face - -
A. Yes, sir.
Q.. -- and arms with it?
A. Yes, sir.
Q. Okay. She washed your behind with it?
A. Yes, sir.
Q. And around your private parts?
A. Yes, sir.
Q. She washed your hair and everything else. Right?
A. Yes, sir.
Q. Is that what Paul was doing to Cansas? Was he wiping her off?
A. Yes, sir.
Q. And you didn't see him do anything else, did you?
A. No, sir.

Neshoba County Sheriff's office investigator Ralph Sciple testified for the State that Appellant made the following statement (T-93):

A. Yes, sir. I talked to Paul about the accusations against him. He stated that he had babysat Cansas and Daniel on that night, took them to the casino, went to the arcade. He said that

> Cansas had wet on herself; he went by Wal-Mart and bought her a pair of Dora pajamas and Dora panties, went back home, give her a sponge bath; then that she had spilled Coke on the pajamas and she had to sleep in one of his tee shirts.

and then invoked his right to counsel, whereupon his interrogation of Appellant was terminated. Sciple did not talk to Cansas Allen, but referred her to Wesley House, Meridian, Mississippi for a "forensic interview" (T-96).

He did not investigate the possibility that anyone else abused Cansas Allen.

Shalotta Sharp, R.N., sexual assault nurse examiner from Rush Foundation Hospital, Meridian, Mississippi testified for the State and was offered and accepted by the Court as an expert in the field of sexual assault examination.

Over hearsay objection overruled she testified that (T-102):

> A. The patient presented with the mother stating that she had been babysat by a neighbor, and upon coming home from this neighbor, complained of genital pain. The mother questioned the child - - I'm sorry. The school counselor, the child had revealed to the school counselor that she had been touched inappropriately, and the mother had stated that the child had genital pain and some behavior changes and that DHS was contacted and she was referred for an exam.
> Q. Did the history also determine or advise you as to who this neighbor was?
> A. Yes.
> Q. And who was the neighbor?
> A. Paul Valmain.

This information had been told her by the mother, not by the child (T-108).

Nurse Sharp further testified on direct examination that Cansas (T-103) had a rash on her buttocks, some redness on the inner lip of her genitalia and on the vaginal

vestibule and two clefts on the hymeneal tissue.

She testified (T-108) on cross examination:

Q. When they came in, who said anything about Paul Valmain?
A. The mother. That's who I received the history from.
Q. And you said that the cause of this could be irritation or trauma.
A. That's correct.
Q. It wouldn't necessarily have to be a trauma to the child. It could be something that might have irritated the area.
A. What area are you referring to?
Q. The vaginal area.
A. The hymenal area or the vestibule? It's documented in stages differently. Yes, there could be irritation to that area. Did I answer that correctly? I mean, did I answer your question, I guess, is what I'm trying to say.

She further testified (T-109, 110):

Q. Do you have different classifications that you classify these findings in?
A. We do.
Q. What classification did you label this exam?
A. This was based on the Adams Classification Scale. She was classed as three.
Q. I've got a copy of that scale. Can you kind of give me the TV version for what that classification means?
A. I can. It is concerning for abuse and it has a list of findings that are concerning for abuse. I can read them.
Q. That's okay.
A. Okay.
Q. It's a concern for abuse, but there's insufficient data that exists to prove that it was definitely sexual abuse?
A. Right.
Q. And you can't sit up here and testify that she was abused.
A. That's correct.
Q. And you certainly can't say who did the abuse, if anybody.
A. That's correct.
Q. The time period, you said you can't age this type of situation.
A. That's correct.

Q. I think you told me earlier it was kind of like trying to age a bruise.
A. That's correct.
Q. You can't say with any reasonable degree of certainty that it did or did not happen on that prior weekend, can you?

A. Could you rephrase that question? I'm sorry.
Q. That's okay. Can you with any reasonable degree of certainty say that that injury happened that weekend, the weekend complained of by the mother?
A. I don't know when it happened. I don't know specifically when it happened.

After her testimony, the State rested and Appellant moved for a directed verdict which motion was denied.

Carla Horne, licensed professional counselor and forensic interviewer for Wesley House, Meridian, Mississippi was offered by Appellant as an expert in counseling and forensic interviewing and was so accepted by the Court (T-118).

She testified that she had interviewed Cansas Allen under a Mississippi state directed protocol (T-119) including identifying various body parts.

She identified her written interview summary, Appellant offered it into evidence (T-120, 121) as an exhibit. The prosecutor objected because it was not the "best evidence" (T-121) and his objection was sustained.

Thereafter, the following colloquy took place (T-121, 122, 123):

Q. Based on your recollection, do you remember what Cansas said to you during the interview?
A. She stated when introduced touch inquiry that Paul had touched - - wait, that's Daniel. I'm sorry. The child disclosed that she was staying at Papaw Paul's trailer, which is next to her mom's best friend, Krystal Beckman's trailer. She explained that it was Krystal's birthday and she and her mom

went out to eat and to celebrate her birthday while Papaw Paul kept her brother, Daniel, and herself overnight. The child described Paul's bed being in the living room where he had a sleeping bag on the top as where she slept. The child stated that it was still - -

BY THE COURT: Just a minute. A narrative statement - - the objection to a narrative testimony is that any witness is subject to cross examination, and a narrative statement prevents that. So I want you to ask your questions and let the witness answer.

BY MR. MANGUM: Okay.

Q. Did Cansas state that Paul had touched her?
A. She did.
Q. And what type of touching did she say Paul did?
A. That he touched her with his hands on her body which she went on to clarify because she named both her vagina and her buttocks her body, she pointed to her buttocks, and that he touched her on her skin.
Q. On her skin and her body.
A. Right.
Q. Did you ask her if there were any more instances?
A. I did.
Q. And what was her response?
A. She denied that more happened.
Q. Did you have the same forensic interview with Daniel Ferguson?
A. I did.
Q. Did he disclose that Paul had touched his sister?
A. Yes, he said he walked into the room and witnessed it.
Q. What did he say he witnessed?
A. He explained a prior incident where Paul touched her between her legs with a rag; another incident, the child - - no, actually he denied - - when he walked into the room, which she said happened, that he walked into the room to get Paul's keys to get a toy out of the truck, and that Paul got mad and spanked him. However, he did not state seeing that happen.

Q. Did he claim that Paul whipped him or her?
A. Him. He got upset with him for asking for the keys.
Q. But didn't Daniel deny anything more between Paul and Cansas?
A. He did.

Appellant testified that he often cared for the two children at their house (T-131), had at one time dated Christy Allen, and that on the day of the incident (T-132-136) Christy Allen asked him to keep the children and:

Q. What time did they show up?
A. Like I said, approximately 3:30 that afternoon.
Q. What did y'all do from there?
A. The children mostly played outside for the first part of their stay with me because it was daylight outside and there was a swing set in the yard. Then probably 5:00 or 5:30 I asked the children if they were ready to go to the casino for dinner and then we would go to the arcade. We went to the casino, went to the Bristro 24 and got dinner. And then after dinner we went to the casino - - to the arcade. We got to the arcade probably about 6:30 and just played games with the kids could get toys afterwards.
Q. Okay. And it would probably be about 9:00 or 9:30 that we finally did leave.
Q. Okay. At the time you left, tell us what happened from there, leaving the arcade.
A. Okay. We left the arcade. We had to go back across the skywalk. Gong back across the skywalk Cansas told me she had wet herself. Well, we went on. We continued across and went to my car. I asked her, did you wet yourself, and she said yes. So we had to go to Wal-Mart and I had to - - I bought her a pack of Dora panties and a Dora pajama set.
Q. Let me stop you right there. Had Christy dropped any clothes off for Daniel or Cansas?
A. No, she didn't.
Q. Okay. Keep going.

A. Then that would have been, like I said, probably about 10:00 or so when we finally left Wal-Mart because the children, being children, they wanted to walk around the area that we were shopping in and look. We got back to my trailer probably 10:30 or so and Cansas and I did go into the bathroom. I set the pajamas and the panties on my little sink there. She got herself undressed while I was turned toward the tub, wetting the rag with warm water. I started with her face because she had had makeup on because she got a little cell phone thing that had makeup in it for children, and she had gotten that all over her face. So I had to wipe her face off, wiped her chest down, both arms, legs, and her vaginal area.

Q. The rag that you used, was there any holes in the rag?

A. No, sir, there was not.

Q. Did you do anything other than what was reasonable and necessary to bathe that child?

A. No, sir, I did not.

Q. Would you have bathed her had it not been for her wetting herself?

A. No, sir, I would not.

Q. Okay. After the bath, what happened then?

A. I had assisted her in getting dressed. Then we went into the living room and I had a little twin bed that I put in the living room because they had asked to sleep in the living room so that they could watch a movie. So, I put the movie in and just set it to play all night for them. Then I got myself ready for bed. And then I slept on the couch, turned the lights out after getting the children something to drink because they had asked for something to drink. Then Cansas said some of the drink had been spilled on the bed, so I had to turn the light back on. I replaced on the sleeping bags and then Cansas asked me if she could sleep in one of my tee shirts. I told her I had no problems with that. She removed her pajamas and then I put my tee shirt on her and the she went back to bed.

Q. Did you touch her in any way that was not necessary to put the shirt back on her?

A. No, sir, I did not.

Q. Okay. Now, the next morning what happened?

A. I'm not exactly sure what time the children woke up, but they did wake up before I did. Cansas changed back into her pajamas. She then went to the refrigerator where they had a pack of cookies that their mom had brought over. Then Cansas came to me, woke me up, and asked me if we could have cookies for breakfast.

Q. So you ate breakfast. What did you do after breakfast?

A. The kids played a little bit outside. They were just in and out of the trailer. I have a little telescope that I had set up on an entertainment center by a window and had the window open. There's a cow pasture across the road. The kids and I would look at the cows, and then we had lunch. Periodically thought the day Christy would call because she ended up having to go to the hospital Saturday night with the date of Krystal. And so she was keeping me up to date on that and making sure I would still be able to keep the children a little longer.

Q. What time did you finally take the children home?

A. It would have been about 5:30 Sunday evening.

Q. Did Christy call you and say, Hey, I'm back home?

A. Yes.

Q. And you went back to your trailer at that time?

A. No, I did not. I took the children to her and Christy was undecisive on whether she wanted to stay at her mom's or come back to Krystal's. Well, she finally decided she wanted to come back to Krystal's, so we all got back in my car, took the children to - - and Christy to Krystal's, and I came home.

Q. That was on a Sunday.

A. Yes, sir.

Q. the next day was - -

A. Was Monday.

Q. Which was a school day.

A. Yes, sir.

Q. Were you asked by Christy to do anything?

A. Yes, I was.

Q. What was that?

A. I was asked if I would be willing to take the children to school.

Q. Okay. Did you do that?

A. Yes, I did.
Q. Did you pick them up from school?
A. I believe I did.

BY THE COURT: Mr. Mangum, this is considerably beyond the date in the indictment. What's the relevancy of what you're doing?

BY MR. MANGUM: Judge, if the little girl's behavior was as bad as they made out, then, certainly she would not ask the Defendant to keep driving them back to school.

BY THE COURT: All right. Go ahead.

Q. The next Tuesday, did you take the kids to school?
A. Yes I did.

BY THE COURT: I think you can ask that question without all the details by the hours. I think you can ask that questions without going into all the details he's now going into.

BY MR. MANGUM. Judge, I'm finishing up.

Q. When did you first lean that you were being accused of something?
A. When I took Christy to the school on Tuesday afternoon, there was a confrontation between myself and the grandfather. And then they had to call security out to get him off of me. Then there was a lady, I am assuming from the office, come out and explained to me what was going on.
Q. Is that the first you had heard about it?
A. That was the very first time I heard about it.

SUMMARY OF THE ARGUMENT

1. Statements that indicate fault are not admissible into evidence as hearsay exception evidence under MRE 803(4) governing statements for purpose of medical diagnosis or treatment.

2. The State has the burden of proving each element of a crime beyond a reasonable doubt.

3&4. Hearsay exception standards under MRE 803(25) may not be substituted for the law governing competency of children as witnesses at trial.

ARGUMENT

I.

The Court Erred in Overruling Appellant's Hearsay Objection to the Testimony of Nurse Shalotta Sharp that Christy Allen Told Her That Appellant Sexually Abused Cansas Allen

Over hearsay objection overruled Nurse Shalotta Sharp testified that (T-102):

A. This is per my nurse's notes.
Q. Right.
A. The patient presented with the mother stating that she had been babysat by a neighbor, and upon coming home from this neighbor, complained of genital pain. The mother questioned the child - - I'm sorry. The school counselor, the child had revealed to the school counselor that she had been touched inappropriately, and the mother had stated that the child had genital pain and some behavior changes and that DHS was contacted and she was referred for an exam.
Q. Did the history also determine or advise you as to who this neighbor was?
A. Yes.
Q. And who was the neighbor?
A. Paul Valmain.

This information had been told her by the mother, Christy Allen, not the child, Cansas Allen.

In its ruling holding the quoted information admissible as a medical history, the trial Court was relying on MRE 803(4) providing that medical histories are an exception to the hearsay rule. However statements that indicate fault do not qualify under the rule and thus are not admissible. Caswell v. Caswell, 763 So. 2d 890 (Miss. App. 2000); United States v. Pollard, 790 F. 2d. 1309 (7th Cir. 1986).

Mississippi's leading case on admissibility of children's statements as medical histories under MRE 803(4) is Jones v. State, 606 So. 2d 1051 (Miss. 1992), in which the Court recognized that Rule 803(4) has been expanded in other jurisdictions to identify the perpetrator in child abuse cases.

The Court stated that there is a two part test for admitting hearsay under MRE 803(4): (1) "the declarant's motive in making the statement must be consistent with the purpose of promoting treatment"; and (2) the content of the statement must be such as is reasonably relied on by a physician in treatment." The Court stated that while statements concerning the identity of the actor or wrongdoer are seldom related to treatment or diagnosis as required by MRE 803(4), they might nevertheless be admissible if the abuser were a member of the victim's immediate household, because prevention, as part of the treatment, would require separation of the abuser and the victim. In Jones, the defendant, the victim's biological parent, did not reside in the child's household, and the Court refused to hold children's statements admissible when the alleged abuser and abused child did not reside in the same household.

Appellant did not reside in the household with the child. Therefore the statement was not admissible.

Another and more compelling reason that the statement did not fall within the exception of MRE 803(4) is that the declarant in the case before the Court was not the child victim but was instead her mother. No exception relating to statements by child abuse victims may thus be invoked to identify the alleged abuser in the case before the Court, because the statement herein was made by an adult (not by the victim.)

The verdict should be overturned.

II.

The Verdict Was Against the Overwhelming Weight of the Evidence

The only evidence of Appellant's guilt of the crime charged was the testimony by six year old Cansas Allen (T-42) who was led by the prosecutor in describing an incident that occurred when she was five years old, which testimony indicated that Appellant had inserted his finger in her vagina while he bathed her in the bathroom.

When she and her brother who saw this incident were interviewed by an expert forensic children's interviewer secured by the officials of the State, both indicated that no such incident had happened and stated that nothing untoward involving Appellant had happened.

In a criminal trial, the State bears the burden of proving each element of the offense charged beyond a reasonable doubt and of overcoming the presumption of innocence. Hedrick v. State 637 So. 2d 834 (Miss. 1994); Jones v. State, 798 So. 2d 124 (Miss. 2001); Edge v. State, 393 So. 2d 1337 (Miss. 1981); Love v. State, 208 So. 2d 755 (Miss. 1968). This constitutionally guaranteed right is an element of due process. In Re Winship , 397 U.S. 358, 361, 908 S. CT. 1068, 25 L. Ed. 2d. 368, 373 (1970).

The verdict should be overturned.

III.

The Court Erred in Overruling Appellant's Objection to Cansas Allen's Testifying

After the jury had been selected, before leaving the Court's chambers the Court began the following colloquy (T-22, 23):

BY THE COURT: Anything else out of the presence of the jury?
BY MR. MANGUM: Judge, we're going to have an immediate objection to their first witness. The objection is going to be the competence of her as a witness.
BY THE COURT: Competence of her what?
BY MR. MANGUM: As a witness.
BY MR. BROOKS: We're going to call the little girl first.
BY THE COURT: How old is she?
BY MR. BROOKS: She's six now. She was five at the time.
BY THE COURT: Have you got the rule book?
(OFF THE RECORD)
BY THE COURT: A statement made by a child of tender years is admissible if the Court finds in a hearing that the time, content, and circumstances of the statement provided substantial indicia of reliability and the child either testifies at the proceeding or is unavailable as a witness - - provided that when the child is unavailable, such statement may be admitted only if there is corroborative evidence.
Is the child going to testify?
BY MR. BROOKS: Yes, Your Honor.
BY THE COURT: Bring her in.

After the hearing the Court found (T-31, 32):

BY THE COURT: The Court is required to determine whether or not the testimony of the child would be substantial indicia of reliability. The child is five years old and is an intelligent child for five years. She understood the questions of Mr. Brooks and her responses were immediate and prompt. Then the child testified as to the conduct of this Defendant without being prompted or urged in any way. There was no suggestion made by the questions of Mr. Brooks, so I feel like that even though she is five years old, she has considerable reliability.

Now, I return to the comments of Rule 25. I want to look at this. This Court has nothing before it to indicate that the minor child here would lie. She's very obviously a very neat and clean child. There's one corroborating witness to her testimony, which is an older brother, which I understand is seven years old, that he saw the conduct with which this Defendant is charged. I have no information about when the child reported this. That was not developed before me. The child - - what is the relation of the child to this Defendant?

BY MR. MANGUM: Just personal friend, friend of the mother of the child.

BY THE COURT: The Defendant is a friend of the child's mother and he was a visitor in the home at that time according to the testimony of this little child. She recollects very well. It appears that she has reported this; it was made. I find no suggestive techniques used to elicit her testimony. I find no evidence of fabrication.

So we'll permit the child to testify. I think what I'm going to do is have her brought back here in chambers with Ms. Patti Lee and have her sworn here in chambers rather than out there in that courtroom.

The Court apparently applied law governing non-testimonial (hearsay) statements (MRE 803[25]) of children instead of our rules relating to competency of children as witnesses at trial.

In Brent v. State, 632 So. 2d 936 (Miss. 1994) the Mississippi Supreme Court, quoting with approval from Mohr v. State, 584 So. 2d 426 (Miss. 1991), held:

> **Before allowing a child witness to testify, the trial judge should determine "that the child has the ability to perceive and remember events, to understand and answer questions intelligently and to comprehend and accept the importance of truthfulness."**

The hearing testimony of Cansas Allen addressed truthfulness as follows:

Q. Cansas, do you know what it means to tell the truth?
A. Yes, sir.
Q. And do you known what it means to tell a story that's not true?
A. Yes, sir.
Q. Yes, sir.
Q. What is the difference?
A. Tell the truth.
Q. Is that what you're supposed to do?
A. Yes, sir.
Q. You watch TV, don't you?
A. Yes, sir.
Q. And you know that - - do you understand a lot of things on TV are not true. Do you understand that?
A. Yes, sir.
Q. What?
A. Yes, sir.
Q. But you understand what is true.
A. Yes, sir.

BY MR. BROOKS: She hasn't been sworn, has she?
BY THE COURT: She doesn't have to be for this hearing.

Q. (Mr. Brooks) We want you for this hearing to tell the truth. Okay?
A. All right.

Q. Are you going to tell us the truth?
A. Yes, sir.

This testimony did not extend beyond using the word truth to define truth, and thus failed to establish that she understood the meaning of truthfulness. Her pledge to tell the truth was meaningless if she did not "comprehend" truthfulness. Her extremely young age may have prevented her from doing so, but, if so, the Brent and Mohr factors should have prevented her from being a witness.

The Court found (T-31):

> Then the child testified as to the conduct of this Defendant without being prompted or urged in any way. There was no suggestion made by the questions of Mr. Brooks, so I feel like that even though she is five years old, she has considerable reliability.

Because she was led (asked Leading questions) throughout her hearing testimony, this finding by the trial court was simply incorrect.

This testimony failed to establish that she understood the meaning of truthfulness. Her pledge to tell the truth was meaningless if she did not "comprehend" truthfulness.

The verdict should be overturned.

IV.

The Court Erred in Overruling Appellant's Objection to Daniel Ferguson Testifying

When the State called Daniel Ferguson as a witness, Appellant objected to his testifying, on the ground that he was too young to be a competent witness. The Court held a hearing out of the presence of the jury. Daniel testified (T-64, 65):

Q. Daniel, do you know the difference between telling the truth and not telling the truth?
A. Yes.
Q. What happens to you if you don't tell the truth? Is that wrong to not tell the truth?
A. No - - yes.
Q. It is?
A. (Affirmative nod)
Q. You can get in trouble for not telling the truth, can't you?
A. Yes, sir.
Q. Now, when you were out there with your mama and those other people and you held up your hand - - do you remember, you held up your hand? You held up this hand first and your mama made you hold up the other hand?
A. Yes, sir.
Q. Do you know - - do you understand that you were saying you were going to tell the truth?
A. Yes, sir.
Q. Are you going to tell us the truth here?
A. Yes, sir.

and then testified that he saw Appellant bathing his half sister and touching her vaginal area in doing so.

The Court found (T-67, 68):

BY MR. BROOKS: That's what we would offer.

> BY THE COURT: The Court will permit the witness to testify. I make the same finding with this young fellow as I did with the previous young witness, who is Cansas Allen. I am of the opinion that his testimony has the indicia of credibility. Considering his age, considering his intelligence and his demeanor, it appears that he is very understanding and is well mature and developed for a seven year old; that he understands the proceeding; he understands the penalty for falsehood and he is willing to testify as to the truth.

The Court again apparently applied law governing non-testimonial statements (heresay) (MRE 803 [25] of children instead of our rules relating to competency of children as witnesses at trial.

In Brent v State, 632 So. 2d 936 (Miss. 1994) the Mississippi Supreme Court, quoting with approval from Mohr v Sate, 584 So. 2d 426 (Miss. 1991) held:

> **Before allowing a child witness to testify, the trial judge should determine "that the child has the ability to perceive and remember events, to understand and answer questions intelligently and to comprehend and accept the importance of truthfulness."**

The testimony did not extend beyond using the word truth to define truth and thus failed to establish that he understood the meaning of truthfulness. His pledge to tell the truth was meaningless if he did not "comprehend" truthfulness.

The Court erred in applying hearsay rules to a competency issue.

The verdict should be overturned.

CONCLUSION

The verdict should be overturned.

RESPECTFULLY SUBMITTED,

EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney, the Honorable Marcus D. Gordon, P.O. Box 220, Decatur, MS 39327, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: February 13, 2008.

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