IN THE SUPREME COURT OF OHIO

STATE OF OHIO	**CASE NO. 08-582**
Plaintiff-Appellant,	**ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT**
vs.	
DORON C. SILVERMAN	**COURT OF APPEALS CASE NO. 22097**
Defendant-Appellee.	

APPELLANT'S REPLY BRIEF

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY
By R. LYNN NOTHSTINE (COUNSEL OF RECORD)
REG. NO. 0061560
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
Appellate Division
P.O. Box 972
301 W. Third Street, Suite 500
Dayton, Ohio 45422
(937) 225-4117

COUNSEL FOR APPELLANT, STATE OF OHIO

MICHAEL COLUMBUS (COUNSEL OF RECORD)
2100 First National Plaza
130 West Second Street
Dayton, Ohio 45402

COUNSEL FOR APPELLEE, DORON C. SILVERMAN

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REPLY TO SILVERMAN'S MERIT BRIEF AND THE AMICUS BRIEF

This appeal was not improvidently allowed.

Silverman and the Ohio Public Defender as amicus in support of Silverman contend that the State has raised issues in this appeal that were not raised below is untenable. In both the trial court and the court of appeals, Silverman raised the issue regarding the necessity for a competence finding in addition to the test for admissibility set forth in Evid.R. 807 and complained that the trial court erred by admitting M. S.'s statements to his aunt without first determining he was competent when the statements were made. (Tr. 563; Silverman's Post-hearing Memorandum filed 11/15/06; Silverman's Merit Brief filed in the court of appeals on 8/10/07) Silverman cited *State v. Said* (1994), 71 Ohio St.3d 473, 644 N.E.2d 337 in support of his argument in both lower courts. Finding that the trial court failed to make a competence determination, the court of appeals held the admission of M. S.'s statements was error and reversed Silverman's conviction for gross sexual imposition. In doing so, the court of appeals relied principally upon this Court's decision in *Said*. The fact that Silverman and the court of appeals relied upon *Said* opens the door for the State to question whether *Said* is good law. Underlying both of the State's propositions of law in this appeal is the question of whether *Said* was wrongly decided and should now be reversed, in part. Since this Court is the only court that can answer the question of whether *Said* was wrongly decided, that issue has not been waived.

Silverman's Reply to the State's Propositions of Law flies in the face of the plain language of Evid.R. 807

In his reply to the State's propositions of law, Silverman incorrectly contends that a competence determination is necessary to the trial court's determination of whether a child's out-of-court statements regarding sexual abuse are trustworthy. The plain language of Evid.R. 807 shows the error in Silverman's contention. Evidence Rule 807 does not require a competence

determination to be made. Rather, the rule requires the trial court to consider the totality of the circumstances surrounding the making of the statement to determine whether there are particularized guarantees of trustworthiness that make the out-of-court statement at least as reliable as statements admitted under Evid.R. 803 and 804. The trial court must consider, for example, factors such as spontaneity, the internal consistency of the statement, the child's mental state and motive, or lack of motive, to fabricate. See, Evid.R. 807(A). The child victim's competence to be a witness at the time the statements were made is not one of the factors included in the rule's list of "circumstances surrounding the making of the statement" to determine its trustworthiness.

Moreover, this Court did not hold in *Said* that a competence determination is required before a trial judge may deem an out-of-court statement to be trustworthy under Evid.R. 807. On the contrary, this Court specifically noted that statements falling within Evid.R. 807 possess a "circumstantial probability of trustworthiness." *Said*, at 476, citing 5 Wigmore on Evidence (Chadborn Rev. 1979) 253, Section 1422. What this Court said in *State v. Said*, was that Evid.R. 807's test for trustworthiness of the out-of-court statement does not "dispose of the need to find a child competent." *Said*, at 476. In other words, this Court established that a child's competence to be a witness must be determined *in addition to* the trial court's finding that the test for admissibility set forth in Evid.R. 807, which includes a finding regarding the out-of-court statement's trustworthiness, has been satisfied. Thus, Silverman is wrong when he asserts that an in-person interview of the child is the only way to determine the trustworthiness of an Evid.R. 807 statement. (Appellee's Merit Brief, p. 6)

Silverman and the Ohio Public Defender assume that all Evid.R. 807 statements are inherently unreliable. This is simply untrue. The plain language of Evid.R. 807 contemplates

that in some cases a child-victim's out-of-court statements regarding sexual abuse will be as trustworthy and reliable as excited utterances and statements for medical diagnosis and treatment. Evid.R. 807(A). And Silverman's concern that defendants will be prosecuted on the basis of unreliable out-of-court statements is further undermined by the fact that Evid.R. 807(A)(3) requires the proponent of the statement to show the existence of independent evidence of sexual abuse before the child's statement will be admissible. The rule's requirement that the trial court determine the sexual abuse allegation is trustworthy, coupled with the additional requirement that independent evidence of sexual abuse exists, ensures that unreliable evidence will not be admitted under Evid.R. 807. The rigorous test for admission under Evid.R. 807 therefore makes a separate competence determination unnecessary. To the extent this Court came to the opposite conclusion in *Said*, it should now be reversed.

Silverman is likewise incorrect when he claims that *Said* does not prevent prosecution of child sex abuse cases when the competence of the child cannot be determined via an in-person interview. (Appellee's Merit Brief, p. 9) In cases such as the one now before this Court, that is exactly what *Said* does. The evidence against Silverman consisted of his own inculpatory admissions plus M. S.'s statements to his aunt Batya and her boyfriend (the corpus delicti). But the trial court could not have conducted an in-person interview of M. S. to determine his competence to be a witness because M. S. was killed before he could testify in this case. Therefore, as long as *Said* remains good law, Silverman cannot be prosecuted for his crime against M. S. despite the fact that Evid.R. 807(B)(3) expressly anticipates the application of Evid.R. 807 in cases where the child-victim is deceased.

And this case is hardly an anomaly in terms of the type of evidence that is available to prove sex crimes against children. As this Court is aware, in many sex abuse cases there is no

physical evidence or witnesses to the crime other than the victim. Consequently, *Said*'s holding that admissibility under Evid.R. 807 depends upon a child-victim's competence when he discloses sexual abuse, even though Evid.R. 807's test for admissibility is sufficient to ensure that only reliable out-of-court statements will be admitted under the rule, unnecessarily hampers the State's ability to prosecute sex offenders who target very young children and those who are incompetent to testify as well as cases in which the child is deceased or has become incompetent since disclosing the sexual abuse.

Further, Silverman has misconstrued the State's argument in support of its second proposition of law. The State did not argue that the child-victim's statement becomes more reliable after his death. Rather, the State is simply asking this Court to recognize the impossibility of presenting a deceased child to the trial court for a competence determination and, in the event this Court declines to reverse *Said*'s requirement that a child be found competent before his statements may be admitted under Evid.R. 807, to permit the State to prove competence by some means other than an in-person interview.

The Public Defender's argument that Evid.R. 807's reliability determinations are not really reliable and that all hearsay rules will be affected if this Court determines a separate competence determination need not be made before a trial court may admit Evid.R. 807 statements is unpersuasive. The admissibility test for Evid.R. 807 is so rigorous in that it requires the statements disclosing sexual abuse to be at least as reliable as Evid.R. 803 and 804 statements and further requires the existence of independent evidence of sexual abuse that a competence finding adds nothing to the admissibility determination. Moreover, there is no reason to believe a ruling by this Court that Evid.R. 807 does not require a determination that the

child-victim was competent to be a witness when he or she disclosed sexual abuse would be extended by lower courts to apply to other hearsay exceptions.

Finally, the Public Defender's claim that the jury in this case did not believe all of Batya Silverman's testimony about M. S.'s disclosure of sexual abuse is irrelevant. (Amicus Brief, p. 9) To begin with, this Court cannot know for certain why the jury acquitted Silverman of some charges; perhaps the jury believed every word of Batya Silverman's testimony but then misunderstood and misapplied the jury instructions to the facts. In any event, even if the jury did find that some portion of the testimony about M. S.'s statements was not credible that does not mean the trial court's ruling that the statements were admissible under Evid.R. 807 was error. The trial court's responsibility was not to make the ultimate credibility determination but to determine whether the circumstances surrounding the making of the statement indicated the statement was trustworthy enough that it could be presented to the jury at trial.

CONCLUSION

This Court should reverse that part of *State v. Said* that requires a trial court to hold an in-person interview with a child-victim to determine whether the child was competent to be a witness before his or her statements about being sexually abused may be admitted under Evid.R. 807. The test for admissibility under Evid.R. 807 is sufficient to ensure that only reliable out-of-court statements will be admitted. Thus, the trial court in this case did not err by admitting M. S's statements disclosing sexual abuse under Evid.R. 807 without first expressly determining that M. S. was competent to be a witness. The decision of the Second District Court of Appeals reversing Silverman's conviction should therefore be reversed by this Court.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY R. Lynn Nothstine
R. LYNN NOTHSTINE
REG. NO. 0061560
Assistant Prosecuting Attorney
APPELLATE DIVISION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was sent by first class mail on this 10th day of November, 2008, to Opposing Counsel: Michael Columbus, 2100 First National Plaza, 130 West Second Street, Dayton, Ohio 45402, and Frank A. Malocu, 130 W. Second Street, Suite 2100, Dayton, OH 45402-1505.

By: R. Lynn Nothstine

R. LYNN NOTHSTINE
REG. NO. 0061560
Assistant Prosecuting Attorney
APPELLATE DIVISION