IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-KA-00786-COA

RUBIN RENFROW — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF SIMPSON COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

Oral argument not requested.

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TABLE OF CONTENTS

STATEMENT OF THE CASE

On October 1, 2007, the Grand Jury of Simpson County issued a two count indictment against Reuben Renfrow, Appellant/Defendant, hereinafter referred to as Mr. Renfrow. Count I of the indictment alleged that:

> Rubin Renfrow, a male person over the age of 18 years in said county and state from and about April through and about May, 2005, did then and there willfully, unlawfully and feloniously for the purpose of gratifying his lust or indulging his depraved, licentious sexual desires, handle or touch or rub with his hands or other parts of his body, a male child under the age of sixteen years, in violation of Section 97-5-23(1) of the Miss. Code of 1972, annotated, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Mississippi.

On March 14, 2008, the State entered a Nolle Prosequi and moved that Count I of the indictment be dismissed without prejudice. (R.E. 1-2).

Count II of the indictment charged that:

> Rubin Renfrow, a male person over the age of 18 years in said County and State on or about the 21st day of March, A.D., 2006, did then and there willfully, unlawfully and feloniously by any means, including computer, possess photographs of an actual child engaging in sexually explicit conduct, in violation of Section 97-5-33(5) of the Miss. Code of 1972, annotated, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Mississippi. (R.E. 1-2)

The indictments arose from allegations by Mr. Renfrow's two minor grandsons made to Mr. Brian Ervin, a Child Advocacy counselor, concerning alleged inappropriate touching that allegedly took place in April or May of 2005. The day is unclear. An interview of the children by Mr. Ervin took place sometime around March 8, 2006 and was viewed by Officer Bernard Gunter of the Simpson County Sheriff's Office, sometime around March 16, 2006. At the time of the interview with Mr. Ervin, Randall Shawn Matthews, hereinafter referred to as "RSM" was six (6) years old, and Seth Matthews, hereinafter referred to as "SM", was four (4) years old. RSM allegedly told Mr. Ervin that his grandfather "touches" his "wee wee", allegedly made

RSM touch Mr. Renfrow's "wee wee" and that Mr. Renfrow showed him pictures of "kids" on the computer with no clothes on. "SM" allegedly told Mr. Ervin that his grandfather touched his "wee wee" and that he saw pictures of mommies and daddies on the computer with no clothes on. (Supplemental R. 10-18). Again all of this allegedly occurred in April or May of 2005. (Supplemental R. 1)

On March 21, 2006, Officer Gunter presented an affidavit for a search warrant which was issued the same day by the Simpson County Justice Court Judge. (Supplemental R. 2-3). On March 21, 2006, the search warrant was presented to Mr. Renfrow and *inter alia*, Mr. Renfrow's computer was taken. (Supplemental R. 4-7). Mr. Renfrow was originally arrested on March 21, 2006 on Count I, which was later dismissed by the State. (R.E. 35; R. 117-118).

Sometime in March, 2007, Officer Bernard Gunter left a card on Mr. Renfrow's door and "requested the presence of the Appellant to come to the Sheriff's Department immediately." (R.E. 21) When Mr. Renfrow arrived at the Sheriff's Department on March 16, 2007, he was allegedly given Miranda Warnings by Officers Gunter and Sheriff Kenneth Lewis, even though they both knew he was represented by counsel, they both asked Mr. Renfrow to sign a waiver a waiver of his rights on March 16, 2007 (Supplemental R. 8-9; R. 618-619).

On February 13th, 2008, Mr. Renfrow filed a Motion to View and examine evidence and asked the State to produce all evidence, including but not limited to, physical and tangible evidence, video tapes, audio tapes and any other evidence which may be in the possession of the State, any of its witnesses, or any other person or entity which it may use against defendant or which may exculpate defendant. (R.E. 14-16) Mr. Renfrow also filed a Motion to Suppress on this date, and moved the Court to suppress any physical evidence, any statement that he allegedly

made, and any statement that he made that was not voluntary. In his Motion to Suppress, Mr. Renfrow asserted that he did not waive his statutory or constitutional rights. (R.E. 17-18).

On February 28, 2008, Mr. Renfrow filed a Motion for Continuance on the basis that his attorney did not have adequate time to prepare for trial. Mr. Renfrow noted in his motion that the trial was set for March 19, 2008, that he had filed a Motion for Discovery on November 14, 2007, (R.E. 19-20), and that on February 8, 2008, three months after the Motion for Discovery was filed, and one month prior to trial, the Special Assistant Attorney General provided additional information pursuant to discovery, totaling 375 pages of complex information regarding computer forensics and 1 computer disk. (R.E. 11-13). In his Motion for Continuance, Mr. Renfrow also noted that an investigator with the State incorrectly listed the computer serial number on the property receipt report and that he had still been denied access to all of the State's evidence, particularly, the original hard drive and the original computer intact. (R.E. 19) As a result, the appellant requested additional time to conduct an examination of the records at the Attorney General's office. (R.E. 19) The trial was reset to March 25, 2008, just six days from its original trial date. (R.E. 34; R. 114-115)

On March 5, 2008, Mr. Renfrow filed an Amended Motion to Suppress once again petitioning the trial court to suppress any physical evidence, any statement allegedly made by Mr. Renfrow, particularly any statement that was not voluntary. Mr. Renfrow indicated that he did not waive his statutory or constitutional rights. Mr. Renfrow additionally moved to suppress evidence obtained as a result of search and seizure and in violation of the law and his constitutional rights. Mr. Renfrow further noted that the State failed to protect and secure the alleged evidence in this case, and it has been contaminated and subjected to potential virus infection. (R.E. 22-23).

On March 7, 2008, the Circuit Court Judge ruled on Mr. Renfrow's motions. Mr. Renfrow's attorney made a Motion to dismiss on the basis that the allegations under Section 97-5-33 were vague and unconstitutional. Mr. Renfrow's attorney argued that the indictment did not include any language about "knowingly or having any knowledge or intent." His attorney pointed out that in the actual statute, it says in certain subsections that the person must 'knowingly send, transport, ship, mail or receive', but that in subsection (5) of 97-5-33, it merely states 'possess' without requiring a *mens rea*. (R.156- 158)

The trial judge overruled Mr. Renfrow's Motion to Dismiss the Indictment, by finding that the word "willfully" that was contained in the indictment equated to the word "knowingly". The trial court specifically held that "while subsection (5) of 97-5-33 does not contain the word 'knowingly' or 'willfully' or anything like that, the word 'willfully' has been equated with 'knowingly' numerous times by our supreme court." The trial court noted that the indictment placed a higher burden on the State than the statute does and that "the State has nailed themselves down to proving that the defendant willfully, i.e., knowingly, possessed this alleged child pornography. The statute doesn't say they have to do it, but the indictment does. So that's what you're stuck with. So, for this case, that motion is denied." (R.159)

As to the Motion to Suppress, the trial court found that the physical evidence was legally seized, properly secured and properly protected, and therefore, should not be suppressed. The court further found that Mr. Renfrow's statement was given freely and voluntarily after having been read his constitutional rights and that he waived the same. The trial court further held that Mr. Renfrow failed to prove contamination and viral infections and failed to show a breach of the chain of custody. The Court indicated that the serial number on the computer was a

scrivener's error and thereby, overruled Mr. Renfrow's motion to suppress the physical evidence in this case. (R. 160-162).

On March 19, 2008, Mr. Renfrow moved to dismiss all charges against him in this case on the basis that the Attorney General's office had virtually taken control of the case and dictated what evidence the defendant could view or examine. Mr. Renfrow further noted in his Motion to Dismiss that the Attorney General's office made all the decisions concerning all witnesses and other documents to be offered at trial without any consultation or assistance from the District Attorney of the Thirteenth Circuit Court of the State of Mississippi, and that the Attorney General had also interfered with Mr. Renfrow's right to view and examine the evidence, and that all of this was in violation of the law which authorized the Attorney General to only assist the District Attorney in the prosecution of any cases in this district. Lastly, Mr. Renfrow indicated that he had been denied equal protection and due process, and that all charges made against him should be dismissed. (R.E. 38-40).

On March 19, 2008, Mr. Renfrow filed another Motion for Continuance alleging that he had still been denied access by the State of Mississippi to all the State's evidence in this matter, specifically, the original hard drive and the original computer intact as it was obtained from the Defendant by the Sheriff's Department and later delivered to the Attorney General's office. (R.E. 41-43).

Mr. Renfrow also filed a renewed Motion to Suppress and Motion in Limine on March 19, 2008. (R.E. 44-49). In his Renewed Motion to Suppress, Mr. Renfrow indicated that he was indicted on October 1, 2007. His trial date was set for March 25, 2008. The State dismissed Count I of the indictment that dealt with the alleged fondling or molestation charge which allegedly occurred in April or May of 2005. Mr. Renfrow was originally arrested on March 21st,

2006 on Count I that was then dismissed by the State. Mr. Renfrow noted in his renewed motion to suppress that by dismissing Count I of the indictment, the State has now confessed that Counts I and II have no connection. Mr. Renfrow further noted that the search warrant issued in this matter was issued March 21, 2006, about one year from the alleged occurrence in Count I. The evidence obtained allegedly in support of Count II of the indictment was obtained on March 21, 2006, without probable cause. Further that the search warrant issued on March 21, 2006 was so remote in time from the original incident of April or May, 2005 that all evidence concerning Count II must be suppressed (R.E. 44-46).

On March 24, 2008, the Court issued a Protective Order to allow Mr. Renfrow to view the original hard drive. Based on Mr. Renfrow's motion to view the original hard drive of Mr. Renfrow's computer and a subsequent hearing on the matter, the Court ruled that the State would make the original hard drive available to the defense for inspection and testing by Mr. Renfrow's designated experts on March 24, 2008 at the Attorney General office. The trial was re-set for March 26, 2008. (R.E. 50-51).

On March 27, 2008, after a trial on the merits, the jury returned a verdict finding Mr. Renfrow guilty of one count of possession of child pornography. (R.E. 52-53).

On April 3, 2008, Mr. Renfrow filed a Motion for Judgment Notwithstanding the Verdict or in the alternative, a Motion for a New Trial. (R.E. 54-56).

On April 21st, 2008, the Court entered an order denying Mr. Renfrow's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial. (R.E. 57)

On April 22, 2008, Mr. Renfrow filed a Notice of Appeal to the Supreme Court of Mississippi against the State of Mississippi from the final judgment entered in this case on

March 27, 2008, and from the denial of his Motion for Judgment Notwithstanding the Verdict or, in alternative, for a New Trial, by order entered on April 21st, 2008. (R.E. 58)

On May 6, 2008, the Circuit Court Judge entered a Final Judgment and Sentence of the Court, sentencing Mr. Renfrow to serve a term of fifteen years pursuant to his conviction under Mississippi Code Ann. 97-5-33(5). He further ordered that Mr. Renfrow register as a sex offender as required by law. (R.E. 63)

SUMMARY OF ARGUMENT

The jury's verdict was against the overwhelming weight and sufficiency of the evidence and the trial court committed reversible error in not granting a judgment notwithstanding the verdict or in the alternative, a motion for a new trial.

The trial court erred in denying the motion to suppress the physical evidence seized pursuant to the search warrant. Such denial constituted a violation of the 4th Amendment because the search warrant was issued so remote in time that it rendered the information stale, therefore causing a defect in the 4th Amendment, probable cause requirement.

The trial court committed reversible error when it admitted the statement allegedly made by Mr. Renfrow into evidence. The statement to the police officers was not made voluntarily, and was not signed. Therefore, the submission of the statement was highly prejudicial to Mr. Renfrow.

Mr. Renfrow's due process rights under the 4th Amendment were violated when the trial court failed to dismiss all charges pursuant to a constitutionally vague statute.

The trial court abused its discretion in refusal to grant a continuance in this case, and that abuse of discretion worked an injustice to Mr. Renfrow by not allowing his attorney the fair

opportunity for reasonable time to prepare for such a complex and technical trial. The State presented a volume of complex computer information less than one month before trial, despite Mr. Renfrow's attorney requesting the information three months prior. The trial court's failure to continue the trial to allow the defense more time to prepare was an abuse of discretion that was highly prejudicial to Mr. Renfrow.

The trial court erred in allowing the introduction of a copy of the computer hard drive instead of the original hard drive because there was no proof of a proper chain of custody. Therefore, the copy could have been contaminated.

ISSUE ONE

THE TRIAL COURT ERRED IN NOT GRANTING A JNOV OR IN THE ALTERNATIVE, A MOTION FOR A NEW TRIAL BECAUSE THE JURY'S VERDICT WAS AGAINST THE OVERWHELMING WEIGHT AND SUFFICIENCY OF THE EVIDENCE

The State contends that Mr. Renfrow is not entitled to a judgment or acquittal or a new trial, because Mr. Renfrow did not object to the State's closing argument that he knew that the photographs were on his computer. Nor did Mr. Renfrow object to the fact that the State mentioned in his closing that Mr. Renfrow saved the photographs in a file called "Pedo." Moreover, the State indicated in its brief, that the State's argument was supported by the evidence. Mr. Renfrow asserts that the admission of this evidence was objected to during the pre-trial motions, and thus the issue was preserved through the proper objection. Mr. Renfrow is not obligated to make continuing objections to the State's evidence regarding the "Pedo" file.

"A motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence, while a motion for a new trial asks that the jury's guilty verdict be vacated on the grounds related to the weight of the evidence." *Pearson v. State*, 937 So. 2d 996, 998 (2006);

citing *May v. State*, 460 So. 2d 778, 780-81 (Miss. 1984). Moreover, "[i]f the evidence is found to be legally insufficient, then discharge of the defendant is proper." *Pearson*, 937 So. 2d at 998, citing *Collier v. State*, 711 So. 2d 458, 461 (Miss. 1998). "By contrast, if the verdict is against the overwhelming weight of the evidence, then a new trial is proper." *Id.*

Mr. Renfrow maintains that the evidence does not support a conviction. The State in its brief, states that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony. Mr. Renfrow does not dispute this assertion but does assert that the verdict rendered is against the overwhelming weight of the evidence.

The indictment charged Mr. Renfrow with willful possession of child pornography. However, the evidence overwhelmingly revealed that Mr. Renfrow had limited knowledge of computers, and that as photographs popped up on his screen, he tried to delete them using the traditional method the same way he would delete an email, but that didn't work. (R 687).

Mr. Renfrow's testimony was corroborated by Nanette Pate, who testified that she found 38 viruses on his computer the first time she examined it. As part of the viruses, she found a porn net Trojan virus on Mr. Renfrow's computer. She testified that this type of virus prompts images to pop up on a computer screen. Ms. Pate also testified that she found a backdoor Trojan virus on Mr. Renfrow's computer that would allow someone to come into a computer using a back door method, and basically take control of the computer, without the owner's knowledge. She indicated that this type of virus can hide itself in the computer and appear to be something it's not sometimes (R. 740).

There was further testimony by Ms. Pate regarding an ICQ program that could allow someone to take control of a computer, by simply placing a pop-up message asking a person to "accept" a file, without revealing the contents of the file. Once the file is in the computer

through the ICQ program, Ms Pate testified that the ICQ automatically saves names or receives names or things and creates a folder on its own, without the computer owner having knowledge or control (R. 743-750).

Ms. Pate opined that Mr. Renfrow was a novice and was not very computer savvy. While examining his computer, she opined that her experience showed that Mr. Renfrow did not know how to properly access files to remove them from his computer. She also testified that contrary to Mr. Keith Leavitt's opinion, a file does not have to be opened for the access date to change. She noted that a virus scan could run on a computer, and the access date would change. (R.753 - 765).

Mr. Leavitt, the state's expert witness, testified that changing an IP address on a computer would not completely prevent anyone from loading or downloading information on Mr. Renfrow's computer. He further testified that he also found Trojan-downloader viruses and Spyware on Mr. Renfrow's computer. Although he opined that he didn't "feel" like the viruses could have manipulated the files, Ms. Pate testified to the contrary. (R. 559, 743-750).

Mr. Renfrow contends that given the ever-changing complexity of the technological industry with computers, the evidence that was presented, even that of the State's expert, was enough to cast reasonable doubt as to his guilt. Mr. Renfrow maintains that the evidence in this case does not support a finding of guilty beyond a reasonable doubt, when weighed as a whole. As a result, the trial court erred in not granting him a JNOV or in the alternative, a new trial.

ISSUE II.

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS ALL EVIDENCE OBTAINED BY THE BELATED SEARCH WARRANT.

Mr. Renfrow was originally arrested on March 21st, 2006 on Count I after a search warrant was issued in this matter on March 21, 2006, almost one year from the alleged occurrence in Count I that allegedly took place in April or May of 2005. He was not indicted until October 1, 2007. On March 14, 2008, the State subsequently dismissed Count I of the indictment that dealt with the alleged fondling or molestation charge which allegedly occurred in April or May of 2005. The allegations used to issue the search warrant also served as the basis for charging Mr. Renfrow with Count II of the indictment, relating to possession of child pornography. Mr. Renfrow alleges that the trial court erred in not granting his pretrial motion to suppress the evidence on the basis that the officers lacked probable cause in issuing the search warrant since the information pertaining to the alleged incident of April or May of 2005 was so remote in time that it rendered the search warrant stale. (R. 117-118).

The State submits that Mr. Renfrow failed to demonstrate an abuse of discretion and failed to show that the trial court erred in denying the motion to suppress. The State indicated that while staleness of information "may be a defect in probable cause for search warrants," it is but one factor in the totality of the circumstances.

The Mississippi Supreme Court has held that when reviewing a finding of probable cause to issue a warrant, a de novo standard for determining probable cause is not used. Instead the court determines "if there was a substantial basis for the magistrate's determination of probable cause." *Foley v. State*, 914 So.2d 677 (Miss. 2005)(citing) *Smith v. State,* 504 So.2d 1194, 1196 (Miss. 1987). This Court noted that the United States Supreme Court adopted the "totality of

circumstances" test set forth in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983), as being the test for "totality of circumstances." In *Illinois v. Gates,* the U.S. Supreme Court held that [t]he task of the issuing magistrate is simply to make a practical, common-sense decision based on all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information." *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). This state has held that probable cause is more than mere bare suspicion, but less than evidence that would justify condemnation. *See Wagner v. State,* 624 So.2d 60, 66 (Miss. 1993).

The State argues that this statement presented sufficient evidence to warrant probable cause for a search warrant one year later. At this stage, even if the Court finds that probable cause existed in 2005, the time lapse of almost one year certainly rendered the search warrant stale. "In making an assessment of probable cause for issuance of a search warrant, one of the factors the warrant-issuing judge must consider is whether the events or circumstances constituting probable cause, occurred at a time so remote from the date of the affidavit as to render it improbable that the alleged violation of law authorizing the search was extant at the time." *Patterson v. State,* 2001 ND 57, 623 N.W.2d 409 (N.D. 2001).

In *Flake v. State*, 948 So.2d 493(Miss.Ct.App. 2007), the Mississippi Court of Appeals reasoned that staleness of information may be a defect in probable cause for search warrants, but that it is only one factor in the totality of circumstances for establishing the existence of probable cause. *Flake v. State*, 948 So.2d at 496 (citing) *Lee v. State*, 435 So.2d 674, 676 (Miss. 1983). The *Flake* Court noted that our supreme court has additionally held that the affidavit will be interpreted in a common sense manner "when the circumstances are detailed, the reason for

crediting the source of information is given, and the judicial officer has found probable cause." *Flake v. State*, 948 So.2d at 496 (quoting) *Meyer v. State,* 309 So.2d 161, 165 (Miss. 1975).

Mr. Renfrow contends that while staleness is but one factor in the totality of circumstances analysis, based on the totality of circumstances before him, the issuing magistrate did not make a practical common sense decision in issuing the affidavit. The affidavit was issued more than one year after the allegations and was premised on knowledge presented by two small children. It is reasonable to infer that children sometimes mix their facts or become confused about situations that might not have actually occurred. This fact is corroborated by evidence that the children allegedly told Mr. Brian Ervin, counselor of the Children's Advocacy Center, that they saw pictures of children on their grandfather's computer and pictures of children on the tractor. (Supplemental R. 10-18). The facts showed that the pictures of the children on the tractor were pictures of the children fully clothed and were not 'obscene' pictures as defined by the statute. Mr. Renfrow maintains that the information relied upon by the two young children almost one year after the alleged incident cannot be deemed credible for the above stated reasons and because the children were unable to give a specific date for the alleged incident. When asked about the incident, the children could not remember the date.

Given the totality of the circumstances, the Court should reverse Mr. Renfrow's conviction on the basis that the issuing magistrate did not have probable cause to issue a search warrant.

ISSUE III.

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE ALLEGED STATEMENT OF THE DEFENDANT.

Prior to the trial, Mr. Renfrow made a motion to suppress his statement on the basis that the statement was not given voluntarily, and further that he did not waive his rights, especially

since at the time, he was represented by an attorney. Deputy Gunter served an arrest warrant on Mr. Renfrow at his residence on March 21, 2006. At this time, Deputy Gunter read Mr. Renfrow his Miranda warning. (R. 43). After Mr. Renfrow was taken to the Simpson County Sheriff's Department, Deputy Gunter once again stated he read Mr. Renfrow his rights, and Mr. Renfrow signed a written acknowledgment of those rights, but chose not to waive his rights. (R. 54-55). On March 7, 2008, Deputy Gunter testified during the pretrial motions, that on March 16th, 2007, Mr. Renfrow appeared at his office and asked to speak with him, and at this time, Deputy Gunter once again read Miranda warnings to Mr. Renfrow, and that after hearing the warnings, and reading him his rights, Mr. Renfrow waived his Miranda rights. (R. 54-57). Mr. Renfrow maintains that he did not just voluntarily show up at the Sheriff's office, but that Officer Gunter left a card on his door with a statement on the back that "Sheriff Lewis requests you to the Sheriff's Department immediately."

Mr. Renfrow had already hired an attorney and the Sheriff's Department was aware of this fact. Yet despite this fact, they enticed Mr. Renfrow to provide a statement. Mr. Renfrow's oral statement was simply that he knew that he had pornography on his computer but that he was trying to delete it since he did not know who sent the information. Mr. Renfrow maintains that there are two problems with this alleged confession. First, the written statement that was introduced into evidence, did not represent Mr. Renfrow's true statement to Officer Gunter, but was a summary concocted from Officer's Gunter's memory as to what Mr. Renfrow had told him earlier. After Mr. Renfrow went upstairs to booking, Officer Gunter discovered that the recording equipment did not record the statement. Instead of bringing Mr. Renfrow back downstairs to re-record another statement, Sheriff Lewis allowed Office Gunter to write out a

statement about what he thought Mr. Renfrow said which was never signed by Mr. Renfrow. (r. 651-660).

The State in its brief, argues that Mr. Renfrow has not met his burden of proving that the trial court's ruling on the admission of his statement was not manifest error or contrary to the weight of the evidence. The State incorrectly stated that Mr. Renfrow initiated the interview and that he gave the statement freely, knowingly and voluntarily. As stated in the original brief, Mr. Renfrow's presence at the Sheriff's office was " immediately requested" by Sheriff Lewis.

Secondly, Officer's Gunter's written statement about what he thought Mr. Renfrow told him was never signed by Mr. Renfrow. (R. 651-660). *See eg. Craft v. State*, 380 So.2d 251, 254 (Miss. 1980)(holding that the admissibility of an undersigned statement becomes an issue of the accuracy of the statement rather than its voluntariness). Mr. Renfrow contends that the fact that he never signed the written statement, certainly questions the accuracy of the statement. This Court in *Craft,* adopted the holding of the U.S. Supreme Court in *Wong Sun v. U.S.*, 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), which found that "[t]he fact that the statement was unsigned, whatever bearing this may have upon its weight and credibility, does not render it inadmissible." In rendering an opinion in *Craft,* the Court found that language controlling because they noted that Craft himself corroborated the testimony of the officers by acknowledging the accuracy of the transcript of his oral statement. The Court compared *Ray v. State,* 213 Miss. 650, 57 So.2d 469 (1952), in which the Court held that an accused's confession taken by a tape recording was properly admitted into evidence when it was shown to be an accurate reproduction of the accused's statement. Mr. Renfrow contends that this case is distinguishable from those cases because his alleged statement was never shown to be an accurate reproduction of what he stated. Also, Mr. Renfrow notes that his statement was not

made voluntarily, and was done so by the enticement of Officer Gunter. This is the only evidence that the jury could consider in reaching its verdict and finding as instructed, that Mr. Renfrow knew the photos were on his computer. As a result, the admission of this statement into evidence was highly prejudicial to the appellant, and should have been suppressed by the trial court.

IV.

THE TRIAL COURT ERRED IN FAILING TO DISMISS ALL CHARGES ON THE BASIS THAT THE STATUTE UNDER WHICH THE DEFENDANT WAS INDICTED IS UNCONSTITUTIONALLY VAGUE AND VIOLATES THE DEFENDANT'S DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT.

During the pre-trial motions, Mr. Renfrow moved to dismiss his indictment on the basis that the statute under which he was indicated was unconstitutionally vague for failure to include a mens rea element, and therefore violates his due process rights guaranteed by the Fourteenth Amendment. (R. 156-158). Mr. Renfrow contends that the trial court erred when it failed to dismiss all charges pursuant to the unconstitutionally vague statute.

The State in its brief correctly noted that the test relating to statutory construction when a statute is under constitutional attack, is "whether a person of reasonable intelligence would, by reading the statute, receive fair notice of that which is required or forbidden." *Richmond v. State*, 751 So. 2d 1038, 1048 (Miss. 1999). The State went on to quote *Wright v. State*, 236 So. 2d 408, 413 (Miss. 1970), which holds the proposition that "[t]he legislature may define a crime which depends on no mental element and consists only of forbidden acts or omission." Moreover, "[t]he intent to do the forbidden act is the only intent necessary to complete the offense." *Roberson v State*, 501 So. 2d 398, 401 (Miss. 1987). The Court in *Wright,* held that statutes "which do not require 'guilty knowledge' have been generally held to be constitutional [citations

omitted], unless such laws invade some specific constitutional right. *Wright,* 23 So. 2d at 414, citing *State v. Johnson,* 163 Miss. 521, 141 So. 338 (1932).

Mr. Renfrow maintains that the statute did invade a specific constitutional right, that of due process as guaranteed by the 14th Amendment. This statute plainly failed to comport with due process in that it was so vague, that a person of ordinary intelligence would not have been given fair notice of what was prohibited. *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000).

The State has indicated that our legislature may define a crime that depends on no mental element and consists only of forbidden acts or omissions. *Roberson v. State,* 501 So. 2d at 401. However, *Roberson* held that in these instances where the legislature defines a crime with no mental element, "the intent to do the forbidden act is the only intent necessary to complete the offense." Mr. Renfrow maintains that "intent" is part of the **mental element or mens rea (emphasis added),** associated with knowingly committing a forbidden act, and thus, this Court should find that the statute was vague because it lacked the necessary mens rea element so that a person of reasonable intelligence would have been presented with fair notice of the act prohibited.

In the alternative, Mr. Renfrow submits that even if this Court finds that the statute was not vague, and did not violate Mr. Renfrow's constitutional rights, the Court should nevertheless find that Mr. Renfrow failed to possess the intent necessary to do the forbidden act. As the evidence overwhelmingly revealed at the trial, and in issue one of this Brief, Mr. Renfrow had very limited knowledge of the workings of computers and viruses, and how viruses can infiltrate into a computer system and place unwarranted material in the system without a computer owner's knowledge.

V.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO CONTINUE THE TRIAL IN ORDER TO ALLOW THE DEFENSE MORE TIME TO PREPARE.

Mr. Renfrow was indicted on October 1, 2007. On November 14, 2007, Mr. Renfrow's attorney filed his Motion for Discovery, but was not provided with the State's information until February 8, 2008, some three months after the discovery request. The State then provided 375 pages of complex and technical information regarding the break-down of the computer and 1 computer disk. Based on this Motion, the trial judge reset the case to March 25, 2008, just six days from its original trial date. However, this short time frame from the original trial date was insufficient time to allow Mr. Renfrow's attorney to prepare for a case of such a complex nature.

"The grant or denial of a continuance lies within the sound discretion of the trial court." *Hughey v. State,* 512 So.2d 4, 6 (Miss.1987)(citing) *Gates v. State,* 484 So.2d 1002, 1006 (Miss.1986); *Carter v. State,* 473 So.2d 471, 475 (Miss.1985). "It is well established in Mississippi that trial judges have broad discretion in granting a continuance." *Norman v. State,* 385 So.2d 1298, 1302 (Miss.1980). To prevail on an issue of the trial judge's refusal to grant a continuance, the defendant must show not only abuse of this discretion, but also that the abuse actually worked an injustice in his case. *Morris v. State*, 595, So.2d 840, 844 (Miss. 1992) citing *Arteigapiloto v. State*, 496 So.2d 681, 685 (Miss. 1986); Miss. Code Ann. § 99-15-29 (1972).

In the case of *Barnes v. State*, 249 So.2d 383 (Miss. 1971), the defendant argued on appeal that he should have been granted a continuance and that the failure to grant him additional time to prepare for trial was prejudicial. The Supreme Court reversed and remanded the case, finding that the facts of the case were close, and based on the overall record, that the defendant/appellant should have been given a fair opportunity to present all the evidence

available, and to that end a new trial was granted. *Barnes v. State*, 249 So.2d at 384-385. The Court held that "[t]he application for continuance upon the ground that the attorney for the defendant has not had a reasonable time to prepare for trial is different from an application for continuance on the ground that there is an absent witness. *Id.* The standard for the former is that a motion for continuance upon the ground that an attorney has not had sufficient time to prepare for trial is subject to proof and also to facts as they may appear from that which is known to the trial court. *Id.*

The State argues in its brief that the trial court did not err in denying the motion for continuance because the court "properly" found that the State had provided ample opportunity for the defendant to view the hard drive and that it had provided "two clones for the defendant." The State quoted the prosecutor during the post-trial motions:

> If you recall, there was a prior indictment and Mr. Stubbs had ample notice that there was a hard drive in this computer. And it was not until two weeks prior to trial that he decided that he needed an expert, and that was certainly not within the rules of the Court. (R. 839).

The State argues that in light of these foregoing facts, Mr. Renfrow cannot show that the trial court abused its discretion in denying the motions for continuance or in denying the motion for new trial on this ground; nor can he show prejudice to his case.

Mr. Renfrow maintains that given the complex nature of these types of cases dealing with computer forensics and computer technology, his attorney and expert did not have ample time to go through this newly submitted evidence which consisted of 375 pages of complex and highly technical information. Nor did the attorney have time to view the original hard drive and computer. The searches of computers require careful scrutiny due to the extraordinary and vast volume of information that may be stored on them. Considering this factor and the seriousness of what the appellant was charged with, coupled with the complexity of computer technology,

hackers and computer viruses, Mr. Renfrow contends that his attorney was not given adequate time to prepare for his trial. Therefore, Mr. Renfrow asserts that the trial court abused its discretion in not continuing the trial for a period in which to allow a sufficient defense, and further, the abuse of this discretion was highly prejudicial to Mr. Renfrow.

VI.

THE COURT ERRED IN ALLOWING INTRODUCTION OF A COPY OF THE COMPUTER HARD DRIVE INSTEAD OF THE ORIGINAL COMPUTER HARD DRIVE BECAUSE THE STATE FAILED TO PROVE THERE WAS NO BREACH IN THE CHAIN OF CUSTODY OF THE COPY.

In Mr. Renfrow's amended Motion to Suppress, Mr. Renfrow alleged that the copy of the computer hard drive should not have been allowed because of possible contamination and viruses as well as a breach in the chain of custody of the copy. Mr. Renfrow also addressed the erroneous serial numbers of the computers that were reflected on documents S-4 and S-5. (R.E. 22-23; 44-46; R. 161). The trial court held that the chain of custody was properly established by the State's custodian and that the erroneous serial numbers were the result of clerical error which did not render the evidence inadmissible. The trial court further noted that testimony was given that the write block hardware was affixed, which created a presumption that the computer was not contaminated nor subjected to potential viral infection while in the State's possession. The trial court therefore, denied Mr. Renfrow's motion to suppress and amended motion to suppress. (R. 160-162).

The test of whether there has been a proper showing of the chain of possession of evidence is whether there is any reasonable inference of likely tampering with or substitution of evidence. *Williams v. State, 794 So.2d 181* (Miss.2001). The burden to produce evidence of a broken chain of custody is on the defendant. *Id.* This Court has held that issues pertaining to the chain of custody are largely left to the discretion of the trial court, and will not be disturbed

unless the discretion has been abused. *Brooks v. State,* 761 So. 2d 944, 948 (Miss. App. 2000), citing *Doby v. State*, 532 So. 2d 584, 588 (Miss. 1988).

Mr. Renfrow contends that the trial court has abused its discretion in this case. Mr. Renfrow contends that because so many people had access to the Attorney General's evidence vault and made copies from the original hard drive, the likelihood of contamination and viral infections was substantially increased. Concomitantly, Mr. Renfrow maintains that with so many people having access to the original hard drive, a proper chain of custody could not have been established, which would have ensured that the original hard drive and copies were not tampered with. Additionally, Mr. Renfrow maintains that the integrity of the original hard drive was not protected because there was no fail safe system in place that would have insured the maintenance of the integrity of the original. Mr. Renfrow would also point out to the Court Mr. Leavitt's testimony that when he removed the hard drive from the vault, he knew that there were bad sectors on the hard drive. These facts certainly present issues regarding whether a proper chain of custody was established, and whether or not the original hard drive and subsequent copies were contaminated.

As a result, Mr. Renfrow maintains that the Court erred in allowing the introduction of the copy of the hard drive as opposed to the original.

CONCLUSION

The evidence in this case does not support a showing that Mr. Renfrow committed this crime, and therefore, it does not support a conviction. The trial court should have granted Mr. Renfrow a judgment of not guilty notwithstanding the verdict or in the alternative, should have

granted him a new trial. Mr. Renfrow prays that this Court reverses the decision of the lower court on this issue.

The evidence shows that there was a defect in the probable cause requirement necessary to issue a search warrant due to the remoteness in time between the alleged incident and the search warrant. The remoteness in time rendered the information stale, and thus Mr. Renfrow prays that the Court reverse his conviction on the basis that no probable cause existed to issue a search warrant on Count II. Additionally, given the totality of the circumstances, this Court should reverse Mr. Renfrow's conviction on the basis that the issuing magistrate did not have probable cause to issue a search warrant.

Mr. Renfrow did not voluntarily make a statement to Officer Gunter. His statement was enticed, and was not signed. Therefore, there was error in the voluntariness and accuracy of his statement, and the admission of this statement into evidence was highly prejudicial to Mr. Renfrow. It was the only piece of evidence the State had to show Mr. Renfrow had any intent. The trial court erred when it did not suppress the statement. Mr. Renfrow, therefore, prays that this Court reverse his conviction on the basis that he did not voluntarily make a statement.

Section 97-5-33(5) of Mississippi Code Annotated is unconstitutionally vague in that it does not contain a mens rea requirement. The lack of a mens rea requirement created an indeterminacy factor which prevented Mr. Renfrow, a person of ordinary intelligence, from receiving fair notice of what conduct was prohibited. This section of the statute itself, makes mere 'possession', the actus rea, a crime, without implementing a 'mens rea' requirement. As a result, Mr. Renfrow's 14th amendment due process rights were violated. Mr. Renfrow prays that this Court find this statute unconstitutionally vague, and thereby, reverse his conviction.

In the alternative, Mr. Renfrow prays that should this court find that the statute was not vague, and did not violate Mr. Renfrow's constitutional rights, this Court should nevertheless reverse the conviction on the basis that Mr. Renfrow failed to possess the intent necessary to do the forbidden act.

The evidence revealed that the State waited until less than one month before trial to present Mr. Renfrow's attorney with 375 pages of complex and technical computer information. The trial court extended the trial date just six days after its original date, which did not allow Mr. Renfrow's attorney adequate time to prepare for trial. As a result, the trial court abused its discretion, and the abuse of discretion was highly prejudicial to Mr. Renfrow. Mr. Renfrow prays that this court reverse his conviction as a result of this abuse of discretion.

Sufficient evidence was presented at trial to show that the State failed to establish that there was no breach in the chain of custody of the original hard drive or tampering and contamination of the hard drive copy that was submitted in lieu of the original hard drive. There was no fail safe system in place to maintain the integrity of either the original hard drive or the copy. The trial court erred in not requiring the introduction of the original hard drive as opposed to a copy. Mr. Renfrow prays that this Court reverse his conviction on the basis that this error was highly prejudicial to Mr. Renfrow.

Respectfully submitted,
RUBIN RENFROW, APPELLANT

By: TERRELL STUBBS, ATTORNEY
FOR APPELLANT

CERTIFICATE OF SERVICE

I, TERRELL STUBBS, attorney of record for **APPELLANT, RUBIN RENFROW**, do hereby certify that I have this day mailed postage prepaid a true and correct copy of the foregoing Appellant's Reply Brief to the following:

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This, the 9th day of April 2009.

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