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

BRIEF OF APPELLANT

Oral argument not requested.

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CERTIFICATE OF INTERESTED PERSONS

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 may evaluate possible disqualification or recusal.

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This, the 26th day of November, 2008.

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RUBIN RENFROW **APPELLANT**

VS.

STATE OF MISSISSIPPI **APPELLEE**

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED IN NOT GRANTING A JUDGMENT NOTWITHSTNADING THE VERDICT 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.

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

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

IV. WHETHER 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.

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

VI. WHETHER 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.

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 acknowledged 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, indicating that the trial was set for March 19, 2008, and that his Motion for Discovery was filed on November 14, 2007. (R.E. 19-20). 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 for Mr. Renfrow viewing of 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 its merit, 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

I. 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.

II. The trial court erred in failing to suppress all evidence obtained by the belated search warrant which was issued so remote in time that it rendered the information stale and consequently caused a defect in the probable cause requirement of the 4th Amendment.

III. Mr. Renfrow's statement to the police officers was not made voluntarily, and was not signed. Therefore, the trial court erred in failing to suppress his statement at trial.

IV. Mississippi Code Annotated § 97-5-33(5)(2003) is unconstitutionally vague because it fails to state a *mens rea* requirement and therefore violated Mr. Renfrow's due process rights under the 14th amendment. As a result, the trial court committed reversible error in failing to dismiss all charges based on this statute.

V. 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.

VI. The trial court erred in allowing the introduction of a copy of the computer hard drive instead of the original hard drive because the State failed to prove a breach in the chain of custody of the copy that could have contaminated the copy of the hard drive.

ARGUMENT

I. THE TRIAL COURT ERRED IN NOT GRANTING A JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, A MOTION FOR A NEW TRIAL.

"[I]n considering whether evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.'" *Ivy v. State,* 949 So.2d 748, 749 (Miss. 2007) (citing *Carr v. State,* 208 So.2d 886, 889 (Miss. 1968). When considering a trial court's denial of a motion for judgment notwithstanding the verdict, the standard of review is de novo. *Gilmer v. State,* 955 So.2d 829 (Miss. 2007); *Poole v. Avara,* 908 So.2d 716, 726 (Miss. 2005). "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Carr v. State,* 208 So.2d at 889; See also *Poole,* 908 So.2d at 726.

When evaluating the denial of a motion for new trial, this Court will overturn the trial court only if it abused its discretion in that it denied a new trial though the verdict was against the overwhelming weight of the evidence. *Id.* at 727.

The weight and sufficiency of the evidence are not synonymous. *Id.* at 726. In determining whether the evidence was sufficient, the courts will look at "whether the evidence is of such quality that reasonable and fair-minded jurors in the exercise of fair and impartial judgment might reach different conclusions. *Id.* In determining whether the verdict was against the overwhelming weight of the evidence, the Supreme Court has held that they will not order a new trial unless they are convinced that the verdict was contrary to the substantial weight of the evidence so that justice requires that a new trial be granted. *Id.*

In the case at hand, Mr. Renfrow contends that the verdict in this case was so overwhelmingly against the weight of the evidence that a new trial should have been granted and further that the trial court erred in denying them a new trial.

The evidence revealed that Mr. Renfrow had limited knowledge of computers, and did not use them until late in life. He testified that he first learned about the photographs when he learned about a word that said "attachment" at the bottom of the computer screen. He clicked on that and the pictures would come up. He testified that from time to time photographs would pop up on the computer or attachments that he didn't ask for. At times, they were pornographic in nature. He testified that he tried to get rid of it, by deleting them "using the traditional method, as if I was trying to get rid of an e-mail, but it didn't work." (R. 682-686). Mr. Renfrow testified that he learned later that he had many viruses on his computer. He did not have firewall or antivirus protection on his computer. (R. 687). Mr. Renfrow testified that he told Officer Gunter

that he was aware that child pornography was on his computer through pop-ups and that it would pop up on his computer, and that he tried to remove the pornography off his computer. (R. 688).

On cross examination, Mr. Renfrow testified that he did not knowingly possess child pornography; it simply appeared on the computer and in his attempt to get rid of them, he might have unintentionally saved them. (R. 700). Mr. Renfrow's son testified he had never seen any child pornography at his father's house or on his computer, in all the times that he visited his father (R. 713-714.). All of Mr. Renfrow's character witnesses testified that his reputation in the community was good (R. 712-718). Mr. Renfrow's testimony was corroborated by Nannette Pate, his expert witness, who testified that when she ran a virus scan on the cloned hard drive, she found 38 viruses on the computer the first time that she examined it. She testified that she ran two virus scans. She wrote by hand all of the viruses found during the first scan. The second scan was not as extensive, because Mr. Renfrow's experts were not allowed to run a full virus scan on the booted machine. She testified that the reason she was not allowed to perform the tests she needed to perform was because the computer needed to be put on the Internet to update the virus protection list to see if it was truly infected with any viruses. Ms. Pate testified that once a virus is in a computer, it works with other viruses to destroy a computer's defenses. Ms. Pate found two (2) additional viruses the second time she examined the computer, for a total of forty (40) viruses. She testified that it would take her several hours to go through each of the entries to find out where the viruses, Trojans viruses, Spyware viruses and Adware viruses, and all of the things were, in order to weed through all of them and get rid of them. (R. 726- 737). Ms. Pate found a porn net Trojan virus on Mr. Renfrow's computer. She testified that this type of virus makes images pop up on your screen. She also found a backdoor Trojan virus, which according to her testimony allows someone to come in your computer from the back door so to

speak, and take control of your computer if they so choose without the owner's knowledge. She testified that this type of virus can hide itself in the computer and appear to be something it's not sometimes. (R. 740).

Ms. Pate further testified that on an ICQ program, if someone has a pop up message that says would you accept this file, and then you hit "I accept", that's all that is required to receive what was in the "pedo file". She stated that it doesn't necessarily have to say "it's a picture." She further testified that the file then becomes in your possession, in your computer, and you would not have to know what it is before accepting it on your computer. Ms. Pate testified that using an ICQ could allow someone to take control of your computer. Ms. Pate also testified that an ICQ automatically saves, names or receives names or things and creates a folder on its own and puts whatever you see into that folder, without the [computer owner] having control. (R. 743-750).

As to her opinion regarding Mr. Renfrow's computer knowledge or literacy, Ms. Pate stated that her experience shows that Mr. Renfrow did not know how to get to the files to remove them. She testified that if an average person is using their PC and they think they deleted something, they might think they deleted it, but it would still be there. Ms. Pate contradicted Mr. Leavitt's testimony that the same date and time did not mean anything with respect to the pictures, Alicia-01 and Alicia-05. She testified that the time and date is relevant because all the viruses in the computer had the exact same time stamp. She also stated that contrary to Mr. Leavitt's opinion, a file does not have to be opened for the access date to change. She stated that "all you have to do is just right click on a file, never open it, and the access date will change. She also testified that a virus scan could be run [on a computer], and the access date will change. (R. 753-765).

The State's expert witness, Mr. Keith Leavitt, even testified that changing an IP address on a computer would not completely prevent anyone from loading or downloading any information on the appellant's computer. He stated that data could be placed on there. (R. 540). As to computer viruses, Mr. Leavitt also testified that he found Trojan-downloader viruses and Spyware on the appellant's computer. Although he stated that he didn't "feel" like they (the computer viruses) could have manipulated the files, Ms. Pate testified to the contrary. (R. 559, 743-750).

Mr. Renfrow had no idea that these viruses were on his computer. He never sent these photos to anyone. At best he was a novice when it came to using the computer. There certainly was reasonable doubt as to his guilt. 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.

II. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS ALL EVIDENCE OBTAINED BY THE 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 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).

Applying the totality of circumstances to the facts of this case, Mr. Renfrow contends that there was no substantial basis for a determination of probable cause present in this case. The State argued during the motion to suppress hearing that the probable cause came from the Child Advocacy Center where the children told Mr. Brian Ervin, the counselor 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.

More importantly, the statement that the children made to Mr. Ervin was made in connection with Count I which was dismissed by the State. 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).

In the case at hand, Mr. Renfrow maintains that the information relied upon was given by two young children almost one year after the alleged incident, and cannot be deemed credible because they could not state a specific date for the alleged incident. It is a known fact that the attention span and ability to retain information by small children at a given age, is short. They

maintained that the incident took place sometime in either April or May of 2005, however they could not remember.

Mr. Renfrow would also note the fact that Count I of the indictment was dismissed, and that this was the count which the State relied upon as justification for probable cause, the trial court should have found that no probable cause existed for the second Count, and consequently, should have dismissed the charges. If the proper procedure had taken place there would have been no need for a suppression hearing, because this case would not be before this Court now.

Mr. Renfrow states that the Court should reverse his conviction on the basis that the issuing magistrate did not have probable cause to issue a search warrant due to the remoteness in time between the alleged incident and the search warrant which rendered the information relied upon stale.

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

Mr. Renfrow maintains that the trial court erred in failing to suppress his statement because his statement was not a confession to knowingly or willfully having possession of child pornography with any malicious intent, but that he was merely presenting a statement that he knew the pornography was on the computer, but that he was trying to delete it since he did not know who sent the information.

In Mississippi, the standard of review for a trial court's denial of a motion to suppress a confession is well established. The Mississippi Supreme Court has held, "[w]hen the trial court has overruled a motion to suppress a defendant's confession, we will reverse the trial court's decision only if the trial court's ruling is manifest error or contrary to the overwhelming weight of the evidence." *O'Halloran v. State,* 731 So.2d 565, 570 (Miss. 1999)(citations omitted).

This Court had held that in reviewing a judge's ruling concerning the suppression of a confession, they will uphold the ruling if it is supported by substantial credible evidence when evaluating the totality of the circumstances. *Gray v. State,* 853 So.2d 869 (Miss.Ct.App. 2003)(citing) *Greer v. State*, 818 So.2d 352, 355 (Miss.Ct.App. 2002). The Court noted that they will allow a confession to stand as long as the confession was given voluntarily, and is not the product of promises, threats, or inducements. *Richardson v. State,* 722 So.2d 481, 487 (Miss. 1998).

During the pretrial motions dated March 7, 2008, Officer Bernard Gunter testified that he gave Miranda warnings to Mr. Renfrow on March 21, 2006. He testified that Mr. Renfrow did not waive his Miranda warnings at this time, and that he signed the document that he had received Miranda warnings but was not waiving his rights. Notwithstanding, Officer Gunter indicated that almost a year later, on March 16th, 2007, he gave Miranda warnings to Mr. Renfrow and that after hearing the warnings, and reading his rights, Mr. Renfrow waived his Miranda rights despite the fact that he was represented by an attorney. (R. 54-57). Officer Gunter stated that once Mr. Renfrow waived his Miranda rights, he gave a verbal statement that Officer Gunter thought they had taped at the Simpson County Sheriff's Department on March 16, 2007. Officer Gunter testified that after he taped Mr. Renfrow, and after Mr. Renfrow had gone upstairs to booking, he realized that he had a video tape with no audio. Officer Gunter stated that he "immediately sat down and did a statement of facts to what he and Mr. Renfrow talked about." (R. 59). Mr. Renfrow contends that he did not just voluntarily show up at the Sheriff's Department. Officer Gunter left a card on his door, that stated that "Sheriff Lewis request 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 give a statement. Mr. Renfrow maintains that his statement should have been suppressed because the statement was not admitting to knowingly or willfully having possession of child pornography with any malicious intent, but that he was merely admitting that he knew the pornography was on the computer, and that he was trying to delete it since he did not know who sent the information.

Once this statement was allowed into evidence, it was highly prejudicial to Mr. Renfrow. Additionally, the statement should have been suppressed because the statement did not represent Mr. Renfrow's true statement to the officer but instead was a summary based only on what Officer Gunter remembered. 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 down stairs to re-record an accurate statement, Sheriff Lewis allowed Officer Gunter to write out a statement about what he thought Mr. Renfrow said which 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 where the defendant's did not sign their statements in that 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. 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 BASES THAT THE STATUTE UNDER WHICH THE DEFENDANT WAS INDICTED IS UNCONSTITUTIONALLY VAGUE AND VIOLATES THE DEFENDANT'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

Mr. Renfrow contends that this portion of the statute is so unconstitutionally vague that it violates his due process rights under the 14th amendment.

Miss. Code Annotated § 97-5-33 (5) states that "[n]o person shall, by any means including computer, possess any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct." Mississippi Code Annotated § 97-5-33 (5)(2003).

The United States Supreme Court has held that "[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standard less that it authorizes or encourages seriously discriminatory enforcement." *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). The highest Court has held that "[w]hat renders a statute vague, however, is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of what that fact is." *See U.S. v.*

Williams, -- U.S. ---,128 S.Ct. 1830, 170 L.Ed. 650 (2008) (citing) *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971).

In *Williams*, the U.S. Supreme Court held that there was no indeterminacy factor present, and that the statute's requirements were clear questions of fact. Finding that in some cases it is difficult to determine whether the requirements have been met, the court reasoned that courts and jurors every day pass upon the reasonable significance of a defendant's statements and upon knowledge, belief and intent. *U.S. v. Williams,* 128 S.Ct. at 1834.

The Mississippi Supreme Court has adopted the test in *Coates* in determining whether a statute is unconstitutionally vague is "whether the statute defines the criminal offense with sufficient definiteness such that a person of ordinary intelligence has fair notice of what conduct is prohibited." *Davis v. State*, 806 So.2d 1098, 1102 (Miss. 2001)(citing) *Lewis v. State,* 765 So.2d 493 (Miss. 2000)(other citations omitted).

Mr. Renfrow contends that the case at bar is a clear cut case of indeterminacy. In certain parts of section 97-5-33, the statute clearly sets forth a mens rea requirement of 'knowingly'; specifically, in subparts, (1),(3),(6) and (7). However, subpart 5 of Section 97-5-33, the section under which the appellant was indicted and subsequently convicted, is absent such an element, and leads to the inference that mere possession, without any criminal intent or mens rea attached, is sufficient for a conviction. However, to allow this section to stand as written, without requiring some mental element on the part of a defendant, would be tantamount to not affording a person of ordinary intelligence, fair notice of exactly what conduct is prohibited. Additionally, in instances, such as what is factually present here, where there is the advent of continuing viruses being placed on computers by computer hackers, where there are computer users who have limited knowledge of the complexity of computers, and how to properly protect themselves

against these types of computer viruses, or let alone, those who have no knowledge that emails that come into their system from cyberspace could possibly have child pornography attached to them without their knowledge, will be unfairly subjected to criminal prosecution under statutes such as 97-5-33(5) for mere possession of a possibly unknown email or attachment. Mr. Renfrow contends that this is not the type of criminal activity that the legislature intended to protect against, in enacting these child pornography protection laws.

If there is no knowledge or intent equated with a particular statute, how can a person of ordinary intelligence be afforded fair notice of what is prohibited. The facts from the testimony at trial revealed that Mr. Renfrow knew that he had some pop ups that were pornography, but did not know that this material was child pornography. He tried to delete the material as was shown by testimony. However, because of his limited knowledge of computers, he was unsuccessful; but nevertheless, the evidence properly showed that he had no intent to possess pornography, let alone child pornography. Therefore, he could not have possessed any knowledge that mere possession of such materials was prohibited. These facts alone show that subsection (5) of Section 97-5-33 is unconstitutionally vague on its face, and therefore, violative of Mr. Renfrow's 14th amendment due process rights.

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

"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.*

In the case at hand, Mr. Renfrow contends that his attorney did not have adequate time to prepare for trial given the fact that he 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. Notwithstanding, the State supplying this information at such a late date close to the trial, the trial court still Mr. Renfrow full access to all of the State's

evidence, particularly, the original hard drive and the original computer intact. The trial judge reset the case to March 25, 2008, just six days from its original trial date. However, given the complex nature of these types of cases dealing with computer forensics and computer technology, Mr. Renfrow's attorney and expert did not have enough time to go through this newly submitted evidence, or 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. WHETHER 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).

Sherita Sullivan, (Ms. Sullivan), a computer forensic examiner with the State Attorney General's office, testified during the pre trial motion that she prepared a Cyber Crime Center report of an examination on the hard drive on a computer with the serial number "0151002229", but that the receipt from the State's exhibit, contained the serial number "0151229", that had two two's instead of three two's. She admitted that the serial number read from the receipt did not match the serial number contained in the report of examination that she prepared. She testified that the property receipt was signed by Keith Leavitt, (Mr. Leavitt), an investigator at the Attorney General's office. During the course of the examination, Ms. Sullivan removed the hard drive from the computer which had the serial number, "0151002229" to maintain the integrity of the original evidence. She testified that maintaining the integrity of the evidence ensured that no changes were made to the original evidence. She made an exact copy of the hard drive (R. 92-99).

During the trial Ms. Sullivan testified that she made an exact copy of the original hard drive. She attached the original hard drive to a machine in their office and attached an exam drive to the same device to make another copy. She attached the original hard drive using a write blocking device in an attempt to insure that no changes were made to the original during the copying process. (R. 336-337)

Mr. Leavitt testified that he removed the original hard drive from the evidence vault to make a clone for Mr. Renfrow's experts. (R. 511). He also testified that he knew that there were two bad sectors on the original hard drive and that he knew this the entire time he processed the

case. Mr. Leavitt testified that the damaged hard drives have something to do with the way the hard drive operates. (R. 514-517).

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.*

Mr. Renfrow contends that because so many people had access to the vault and made copies from the original hard drive, that this increased the likelihood of contamination and viral infections. Concomittantly, 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.

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. 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 did not state 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.

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. Because of this evidence, 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 allowing the introduction of the original hard drive as opposed to the 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 Brief to the following:

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