

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-M-819-SCT

RENNIE T. GIBBS

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

**ON INTERLOCUTORY APPEAL FROM
THE CIRCUIT COURT OF LOWNDES COUNTY, MISSISSIPPI**

**BRIEF OF AMICUS CURIAE MISSISSIPPI PSYCHOLOGICAL
ASSOCIATION IN SUPPORT OF APPELLANT**

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CERTIFICATE OF INTERESTED PERSONS

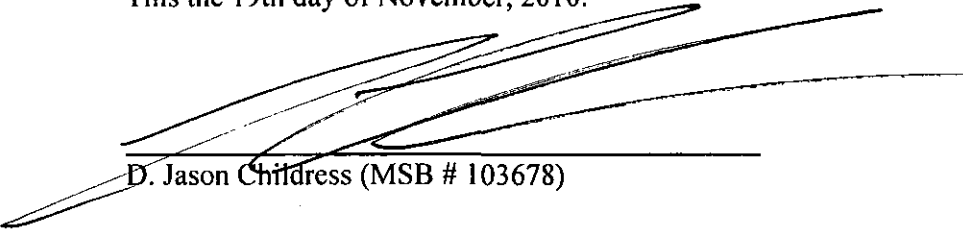
The undersigned Counsel of Record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

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This the 19th day of November, 2010.



D. Jason Childress (MSB # 103678)

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I. INTERESTS OF AMICUS CURIAE

Amicus Curiae consists of psychologists of the Mississippi Psychological Association (MPA), which is the organized voice of psychology in Mississippi. MPA's purpose is to advance psychology as a science and a profession by contributing to scientific knowledge in the field of psychology; disseminating this knowledge through education of the public, including the courts, as well as MPA's membership; and applying this knowledge through professional practice to promote health and human welfare. Based on its collective knowledge, skill, education, training, and experience in the field, *Amicus Curiae* MPA possesses special expertise in the fields of assessing and treating mental health and substance use disorders.

MPA files this brief because any criminal prosecution of a young woman for homicide arising from alleged cocaine use during pregnancy associated with subsequent stillbirth almost certainly represents a misunderstanding of the nature of substance use disorders in general and of this substance abuse disorder in particular. Such a prosecution is also almost certain to deter adolescent and adult women in Mississippi from seeking appropriate mental health and substance abuse treatment services and thus, criminal sanctions intended to *decrease* harm to unborn children, may actually contribute to *increasing* it.

MPA stays within its field of expertise. Many of MPA's members are of the view that science has not established a causal relationship between substance abuse and fetal disorders or birth defects. We recognize, however, that few, if any, professional psychologists would qualify as experts in this point in the sense contemplated by Miss. R. Ev. 702. That MPA does not address this point of scientific causation means only that MPA is staying within its field, not that

its members have a view contrary to that espoused in the Brief of Appellant and no doubt by others.

II. PRELIMINARY CONSIDERATIONS

Amicus Curiae does not purport to tell this Court what the facts are. Nor do we intend to tell this Court how this case should be decided. By analogy to Miss. R. Ev. 702(2), MPA respectfully presents views grounded in reliable and accepted principles and methods in the field of psychology that we believe will assist the Court in its adjudication of the issues tendered. We proceed as well on premises analogous to those recognized in Miss. R. Ev. 703 and 705 regarding reliance materials. Limitations of space and time, particularly those imposed by Miss. R. App. P. 29(b), preclude a more comprehensive and more fully documented presentation that your *Amicus Curiae* would otherwise make.

MPA recognizes the prerogative of the Legislature of the State of Mississippi, acting with the approval of the Governor, to identify and define crimes and proscribe punishments, subject only to constitutional limits. *See, e.g., Faraga v. State*, 514 So.2d 295, 302, 313 (Miss. 1987). Within these same limits, the Legislature may define a crime, or a term or phrase within a declaration of a criminal offense, as it sees fit. *Cf. Richardson v. Canton Farm Equipment, Inc.*, 608 So.2d 1240, 1250-51 (Miss. 1992). The Legislature has the authority to “define a term or phrase in a manner not necessarily consonant with common understanding.” *Mississippi State Tax Commission v. Moselle Fuel Co.*, 568 So.2d 720, 723 (Miss. 1990). When it takes this latter course, however, this Court has admonished that in the context of taxation at least “it must do so with relative certainty.” *Id.* The one context where the law must be more strictly construed than when it taxes its citizens is in the law of crimes and punishments. *See, e.g., Tipton v. State*, 41

So.3d 679, 682 (Miss. 2010) (“criminal statutes are to be *strictly* construed against the State and *liberally* in favor of the accused.”) (emphasis in original).

This case concerns “depraved heart” murder, as proscribed by Miss. Code Ann § 97-3-19(1)(b). Unfortunately, the Legislature has provided few clues what “depraved heart” means and how it should be applied in particular cases. In this relative vacuum, the Justices of this Court have struggled mightily to divine the best legal meaning of “depraved heart” within the statute. *See, e.g., Windham v. State*, 602 So.2d 798 (Miss. 1992). MPA advises the Court that neither the term “depraved heart” nor any similar term or supposed psychological phenomenon is known to the field of psychology. The term “depraved heart” is not based in clinical science. It appears nowhere in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* (DSM-IV-TR) (2000), [“DSM-IV-TR”]. Nor does it have any independent clinical relevance. To be sure, MPA would respect any legislative definition or elaboration that may have been provided, subject only to constitutional limits. There are none, and, as this is so, we urge the Court to be guided in applying this statute in this case by the fundamental practical imperative that the law must regard the objective “realities of the behavior it seeks to regulate,” *Tanner v. State*, 566 So.2d 1246, 1249 (Miss. 1990).

III. ARGUMENT

A. This Prosecution of a Pregnant Drug User for Depraved Heart Murder Represents a Misconception of the Nature of Substance Related Disorders.

Medical and mental health professions have long recognized that substance use disorders are illnesses which have multiple risk factors and complex etiologies, are often associated with other mental health disorders, and have been shown to persist if untreated. American Psychological Association, *Resolution on Substance Abuse by Pregnant Women* (August, 1991).

This disease is “marked by the loss of consistent control over intake, a continuous desire for a drug in spite of possible harmful effects, and frequent relapses following periods of abstinence.”

Physician Leadership on National Drug Policy, *Position Paper on drug policy*, January 2000, at page 11, available at http://plndp.org/Physician_Leadership/

[Resources/researchrpt.pdf](#). In 1988, the American Medical Association (AMA) expressed its view that:

Treatment – in the form of medical, psychological and psychiatric care – is a necessary and appropriate response to drug abuse. Reluctance to provide such care to drug abusers reflects unwarranted misconceptions about the nature of addiction. While there is much to be learned about drug dependency, it is clear that addiction is not simply the product of a failure of individual willpower. Instead, dependency is the product of complex hereditary and environmental factors. It is properly viewed as a disease, and one that physicians can help many individuals control and overcome.

American Medical Association, *Proceedings of the House of Delegates: 137th Annual Meeting*, Board of Trustees Report NNN at 241 (June 26-30, 1988) (AMA). The AMA further noted that it is unrealistic to view drug abuse as a “failure of individual willpower.” AMA at 249. Such women are therefore not fairly portrayed to be uncaring or even unconcerned about the well-being of their unborn child, much less may they be said to have acted by reason of having a “depraved heart.” Because the Legislature has not clearly included such actions by pregnant women with a definition of “depraved heart” in Section 97-3-19(1)(b), and consistent with the premises acknowledged above, we urge the Court to take a very, very skeptical view of the argument that on the facts charged in the indictment there has been a murder here.

Understandably, drug abusers receive little sympathy on this point. The instant case perhaps echoes society’s impatience and intolerance. Labeling drug addiction as a disease is as unpopular as it is scientifically accepted. Nevertheless, a specific drug’s addictive qualities are

relevant in gauging whether a woman is acting with the lack of concern or care suggested by the “depraved heart” language when she uses narcotics during her pregnancy. These are among the practical objective realities of the phenomenon the statute seeks to regulate that should be respected so long as the Legislature has not within its constitutional power spoken otherwise.

This Court has held inappropriate the use of the depraved heart murder statute to hold a mother to a standard to which she is incapable of meeting. *Clayton v. State*, 652 So. 2d 720 (Miss. 1995). In that case, a very poor Bessie Marie Clayton gave birth to a child that had a severe seizure disorder, among other severe and permanent conditions. *Id.* at 723. Clayton lived with her five children in a home that was not “fit for a dog to live in” and with little food. *Id.* at 722. Feeding the child proved difficult, and the child died of dehydration and malnutrition. *Id.* at 723.

The mother was convicted of murder under the depraved heart statute. *Id.* at 721. This court reversed the conviction. *Id.* at 724. This Court recognized the imprudence of “hold[ing] the defendant to a standard of health care . . . that rises above her ability.” *Id.* at 724. The child was difficult to feed and the most prudent course of action was to insert a special feeding tube. *Id.* at 725. This Court was not convinced the defendant had the ability to “give this type of care.” *Id.*

There are differences between the instant case and *Clayton*. The child in *Clayton* was approximately three years old, while the instant case involves a still-born. The Court in *Clayton* focused largely on the difficulties inherent in the child’s condition. That is not to say this Court did not consider the mother’s condition, however. *See Id.* at 726 (“We should not place the total blame on an ignorant and unknowing mother.”).

There are also many similarities between the instant case and *Clayton*. Like the mother's limited access to assistance in *Clayton*, access to available treatment services is also a significant problem for pregnant, adolescent females with substance use disorders in Mississippi. There may be a variety of outpatient and community-based residential alcohol and drug abuse treatment services provided by regional community mental health centers across the state. But, there are very few public sector inpatient drug treatment programs in Mississippi, and most are not intended to meet the needs of pregnant adolescent females. For example, the Mississippi Department of Mental Health currently has inpatient "chemical dependency units" located at Mississippi State Hospital in Whitfield ["MSH"] and at East Mississippi State Hospital in Meridian. The chemical dependency unit at East Mississippi State Hospital is a 25-bed unit for adult males with substance abuse problems and also provides treatment for adolescent males who are diagnosed with both mental illness and substance abuse disorders. The chemical dependency service at MSH consists of three units with a total of 117 beds. Two of these units provide treatment for adult men and women with alcohol and/or drug problems, and the third unit provides treatment for adult men who are diagnosed with both mental illness and substance abuse disorders. MSH also operates a 12-bed group home for adults with dual diagnosis of mental illness and substance abuse, which is funded by the DMH Bureau of Alcohol and Drug Abuse. However, none of these units or programs is specifically designed to target pregnant adolescent females (*see* http://www.dmh.state.ms.us/substance_abuse.htm).

It is unrealistic for the State to expect, much less require on pain of extensive imprisonment, that a sixteen year old pregnant drug addict, without proper treatment, should have simply stopped using cocaine during her pregnancy term. The APA's *Diagnostic and*

Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) (2000)¹, defines substance abuse and dependence as diagnosable mental disorders. DSM-IV-TR describes the essential feature of Substance Dependence as a "cluster of cognitive, behavioral and physiological symptoms indicating that the individual continues use of the substance despite significant substance-related problems" (p. 192). The DSM-IV-TR diagnostic criteria for both Substance Abuse and Substance Dependence include clinically significant impairment or distress, along with "continued use despite experiencing persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance" (p. 192).

The DSM-IV-TR classification of cocaine use disorders in particular consists of "Cocaine Dependence," "Cocaine Abuse," "Cocaine Intoxication," "Cocaine Withdrawal," and "Other Cocaine-Induced Disorders." As the DSM-IV-TR explains, "Cocaine has extremely potent euphoric effects, and individuals exposed to it develop Dependence after using the drug for very short periods of time" (p. 242-243). Those who suffer cocaine use disorders may become involved in a wide range of illegal behaviors in order to obtain the drug -- including theft, prostitution, and drug dealing. The DSM-IV-TR also states that individuals who use cocaine often fail to fulfill important obligations and responsibilities and "child care may be grossly neglected to obtain or use cocaine" (p. 243). In addition, those with cocaine related disorders also commonly suffer co-morbid mental disorders, including depression, panic attacks, social phobic behavior, generalized anxiety disorder, eating disorders, cocaine induced psychotic disorder, as well as a number of other chronic health conditions such as tuberculosis, hepatitis, HIV and other sexually transmitted diseases (p. 243).

¹ The DSM-IV-TR is recognized by this Court as authoritative. *Chase v. State*, 873 So. 2d 1013, 1021 (Miss. 2004) (citing *Atkins v. Virginia*, 536 U.S. 384, 309 n.3 (2002)).

Because these pregnant addicts cannot unilaterally alter their substance use, fear of prosecution will likely result in adverse outcomes that far exceed any benefit to the punishment. For example, not only are pregnant addicts likely to avoid treatment for their substance use disorder, thus ensuring continued harm to both themselves, their unborn child, and society from the substance use, but they are also likely to avoid contact with any health care professionals. This would result in poorer overall medical care, poor prenatal care specifically, and the myriad of problems that accompany these deficits. *See App.'s Br. at 15-17.* In its *Resolution on Substance Abuse by Pregnant Women* (1991), the American Psychological Association "Affirm[ed] its view that alcohol and drug abuse by pregnant women is a public health problem and that laws, regulations and policies that treat chemical dependency primarily as a criminal justice matter requiring punitive sanctions are inappropriate." Such sanctions are ineffective and detrimental to the health of babies born to drug users.

It is within the scientific knowledge and expertise of MPA that a young woman's use of narcotics leading up to her addiction cannot qualify as evincing a depraved heart, whatever that is. Again, we find that it is barely defined in the statute. Miss. Code Ann. § 97-3-19(1)(b). Her addiction itself is not a criminal offense, nor may the State punish her for her decision to carry the pregnancy to term. *Robinson v. California*, 370 U.S. 660, 670 n.8 (1992); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 839 (1991). Therefore, as the facts appear from the indictment, the only punishable conduct is a young woman's use of narcotics while pregnant. Her addiction does not excuse her use of course. It does, however, mitigate her state of mind. This is not a case where intoxication caused the defendant to engage in an independent act imminently dangerous to others. In this case, the very use of the narcotic

is the act. We know of no known clinical basis for the suggestion that a young woman, as here, used cocaine because she had a “depraved heart” nor because of a disregard for her fetus. She continued to use cocaine because she had become an addict. The mother in *Clayton* did not fail to feed her child because she had a “depraved heart” nor because of a disregard for her child. These women had limitations as do we all. But neither is guilty of murder.

Because a substance use disorder is an illness, which is unlikely to improve without treatment, prosecuting women who abuse cocaine during pregnancy represents a basic misunderstanding of the nature of substance use disorders. Pregnant women who suffer from substance use disorders should instead be provided with proper care and treatment, which unfortunately, appears largely inaccessible to many women, particularly pregnant adolescents in Mississippi.

B. Prosecution of Pregnant Women For Injury to the Fetus Because of Her Drug Use While Pregnant Will Almost Certainly Deter Women From Seeking Needed Mental Health and Substance Abuse Treatment Services.

Prosecution for crime does deter. It is MPA’s view that the deterrent effect likely emanating from this prosecution is not the one the criminal justice system normally hopes for. Rather, to the extent that this prosecution becomes known and is repeated, an unintended deterrent will follow that is in MPA’s view quite contrary to the public interest.

Deterrence is among the important public purposes of the criminal law. *See, e.g., King v. State*, 960 So. 2d 413, 432, ¶ 33 (Miss. 2007) The law punished criminals because it is important that the law keep its promises. Holmes, The Common Law 46-47 (1881). Persons within the jurisdiction – capable of modifying their conduct in the sense that external stimuli are significantly more unpleasant than countervailing compulsions – will in fact receive strong

incentives to do so where criminals are punished. As with Pavlov's Dog, persons learn from the public response to their behavior and the behavior of other persons. Deterrence theory looks to the future. The deterrence is gone with respect to a person's past conduct.

Psychologists and no doubt other thoughtful persons know that the deterrent effect of judicial actions is hardly cabined within the criminal code. If unpleasant consequences follow conduct and that is known, similar conduct thereafter will be deterred as the night follows the day. By its acceptance of deterrence theory within its criminal justice system, the State is sensibly estopped to deny that deterrence theory is equally operative and effective in any field of human behavior where unpleasant consequences follow certain conduct and that fact is known.

The foregoing practical reality of behavioral science forms one of the major reasons why medical and public health organizations have uniformly objected to the prosecution of women for their prenatal conduct. For example, in its *Resolution on Substance Abuse by Pregnant Women* (August, 1991), the American Psychological Association expressed concern about the effects of imposing criminal sanctions on pregnant women with substance use disorders:

Evidence from health care providers suggests that fear of prosecution and loss of their children may deter women from seeking prenatal care and chemical dependency treatment. Such fear can only increase the barriers to timely health care that already impede access for many women, particularly women of color and the poor. Criminal sanctions for drug use during pregnancy will also likely hinder the effectiveness of mental health and substance abuse treatment for pregnant women who do seek treatment.

A key component to effective mental health and substance abuse treatment outcomes is confidentiality between a doctor and his or her patient. The expectation of confidentiality is

essential if patients are to disclose potentially incriminating information about their drug use to medical, mental health, and substance abuse professionals. In recognizing the importance of confidentiality as the very foundation of a successful therapeutic relationship, the United States Supreme Court held in *Jaffee v. Redmond*, 518 U.S. 1, 12 (1997), that a “confidential relationship” is a necessary precondition for “successful treatment” and also observed that a “patient must be willing to tell a physician, who is often a total stranger, about such matters as drug usage.”

Moreover, mental health professionals have an ethical and legal obligation not to disclose confidential patient information, except in certain carefully limited circumstances not implicated here. Principle 5, Ethical Principal of Psychologists (); *Mississippi State Board of Psychological Examiners*, 508 So. 2d 1049, 1055-56 (Miss. 1987); Miss. R. Ev. 503; *Mental Disability Law, Evidence and Testimony: A Comprehensive Reference Manual for Lawyers, Judges and Mental Disability Professionals*. American Bar Association.

(Parry & Drogin, 2007). Cf. Miss. R. Ev. 503 According to the American Psychological Association's *Ethical Principles and Code of Conduct* (APA, 2002), "Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional scientific relationship." Standard 4.01 Maintaining Confidentiality, available at <http://www.apa.org/ethics/code/index.aspx>.

In its Resolution on Substance Abuse by Pregnant Women, the American Psychological Association (1991) also affirmed its view that

... laws, regulations and policies that require psychologists to function as law enforcement agents regarding pregnant women's behavior are inappropriate. Psychologists are required to comply with any laws in this area but are strongly encouraged to provide information to legislators and policy makers about the negative effects of such laws and to assist in the development of appropriate laws, regulations and policies.

Psychologists are ethically obligated to discuss with their patients at the outset of the professional relationship the limits of confidentiality, as well as any other foreseeable uses of information generated through their psychological activities (APA). As this is so, psychologists should also be ethically obligated to describe to their patients the consequences of any disclosures they may make regarding drug use during pregnancy.

Limits of confidentiality typically include situations involving acutely dangerous and/or suicidal patients and mandated reporting of child abuse. However, if women were to face threats of criminal prosecution because of their prenatal behavior, psychologists and other mental health professionals are likely to encounter tremendous confusion as to their legal and ethical mandates in the event that their patients make confidential disclosures regarding substance use during pregnancy and/or should patient records containing such disclosures be subpoenaed for the purpose of a legal proceeding. Similar confusion already exists among mental health providers in Mississippi with regard to mandated child abuse reporting laws and how they apply to the treatment of sexual abusers. Section 43-21-353 of the Mississippi Code, Duty to inform state agencies and officials, states:

Any attorney, physician, dentist, intern, resident, nurse, psychologist, social worker, child care giver, minister, law enforcement officer, public or private school employee or any other person having reasonable cause to suspect that a child is a neglected child or an abused child, shall cause an oral report to be

made immediately by telephone or otherwise and followed as soon thereafter as possible by a report in writing to the Department of Human Services...

In *Everett v. State*, 572 So.2d 838 (Miss. 1990), however, the Mississippi Supreme Court held that in child abuse cases there is no mandatory reporting when the abuser seeks treatment:

Section 43-21-353 does not create a child abuse exception to the psychologist-patient privilege set forth in § 73-31-29. Section 43-21-353 pertains to situations where a child is presented to a physician for treatment. It does not pertain to a situation where the offender seeks treatment from a physician; if such were the case, persons with abnormal behaviors would be forestalled from seeking treatment.

Mississippi courts have decided that the state has an interest in child abusers getting treatment without fear of being reported. It sensibly follows that the same exception should apply to pregnant drug users who seek treatment. Nevertheless, significant concerns exist with regard to the criminalization of substance use during pregnancy, in that such prosecutions may not only deter women from seeking treatment altogether, but they may also hamper treatment outcomes because of issues related to the limits of confidentiality - thereby creating a *Catch-22* for pregnant women with substance use disorders. Also, successful outcomes for those who do seek treatment may be further mitigated by psychologists' and other mental health professionals' ethical and legal mandates in such cases.

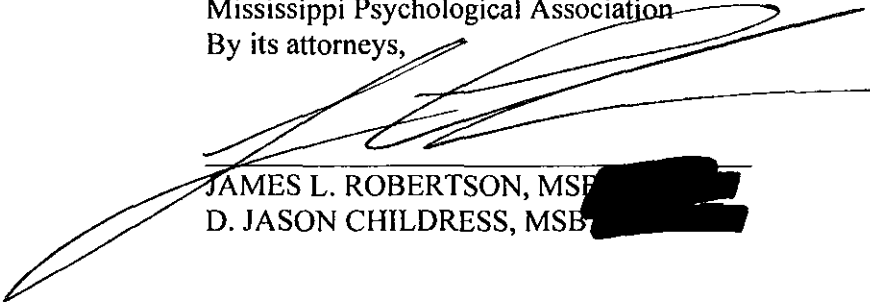
IV. CONCLUSION

Your *Amicus Curiae*, the Mississippi Psychological Association, represents to the Court that the propositions advanced above are the product of reliable principles and methods, analogous to what is required in Miss. R. Ev. 702(2), and, as well, the collective knowledge,

skill, experience, training and education of MPA and its members. Your *Amicus Curiae* respectfully requests that the Court give due consideration to these propositions.

Respectfully submitted,

Mississippi Psychological Association
By its attorneys,



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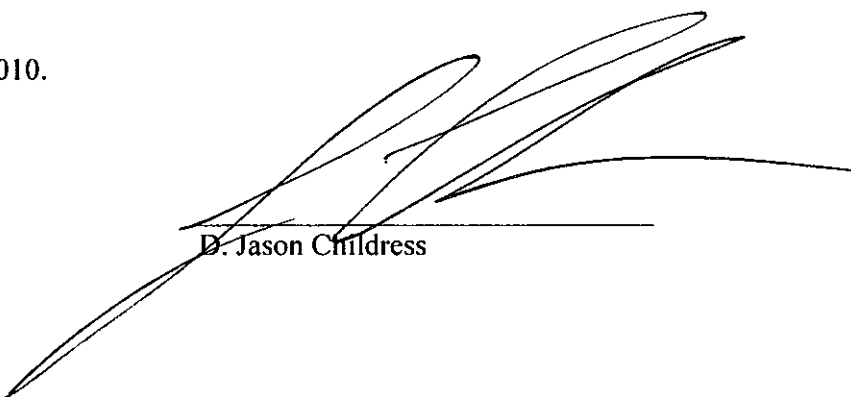
I, D. Jason Childress, one of the attorneys for Mississippi Psychological Association, do hereby certify that I have this day served a copy of the foregoing via first class mail, postage prepaid on the following:

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This 19 day of November, 2010.



D. Jason Childress