No. 18-_____

In the Supreme Court of the United States

MICHAEL ISHEE,

Petitioner,

–v–

STATE OF MISSISSIPPI,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Governmental regulation of First Amendment rights, particularly freedom of speech and expression, draws close constitutional scrutiny since these rights are deemed so basic and fundamental. While child pornography is not protected speech, any statutory regulation must be drawn with such specificity as to avoid overreach and undue restraints of protected speech. To prevent overreach, *Ferber v. New York*, 458 U.S. 747 (1982) and its progeny clearly mandated that any statute regulating child pornography contain some element of scienter.

Prior to 2013, Miss. Code, 1972, Ann., § 97-5-33(5) was void of any element of scienter in the criminalization of the possession of child pornography. (App.41a). In attempting to cure this impermissible void, the State inserted elements of scienter into the indictment to which Petitioner ultimately pleaded guilty. (App.43a). Petitioner seeks to annul his plea and sentence, asserting that without scienter the statute was facially unconstitutional, thus void *ab initio*, and that the prosecution's insertion of scienter into the indictment was an ex-post facto act and in violation of the doctrine of separation of powers. The questions thus presented are:

(1) Is a statute proscribing the mere possession of child pornography facially unconstitutional if it contains no element of scienter?

(2) If scienter is required in the statutory regulation of child pornography, can the omission of scienter in the charging statute enacted by the legis-

lature be cured by the state's ex post facto insertion of scienter into the indictment?

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PETITION FOR A WRIT OF CERTIORARI

Michael Ishee respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals of the State of Mississippi in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Mississippi is reported at *State v. Ishee*, 248 So.3d 841 (Miss. Ct. App. 2017). (App.3a). The April 17, 2018, order of the Court of Appeals of the State of Mississippi denying Petitioner's Motion for Reconsideration is unpublished, but notice thereof was provided. (App. 35a). The order of the Mississippi Supreme Court, entered July 19, 2018, denying review through certiorari is unpublished, but the notice thereof provided. (App.1a). The May 20, 2016, Order and Judgment (filed May 23, 2016) of the Circuit Court of the First Judicial District of Harrison County, Mississippi denying Petitioner's application for post conviction relief and the Order denying Petitioner's Motion for Reconsideration are both unpublished. (App.10a, 12a).

JURISDICTION

The Mississippi Supreme Court filed its June 28, 2018 order denying review on July 19, 2018. (App.1a). The instant Petition for a Writ of Certiorari is filed within ninety (90) days of the filing or notification date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves:

- U.S. Const. Art. I, Section 10, Clause 1;
- Miss. Constitution, Art. I, Sections 1 and 2;
- Miss. Constitution, Article III, Section 16; and
- Miss. Code of 1972, Ann., § 97-5-33.

Due to their brevity, these statutory provisions are set forth in relevant part or in their entirety below, but for easy reference are also reproduced in the Constitutional and Statutory Addendum.

- **Miss. Code of 1972, Ann., § 97-5-33(5)** as enacted prior to 2013, provided

  > No 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.

- **Miss. Code of 1972, Ann., § 97-5-33(5)** as amended in 2013 provides:

  > No person shall, by any means including computer, knowingly possess or knowingly access with intent to view any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

- **Miss. Code of 1972, Ann., § 97-5-33**, pre-2013, provides in its entirety:

  > (1) No person shall, by any means including computer, cause, solicit or knowingly permit any child to engage in sexually explicit conduct or in the simulation of sexually explicit conduct for the purpose of producing any visual depiction of such conduct.
  >
  > (2) No person shall, by any means including computer, photograph, film, video tape or otherwise depict or record a child engaging in sexually explicit conduct or in the simulation of sexually explicit conduct.
  >
  > (3) No person shall, by any means including computer, knowingly send, transport, transmit, ship, mail or receive any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.
  >
  > (4) No person shall, by any means including computer, receive with intent to distribute, distribute for sale, sell or attempt to sell in any manner any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

(5) No 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.

(6) No person shall, by any means including computer, knowingly entice, induce, persuade, seduce, solicit, advise, coerce, or order a child to meet with the defendant or any other person for the purpose of engaging in sexually explicit conduct.

(7) No person shall by any means, including computer, knowingly entice, induce, persuade, seduce, solicit, advise, coerce or order a child to produce any visual depiction of adult sexual conduct or any sexually explicit conduct.

- **U.S. Const. Art. I, § 10, Cl. 1**

  No State shall . . . pass any . . . ex-post facto Law. . . .

- **Miss. Const. Article I, § 1**

  Powers of Government—The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those to which are legislative to one, those which are judicial to another, and those which are executive to another.

- **Miss. Const. Article I, § 2**

  No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of

the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.

- **Miss. Const. Article 3, § 16**

  "Ex-post facto laws . . . shall not be passed."

INTRODUCTION

This case concerns a simple question, simply put. Is the pre-2013 Mississippi statute governing the prohibition of possession of child pornography facially unconstitutional and therefore incapable of supporting Petitioner's adjudication of guilt? Several landmark U.S. Supreme Court cases clearly require an element of scienter on the part of a defendant be included in the definition of any criminalization of the possession of child pornography. These decisions state unequivocally that without the inclusion of a scienter element a constitutional prosecution of an offender cannot occur. Such is the case with Petitioner. In 2007, the Mississippi Legislature enacted a statute criminalizing the mere possession of child pornography without containing any hint of an element of scienter on the part of the offender. Therefore, is the statute facially unconstitutional and subject to overbreadth attack?

To justify its prosecution of Petitioner under this statute, the State of Mississippi inserted elements of scienter in the indictment although the elements were not in the statute. This action is no more than the State forcing scienter into the statute by violating the

ex-post facto prohibition of both the United States Constitution and the Mississippi Constitution. Clearly, this inclusion of scienter in the indictment occurred after the date of the alleged offenses, and the indictment was drafted by the executive branch, not the legislative branch. Another question then arises as to whether the executive branch, in adding scienter to the indictment, violated the separation of powers by effectively amending a statute enacted by the legislature. Despite greater leeway being allowed in legislative actions regulating child pornography, permitting the executive branch to alter the statute ex-post facto without legislative enactment presents a new and dangerous path. By inserting scienter into the indictment charging Petitioner, the State of Mississippi seemingly acknowledged that scienter is required to prosecute and thereby answering the primary question in this petition. The Petitioner's case presents the Court with an opportunity to resolve these profound constitutional dilemmas.

The one critical statutory element to the prosecution of possession of child pornography is scienter. The courts, including the United States Supreme Court, have been consistent in that ruling. *New York v. Ferber*, 458 U.S. 747 (1982); *Osborne v. Ohio*, 495 U.S. 103 (1990); *U.S. v. Williams*, 553 U.S. 285 (2008). In *Ferber* and its voluminous progeny, the Supreme Court has consistently held that while a legislature is entitled to "greater leeway" in regulatory enactments concerning child pornography, any conduct to be prohibited must be adequately defined by such enactment and criminalization cannot arise without some element of scienter on the part of the defendant. *Ferber* at 764-765.

Governmental regulation of speech has been fodder for innumerable cases before the United States Supreme Court. The reason is simple: the freedoms of speech and expression are two fundamental rights guaranteed by the First Amendment. The foundation of liberty and democracy, and "[t]he durability of our system of government hinges upon the preservation of those freedoms." *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 382 (1973). But, even these fundamental rights are not absolute. Thus is created that continual "rub" naturally existing between the government's legitimate purpose of regulating unprotected speech, such as child pornography, without collaterally infringing on a substantial amount of protected expressive activity.

Through a myriad of pornography and child pornography cases, the Supreme Court has continually struggled to achieve that balance of protecting a legitimate public welfare interest of the state and the fundamental freedom of speech guaranteed all citizens. *Reno v. ACLU*, 521 U.S. 844 (1997); *Ginsberg v. New York*, 390 U.S. 629, 639-640 (1968); *New York v. Ferber*, 458 U.S. 747 (1982). The Court should grant the petition and resolve these issues involving basic, fundamental First Amendment rights of all Americans, not just Petitioner.

STATEMENT OF THE CASE

BACKGROUND FACTS

A. Petitioner's Entry of Plea of Guilty

1. On December 5, 2011, Defendant was indicted by a grand jury of the First Judicial District of Harrison County, Mississippi, the indictment presenting nineteen (19) counts of felony Exploitation of a Child [possession of child pornography on a computer] in violation of § 97-5-33(5) of the Mississippi Code of 1972, Ann., (hereafter referred to as § 97-5-33(5), MCA). (App.46a) All of the alleged crimes purportedly occurred on July 12, 2010. (App.46a) On April 22, 2014, while represented by counsel, Defendant entered a plea of guilty to Count I of the indictment and sentencing was deferred until June 20, 2014. (App.35a). At sentencing on June 20, 2014, Petitioner was sentenced to twenty (20) years' incarceration with eight (8) years suspended, leaving twelve (12) years to serve day for day, to be followed by four (4) years of reporting post release supervision. The remaining eighteen (18) counts of the indictment were passed to the files. (App.31a).

2. During the colloquy between Petitioner and the Court at his sentencing hearing, Petitioner admitted he had downloaded the material found on the hard drive of his computer and that he was in possession of same. The relevant portions of this colloquy are recited in the opinion of the Mississippi Court of Appeals in Petitioner's case and a careful reading of same clearly shows that there is no direct admission he knew or was aware that there were depictions of children under

the age of eighteen (18) engaged in sexual conduct at the time he downloaded them. During the plea hearing, the questions concerning his knowledge of the content of his computer's hard drive were asked in the past tense, but clearly answered in the present tense. (App.3a).

B. Petitioner Attacked the Constitutionality of Pre-2013 § 97-5-33(5), MCA, Through His Application for Post-Conviction Relief

3. Following sentencing and after his time for appeal had expired, Petitioner filed an application for post-conviction relief under the Mississippi Post Conviction Relief Act on October 23, 2015. (App.58a).

4. Petitioner's application for post-conviction relief asserted § 97-5-33(5), MCA, was facially unconstitutional and thus void *ab initio*, or unenforceable, for failing to include an element of scienter or *mens rea* in its attempt to regulate the possession of child pornography. Throughout his post-conviction relief proceedings, Petitioner maintained that the statute contained no element of scienter despite several U.S. Supreme Court decisions mandating that scienter was a required statutory element in the regulation/criminalization of child pornography, and without an element of scienter, such statutes fail to meet constitutional muster. (App.58a).

5. It is noted here that under the guise of "clarifying" the subject statute, the Mississippi Legislature in 2013 amended § 97-5-33(5), MCA, the only "clarification" being that element(s) of scienter were added to the definition of the crime. (App.40a). Therefore, after years of tardiness before amending the statute, Mis-

sissippi finally joined with every other state in the union, who had long before included an element of scienter in their respective statutes regulating or prohibiting the possession of child pornography.

6. While no element of scienter was contained in pre-2013 § 97-5-33(5), MCA, Count I of the indictment specifically alleges that Petitioner "willfully, unlawfully, and feloniously" possessed [child pornography]. (App. 46a). Petitioner maintained that the inclusion of words of scienter not contained in the statute and after his purported violation was an action ex-post facto by the State and therefore unconstitutional. Petitioner further maintained that any inclusion of scienter by the Attorney General in obtaining the indictment was a violation of the separation of powers in that crimes are to be defined by laws enacted through the legislative branch, and such laws cannot be arbitrarily or capriciously amended by the executive branch. (App.46a).

7. As required under Mississippi's post-conviction relief procedure, the Circuit Court reviewed his application and determined that it contained enough merit to require the State to respond and ordered the State to do so. (App.29a). With the issues so joined and the parties having set forth their respective positions, and after review of these issues and arguments, the Circuit Court entered its order denying all relief sought by Petitioner. (App.12a). Later, Petitioner's Motion for Reconsideration was denied (App.10a)

8. Petitioner timely appealed the Circuit Court's denial of relief to the Mississippi Court of Appeals which also denied him any relief through its published decision, *State v. Ishee*, 248 So.3d 841 (Miss. Ct. App. 2017). (App.3a). The Court, citing and relying heavily

on *Renfrow v. State*, 34 So.3d 617 (Miss. Ct. App. 2009), held that: (1) scienter was not a required element in criminal statutes, as regulation of child pornography allowed for greater leeway in regulatory restrictions, (2) scienter appeared in the indictment thereby requiring proof of scienter, and (3) Petitioner's "admissions" of scienter at his plea hearing satisfied any omission of scienter in the statute. While not mentioning or discussing the decisions of *Ferber*, *Osborne*, or any cases arising from them, the Mississippi Court of Appeals in *Renfrow* observed that § 97-5-33(5), MCA, like many other criminal statutes, can be bereft of scienter or *mens rea* and still pass constitutional scrutiny. In effect, the Court of Appeals reasserted that reasoning in Petitioner's case. (App.3a). Petitioner's Motion for Reconsideration to the Mississippi Court of Appeals was denied on April 17, 2018. (App.37a).

9. Thereafter, Petitioner filed his Petition for a Writ of Certiorari to the Mississippi Supreme Court, which requested relief was denied by unpublished Order filed on July 19, 2018. (App.1a). With no motion for reconsideration available under the Mississippi Supreme Court Rules following the entry of this order, Petitioner petitions this honorable Court for relief.

REASONS FOR GRANTING THE PETITION

I. NO STATE SHOULD BE ALLOWED TO PROSECUTE CITIZENS UNDER A FACIALLY UNCONSTITUTIONAL STATUTE, PARTICULARLY ONE ATTEMPTING TO REGULATE OR PROHIBIT FREEDOM OF SPEECH AND EXPRESSION UNDER THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

All of Petitioner's aggrievements are ultimately premised on one primary issue: Is pre-2013 § 97-5-33(5), MCA, facially unconstitutional since it contained no element of scienter/*mens rea* in the criminalization of the possession of child pornography?

A. At the Time Petitioner Is Accused of Violating § 97-5-33(5), MCA, Mississippi Was the Only State That Enforced a Statute Bereft of an Element of Scienter in the Regulation of the Possession of Child Pornography

The United States Supreme Court has held repeatedly that fundamental rights guaranteed under the First Amendment to the United States Constitution should be zealously guarded, and any abridgement of same, viewed with careful and vigilant scrutiny. *Ferber v. New York*, 458 U.S. 747, 764-765, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). While it has been held that child pornography does not constitute protected speech, any legislation in the regulation of same must be carefully drafted so as not to abridge protected speech or due process. *Miller v. California*, 413 U.S. 15, 23-24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1972); *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). With this fundamental principle of constitutional law clearly established, the Supreme Court mandated that

some element of scienter be placed in statutes governing the regulation of child pornography. *Ferber*, 458 U.S. at 765, *Osborne v. Ohio*, 495 U.S. 103, 115, 110 S.Ct. 1691, 109 L.Ed.2d (1990). These decisions were the catalysts which resulted in every state of the union, enacting statutes proscribing the possession of child pornography which included some element, or elements, of scienter, save Mississippi.[1] Despite Mississippi's statute failing to include any required element of scienter or *mens rea* in defining the crime of possession of child pornography, the Attorney General of Mississippi, in presenting Petitioner's case to the grand jury (or in simply preparing the indictment for the grand jury foreman's signature, who knows?), some seventeen (17) months after the alleged offense was committed, added the language that Petitioner, " . . . did willfully, unlawfully, and feloniously possess [child pornography]." (App.46a).

There seems to be no question that pre-amendment § 97-5-33(5) is facially unconstitutional due to the absence of scienter. *Ferber*, 458 at 764-765. Throughout all proceedings in this case, the State has contended that (1) scienter is not a prerequisite in criminal statutes, and (2) that since the indictment charging Petitioner contained scienter and therefore scienter had to be proven, any omission of scienter in the statute was cured. In denying Petitioner relief, the Court of Appeals relied heavily on its prior decision in *Renfrow v. State*, 34 So.3d 617 (Miss. Ct. App. 2009). *Renfrow* was decided long after the *Ferber* and *Osborne*

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[1] Nebraska did not have a statute regulating possession of child pornography at the time of Ishee's alleged offense. Of course, Mississippi's pre-2013 possession statute contained no scienter.

decisions. Therefore, the Circuit Court, in its order denying relief to Petitioner, presumed these decisions were ignored while deciding *Renfrow* (although *Ferber* and *Osborne* are never cited in any party's appellate briefs in *Renfrow* nor in the court's written opinion). (App.12a). While nimbly maneuvering through the issue, the Mississippi Court of Appeals never directly addressed the main issue of Petitioner's appeal: whether a statute proscribing the possession of child pornography was required to contain some element of scienter in order to support prosecution, and, if so, whether the pre-amendment statute contained any scienter to satisfy such a requirement? The *Renfrow* decision held (and wrongfully) that the insertion of scienter element(s) into the indictment long after the alleged wrongful acts cured any defect and that scienter is not a requirement in criminal statutes (which Petitioner maintains is clearly in error in a case involving regulation of free speech and expression under the First Amendment, per *Ferber* and *Osborne*).

As to the argument that scienter is not required in criminal statutes regulating the possession of child pornography as maintained in *Renfrow*, suffice it to say that the U.S. Supreme Court in *Ferber* held that " . . . in all legislation involving this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed, and that criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *Ferber*, 458 U.S. at 765. (Emphasis added). In *Osborne*, the Court held that reckless possession was adequate scienter, but nonetheless, again proclaimed that some scienter was a required statutory element to meet constitu-

tional standards. *Osborne*, 495 U.S. at 115. Since every state legislature and the United States Congress included scienter in statutes regulating possession of child pornography, save Mississippi until 2013, there are not many cases directly on point as to the requirement of scienter in the regulation of possession of child pornography alone. However, the cases are numerous in holding the requirement of scienter as to other aspects and issues in the production, solicitation, dissemination, and distribution of child pornography. Importantly, the Fifth Circuit Court of Appeals held that a child pornography statute outlawing the reckless possession or receipt of child pornography plainly satisfied the requirement laid down in *Ferber* and *Osborne* that "statutory prohibitions on child pornography must include some element of scienter." *U.S. v. Burian*, 19 F.3d 188, 190 (1994).

From these Supreme Court decisions and the Fifth Circuit's clear interpretation of same, there can be no doubt that scienter is a requirement in the statutory regulation of possession of child pornography if it is to pass constitutional muster. The purpose of the requirement of scienter in the regulatory statute is to adequately define the crime for the public to obey and inform the public of what is prohibited. Placing elements of the crime in an indictment afterwards defeats the entire purpose and runs afoul of the First Amendment and due process. Due process and First Amendment protections require that a defined scienter be placed in any regulatory criminal statute involving fundamental First Amendment rights, even when it relates to unprotected speech such as child pornography.

B. Defendant's Right to Petition to Have the Statute Declared Unconstitutional

Under the long established "overbreadth doctrine," a statute may be invalidated if it is fairly capable of being utilized to regulate, burden, or punish constitutionally protected speech or conduct. *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. *Ferber*, 458 U.S. at 767 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973); *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513, 57 S.Ct. 868, 874, 81 L.Ed. 1245 (1937); *Yazoo & M. V. R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-220, 33 S.Ct. 40, 41, 57 L.Ed. 193 (1912). However, the "First Amendment overbreadth doctrine" provides a key exception to this traditional canon. The doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *Ferber*, 458 U.S. at 768 (citing *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980)). "It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." *Ferber*, 458 U.S. at 768 (citing *Dombrowski v.*

Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965)). The overbreadth doctrine has been construed as harsh medicine, not to be applied on a liberal basis to cases involving facially unconstitutional statutes. *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999). However, application of the doctrine obviously applies here, as Petitioner was prosecuted under a statute void of scienter, an element clearly mandated by the U.S. Supreme Court in *Ferber* and *Osborne* to prevent substantial intrusion upon protected speech. Thus, without question, Appellant has standing to contest the facial constitutionality of this law.

The Mississippi legislature's omission of scienter from pre-amendment § 97-5-33(5), MCA, must be presumed intentional, as the other subsections of the statute regulating other aspects of child pornography contained an element of scienter at the time of Appellant's alleged offense. (App.40a). The requirement of scienter in unlawful possession of child pornography statutes is also to protect against punishment of those that possessed such images inadvertently or unknowingly. To allow such a broad First Amendment regulatory statute to pass constitutional attack would be tantamount to "imposing a severe limitation on the public's access to constitutionally protected matter." *Smith v. People of the State of California*, 361 U.S. 147, 153, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). Violation of an unconstitutional law should confer no punishment, particularly one facially violating the substantive rights of the First Amendment.

II. A STATUTE IN VIOLATION OF THE FIRST AMENDMENT'S PROTECTION AGAINST INTRUSIVE REGULATION OF THE RIGHT OF FREEDOM OF SPEECH SHOULD BE HELD VOID *AB INITIO*, PARTICULARLY WHERE THE REQUIRED ELEMENT OF SCIENTER OR *MENS REA*, IS ABSENT

While the U.S. Supreme Court has held that child pornography is not protected speech and can be lawfully regulated, it has also held that any statute criminalizing child pornography is facially invalid if it prohibits a substantial amount of protected speech. *U.S. v. Williams*, 553 U.S. 285, 289 (2008). In making such a determination of whether "a substantial amount of free speech is prohibited", the Court found that the statute being considered was adequate to meet constitutional scrutiny because it had, among other features, the mandated element of scienter ("knowingly"). *Williams*, 553 U.S. at 293-294. Certain provisions of the Child Pornography Prevention Act of 1996 were held facially unconstitutional due to the vagueness of their terms which would have allowed a person to face prosecution for possession of unobjectionable material that someone else had solicited. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). With no defined scienter in pre-2013 § 97-5-33(5), MCA, there can be no doubt it fails to meet constitutional standards and is void.

Mississippi has long followed the doctrine that a statute which is in violation of the Constitution is unconstitutional and void *ab initio*. A conviction under such an unconstitutional statute requires reversal and the release of the defendant. *State v. Sansome*, 133 Miss. 428, 97 So. 753 (1923); *Norwood v. State*, 136

Miss. 272, 101 So. 366 (1924). This doctrine is applied even if the defendant pleaded guilty. *Norwood*, 101 at 366.

III. The Insertion of Scienter into the Indictment After the Date the Alleged Crimes of Petitioner Had Been Committed Constituted an Unlawful Ex-post Facto Act, Done Solely to Prosecute Under a Facially Unconstitutional Statute, Thereby Violating Art. I, Section 10(1) of the United States Constitution and Art. 3, Section 16 of the Mississippi Constitution

The Mississippi Court of Appeals' decision in part rests on the basis that the insertion of scienter in the indictment cured the lack of scienter in the statute. However, this position is untenable because the insertion of scienter into the indictment occurred after the alleged acts for which Petitioner was prosecuted, and is ex-post facto and in violation of Article 3, Sect. 16 of the Mississippi Constitution and Article I, Sect. 10(1) of the United States Constitution. *Ferber* required statutory language to include scienter in criminal laws regulating speech to prevent intrusion upon or unlawful constraining of protected speech. The statute should adequately define the crime, not a later instrument charging an offense. Since no scienter element existed by statute prior to the downloading of any objectionable material by Appellant, constitutional safeguards were not met. To allow inclusion "after the fact" is no more than allowing prosecution ex-post facto.

Allowing the State of Mississippi to wait until after the purported criminal act is done to implant

the necessary statutory scienter is constitutionally objectionable for other reasons. In the pre-2013 statute, Mississippi had no defined element of scienter advising its citizens of what constituted the proscribed conduct. In practice, if a prosecution was desired, the State of Mississippi would have a smorgasbord of scienter elements to choose from at the time of indictment based on the facts of any particular case. This is far too broad, and failed to do what the Supreme Court mandated in *Ferber* to protect citizens in their pursuit of protected speech. In *Osborne*, the Ohio legislature omitted a scienter element from the charging statute, but this omission was held to be cured under a catch-all legislative statute which authorized the use of a reckless standard in such cases. Since Mississippi has no catch-all statute providing scienter, the omission presents a different problem. Because scienter was wrongfully omitted in pre-2013 § 97-5-33(5), MCA, is the prosecution then afforded a menu of optional scienter standards to apply in an indictment? Could the indictment for stronger cases use "intentionally" or "knowingly" as scienter, while in weaker cases use "recklessness", "simple inadvertence" or "negligence" as the scienter standard? This is why the statutory requirement of a defined scienter is mandated by *Ferber* and *Osborne*, not a menu of scienter options available to the State at the time the charges are being lodged, for then it is too late.

Further, allowing the State to place new elements in the indictment rather than those described or defined by statute was tantamount to allowing the executive branch to amend the statute passed by the legislature. This violates the doctrine of separation of powers established by the Mississippi Constitution, Art. I,

§§ 1, 2. Why should a prosecutor be allowed to imbed new elements of a crime into a statute enacted by the legislature? Would the State then be allowed to imbed different levels of scienter for different cases, *i.e.* one case's scienter being "knowingly", another case's being "recklessly", or yet another case's being "negligently" based on the facts of the case? Would the prosecutor be able to rewrite the entire statute if he is allowed to rewrite part of it? It is the sole constitutional function of the legislature to enact laws defining crimes, particularly such laws regulating First Amendment freedoms.

The protection against improper intrusion upon constitutionally protected free speech must be vigorously defended, even at the cost of allowing some miscreant to escape what is or should be criminal behavior. While Petitioner does not argue that speech is an absolute right not subject to careful, well-defined regulation, such regulation at the expense of First Amendment fundamental rights is unacceptable. One need only study the persecution of Socrates for spreading enlightenment, or of Galileo for proclaiming the world was round, not flat, to realize the importance of free speech and expression. The First Amendment was spawned to prevent such persecution here, yet there will always arise perceived necessities for relaxation of fundamental rights. William Pitt, the Elder, Earl of Chatham, in addressing the English House of Commons on November 18, 1783, warned:

> Necessity is the plea for every infringement of human freedom. It is the argument of tyrants: it is the creed of slaves.

Today, one perceived necessity is the concern over child pornography. A necessity to relax fundamental constitutional rights will always be present itself. It is the responsibility of the courts to look beyond that necessity. No matter how great the need to control child pornography, that need will never be greater than the cherished fundamental right to free speech and expression the First Amendment is designed to protect.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests this Court to grant certiorari review.

Respectfully submitted,

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