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ORDER OF THE SUPREME COURT OF
MISSISSIPPI DENYING PETITION
FOR WRIT OF CERTIORARI
(JULY 19, 2018)*

IN THE SUPREME COURT OF MISSISSIPPI

MICHAEL ISHEE,

Appellant,

v.

STATE OF MISSISSIPPI,

Appellee.

No. 2016-CT-01033-SCT
A2401-15-206

Before: Dawn H. BEAM, Justice.

This matter is before the Court on Michael Ishee's Petition for Writ of Certiorari. After due consideration, the Court finds the petition should be denied.

IT, THEREFORE, IS ORDERED that Michael Ishee's Petition for Writ of Certiorari is denied.

* Note: The Mississippi Supreme Court's Order denying a Petition for Writ of Certiorari is dated June 28, 2018, but was not filed by the clerk of court until July 19, 2018. The Supreme Court of Mississippi recognizes July 19, 2018 as the filing date of the order. (See Mandate of the Supreme Court of Mississippi, App.38).

SO ORDERED, this the 28th day of June, 2018.

/s/ Dawn H. Beam
Justice, for the Court

**OPINION OF THE COURT OF APPEALS
(NOVEMBER 28, 2017)**

**IN THE COURT OF APPEALS OF
THE STATE OF MISSISSIPPI**

MICHAEL ISHEE,

Appellant,

v.

STATE OF MISSISSIPPI,

Appellee.

No. 2016-CP-01033-COA

A2401-15-206

Harrison County Circuit Court, First Judicial District
Trial Judge: Hon Lisa P. Dodson

Before: IRVING, P.J.,
BARNES and WESTBROOKS, JJ.

IRVING, P.J., FOR THE COURT:

¶ 1. Michael Ishee appeals the Harrison County Circuit Court's denial of his motion for post-conviction relief (PCR), after pleading guilty to one count of exploitation of a child under Mississippi Code Annotated section 97-5-33(5) (Supp. 2007). He claims that, at the time of his indictment and conviction, section 97-5-33(5) was overbroad and unconstitutional because it lacked the element of scienter.

FACTS

¶ 2. On December 5, 2011, Ishee was indicted on nineteen counts of exploitation of a child. The indictment charged that, on or about July 12, 2010, Ishee possessed visual depictions of actual children under the age of eighteen years engaging in sexually explicit conduct. These images were found on the hard drive of his computer. The State agreed to pass eighteen counts to the files, and Ishee entered a plea of guilty to Count I. Sentencing was deferred to a later date, at which time Ishee was sentenced to twenty years, with eight years suspended, leaving twelve years to serve, followed by four years of probation. Ishee timely filed his PCR motion; however, it was denied by the circuit court. This appeal followed.

DISCUSSION

¶ 3. We review the dismissal or denial of a PCR motion for abuse of discretion. We will only reverse if the trial court's decision is clearly erroneous. We review issues of law *de novo*. Under Mississippi Code Annotated section 99-39-11(2) (Rev. 2015), a trial court may deny a PCR motion if it plainly appears from the face of the motion, any annexed exhibits, and the prior proceedings in the case that the movant is not entitled to any relief.

Wilson v. State, 203 So.3d 762, 764 (¶ 6) (Miss. Ct. App. 2016) (internal citations and quotations omitted).¹

¹ We note that Ishee's PCR motion is proper under Mississippi Code Annotated section 99-39-5(1)(c) (Rev. 2015), as he challenges the constitutionality of the statute he was sentenced under. *See Conyers v. State*, 196 So.3d 170, 171 (5) (Miss. Ct.

¶ 4. Ishee argues that section 97-5-33(5), as written at the time of his indictment, was unconstitutional because it lacked a scienter requirement. At that time, section 97-5-33(5) read: “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.” Effective July 1, 2013, this section was amended to read: “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 Ann. § 97-5-33(5) (Rev. 2014) (emphasis added).

¶ 5. Count I of Ishee’s indictment reads that Ishee

did wilfully, unlawfully, feloniously possess[] visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee[] did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Western Digital hard drive with a serial number of WMAT-J3553758, all in violation of 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

¶ 6. In support of his argument, as discussed below, Ishee relies on United States Supreme Court

rulings in similar cases that require a scienter requirement for conviction. Furthermore, he asserts that the State acknowledged this error when the statute was revised in 2013. The State responds that the issue being raised by Ishee was previously decided in *Renfrow v. State*, 34 So.3d 617 (Miss. Ct. App. 2009). The State contends that Ishee admitted that he willfully possessed child pornography. He also admitted that he downloaded the child pornography, and knew it was illegal based upon his statements at his plea hearing:

[BY THE COURT]: Mr. Ishee, according to the cause number 11-813, count one, it says that this exploitation occurred on or about July 12, 2010. Tell me about what happened in your case[.]

[BY ISHEE]: I was found to be in possession of something that goes against the statute.

[BY THE COURT]: So tell me. Where were you in possession of it?

[BY ISHEE]: At my home.

[* * *]

[BY THE COURT]: So you downloaded it on the computer?

[BY ISHEE]: Yes ma'am.

[* * *]

[BY THE COURT]: So you downloaded pictures or videos of children under the age of 18 engaging in sexual explicit conduct, is that correct?

[BY ISHEE]: Yes ma'am.

In this case, there was no challenge to either Ishee's indictment or the statute, before or during his plea hearing. Pursuant to *Ryals v. State*, 881 So.2d 933, 936 (¶ 13) (Miss. Ct. App. 2004), "[i]n a request for post-conviction relief, a trial court is entitled to place great weight on the testimony given at a plea hearing." Emphasis should be placed on Ishee's statements made at his hearing.

¶ 7. Ishee's counsel relies on *New York v. Ferber*, 458 U.S. 747 (1982), in support of his argument—that there must be some form of scienter to sustain convictions for possession of child pornography. He specifically quotes the *Ferber* court: "As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *Id.* at 765. Though not referenced by Ishee, we note that the *Ferber* court also held that "states are entitled to greater leeway in the regulation of pornographic depictions of children." *Id.* at 756.

¶ 8. The State contends that under *Ferber*, this requirement was met when Ishee pleaded guilty to willfully possessing child pornography on his hard drive. Thus, the requirement of scienter was met. Additionally, the State relies on the similar ruling in *Renfrow*, 34 So.3d at 625 (¶ 19). Renfrow sought to dismiss his case on the basis that there was a lack of scienter in the same statute at issue today. The motion was denied, as willfully possessing child pornography was the basis of scienter for convicting Renfrow. The crux of this case is whether Ishee was convicted under an unconstitutional statute. During his plea hearing, he admitted to willfully possessing child pornography. "Willfully" indicates scienter. Ishee argues that *Ren-*

frow is inapplicable, that this Court erred in that decision, and that we should overrule *Renfrow* in this case.

¶ 9. In addition, Ishee argues that, by inserting elements of a crime into the indictment that were not in the statutory definition of the crime, the State violated the separation of powers as mandated by the Mississippi Constitution. He also argues that this would be an *ex post facto* law and therefore unconstitutional. The State responds that it was not improper to charge Ishee with willful possession of child pornography. Since Ishee's indictment charged him with willfully, unlawfully, and feloniously possessing child pornography, and Ishee admitted to knowingly possessing child pornography, it was irrelevant that section 97-5-33(5) did not have a mens rea element, just as this Court found in *Renfrow*.

¶ 10. Again, this Court in *Renfrow* provided clear guidance on this exact issue in 2009:

[O]ur decision need not turn on whether section 97-5-33(5) is unconstitutionally vague simply because it does not contain a mens rea element. The State charged Renfrow with willful possession of child pornography. That is, Count II of the indictment against Renfrow contained language that included an allegation that Renfrow willfully possessed child pornography. By including that language, the State imposed a mens rea requirement, and it was obligated to prove that aspect of the charge beyond a reasonable doubt. Consequently, under the circumstances, it is irrelevant that section 97-5-33(5) does not include a mens rea element.

Renfrow, 34 So.3d at 625 (¶ 19). The subsequent change in the statute therefore has no bearing on this case. As such, we affirm.

¶ 11. AFFIRMED.

LEE, C.J., GRIFFIS, P.J., CARLTON, FAIR, GREEN-LEE, WESTBROOKS AND TINDELL, JJ., CONCUR. WILSON, J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. BARNES, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION.

ORDER OF THE CIRCUIT COURT
DENYING MOTION FOR RECONSIDERATION
(JUNE 28, 2016)

IN THE CIRCUIT COURT OF HARRISON COUNTY,
MISSISSIPPI, FIRST JUDICIAL DISTRICT

MICHAEL ISHEE,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

Cause No. A2401-2015-00206
(Underlying Criminal Cause No. B2401-2011-00813)

Before: Lisa P. DODSON, Circuit Court Judge.

This matter is before this Court on the Motion for Reconsideration (hereinafter Motion) filed by Michael Ishee (hereinafter Ishee). Ishee filed a Petition seeking post conviction relief in this cause. This Court entered its Order and Judgment in this cause denying that Petition. The Motion seeks reconsideration of that Order and Judgment. This Court attempted to address all issues raised in the Petition and briefs in the Order and Judgment. In short, and as noted in the Order and Judgment, the situation in Ishee's case was addressed by the Mississippi Court of Appeals' decision in *Renfrow v. State*, 34 So.3d 617 (Miss. Ct.

App. 2009). That decision remains the law in this State. The Order and Judgment, however, also addressed the other authorities cited and arguments made by Ishee in his Petition and briefs. The Motion simply repeats part of the arguments made in the Petition seeking post conviction relief and related briefs. Neither the Motion nor the brief on the Motion has provided anything which could not have been presented on the initial Petition and briefs. The Motion is without merit. It is, therefore,

ORDERED that the Motion for Reconsideration is hereby denied.

SO ORDERED this the 28th day of June, 2016.

/s/ Lisa P. Dodson
Circuit Court Judge

**ORDER AND JUDGMENT OF THE
CIRCUIT COURT OF HARRISON COUNTY
(MAY 20, 2016)**

IN THE CIRCUIT COURT OF HARRISON COUNTY,
MISSISSIPPI, FIRST JUDICIAL DISTRICT

MICHAEL ISHEE,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

Cause No. A2401-2015-00206
(Underlying Criminal Cause No. B2401-2011-00813)

Before: Lisa P. DODSON, Circuit Court Judge.

This matter is before this Court on the Motion for Post Conviction Collateral Relief (hereinafter Motion) filed by Michael Ishee (hereinafter Ishee). Ishee was indicted on December 5, 2011, in Cause No. B2401-2011-00813 for nineteen (19) counts of the felony charge of Exploitation of a Child. On April 22, 2014, Ishee entered his plea of guilty to Count I and sentencing was deferred. The State agreed to pass the remaining eighteen (18) counts to the files. On June 20, 2014, Ishee was sentenced to twenty (20) years with eight (8) years suspended, leaving twelve (12) years to serve followed by four (4) years of

reporting probation. The Motion was filed on October 23, 2015. As the Motion asserted that the statute on the subject charge was unconstitutional, the Attorney General's Office was given time to file an Answer. That Answer was filed and Ishee has filed his rebuttal. The Court also requested a transcript of Ishee's plea hearing which has now been received.

The Motion argues that Mississippi Code Annotated § 97-5-33(5) is unconstitutional as it lacked any requirement of scienter. Ishee maintains that his indictment, plea, conviction and sentence are thus void. The Indictment charges that each of the nineteen (19) counts occurred on or about July 12, 2010. At that time, § 97-5-33(5) 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.

Ishee asserts that the remaining subsections of § 97-5-33 provide some form of scienter or knowledge. He argues that certain decisions of the United States Supreme Court mandate that such a statute include an element of scienter. He also argues that the statute has been amended since the conduct for which he was indicted occurred and that this amendment in some manner indicates an acknowledgment that the prior statute was deficient.

Count I of the Indictment stated that Ishee did: wilfully [sic], unlawfully, feloniously possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee did

possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Western Digital hard drive with a serial number of WMAT-13553758 all in violation of 97-5-33(5) of the Miss. Code of 1972, as amended. . . .

The remaining eighteen (18) counts used the same language except that each of those counts involved separate DVD's. Ishee's Petition to Enter Plea of Guilty in Paragraph 13 provides a space for a defendant to state the basis of his plea. Ishee stated: "I downloaded and had in my possession material in violation of the statute." The Mississippi Court of Appeals decision in *Renfrow v. State*, 34 So.3d 617 (Miss. Ct. App. 2009) addressed § 97-5-33(5). Renfrow had filed a motion seeking to dismiss the charge arguing that this subsection of the statute contained no mens rea requirement. The trial court denied the motion. On appeal, the Court of Appeals found:

[T]he appropriate test is to determine "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." *Lewis v. State*, 765 So.2d 493, 499 (¶ 25) (Miss. 2000).

[* * *]

There can be no doubt that a criminal statute is not unconstitutionally vague solely because it does not contain a mens rea element. "The Legislature may define a crime which depends on no mental element and consists only of forbidden acts or omissions." *Roberson v. State*, 501 So.2d 398, 401 (Miss.

1987) (quoting *Wright v. State*, 236 So.2d 408, 413 (Miss. 1970)). “In that instance, the intent to do the forbidden act is the only intent necessary to complete the offense.” *Id.*

However, our decision need not turn on whether section 97-5-33(5) is unconstitutionally vague simply because it does not contain a mens rea element. The State charged Renfrow with willful possession of child pornography. That is, Count II of the indictment against Renfrow contained language that included an allegation that Renfrow willfully possessed child pornography. By including that language, the State imposed a mens rea requirement, and it was obligated to prove that aspect of the charge beyond a reasonable doubt. Consequently, under the circumstances, it is irrelevant that section 97-5-33(5) does not include a mens rea element.

Id. at 625, ¶¶ 16-19. As in Renfrow’s case, Ishee’s indictment charges that he willfully possessed child pornography. Further, Ishee admitted that he downloaded the pornography and that he knew what it was.

THE COURT: Mr. Ishee, according to cause number 11-813, count one, it says that this exploitation of a child occurred on or about July 12, 2010. Tell me what happened in your case?

MR. ISHEE: I was found to be in possession of something that goes against the statute.

THE COURT: So tell me where. Where were you in possession of it?

MR. ISHEE: At my home.

THE COURT: At your home, which is located where?

MR. ISHEE: In Saucier.

THE COURT: In Saucier. Here in Harrison County?

MR ISHEE: Yes, ma'am.

THE COURT: How were you in possession of it?

MR. ISHEE: It was found on the computers.

THE COURT: It was on the computers. Who put it on the computer?

MR ISHEE: I did.

THE COURT: So you downloaded it on the computer?

MR. ISHEE: Yes, ma'am.

THE COURT: What was it that you downloaded?

MR. ISHEE: It was something in violation of the statute.

THE COURT: Which was what?

MR. ISHEE: It was pictures or videos, either one.

THE COURT: Pictures or videos of what?

MR. ISHEE: Of—

THE COURT: Do you know what you put on there?

MR. ISHEE: Somebody under the age of 18.

THE COURT: Okay. Was it child pornography?

MR. ISHEE: Yes, ma'am.

THE COURT: So you downloaded pictures or videos of children under the age of 18 engaging in sexually explicit conduct, is that correct?

MR. ISHEE: Yes, ma'am.

THE COURT: And you had those on your home computer?

MR. ISHEE: Yes, ma'am.

THE COURT: Now according to this, and I'm looking at count one of the indictment, it says that you possessed visual depictions of the actual children under the age of 18 years engaging in sexually explicit conduct on a Western Digital hard drive with a serial number of WMAT13553758. Is that all correct?

MR. ISHEE: Yes, ma'am.

Plea Transcript pages 15-17. In accord with *Renfrow*, Ishee's argument is without merit.

Ishee argues that the Court of Appeals in *Renfrow* ignored the United States Supreme Court decisions concerning mens rea or scienter in cases such as this. He gives no reason for this position except that he believes that the United States Supreme Court decisions mandate a mens rea component in child pornography statutes. The decisions relied upon by Ishee were decided well before *Renfrow*. It cannot be presumed that the Court of Appeals ignored those decisions.

Moreover, the decisions relied upon by Ishee do not mandate a finding that the Mississippi statute is

unconstitutional in this case. In *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982), the Supreme Court reviewed its decisions concerning pornography and discussed the fact that “States are entitled to greater leeway in the regulation of pornographic depictions of children.” *Id.* at 756. After discussing reasons for that, that Court stated:

Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions.

Id. at 763. The *Ferber* Court held:

There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed.

Id. at 764. In this case, the Mississippi Court of Appeals had authoritatively construed the statute prior to the date of Ishee’s crime. It had not found the statute to be defective or unconstitutional where the indictment required a finding of willfulness. Finally, the decision in *Ferber* states that:

As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant. *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L.Ed.2d 205 (1959); *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L.Ed.2d 590 (1974).

Id. at 765. The Mississippi Court of Appeals has clearly provided that the element in scienter exists when the indictment alleges a willful possession of the prohibited materials.

Ishee cites to the opinion in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994). That case interpreted a child pornography statute which provided the word “knowingly” in one portion, but not in another portion of the statute. Important to the issues in this case is the Supreme Court’s pronouncements concerning presumptions of scienter and statutory construction. That opinion provides:

But we do not think this is the end of the matter, both because of anomalies which result from this construction, and because of the respective presumptions that some form of scienter is to be implied in a criminal statute even if not expressed, and that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions.

Id. at 68-69. And:

Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them. * * * See also *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S. Ct. 2864, 2874, 57 L.Ed.2d 854 (1978) (“[F]ar more than the simple omission of the appropriate phrase

from the statutory definition is necessary to justify dispensing with an intent requirement.”).

Id. at 70. The decision then says:

A final canon of statutory construction supports the reading that the term “knowingly” applies to both elements. Cases such as *Ferber*, 458 U.S., at 765, 102 S. Ct., at 3359 (“As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant”); *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L.Ed.2d 205 (1959); *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L.Ed.2d 590 (1974); and *Osborne v. Ohio*, 495 U.S. 103, 115, 110 S. Ct. 1691, 1699, 109 L.Ed.2d 98 (1990), suggest that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts. It is therefore incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 1397, 99 L.Ed.2d 645 (1988).

Id. at 78. Mississippi law is in accord concerning statutory construction. Recently, the Mississippi Court of Appeals held:

Moreover, even if we concluded that section 11-44-3 were [sic] ambiguous standing alone, settled rules of statutory interpretation would

oblige us to read it together with chapter 44's other provisions—and to avoid potential conflict between those provisions if possible. *See Carl Ronnie Daricek Living Tr.*, 34 So.3d at 599 (¶ 25); *Tunica COP.*, 27 So.3d at 1133 (¶ 15); *Martin*, 501 So.2d at 1127.

Moore v. State, 2015-COA-00357-COA ¶ 12 (04/12/16). And further,

“[W]hen two statutes pertain to the same subject, they must be read together[.]” *Tunica Cty.*, 27 So.3d at 1133 (¶ 15). “[All] of the relevant statutes must be taken into consideration, and a determination of legislative intent must be made from the statutes as a whole.” *Martin*, 501 So.2d at 1127 (emphasis added).

[Emphasis in opinion.] *Moore, supra*, at ¶ 13. In construing all the subsections of § 97-5-33 together, it is clear that the intent is to prohibit the knowing production of, transmission of and possession of child pornography. There is no doubt in this case that Ishee's conduct in deliberately downloading child pornography onto his computer is proscribed by the statute.

While Ishee argues that scienter must be included in the statute, his argument is actually that, without a scienter requirement, those who are unaware that they possess child pornography or who are unaware of the ages of the children in the pornography would “inevitabl[y]” be punished. He argues that the overbreadth doctrine applies in this case as the statute would severely limit public access to matter protected by the Constitution. It is without question that child pornography such as exists in Ishee's case is not

protected by the Constitution. Nor is there any public entitlement to such. The opinion in *Ferber* held:

We accordingly held that “particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Ibid.*

[* * *]

Applying these principles, we hold that § 263.15 is not substantially overbroad. We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. New York, as we have held, may constitutionally prohibit dissemination of material specified in § 263.15. While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of § 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute’s reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the

statute by giving an expansive construction to the proscription on “lewd exhibition[s] of the genitals.” Under these circumstances, § 263.15 is “not substantially overbroad and . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.” *Broadrick v. Oklahoma*, 413 U.S., at 615-16, 93 S. Ct., at 2917-2918.

Id. at 773-74. Ishee does not give a single example as to how depictions of children engaging in sexually explicit conduct would ever be some type of protected expression under the First Amendment. As in *Ferber*, it is difficult to imagine how such depictions might be necessary for any sort of “educational, medical, or artistic works. . . .”

More concerning, of course, is Ishee’s argument that someone could be charged who possessed such depictions without knowing that he or she possessed them. Ishee has provided nothing to indicate how often, if at all, this might ever occur or even possibly occur. However, the Court of Appeals has clearly indicated that the indictment on such a charge must include a willful possession and that the State would be required to prove same. This authoritative interpretation of the statute along with *Ferber*’s case-by-case analysis addresses any possible overbreadth in the statute.

The United States Supreme Court also addressed child pornography statutes in *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L.Ed.2d 98 (1990). Again, addressing the overbreadth doctrine, that Court stated:

In our previous decisions discussing the First Amendment overbreadth doctrine, we have repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only “real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 2917, 37 L.Ed.2d 830 (1973). Even where a statute at its margins infringes on protected expression, “facial invalidation is inappropriate if the ‘remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . .’” *New York v. Ferber*, 458 U.S., at 770, n.25, 102 S. Ct., at 3362 n25.

Id. at 112. The Court then found that the Ohio Supreme Court’s interpretation of the statute avoided penalizing those who possessed “innocuous photographs of naked children” and thus the statute survived the overbreadth challenge. *Id.* at 113-14. Further,

Shuttlesworth, then, stands for the proposition that where a State Supreme Court narrows an unconstitutionally overbroad statute, the State must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written;

Id. at 118. Mississippi’s statute covers “easily identifiable and constitutionally proscribable conduct” as referred to in *Osborne*. In addition, that statute had been construed by the Mississippi Court of Appeals

prior to Ishee's conduct in this case. The State followed the decision in *Renfrow* in this matter, the indictment being in line with that decision and the proof evidencing a knowing and willful possession of the videos and pictures.

Ishee is in much the same situation as was Osborne.

Osborne had notice that his conduct was proscribed. It is obvious from the face of § 2907.323(A)(3) that the goal of the statute is to eradicate child pornography. The provision criminalizes the viewing and possessing of material depicting children in a state of nudity for other than "proper purposes." The provision appears in the "Sex Offenses" chapter of the Ohio Code. Section 2907.323 is preceded by § 2907.322, which proscribes "[p]andering sexually oriented matter involving a minor," and followed by § 2907.33, which proscribes "[d]eception to obtain matter harmful to juveniles." That Osborne's photographs of adolescent boys in sexually explicit situations constitute child pornography hardly needs elaboration. Therefore, although § 2907.323(A)(3) as written may have been imprecise at its fringes, someone in Osborne's position would not be surprised to learn that his possession of the four photographs at issue in this case constituted a crime.

Osborne, 495 U.S. at 116. Section 97-5-33 is in the chapter titled "Offenses Affecting Children." It is preceded by statutes concerning sex crimes against children and sexually oriented materials. It is followed by other statutes providing for the protection of children

from neglect and abuse. As with Osborne, someone reading § 97-5-33 “would not be surprised to learn” that Ishee’s possession of the videos and pictures involved in this case “constituted a crime.” *Id.*

Ishee also argues that the applicable statute has now been amended and that this somehow evidences a recognition that the statute was deficient. Amendments to statutes do not necessarily mean that a statute was in any manner deficient. In the case of § 97-5-33(5), the 2013 amendment was specifically “to clarify the state of mind necessary to constitute a knowing violation of the proscription against possession of child pornography. . . .” Prior amendments in 1995, 2003, and 2005 all indicate that they are to add prohibitions, not to clarify anything. The 1995 amendment was “to amend . . . to prohibit the possession of materials depicting the sexual exploitation of children. . . .” 1995 Miss. Laws Ch. 484. In 2003, the purpose was to “amend” to include the use of computers. 2003 Miss. Laws Ch. 562. Both 2005 bills were to “amend” to prohibit causing a child to take sexually provocative photographs. 2005 Miss. Laws Ch. 467 and 491. Only the 2007 amendment and the 2013 amendment refer to clarifying some portion of the statute. The word “clarify” is defined as to make clearer or more understandable. It does not connote a change or addition, but simply a more precise identification or explanation of a matter. There is nothing in the 2013 amendment that indicates any unconstitutionality in or ineffectiveness of the statute as it existed prior to that amendment.

Finally, the Mississippi appellate courts have many times indicated that testimony during a plea hearing is to be given great weight. As the Mississippi Court

of Appeals stated in *Ryals v. State*, 881 So.2d 933 (Miss. Ct. App. 2004):

“In a request for post-conviction relief, a trial court is entitled to place great weight on the testimony given at a plea hearing.” [*Sutton v. State*, 873 So.2d 120,] 123 (P17). This is because “statements made under oath in open court have a strong presumption of truthfulness.” *Jackson v. State*, 872 So.2d 708, 711 (P11) (Miss. Ct. App. 2004). Since Ryals is merely seeking to contradict the testimony that was given during his plea hearing, we find no error.

Id. at 936, ¶ 13. Ishee’s claim on this Motion is at its most basic that someone might be convicted under the statute for unknowingly possessing child pornography on a computer. The statutory and constitutional arguments have been addressed herein. Very clearly, however, Ishee did not unknowingly possess the child pornography in this case. Nor was he unaware of the fact that it was child pornography as defined by the statutes. As reflected in his plea colloquy (a portion being set forth above at pages 3-4), he personally downloaded the child pornography onto his computer and he clearly knew what type of videos and pictures were there.¹ The State’s brief recitation of evidence and particularly how Ishee came to be investigated further reflects Ishee’s knowledge of both the existence and contents of the videos and pictures.

¹ This does not even include the numerous DVD’s containing child pornography as charged in the remaining counts which were passed.

Considering all of the foregoing, the Motion is without merit. It should be denied. It is, therefore,

ORDERED that the Motion for Post Conviction Collateral Relief is hereby denied.

SO ORDERED this the 20th day of May, 2016.

/s/ Lisa P. Dodson
Circuit Court Judge

**ORDER OF THE CIRCUIT COURT
OF HARRISON COUNTY
(NOVEMBER 30, 2015)**

IN THE CIRCUIT COURT OF HARRISON COUNTY,
MISSISSIPPI, FIRST JUDICIAL DISTRICT

MICHAEL ISHEE,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

Cause No. A2401-2015-00206

Before: Lisa P. DODSON, Circuit Court Judge.

THIS CAUSE is pending before this Court on the Motion for Post Conviction Relief filed by Petitioner. That Motion challenges the constitutionality of the statute under which Petitioner was convicted in Cause No. B2401-2011-00813. Therefore, “the Attorney General must be notified and provided an opportunity to respond.’ *Martin v. Lowery*, 914 So.2d 461, 465 (¶ 9) (Miss. 2005) (citing *In re D.O.*, 798 So.2d 417, 423 (¶ 22) (Miss. 2001)), *See also* Miss. R. Civ. P. 24(d).” *Bass v. State*, 115 So.3d 889, 890, ¶ 6 (Miss. Ct. App. 2013). It appears that Petitioner served the Attorney General with the Motion at the time of its filing, thereby providing notice. The Attorney General

shall have thirty (30) days from the date hereof to file any response to the Motion. It is, therefore,

ORDERED that the Attorney General shall have thirty (30) days from the date hereof to file a response to the Motion for Post Conviction Relief.

ORDERED this the 30th day of November, 2015.

/s/ Lisa P. Dodson
Circuit Court Judge

**ORDER OF THE CIRCUIT COURT
OF HARRISON COUNTY
(JUNE 20, 2014)**

**IN THE CIRCUIT COURT OF HARRISON COUNTY,
MISSISSIPPI, FIRST JUDICIAL DISTRICT**

STATE OF MISSISSIPPI

v.

MICHAEL ISHEE

Cause No. B2401-2011-813

Before: Lisa P. DODSON, Circuit Judge.

This day this cause came on for sentencing of the Defendant who had previously pled guilty in this cause to Exploitation of a Child-Count I. The Attorney General's Office being represented by Brandon Ogburn, Assistant Attorney General and the Defendant in his own proper person and his attorney, Joe Sam Owen, were present in the Court.

Thereupon the Defendant was placed at the Bar of the Court for sentence and was asked by the Court if he had anything to say why the judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court, the State previously made no recommendation (*Open Plea*). It is therefore,

ORDERED that the Defendant be and is hereby sentenced to Twenty (20) Years, suspending Eight (8)

Years, leaving Twelve (12) Years to serve which sentence is day for day pursuant to the statutes governing such cases (the Defendant shall receive credit for any and all Time Served as to this charge) in an institution under the control and supervision of the Mississippi Department of Corrections.

UPON RELEASE from the custody of the Mississippi Department of Corrections the defendant is hereby placed under the supervision of the Mississippi Department of Corrections for a period of Four (4) Years of Reporting Probation until the Court in term time, or the Judge on vacation, shall alter, extend, terminate or direct the enforcement of the above sentence, and the suspension of said sentence is based upon the following conditions. Defendant shall:

- (a) Hereafter commit no offense against the laws of this or any state of the United States, or of the United States;
- (b) Avoid injurious or vicious habits;
- (c) Avoid persons or places of disreputable or harmful character;
- (d) Report to the supervising officer as directed;
- (e) Permit the supervising officer to visit in home or elsewhere;
- (f) Work faithfully at suitable employment as far as possible;
- (g) Remain within the State of Mississippi unless authorized to leave on proper application therefore;
- (h) Support dependents;

- (i) Abstain from drinking alcoholic beverages of any kind or character and abstain from using narcotic drugs of any kind unless prescribed by a licensed physician and then only as prescribed;
- (j) Hereby waives extradition to the State of Mississippi from any jurisdiction, in or outside the United States where Defendant may be found and will not contest any effort by any jurisdiction to return Defendant to the State of Mississippi;
- (k) Pay to the Mississippi Department of Corrections the sum of \$55.00 per month by certified check or money order until discharged from supervision, per Miss. Code Ann. § 47-7-49;
- (l) Submit, as provided by Miss. Code Ann. § 47-5-601 to any type of breath, saliva or urine chemical analysis test, the purpose of which is to detect the possible presence of alcohol or a substance prohibited or controlled by any law of the State of Mississippi or the United States, and shall pay a \$10.00 fee for each positive urine analysis.

The Defendant's drug use not covered.

- (m) Attend and complete any special programs or counseling as directed by the Court or the supervising officer, and pay any fees as required for services;
- (n) Pay all costs as described in condition "o" of this order to the Circuit Clerk by certified check or money order. Unless otherwise

specified in condition "o" of this order, all costs are due in full within 30 days of the date of this order.

- (o) Pay all court costs, a \$50,000.00 fine; however, the Court hereby suspends \$40,000.00, leaving a total fine in the amount of \$10,000.00, a \$300.00 C.V.C.F. assessment and restitution in the amount of \$1,000.00 to be reimbursed to the Mississippi Children's Trust Fund. Payments in the amount of \$100.00 are to begin on or before sixty (60) days after release from incarceration and shall continue in the amount of \$100.00 every thirty (30) days thereafter until all amounts are paid in full. The Defendant shall report to the supervising officer to begin his Reporting Probation within Forty-Eight (48) hours after his release from incarceration. The Defendant shall register as a sex offender.
- (p) NOT possess any type of weapon.

ORDERED this the 20th day of June, 2014.

Entered this the 23rd day of June, 2014.

/s/ Lisa P. Dodson
Circuit Judge

ORDER OF THE CIRCUIT COURT
OF HARRISON COUNTY
(APRIL 22, 2014)

IN THE CIRCUIT COURT OF HARRISON COUNTY,
MISSISSIPPI, FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI,

v.

MICHAEL ISHEE,

Cause No. B2401-2011-813

Before: Lisa P. DODSON, Circuit Judge.

This day into open court came the Assistant Attorney General, Brandon Ogburn, and the Defendant, in his own proper person and represented by counsel, Joe Sam Owen. The Defendant filed a petition to enter a plea of Guilty in which he was advised of his legal and constitutional rights in the premises and was advised of the consequences of such a plea. The Defendant entered his plea of Guilty to the charge of Exploitation of a Child–Count I, after having been fully advised of his legal rights and questioned under oath by the Court concerning his understanding of the proceedings including his rights under the Constitutions of the United States and the State of Mississippi. The Court, being satisfied by the proof and Defendant's answers, found that the Defendant knowingly and voluntarily waived his constitutional rights to trial; that the plea of Guilty was freely,

knowingly and voluntarily made; that the Defendant is Guilty based upon the facts presented to the Court; and the Court adjudicated the Defendant to be Guilty of the charge of Exploitation of a Child–Count I.

Thereupon the Defendant was placed at the Bar of the Court for sentencing and the Defendant was asked if he had anything to say why the judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court. The State made no recommendation and this is an Open Plea. The State shall pass to the files Counts II through XIX (Exploitation of a Child all Counts). It is therefore,

ORDERED that sentencing is hereby deferred, this case is reset for sentencing on June 2, 2014 at 9:00 a.m. in Biloxi. The Defendant denies the use of drugs. The Defendant shall not have access to computers or similar devices or to any device with internet capabilities and defendant is restricted from using the internet. Defendant shall have no contact with anyone less than eighteen (18) years of age with the exception of his children. Defendant shall not be permitted on the property of any school with the exception of attending graduation ceremonies for his two (2) children.

Ordered this the 22nd day of April, 2014.

/s/ Lisa P. Dodson

Circuit Judge

**ORDER OF THE MISSISSIPPI COURT OF
APPEALS DENYING MOTION FOR REHEARING
(APRIL 17, 2018)**

**SUPREME COURT OF MISSISSIPPI,
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
Office of the Clerk**

Muriel B. Ellis
Post Office Box 249
Jackson, Mississippi 39205-0249

(Street Address)

450 High Street
Jackson, Mississippi 93201-1082

Telephone: (601) 359-3694
Facsimile: (601) 359-2407
Email: sctclerk@courts.ms.gov

This is to advise you that the Mississippi Court of Appeals rendered the following decision on the 17th day of April, 2018.

Court of Appeals Case #2016-CA-01033-COA
Trial Court Case #A2401-15-00206

Michael Ishee v. State of Mississippi

The motion for rehearing is denied.

**MANDATE OF THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI
(AUGUST 13, 2018)**

**COURT OF APPEALS OF
THE STATE OF MISSISSIPPI**

MICHAEL ISHEE

v.

STATE OF MISSISSIPPI

Court of Appeals Case# 2016-CP-01033-COA

Train Court Case# A2401-15-00206

Tuesday, 28th day of November, 2017

Affirmed. Appellant taxed with costs of appeal.

Tuesday, 17th day of April, 2018

The motion for rehearing is denied.

Thursday, 19th day of July, 2018

DISPOSITION OF THE MISSISSIPPI SUPREME COURT—Michael Ishee's Petition for Writ of Certiorari is denied. To Deny: All Justices. Order entered.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

I, D. Jeremy Whitmire, Clerk of the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, certify that the above judgment

is a true and correct copy of the original which is authorized by Jaw to be filed and is actually on file in my office under my custody and control.

Witness my signature and the Court's seal on August 9, 2018, A.D.

/s/ DJ Whitmire
Clerk

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Constitutional Provisions

- **U.S. Const. Art. I, § 10**

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

- **Miss. Const. Ann. Art. 1, § 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 which are legislative to one, those which are judicial to another, and those which are executive to another.

- **Miss. Const. Ann. Art. 1, § 2**
—Encroachment of Power

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. Ann. Art. 3, § 16**
—Ex Post Facto Laws; Impairment of Contract

Ex post facto laws, or laws impairing the obligation of contracts, shall not be passed.

B. Statutory Provisions

- **Miss. Code Ann. § 97-5-33 (Pre-2013 Statute)**

An Act to amend Section 97-5-33, Mississippi Code of 1972, to clarify undercover detection in exploitation of children cases; and for related purposes.

Be it enacted by the legislature of the State of Mississippi:

SECTION 1. Mississippi Code of 1972, is amended as follows:

(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.

(8) The fact that an undercover operative or law enforcement officer posed as a child or was involved in any other manner in the detection and investigation of an offense under this section shall not constitute a defense to a prosecution under this section.

(9) For purposes of determining jurisdiction, the offense is committed in this state if all or part of the conduct described in this section occurs in the State of Mississippi or if the transmission that constitutes the offense either originates in this state or is received in this state.

SECTION 2. [Effective date] This act shall take effect and be in force from and after July 1, 2007.

APPROVED March 15, 2007;

EFFECTIVE July 1, 2007.

- **Miss. Code Ann. § 97-5-33 (2013 Statute)**
—Depicting Child Engaging in Sexual Conduct

(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, 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.

(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.

- (8) The fact that an undercover operative or law enforcement officer posed as a child or was involved in any other manner in the detection and investigation of an offense under this section shall not constitute a defense to a prosecution under this section.
- (9) For purposes of determining jurisdiction, the offense is committed in this state if all or part of the conduct described in this section occurs in the State of Mississippi or if the transmission that constitutes the offense either originates in this state or is received in this state.

... EFFECTIVE July 1, 2013

**MULTI COUNT INDICTMENT
(DECEMBER 5, 2011)**

**THE STATE OF MISSISSIPPI
CIRCUIT COURT, FIRST JUDICIAL DISTRICT,
COUNTY OF HARRISON**

No. B2401-2011-813

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful citizens of the First Judicial District of Harrison County, duly elected, empaneled, sworn and charged to inquire in and for the said State, County and District, at the Term of Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present:

COUNT I

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Western Digital hard drive with a serial number of WMAT13553758, all in violation of 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided,

and against the peace and dignity of the State of Mississippi.

COUNT II

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a HP DVD+R optical disk labeled as evidence disk 1, item 6, all in violation of 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT III

EXPLOITATION OF A CHILD

Section 97-5-33(5) Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Verbatim DVD+R

optical disk labeled as evidence disk 2, item 7, all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT IV

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Verbatim DVD+R optical disk labeled as evidence disk 3, item 8, all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT V

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct:

namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Sony DVD-R optical disk labeled as "1", all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT VI

EXPLOITATION OF A CHILD

Section 97-5-33(5). Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Verbatim DVD+R optical disk labeled as "2", all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT VII

EXPLOITATION OF A CHILD

Section 97-5-33(5). Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12,

2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Verbatim DVD+R optical disk labeled as “4”, all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT VIII

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Sony DVD-R optical disk labeled as “5”, all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT IX

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Sony DVD-R optical disk labeled as "6", all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT X

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Verbatim DVD+R optical disk labeled as "7", all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT XI

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan
That: MICHAEL ISHEE in the First Judicial District
of Harrison County, Mississippi, on or about July 12,
2010 did wilfully, unlawfully, feloniously possess,
visual depictions of actual children, under the age of
eighteen years, engaging in sexually explicit conduct:
namely that Mike Ishee, did possess visual depictions
of actual children, under the age of eighteen years,
engaging in sexually explicit conduct on a HP DVD+R
optical disk labeled as "8", all in violation of § 97-5-
33(5) of the Mississippi Code of 1972, as amended,
contrary to the form of the statute in such cases
made and provided, and against the peace and dignity
of the State of Mississippi.

COUNT XII

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan
That: MICHAEL ISHEE in the First Judicial District
of Harrison County, Mississippi, on or about July 12,
2010 did wilfully, unlawfully, feloniously possess, visual
depictions of actual children, under the age of eighteen
years, engaging in sexually explicit conduct: namely
that Mike Ishee, did possess visual depictions of actual
children, under the age of eighteen years, engaging
in sexually explicit conduct on a Verbatim DVD+R
optical disk labeled as "9", all in violation of § 97-5-
33(5) of the Mississippi Code of 1972, as amended,
contrary to the form of the statute in such cases

made and provided, and against the peace and dignity of the State of Mississippi.

COUNT XIII

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a HP DVD+R optical disk labeled as "10", all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT XIV

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Verbatim DVD+R

optical disk labeled as “11”, all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT XV

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Memorex DVD-R optical disk labeled as “12”, all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT XVI

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely

that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Verbatim DVD+R optical disk labeled as "13", all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT XVII

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Verbatim DVD+R optical disk labeled as "14", all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT XVIII

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12,

2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Sony DVD-R optical disk labeled as “15”, all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT XIX

EXPLOITATION OF A CHILD

Section 97-5-33(5), Miss. Code of 1972, as amended

As part of the same common scheme or plan That: MICHAEL ISHEE in the First Judicial District of Harrison County, Mississippi, on or about July 12, 2010 did wilfully, unlawfully, feloniously possess, visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct: namely that Mike Ishee, did possess visual depictions of actual children, under the age of eighteen years, engaging in sexually explicit conduct on a Verbatim DVD+R optical disk labeled as “16”, all in violation of § 97-5-33(5) of the Mississippi Code of 1972, as amended, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

A True Bill:

/s/ Crystal Johnson

Foreman of the Grand Jury

/s/ {Signature not legible}

District Attorney

/s/ {Signature not legible}

Special Assistant Attorney General

Witness: Stan Fisher

AFFIDAVIT

Comes now Crystal Johnson, Foreman of the aforesaid Grand Jury, and makes oath that this indictment presented to this Court was concurred in by twelve (12) or more members of the Grand Jury and that at least fifteen (15) members of the Grand Jury were present during all deliberations.

/s/ Crystal Johnson

Foreman of the Grand Jury

Sworn to and subscribed before me this the 5th day of December, 2011.

Gayle Parker

Circuit Clerk

**MOTION FOR POST CONVICTION RELIEF
(OCTOBER 23, 2015)**

IN THE CIRCUIT COURT OF HARRISON COUNTY,
MISSISSIPPI, FIRST JUDICIAL DISTRICT

MICHAEL ISHEE,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

Cause No. A2401-2015-206

NOW INTO COURT comes MICHAEL ISHEE, hereinafter referred to as Petitioner, and files this motion for post conviction relief under and pursuant to Miss. Code Ann., § 99-39-1, *et seq.* (1972), as amended, against the State of Mississippi, hereinafter referred to as Respondent, and in support thereof and for cause would show the following facts and matters, to-wit:

Case Information/History

1. Original Case Styling:

This case was originally styled, *State of Mississippi vs. Michael Ishee*, and was brought in the Circuit Court of the First Judicial District of Harrison County,

Mississippi, in Cause No. B2401-2011-813 following the return by the grand jury of a nineteen (19) count indictment. That all charges or counts under which Defendant stood indicted were for the alleged violation of Miss. Code Ann., § 97-5-33(5) (1972), entitled “exploitation of children; prohibitions”, said subsection commonly described as “possession of child pornography”.

2. Judgment of Conviction and Sentence Information:

- (A) Charges: Nineteen (19) counts of possession of child pornography. See Exhibit “A”, the indictment returned against Petitioner.
- (B) Guilty Plea: To Count I only of the XIX count indictment.
- (C) Date of Guilty Plea and Acceptance of Plea: April 22, 2014. See Exhibit “B”, the Order accepting guilty plea.
- (D) Date of Sentence Following Plea: June 20, 2014.
- (E) Sentence: Twenty (20) years, eight (8) suspended, twelve (12) to serve, \$50,000.00 fine, \$40,000.00 suspended, \$10,000.00 to pay, payment of court costs, \$300.00 to Crime Victim Compensation Fund, and \$1,000.00 reimbursement to the Mississippi Children’s Trust Fund. See Exhibit “C”, the Order sentencing Petitioner.

Basis for Relief Sought by Petitioner

3. Concise Statement of Grounds for Relief:

That Petitioner seeks relief on the basis that the statute under which he was indicted was patently unconstitutional. At the time of his alleged offense, the statute under which he was charged and indicted, Miss. Code Ann., § 97-5-33(5) (1972), “exploitation of children; prohibitions” (possession of child pornography), lacked the required element of scienter, and thus was unconstitutional for violating the dictates of U.S. Supreme Court rulings on the issue. Accordingly, Petitioner’s indictment, plea, conviction, and sentence are void.

4. Petitioner’s Statement of Specific Facts Within or Without Petitioner’s Knowledge and the Legal Basis for the Dismissal of the Indictment Against Petitioner and the Setting Aside His Guilty Plea and the Sentence Imposed by the Court:

(A) That Petitioner’s basis for post conviction relief is based upon questions of law only, other than recitals of facts as to his indictment, plea, and sentence which he believes are not in dispute.

(B) That Petitioner would show that at the time of his plea he knew nothing of and had not been advised of any issues concerning the constitutionality of Miss. Code Ann., § 97-5-33(5) (1972), and no motion or other plea concerning same was filed on his behalf. That had he known the subject statute failed to include all required elements to meet minimal constitutional standards, he never would have considered a plea of guilty. That Petitioner would further show that his guilty plea and conviction on a facially unconstitutional

statute (particularly one in violation of the United States Constitution as shown hereafter) must be set aside, and further, his indictment dismissed as a denial of due process and a denial of his fundamental First Amendment right of freedom of speech.

(C) That Petitioner avers on or about July 12, 2010, the date the indictment alleges he violated Miss. Code Ann., § 97-5-33(5) (1972) by possessing child pornography, said statute was unconstitutional on its face because it failed to include a mandatory element of scienter or *mens rea*, such element required for statutes governing the regulation of speech or press. *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982); *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L.Ed.2d 98, 58 U.S.L.W. 4467 (1990); *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S. Ct. 464, 130 L.Ed.2d 372, 63 U.S.L.W. 4019 (1994) (citing *Alexander v. United States*, 509 U.S. 544, 549-550, 113 S. Ct. 2766, 2771, 125 L.Ed.2d 441 (1993). That at the time of the alleged illegal act of Petitioner, said § 97-5-33(5) in relevant part stated:

“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.”

The legislature drafted and passed the subject statute, carefully delineating the required elements of the offense without including the requirement of knowledge, intent, or scienter of any kind, type, or character, (or even gross negligence as approved under *Osborne, supra*). Under the aforesaid Supreme Court cases and their progeny, the statute is thereby un-

constitutional on its face and unenforceable. All other subsections of the statute (except subsection (2)) include scienter of some type thereby clearly revealing the legislature's knowledge of its requirement, but the legislature clearly decided not to include same in subsection (5). That attached hereto as Exhibit "C" is Petitioner's Memorandum of Law in support of this motion, said Memorandum being made a part hereof as though fully copied herein in both numbers and words.

5. Other Matters:

That Petitioner avers the assertion of this claim is based upon a clear violation of the First Amendment of the United States Constitution and the Mississippi Constitution as determined by the United States Supreme Court, and any objection to the assertion of same should be overruled and his plea for post conviction relief allowed, as (1) good cause is shown for relief and (2) actual prejudice (incarceration and fine) has resulted and will continue to result. That, further, Petitioner would aver that he has not sought any post conviction relief involving the subject case through any other court or forum, and that the doctrine of *res judicata* has no application herein.

6. Out of Time Appeal:

That should this Court refuse to allow him the right to pursue his argument for post conviction relief as above shown, Petitioner alternatively requests that the Court grant him the right to an out of time appeal to set forth his plea for relief.

WHEREFORE, THE PREMISES CONSIDERED, Petitioner prays that his Motion for Post Conviction

Relief will be received and filed, that upon review his grounds for relief there will be found sufficient to require a response by the State, and that upon full and complete hearing hereon the plea and sentence of Petitioner will be set aside, the indictment against him dismissed, and he be released from custody; or, alternatively, that an out of time appeal be allowed.

Respectfully Submitted,

/s/ Michael Ishee

/s/ W.F. Holder II
of counsel

STATE OF MISSISSIPPI
COUNTY OF GEORGE

THIS DAY, PERSONALLY CAME AND APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, MICHAEL ISHEE, who being by me first duly sworn stated upon his oath that the facts and matters set forth in the above and foregoing Motion for Post Conviction Relief are true and correct as therein stated, and where stated on information and belief he verily believes same to be true and correct.

/s/ Michael Ishee

SWORN TO AND SUBSCRIBED BEFORE ME,
this the 17th day of October, A.D., 2015.

/s/ Terry Rogers

Notary Public, ID #72390
State of Mississippi
George County
Commission Expires Jan. 11, 2016