STATEMENT OF FACTS

On March 30, 2005, at approximately 12:40 p.m., Defendant Michael Phillips had a conversation on the Internet in an adult Yahoo chat room with an individual claiming to be a 14-year-old girl. (JT I, 7/14/05, 192-194). Mr. Phillips entered the chat room sponsored by Yahoo, specifically for adults in Michigan, to find someone to help him cope with his personal problems. ((JT I, 7/14/05, 190). The basic idea of a chat room is for private adult-to-adult conversation, and perhaps later a personal meeting.

On the afternoon of March 30, 2005, Mr. Phillips contacted different individuals in this chat room to discuss fantasies that he was unable to properly release in his marriage, specifically that of a doctor/patient role play. (JT I, 7/14/05, 192). During this evening he contacted an individual with the screen name, "sweetietracy56," and requested a private chat. (JT I, 7/14/05, 193). Mr. Phillips provided his age, gender, and location and then asked for the same. (JT I, 7/14/05, 194). The individual, who later proved to be James May, a male detective, explained that "she" was female and 14-years-old. (JT I, 7/14/05, 193).

Mr. Phillips had never met or searched out minors in chat rooms which is why he was in the adult chat room. (JT I, 7/14/05, 188, 194). Because of this, Mr. Phillips investigated the age further and first studied the individual's profile on Yahoo, which stated it was an adult profile. (JT I, 7/14/05, 194). The Profile also had a non-descript picture which could have been a person of any age from 14 to 24. (JT I, 7/14/05, 194).

Mr. Phillips then investigated the age discrepancy by initiating sexually explicit conversation. (JT I, 7/14/05, 194). Mr. Phillips reasoning was that since he was a High School Teacher, that he would be able to tell quickly from conversation the probable

actual age of the individual and whether "she" was an adult or teenager. (JT I, 7/14/05, 194).

Mr. Phillips read "her" responses and from their mature content, concluded that the age representation was just one of many fantasies toted online. (JT I, 7/14/05, 197). Specifically, most women that Mr. Phillips had talked to online and in chat rooms were in some way untruthful, so this idea was nothing new. (JT I, 7/14/05, 189). Mr. Philips based his conclusions on that fact that "she" was not in school during the conversation time, 12:40 pm to 2:40 pm, and through the language and vocabulary "she" used. (JT I, 7/14/05, 201).

Mr. Phillips also probed the individual during their conversations by asking about the age difference and the police, looking for inconsistencies and trying to ascertain "her" true age. (JT I, 7/14/05, 202). Due to the mature content of the conversation, the language and vocabulary and the time of the conversation and lack of inconsistencies, Mr. Philips continued conversations with "sweetietracy56." (JT I, 7/14/05, 199-208).

Mr. Phillips asks "sweetietracy56" if she "seriously wants to meet in person." (JT I, 7/14/05, 80). It is "sweetietracy56" who suggests meeting the next day at Denny's restaurant, on Telegraph near twelve mile. (JT I, 7/14/05, 80-82). She then asks Mr. Phillips, "will I get pregnant?" (JT I, 7/14/05, 81). Mr. Phillips answers, "We are not having sex. No, you will not get pregnant." (JT I, 7/14/05, 81).

At approximately 3:42 p.m., Mr. Phillips told "her" he had to go and asked if she wanted to meet him again at 11 p.m. that night in the chat room. She said she did and they both signed off. (JT I, 7/14/05, 87).

However, that evening at 11 pm when Mr. Phillips was supposed to meet and talk to "sweetietracy56" again, he decided that this type of sexual conversation with a stranger was not proper for a person with his public persona as a teacher, and he did not write back despite "her" offline transmissions asking him too. (JT I, 7/14/05, 203; Appendix F, 7).

On March 31, 2005, after Mr. Phillips failed to keep their 11pm appointment in the chat room on March 30, 2005, it was Detective Mays, posing as the 14-year-old "sweetietracy" who contacted Mr. Phillips asking him what happened to him the night before. (JT I, 7/14/05, 204). The conversation picked up where it had left off, although Mr. Phillips refused to add "sweetietracy56" to his online buddy list. (JT I, 7/14/05, 207). Mr. Phillips tells her "I will let you know if we are meeting today when I know more. I would like to meet you in person." (JT I, 7/14/05, 94). Again it is "sweetietracy56" who pushes for the meeting by responding, "Do you want to meet this afternoon?" (JT I, 7/14/05, 94). Mr. Phillips changes the subject, makes an excuse about having to pick up his car and asks if she is going to be around the rest of the day. (JT I, 7/14/05, 94). She says she is. (JT I, 7/14/05, 94). As Mr. Phillips is signing off it is "sweetietracy56" who says, "Oh, I can't wait for us to be together." (JT I, 7/14/05, 97). The conversation ends at 11:10 a.m. with plans to meet back online at 1 p.m. (JT I, 7/14/05, 97).

At approximately 5:40 p.m. Mr. Phillips is back on line and it is "sweetietracy56" who asks, are we "still meeting today?" (JT I, 7/14/05, 98). Mr. Phillips says he does not know and claims that he still has not received his car from the shop yet. (JT I, 7/14/05,

98). They talk some more than Mr. Phillips tells "sweetietracy56" that he has to go and will meet her back there in an hour and they sign off at 6:07 p.m.. (JT I, 7/14/05, 101).

At approximately 7:19 p.m., "sweetietracy56" contacts Mr. Phillips and asks if he's there. (JT I, 7/14/05, 101). She asks if he is back home now and is his car okay. (JT I, 7/14/05, 101). Mr. Phillips tells her his car is fine and asks if she is ready to meet. (JT I, 7/14/05, 101). She says she is and when he asks, she tells him which side of the street "Denny's" is on. (JT I, 7/14/05, 101).

"Sweetietracy56" volunteers that she is not wearing perfume, panties or a bra. (JT I, 7/14/05, 102). Mr. Phillips tells her to put some panties on because they will not be having "sex the first time." (JT I, 7/14/05, 102). They both sign off and Mr. Phillips goes to Denny's.

Mr. Phillip's arrived at the restaurant first and was seated in a booth by himself where he ordered a milkshake. (JT I, 7/14/05, 210). He did not believe a minor was going to come to the restaurant, and further was ultimately curious as to who he had been talking to. (JT I, 7/14/05, 210-211). He did not try to contact anyone in the restaurant, and only stayed for 20-30 minutes before returning to his car to leave. (JT I, 7/14/05, 211). As Mr. Phillips was getting into his car, he was approached by Detective Mays, arrested, and taken to the local police department. (JT I, 7/14/05, 211-213).

Procedural History

Mr. Phillips was arrested on March 31, 2005 and arraigned on April 1, 2005 on one count of Child Sexually Abusive Activity in violation of MCL 750.145(c)(2) and one count of Computers – Internet – to Commit Crime in violation of MCL 750.145(d)(2)(f).

Defense counsel was retained and counsel waived the preliminary examination on April 6, 2005. Hence, Mr. Phillips was bound over on both charges.

Mr. Phillips was convicted by a jury in the Oakland County Circuit Court on July 15, 2005. He was sentenced on August 2, 2005. A claim of Appeal was filed by the trial court on September 6, 2005 as authorized by MCR 6.425(F)(3) pursuant to the indigent defendant's timely request for the appointment of counsel filed on August 15, 2005. Appellate counsel was appointed on September 1, 2005.

On February 8, 2006, court appointed appellate counsel Arthur Rubiner, filed a Motion for New Trial in the trial court. In the appeal, appellate counsel also asked "for an evidentiary hearing on the issue of entrapment, a *Ginther*[1] hearing and for a new trial." (Appendix A). Appellate counsel filed a Supplement to Motion for New Trial and Included Memorandum of Law on February 9, 2006. The supplement only addressed sentencing and did not ask for any additional relief. A hearing on the Motion was held on March 1, 2006 at which time the trial court denied the Motion and indicated that a written opinion denying the Motion would be issued.

On April 5, 2006 the Opinion and Order was filed. (Appendix C). However, the trial court's Opinion and Order did not address the issue of whether defense counsel was ineffective at trial for failing to move for a continuance when his expert witness failed to appear and for failing to move the court to accept the medical written report from the expert witness at sentencing.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973) (superseded by MCR 7.211(C)(1)(a) which requires a motion for a new trial must include an issue on the record or motion to develop the factual record. See also, *Bulger v Curtis*, 328 FSupp2d 692, 701 (D Mich. 2004).

Furthermore, the trial court denied appellate counsel's Motion for a New Trial without addressing appellate counsel's request "for an evidentiary hearing on the issue of entrapment, a *Ginther* hearing [or] a new trial." (Appendix C).

Appellate counsel then filed an Appeal in our Court of Appeals arguing the same issues except for the prosecutor's injection of the peace and safety of the community. (See Appellant's Brief on Appeal, 5/10/06). In his conclusion and relief, appellate counsel argues that "the trial court was in error in dismissing the charges or denying Mr. Phillips a new trial, and an entrapment and *Ginther* hearings." (See Appellant's Brief on Appeal, 5/10/06, 30). Oral argument was January 9, 2007.

On January 23, 2007, the Court of Appeals issued an unpublished opinion denying Mr. Phillips relief. (*People v Phillips*, Docket No. 264889, Appendix D). In particular we would like to draw this Court's attention to footnote 6:

> Because defendant did not raise this issue in a motion for a new trial *or request for an evidentiary hearing* under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (19730, this Court's review is limited to mistakes apparent from the record. Appendix D, 3).

As previously discussed, appellate counsel did raise this issue in his Motion for a New Trial. (See Appendix A, 7). However, the trial court never ruled on whether to grant an evidentiary hearing on the issue of entrapment or a *Ginther* hearing, issuing instead a blanket denial for a new trial. (Appendix C).

A Motion for Reconsideration was filed on February 13, 2007, in the Court of Appeals asking the court to grant an evidentiary and *Ginther* hearing to clarify the record of appeal. On April 4, 2007, the Motion was denied. (Appendix A).

Additional facts may be introduced where appropriate.

SUMMARY OF THE ARGUMENT

During his jury trial, Mr. Phillips received ineffective assistance of counsel. Mr. Phillip's defense counsel failed to properly prepare, investigate or subpoena witnesses, including the psychotherapist expert who also was well versed in computer sex crime sting operations. (JT I, 7/14/05, 275). Defense counsel also argued aspects of entrapment but failed to request an entrapment hearing before the judge. Furthermore, defense counsel did not hire a forensic computer expert to examine the hard drive for itself, but instead relied on testimony at trial. Defense counsel also failed to subpoena an expert to explain to the jury what chat rooms were, how the information was recorded and how it should be preserved by the police when taken into evidence.

Defense counsel also told Mr. Phillips to say nothing about an incident that occurred early in his teaching career regarding a student. In this incident, Mr. Phillips placed his hand on a student's shoulder to assure her that she could pass a test. (JT I, 7/14/05, 225). The student was emotionally impaired, and her mother complained to the principal. (JT I, 7/14/05, 224-25). The principal found the complaint to be without basis and declined to even put the incident into Mr. Phillips' record personnel record. Instead, the complaining student was removed from Mr. Phillips' class. ((JT I, 7/14/05, 225).

Yet, on the first day of trial, after defense counsel instructed Mr. Phillips' not to mention this incident during trial, it was defense counsel who brought it up on direct examination by asking Mr. Phillips if there had ever been allegations of improper conduct against him. As instructed, Mr. Phillips answered no. (JT I, 7/14/05, 184). This in itself is suborning perjury.

On cross-examination, Mr. Phillips was impeached using hearsay the prosecution had gathered from a phone call with the principal on this incident. (JT I, 7/14/05, 219). Moreover, defense counsel did not subpoena the principal or anyone else involved to rehabilitate Mr. Phillips' credibility for the second day of trial. These incidents, when seen together, prejudiced Mr. Phillips and support a need for a *Ginther* Hearing and Evidentiary Hearing, as well as a new trial.

ARGUMENT

I. DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING BECAUSE OF THE NEWLY DISCOVERED EVIDENCE, SPECIFICALLY, THAT DETECTIVE MAY'S TESTIMONY CONCERNING THE HARD DRIVE NEVER BEING ALTERED IS INCORRECT BECAUSE THE NEWLY DISCOVERED EVIDENCE INDICATES THE HARD DRIVE ITSELF WAS ACCESSED ON APRIL 27, 2005 WHILE IT WAS IN POLICE CUSTODY SINCE APRIL 1, 2005.

STANDARD OF PROOF

Four trial requirements must be met to be granted a new trial based on newly discovered evidence. *People v LoPresto*, 9 Mich App 318; 156 NW2d 586 (1961). First, is the substance of the evidence and not just its materiality must have been discovered after the trial. *Id*. at 324. Second, there must be a showing that the new evidence is not cumulative. *Id*. Third, there must be a showing that the moving party could not even with reasonable diligence have discovered or produced the new evidence at trial. *Id*. Fourth, the newly discovered evidence is such that a different result will occur on retrial. *Id*.

DISCUSSION

Mr. Phillips seeks an evidentiary hearing based on the newly discovered evidence that testimony and evidence provided by Detective Mays during the jury trial was in error. During the jury trial Detective Mays testified that he used software that images the data on the hard drive of the computer and makes an exact duplicate of that data. (Appendix G, 117). Mays testified that he never looked at the hard drive itself, and therefore, *nothing was altered on the hard drive* because what he was looking at was the mirror image. (Appendix G, 117).

Mays explained that he used software called End Case [sic] to obtain what is called a hash value. (Appendix G, 118). He then went on to explain to the jury that "if anyone

takes the same hard drive and does the same performance that I do, they will get the same hash value." (Appendix G, 118).

Mr. Larry Dalman of Dalman Investigations did the same performance test, using EnCase software that Mr. Mays used. (Appendix E, 1). However, the results Mr. Dalman obtained were not the same as those obtained by May. (Appendix E, 1).

On May 21, 2007, Detective Mays provided Mr. Dalman with a duplicate mirror image of the hard drive containing the evidence files from Mr. Phillips' hard drive. (Appendix E, 1). Detective Mays report shows an acquisition hash value of B1DF9BBA83E0680ACD47D5ED8BD1BE8A, however, Mr. Dalman obtained a hash value of 586DF9E466AC7C856CB9D76814A786C9, which according to Detective Mays' own testimony means the hard drive has been *altered* since being taken into evidence. (Appendix G, 117-118).

Mays testified that the hash value is more perfect than DNA. (Appendix G, 118). He explained that if he were to change the date, then the hash value would also change. (Appendix G, 118). It follows then that since the hash values do not match, and the same software was used by Mays as by Mr. Dalman, that Mays altered the data on the hard drive and remand for an evidentiary hearing or a new trial is mandated.

Furthermore, when Mays did his analysis on the mirror image he obtained from the hard drive he testified that he found text fragments from chats he had with Mr. Phillips when he searched the drive using his screen name of "sweetietracy56." (Appendix G, 119-120). However, when Mr. Dalman performed his analysis he found not just fragments of the chats, but the chats in their entirety to include "off line" chats. (Appendix F). During trial, Mays did not submit the chats from the hard drive, but instead, he presented copies he

had made from all the chats he claimed he had with Mr. Phillips. Yet, he could have simply downloaded the full text from the hard drive since it naturally would have been the "best evidence" available.

When comparing the chats read into evidence by Mays that he claims were copied directly after his chats with Mr. Phillips, there are discrepancies, including parts of the "off line" chats where Mays was attempting to contact Mr. Phillips. These offline chats where Mays attempted to contact Mr. Phillips were not disclosed to the court. (Appendix E, dated 3/31/05, 11)(Appendix H, 98). The text is:

> **philli96 (2005-3-31 15:00:48)**: I miss you. Give me an offline message if that is ok. I will contact you around 4:30 or 5:00pm. Be here ok sweetie.
> **sweetietracy56 (2005-3-31-17:19:49)**: hi sweetie 6:00 is fine with me I will be at Dennys on telegraph near 12 mile (*offline message*)
> **sweetietracy56 (2005-3-31 17:21:09)**: I hope I catch u on line if not tell me what u will be driving n wearing put ur steposcope in the front seat of ur car so I no it is u (*offline message*).
> **sweetietracy56 (2005-3-31 17:23:43)**: hope to see u sweetie cant wait (*offline message*).

In addition, Mays testified to text found on the hard drive which Mr. Dalman was unable to locate using the same software. (See JT I, 7/14/05, p 99). The text is:

> If we go to grandma's house, I will stay there until my mom brings grandma home around nine. I told her I was going to the mall with some friends, so she know I will be out. (See JT I, 7/14/05, p 99).

Moreover, Mays testified that he had found his screen name, "sweetietracy56" on Mr. Phillips' buddy list. (Appendix G, 121). Mays said he found it under the hard drive's temporary internet files with a date of 3/31/2005 at 6:41pm. (Appendix G, 124). Mr. Phillips denied adding "sweetietracy56" to his buddy list. (JT I, 7/14/05, 207). A search of the hard drive by Mr. Dalman reveals no such buddy list.

Lastly, Mays testified that the computer clock of Phillips' hard drive was no more than 10 minutes off which to him meant the computer clock was accurate. (Appendix G, 125). But according to Mr. Dalman's findings, the computer clock was off by as much as an hour. We draw your attention to page 97 of the jury trial transcript which says:

> Offline messages Philli96, "Hello, baby." This is at 1:52:11 p.m. Offline message at 1:52:17 p.m. "How is your heart doing right now?" Offline message at 1:58 p.m., "I will be on later this afternoon. Would you like to meet at six p.m." We could be out until around nine, your curfew. How does that sound?" (Appendix H, 97).

According to the chat found by Mr. Dalman the above offline messages were at 14:54:24, 14:54:31, and 15:00:20 military time respectively. That is, 2:54:24, 2:54:31 and 3:00:20. In other words, the read out from the hard drive does not match the testimony of Mays. Also, the chat on the hard drive indicates it was online, not offline as testified to by Mays in court.

Due to the numerous discrepancies between what Mays presented in court as his own copied and pasted conversations between himself as "sweetietracy56" and Mr. Phillips as "philli96," we would ask for a new trial, or at the very least an evidentiary hearing where the "best evidence" rule could be followed and only the chats from the hard drive be admitted into evidence.

In deciding whether to grant relief in Mr. Phillips' case this Court should be guided by cases such as *People v Barbara*, 400 Mich 352, 362; 255 NW2d 171 (1977), where the Supreme Court stated:

> Before a court will grant a new trial because of newly discovered evidence, 'It must be shown that the evidence itself, not merely its materiality, was newly-discovered; that it is not cumulative; that it is such as to render a different result probable on a retrial of the cause; and that the party could not with reasonable diligence have discovered and produced it at trial.' *People v Clark*, 363 Mich 643, 644; 110 NW2d 638 (1961). See also,

> *Canfield v City of Jackson*, 112 Mich 120; 70 NW 444 (1897); *People v Bauman*, 332 Mich 198; 50 NW2d 757 (1952); *People v Cummings*, 42 Mich App 108; 201 NW2d 358 (1972); *People v Coffman*, 45 Mich App 480; 206 NW2d 795 (1973).

This Court has, without reference to timeliness, previously vacated orders of the Court of Appeals denying defense motions to remand which identified issues sought to be reviewed on appeal and which required that a record be made at the trial court level, and remanded to the Court of Appeals for remand to the trial court for a hearing on defense allegations. *People v Newton*, 428 Mich 855; 399 NW2d 28 (1987); *People v Couch*, 422 Mich 969; 373 NW2d 590 (1985).

The decision whether to grant relief on the basis of newly discovered evidence is discretionary with the trial court, but such discretion should be exercised wisely for the purpose of promoting justice and protecting the innocent. *People v Prag*, 261 Mich 686; 247 NW 94 (1933); *People v Inman*, 315 Mich 456; 24 NW2d 176 (1946).

Mr. Phillips' case clearly warrants relief under the test outlined in *Barbara, supra.* First, the evidence cannot be considered anything but **newly** discovered. Only when appellate counsel hired a computer forensic examiner who performed an independent examination of the hard drive was this evidence discovered. (Appendix E).

Second, the evidence is not cumulative because no other prosecution witness testified about the entire chat conversation being on the hard drive, and to additional chat found on the hard drive that was not admitted into evidence. Although May testified about some of the chat, "cumulative" as the term is used here means evidence which merely adds weight to a point already well made by the offering party. Here the evidence contradicts the prosecution's case, brings into question the bulk of the evidence admitted against Phillips – that of May's own inaccurate cut and paste of some chats, and substantially

detracts from the credibility of Detective May, the key prosecution witness, and corroborates Defendant Phillips' own testimony as to the chats. **It is not cumulative**. See *People v Norwood*, 123 Mich App 287, 293-294 (1983) *lv den* 417 Mich 1006 (1983).

Third, the new evidence would make a different result probable because there is evidence that Detective May altered the original hard drive taken into evidence, something he himself said he did not do. (Appendix G, 117). Now with proof the hard drive was altered, there exists the probability of the evidence of the chats being suppressed and without the chats in evidence, the prosecution has lost the bulk of the evidence and therefore may have to dismiss the case.

As for the fourth prong of the test, Defendant Phillips could not with reasonable diligence have produced this evidence during the trial as it did not become available until well after Mr. Phillips had been sentenced and incarcerated. (Appendix E). It is not reasonable to expect that anyone could have discovered this evidence were it not for an independent computer forensic examination that was performed to verify the testimony and results of May's own examination.

It is also important to note that the newly discovered evidence involves false testimony by Detective Mays, a representative of the State. There is no question that Detective Mays was a police agent. *People v Wisneski,* 96 Mich App 299; 292 NW2d 196 (1980). The United States Supreme Court has held that the admission of false evidence in a criminal trial violates due process and warrants reversal if it may have had an effect on the outcome of the trial. In *Napue v Illinois*, 360 US 264, 269; 79 SCt 1173; 3 LEd2d 1217 (1959), the Supreme Court stated:

> It is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the

> Fourteenth Amendment, ... The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. ...
>
> The principle that a State may not knowingly use false evidence, including false testimony, to obtain conviction, implicit in any ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. (citations omitted).

The Michigan Court of Appeals, in *People v Anderson*, 44 Mich App 222; 205 NW2d 81 (1972), held that it was reversible error to allow into evidence statements that were false and that were relied upon by the prosecutor, even though the false statements were obtained innocently by the prosecutor and given in good faith.

Where nonrecord evidence forms the basis for a claim of newly discovered evidence, an evidentiary hearing must be held. *People v Jackson*, 91 Mich App 636; 283 NW2d 648 (1979); *People v Burton*, 74 Mich App 215; 253 NW2d 710 (1977). See also, *Ginther*, 390 Mich at 443. This issue depends on evidence which is not yet part of the record. Defendant Phillips therefore requests an evidentiary hearing.

The government violates a defendant's due process rights where material exculpatory evidence is not preserved regardless of whether government acted in bad faith. *California v Trombetta*, 467 US 479, 485; 104 SCt 2528; 81 Led2d 413 (1984). Spoliation is defined as the intentional destruction of evidence that is presumed to be unfavorable to the party responsible for its destruction. *US v Copeland*, 321 F3d 582 (CA6 2003)(quoting Black's Dictionary 1401 6th ed 1990). To be material and exculpatory, evidence must "possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means." *Trombetta*, 467 US at 489.

Here, the bulk of the evidence against Mr. Phillips was on the hard drive obtained by the police from his computer taken into evidence on April 1, 2005. Without the evidence on the hard drive the police had no case against Mr. Phillips. Therefore, the exculpatory value of the evidence would have been apparent before it was altered and naturally is of a nature that Mr. Phillips is unable to obtain by any other reasonable means because that was his hard drive taken from his computer. In accord with *Copeland, supra*, because only the police were aware of what was on the hard drive before it was altered, this Court should find that the intentional destruction of evidence in the form of altering the information on the hard drive would have been exculpatory and in Mr. Phillips' favor.

Lastly, since it was the police who took the computer into evidence and removed the hard drive, Mr. Phillips would be unable to obtain the comparable exculpatory evidence from any other place because the police had his hard drive. Detective May's own testimony explains what is supposed to happen when a hard drive is taken into evidence. (Appendix G). According to May, the hard drive itself is never examined. (Appendix G, 117). Instead, a mirror image is obtained from the hard drive and that is what the tests are run on in order to preserve the evidence of the hard drive's contents. (Appendix G, 117). In addition, that is why there is a hash value taken when a mirror image is created. (Appendix G, 118). The hash value is there to ensure that any other examinations also reflect the same hash value as evidence that the hard drive itself was not altered. (Appendix G, 118).

However, in this case, the hash values are not the same. (Appendix E). Because May testified that hash values are better than DNA the conclusion is that the hard drive

itself has been altered. (Appendix G, 118). Therefore, the evidence that has been altered on the hard drive can only have been exculpatory which would explain the alteration of the hard drive and the discrepancies not only in May's testimony, but also in the copied and pasted chat conversations admitted as evidence to the court. Therefore, we request reversal of Mr. Phillips' conviction and his immediate release or in the alternative, a new trial or at the very least remand for an evidentiary hearing.

II. A HEARING MUST BE ORDERED TO ALLOW APPELLANT TO SHOW THAT HIS CONVICTION MUST BE REVERSED AS APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GURANTEED BY THE FEDERAL AND STATE CONSTITUTIONS (US CONST AMEND VI; CONST 1963, ART I, § 20) WHERE HIS DEFENSE ATTORNEY, WITH NO STRATEGIC PURPOSE, MADE SEVERAL OUTCOME-DETERMINATIVE ERRORS.

STANDARD OF REVIEW

A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed de novo. *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 359; 521 NW2d 797 (1994); *People v LeBlanc*, 465 Mich 575; 640 NW2d 246 (2002).

In order to establish a claim of ineffective assistance of counsel a defendant must show that the performance of his attorney fell below an objective standard of reasonableness and that the failed performance so prejudiced the defense that a fair trial was denied. In *People v Smith,* 456 Mich 543; 581 NW2d 684 (1998), the court held that "[t]o prove a claim of ineffective assistance of counsel under *Pickens* and *Strickland,* a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *Id*. at 556. It is incumbent on defendant, who bears the burden of

proof on this issue, to make a testimonial record in the trial court if facts not on the record are required to establish the claim. *Ginther, supra*; *People v Tranchida,* 131 Mich App 446; 346 NW2d 338 (1984).

PRESERVATION OF ERROR

Mr. Phillips could not have preserved this issue at trial as it is asserted that trial counsel was ineffective. Because this claim is one which involves a constitutional error which altered the outcome of the trial, Mr. Phillips can raise this issue for the first time on appeal as it is plain error which affected substantial rights. *People v Carines* 460 Mich 750, 774, 597 NW2d 130 (1999) (citing *People v Grant*, 445 Mich 535, 547, 520 NW2d 123 (1994); *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). With respect to the request for an evidentiary hearing this issue has been preserved by way of a timely post-conviction request in the trial court. (Appendix B).

DISCUSSION

Mr. Phillips requests the opportunity to make a record of his defense counsel's errors through the conduct of a *Ginther* hearing. *Ginther, supra,* requires that a hearing be held to fully lay out on the record the facts in support of this issue and Mr. Phillips urges this Court to remand this matter to the trial court for such a hearing. It is critical that this Court direct the trial court to hold a *Ginther* hearing instead of issuing an order allowing Mr. Phillips to request a hearing from the trial court, as the trial court has already, by separate order, denied **a** request for an evidentiary hearing. (Appendix B). This is applicable under *People v Taylor*, 387 Mich. 209, 218; 195 NW2d 856 (1972), which states that all cases applying to matters not already on the record must first be reviewed before the trial court.

An evidentiary hearing and *Ginther* hearing were both requested in the motion for a new trial, and an argument was made concerning the ineffective assistance of trial counsel. These issues were neither accepted nor denied in the trial court's opinion, but apparently were overlooked. (Appendix C). This mistake was exacerbated by the appellate court when it stated that, because the defendant did not raise the issue of ineffective assistance or ask for a *Ginther* hearing the court's review is limited to mistakes apparent to the record. (Appendix D, p 3, fn 6). These two mistakes further support the need for the above hearings and remand for a new trial because the argument for a new trial was not properly considered by the lower courts.

Therefore, we ask this Honorable Court to remand for a Ginther Hearing and Evidentiary Hearing or in the alternative for a new trial based on the ineffective assistance provided by defense counsel. A *Ginther* hearing is required to remedy the lack of information in the record on ineffective assistance of counsel. If a *Ginther* hearing is not conducted, the review of relevant facts is limited solely to mistakes within the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). Use of such a limited record would be insufficient to fully understand the problems associated with defense counsel's assistance.

Mr. Phillips argues that because of defense counsel's inability to properly prepare for trial by failing to request an entrapment hearing although that was the gist of his defense, by failing to challenge evidence prepared by Detective Mays in anticipation of trial, by failing to subpoena his own expert witness to testify as to Mr. Phillips psychiatric examination and how evidence in a computer related crime must be gathered and preserved, by suborning perjury from Mr. Phillips regarding an unfounded accusation of

inappropriate touching of a student and by failing to subpoena witnesses that would have rehabilitated Mr. Phillips testimony regarding the inappropriate touching issue, specifically the principal, the student, and the counselor, that counsel was ineffective under what can be labeled as a clearly established "per se" ineffective assistance of counsel rule applied by *United States v Cronic*, 466 US 648, 659: 104 S Ct 2039; 80 L Ed 2d 657 (1984). See also, *Holloway v Arkansas*, 435 US 475, 489; 98 S Ct 1173; 55 L Ed 2d 426 (1978); US Const, Ams VI, XIV; Const 1963, art 1, § 20.

A. DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO REQUEST AN ENTRAPMENT HEARING.

From the trial transcript it is evidence that defense counsel's strategy was to prove the police entrapped Mr. Phillips. Yet, defense counsel did not ask for a hearing in front of the trial judge concerning the entrapment. Entrapment is an issue that is best decided by the trial judge and not the jury. *People v D'Angelo*, 401 Mich 167, 173; 257 NW2d 655 (1977). See also, *Sorrells v US*, 287 US 435, 457; 53 SCt 210; 77 LEd 413 (1932) (Roberts decision). When a defendant raises the issue of entrapment, the trial court is then required to hold an evidentiary hearing outside of jury presence to decide the issue. *D'Angelo*, 401 Mich at 177-178. See also, *People v Patrick*, 178 Mich App 152, 154; 443 NW2d 499 (1989).

The trial court never decided the issue of entrapment, which is an arguable issue due to the circumstances of the sting operation, because defense counsel never asked for a hearing. Defense counsel initiated an argument in front of the jury that could not be decided by them. However, defense counsel never asked the court itself for the entrapment hearing, therefore abandoning the issue by proceeding to sentencing without

raising the claim of entrapment. *People v Bailey*, 439 Mich 897; 478 NW2d 480 (1991). This prejudiced Mr. Phillips by disallowing a possible defense, and by clouding other issues for the jury.

B. DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO CHALLENGE THE ADMISSIBILITY OF THE DOCUMENT PREPARED BY DETECTIVE MAYS IN ANTICIPATION OF TRIAL THAT HE TESTIFIED CONTAINED THE CHAT CONVERSATIONS HE COPIED AND PASTED INTO THE DOCUMENT BETWEEN "SWEETIETRACY56" AND "PHILLI96," INSTEAD OF DOWN LOADING THE CONVERSATION OF CHATS FROM THE HARD DRIVE.

In this case, the bulk of the physical evidence against Mr. Phillips was computer-generated. Therefore it was incumbent on defense counsel to challenge the admissibility and verify the authenticity of any computer-generated documents the prosecution was introducing against Mr. Phillips. However, defense counsel did neither.

Defense counsel should have filed a pretrial motion challenging the admissibility of the computer-generated evidence to give the trial court time to consider what is often a difficult and technical motion. A motion to suppress evidence in a criminal proceeding must be made, if at all, in advance of trial. *People v Ferguson*, 376 Mich 90; 135 NW2d 357 (1965).

Here defense counsel failed to challenge the bulk of the evidence against Mr. Phillips that being the chats submitted and prepared by Detective Mays for trial. Defense counsel made no attempt to have the hard drive examined by an independent forensic examiner. He asked no questions regarding the search warrant, chain of custody or preservation of the hard drive. He made no motion to suppress the document of chats prepared by Detective Mays in anticipation of trial. Therefore, we ask this court to

remand for a *Ginther* hearing to determine the reasons behind defense counsel's failure to challenge the evidence.

There were two arguments that defense counsel should have used to argue against the admissibility of the computer-generated evidence. First, under the Best Evidence rule, original documents are generally required, rather than copies. MRE 1001-MRE 1008.

"To prove a content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." MRE 1002. Michigan Rule of Evidence 1002 is only applicable if: (1) evidence involves a writing, recording, or photograph and (2) object of proof is the contents of that writing. See MRE 1002; see also *People v Alexander*, 112 Mich App 74, 76; 314 NW2d 801 (1981) (holding best evidence rule inapplicable when contents not in issue); *People v Trudeau*, 51 Mich App 766, 772, 216 NW2d 450 (1974) (citing *Dunaway v State*, 50 Ala App 198, 278 So2d 198, *cert den*, 50 Ala App 200, 278 So2d 200 (Ala Cr App 1973)).

Here, the case rested on the chat conversations prepared by Detective Mays in anticipation of trial. (JT I, 7/14/05, 74). The chats were in the form of writings and were therefore subject to the best evidence rule. MRE 1002. The purpose of the best evidence rule is to prevent inaccuracy and fraud when attempting to prove the contents of a writing, recording or photograph. See FRE 1001 & Advisory Committee's Note; see also *United States v Yamin*, 868 F2d 130, 134 (CA 5 1989). The admission of the prepared document containing chats by Detective Mays in lieu of the original chats contained on the hard drive in the case at bar, failed to adequately protect against the possibility of fraud. Thus, an evidentiary hearing is required to determine what the original chats from

the hard drive consist of and to compare them with the chats prepared by Detective Mays, and to question Detective Mays as to the discrepancies between his prepared chats and those downloaded from the hard drive.

In the case at bar, because the prosecution sought to prove chats prepared by Detective Mays were in fact the only chats between "sweetietracy56" and "philli96" the prosecution was seeking to prove the contents of the chats from the hard drive. (Appendix G). Thus, Michigan Rule of Evidence 1002 requires not a copy of a writing, but the original writing to prove the contents of the writing at issue. See MRE 1002.

Manifest unfairness resulted from the admission of the prepared chats instead of the original chats from the hard drive. More specifically, the unsupported integrity of the prepared chats from copying and pasting, the likelihood of additional relevant evidence on the original hard drive itself, and the uncertain accuracy of the prepared chats all indicate that it was unfair for the prepared chats to have been admitted instead of the originals.

Where the original would have been of value in ascertaining the relevant and accurate facts, it was manifestly unfair to admit a prepared document of copied and pasted chats into evidence. *Fox v Peck Iron & Metal Co*, 25 BR 674 (BC SD Cal 1982) (analyzing admissibility under Federal Rule of Evidence 1003).[2] In *Fox*, the admissibility of a copy of an exhibit was at issue. *See id*. at 679. The Court held that the copy was inadmissible because the authenticity was tied solely to one witness found not to be credible and that it would have been manifestly unfair to admit the duplicate where the original would have been of value. *Id*. at 680. Similarly, the original chats from the

[2] Federal Rule of Evidence 1003 is identical to Michigan Rule of Evidence 1003. See FRE 1003; MRE 1003 & commentary.

hard drive in the case at bar would have been of tremendous value in ascertaining both the authenticity and accuracy of what transpired between Detective May as "sweetietracy56" and Mr. Phillips.

In the present case, the prosecution never claimed that the original chats on the hard drive had been lost, destroyed, altered, or even that they were unavailable. An original is not required, and secondary evidence of a writing is also admissible if the original is lost or destroyed, absent a showing of bad faith or negligence. *Trudeau*, 51 Mich App at 772 (citing *Commonwealth v Cromartie*, 222 Pa Super 278, 294 A2d 762 (1972), *United States v Trenary*, 473 F2d 680 (CA 9, 1973)); see also *Joba Construction Co., Inc v Burns & Roe Inc.*, 121 Mich App 615, 329 NW2d 760 (1982). However, Detective Mays merely testified that the he found text fragments on the hard drive and did not state that the chats were not on the hard drive. Thus, the introduction of a prepared document cannot be justified on this exception to the original writing rule. See MRE 1002.

The introduction of a document prepared in anticipation of trial into evidence of was manifestly unfair and greatly prejudiced Mr. Phillips. The lack of corroboration regarding the integrity of the prepared document and the likelihood of additional relevant evidence on the hard drive itself indicates that it was unfair for the prepared document to have been admitted instead of the original chat from the hard drive. The circumstances surrounding the preparation of the chat conversation were sufficiently questionable so as to require the production of the original chats from the hard drive.

The second argument would be under hearsay, which generally requires that evidence consist of "statements" that are made by a witness testifying from personal

knowledge in court. MRE 801. Another problem with defense counsel's treatment of computer issues is that he relied on the investigation by the police of Mr. Phillip's computer hard drive. Defense counsel should have hired his own computer expert, to examine and evaluate what was and was not on the hard drive of Mr. Phillip's computer. This lack of preparation and reliance on work done by others affected defense counsel's ability to adequately represent Mr. Phillips because was a less than thorough investigation, and one that if conducted appropriately, would have discovered important inconsistencies.

C. DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO SUBPOENA MATTHEW ROSENBERG, THEIR EXPERT WITNESS WHO WOULD HAVE TESTIFIED AS TO MR. PHILLIPS' MENTAL STATE AND PERSONALITY PROFILE WHICH DID NOT FIT THAT OF A CHILD MOLESTER AND ROSENBERG COULD HAVE TESTIFIED WHAT THE POLICIES AND PROCEDURES WERE IN A STING OPERATION SUCH AS THE ONE MR. PHILLIPS WAS ARRESTED IN THIS CASE, BECAUSE ROSENBERG WAS ON THE BOARD THAT HELPED DEVELOP THE PROCEDURES.

The duty to investigate includes the duty to investigate all witnesses who may have information concerning a client's guilt or innocence. *Bryant v Scott*, 28 F3d 1411, 1419 (CA 5, 1994) (citing *Henderson v Sargent*, 926 F2d 706, 711 (CA 8, 1991)). Counsel has been found to be ineffective when failing to investigate their own expert witness. *Combs v Coyle*, 204 F3d 269, 287-288 (CA 6, 2000).

In the case at bar, defense counsel failed to subpoena their own expert witness. This failure created a twofold issue because the psychotherapist was supposed to testify as to Mr. Phillips' mental state and also testify about guidelines used in sting operations like the one conducted here. (Appendix I). Matthew Rosenberg, MSW, CSW specializes

in the assessment and treatment of sexual deviancy and abuse. (Appendix I). He also helped prepare the guidelines and ideas used by officers who operate sting operations on the Internet, like this operation conducted by Detective Mays. This proficiency made him an expert for two different areas of the trial. Yet, Mr. Rosenberg did not appear in court, and due to the lack of a subpoena, the court was unable to bring Mr. Rosenberg to court to testify. (JT II, 7/15/05, 275).

This was ultimately the fault of defense counsel who did not make the proper concerted effort to guarantee the witness would be in court to testify. From the report created by Mr. Rosenberg, which was also never given to the court by defense counsel to become part of the record, Mr. Rosenberg could have testified that Mr. Phillips does not have a fixation on children or adolescents, nor was there any evidence of predatory sexual behaviors. (Appendix I, 10). Further, Mr. Rosenberg identified problems with both the police investigation and sting operation, which he could have testified to. (Appendix I, 10). The lack of this information prejudiced Mr. Phillips and demonstrates defense counsel's ineffectiveness. *Combs*, 204 F3d at 287-288.

D. DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR SUBORNING PERJURY FROM MR. PHILLIPS AFTER INSTRUCTING MR. PHILLIPS TO DENY EVER HAVING ALLEGATIONS BROUGHT AGAINST HIM CONCERNING INAPPROPRIATE CONDUCT FROM A FEMALE STUDENT AND FOR FAILING TO SUBPOENA THE SCHOOL'S PRINCIPAL, THE STUDENT AND THE STUDENT'S COUNSELOR TO DETERMINE WHAT OCCURRED AND EXACTLY WHAT THE PRINCIPAL TOLD THE PROSECUTION SINCE IT WAS ALLOWED IN UNDER A HEARSAY EXCEPTION AND NOT FROM THE PRINCIPAL'S OWN TESTIMONY.

Moreover, as discussed above, trial counsel essentially suborned perjury, which is ethically and legally unacceptable. This issue occurred when defense counsel placed Mr.

Phillips on the stand and asked him a question about prior inappropriate touching. The evening before, when Mr. Phillips told defense counsel of a previous incident, defense counsel instructed Mr. Phillips to deny any incident every occurred. This means that trial counsel allowed him to lie. It could be argued that not only did he suborn the perjury, but that defense counsel procured Mr. Phillips to commit perjury, against MCL 750.425.

This procurement was accomplished through a conversation prior to trial when Mr. Phillips approached the attorney and asked whether the incident should be mentioned, and his attorney told him no. (See Affidavit of Janice Phillips attached to Motion for Reconsideration in the Court of Appeals). It would seem that if the attorney states he does not want something mentioned, and asks a question which has only the option of exposing the information, that he is forcing perjury. The later exposure of the perjury prejudices Mr. Phillips in front of the jury and court, and colors his image in their eyes.

While suborning perjury is obviously a large ethical issue, the problem of the incident being brought into the open was only exacerbated by lack of attorney support once the incident was exposed. While the attorney asked questions that allowed Mr. Phillips to tell his side of the story, and found reasoning for the lie, it was not enough. The reasoning behind the lie was that Mr. Phillips believed that anything not on his school teaching record did not really happen. (JT I, 7/14/05, 225-226). Additionally, Mr. Phillips reasoned that the principal felt the incident was not a legitimate complaint since it was not included within his record. (JT I, 7/14/05, 226). It seems that with the damage the perjury inflicted on the case, it would be important to address the issue further beyond this reasoning because otherwise prejudice would occur.

Defense counsel did not subpoena the principal, the student or the student's counselor to testify so the jury could hear and judge the evidence themselves. It was imperative to know why the principal handed out information so readily, and exactly what he believed about the incident.

While it could be argued that these decisions are trial strategy, which under *Strickland, supra* and *Pickens, supra* is acceptable, the lack of attorney support for a situation that trial counsel created exceeds trial strategy and becomes a prejudicial lack of preparation. Plus, under *Wiggins v Smith*, 539 US 510, 526-527; 123 SCt 2527; 156 L Ed 2d 471 (2003), ineffective assistance is not simply about what evidence an attorney has compiled, but whether that evidence would lead a reasonable attorney to investigate further.

The knowledge of this incident should have led to further investigation and mitigation of the possible damages. Also under *Parrish v Towns*, 395 F3d 251, 258 (6th Cir. 2005) the duty to investigate includes a responsibility to investigate all possible witnesses who may have information about the guilt or innocence of your client. Defense counsel did not fully investigate witnesses in congruence with the former incident, and particularly did not talk to the principal, who was important to show Mr. Phillip's innocence because of the prejudice that occurred from the introduction of the previous incident without a proper defense.

For all of the foregoing reasons, Defendant's conviction should be reversed.

SUMMARY AND RELIEF REQUESTED

Therefore, for the foregoing reasons, Mr. Phillips respectfully asks this Court to vacate his conviction or remand this case for a new trial, an evidentiary hearing and a Ginther hearing for the reasons previously set forth.

Respectfully submitted,

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