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INTRODUCTION

The Appellant, Justin David Shaffer, submits his reply brief in response to the State's brief on the merits and in further support of his own brief on the merits. In summary, the State's rebuttal of Mr. Shaffer's arguments fails in all respects. First, and most importantly, the State's construction of the applicable statutes is unpersuasive and chiefly relies on the incantation, devoid of any substantive analysis, that the Mississippi legislature clearly intended to criminalize Mr. Shaffer's conduct despite the undisputed fact that he never communicated with anyone under the age of 18. The State also expends substantial effort in arguing against the defense of impossibility, a defense Mr. Shaffer does not seek a raise in this appeal. As explained in his principal brief on the merits, Mr. Shaffer's defense is that the State failed to prove all the elements of the offense for which the State prosecuted him, mainly, that it failed to prove that he communicated with anyone under the age of 18. Finally, with respect to Mr. Shaffer's principal issue on appeal, the State argues that if its proof failed on the offense for which it chose to prosecute him, this Court should apply the direct remand rule by finding that Mr. Shaffer was guilty of the separate crime of attempt. This Court, wisely, has never applied the direct remand rule to the separate crime of attempt and should not extend the application of that rule under the circumstances of this case.

With respect to Mr. Shaffer's other issues raised in this appeal, the State's argument is equally unconvincing. In the event that the Court should choose to remand this case for a new trial, the Court should address the issue of the admission of the chat logs and the recusal of the trial judge. The Court should find the chat logs improperly admitted and a violation of Shaffer's Sixth Amendment and Mississippi Constitution rights of

confrontation. The Court should further recuse the trial judge from any participation in the case on remand and appoint another judge who can preside over the case without the appearance of bias.

Lastly, the State's attempt to distinguish *Grillis v. State*, 196 Miss. 576, 17 So. 525 (1944), is unpersuasive. That case and its progeny clearly stand for the proposition that where the Mississippi legislature creates two punishments for the same conduct, only the lesser punishment may be imposed. Under the precedent of *Grillis*, if this Court affirms Mr. Shaffer's conviction, it must remand for resentencing under the computer luring statute, Code Section 97-5-27(3)(a) of the Mississippi Code, which carries a maximum punishment of five years imprisonment and a fine of up to \$10,000.

Mr. Shaffer wishes to note that the State seeks to make much of the fact that he is "no stranger to the courts of criminal justice" due to a previous criminal matter coming before the Mississippi Supreme Court. (State's Brief, p. 1) In light of the circumstances of Mr. Shaffer's previous involvement with the criminal justice system, *Shaffer v. State*, 740 So. 2d 273 (Miss. 1998), which involved blatant prosecutorial misconduct unchecked by the trial judge, and the most elementary errors prejudicial to a fair trial, he would note that he is, in point of fact, no stranger to the *injustice* the criminal justice system inflicts when not properly supervised by this state's appellate courts. The State's attempt to imply that Mr. Shaffer is a convicted criminal is misleading and should be condemned by this Court.

ARGUMENT

I. **The Trial Court Erred in Interpreting Section 97-5-33 of the Mississippi Code to Allow a Conviction Where No Actual Child is Involved in the Accused's Conduct**

The State suggests that Mr. Shaffer's argument on this issue is unclear. (State's Brief, p. 3). While believing that this Court is fully capable of understanding the argument as cast in his principal brief, Mr. Shaffer will accept the State's invitation to clarify his argument on his primary issue.

By way of clarification, Mr. Shaffer believes that rather than referring to the statutory sections in issue by their numbers, adopting a descriptive label for each might be useful to the Court. Mr. Shaffer will refer to Section 97-5-33 (6) (Rev. 2006), the statute under which he was tried and charged, as the "Prohibition." Mr. Shaffer will refer to Section 97-5-33 (8) (Rev. 2006), the statute which sets out that the involvement of an undercover operative or law enforcement officer in the detection and investigation of an offense under 97-5-33 shall not constitute a defense to the offense, as the "Notification", as it appears to serve no other purpose than to notify law enforcement that it may conduct undercover operations to detect violations and investigate them. Finally, Mr. Shaffer will refer to Section 97-5-33 (8) (Rev. 2007), the revised statute that seeks to expand the extent to which an undercover operative or law enforcement officer may participate in the detection and investigation of an offense, as the "*ex post facto* Notification."

By way of clarification, Mr. Shaffer's argues that the Prohibition requires that an actual child, which is defined as someone under 18 years of age, be the recipient of the criminalized communications. The Prohibition criminalizes communicating with a

person under the age of 18 to cause that person to meet for the purpose of engaging in sexually explicit conduct. The Notification does not remove the element of the offense that a person under the age of 18 be the recipient of the criminalized communication. The State concedes, as it must, that Mr. Shaffer never communicated over the internet or by telephone with any person under the age of 18. (State's Brief, p. 3) At the conclusion of the proof in the case, the jury was instructed about a violation of the Prohibition. The jury received no instructions about attempt. The State's presentation of its case and the instructions to the jury focused exclusively on a completed violation of the Prohibition, even though it presented testimony from its witnesses that conclusively proved that Mr. Shaffer never communicated with anyone under the age of 18. As a result of this failure in proof, the Court must reverse Mr. Shaffer's conviction and render a judgment of acquittal.

This is the essence of Mr. Shaffer's argument on the primary issue in the case. This is the argument the State fails in its brief to persuasively rebut. Having succinctly stated his argument on the primary issue on appeal, Mr. Shaffer will discuss the nuances of his argument and the State's attempt to rebut this argument.

First, Mr. Shaffer will address the *ex post facto* Notification since is the most straightforward. At trial, the State argued that the *ex post facto* Notification, which the Mississippi legislature enacted after the dates of Mr. Shaffer's communications, informed the meaning of the Notification in effect at the time of Mr. Shaffer's communications. The State's argument at trial effectively sought to have the trial judge apply the *ex post facto* Notification. In arguing in his principal brief, Mr. Shaffer anticipated that the State

would continue to pursue this argument on appeal. To the State's credit, it appears to have abandoned this argument on appeal, State's Brief, pp. 5, 8, and argues that the trial court simply interpreted the Notification as removing the element that the criminalized communications be with a person under the age of 18. To the extent that any issue of the application of the *ex post facto* Prohibition remains, that revised statute, if applied to Mr. Shaffer, violated the prohibition against *ex post facto* laws because it criminalized his communication with a person 18 years of age or older and because it deprived him of this defense to his disadvantage. See *Bell v. State*, 726 So. 2d 93 (Miss. 1998) (*ex post facto* law is one that punishes an act as previously committed, where act when committed was not a crime or deprives one of a defense which was available at the time the crime was committed); *Christmas v. State*, 700 So. 2d 262, 267 (Miss. 1997) (quoting *Collins v. Youngblood*, 497 U.S. 37, 48 (1990) ("An *ex post facto* law is one which...in relation to the offense or its consequences, alters the situation of a party to his disadvantage."))

Mr. Shaffer will now rebut the State's argument that the Notification eliminates the element of the Prohibition that the criminalized communications must be with a person under the age of 18. In the first instance, there is no issue as to whether a child was the recipient of Mr. Shaffer's communication. Mr. Shaffer did not communicate with a child, defined for purposes of the Prohibition as a person under the age of 18. The State concedes this point, State's Brief, p. 3, and that concession should be the beginning and end of any argument about whether the case should even have been submitted to the jury under the instructions it received. The lack of any communication with a child by Mr. Shaffer defeats his conviction under the Prohibition. Nevertheless, the State persists in

arguing that the Notification somehow removed the element of the crime that the communication be with a child.

The primary argument advanced by the State is, essentially, that the Mississippi legislature clearly intended that the Notification remove the element of the crime that the communication be with an actual child, rather than someone pretending to be a child. (State's Brief at, 5-6, 8) The only support offered by the State in support of this construction is that the construction urged by Mr. Shaffer is absurd, State's Brief, pp. 6-7. According to the State, the reason the construction offered by Mr. Shaffer is absurd is that his proposed construction would either require the use of actual children as undercover operatives, State's Brief, p. 6, or "that law enforcement officers may only stand idly by while pedophiles contact children, only able to investigate if and when a complaint is made," State's Brief, p. 6.¹ The alternatives offered by the State are, at best, a false dilemma, at worst, a deliberate obfuscation of Section 97-5-33.

Any reasonable construction begins with the context of the Section 97-5-33, which is a statutory scheme aimed at criminalizing the production, transmission, and possession of child pornography, that is, the visual depiction of a child engaged in sexually explicit conduct or the simulation of sexually explicit conduct.. Section 97-5-33 (1) criminalizes

¹ The State attempts to enlist the help of an opinion from another jurisdiction to demonstrate its perceived absurdity of Mr. Shaffer's reading of the Prohibition and the Notification. (State's Brief, pp. 6-7 n. 2 (citing *State v. Coonrod*, 652 N.W.2d 715 (Minn. App. 2002))). The case is inapposite because Minnesota's statute is much different from Mississippi's. In the first instance, the Minnesota statute specifically states that the perpetrator only "reasonably believe" that they are soliciting a minor. *Coonrod*, 652 N.W.2d at 721-22. Consequently, that Minnesota statute, by its terms, focuses on the state of mind of the alleged perpetrator rather the age of the person being solicited. In contrast, the Prohibition includes as an element that the recipient of the communication be a child. *See* Miss. Code Ann. § 97-5-33 (6) (2006). The illustrations provided by the *Coonrod* Court, in addition to being dictum, are simply not applicable in light of the difference between Mississippi's and Minnesota's statutes.

the causing, soliciting, or permitting a child to produce child pornography. Section 97-5-33 (2) criminalizes the making of child pornography. Section 97-5-33 (3) criminalizes the transmitting and receiving of child pornography. Section 97-5-33 (4) criminalizes further the receipt with intent to distribute child pornography. Section 97-5-33 (5) criminalizes the possession of child pornography. Section 97-5-33 (7) criminalizes further efforts directed at persuading or coercing a child to participate in the production of child pornography. Each of the offenses in Section 97-5-33 explicitly refers to child pornography. Consequently, the State's bald assertion that there is no support for Mr. Shaffer's argument that the Notification should be understood as being directed at sting operations involving the production, transmission, and possession of child pornography is without merit. In fact, this is the most reasonable understanding of the Notification: The provision can reasonably be read as intending to obviate a defense of entrapment where law enforcement or an undercover operative seeks to buy or sell child pornography over the internet or by some other means. Under that type of sting operation, no actual child need be involved in the distributing of the child pornography because the offense does not involve a child as one of the parties in the criminalized transaction.

The wording of the Notification also reasonably can be read as not removing the requirement of a child where the gravamen of the criminalized conduct is communication with a child. The language may be reasonable read as not seeking to criminalize communications unless those communications involved an actual child. This reading of the Notification effectively gives meaning to the element that a child be involved in the criminalized conduct while also ascribing a meaning to the Notification, that meaning

being that entrapment is no defense to an offense. The reading of the statute proposed by Mr. Shaffer also attributes to the Mississippi legislature the very reasonable intent to only punish the communication proscribed by the Prohibition when a child is the recipient because of the harsh penalty, a maximum sentence of 40 years, imposed for such communication.

Had the Mississippi legislature wished to impose the meaning adopted by the trial court and argued by the State on appeal, it certainly had models that would have expressed this meaning in a clear manner. Several jurisdictions criminalize the intent to communication with a person that one “reasonably believes” is a minor, effectively removing any requirement that an actual child be involved.. *See e.g.*, Minn. Code § 609.352; Ark. Code Ann. § 5-27-306. The Mississippi legislature chose to use language that, at best, is ambiguous as to its intent to remove the element that the recipient of the communication be with a child and can reasonably be read as not being intended to effect such a modification of the elements of the offense. Under such circumstances, where, at best, the criminal statute is ambiguous, the Court must construe the statute strictly against the State and in a manner that favors the accused. *Coleman v. State*, 947 So. 2d 878, 881 (Miss. 2007); *McLamb v. State*, 456 So. 2d 743, 745 (Miss. 1984); *Russell v. State*, 94 So. 2d 916, 231 Miss. 179, 190 (1957).²

² The State cites *32 Pit Bulldogs and Other Property v. County of Prentiss*, 808 So. 2d 971 (Miss. 2002) as providing the proper criteria for determining legislative intent when a statute is ambiguous. Assuming for purposes of argument that the Prohibition and the Notification are ambiguous, *32 Pit Bulldogs* directs the Court to look to the entire statutory scheme as an aid in interpreting an ambiguous provision and to use the overall purpose of the statute to inform the meaning of the ambiguous provision. Such an approach in interpretation is unhelpful to the State as the overall purpose of 97-5-33 is directed at criminalizing the production, distribution, and possession of child pornography. The State’s interpretation

The State also seeks to recast Mr. Shaffer's argument as one of impossibility in order that it may argue the applicability of Fifth Circuit Court of Appeals caselaw. Unfortunately, Mr. Shaffer's argument is not premised on the defense of impossibility, but rather the defense that the State failed to prove that Mr. Shaffer violated Section 99-5-33 (6) because he did not communicate with a child, an element of a violation of subsection (6), the Prohibition. The cases the State discusses on the defense of impossibility were convictions for attempt under Federal statutes that include attempt as a violation. See *United States v. Farner*, 251 F.3d 510, 511 (5th Cir. 2001); *Fuqua v. United States*, No. 3:07CR022-MPM, 2009 WL 2854893, *2-*3 (N.D. Miss. Sept. 1, 2009). The *Hubbard* case relied upon by the State, see *United States v. Hubbard*, 480 F.3d 341 (5th Cir. 2007), is completely irrelevant to Mr. Shaffer's argument. The issue in *Hubbard* involved the interpretation of a Federal sentencing statute and the applicability of Mr. Hubbard's previous Oklahoma conviction for attempting to make lewd or indecent proposals to a child under sixteen. *Hubbard*, 480 F.3d at 345-46. Looking to similar Federal statutes, like those discussed in *Farner* and *Fuqua*, the Court found that because the federal statutes punishing an attempt were not frustrated by the presence of an undercover operative instead of a child, the fact that Mr. Hubbard's Oklahoma state law attempt convictions arose from contact with an undercover operative did not defeat the application of the federal sentencing statute to enhance his federal sentence. *Id.* at 346. As previously noted, Mr. Shaffer's argument is that the State tried him for the completed offense, not for attempt.

of the Notification, which would authorize an adult to pose as a minor, in no way enhances the State's ability to investigate and detect the production, distribution, and possession of child pornography, which is the overall purpose of Section 97-5-33.

The State also argues that the Mississippi statute is written such that it encompasses the offense of attempt, such that the United States Fifth Circuit Court of Appeals cases on which it relies should be applicable. The simple response to this argument is that it incorrectly characterizes the statute. Using a semantic sleight of hand, the State argues that in actuality the crime in the Prohibition is attempted child exploitation. (State's Brief pp., 13-14) The State does so by accurately pointing out that engaging in sexually explicit conduct with a child is not a requisite to the crime in the Prohibition. (State's Brief, p. 14) The State argues that since the Prohibition does not require engaging in sexually explicit conduct, then the offense is somehow consonant with the attempted conduct criminalized by the Federal statutes³. The federal statutes are broadly written to encompass the crime of attempting to exploit a child. *See* 18 U.S.C. § 2422; 18 U.S.C. § 2425. The federal cases the State relies upon to interpret Mississippi's quite different statute are all cases prosecuted as attempts because the recipient of the communications was an adult posing as a minor. As noted, ad nauseam, the State did not prosecute Mr. Shaffer for attempt, but for the completed crime. Consequently, the cases the State relies upon are irrelevant in analyzing the elements of proof necessary for Mr. Shaffer's prosecution.

³ The State also states that this understanding of the Prohibition as criminalizing attempt somehow distinguishes the cases from other jurisdictions which Mr. Shaffer cites in his principal brief, *Moore v. State*, 882 A.2d 256 (Md. Ct. App. 2005); *State v. Ellis*, 657 S.E.2d 51 (N.C. Ct. App. 2008); *Adams v. State*, 117 P.3d 1210 (Wy. 2005). (State's Brief, p. 14) In fact, each of these cases, addresses the distinction between attempt and the completed crime not in terms of failing to engage in sexually explicit conduct, but in terms of communicating with an adult undercover operative rather than a child. This is precisely the distinction Mr. Shaffer makes in his argument for reversal of his conviction.

Almost belatedly, having exhausted its other arguments to affirm Mr. Shaffer's conviction, the State invites this Court to prosecute Mr. Shaffer for the crime of attempt on the record made in the trial court by way of the direct remand rule. (State's Brief, p. 15-16) As this Court is well-aware, "An attempt to commit a crime is, as a general rule, an indictable offense, which is separate and distinct from the crime itself." *Mason v. State*, 430 So.2d 857, 858 (Miss.1983). While Section 99-19-5 (1) does state, in effect, that a charge of attempt is included in the indictment of the completed crime, it does not create the direct remand rule, which is a judicial creation. Whatever the application of the direct remand rule may be in cases of a lesser included offense, *see Shields v. State*, 722 So. 2d 584 (Miss. 1998), Mr. Shaffer contends that the Mississippi Supreme Court has never recognized its application to the separate, distinct crime of attempt. In this case, the jury received no instruction on the charge of attempt and did not convict Mr. Shaffer for attempt, but convicted him of the completed crime for which the proof is insufficient to sustain that conviction. As a policy, applying the direct remand rule to convict a criminal defendant of attempt where the State has pursued a clear course of prosecution for the completed crime invites mischief. The Court would effectively establish itself as a super jury to review records and speculate that a jury, presented with instructions on the separate crime of attempt with its own set of elements distinct from the completed crime, would have convicted for attempt. The Court should decline the State's invitation to extend the direct remand rule to the crime of attempt under the circumstances of this case where the State submitted no jury instructions on the crime of attempt.

II. The Trial Court Erred in Admitting the Chat Logs Because They Were Not Authenticated

The State focuses on two arguments with respect to this issue: (1) The material presented is “recondite,” that is, not easily understood by the average person; and (2) The witness who testified at trial about the chats with Mr. Shaffer, Deanna Doolittle, adequately authenticated the chat logs. The complexity of the process by which the chats were first preserved, and then retrieved from the computer, is the very reason additional testimony is required to authenticate the chat logs introduced as Exhibit 10. Ms. Doolittle’s testimony at trial was insufficient, by itself, to authenticate the chat logs.

First, the State does not dispute that one aspect of authentication—proving that a thing is what it appears to be—is the accuracy of the thing, in this case a 69-page chat log. (State’s Brief at pp. 17-18). The sole authority, beyond the language of Miss.R.Evid. 901, that the State cites in support of its argument that Ms. Doolittle’s testimony alone was sufficient to authenticate the document, *i.e.*, establish its accuracy is *State v. Webster*, 955 A.2d 204 (Me. 2008). The State does not discuss the details of *Webster* in its brief and, as is the case with the authentication of the chat logs, the devil is in the details.

The witness offered by the prosecution in the *Webster* case, was like the State’s witness in Mr. Shaffer’s prosecution, a “contributor” to the organization, Perverted Justice. *Webster*, 955 A.2d at 241. Like the Mississippi contributor, the Maine contributor offered testimony at trial about chats of a sexual nature with the defendant and introduced into evidence logs of those chats. *Id.* at 242-43. The Maine contributor

also offered detailed testimony about the manner in which the chat logs were maintained by Perverted Justice and the manner of her cooperation with law enforcement officials during the investigation. *Id.* at 242. She testified that her chats were uploaded on a daily basis to a data center maintained by Perverted Justice. *Id.* Three proxy servers were maintained in three states to ensure no tampering with the chat logs. *Id.* She testified that after the conversations with the defendant in the Maine case turned sexual, she contacted a Maine law enforcement officer, who consulted with her about the investigation and conducted an ongoing review of the chats by logging into the Perverted Justice data base. *Id.* The contributor did not do anything in the investigation of the case without the Maine law enforcement officer's knowledge and approval. *Id.*⁴

As this Court can see from the testimony offered in this Maine case relied upon by the State, the witness offered much more extensive testimony and markedly different testimony about the integrity of the chat logs introduced in evidence at trial. Ms. Doolittle could only offer testimony about a single proxy server she was told resided in Byrum, Mississippi that was used in a limited-duration sting operation, which included chats with other suspects.⁵ Ms. Doolittle offered no testimony that she was supervised by

⁴ Mr. Shaffer notes with interest, that the prosecution in *Webster*, which involved a Perverted Justice contributor who was an adult pretending to be a thirteen-year-old girl, was for an attempt, not the completed crime.

⁵ The State boldly states that Mr. Shaffer's concerns about the proxy server containing chats with other suspects is "mere speculation" and that "[t]here is nothing whatever to give color to [Mr. Shaffer's] suppositions." State's Brief, p. 18. In point of fact, Ms. Doolittle testified that other Perverted Justice junior contributors cooperated with the Hinds County Sheriff's Department by trolling the internet for suspects. (T. 84-85) Steven Lofton of the Hinds County Sheriff's Department testified that other men were picked up during the sting operation at the sting house, in addition to Mr. Shaffer, as a part of the sting operation. (T. 157) The testimony of the two State's witnesses establishes beyond speculation that the proxy server recorded the chats of other suspects, in addition to Mr. Shaffer.

a law enforcement officer during her chats with Mr. Shaffer. The involvement of law enforcement in this operation appeared to be, by comparison to the Maine case, quite passive, consisting of waiting at the sting house in Byrum for suspects to arrive for a meeting with a fictitious online persona.

Mr. Shaffer's contention is that the testimony offered by the State to authenticate the chat logs was insufficient to establish their accuracy. The testimony as presented in the *Webster* case to demonstrate the accuracy of the chat logs admitted in evidence there is far beyond that offer by the State in Mr. Shaffer's case, as demonstrated above. The testimony offered by the State, in fact, introduces doubt as to the accuracy of the chat logs because the chat logs omitted any reference to chats with another related online persona allegedly used by Mr. Shaffer, girth_i.⁶ While Ms. Doolittle's testimony was necessary to authenticate the chat logs, questions about the accuracy of those logs caused her testimony alone to be insufficient to establish their authenticity such that the trial court should have allowed them into evidence. The trial court abused its discretion under the circumstances of this case and this Court must reverse Mr. Shaffer's conviction as a result.

III. The State Violated Mr. Shaffer's Right to Confront the Witnesses Against Him When Introducing the Chat Logs Without Calling as a Witness the Persons Responsible for the Proxy Server

⁶ The State brushes aside the omission of these chats as something that would "gild" the "lily," State's Brief, p. 19, which Mr. Shaffer could have introduced at trial if he believed them to be useful, State's Brief, p. 18. The problem with that argument is two-fold: First, the party seeking to introduce evidence is the party who must establish its authenticity and the omission of chats from a machine-generated chat log hardly undergirds the parties claim to the log's accuracy; Second, as far as Mr. Shaffer is aware, the State never produced to him any log of chats between "orlandoluvsm2" and "girth_i."

The State offers little argument against the substance of this issue raised by Mr. Shaffer beyond reiterating that testimony of Ms. Doolittle alone was sufficient to authenticate the chat logs and, consequently, there was no hearsay testimony against Mr. Shaffer. As discussed above, Mr. Shaffer does not believe that the State has persuasively rebutted his argument as to authenticity. Assuming his argument as to authenticity is correct, it naturally follows that the testimony necessary to authenticate the documents would necessarily come from a witness who did not testify at trial, giving rise to a violation of Mr. Shaffer's Mississippi and federal rights to confront the witnesses against him. For the reasons stated in his principal brief, which the State has failed to effectively rebut, this Court must reverse Mr. Shaffer's conviction as a result of the State's violation of his confrontation clause right.

IV. The Trial Judge Erred in Failing to Recuse Herself Based on Her Previous Involvement in Presiding Over an Attempted Prosecution of Mr. Shaffer in a Previous Case Which Resulted in a Reversal of the Conviction and Dismissal of the Indictment of Remand

The principal arguments advanced by the State are that this issue is procedurally barred in any number of internally contradictory ways. Ultimately, the issues raised in this appeal are not barred by any precedent cited by the State.

First, there is no dispute as to Mr. Shaffer having filed a motion seeking the trial judge's recusal for bias and prejudice against him arising from her presiding over the State's previous failed attempt in another case to prosecute him for capital murder. The Mississippi Supreme Court denied Mr. Shaffer's petition on the record as it existed at the time, which was prior to trial and, ultimately, sentencing. Consequently, the State's

reliance on *Tubwell v. Grant*, 760 So. 2d 687 (Miss. 2000) is misplaced because the factual context of that case is distinguishable. In *Tubwell*, no recusal motion was filed. As noted, Mr. Shaffer sought recusal of the trial judge by filing his motion and following the procedure set out in the Mississippi Circuit Court Rules and the Rules of Appellate Procedure.

The State, however, seeks to impose a further bar to his issue by the Orwellian argument that because he followed the procedure required by the rules established by the Mississippi Supreme Court, the Court's denial of his recusal motion now estops him through *res judicata* or the law of the case doctrine from raising the issue on appeal. (State's Brief, p. 20-21) Had nothing happened between the time of the Mississippi Supreme Court's denial of the petition and this appeal, the State's argument would make sense. However, a great deal has taken place: Mr. Shaffer has been tried, convicted, and sentenced. He now seeks review of the trial judge's presiding over the trial and sentencing, matters that were not previously reviewed by the Mississippi Supreme Court. Under these facts, the law of the case doctrine presented in the State's brief through its cite to *Thorson v. State*, 895 So.2d 85, 117 (Miss. 2004) is inapposite precisely because in that case the defendant sought review of a matter which the Mississippi Supreme Court had previously review. The Mississippi Supreme Court has not reviewed whether the trial court's ruling on the admission of the chat logs and her comments made during sentencing present the appearance of bias and prejudice such that this Court should reverse Mr. Shaffer's conviction, and recuse the trial judge from presiding over any retrial. In reviewing this issue, the Court cannot ignore the context in which those the

trial judge made that evidentiary ruling and those comments during sentencing. The context is that presented in Mr. Shaffer's principal brief, the previous attempt to prosecute him for capital murder, the trial botched by the trial judge, and her comments during the hearing on the recusal motion that she thought that Mr. Shaffer could have been retried by the District Attorney with the implication that she believed him to be guilty of murder.

Finally, the State argues that these issues that arose at trial and during sentencing should be barred because Mr. Shaffer made no contemporaneous objection, citing *Gatlin v. State*, 724 So. 2d 359 (Miss. 1998). *Gatlin* is distinguishable on its facts. In *Gatlin*, the remarks made by the trial judge during sentencing had not been preceded by any effort by the defendant to have the trial judge recused. This is distinguishable from the context of Mr. Shaffer's case where the trial judge was well aware that Mr. Shaffer perceived her to be hostile, biased, and prejudiced. The purpose of an objection is to allow the Court to correct error. In Mr. Shaffer's case, it is impossible to see how an objection to the trial judge's remarks would have allowed her to correct an issue of which Mr. Shaffer had already apprised her.

There being no procedural bar to this issue, the Court should remand the case for trial, order the trial judge recused for the appearance of bias and prejudice, and appoint a new trial judge to hear the retrial of the case.

V. Where the Same Conduct Violates Two Criminal Statutes, an Accused May Only Be Sentenced Under the State Providing the Lesser Punishment

The State mischaracterizes the holding in the primary case upon which Mr. Shaffer relies, *Grillis v. State*, 196 Miss. 576, 17 So. 525 (1944), which was reaffirmed in *Johnson v. State*, 260 So. 2d 436 (Miss. 1972). *Grillis* clearly holds that the rule in Mississippi is that “when the facts which constitute a criminal offense may fall under either of two statutes, *or* when there is substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment.” *Grillis*, 196 Miss. at 586 (emphasis added). *Johnson* is to the same effect. In this case, the facts which constitute the offense with which Mr. Shaffer was charged, tried, and convicted also constitute the crime of computer luring, which imposes a much lesser punishment, a maximum sentence of five years imprisonment. Under *Grillis* and *Johnson*, cases that remain good law in Mississippi, Mr. Shaffer’s conviction must be vacated, a conviction under the Section 97-55-27 entered, and the case must be remanded for sentencing under the correct statute.

CONCLUSION

Nothing presented in the State’s Brief undermines the persuasive arguments presented by Mr. Shaffer of each of the issues he raises as error. Under Mr. Shaffer’s first issue, the failure of the evidence to maintain his conviction under Section 97-5-33(6) because a child was not the recipient of his communications, the Court must reverse and render a judgment of acquittal. Only if the Court rejects this first issue, is it necessary to address issues II. through IV. Under each of those assignments, Mr. Shaffer is entitled to have his conviction reversed and remanded for a new trial. Even if the Court finds no error in Mr. Shaffer’s trial, he is, at the very least, entitled to have his conviction under Section

99-7-33 (6) vacated, judgment entered against him under the proper statute, Section 97-5-27, and the case remanded for sentencing under that statute which allows a maximum sentence of five years imprisonment and a \$10,000 fine.

Respectfully submitted,



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CERTIFICATE OF SERVICE

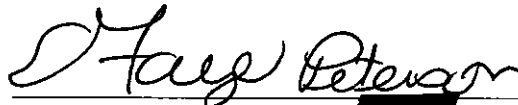
I, the undersigned attorney, do hereby certify that I have this day caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLANT to the following:

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So certified, this the 22 day of December, 2009.



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