2009-KA-00151-COAT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

E. Faye Peterson, Esq.,
THE PETERSON GROUP, LLC
310 Edgewood Terrace, Suite C
Post Office Box 16882
Jackson, Mississippi 39206-6882

Robert F. Clark, Esq.
Post Office Box 2705
Mobile, Alabama 36652

Dennis DeBar, Esq.
Post Office Box 1090
Leakesville, MS 39451-1090
Honorable Robert Shuler Smith,

GREENE COUNTY DISTRICT ATTORNEY
Anthony N. Lawrence, III, Esq.
District Attorney
Robert Knochel, Esq.
Cheryl C. Sullivan, Esq.
Assistant District Attorneys
Post Office Box 1756
Pascagoula, Mississippi 39568-1756

Honorable Kathy King Jackson
CIRCUIT JUDGE
Post Office Box 998
Pascagoula, Mississippi 39568

Mr. Justin David Shaffer
PIN 77380
SMCI-2 BLDG E-1 B Zone
Post Office Box 1419
Leakesville, MS 39451

So certified, this the 29th day of July, 2009.

E. Faye Peterson, MB No [redacted]
Certifying Attorney

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STATEMENT OF THE CASE

A. Course of Proceedings in the Trial Court

The defendant, Justin David Shaffer, was indicted September 21, 2006 by the grand jury of Greene County, Mississippi, for exploitation of a child, specifically, for using a computer and cellular telephone to

> knowingly entice, induce, persuade, seduce, solicit, advise, coerce, or order a child under the age of 18 years, to meet with him for the purpose of engaging in sexually explicit conduct, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

(CP. 8). Mr. Shaffer was tried by a jury in Greene County, Mississippi, beginning on August 12, 2008. (T. 21) Following the presentation of the State's case, Mr. Shaffer's counsel moved for a directed verdict, which the trial court denied. (T. 179-190; RE. 4). Mr. Shaffer's counsel then rested and renewed the motion for a directed verdict, which the trial court also denied. (T. 192-93, 200-01). The jury convicted Mr. Shaffer of exploitation of a

child, and the trial court sentence Mr. Shaffer to 25 years without the benefit of parole and a fine of $50,000.00. (CP. 89-90; RE. 2). Subsequently, the trial court denied Mr. Shaffer's motion for J.N.O.V. or for a new trial on December 23, 2008. (CP. 103; RE. 3).

Mr. Shaffer then perfected his appeal of his conviction to the Mississippi Supreme Court on January 23, 2009. (CP. 104).

B. Statement of Facts

The defendant Justin Shaffer is a single man in his forties, living in Greene County, Mississippi at the time of the incidents that led to his prosecution. (State's Ex. 10). On June 29, 2006, Mr. Shaffer was in an internet chatroom called "Mississippi2" operated by Yahoo! that was supposed to be restricted to adults. (State's Ex. 10; T. 90, 121-22). Also in the same chatroom was a volunteer for the private organization, Perverted Justice. (T. 94-95). This volunteer entered the chatroom using a profile for a fake identity. (T. 86, 89, 94-95; State's Ex. 1). The profile used the screen name "orlandoluvsme2," which listed the age of the owner of the profile as 113 years old, but displayed the photographic image of a young woman. (T. 89-90; State's Ex. 1). The fake identity of the owner of the profile was "Chloe," a thirteen-year-old girl who lived in the Byram community in Hinds County, Mississippi. (State's Ex. 10). In fact, "Chloe" was Deanna Doolittle, a 29-year-old volunteer for Perverted Justice, living in Grand Junction, Colorado. (T. 74, 124). Perverted Justice, the organization for whom Deanna Doolittle volunteered, is a private organization whose purpose is to use subterfuge and fake identities to catch men looking on the internet for minors with whom to meet for sex. (T. 74-75).

Deanna Doolittle testified that after "Chloe" exited the chatroom she received a private message from "cowboy39461."[1] (T. 94-95). Doolittle responded to the private message pretending to be 13-year-old "Chloe" using the profile name "orlandoluvsme2." (T. 97-98). The two chatted using Yahoo!'s Messenger software that evening. (State's Ex. 10) During the initial online chat, "cowboy39461" asked "orlanoluvsme2" to call him on his cell phone. (State's Ex. 10) At that point, another Perverted Justice volunteer, Kimberly Price, spoke briefly with "cowboy39461" on the telephone. (T. 130-31). Kimberly Price testified that her job was to be a verifier, which required that she obtain the name of the person calling and verify that this person was the same person chatting with "orlandoluvsme2" on the internet. (T. 128). In the telephone conversation, "cowboy39461" confirmed that his name was "Justin," which he had disclosed in the internet chat. (T. 130). Ms. Price represented that she was "Chloe" with whom "cowboy39461" had chatted. (T. 130; State's Ex. 11 & 12). After a short telephone conversation, "Chloe" and "Justin" resumed their chat over the internet using Yahoo! Messenger. (State's Ex. 10). Later in that chat, "cowboy39461" disclosed the he lived in Neely, Greene County, Mississippi. (State's Ex. 10).

"Orlandoluvsme2" and "cowboy39461" resumed their internet chat on July 1, 2006. (State's Ex. 10). During their chat, "orlandoluvsme2" emailed pictures of herself to "cowboy39461." (Tr. 104-05; State's Ex. 10). The remainder of the chat involved small talk. (State's Ex. 10). "Orlandoluvsme2" and "cowboy39461" attempted to chat on July 2 through 4, but were never signed on at the same time. (State's Ex. 10).

Finally, on July 5, 2006, "orlandoluvsme2" and "cowboy39461" resumed their chat. (State's Ex. 10). During this series of chats that carried over onto July 6, 2006,

[1] In one of their later chats, Mr. Shaffer is alleged to have used the profile name "Girth_i." (T. 101-03; State's Ex. 6 & 7).

"orlandoluvsme2" and "cowboy39461" began discussing the possibility of meeting. (State's Ex. 10). The chat contained some sexually explicit conversation. (State's Ex. 10) "cowboy39461" also revealed that his last name was "Shafer" and that he lived in at "5908 Neely Avera Rd, (sic) neely ms 39461." (State's Ex. 10). "Chloe" and "Justin" also had a very brief telephone conversation. (T. 131-32; State's Ex. 11 &12).

On July 7, 2006, "orlandoluvsme2" and "cowboy39461" chatted again. (State's Ex. 10). This chat also contained sexually explicit conversation. (State's Ex. 10). The chat carried over to July 8, as "orlandoluvsme2" and "cowboy39461" arranged to meet the next day. (State's Ex. 10). In a subsequent chat between "orlandoluvsme2" and "cowboy39461" that morning, they arranged a telephone call to discuss their meeting. (State's Ex. 10).

On July 8, 2006, "Chloe" and "Justin" had a series of telephone calls in which they discussed their meeting later in the day. (State's Ex. 13 & 14). During these conversations another Perverted Justice volunteer, Tricia Bootsma, pretended to be "Chloe." (T. 143). While the beginning conversations first demonstrate some reluctance by "Justin" to follow through on their meeting and some reluctance to engage in any sexually explicit conduct, eventually the conversations turned sexually explicit. (State's Ex. 13 & 14). Mr. Shaffer arrived at the location where "Chloe" and "Justin" arranged to meet at approximately 6:00 p.m. on July 8, 2006, where he was met by officers with the Hinds County Sheriff's Department and arrested. (T. 157, 159).

SUMMARY OF THE ARGUMENT

Mr. Shaffer presents five issues on appeal of his conviction for "child exploitation." The argument presented under the first issue should be sufficient to dispose of the appeal of

the case. The remaining four issues are presented as error in the event that this Court is not persuaded by Mr. Shaffer's argument of the first issue.

Under the first issue, Mr. Shaffer presents the crucial argument that this Court must reverse his conviction and discharge him because the State failed to prove his guilt as to one of the elements of the crime for which he was indicted. Mr. Shaffer was indicted for the crime of "child exploitation." The indictment accuses Mr. Shaffer of using his computer and a cellular phone to entice a child to meet him for the purpose of engaging in sexually explicit activity. One of the elements of the indicted crime is that the enticement must be of a child, a person under the age of 18. None of the persons involved in the sting operation which nabbed Mr. Shaffer were under the age of 18. Consequently, he did not violate the criminal statute under which he was indicted and his conviction cannot stand.

Should this Court reject Mr. Shaffer's first argument, this Court must grant Mr. Shaffer a new trial. The most significant evidence against Mr. Shaffer was a 69-page chat log, which the State represented as being a "true and accurate" copy of the online computer chats between Mr. Shaffer and a volunteer for an organization named Perverted Justice. This volunteer was a 29 year-old woman living in Colorado who pretended to be a 13 year-old girl living in Byram, Mississippi. The State introduced the 69-page chat log through this volunteer, who admitted that she was not involved in its compilation and creation from the data stored on the "proxy" in Mississippi. The record at trial demonstrates that the chat log is incomplete and represents only a portion of the data stored on the proxy, some of which may be relevant to Mr. Shaffer's case. Over the objections of Mr. Shaffer's counsel that the State had failed to properly authenticate the chat logs, the Court erroneously introduced the chat logs. The volunteer offered no independent testimony about the content of the chats at trial.

Thus, the erroneously admitted chat logs are the only evidence of the chats. Consequently, Mr. Shaffer must be granted a new trial because the chat logs were crucial evidence undergirding the State's conviction.

The admission of the chat logs also implicates Mr. Shaffer's fundamental rught to confront the witnesses against him secured by the Sixth Amendment to the United States Constitution. The State did not offer as a witness the person who set up the proxy that recorded the chats and who would have reviewed the data on the proxy to determine which chats were relevant to the charges against Mr. Shaffer. This person or persons would have been responsible for the integrity of the proxy throughout the sting operation and after its conclusion prior to trial. These same persons would have reviewed the data on the proxy accumulated during the sting operation which involved multiple Perverted Justice volunteers and the men with whom they chatted on the internet. The testimony of these persons was necessary to establish the integrity of the data on the proxy and that all the data relevant to Mr. Shaffer had been compiled in the chat logs. This would constitute the type of testimonial evidence at the core of the confrontation clause of the Sixth Amendment and the failure of the trial court to require this testimony deprived Mr. Shaffer of his confrontation rights secured by the Sixth Amendment and the Mississippi Constitution.

Mr. Shaffer is also entitled to new trial because the trial judge failed to recuse herself. The trial judge previously presided over a capital murder trial of Mr. Shaffer. Mr. Shaffer was convicted of murder and sexual battery and appealed his conviction to the Mississippi Supreme Court. On appeal, the Mississippi Supreme Court reversed the conviction and remanded because of police and prosecutorial misconduct in the handling of evidence, which the trial court allowed, and for other elementary errors by the trial court. On remand to the

trial court, the District Attorney decided that he could not prosecute the case because he did not have sufficient evidence. The trial court, the same judge who presided over and sentenced Mr. Shaffer in this case now on appeal, disagreed with the District Attorney in open court arguing that because Mr. Shaffer had been previously convicted, there was sufficient evidence to convict him again. When confronted with this matter, the judge refused to recuse herself from this trial. She presided over the trial, then, during sentencing of Mr. Shaffer, referred to her history with him, which could have been only in reference to the previous capital murder case in which the indictment had been dismissed by the District Attorney. A reasonable person viewing these facts would question the impartiality of the trial judge, which requires recusal. This Court should remand for trial before an impartial judge.

Finally, if this Court determines that Mr. Shaffer is not entitled to be discharged or that he is not entitled to a new trial, his sentence must be vacated and remanded for re-sentencing under the proper statute. Mr. Shaffer's alleged conduct is chargeable under two statutes, one of which is subject to a lesser punishment. Where the accused may be sentenced under more than one statute, the accused must be sentence under the statute imposing the lesser punishment. Therefore, this Court must vacate Mr. Shaffer's sentence and remand to the trial court to re-sentence him under Section 97-5-27 of the Mississippi Code, which provides for imprisonment not to exceed three years.

ARGUMENT

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

In this assignment of error, Mr. Shaffer challenges the sufficiency of the evidence supporting the crime of which the jury convicted him. That crime, nominated as "Child Exploitation" in the indictment, requires as an element that the victim of the crime be a "child," which is a term defined by statute for purposes of the indicted crime. The evidence at trial established that all of the volunteers for Pervert Justice were adults at the time of their conversations with Mr. Shaffer. At trial, when confronted with this argument during the motion for a directed verdict, the State argued that the statute, despite its clear, unambiguous language, criminalized Mr. Shaffer's acts. The State cited to a proviso in a separate subsection of the statute that precluded the defense of involvement of undercover operatives or law enforcement. This interpretation of the statute contradicts the plain language of the statute. This interpretation also runs afoul of the time-honored rule of construction that criminal statutes are to be construed strictly and in favor of the defendant. Finally, the State's interpretation is untenable because it requires the addition of language that was not a part of that statute as it existed in 2006 at the time of Mr. Shaffer's actions.

The critical inquiry when reviewing a defendant's challenge to the sufficiency of the evidence is whether viewing all the evidence presented—not just that supporting the State's case—in the light most favorable to the State, keeping in mind the beyond a reasonable doubt burden of proof, reasonable fair-minded persons would believe that the accused committed the act charged and that every element of the offense existed. *Coleman v. State,* 947 So. 2d 878, 881 (Miss. 2007); *Bush v. State,* 895 So. 2d 836, 843 (Miss. 2005); *Edwards v. State,* 469 So. 2d 68, 70 (Miss. 1985). If the State fails to prove any element of the offense beyond

a reasonable doubt, this Court must reverse the conviction and render a judgment of acquittal. *Coleman,* 947 So. 2d at 881, 885 (Reversing embezzlement conviction and discharging defendant where entity from whom money taken was not protected under the embezzlement statute); *Bush,* 895 So. 2d at 843; *Edwards,* 469 So. 2d at 70 (reversing and rendering where State failed to introduce evidence of amount of money received by the accused; the amount received was an element of the crime of food stamp fraud). This Court reviews the interpretation of a statute as a question of law, which is reviewed de novo. *Gilmer v. State,* 955 So. 2d 829, 833 (Miss. 2007); *Coleman,* 947 So. 2d at 880.

The State indicted Justin Schaffer under Section 97-5-33 of the Mississippi Code Annotated of 1972. The indictment reads as follows:

> Justin David Shaffer (sic)...did unlawfully, willfully, and feloniously[,] through the use of messaging sent via a computer and cellular telephone[,] knowingly entice, induce, persuade, seduce, solicit, advise, coerce, or order a child under the age of 18 years, to meet with him for the purpose of engaging in sexually explicit conduct....

(CP. at 8). The indictment does not charge Justin Schaffer with an attempt under 97-1-1 of the Mississippi Code Annotated of 1972, as amended. The indictment charges Justin Schaffer with the completed crime.

The prosecution presented its case against Justin Schaffer by calling as witnesses the volunteers with the organization Perverted Justice. Each of these witnesses, who interacted with Mr. Schaffer through the internet or through a cellular telephone, were adults. Deanna Doolittle, who chattered with Mr. Schaffer over the internet under the fake persona of "Chloe," testified that she was 29 years old. Kimberly Price, who spoke with Mr. Schaffer by telephone, testified that she was either 21 or 22 at the time of the conversations. (T. at 136). Tricia Bootsma, who also spoke with Mr. Schaffer by telephone, testified that she was 19 at the time of the conversations. (T. at 148). When Mr. Shaffer arrived at the meeting

place, he was met and arrested by officers with the Hinds County Sheriff's Department. No person, neither volunteer nor law enforcement, participating in the sting operation was a "child" as that term is defined for purposes of the crime of which Mr. Shaffer was convicted.

Following the presentation of evidence to the jury, the trial court instructed the jury based on Section 97-5-33 (6) of the Mississippi Code Annotated of 1972 as it existed in 2006 at the time of the alleged acts, through instruction S-1B:

> The Court instructs the jury that the defendant, Justin David Shaffer, has been charged in the indictment with the crime of Exploitation of a Child.
>
> If you find from the evidence in this case, beyond a reasonable doubt, that Justin David Shaffer:
>
> (1) On or between June 29, 2006 through July 9, 2006, did unlawfully, willfully, and feloniously;
>
> (2) by any means, including computer and cellular telephone;
>
> (3) did knowingly entice, induce, persuade, seduce, solicit, advise, or order a child under the age of eighteen years;
>
> (4) to meet with the Defendant, Justin David Shaffer, for the purpose of engaging in sexually explicit conduct and
>
> (5) that the incidents occurred in Greene County, Mississippi;
>
> then you shall find the Defendant, Justin David Shaffer, guilty [of] exploitation of a child as charged in the indictment.

(CP. 83).

The crimes created by Section 97-5-33 clearly and unambiguously require as an element that the victim of the exploitation be a child, that is, a person under the age of 18. *See* Miss. Code Ann. §97-5-31 (a) (2006) ("'Child' means any individual who has not attained the age of eighteen (18) years" and that definition applies to the crimes created by Section 97-5-33). The applicable portion of the statute states, "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." Miss Code Ann. § 97-5-33 (6) (2006). The charge to the jury correctly incorporated this element that the victim be a child.

At trial, in response to Mr. Shaffer's directed verdict motion based on the State's failure to prove the involvement of a child in his conduct, the State argued that another subsection of 97-5-33 removes the requirement that the criminalized actions must be directed toward an actual "child." Subsection (8) of 97-5-33, as it appeared at the time of Mr. Shaffer's conduct that led to his prosecution, states:

> The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of the offense as charged in the indictment shall not constitute a defense to the prosecution of the crime charged.

The trial court accepted the State's erroneous construction of the statute when it denied Mr. Shaffer's directed verdict motion based on the failure of the State to introduce any evidence that Mr. Shaffer's conduct involved a child.

The construction of Section 97-5-33 (8) accepted by the trial court is error because the plain language of that section does not remove the element of the crime created by Section 97-5-33 (6) that the victim be a child. Section 97-5-33 (8) does contemplate that undercover operatives and law enforcement officers will be involved in detecting and investigating all of the conduct criminalized in Section 97-5-33. The word "detection" is defined by The American Heritage Dictionary of the English Language as "The act of finding out or the fact of being found out; discovery, as of something hidden or obscure." Consequently, it would be no defense to the crime of child exploitation that law enforcement discovered communications that violated the section through the monitoring of public chat rooms under circumstances where an actual child was being "enticed" to meet for the

purposes of engaging in sexually explicit conduct. It would be no defense that once such communications were discovered, which initially involved an actual child, that an undercover operative became involved in subsequent conversations and any arranged meeting. However, the evidence in the case against Mr. Shaffer involves no actual minor child at any time; the evidence shows that only undercover operatives and law enforcement were involved.

Furthermore, the language of subsection (8) of Section 97-5-33 must be viewed in the context of the entire section. The statute, Section 97-5-33, criminalizes conduct associated with the creation and distribution of child pornography. One could even say that Section 97-5-33 (6) is an odd provision to include in this section that criminalizes the creation and distribution of child pornography. When the language of subsection (8) is viewed in relation to the other provisions of section 97-5-33, one finds many instances where the language of subsection (8) applies to preserve prosecutions where law enforcement is involved in the "detection and investigation" of crimes involving child pornography. For example, Sections 97-5-33 (3), (4) and (5) criminalize the transmitting, receipt with intent to sell, sale and possession, respectively, of child pornography. One can easily conceive of instances where law enforcement officers would operate sting operations that revolved around the offer to sell child pornography or to buy it. In these instances, law enforcement officers would be working undercover and subsection (8) would clearly prohibit a defense of law enforcement officer involvement. However, Mr. Shaffer was not indicted and tried for any of these crimes involving child pornography. He was indicted and charged with enticing an actual child to meet with him.

The Mississippi Supreme Court holds that its primary role in statutory construction is to apply the plain meaning of the words of the statute. *Coleman,* 947 So. 2d at 881. In *Russell v. State,* 94 So. 2d 916, 231 Miss. 179, 189 (Miss. 1957), the Mississippi Supreme Court pronounced well-established rules for the construction of a penal statute: "The intention of the legislature is to be ascertained primarily from the language used in the statute, irrespective of the fact that the phraseology of the statute may be awkward, slovenly, or inartificial. Accordingly, the meaning of statutes is to be sought and ascertained from their language." The court further stated, "Courts should not attribute to the legislature the enactment of a statute devoid of purpose, but cannot attribute to the legislature an intent that is not in any way expressed in the statute. *Russell,* 94 So. 2d 916, 231 Miss. at 189. In summarizing the correct approach to statutory interpretation, the court stated, "In other words, the only mode of which the will of the Legislature is spoken is in the statute itself. Legislative intent is manifested in the statute and must be determined primarily from its language." *Id.*

The plain meaning of subsection (8) encompasses scenarios where law enforcement might be involved in a sting operation and their involvement would not provide defendant with a defense. Nevertheless, the sting operation devised and executed by Perverted Justice falls outside the plain meaning of subsection (8), as the plain meaning of subsection (6) does not allow prosecution for the completed crime of child exploitation where no actual child was ever involved. The plain meaning of subsection (8) does not function as a magic wand to remove the element that the communications be with a child. The plain meaning of Subsection (6) when read in conjunction with Subsection (8) does not criminalize the conduct of Mr. Shaffer because he never communicated with a child.

If the Court rejects this evident plain meaning of subsections (6) and (8) of Section 97-5-33, then subsection (8) is ambiguous at best. Where a criminal statute is ambiguous, the statute must be construed strictly against the State and construed in a manner that favors the accused. *Coleman,* 947 So. 2d at 881; *McLamb v. State,* 456 So. 2d 743, 745 (Miss. 1984); *Russell,* 94 So. 2d 916, 231 Miss. at 190. Consequently, a strict construction of subsection (6) and subsection (8) would require that an actual child—not an adult posing as a child—be the victim of a subsection (6) offense. To interpret subsection (8) in the manner proposed by the State, that enticing an adult posing as a child violates subsection (6), violates this Court's cases which refuse to allow the addition of words to a statute that are not already included therein. *Balouch v. State,* 938 So. 2d 253, 260 (Miss. 2006) (citing *Wallace v. Town of Raleigh,* 815 So. 2d 1203, 1208 (Miss. 2002)).

Ultimately, The Mississippi Legislature evidently believed that it needed to amend the wording of subsection (8) by adding language that explicitly states that law enforcement "posing as a child" is no defense to any of the conduct criminalized by Section 97-5-33. *See* Miss. Code Ann. § 97-5-33 (8) (Rev. 2007). Subsection (8) now reads as follows: "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." Miss. Code Ann. § 97-5-33 (8) (Rev. 2007) (emphasis added). This amended subsection (8) states precisely the meaning the State seeks to attribute to the pre-amendment subsection (8) that existed at the time of Mr. Shaffer's conduct. The State would have this Court read into subsection (8) the words added by the 2007 amendment to subsection (8), a request at odds with the law of this State. The creation of crimes is not the within the authority of the Court, but instead is a power vested in

the Mississippi Legislature. *See Shaffer v. State,* 740 So. 2d 273, 283 (Miss. 1998). Accepting the State's proposed interpretation of the language of subsection (8), as it existed in 2006, would create a crime where none previously existed.

The State finds itself in an untenable dilemma in arguing an interpretation that the pre-amendment subsection (8), applicable to Mr. Shaffer, allows law enforcement to pose as a minor. On one hand is the rule of statutory construction that the words appearing in a statute must be read such that they are given effect. *See Balouch,* 938 So. at 260. Accepting the State's interpretation of the pre-amendment language would violate this rule of statutory construction: The statute prior to amendment would have exactly the same meaning after the amendment, and the words added by the Legislature in 2008 would have changed nothing. The State's interpretation must fail because, under the Mississippi Supreme Court's well-established canons of statutory interpretation, the Legislature cannot be found to have added the amended wording for no reason.

Since the State's interpretation of subsection (8) must fail, the effect of what the State did in prosecuting Mr. Shaffer for his conduct in 2006 was to apply the 2007 amended subsection (8). The 2007 amended version of subsection (8) contains the words that provide the meaning the State wishes to attributed to the 2006 version. Consequently, the other side of the dilemma results in the State's prosecution of Mr. Shaffer under an *ex post facto* law.

> "'[A]n ex post facto law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, **in relation to the offence or its consequences, alters the situation of a party to his disadvantage.**'" *Collins [v.Youngblood,* 497 U.S. 37, 48, 110 S.Ct. 2715, 2722, 111 L.Ed.2d 30 (1990)] *quoting Kring v. Missouri,* 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883) (emphasis added).

Christmas v. State, 700 So.2d 262, 267 (Miss. 1997). The State effectively prosecuted Mr. Shaffer under an *ex post facto* law, if its interpretation of subsection (8) is to be accepted. In

fact, when the State explicitly argued for its interpretation of the Statute, its only cited authority was the amended subsection (8) as evidence of what the Legislature intended in the original subsection (8). (T. 26-27; 29-30; 182-83).

Consequently, the State's interpretation of the 2006 version subsection (8) fails, if that subsection is ambiguous. The State's interpretation violates the Court's rules of statutory construction and argues for the application of an unconstitutional *ex posto facto* law to Mr. Shaffer.

Mr. Shaffer's reading of Section 97-5-33 (6) is also supported by reference to the law of other jurisdictions. Several jurisdictions, facing language that criminalizes only the enticement of an actual child, have found that no completed crime is committed when the communications were solely with undercover agents. *See Moore v. State,* 882 A.2d 256 (Md. Ct. App. 2005) (holding that language in statute criminalizing conduct of conversing with minor online to arrange meeting for sexual conduct applied only to actual minor, not communications with undercover law enforcement); *State v. Ellis,* 657 S.E.2d 51 (N.C. Ct. App. 2008) (holding search warrant valid because warrant stated probable cause for attempt to entice child where undercover agent involved, not probable cause based on completed crime); *Adams v. State,* 117 P.3d 1210 (Wy. 2005). Thus, other state courts have confronted the issue raised by this appeal and have consistently held that language similar to Mississippi's Section 97-5-33 (6) requires as a necessary element an actual child victim, not an undercover agent who is an adult pretending to be a child.

Whether this Court finds Sections 97-5-33 (6) and (8) as clearly written or ambiguous, the outcome must be the same. A necessary element of the conduct criminalized under 97-5-33 (6), as that statutory scheme existed in 2006, was communications with a

child, that is, a person under the age of 18. Mr. Shaffer could not be found guilty on the evidence presented at trial because there is no evidence he had any communications with a child. This Court must reverse the verdict below, render a judgment of not guilty of the charge in the indictment, and discharge Mr. Shaffer.

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

In this assignment of error, Mr. Shaffer challenges the admission of the chat logs at trial during the testimony of Deanna Doolittle. During the sting operation undertaken by Perverted Justice, Ms. Doolittle posed as "Chloe," the fake 13-year-old girl who owned the Yahoo! profile, "orlandoluvsme2." At trial, Ms. Doolittle offered limited testimony about the substance of her chats with "cowboy39461." Instead of Ms. Doolittle offering direct testimony about the substance of the chats, the State introduced into evidence copies of what were represented to the trial court as being logs of the chats between "orlandoluvsme2" and "cowboy39461". Prior to the State offering the logs into evidence, Ms. Doolittle attempted to explain possible locations where the chats between "orlandoluvsme2" and "cowboy39461" might be stored. She explained that the chats might be stored on the individual computer users' computers as a ".dat" file. She explained that the Yahoo!, the company providing the software for the chat service, could record, *i.e.*, store, the typed messages between the users.

Ms. Doolittle also offered an explanation of another location where the chat logs would be stored. She explained that a "proxy" at the sting house in Mississippi also recorded the chats. Ms. Doolittle was not offered as an expert in computer networking or "proxies" or anything else related to computers. Her testimony on the matter of the "proxy" and the "recording" of chats was as follows:

> A....And then we have a proxy in a different state which was actually Mississippi at the time—it was at the house—that records the conversations.

Q. Okay. And when you say records the conversations, you mean—

A. Uh-huh, the chats.

Q. The chats. Not actual voice?

A. No, it's not the voice. It's the actual chat.

Q. What's being typed?

A. Uh-huh.

Q. Okay.

A. From the initial contact until it's done.

Q. Okay. Now, I don't know what a proxy is. What is that?

A. It's a device that is used to record chats.

Q. Okay.

A. And it has the time stamps on it and it cannot be altered.

Q. Okay. You can't alter it?

A. I don't even have access to it. But, no, I can't. Not even the person that owns it can.

Q. Okay. Do you do something to initiate the recording of these things?

A. Yeah, there's an option to go into Yahoo Messenger and you can go into—I thinks it's "perform action" and then "use proxy." And then there's a series of steps that you have to go through to connect to that proxy. And then it will record everything that is said in chat while you're on the proxy.

Q. That is typed?

A. Yes, typed. Sorry. I'm sorry. I say "chat," but, yes, typed, sir.

Q. I understand. Okay. And did you in fact, I guess, in a sense, push a button and ask the computer to record your conversations with "cowboy39461"?

A. No. We are required, ever single time that we go trolling, to be on the proxy.

Q. Okay. So you got on the proxy before he ever contacted you.

A. Yes.

Q. Okay. So, when he contacted you, were you in fact on the proxy?

A. Yes.

Q. And everything was being recorded?

A. The whole time.

Q. Okay....

Q. Have you had an opportunity to review a printout of what was recorded in this case.

A. Yes....

Q. I'm handing you a document.

A. Yes.

Q. Can you tell me what that document is?

A. This is the log that I—of all the conversations, the chats. Of the Yahoo chats that—

(T. 106-08). At this point Mr. Shaffer's counsel objected to the introduction of the logs into evidence based on the complete absence of the provenance of the logs and any indicia that the 69 page document handed to the witness accurately reflected the chats between "orlandoluvsme2" and "cowboy39461". (T. 108; State's Ex. 10; T. 109). The trial court overruled the objection. Following the objection, Ms. Doolittle testified that she had read the document, without indicating at what point she had read this 69 page document, that it was "absolutely" a true and accurate copy of the chats that she had with "cowboy39461." (T. 108). The State moved to have the document introduced into evidence. (T. 108). Mr. Shaffer's counsel objected on the same ground, summarizing the objection as lack of a proper predicate and the trial court again overrule this objection to the documents. (T. 108).

Admission of the logs raises two evidentiary problems. First, there is nothing in the record which provides any basis for the trial court to determine from whence the 69 pages of chat came. Ms. Doolittle testified about the possible sources of "recordings" of the chats between "orlandoluvsme2" and "cowboy39461," including the "recordings" by the "proxy." She was asked if she had an opportunity to review "a printout of what was recorded in this case." This State's Exhibit 10 was a 69 page document, which Ms. Doolittle immediately identified as being "a true and accurate copy of the chats that you had entered in with 'cowboy39461'." (T. 107-08). On cross-examination, she admitted that she though the chat log introduced as State's Exhibit 10 was generated in Mississippi. (T. 125-26). Ms. Doolittle admitted that she wasn't present when the report was printed. (T. 125-26). Thus, no evidence was presented about the provenance of this printout. No one with personal knowledge about the source of this printout offered any testimony. Nothing that would lend any indicia of authenticity to these printouts was offered. For example, the State could have called as a witness, the person who retrieved the information from the computer that was its source or some person responsible for that process, much like a laboratory technician is called to testify. Yet, the State failed to offer any such testimony to authenticate the chat logs, that is, to testify from whence the printout came.

The second problem is amplified by the first problem: There was no credible evidenced that the 69 page document introduced into evidence accurately reflected the chats between "orlandoluvsme2" and "cowboy39461." That Ms. Doolittle could in a matter of seconds flip through 69 pages that recorded chats she had more than two years before defies credulity. Consequently, there is no evidence about the source of the chat logs that would

authenticate them nor is there any credible evidence that the chat logs accurately reflect the chats between "orlandoluvsme2" and "cowboy39461."

In addition to these two obvious problems, the chat logs appear on their face to be incomplete. Ms. Doolittle testified that after being contacted by "cowboy39461," she was also contacted by "Girth_i," who identified himself as being the same person as "cowboy39461." (T. 101-03; State's Ex. 6 & 7) The State even introduced into evidence two screen shots of chats between "orlandoluvsme2" and "Girth_i." State's Exhibit 10, the 69-page chat log, which was represented as being the chats that took place between "Chloe" and "Justin," does not include the chats between "orlandoluvsme2" and "Girth_i" and, in fact, do not include a single chat between the two. The only conclusion that can be draw is that the 69 page chat log does not include any of the screen shot chats between "orlandoluvsme2" and "Girth_i" and is an incomplete record of the chats between "Chloe" and "Justin." The incomplete nature of the chat log underscores the failure of the State to properly authenticate the logs, which should have resulted in their exclusion from evidence.

Another implication about the chat logs can be logically drawn from the testimony of Ms. Doolittle and Hinds County Sheriff Department Investigator Steven Lofton. The proxy was being used by other Perverted Justice "contributors" like Doolittle during the sting operation in Mississippi. Ms. Doolittle testified that she was a junior contributor for Perverted Justice at the time of her chats with Mr. Shaffer. (T. 84) She explained briefly about the coordination between Perverted Justice and the Hinds County Sheriff's Department: "Hinds County contacted one of [Perverted Justice's] administration and set up a sting and a bust house. And [Perverted Justice] gathered all the junior contributors at the time, told them that there would be a sting, these were the dates...[a]nd when the bust house

would be open...so...we could troll." (T. 84-85) Based on this testimony, other junior contributors with Perverted Justice were logging into the proxy just like Ms. Doolittle, trolling chat rooms, and recording chats. The testimony of Steven Lofton confirms this implication. Mr. Lofton testified that other persons were pick up during the sting operation in addition to Mr. Shaffer. (T. 157).

As a consequence, the logical implication is that the proxy located at the sting house in Mississippi contained chats between multiple Pervert Justice volunteers just like Ms. Doolittle and multiple men like Justin Shaffer with whom those volunteers were chatting. These chats would have been stored on the proxy in some manner that would have required a person to perform a search of all these chats to filter those relevant to each case. That filtering process, whatever it may have been, required the person to make decisions about the filtering criteria, which may have resulted either in including irrelevant chats between other persons or in excluding relevant chats. Without the person who was responsible for setting up the proxy and searching it for the chats relevant to the case against Mr. Shaffer, the State, including its witness, Ms. Doolittle, could not offer credible testimony about the source of the chat logs and their completeness.

The standard of review for the admission of evidence is whether the trial court abused its discretion. *Johnston v. State,* 567 So.2d 237, 238 (Miss. 1990). The trial court abuses its discretion when it fails to exercise it within the boundaries of the Mississippi Rules of Evidence. *Id.*

In order for a writing to be authenticated under Rule 901, there must be evidence that it is what its proponent claims. Miss. R. Evid. 901 (a). Authentication or identification of a writing is a condition precedent to its admissibility. Miss. R. Evid. 901 (a); *Gorman-Rupp*

Co. v. Hall, 908 So. 2d 749, 754 (Miss. 2005). A trial court commits error when it allows an unauthenticated document into evidence. *See Gorman-Rupp Co.,* 908 So. 2d at 754 (finding that trial court should not have relied on unauthenticated documents in ruling on defense motion for summary judgment).

One common method of authenticating a document is for a witness with knowledge of a writing to testify that "a matter is what it is claimed to be." Miss. R. Evid. 901 (b) (1); *see Bower v. Bower,* 758 So.2d 405, 414-15 (Miss. 2000). The problem with the State attempting to use Ms. Doolittle to authenticate the chat logs is that she has no personal knowledge about the source of the chat logs and could not credibly state that the 69 pages of chat logs were accurate. For these reasons, she is incapable of testifying that the chat logs are what the State claims them to be, a true and accurate recording of the chats between "Chloe" and Mr. Shaffer.

Without the evidence of the chat logs, the State could not have met its burden of proving all the elements of the crime charged, specifically, that Mr. Shaffer was communicating with a minor or, as the State argues is sufficient, someone posing as a minor. Without this element, the conviction must be reversed and remanded for a new trial.

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

In the previous assignment of error, Mr. Shaffer argued that the chat logs were wrongfully introduced into evidence because they were not properly authenticated. This error also rises to the level of a violation of the Mr. Shaffer's rights under the United States and Mississippi constitutions to confront the witnesses against him. *See* U.S. Const., Amend. 6; Miss. Const., Art. 3, § 26.

Any analysis of the Confrontation Clause and its analog in the Mississippi Constitution must begin with the United States Supreme Court's landmark decision in *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct.1354, 158 L. Ed.2d 177 (2004). In *Crawford,* the Supreme Court swept away the analytical framework of its previous decision in *Ohio v. Roberts,* 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed.2d 597 (1980) and formulated a new approach by holding that the Confrontation Clause "guarantees a defendant's right to confront those "'who bear witness'" against him." *Melendez v. Massachusetts,* 2009 WL 1789468, *3 (U.S. 2009) (quoting *Crawford,* 541 U.S at 51). Consequently, "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez,* 2009 WL 1789468 at *3.

The Confrontation Clause applies to testimonial evidence, which the Supreme Court has continued to define through the application of *Crawford. See Melendez,* 2009 WL 1789468 (holding that a sworn certificate of a lab technician as to the composition, quality, and the net weight of a substance purported to be cocaine was testimonial evidence subject to the Clause); *see also Davis v. Washington,* 547 U.S. 813, 126 S. Ct. 226, 165 L. Ed.2d 224 (2006) (911 emergency call not testimonial, but statements made to police at the scene while investigating are testimonial); *Crawford,* 541 U.S. 36, 68-69 (2004) (recorded statement of wife precluded from testifying because of marital privilege was testimonial and should have been excluded from evidence).

Unquestionably, the evidence required to properly authenticate the chat logs would be testimonial and bear witness against Mr. Shaffer. The evidence would have to be presented at trial by a witness with knowledge about the integrity of the proxy and the methodology by

which the relevant chats were filtered from the other chats relating to other cases that were stored on the proxy. This evidence bears witness against Mr. Shaffer because it is evidence that is necessary for the introduction of evidence necessary to establish Mr. Shaffer's guilt of the alleged crime.

This evidence is clearly distinguishable from the mere certification of documents as to their accuracy and authenticity, which the Mississippi Court of Appeals found to be non-testimonial in *Frazier v. State,* 907 So. 2d 985, 997-98 (Miss. App. 2005). In *Frazier,* the Mississippi Court of Appeals held that the certificate by the Alabama custodian of governmental records of prior convictions, which made them self-authenticating under the Mississippi Rules of Evidence, was non-testimonial. *Frazier,* 907 So. at 997-98. The court reasoned that the custodian was not testifying that the defendant had committed the crimes, only that the records attached to the certificate were accurate copies of the official records. *Id.* at 997-98. No claim was made that the custodian, a government official, had any personal knowledge by the underlying convictions evinced by the documents. *Id.* Furthermore, there was no evidence indicating any real dispute as to the accuracy of the records. In contrast, Mr. Shaffer has pointed to significant questions about the completeness of the chat logs. The chat logs show no chats between "orlandoluvsme2" and "Girth_i." Additionally, the testimony of Deanna Doolittle and Steven Lofton shows that the proxy contained the chats of other Perverted Justice volunteers with men who were arrested as a rest of the sting operation. The person or persons responsible for setting up the proxy, for its integrity, and for extracting the relevant chats is more than a mere custodian of records. Consequently, *Frazier* is distinguishable.

A person testifying about the proxy bears witness against Mr. Shaffer by stating that I set up a proxy to record the chats of Pervert Justice volunteers including Deanna Dolittle. The person testifying about the proxy would further state that the proxy was set up in a house in Byram, Mississippi that was secure and the proxy was secured in some manner. Finally, the person would testify about the process or methodology they used to extract, from all the chats recorded as part of the entire sting operation, those chats relevant to the case against Mr. Shaffer. The effect is testimony that the chats the jury is about to hear read to them are a complete and accurate compilation of the chats between Deanna Doolittle, "orlandoluvsme2," and Mr. Shaffer, "cowboy39461" and "Girth_i." This is the testimony that would be necessary to authenticate the documents and it is testimony that bears witness against Mr. Shaffer.

The failure to properly authenticate the chat logs creates a violation of Mr. Shaffer's Confrontation Clause rights and the analogous rights under Section 26 of the Mississippi Constitution. Depriving Mr. Shaffer of the right to cross-examine the person responsible for the proxy and the compilation of the chat logs prevented Mr. Shaffer from calling into question the missing "Girth_i" chats and the possibility of other chats that may not have been extracted from the proxy. The chat logs were the most significant piece of evidence against Mr. Shaffer and he is entitled to a new trial because the State failed to submit the witness responsible for the chat logs to cross-examination, Mr. Shaffer's right to confront this witness against him.

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 on Remand

The trial court erred in failing to recuse itself from hearing this case. Mr. Shaffer appeared before the trial judge in a previous criminal trial involving an allegation of capital murder. *See Shaffer v. State,* 740 So. 2d 273 (Miss. 1998). The jury in that case convicted Mr. Shaffer of simple murder and sexual battery. *Shaffer,* 740 So. 2d at 273-74. The trial judge in that case, the same trial judge who presided over this trial, sentenced Mr. Shaffer to life in prison for simple murder and 30 years in prison for the sexual battery, the sentences to run consecutively. *Id.* at 274. Mr. Shaffer appealed his conviction to this Court, which found numerous errors committed by the trial judge requiring that the convictions be reversed and remanded. *Id.* at 283-84. The case also involved a finding that the State's attorney's and a detective in the case had presented false evidence about blood and bile analysis of the victim for alcohol and drug usage at the time of death, which could have significantly altered the autopsy findings. *Id.* at 279-80. The errors committed by the trial judge included limiting cross-examination of a key witness, failing to include in its simple murder instruction the element of "evincing a depraved heart, regardless of human life," and instructing the jury they could find defendant guilty of the combined crime of "murder and sexual battery." *Id.* at 281-83. On remand, the State determined it would dismiss the indictment because the District Attorney determined he could not prove the case against Mr. Shaffer. (T. 6-7). The trial judge, while recognizing that it was the District Attorney's prerogative, publicly disagreed with him on the record about his opinion that he couldn't prove his case. (T. 6-7). The trial judge opined that she had tried the case, heard the

evidence against Mr. Shaffer and that the District Attorney could make out a case against Mr. Shaffer. (T. 6-7).

During a pretrial motion, Mr. Shaffer's counsel argued that the trial judge's involvement in the previous criminal prosecution, especially her stated position following the remand of the case, demonstrated prejudice and bias against Mr. Shaffer. (T. 6-7). Mr. Shaffer's counsel was particularly concerned that this prior experience would negatively effect sentencing in the event of Mr. Shaffer's conviction. (T. 10-11). Bearing out this concern, during sentencing, the trial court made reference to Mr. Shaffer's history before her: "Mr. Shaffer, I hate to say this but you and I go back many years...in my position here on the bench. I've seen your family in the courtroom before. I feel for them. I know they have been through hell and back...with you." (T. 235).

Mr. Shaffer appealed the trial court's denial of the motion for recusal prior to trial. (CP. 20). This Court denied Mr. Shaffer's Petition by order without written opinion. (CP. 59). Now that the trial as occurred and the trial court's history with Mr. Shaffer can now be show to have adversely influenced her presiding over the trial including sentencing, Mr. Shaffer raises the issue of failure to recuse on appeal.

Because none of the constitutional or statutory grounds for recusal exists in this case, the issue is governed by Canon 3 (E) of the Code of Judicial Conduct: "Judges should disqualify themselves from proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances..." Specifically, Canon 3 (E) (1) (a) requires disqualification of the judge where his or her "impartiality might be questioned...where the judge has a personal bias or prejudice concerning the party, or personal knowledge of disputed evidentiary facts concerning the Proceeding." This Court

reviews the trial court's decision under an abuse of discretion standard. *Copeland v. Copeland,* 904 So. 2d 1066 (Miss. 2004). Essentially, the question before this Court is whether the trial judge abused her discretion in determining whether "a reasonable person, knowing all the circumstances, [would] harbor any doubts about the judge's impartiality?" *Schmidt v. Bermudz,* 5 So. 3d 1064, 1073 (Miss. 2009) (citations omitted). In reviewing this issue, Mr. Shaffer asks that this Court bear in mind its earlier statement of principle about jury trials, recently reaffirmed in *Schmidt*:

> Respect of the sanctity of an impartial trial requires that courts guard against even the appearance of unfairness for "public confidence in the fairness of jury trials is essential to the existence of our legal system. Whatever tends to threaten public confidence in the fairness of jury trials, tends to threaten one of our sacred legal institutions."

Schmidt, 5 So. 3d at 1073 (citing *Hudson v. Taleff,* 546 So. 2d 359, 362-63 (Miss. 1989) (reaffirming quote from *Lee v. State,* 226 Miss. 276, 83 So. 2d 818 (1955))).

No human being can erase from their memory the knowledge gained from past experience. In this case, Mr. Shaffer had appeared before this trial judge as a defendant in a horrible capital murder trial where he was accused of the sexual battery and murder of a woman. The trial resulted in Mr. Shaffer being convicted of simple murder and sexual battery, and this trial judge imposing a sentence that would have in all likelihood effectively resulted in Mr. Shaffer spending the remainder of his life incarcerated. Instead, Mr. Shaffer appealed that conviction, proved prosecutorial misconduct about which this trial judge did nothing, demonstrated judicial error of the most elementary level by this trial judge, all of which resulted in the case being remanded. Ultimately, the State determined that it did not have sufficient evidence to prosecute Mr. Shaffer and moved to dismiss the capital murder indictment. This trial judge openly disagreed with the State's assessment of the case at that time. Nevertheless, under the law, Mr. Shaffer was innocent of those horrible crimes

precisely because he was never convicted of them. He was entitled to be treated as if that first trial had never happened.

The record demonstrates that this trial judge could not accomplish the superhuman feat of forgetting that previous trial. To her credit, she expressed her honest sentiments. At the initial hearing on the motion to recuse, she continued to express her disagreement with the State about dismissing the indictment in the capital murder case, a case that had been reversed and remand approximately 10 year previously:

> Mr. Clark: And we're just asking that Your Honor recuse herself because of the prejudicial statements made in a prior case that had been reversed by the Mississippi Supreme Court.
>
> The Court: Well, it wasn't reversed for lack of evidence, was it?...They didn't reverse it for lack of evidence, I don't recall.
>
> Mr. Clark: No, ma'am, they didn't reverse it for lack of evidence, but I remember Mr. Keith Miller asking the Court to dismiss it and the Court said you had heard the case and you were familiar with the evidence and you thought the State could prove it.
>
> The Court: Well, they did prove it.
>
> Mr. Clark: Well, they had proven it prior to it being reversed. But what I'm saying is Mr. Miller, at the time, was the district attorney—he said he didn't think they could prove the case. That's why he wanted to dismiss it.
>
> The Court: I remember it well. I was there.
>
> Mr. Clark: Yes, ma'am. Me too.
>
> The Court: I mean, I remember the motion well.

(T. 7-8).

During the trial, the Court overruled Mr. Shaffer's single most important evidentiary objection to the entry of the chat logs, which was error as discussed above. The Court rejected all of Mr. Shaffer's motions relating to the plain meaning of the statute that required that the person being "enticed' under Section 97-5-33 (6) be a child. By themselves these

might be sufficient to demonstrate the trial judge's bias against Mr. Shaffer, when coupled with her previous experience with Mr. Shaffer. However, when these are coupled with her statement during her sentencing of Mr. Shaffer, the record demonstrates her inability to set aside the previous capital murder trial as an influence.

This inability would be of no surprise to a person considering these circumstances. These circumstances create a reasonable doubt about this trial judge's ability to preside over Mr. Shaffer's trial and, especially, to sentence without taking into account her knowledge about the previous capital murder trial. Consequently, this Court must reverse Mr. Shaffer's conviction and remand the case for trial before another judge.

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

Mr. Shaffer was indicted for using a computer to "knowingly entice, induce, persuade, seduce, solicit, advise coerce, or order a child under the age of 18 years, to meet with him for the purpose of engaging in sexually explicit conduct...." (CP. 8). The heading of the indictment lists Section 97-5-33 of the Mississippi Code of 1972 as the statutory provision of the indictment. (CP. 8).

While the conduct alleged in the indictment does fall within the cited statute, another crime created by this legislature also encompasses the same conduct. Section 97-5-27 (3) of the Mississippi Code Annotated of 1972 criminalizes this conduct under the label of computer luring. Section 97-5-27 (3)(a) states

> A person is guilty of computer luring when:
>
> (i) Knowing the character and content of any communication of sexually oriented material, he intentionally uses any computer communication system allowing the input, output, examination or transfer of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person under the age of eighteen (18); and

(ii) By means of such communication he importunes, invites or induces a person under the age of eighteen (18) years to engage in sexual intercourse, deviant sexual intercourse or sexual contact with him, or to engage in a sexual performance, obscene sexual performance or sexual conduct for his benefit.

This statute appears to contain the additional element of communicating sexually oriented material, but this element is subsumed by the definition of "sexually oriented material" in Section 97-5-27 (2). "[A]ny material is sexually oriented if the material contains...descriptions...of masturbation...[or]...sexual intercourse...."[2] Miss Code Ann. § 97-5-27 (2) (2002). Consequently, sexually explicit chats would be "sexually oriented material" for purposes of the crime of computer luring. The crime of computer luring is a felony punishable by imprisonment for not more than three years and a fine not to exceed $10,000.00. Miss. Code Ann. § 97-5-27 (3)(e) (2002).

The leading case on this issue is *Grillis v. State,* 17 So. 2d 525, 196 Miss. 576 (1944), in which the accused might have been guilty under either of two statutes, one of which was a felony for the slaughter of a diseased animal, or the other of which was a misdemeanor for offering for sale the flesh of any diseased animal. *Grillis,* 17 So. 2d 525, 196 Miss. at 585-86. This Court announced the rule "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

[2] Section 97-5-27 (2) states, in its entirety:

For purposes of this section, any material is sexually oriented if the material contains representations or descriptions, actual or simulated, of masturbation, sodomy, excretory functions, lewd exhibition of the genitals or female breasts, sadomasochistic abuse (for the purpose of sexual stimulation or gratification), homosexuality, lesbianism, bestiality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast or breasts of a female for the purpose of sexual stimulation, gratification or perversion.

punishment." *Id.* at 586. Consequently, this Court affirmed as to guilt, but remanded for sentencing under the statute penalizing the conduct as a misdemeanor. *Id.*

The rule established in *Grillis* was later applied in *Johnson v. State,* 260 So. 2d 436 (Miss. 1972), where the accused might have been sentenced under one of two provisions of a statute for the possession of LSD. *Johnson,* 260 So. 2d at 438-39. The Court held that the rule announced in *Grillis* required the court to vacate the sentence and remand the case to the trial court for re-sentencing under the statutory provision punishing the conduct as a misdemeanor. *Id.* This Court also applied the *Grillis* rule in *Mayfield v. State,* 612 So. 2d 1120 (Miss. 1992). In *Mayfield,* the question involved the interpretation of the aggravated D.U.I. statute and whether the statute criminalized the act of drinking while intoxicated or the homicide resulting from driving under the influence. *Mayfield,* 612 So. 2d at 1126-27. If the statute criminalized the act of drinking, then multiple deaths would result in only one violation and multiple counts based on each death would me double jeopardy. *Id.* The Court found the statute ambiguous on that question. *Id.* at 1127. Likening the Court's *Grillis* rule to the federal rule of lenity, the Court held that the statute must be interpreted to impose the lesser penalty of a single offense. *Id.* at 1128.

With respect to Mr. Shaffer, his alleged conduct easily fits within the lesser offense of computer luring. The evidence the State introduced at trial shows that he used his computer to communicate sexually explicit material to a person under the age of 18[3] and by means of those communications invited a person under the age of 18 to engage in sexual intercourse. The sexually oriented material communicated by means of the computer were his

[3] Mr. Shaffer presents this argument as an alternative to his first issue, that no person under the age of 18 was ever involved in any of his conduct or communications. The same argument would invalidate a conviction for computer luring as well, since one of the elements is communication with a person under the age of 18. This argument is presented should this Court reject the argument presented in Mr. Shaffer's first issue.

descriptions of masturbation and sexual intercourse in the chats with "Chloe." (State's Ex. 10). As noted above, descriptions of masturbation and sexual intercourse are defined as "sexually oriented material" under Section 97-5-27 (2). Finally, the maximum sentence for computer luring is three years incarceration and a fine not to exceed $10,000.00, which is dramatically less than a sentence of at least five years, but not more than 40 years incarceration and a fine of at least $50,000.00, but no more than $500,000.00, under which the Court sentence Mr. Shaffer. *Compare* Miss. Code Ann. § 97-5-27 (2) (2002) *with* Miss. Code Ann. § 97-5-35 (2005). Under the well-established precedent in *Grillis* and its progeny, this Court must vacate Mr. Shaffer's sentence and remand to the trial court for re-sentencing under Section 97-5-27 (2) of the Mississippi Code.

CONCLUSION

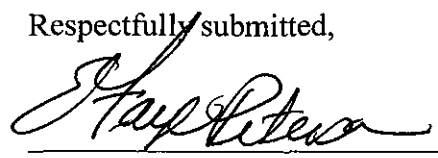
This Court must find that the State failed to prove an element of the crime for which Mr. Shaffer was indicted. That element is the requirement that a person under the age of 18 be the person with whom the accused communicated for the purpose of enticing the child to meet for sexually explicit activity. Mr. Shaffer was ensnared by a sting operation headed by a private organization, Pervert Justice, whose volunteers were all adults well over the age of 18. At no point was there an actual child under the age of 18 involved in this matter. Consequently, this Court must reverse Mr. Shaffer's conviction and discharge him.

In the event this Court disagrees with Mr. Shaffer's primary argument, this Court should grant him a new trial. The most significant evidence introduced against him, the 69-page chat logs were not authenticated and should not have been allowed in evidence by the trial court. The chat logs' admission in evidence also deprived Mr. Shaffer of his fundamental right to confront the witnesses against him secured by the Sixth Amendment.

The admission of the chat logs should require one or more witnesses to testify about from whence the chat logs came, *i.e.*, how the proxy recorded this data, the integrity of this data on the proxy, and how the relevant chats were determined. The witness sponsoring the chat logs admitted that she knew nothing about how they were produced. This violation of Mr. Shaffer's fundamental right entitles him to a new trial. Mr. Shaffer is also entitled to a new trial before an impartial judge. Even if the Court should decide that Mr. Shaffer is not entitled to have the charges against him dismissed or that he is entitled to a new trial, Mr. Shaffer is entitled to be re-sentenced under the proper statute. At the least, this Court must vacate Mr. Shaffer's sentence and remand the case to the trial court for re-sentencing under the computer luring statute. This re-sentencing should be done by a different, impartial judge.

These mistakes, these injustices, against Mr. Shaffer cannot be allowed to remain unchecked by this Court. Otherwise, the integrity of our justice system will be undermined and this Court cannot afford to tolerate the gradual whittling away of the protections that protect the individual from the mighty prosecutorial power of the State.

Respectfully submitted,



E. Faye Peterson, Esq.

The Peterson Group, LLC
310 Edgewood Terrace, Suite C
Post Office Box 16882
Jackson, Mississippi 39206
Telephone: 769-233-8915
Fax: 1-800-707-9798
Email faye@petersongrpllc.com

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:

Anthony N. Lawrence, III, Esq.
District Attorney
Robert Knochel, Esq.
Cheryl C. Sullivan, Esq.
Assistant District Attorneys
Post Office Box 1756
Pascagoula, Mississippi 39568-1756

Honorable Kathy King Jackson
Circuit Judge
Post Office Box 998
Pascagoula, Mississippi 39568

Honorable James Hood III
Attorney General
Charles W. Maris Jr.
Assistant Attorney General
Walter Sillers State Office Building
Post Office Box 220
Jackson, Mississippi 39205-0220

So certified, this the 29th day of July, 2009.

E. Faye Peterson, MBN [redacted]
Certifying Attorney

ADDENDUM OF STATUTES

➡§ 97-5-33. 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, 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 was involved 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.

CREDIT(S)

Laws 1979, Ch. 479, § 2; Laws 1988, Ch. 558, § 1; Laws 1995, Ch. 484, § 2, eff. July 1, 1995; Laws 2003, Ch. 562, § 2, eff. July 1, 2003; Laws 2005, Ch. 467, § 1, eff. July 1, 2005;

Laws 2005, Ch. 491, § 1, eff. July 1, 2005.

HISTORICAL AND STATUTORY NOTES

The 1995 amendment substantially rewrote this section in order to include in the offense possession of materials depicting the sexual exploitation of children.

The 2003 amendment substituted, in subsec. (1), "cause, solicit or knowingly permit" for "cause or knowingly permit"; deleted, from subsec. (2), "sketch, draw" following "photograph"; inserted, in subsecs. (2) through (5), "by any means including computer," following "No person shall,"; substituted, in subsec. (3), "depiction of an actual child" for "depiction depicting a child"; substituted, in subsecs. (4) and (5), "or other visual depiction of an actual child" for "which depicts a child" following "video tape"; and added subsec. (6), relating to arrangement of meetings with defendant, subsec. (7), providing that use of undercover law enforcement personnel is not a defense to prosecution, and subsec. (8), relating to determination of jurisdiction.

This section was amended by Laws 2003, Ch. 562, § 2. Section 12 of Laws 2003, Ch. 562 is a severability provision, and provides:

"If any provision of this act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this act, and to this end the provisions of this act are declared severable."

The 2005 amendments, by Laws 2005, Ch. 467, § 1 and by Laws 2005, Ch. 491, § 1 were identical and inserted subsec. (7) relating to production of visual depictions of adult sexual conduct, and redesignated former subsecs. (7) and (8) as subsecs. (8) and (9), respectively.

This section was amended by both Laws 2005, Ch. 467, § 1, eff. July 1, 2005 (approved March 29, 2005) and Laws 2005, Ch. 491, § 1, eff. July 1, 2005 (approved April 19, 2005). Pursuant to Section 1-3-79, the amendment by Chapter 491 supersedes the amendment by Chapter 467 since it has a later approval date.

➞§ 97-5-31. Definitions for sections 97-5-33 to 97-5-37

As used in Sections 97-5-33 through 97-5-37, the following words and phrases shall have the meanings given to them in this section:

(a) "Child" means any individual who has not attained the age of eighteen (18) years.

(b) "Sexually explicit conduct" means actual or simulated:

(i) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) Bestiality;

(iii) Masturbation;

(iv) Sadistic or masochistic abuse;

(v) Lascivious exhibition of the genitals or pubic area of any person; or

(vi) Fondling or other erotic touching of the genitals, pubic area, buttocks, anus or breast.

(c) "Producing" means producing, directing, manufacturing, issuing, publishing or advertising.

(d) "Visual depiction" includes without limitation developed or undeveloped film and video tape or other visual unaltered reproductions by computer.

(e) "Computer" has the meaning given in Title 18, United States Code, Section 1030.

(f) "Simulated" means any depicting of the genitals or rectal areas that gives the appearance of sexual conduct or incipient sexual conduct.

CREDIT(S)

Laws 1979, Ch. 479, § 1; Laws 1995, Ch. 484, § 1, eff. July 1, 1995; Laws 2003, Ch. 562, § 1, eff. July 1, 2003.

HISTORICAL AND STATUTORY NOTES

The 1995 amendment rewrote the definitions.

The 2003 amendment substituted, in the introductory paragraph, "Sections **97-5- 33** through 97-5-37" for "Sections **97-5-33** to 97-5-37"; substituted in subsec. (d), "other visual unaltered reproductions by computer" for "or computer generated or displayed images"; and added subsec. (f), defining "simulated".

This section was amended by Laws 2003, Ch. 562, § 1. Section 12 of Laws 2003, Ch. 562 is a severability provision, and provides:

"If any provision of this act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this act, and to this end the provisions of this act are declared severable."

97-5-27. Dissemination of sexually oriented material to persons under eighteen years of age; use of computer for purpose of luring or inducing persons under eighteen years of age to engage in sexual contact.

(1) Any person who intentionally and knowingly disseminates sexually oriented material to any person under eighteen (18) years of age shall be guilty of a misdemeanor and upon conviction shall be fined for each offense not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00) or be imprisoned for not more than one (1) year in the county jail, or be punished by both such fine and imprisonment. A person disseminates sexually oriented material within the meaning of this section if he:

(a) Sells, delivers or provides, or offers or agrees to sell, deliver or provide, any sexually oriented writing, picture, record or other representation or embodiment that is sexually oriented; or

(b) Presents or directs a sexually oriented play, dance or other performance or participates directly in that portion thereof which makes it sexually oriented; or

(c) Exhibits, presents, rents, sells, delivers or provides, or offers or agrees to exhibit, present, rent or to provide any sexually oriented still or motion picture, film, filmstrip or projection slide, or sound recording, sound tape or sound track or any matter or material of whatever form which is a representation, embodiment, performance or publication that is sexually oriented.

(2) For purposes of this section, any material is sexually oriented if the material contains representations or descriptions, actual or simulated, of masturbation, sodomy, excretory functions, lewd exhibition of the genitals or female breasts, sadomasochistic abuse (for the purpose of sexual stimulation or gratification), homosexuality, lesbianism, bestiality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast or breasts of a female for the purpose of sexual stimulation, gratification or perversion.

(3) (a) A person is guilty of computer luring when:

(i) Knowing the character and content of any communication of sexually oriented material, he intentionally uses any computer communication system allowing the input, output, examination or transfer of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person under the age of eighteen (18); and

(ii) By means of such communication he importunes, invites or induces a person under the age of eighteen (18) years to engage in sexual intercourse, deviant sexual intercourse or sexual contact with him, or to engage in a sexual performance, obscene sexual performance or sexual conduct for his benefit.

(b) A person who engages in the conduct proscribed by this subsection (3) is presumed to do so with knowledge of the character and content of the material.

(c) In any prosecution for computer luring, it shall be a defense that:

(i) The defendant made a reasonable effort to ascertain the true age of the minor and was unable to do so as a result of actions taken by the minor; or

(ii) The defendant has taken, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to the materials prohibited, which may involve any appropriate measures to restrict minors from access to such communications, including any method which is feasible under available technology; or

(iii) The defendant has restricted access to such materials by requiring use of a verified credit card, debit account, adult access code or adult personal identification number; or

(iv) The defendant has in good faith established a mechanism such that the labeling, segregation or other mechanism enables such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening and the defendant has not otherwise solicited minors not subject to such screening or blocking capabilities to access that material or to circumvent any such screening or blocking.

(d) In any prosecution for computer luring:

(i) No person shall be held to have violated this subsection (3) solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software or other related capabilities that are incidental to providing such access or connection that do not include the creation of the content of the communication.

(ii) No employer shall be held liable for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his employment or agency or the employer, having knowledge of such conduct, authorizes or ratifies such conduct, or recklessly disregards such conduct.

(iii) The limitations provided by this paragraph (d) shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate such provisions, or who knowingly advertises the availability of such communications, nor to a person who provides access or connection to a facility, system or network engaged in the violation of such provisions that is owned or controlled by such person.

(e) Computer luring is a felony, and any person convicted thereof shall be punished by commitment to the custody of the Department of Corrections for a term not to exceed three (3) years and by a fine not to exceed Ten Thousand Dollars ($10,000.00).

Sources: Laws, 1979, ch. 475, § 1; Laws, 2002, ch. 319, § 1, eff from and after July 1, 2002.

→§ 97-5-35. Depicting child engaging in sexual conduct, punishment

Any person who violates any provision of Section **97-5-33** shall be guilty of a felony and upon conviction shall be fined not less than Fifty Thousand Dollars ($50,000.00) nor more than Five Hundred Thousand Dollars ($500,000.00) and shall be imprisoned for not less than five (5) years nor more than forty (40) years. Any person convicted of a second or subsequent violation of Section **97-5-33** shall be fined not less than One Hundred Thousand Dollars ($100,000.00) nor more than One Million Dollars ($1,000,000.00) and shall be confined in the custody of the Department of Corrections for life or such lesser term as the court may determine, but not less than twenty (20) years.

CREDIT(S)

Laws 1979, Ch. 479, § 3; Laws 1995, Ch. 484, § 3, eff. July 1, 1995; Laws 2003, Ch. 562, § 3, eff. July 1, 2003; Laws 2005, Ch. 467, § 2, eff. July 1, 2005; Laws 2005, Ch. 491, § 2, eff. July 1, 2005.

HISTORICAL AND STATUTORY NOTES

The 1995 amendment increased the maximum fine in the first sentence and added the second sentence.

The 2003 amendment rewrote the section, which prior thereto read:

"Any person who violates any provision of Section **97-5-33** shall be guilty of a felony and upon conviction shall pay a fine of not less than Twenty-five Thousand Dollars ($25,000.00) nor more than One Hundred Thousand Dollars ($100,000.00) and shall be imprisoned for not less than two (2) years nor more than twenty (20) years. Any person convicted of a second or subsequent violation of Section **97-5-33** shall pay a fine of not less than Seventy-five Thousand Dollars ($75,000.00) and shall be imprisoned not less than ten (10) years nor more than thirty (30) years."

This section was amended by Laws 2003, Ch. 562, § 3. Section 12 of Laws 2003, Ch. 562 is a severability provision, and provides:

"If any provision of this act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this act, and to this end the provisions of this act are declared severable."

The 2005 amendments, by Laws 2005, Ch. 467, § 2 and by Laws 2005, Ch. 491, § 2, were identical and rewrote the section, which prior thereto read:

"Any person who violates any provision of subsections (1) through (6) of Section **97-5-33** shall be guilty of a felony and upon conviction shall pay a fine of not more than Fifty Thousand Dollars ($50,000.00) and shall be imprisoned for not less than two (2) years nor

more than twenty (20) years, or by both such fine and imprisonment. Any person convicted of a second or subsequent violation of subsections (1) through (6) of Section **97-5-33** shall pay a fine of not more than One Hundred Thousand Dollars ($100,000.00) and shall be imprisoned not less than ten (10) years nor more than thirty (30) years, or by both such fine and imprisonment."

This section was amended by both Laws 2005, Ch. 467, § 2, eff. July 1, 2005 (approved March 29, 2005) and Laws 2005, Ch. 491, § 2, eff. July 1, 2005 (approved April 19, 2005). Pursuant to Section 1-3-79, the amendment by Chapter 491 supersedes the amendment by Chapter 467 since it has a later approval date.