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STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
BORELLO, P.J., and MURRAY and LETICA, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAYNEEL JADE,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 365951

Circuit Court No. 22-023839 FH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

GRABEL & ASSOCIATES
Scott A. Grabel (P53310)
Timothy A. Doman (P77811)
Attorney for Defendant-Appellant
23169 Michigan Avenue
P.O. Box 2723
Dearborn, MI 48123
(734) 642-7916

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STATEMENT OF JURISDICTION

The defense moved the circuit court to dismiss the felony charges in this case, arguing that Jayneel Jade had been entrapped. The court denied the motion in an opinion and order dated December 29, 2022. The defense applied for leave to appeal in the Court of Appeals, which was granted. *People v Jade*, unpublished order of the Court of Appeals, entered October 16, 2023 (Docket No. 365951). The court affirmed the trial court's decision in a published opinion on October 28, 2024. *People v Jade*, ___ Mich App ___; ___ NW3d ___ (2024). Mr. Jade now seeks leave to appeal in this Court. This application is being timely filed within 56 days of the Court of Appeals' opinion. MCR 7.305(C)(2)(a). This Court has jurisdiction to consider this application. Const 1963, art VI, § 4; MCR 7.303(B)(1).

And for the reasons explored below, the issues in this case involve three legal principles of major significance to Michigan's entrapment jurisprudence: (1) the correct test for entrapment, (2) whether the bait-and-switch sex stings now regularly conducted throughout Michigan constitute entrapment, and (3) the correct standard of review for entrapment claims. This Court should grant leave in this jurisprudentially significant case. MCR 7.305(B)(3).

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STATEMENT OF QUESTION INVOLVED

Did police entrap Jayneel Jade with an underhanded bait-and-switch sex sting?

The trial court answered, "No."
The Court of Appeals answered, "No."
The defense answers, "Yes."

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INTRODUCTION

In the traditional *To Catch A Predator*-style sting operation, police target online chatrooms where men seeking sex with underage girls are known to lurk. Police create a decoy profile of a young teenage girl. Then they wait for a suspect to contact the decoy profile in the chatroom. During the chat, police let the suspect bring up sex, and police also let the suspect propose meeting to have sex. At an appointed rendezvous, the suspect is arrested. In this typical scenario, there's no question that the suspect was seeking sex with a minor and that the suspect would have sought sex with a different minor in the chatroom had he not been apprehended. In other words, police were detecting crimes that the suspect otherwise would have committed without police involvement. So the suspect cannot complain that he was entrapped.

But now a new twist on these sex stings has taken root across Michigan. It goes like this. Police make a posting for a young adult escort on "Skip the Games," a commercial sex website that bills itself as a place "for consenting adults to find each other and have fun with each other." Would-be johns call or text the number in the posting, and a decoy officer communicates with them to arrange a rendezvous. At some point the decoy says something along the lines of "I'm actually 15, is that ok?" Any prospective patrons who plough ahead are arrested at the meetup. In Michigan,

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defendants are routinely charged with child sexually abusive activity, MCL 750.145c(2), a 20-year felony and a far cry from 93-day misdemeanor they had set out to commit, MCL 750.449a(1); MCL 750.451 (engaging the services of a prostitute).

The question this case asks is whether this scenario constitutes entrapment. One federal court, applying a test similar to Michigan's reprehensible-conduct test for entrapment, has said yes. This Court should concur. For any entrapment claim, the ultimate question is whether the charged crime would have occurred without police involvement. Here, there's no evidence that Jayneel Jade or any other similarly ensnared suspects sought sex with a minor rather than an adult. At bottom, these bait-and-switch schemes cross the line from detecting crimes to creating them.

"Michigan has described itself as being 'at the forefront in protecting persons from being convicted of a crime which was instigated, induced or manufactured by a government agent.' " *People v Jamieson*, 436 Mich 61, 87; 461 NW2d 884 (1990), quoting *People v White*, 411 Mich 366, 387; 308 NW2d 128 (1981). And, crucially, this Court has repeatedly held that police machinations that *escalate* a defendant's criminal liability constitute entrapment. This Court should hold that the sex sting in this case constituted entrapment.

In holding to the contrary, the Court of Appeals, in a published opinion, applied a bowdlerized version of

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Michigan's entrapment test that—taken to its logical conclusion—renders it toothless. What's more, as the majority and concurring opinions from the Court of Appeals show, there is significant ambiguity in existing caselaw about the correct standard of review for entrapment claims. And the Court of Appeals' decision in this case—holding that the trial court's application of the law to the facts is reviewed for clear error rather than de novo—creates an anomaly in the law.

More than 30 years have passed since this Court issued a major entrapment decision. This Court should grant leave to bring clarity to this fraught area.

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STATEMENT OF FACTS

In April 2022, deputies from the Genesee County Sheriff's Office traveled to Van Buren County—roughly 150 miles away—to train deputies there on how to conduct a child sex trafficking sting. (Tr, 20;[1] Stip, ¶¶ 8, 11[2]). The sting used a website called "Skip the Games." (Stip, ¶¶ 5, 7). Skip the Games is a website "for consenting adults to find each other and have fun with each other." Skip the Games, *About*, <https://skipthegames.com/about> (accessed on July 18, 2022). It connects adult escorts with potential clients. Skip the Games, *Home*, <https://skipthegames.com> (accessed on July 18, 2022).

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[1] "Tr" refers to the transcript of the December 9, 2022 entrapment hearing. All pertinent lower court record material was included in the appendix filed with the application for leave to appeal in the Court of Appeals. Mr. Jade's entrapment hearing was held concurrently with a hearing in *People v Brian Lee Stepka*, Van Buren Circuit Court Case No. 22-023804 FH, another case from the same sting operation. (Tr, 1). Mr. Stepka was also represented by GRABEL & ASSOCIATES. The trial court denied his entrapment motion, and the Court of Appeals affirmed that decision. *People v Stepka*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2024 (Docket No. 365588). An application for leave to appeal is forthcoming in his case as well.

[2] "Stip" refers to the "Stipulated Facts" agreed to by the parties and entered on December 9, 2022.

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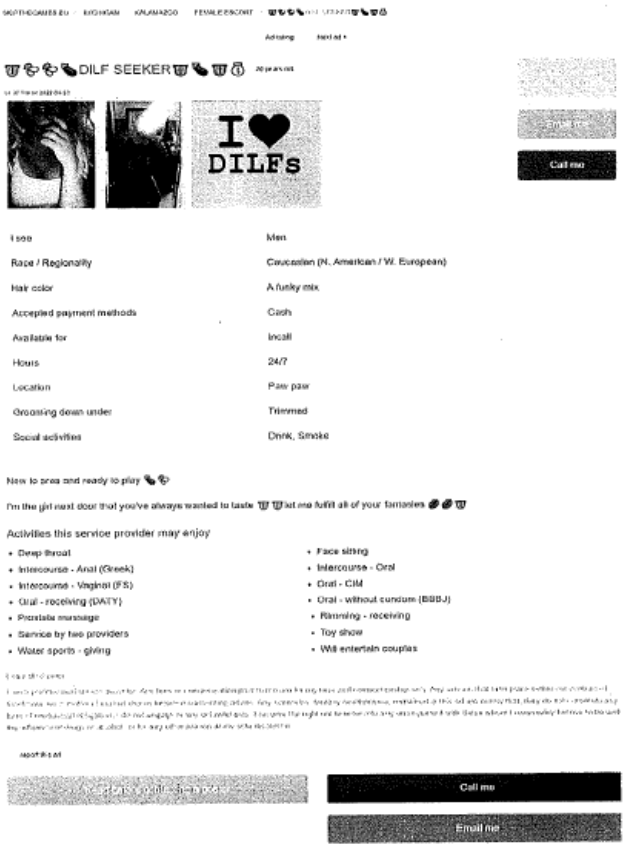
The site stresses that it is only for consenting adults. Skip the Games, *About*, <https://skipthegames.com/about> (accessed on July 18, 2022). "If you are not an adult or if we find out that you are using our site for something non-consensual, we'll do everything we can to stop that," the site says. *Id*. It also offers to cooperate with law enforcement investigating any activity that "involves a minor." *Id*.

Larry Dalman, a computer forensics expert (Tr, 34) and former Michigan State Police detective sergeant (Tr, 42), provided additional details about Skip the Games (Tr, 35). Postings of minors are strictly prohibited, and the site goes so far as to say that "if you are a law enforcement agent you don't need a search warrant, call us, we will give you whatever you need if minors are involved." (Tr, 39, 40). The site also says, "[I]f you work with law enforcement and you are investigating something non-consensual as related to our site, or involves a minor, please contact us, you do not need to subpoena or court order, because honestly—pardon of my language—f-u-c-k those people who do things like that." (Tr, 40-41). Skip the Games has also voluntarily registered with parental control programs to keep minors off the site. (Tr, 41). Mr. Dalman testified that he had no information suggesting that Skip the Games is used as a cover for child sex trafficking operations. (Tr, 58).

Dan Frattura, a detective with the Van Buren County Sheriff's computer crimes unit (Tr, 60), testified that he had visited Skip the Games "for a couple of cases

unfortunately" (Tr, 61). Asked what he had "been able to uncover about Skip The Games," he recounted a shaggy dog story about trying to track down an escort who had robbed a john. (Tr, 61-62). Nothing about minors or child sex trafficking. (Tr, 61-62). Instead, he suggested that the more vexing problem is minors posting nude photos of themselves on social media. (Tr, 65-66).

Here, the following ad was posted as part of the sting:



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Although perhaps difficult to see here,[3] the ad lists the escort's age as 20 years old.[4] "DILF" stands for "dad's I'd like to F." (Tr, 48). The woman pictured in the ad—referred to as the "UC" or undercover—was actually an 18-year-old working in law enforcement. (Stip, ¶¶ 8-9; Am Stip, ¶ 19.a.[5]).[6] Police did not do a reverse lookup on the phone number they used for the posting. (Stip, ¶ 18; Tr, 23).

Van Buren Detective Sharon Van Dam was the lead officer in this case. (Tr, 19-20). She testified that Genesee officers did not provide Van Buren officers with "any written policies, procedures, manuals or training with respect to the dos and don'ts for these types of investigations." (Tr, 20). She had no previous knowledge of Skip the Games or why Genesee officers used it. (Tr, 21). She also testified that she had no experience in these type of sting investigations. (Tr, 32).

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[3] A full-page version is Exhibit 1 to the Stipulated Facts.

[4] The site does not have age verification for its posters. (Tr, 50, 63).

[5] "Am Stip" refers to the amended stipulated facts entered December 22, 2022.

[6] Mr. Jade disputes that this was the ad he responded to. It is possible that other postings were used but not preserved by law enforcement. (Stip, ¶ 10). Genesee deputies would have been in charge of preserving the postings. (Tr, 22).

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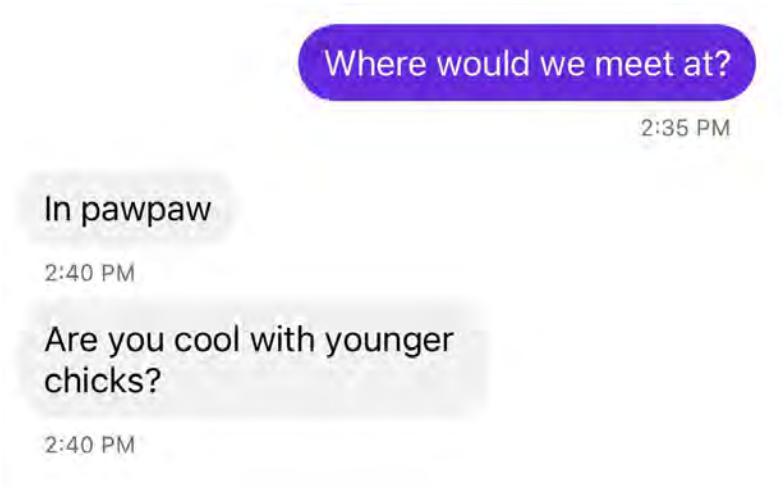
Jayneel Jade responded to the ad, asking if the decoy[7] was free that afternoon.[8] The decoy responded that she was. "Where would we meet at?" Mr. Jade asks. "In paw-paw," the decoy responds, adding, "Are you cool with younger chicks?":



[7] The UC handled any phone calls with suspects while other officers controlled the text exchanges. (Am Stip, ¶ 19.b.). "Decoy" as used here means law enforcement collectively impersonating the woman in the posting.

[8] The complete text exchange—which is not lengthy—was provided as an attachment to the defense's motion in circuit court.

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Mr. Jade says, "I am," and the decoy says, "Ok cool cuz I'm 15." This provokes hesitance from Mr. Jade:



Mr. Jade googled the decoy's phone number to do a reverse lookup. (Stip, ¶ 15). It showed that the number belonged to a Tawny Borah, who was a 34-year-old single woman with no children. (Stip, ¶ 16).[9]

Mr. Jade asked to talk to the decoy on the phone, and the decoy agreed to call him:

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[9] Police later did another reverse lookup and found that the number now came back to "multiple other people." (Stip, ¶ 17).

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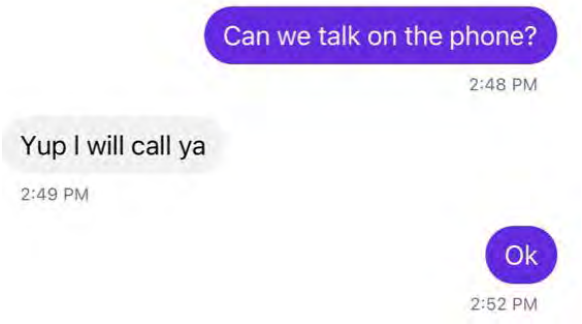

Inexplicably, police failed to record the phone call. (Stip, ¶ 13). Detective Van Dam found this unusual. (Tr, 26). Mr. Dalman likewise testified that the call should have—and easily could have—been recorded. (Tr, 44-45). Detective Frattura suggested, too, that the call should have been recorded. (Tr, 68-70).

By the time of the entrapment hearing, the decoy's memory of the call was faint. The decoy did not recall Mr. Jade saying anything about money for sex during the call. (Am Stip, ¶ 19.f.). She also admitted that she was not trained to let suspects bring up sex first in her conversations. (Am Stip, ¶ 19.b.).[10] She also thought that her call with Mr. Jade had been recorded. (Am Stip, ¶ 19.c.).

---

[10] Mr. Dalman testified that before his retirement he had been trained by the National Center for Missing and Exploited Children on how to conduct child sex trafficking stings. (Tr, 42). "In the training," he testified, "they strongly advised that in an undercover sting operation similar to Dateline NBC that we as police officers do not initiate the discussion of sex." (Tr, 42). Instead, "[t]he person

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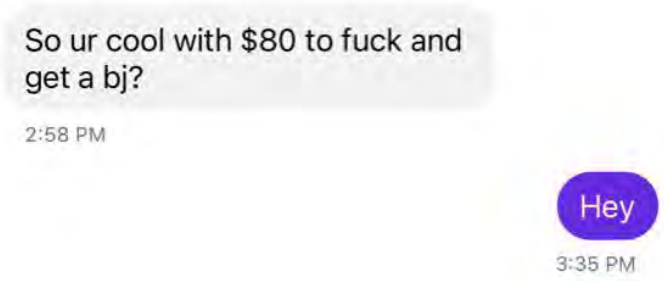
After the call, the decoy initiated contact with Mr. Jade again, saying, "So ur cool with $80 to fuck and get a bj?" (Am Stip, ¶ 19.g.). Mr. Jade waited more than half an hour before simply responding, "Hey":



Meanwhile, Mr. Jade had driven to the Comfort Inn, where the decoy had said she was at. When he arrived, he asked if the decoy wanted to go out to eat, to which she responded, "I really just wanna fuck and make some cash":



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that we are online with or chatting with has to bring it up first." (Tr, 43).

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Mr. Jade asked, "Can you come down to the back entrance? I'm here." The decoy responded, "Ok, hang on."

The decoy came out of the hotel covered in a blanket. It is possible that Mr. Jade saw her face at this time. (Am Stip, ¶ 19.d.). As he approached, she turned and went back into the hotel, entering a room close to the entrance. Mr. Jade went into the hotel and was swarmed by police. (Tr, 24-25, 29). Detective Van Dam admitted that Mr. Jade was not a target of an ongoing investigation, nor did police learn any facts about Mr. Jade before his arrest. (Tr, 21-22).

The prosecution charged Mr. Jade with child sexually abusive activity (CSAA), MCL 750.145c(2), accosting a child for immoral purposes, MCL 750.145a, and two corresponding counts of using a computer to commit a crime, MCL 752.797. CSAA is punishable by up to 20 years in prison. MCL 750.145c. The defense moved to dismiss the charges, arguing that Mr. Jade had been entrapped. After a hearing at which the foregoing evidence was adduced, the trial court issued a written opinion and order denying the defense's motion. The court's rationale will be discussed in detail below.

The defense filed a delayed application for leave to appeal in the Court of Appeals on May 2, 2023. On May 11, 2023, the parties reached a plea deal. Mr. Jade pleaded guilty to one count of accosting a child for immoral purposes in exchange for dismissal of the remaining charges.

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(P Tr, 7-9).[11] The trial court, considering the mitigating circumstances of the case, ultimately sentenced Mr. Jade to time-served with no probation. (S Tr, 13-14).[12] Mr. Jade's plea does not waive his entrapment claim. *White*, 411 Mich at 387.

The Court of Appeals granted Mr. Jade's application. *People v Jade*, unpublished order of the Court of Appeals, entered October 16, 2023 (Docket No. 365951). The court asked the parties to brief the correct standard of review for entrapment claims:

> This Court must resolve the question of which standard of review applies to entrapment rulings. In *People v Johnson*, 466 Mich 491; 647 NW2d 480 (2002), our Supreme Court stated that "[a] trial court's finding of entrapment is reviewed for clear error." *Id.* at 497. That standard of review has been applied numerous times by our Court with a citation to Johnson. But a separate line of cases has relied on *People v Fyda*, 288 Mich App 446; 793 NW2d 712 (2010), where we stated: "Whether entrapment occurred is determined by considering the facts of each case and is a question of law for this Court to decide de novo." Id. at 456. In order to resolve this conflict in

[11] "P Tr" refers to the transcript of the May 11, 2023 plea hearing.

[12] "S Tr" refers to the transcript of the June 26, 2023 sentencing hearing.

> Michigan law, we grant defendant's application for leave to appeal the trial court's ruling on entrapment here and instruct the parties to brief the issue on appeal. [*Id.*]

The court ultimately affirmed the trial court's ruling that Mr. Jade had not been entrapped in a published opinion. *People v Jade*, ___ Mich App ___; ___ NW3d ___ (2024). The court's rationale will be explored below. The court also held that "the trial court's ultimate ruling on the issue of entrapment is reviewed for clear error." *Id.* at ___; slip op at 6.

Mr. Jade now seeks leave to appeal in this Court.

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ARGUMENT

I. Mr. Jade was entrapped by the bait-and-switch sting operation.

Issue Preservation

This issue was raised before and decided by the trial court, so it is preserved for appellate review. *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010).

Standard of Review

As noted above, the Court of Appeals asked the parties to brief which standard of review applies to entrapment rulings. *Jade*, unpub ord. In *People v Johnson*, 466 Mich 491, 497; 647 NW2d 480 (2002), this Court said, "A trial court's finding of entrapment is reviewed for clear error." *People v Johnson*, 466 Mich 491, 497; 647 NW2d 480 (2002). But in *People v Fyda*, 288 Mich App 446, 456; 793 NW2d 712 (2010), the Court of Appeals held, "Whether entrapment occurred is determined by considering the facts of each case and is a question of law for this Court to decide de novo."

Following the citations in *Johnson* and *Fyda*, both end up at *People v D'Angelo*, 401 Mich 167; 257 NW2d 655

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(1977).[13] In *D'Angelo*, this Court announced several procedural rules for assessing entrapment claims, including that entrapment is a question for the judge, not a jury, *id.* at 176-177, and that the defendant bears the burden of proving entrapment by a preponderance of the evidence, *id.* at 183. The Court also held that trial courts "should make specific findings of fact" and that such findings will be reviewed for clear error:

> In deciding the entrapment question the trial court should make specific findings of fact. Should the trial court find the claim of entrapment to be proved, the related charge will be dismissed. If the court finds the claimed entrapment not proved, the prosecution will proceed.
>
> The trial court's finding will be subject to appellate review under the clearly erroneous standard. [*Id.*]

The defense argued in the Court of Appeals that, correctly understood, *D'Angelo* holds that trial courts' factual

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[13] Specifically, *Johnson* cites *People v Jamieson*, 436 Mich 61, 80; 461 NW2d 884 (1990), which cites *D'Angelo*, 401 Mich at 183, whereas *Fyda* cites *People v Milstead*, 250 Mich App 391, 397; 648 NW2d 648 (2002), which cites *People v McGee*, 247 Mich App 325, 344; 636 NW2d 531 (2001), which cites *People v Patrick*, 178 Mich App 152, 154; 443 NW2d 499 (1989), which cites *D'Angelo*, 401 Mich at 177.

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findings are reviewed for clear error, not their ultimate rulings on whether entrapment has occurred.

First, any entrapment claim entails a classic mixed question of fact and law. That is, the trial court receives the evidence, resolves any factual disputes, and then applies the law to the facts as found. See, e.g., *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). And such an application of law to facts is traditionally reviewed de novo on appeal. See, e.g., *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017). There is no reason why the same wouldn't apply to entrapment claims. In fact, this Court in *D'Angelo*, 401 Mich at 175, analogized entrapment hearings to *Walker*[14] hearings, and a trial court's ultimate ruling at such a hearing—that is, it's application of the law to the facts—is reviewed de novo. *People v Nelson*, 443 Mich 626, 631 n 7; 505 NW2d 266 (1993); *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003).

Importantly, the clear-error standard of review contemplates that two judges working from the same evidence could reasonably reach different conclusions. *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1990). This is another reason why the clear-error standard of review should not apply to entrapment rulings. A fundamental tenet of our criminal justice system is that similarly situated defendants should be treated equally. See, e.g.,

[14] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

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Griffith v Kentucky, 479 US 314, 323; 107 S Ct 708; 93 L Ed 2d 649 (1987) (recognizing "the principle of treating similarly situated defendants the same"). The idea that a functionally indistinguishable set of facts could lead to a finding of entrapment by one judge but no-entrapment by another is antithetical to this tenet. This is especially true in cases like Mr. Jade's, where the difference in outcomes—charges dismissed versus up to 20 years in prison—is so stark. What's more, clear-error review does not yield definitive guidance for police on what investigative techniques constitute entrapment. This need for guidance was one of the reasons the *D'Angelo* Court believed entrapment should be a question for a judge rather than a jury. *D'Angelo*, 401 Mich at 174-175. This same rationale militates in favor of de novo review for entrapment claims.

And the prosecution agreed. In its brief on appeal, the prosecution observed that appellate courts review a trial court's application of the law to the facts de novo in several contexts. (Pros COA Br, p 7-9). "This standard of review is not novel to entrapment," the prosecution correctly remarked.

And yet the Court of Appeals majority equivocated. The court at first seemed to agree with the parties, saying that "an appellate court reviewing a trial court's entrapment ruling must review the trial court's findings of fact for clear error and review de novo questions of law such as the application of the common-law entrapment standards to

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those facts." *Jade*, unpub op at 5-6. But then the Court looked to *People v Hartwick*, 498 Mich 192; 870 NW2d 37 (2015), a case involving the immunity provision of the Michigan Medical Marihuana Act. *Id* at 6. *Hartwick* had relied on *Johnson* to hold that "the trial court's ultimate grant or denial of immunity is fact-dependent and is reviewed for clear error." *Hartwick*, 498 Mich at 215. The Court of Appeals understood this statement "to also express our Supreme Court's understanding of the complete standard of review that is applicable to a trial court's entrapment ruling: the court's factual findings are reviewed for clear error, questions of law are reviewed de novo, and the trial court's ultimate ruling on the issue of entrapment is reviewed for clear error." *Jade*, unpub op at 6. The majority concluded, "Because we are bound by the holdings of our Supreme Court, we decline to follow this Court's statement of the applicable standard of review in *Fyda*, 288 Mich App at 456, to the extent it is inconsistent with our Supreme Court's holdings in *Johnson* and *Hartwick*." *Id.* (cleaned up).

In a concurring opinion, Judge MURRAY found that *Fyda* "was not necessarily inconsistent with" *Johnson*. *Jade*, unpub op at 1 (MURRAY, J., concurring). Judge MURRAY also sought "to point out a possible inconsistency in the standard of review applied in entrapment appeals." *Id.* He first noted that the portion of *D'Angelo* that had subsequently been cited as propounding a clearly-erroneous standard of

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review had actually referred to a trial court's finding of fact, not ultimate ruling. *Id.* at 2 n 2. He observed that entrapment is often highly fact dependent, and "where the viability of the defense depends entirely upon the resolution of a factual dispute, it is the role of the trial court to ascertain those facts and appraise their effect upon the administration of criminal justice." *Id.* at 2, quoting *People v Flansburgh*, 71 Mich App 1, 5; 246 NW2d 360 (1976) (cleaned up). So, as Judge MURRAY explained, "it remains true that whether entrapment exists under the facts is a legal question, not a factual one." *Jade*, unpub op at 2. In other words, "though the *factual* findings by the trial court as to whether a defendant was entrapped are subject to the clearly erroneous standard, whether those factual findings equate to entrapment is a legal question subject to de novo review." *Id.* at 3 (cleaned up). *Fyda*, then, correctly articulated the standard of review for entrapment. *Id.* at 2.

That said, Judge MURRAY acknowledged that the majority's holding—that a trial court's "ultimate ruling" is reviewed for clear error—was consistent with *Hartwick*. *Id.* at 3. But "the difference between reviewing for clear error a trial court 'finding' or 'ruling' on whether defendant was entrapped, and resolving whether entrapment exists under the trial court's factual findings, which is a question of law reviewed de novo, is somewhat unclear." *Id.* Regardless, Judge MURRAY suggested that the Court of Appeals was bound by this Court's precedent holding that the legal

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conclusion of whether a defendant was entrapped is reviewed for clear error. *Id*. at 3. But if this were true, he explained, "then the trial court's legal determination would essentially be binding on the appellate courts because of the more deferential standard of review, creating an anomaly by allowing trial courts to determine the scope of the common law in this state." *Id*. But if "finding" means factual findings rather than legal determinations, then *Hartwick* and its antecedents "square with the well-known standards of review applied throughout Michigan law." *Id*. at 3-4, 4 n 5.

Judge MURRAY is correct. Again, when it comes to the idea that legal conclusions about whether a defendant was entrapped are reviewed for clear error, all roads lead back to *D'Angelo*. But the pertinent portion of *D'Angelo* is best understood as referring to factual findings, not conclusions of law. As Judge MURRAY cogently explained, whether a set of facts (as found by the trial court) equates to entrapment is a question of law that should be subject to de novo review. This Court should grant leave to clarify this point. Otherwise, as Judge MURRAY observed, this Court will leave an anomaly in the law of appellate review.

Analysis

In *People v Turner*, 390 Mich 7, 17; 210 NW2d 336 (1973), this Court adopted the objective rather than the

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subjective test for entrapment. The objective test focuses on the police's conduct whereas the subjective test focuses on the defendant's predisposition to commit the crime. *Id.* at 19. Under the objective test, entrapment occurs "when the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it." *Id.* at 21 (cleaned up). "The thesis is that law enforcement conduct which essentially manufactures crime is a corruptive use of governmental authority which, when used to obtain a conviction, taints the judiciary which tolerates its use." *D'Angelo*, 401 Mich at 174.

In *People v Jamieson*, 436 Mich 61, 79-80; 461 NW2d 884 (1990), this Court adhered to the objective test. Yet the lead opinion, signed by three justices, suggested—confusingly—that "courts applying the objective approach use the state of mind of the accused as a factor." *Id.* at 74. "When applying the objective test," the plurality said, "consideration is given to the willingness of the accused to commit the act weighed against how a normally law-abiding person would react in similar circumstances." *Id.*

This mismarriage between the subjective and the objective continued in *People v Juillet*, 439 Mich 34; 475 NW2d 786 (1991), where this Court issued four separate opinions, none of which garnered a majority. Yet in *People v Fabiano*, 192 Mich App 523; 482 NW2d 467 (1992), our Court of

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Appeals attempted to synthesize the multiple separate opinions in *Juillet* into a coherent doctrine. The court concluded that entrapment can be established in either of two ways—(1) impermissible inducement or (2) reprehensible conduct.

First, for the impermissible-inducement prong, the question is "whether the police conduct would have induced a person similarly situated as the defendant to commit the crime rather than whether it would have induced an average, law-abiding citizen to commit the offense." *Fabiano*, 192 Mich App at 526. This has also been referred to as the causation prong. *Juillet*, 439 Mich at 72 (opinion of CAVANAGH, C.J.). "It must be determined whether the police conduct in question had as its probable and likely outcome the instigation rather than the detection of criminal activity." *Fabiano*, 192 Mich App at 527 (cleaned up). Caselaw has prescribed 12 non-exhaustive factors to consider:

> (1) whether the police appealed to the defendant based on friendship,
>
> (2) whether the defendant had been known to commit the charged crime,
>
> (3) whether there was a time lapse between the investigation and the arrest,
>
> (4) whether there was an inducement that would make the crime unusually attractive to a law-abiding citizen,

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> (5) whether excessive consideration was offered to the defendant,
>
> (6) whether the police guaranteed that the acts were not illegal,
>
> (7) whether the government pressured the defendant to commit the crime,
>
> (8) whether sexual favors were offered to the defendant,
>
> (9) whether the defendant was threatened with arrest unless he or she complied,
>
> (10) whether the government acted to escalate the defendant's criminal culpability,
>
> (11) whether the police had control over the informant, and
>
> (12) whether the investigation targeted the defendant. [*People v Akhmedov*, 297 Mich App 745, 753; 825 NW2d 688 (2012) (cleaned up).]

These factors are evaluated without considering the defendant's subjective predisposition to commit the crime. *Juillet*, 439 Mich at 56 (opinion of BRICKLEY, J.).[15] And although the existence of multiple factors can strengthen an entrapment claim, *id*. at 66-69, entrapment has been found

[15] According to *Fabiano*, Justice BRICKLEY's opinion in *Juillet* contains the rule for the impermissible-inducement prong. *Fabiano*, 192 Mich App at 528.

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where only one factor is present, *id* at 56-57; *Jamieson*, 436 Mich at 89 (opinion of BRICKLEY, J.).

Second, for reprehensible conduct, "entrapment exists if the police conduct is so reprehensible that we cannot tolerate the conduct and will bar prosecution on the basis of that conduct alone." *Fabiano*, 192 Mich App at 531-532 (cleaned up). "That is, there is certain conduct by government that a civilized society simply will not tolerate, and the basic fairness that due process requires precludes continuation of the prosecution where the police have gone beyond the limit of acceptable conduct in ensnaring the defendant, without regard to causation." *Id.* at 532. Police act reprehensibly when they "have acted in such a way as is likely to instigate or create a criminal offense." *Jamieson*, 436 Mich at 77-78 (cleaned up). In other words, "law enforcement agents play a debased role when they become the instigators of the crime, or partners in its commission, or the creative rain behind the illegal scheme." *Juillet*, 439 Mich at 77 (opinion of CAVANAGH, C.J.).[16] So "reprehensible conduct" does not necessarily require immoral or otherwise odious police behavior. Instead, it simply requires an assessment of whether the conduct "falls below the standards, to which the common feelings respond, for the proper

[16] The *Fabiano* Court found that Chief Justice CAVANAGH's and Justice BOYLE's opinions in *Juillet* contain the rule for the reprehensible-conduct prong. *Fabiano*, 192 Mich App at 531-532.

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use of governmental power." *Jamieson*, 436 Mich at 72. And this assessment must bear in mind that "the function of law enforcement is to deter crime and not to manufacture it." *Id*. at 74. The two-prong test propounded by *Fabiano* has come to be known as a "modified objective test" for entrapment. *People v Johnson*, 466 Mich 491, 508; 647 NW2d 480 (2002).[17]

But Judge GRIFFIN, dissenting in *Fabiano*, found that *Juillet* "is not binding precedent because a majority of the justices were unable to agree on a new rule of law." *Id*. at 534 (GRIFFIN, J., dissenting). The defense submits that Judge GRIFFIN is correct and, accordingly, that Michigan should revert to the purely objective test first announced in *Turner* and left intact by *Jamieson*. At its heart, such a test comprises two questions: (1) were the police detecting crimes rather than manufacturing them and (2) would the charged crimes have been committed without police involvement. If the answer to both questions is no, entrapment has occurred.

This Court has previously held that fractured decisions from the same era as *Juillet* failed to create binding precedent. *People v Beck*, 504 Mich 605, 617, 617 n 9; 939 NW2d 213 (2019). And under *Fabiano*'s conception of a "modified

[17] The Court in *Johnson* had granted leave to determine if Michigan should adopt the subjective test for entrapment but ultimately declined to reach that question because the defendant lost even under an objective standard. *Id*. at 508.

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objective test," "the current state of Michigan law regarding the entrapment defense is unclear." *People v Maffett*, 464 Mich 878; 633 NW2d 339, 340 (2001) (CORRIGAN, C.J., dissenting) (cleaned up). The defense asks the Court to grant leave in this case to ascertain the correct articulation of Michigan's entrapment test, and the defense would intend to develop its arguments on this point further.[18]

That said, even under the modified objective test, entrapment has been established in this case.[19] While entrapment does not occur when the police merely furnish an opportunity for the defendant to commit a crime he would have committed anyway, *Jamieson*, 436 Mich at 68, when furnishing an opportunity to create a crime instigates a crime that otherwise would not have occurred, entrapment exists, *Juillet*, 439 Mich at 67 (opinion of BRICKLEY, J.) (finding entrapment where a police informant asked a drug

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[18] The defense would further contend that "whether the government activity would induce a hypothetical person not ready and willing to commit the crime to engage in criminal activity" is a problematic articulation of the entrapment test that this Court should revise or qualify. See *Juillet*, 439 Mich at 96 (opinion of BOYLE, J.) ("The normally law-abiding or average person probably cannot be induced or tempted into criminal conduct absent duress or coercion."); *id.* at 96 n 8. Again, the defense would intend to develop this argument further if the Court grants leave.

[19] The remainder of this brief operates under the assumption that *Fabiano* is good law.

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user to deal drugs where the user had no prior history of drug dealing). See also *Juillet*, 439 Mich at 77-78 (opinion of CAVANAGH, C.J.) (stating that "affording a person an opportunity to commit an offense does not ordinarily constitute entrapment *unless* (1) the circumstances indicate that such an opportunity would not normally be presented *or* (2) the mere furnishing of the opportunity requires the police to commit certain criminal, dangerous, or immoral acts") (cleaned up).

At bottom, the touchstone of any entrapment claim is whether the charged crime would have occurred without police intervention. *Jamieson*, 436 Mich at 76; *Juillet*, 439 Mich at 64-65 (opinion of BRICKLEY, J.). Again, "the thesis is that law enforcement conduct which essentially manufactures crime is a corruptive use of governmental authority which, when used to obtain a conviction, taints the judiciary which tolerates its use." *D'Angelo*, 401 Mich at 174 (cleaned up).

"In Michigan entrapment is not a defense that negates an essential element of the charged crime. Instead, it presents facts that are collateral to the crime that justify barring the defendant's prosecution." *Juillet*, 439 Mich at 52 (opinion of BRICKLEY, J.). The purpose of the entrapment doctrine is "to deter the corruptive use of governmental authority by invalidating convictions that result from law enforcement efforts that have as their effect the instigation

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or manufacture of a new crime by one who would not otherwise have been so disposed." *Id.*

Entrapment can be established through either impermissible inducement *or* reprehensible conduct. *Akhmedov*, 297 Mich App at 754.

A. Reprehensible conduct

1. Police manufactured crimes that never would have occurred without their involvement.

The police went beyond the limit of acceptable conduct to ensnare Mr. Jade in crimes he never intended to commit.[20] To be sure, soliciting children for sex is a heinous crime that deserves police resources and attention. And, to that end, police are allowed to use cunning and deceit to detect what is otherwise a difficult-to-detect crime. But the targets of such investigations should be *people looking to have sex with children*. That's not what happened here. Instead, the police targeted suspects soliciting adult escorts, arranged meetings under the pretense that the decoy was an adult, and later revealed that the decoy was 15. In other words, the police drew from a pool of suspects inclined to commit one crime and duped them into going one step further to commit a far more serious one. Importantly, there

[20] The defense need not concede guilt to raise entrapment. *D'Angelo*, 401 Mich at 178.

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is no evidence that Skip the Games is being used as a front for underage prostitutes. So police here were not trying to detect crimes, they were creating them. Their scheme fits the classic definition of entrapment as "the 'conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for trickery, persuasion, or fraud of the officer.' " *Jamieson*, 436 Mich at 68, quoting *Sorrells v United States*, 287 US 435, 454; 53 S Ct 210; 77 L Ed 413 (1932). This was reprehensible as that word is used in entrapment doctrine. *Jamieson*, 436 Mich at 77-78. See also *Turner*, 390 Mich at 17 ("The encouragement of criminals to induce them to commit crimes in order to get up a prosecution against them is scandalous and reprehensible.") (cleaned up).

One federal court has agreed. *United States v Lofstead*, 574 F Supp 3d 831 (D Nev 2021), addressed a sting operation with striking parallels to Mr. Jade' case. In *Lofstead*, Federal Bureau of Investigation (FBI) agents created a posting on Skip the Games advertising a 19-year-old female escort, "Emma." *Lofstead*, 574 F Supp 3d at 835-836. Emma was depicted using photographs of a 23-year-old woman. *Id*. at 836. The defendant called the number on the ad but no one answered. *Id*. A decoy officer posing as Emma texted him back. *Id*. They began to arrange for a meeting, but when Emma mentioned that her parents were out of town, the defendant asked how old she was, wanting to

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confirm that she was at least 16 years old.[21] *Id.* at 837. The defendant repeatedly tried to confirm Emma's age and expressed hesitation about meeting with her. *Id.* At one point, the defendant offered to give her marijuana and "meet each other," but Emma said, "Not to be rude baby, but if ur coming I need the $$ for the time ya know." *Id.* The defendant told Emma that he would leave soon, and Emma told him to "hurry" and later asked "on ur way still?" *Id.* When the defendant arrived at the house where he thought he'd be meeting Emma, he was arrested. *Id.*

The court in *Lofstead* considered whether the FBI's conduct was "so outrageous" as to bar prosecution under "due process principles," *id.* at 848, a test that resembles Michigan's reprehensible-conduct test, *Fabiano*, 192 Mich App at 531-532 (likening reprehensible conduct "to a due process violation"). "It is outrageous" the court explained, "for government agents to (1) engineer and direct a criminal enterprise from start to finish; (2) to use excessive physical or mental coercion to convince an individual to commit a crime; or (3) to generate new crimes merely for the sake of pressing criminal charges." *Lofstead*, 574 F Supp 3d at 848 (cleaned up). The court looked to the six-factor test for gauging outrageousness used in the Ninth Circuit:

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[21] Although the age of consent in Nevada is 16, you must be at least 18 to engage in commercial sex. *Id.* The defendant mistakenly believed that commercial sex with a 16-year-old was legal. *Id.* at 852 n 12.

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> (1) known criminal characteristics of the defendants;
>
> (2) individualized suspicion of the defendants;
>
> (3) the government's role in creating the crime of conviction;
>
> (4) the government's encouragement of the defendants to commit the offense conduct;
>
> (5) the nature of the government's participation in the offense conduct; and
>
> (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue. [*Id.* at 848-849.]

These factors are considered in their totality, not as a checklist. *Id.* at 849.

Applied to the defendant in *Loftstead*, the court found the FBI's conduct outrageous. *Id.* at 849. First, the defendant was previously unknown to the FBI. *Id.* Second, there was no evidence that the defendant or anyone else was using Skip the Games to solicit sex with minors. *Id.* at 849-851. Next, taking the third and fourth factors together and eschewing consideration of the fifth factor,[22] "the proposed

[22] The court found this factor "unhelpful" because although the alleged offense would not have existed without the FBI's participation, undercover agents impersonating minors is a necessary tactic for investigating child sex trafficking. *Id.* at 852.

encounter with 'Emma' was entirely the government's creation and it was the agent who set the parameters for how it had to be carried out." *Id*. at 853 (cleaned up). And rather than investigate an "ongoing criminal enterprise," the FBI instigated an otherwise nonexistent crime. *Id*. Plus, the FBI encouraged the defendant to go through with the meeting "despite his clear hesitation." *Id*. at 854. Sixth and finally, although "sting operations may be required to effectively uncover individuals who are seeking to purchase sex from children," the FBI's scheme "lacked any safeguards that would limit agents' actions when communicating with potential targets or would ensure the focus the operation is policing child sex trafficking, rather than broadly targeting anyone using a website for adult hookups." *Id*. at 855. The court thus found that the FBI violated fundamental fairness and dismissed the indictment. *Id*.

Although *Lofstead* is not binding, this Court should find its cogent analysis persuasive in Mr. Jade's case. There is no evidence that Mr. Jade or any of the targets of the police's investigation were using Skip the Games to solicit sex with minors. Nor is there any evidence that Mr. Jade was otherwise predisposed to seek sex with minors. So rather than using a sting operation to investigate a known or suspected criminal enterprise, the police used a sting operation to invent previously nonexistent crimes. As in *Lofstead*, "law enforcement manufactured the entire crime from start to finish: first by creating the fictitious profile,

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then altering the poster's age, and finally encouraging [the defendant] to continue with an in-person meeting after he showed hesitation." *Id.* at 849. As the court in *Lofstead* put it, "whether the crime, or something very similar to it, would have occurred without government involvement is of paramount importance to the fundamental fairness inquiry." *Id.* at 853 (cleaned up). The court's explanation is worth quoting in full:

> Criminal sanction is not justified when the state manufactures crimes that would otherwise not occur. Punishing a defendant who commits a crime under such circumstances is not needed to deter misconduct; absent the government's involvement, no crime would have been committed. Where the police control and manufacture a victimless crime, it is difficult to see how anyone is actually harmed, and thus punishment ceases to be a response, but becomes an end in itself. Under such circumstances, the criminal justice system infringes upon personal liberty and violates due process. [*Id.*, quoting *United States v Bogart*, 783 F2d 1428, 1436 (CA 9, 1986) (cleaned up).]

These words ring true in Mr. Jade's case. The police manufactured a crime that otherwise would not have occurred. The elaborate sting they created did nothing to stop or deter child sex trafficking. Instead, their aim was to generate new crimes merely for the sake of pressing charges. "The purpose of the entrapment test is to discourage police conduct that manufactures, induces, or instigates the

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commission of a crime, rather than simply detecting criminal behavior." *Juillet*, 439 Mich at 53. The police went beyond the limit of acceptable conduct in ensnaring Mr. Jade, and this Court should dismiss the charges.

2. The trial court and Court of Appeals incorrectly analogized this case to reverse-buy drug cases.

The trial court initially recognized the persuasive force of *Lofstead*:

> The court acknowledges that the facts in *Lofstead* are quite similar to the facts in this case. For example, the *Lofstead* court found it significant that a written operational plan was lacking in the constraints it put on law enforcement. In this case, Van Buren County law enforcement testified that Genessee deputies did not provide them with any written operational plan, and it is not clear whether one even existed. Consequently, there are serious questions about whether there were sufficient operational constraints put upon the officers conducting the reverse sting. [Op & Ord, p 11.]

But the court held that "[w]hatever persuasive value *Lofstead* might have, this court is required to follow precedentially binding authorities." (Op & Ord, p 11). The court then held that *People v Butler*, 444 Mich 965; 512 NW2d 583 (1994), "condoned the use of untargeted, dragnet-style

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solicitations of criminal activity." (Op & Ord, p 11). At this point, *Butler* requires explication.

In *Butler*, an undercover agent with the Bureau of Alcohol, Tobacco, and Firearms (ATF) "sent word out on the streets that he had cocaine available for sale" and made his beeper number available. *People v Butler*, 199 Mich App 474, 476; 502 NW2d 333 (1993). One co-defendant, Duane Sturges, paged the agent, and the agent called and spoke to Mr. Sturges about arranging a sale. *Id.* at 476. The pair had "numerous" conversations over the phone, but the deal fell through. *Id.* The agent later reinitiated contact with Mr. Sturges to work toward a deal. *Id.* at 476-477. When the deal fell through again, the agent once more reinitiated contact to finalize a deal. *Id.* at 477-478. At an eventual meetup, the defendants presented "several thousand dollars" in exchange for half a kilogram of cocaine. *Id.* at 478. They were arrested on the agent's signal. *Id.*

The Court of Appeals held that the defendants had been entrapped. *Id.* at 479-481. This Court reversed in a one-paragraph opinion. *Butler*, 444 Mich at 965. "This Court has previously held that undercover drug sales operations conducted by government officials are not indicative of entrapment per se," the Court explained. *Id.* at 965-966. The Court concluded, "Law enforcement officials did nothing more than to present defendants with the opportunity to commit the crimes of which they were convicted." *Id.* at 966.

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Based on *Butler*, "[i]t follows," the trial court here concluded, "that the ad here, which did not specifically target people suspected of engaging in child sexually abusive activity, also does not rise the level of entrapment." (Op & Ord, p 11-12). The court also found "the degree of manufacturing or manipulation at issue in this case" to be "comparable to the conduct of the police in *Butler*." (Op & Ord, p 12).

But the trial court misread *Butler*. Although the factual summary in *Butler*—comprising two paragraphs in the Court of Appeals' opinion—is brief, given the amount of money and drugs involved, it appears that the "word" the police had sent out on the streets, apparently through established channels, was targeted at large-scale cocaine dealers. In other words, any Joe Blow who had never considering dealing drugs would not have been tempted to start by the offer of large amounts of cocaine and the agent's beeper number. And it appears that if the defendants in *Butler* had not sought cocaine from the undercover ATF agent, they would have sought it elsewhere. So the police activity was appropriately targeted at those ready and willing to deal drugs. In short, the police in *Butler* were trying to *detect* drug dealers, not *create* them. *Butler* would only be analogous here if the posting had advertised a 15-year-old prostitute, which would have directly targeted people looking to have sex with minors. Likewise, while "some degree" of manipulation is acceptable under *Butler*,

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that manipulation must be used to detect rather than create criminals.

The trial court also found that the Court of Appeals and our Supreme Court "have repeatedly condoned escalatory tactics." (Op & Ord, p 13). For this proposition, the court cited *People v Ealy,* 222 Mich App 508; 564 NW2d 168 (1997). (Op & Ord, p 13). There, the defendant sold cocaine to an undercover police officer on five occasions. *Ealy*, 222 Mich App at 509. Each time, "the officer offered to purchase an amount of cocaine and defendant set the price." *Id*. As the Court recounted, "The first two sales involved one-half of one gram, the third sale involved an eighth of an ounce, the fourth involved two ounces, and the final sale involved 250 grams of cocaine." *Id*. at 509. And "the officer testified that he purchased greater amounts of cocaine from defendant to determine how much defendant could deliver and to assist in locating defendant's source." *Id*. (cleaned up). The defendant was charged with, among other things, delivery of between 225 and 650 grams of cocaine. *Id*. The Court of Appeals held that the police had merely presented the defendant with the opportunity to commit the charged crime, saying, "There is no evidence that the police continued the purchases merely to enhance defendant's eventual sentence. The undercover officer testified that he purchased greater amounts of cocaine from defendant in order to determine defendant's selling capabilities and to discover the identity of defendant's supplier." *Id*. at 511.

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Ealy is readily distinguishable from Mr. Jade's case. In *Ealy*, police were *detecting* the scope of defendant's extant drug-trafficking activity. They were not inviting the him to commit a crime he otherwise would not have committed. So *Ealy* does not stand for the proposition that escalation, per se, does not constitute entrapment.

To that point, consider *People v Killian*, 117 Mich App 220; 323 NW2d 660 (1982).[23] There, the police had information that the defendant used marijuana and cocaine and had offered to sell marijuana, but police had no reason to believe that he was dealing cocaine. *Killian*, 117 Mich App at 223. Still, a police informant asked the defendant to sell him cocaine. *Id*. at 222, 223. The defendant obliged and was charged with delivery of cocaine. *Id*. at 221, 222.The Court of Appeals found that the defendant had been entrapped. *Id*. at 223. The court explained, "Police were not gathering evidence of crimes which they had any reason to suspect defendant had committed or would commit in the future." *Id*. And "the sale of large quantities of cocaine is an offense of a different order than the use of cocaine or the sale of marijuana." *Id*. The court concluded that because police had no evidence that the defendant dealt cocaine "yet induced him to make substantial cocaine sales, we must conclude that police agents impermissibly manufactured or

[23] This Court has cited *Killian* favorably. *Jamieson*, 436 Mich at 90; *Juillet*, 439 Mich at 67 n 8.

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instigated a crime." *Id*. at 224. See also *Juillet*, 439 Mich at 67 ("We note that courts have found, under either the objective or the subjective test of entrapment, that when a drug user is convicted for the sale of drugs where no evidence exists that police had knowledge that the defendant was a drug dealer, the defendant was entrapped.").

Mr. Jade's case is much closer to *Killian* than *Ealy*. Like in *Killian*, while police knew that Mr. Jade was inclined to commit one crime, they had no reason to suspect that he wanted to commit a far more serious one. The lead detective here testified that she had never heard of Skip the Games and offered no evidence that Skip the Games is a front for child sex trafficking. And unlike in *Ealy*, police were not trying to detect the scope of criminal activity they had reason to believe Mr. Jade was already committing. So the escalation here did not have a legitimate investigatory purpose; rather, it was only geared toward increasing Mr. Jade's criminal liability.

One last point. Throughout its opinion, the trial court repeatedly suggests that Mr. Jade was merely provided an "opportunity" to commit the charged crimes. But this truncates the test for entrapment. Instead, the test is whether a defendant was provided with an opportunity to commit a crime he was *ready and willing to commit*. *Jamieson*, 436 Mich at 68. In other words, would the defendant have committed the crime even without police involvement. See again *Juillet*, 439 Mich at 77-78 (opinion of CAVANAGH,

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C.J.) (explaining that providing an opportunity to commit a crime is entrapment when "the circumstances indicate that such an opportunity would not normally be presented"). For most—if not all—entrapment claims, a court could blithely say that the defendant was merely given an opportunity to commit the crime and that his commission of the crime demonstrates that he was ready and willing to commit it. If this were the rule, the entrapment doctrine would collapse upon itself.

And yet the Court of Appeals fell into the same trap. According to that court, "Merely presenting an opportunity to commit a crime is not entrapment." *Jade*, ___ Mich App at ___; slip op at 10. See also *id.* at ___; slip op at 11 (stating that "the mere presentation of the opportunity to commit criminal acts in a non-targeted manner does not constitute reprehensible conduct amounting to entrapment"). The court repeated this phrase or some version of it throughout its opinion. Again, though, this is only half the test. The court failed to ask whether Mr. Jade had been ready and willing to commit the charged crimes. The answer is plainly no—he had been ready and willing to solicit an adult prostitute, not a minor.

The Court of Appeals also cited the trial court's finding that "identifying individuals willing to make plans to engage in sex with minors is a legitimate law enforcement goal that justifies the decision to see whether defendant's conduct might expose him to heightened criminal liability."

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Id. at ___; slip op at 12 (cleaned up). But this gets things precisely backwards. Entrapment presumes that the function of law enforcement is not to test the virtue of the citizenry to see who might buckle if tempted the right way. "The whole point of the objective entrapment test is that human nature is weak enough at best without active police encouragement of a character designed to overcome the inhibitions even of those who may not be predisposed to such escalation." *Juillet*, 439 Mich at 76 n 3 (opinion of CAVANAGH, C.J.) (cleaned up). "Human nature is frail enough at best, and requires no encouragement in wrongdoing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation." *Saunders v People*, 38 Mich 218, 222 (1878) (MARSTON, J., concurring). To that point, this Court has explicitly recognized escalation as a form of entrapment and held, for example, that inviting drug users to become drug dealers constitutes entrapment. *Juillet*, 439 Mich at 67 (opinion of BRICKLEY, J.) ("We note that courts have found, under either the objective or the subjective test of entrapment, that when a drug user is convicted for the sale of drugs where no evidence exists that police had knowledge that the defendant was a drug dealer, the defendant was entrapped."). Once more, then, the lower courts in this case labored under a fundamental misconception of entrapment doctrine.

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The Court of Appeals concluded that the "purpose" of the sting operation in Mr. Jade's case "was the detection of crime, not its manufacture." *Jade*, ___ Mich App at ___; slip op at 12. This conclusion is difficult to take seriously. Police were not investigating crimes they had reason to believe *anyone* was committing. Again, the lead detective was oblivious of Skip the Games before the sting was initiated. What's more, once police had hooked Mr. Jade, their efforts to land him were heedless. For example, they repeatedly propositioned him despite his clear hesitance, and they failed to record the phone call that would have supplied the best evidence of his intent. See *People v Williams*, 196 Mich App 656, 664; 493 NW2d 507 (1992) (noting that "each transaction was videotaped, thereby enabling review of the police conduct"). These missteps evince a resolve to create crimes, not detect them.

In sum, the sting in this case perverted the role of law enforcement officers as investigators rather than instigators of crime. The sting was an improper use of governmental power and resources, and this Court should call it what it was—reprehensible.

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B. Impermissible inducement

1. The police impermissibly induced Mr. Jade to commit the charged crimes.

For the impermissible-inducement prong, again, the question is "whether the police conduct would have induced a person similarly situated as the defendant to commit the crime rather than whether it would have induced an average, law-abiding citizen to commit the offense." *Fabiano*, 192 Mich App at 526.[24] Here, assuming Mr. Jade committed any crime, several factors show that the police induced them.

First, the ad the police posted on Skip the Games—a website for "consenting adults"—showed a 20-year-old woman, not a minor. And when the decoy asked, "Are you cool with younger chicks" and said she was 15, Mr. Jade responded, "Got to be 16," the age of consent in Michigan. See MCL 750.520d. So Mr. Jade was not trolling for sex with an underage girl. What's more, when Mr. Jade did a reverse lookup of the phone number, it came back to an adult, which likewise would have led a reasonable person to doubt the veracity of the decoy's "I'm 15" claim. Even if Mr. Jade had been willing to trade money for sex with an adult, he would have been liable for a 93-day misdemeanor,

[24] The nature of the police conduct is relevant for both reprehensible-conduct and impermissible-inducement. *Id.* at 531.

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not the multiple felonies he was charged with. In this way, the police substantially escalated Mr. Jade's criminal culpability.

Next, it was the decoy, not Mr. Jade, who brought up sex for money in both the call and over messaging: "So ur cool with $80 to fuck and get a bj?" And when Mr. Jade suggested going out to eat, the decoy said, "I really just wanna fuck and make some cash." So it was the decoy who repeatedly brought up sex and enticed Mr. Jade.

In sum, the police instigated the crimes in this case. They made the posting, repeatedly proposed sex for money, and refused Mr. Jade's offer to go out to eat. In all, the police did far more than simply present an opportunity for Mr. Jade to commit a crime he otherwise would have committed. A person similarly situated to Mr. Jade who had already decided to solicit an adult escort would have been induced to go through with the meeting. *Juillet*, 439 Mich at 69.

At bottom, police were not investigating a crime, they were concocting one and trolling for people to commit it. Like in *Killian*, while Mr. Jade was arguably prone to commit one crime, police escalated his culpability by several orders of magnitude, from a 93-day misdemeanor to a 20-year felony. "The police conduct in question had as its probable and likely outcome the instigation rather than the detection of criminal activity." *Fabiano*, 192 Mich App at 527

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(cleaned up). This was impermissible inducement, and this Court should hold that Mr. Jade was entrapped.

2. The lower courts misapplied the impermissible-inducement test.

In rejecting the impermissible-inducement claim, the trial court surveyed the 12 factors cited above, finding that only two favored a finding of entrapment: the defendant's criminal history and escalation. (Op & Ord, p 4-9). But the court held that "the totality of the circumstances" cut against a finding of entrapment based on these two factors. (Op & Ord, p 8).

First, considering Mr. Jade's criminal history, the court found that he "had no reservations about arranging for paid sex with someone younger than 18, an act which is child sexually abusive activity contrary to MCL 750.145c." (Op & Ord, p 8-9). The court added, "One would not expect an otherwise law-abiding person willing to pay for sex with a consenting adult to continue talking to a prostitute who had represented that she was only 15 years old." (Op & Ord, p 9). The court thus found that Mr. Jade's "lack of prior criminal history does not weigh strongly in favor of finding that he was entrapped." (Op & Ord, p 9).

For escalation, the court acknowledged that given the construct of the sting, "customers who were ready and willing to commit one type of offense were in essence invited by

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police to commit a more serious one." (Op & Ord, p 9). The court found that this could be "troubling" in some cases but not here because "[t]he texts reveal that police did nothing more than provide defendant the opportunity to commit a crime, even if it wasn't the one he initially intended to commit upon responding to the ad." (Op & Ord, p 9). The court also found that Mr. Jade "readily seized" the opportunity to have sex with a 15-year-old, explaining, "Defendant's text messages display no indication that he was concerned with the wrongness of paying for sex with a minor under the age of 18. While he did initially indicate that the officer had to be at least 16, he ultimately arranged to meet the officer." (Op & Ord, p 9).

The court also found "not particularly persuasive" evidence that Mr. Jade believed the decoy was lying about her age. (Op & Ord, p 9). The court explained:

> Defendant did text the officer to say that he was "cool" if she wanted "to role play to be 15," but the officer immediately responded that she was "[a]ctually 15[, l]ike real life lol." The parties have stipulated that defendant searched the officer's phone number online and saw that it was registered to a 34-year-old single woman. But reverse phone lookups are not at all reliable, as evidenced by the fact that the parties have also stipulated that recent reverse lookups indicate the same number is registered to multiple people. No one would expect an otherwise law-abiding person prepared to pay for sex with a consenting

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> adult to rely on a reverse phone lookup to confirm that someone who had represented themselves to be underage was actually of legal age. Finally, the parties have stipulated that defendant may have seen the officer's face when she came to the hotel side entrance to let him into the building. However, the parties agree that the officer was covered head to toe in a blanket, and testimony at the evidentiary hearing established that she attempted to cover all but the circle of her face with the blanket. Additionally, the parties agree that at the time, the officer was eighteen and eleven months old. No otherwise law-abiding person willing to pay for sex with a consenting adult would rely on such limited visual evidence to determine that a teenager who had represented she was 15 was actually over the age of 18. [Op & Ord, p 9-10.]

The court thus concluded that police had not impermissible induced Mr. Jade to commit the charged crimes. (Op & Ord, p 10).

The trial court erred in two ways. First, Mr. Jade did not "readily seize" the opportunity to have sex with a minor. The text messages show his hesitance to meet the decoy for sex as well as his skepticism that she was under 18. Instead, it was police who repeatedly proposed a meetup for sex and rejected Mr. Jade's request to go out to eat.

Second, and more importantly, the court erred by focusing on Mr. Jade's subjective disposition to commit the

crime. Again, impermissible inducement is evaluated without considering the defendant's subjective predisposition to commit the crime. *Juillet*, 439 Mich at 56 (opinion of BRICKLEY, J.). As already discussed, a person similarly situated to Mr. Jade who had already decided to solicit an adult escort would have been induced to go through with the meeting. Plus, the trial court once more lapsed into the circuitous conclusion that Mr. Jade was merely given an opportunity to commit a crime and that his commission of the crime demonstrates that he was ready and willing to commit it. See *Turner*, 390 Mich at 20. The trial court should have focused on the police behavior and whether it caused the charged offenses.

The Court of Appeals likewise erred in its appraisal of the impermissible-inducement prong. In addition to *Butler*, the court also looked to *People v Williams*, 196 Mich App 656; 493 NW2d 507 (1992), a decision the trial court had also relied on. *Jade*, ___ Mich App at ___; slip op at 8. In *Williams*, police "fashioned chunks of soap in a size and manner to resemble rocks of crack cocaine" and laced the soap with cocaine. *Williams*, 196 Mich App at 658. Undercover officers "stood on a corner in an identified area of high drug activity" to sell the ersatz crack. *Id.* at 659. "The undercover officers were instructed not to engage in any 'initiating gestures' and to respond only to those subjects who initiated contact with them." *Id.* The Court of Appeals held that the buyers had not been entrapped because they had

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"sought out the officers, initiated contact with them, and inquired whether the officers had any cocaine." *Id* at 662-663. So police "did nothing to instigate or induce the purchase of drugs." *Id*. at 663.

Williams fits comfortably within the defense's preferred conception of entrapment. First, police were detecting crimes that they had reason to believe were already occurring, as they targeted "an identified area of high drug activity." Second, there is every indication that the defendants would have sought drugs from a different dealer if they hadn't been caught by police, as the defendants were the ones who approached the undercover officers, initiated contact, and inquired about cocaine. In short, *Williams* falls within a purely objective entrapment test.

But the Court of Appeals reads *Williams* more broadly. According to the court, Mr. Jade's case is similar because "law enforcement officers simply presented defendant with the opportunity to engage in criminal activity." *Jade*, ___ Mich App at ___; slip op at 9. For the reasons explored above, this is an incomplete articulation of the entrapment test, as it fails to ask whether Mr. Jade had intended to commit the charged crimes when he contacted the decoy. The Court of Appeals also found that Mr. Jade's "actions were not coerced or manipulated by law enforcement" and it was his "voluntary choice to commit the crime for which he was convicted." *Id*. But these observations are beside the point. Entrapment does not equate with duress or coercion.

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"The normally law-abiding or average person probably cannot be induced or tempted into criminal conduct absent duress or coercion." *Juillet*, 439 Mich at 96 (opinion of BOYLE, J.). To that point, the defendants in *Juillet* and *Killian* were not coerced into selling drugs and yet entrapment by escalation was found in both cases.

On that score, the Court of Appeals distinguished *Killian* from Mr. Jade's case, saying, "It is noteworthy that the police in *Killian* targeted a defendant with no prior involvement in cocaine sales, while the operation in the present case bears more resemblance to the undercover operations in *Butler* and *Williams*." *Jade*, ___ Mich App at ___; slip op at 10. But under the Court of Appeals' conception of entrapment, it is difficult to discern why any such distinction should matter. Wasn't the defendant in *Killian* provided with a "mere opportunity" to deal drugs? In short, *Killian* and *Jade* cannot logically coexist.

What's more, contrary to the Court of Appeals' analysis, this case is not analogous to *Butler* or *Williams*. *Id*. at ___; slip op at 10. In both those cases, police were investigating ongoing criminal activity, and the defendants in those cases would have committed the same crimes even without police involvement. Here, by contrast, police were not investigating a known enterprise involving underage prostitution, and there is no evidence that Mr. Jade or any other suspect went on Skip the Games looking for underage escorts.

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The Court of Appeals also rejected the defense's argument that the trial court had improperly imported subjective considerations into its analysis. The Court of Appeals explained that "the court can review the circumstances of the defendant to determine whether the police conduct would induce a similarly situated person, with an otherwise law-abiding disposition, to commit the charged crime." *Id*. at ___; slip op at 11 (cleaned up). But under *Juillet*, this analysis takes into account criminal activity the defendant has already engaged in. *Juillet*, 439 Mich at 65-66 (opinion of BRICKLEY, J.). Here, the Court of Appeals failed to analyze whether the bait-and-switch tactic would have induced someone who had already decided to solicit a prostitute to alter his plans to meet with a younger escort.

The Court of Appeals concluded that the trial court had not clearly erred in finding that Mr. Jade had not been entrapped. *Jade*, ___ Mich App at ___; slip op at 10-11. So could a different circuit court come to a different conclusion under the same facts? The Court of Appeals doesn't say. This is yet one more ambiguity the Court of Appeals has sown into our entrapment doctrine through its flawed decision in this case.

At bottom, the sting operation here had as its probable and likely outcome the instigation rather than the detection of criminal activity. In other words, the police caused criminal activity that would not have occurred without

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their involvement. The trial court erred by finding no entrapment, and this Court should reverse.

C. Conclusion

For the reasons explored above, this Court should grant leave and hold that Mr. Jade was entrapped as a matter of law. And without this Court's intercession, it will leave in place a published Court of Appeals opinion that all but eliminates the entrapment doctrine as an important check on police excesses. In fact, it is difficult to imagine any police practices short of duress that would not be regarded as a "mere opportunity" to commit a crime under the Court of Appeals' decision in this case. This conception is inconsistent with a correct understanding of the objective test for entrapment and this Court's prior decisions.

It should be mentioned, too, that Mr. Jade's case is just one from a series of sting operations that have been orchestrated throughout Michigan by a single law enforcement agency—the Genesee County Sheriff's Office. Their "GHOST" program (Genesee Human Oppression Strike Team) apparently originated the Skip the Games-bait-and-switch sting in Michigan. And they have worked with at least 40 other counties to conduct these stings. Oliver, *GHOST works with police departments across state, nation in targeting child predators*, MLive (June 22, 2022) <https://www.mlive.com/news/flint/2022/06/ghost-works-

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with-police-departments-across-state-nation-in-targeting-child-predators.html> (accessed April 3, 2023). Recall that the sting in this case was performed by the Van Buren County Sheriff's Office working in concert with deputies from Genesee County. And after the stings, the Genesee County Sheriff's Office will often hold press conferences with local officials to publicize how their stings have taken "predators off the street." See, e.g., Owens, *Four arrested in Operation G.H.O.S.T. child sex sting*, WLNS (Jan 18, 2023) <https://www.wlns.com/news/four-arrested-in-operation-g-h-o-s-t-child-sex-sting/> (accessed February 2, 2024) (documenting statements at a press conference that law enforcement is "proactively seeking out these criminal predators and arresting them before they can do harm to our children" and that every arrest "saves the lives of 25 future victims"). In other words, the Genesee County Sheriff's Office and their partnering agencies are inventing crimes, trolling for people to commit them, and then using their manufactured arrests for their own self-aggrandizement. This is precisely the kind of unseemly law enforcement behavior that the entrapment doctrine is designed to prevent, and this Court should put an end to it.

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RELIEF REQUESTED

This Court should grant leave in this case to address three questions: (1) the correct standard of review for entrapment claims, (2) the correct articulation of Michigan's entrapment test, and (3) whether Mr. Jade was entrapped. The defense asks the Court to grant any further or different relief the Court deems appropriate.

Respectfully submitted,

/s/ Scott A. Grabel
/s/ Timothy A. Doman
GRABEL & ASSOCIATES
Scott A. Grabel (P53310)
Timothy A. Doman (P77811)
Attorneys for Defendant-Appellant
23169 Michigan Avenue
P.O. Box 2723
Dearborn, MI 48123
(734) 642-7916

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