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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. 167920

Court of Appeals No. 365951

Circuit Court No. 22-023839 FH

DEFENDANT-APPELLANT'S APPLICATION REPLY

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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ARGUMENT

While most of the prosecution's contentions were addressed in the defense's application, a few points warrant this reply.

Contrary to the prosecution's representations (Pros Ans, p 7-8), the "modified objective test" for entrapment is not firmly rooted in our jurisprudence. That test was conceived in the Court of Appeals' 2-1 decision in *People v Fabiano*, 192 Mich App 523; 482 NW2d 467 (1992), which interpreted the highly fractured decision in *People v Juillet*, 439 Mich 34; 475 NW2d 786 (1991). And following *Fabiano*, this Court granted leave on at least two occasions to reconsider Michigan's entrapment test, *People v Maffett*, 462 Mich 919; 617 NW2d 333 (2000); *People v Johnson*, 465 Mich 912; 638 NW2d 747 (2001), ultimately declining to revisit the matter but leaving the door open to future developments. *People v Johnson*, 466 Mich 491, 508-509; 647 NW2d 480 (2002). *Johnson* was this Court's last decision addressing the entrapment doctrine. So the correctness of *Fabiano*'s articulation of Michigan's entrapment test is not a settled issue, it has simply been lying dormant, emerging today with the rise of the bait-and-switch sex stings that this case exemplifies.

On that score, the prosecution argues that this case is a one-off, as "there are very few cases in which law enforcement has conducted undercover chatting operations aimed

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at investigating CSAA." (Pros Ans, p 9). But that's simply not true. As the articles cited in the defense's application show (Def App, p 53-54), this case is only one of many where local police partnering with the Genesee County Sheriff's Office and their "GHOST" program have deployed these bait-and-switch stings. In fact, drive just about any highway in the state and you're apt to see a billboard like this advertising the GHOST program:



See also Jeltema, *Genesee County GHOST team on billboards across Michigan*, ABC 12 News (Jan 2, 2024) <https://www.abc12.com/news/local/genesee-county-ghost-team-on-billboards-across-michigan/article_82a2f262-a996-11ee-abff-37c224f93ea7.html>. What's more, to the defense's knowledge, there are also multiple cases from throughout the state similar to Mr. Jade's currently pending in the Court of Appeals and this Court. See, e.g., *People v Deisler* (MSC Docket No. 166433). So the

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prosecution's claim that Mr. Jade's case is somehow unique is simply ill-informed.

The prosecution also complains that the defense has given "no justification" for why undercover sex stings should be subject to a different entrapment test than all other cases. (Pros Ans, p 8-9). But that has never been the defense's argument. Instead, the defense advocates for a return to a purely objective test for *all* cases, not just undercover sex stings. The objective test is straightforward, easy to implement, and harmonizes with the goal of the entrapment doctrine—to stop police practices that are designed to create rather than detect crime.

Worth noting, the prosecution agrees that providing an opportunity to commit a crime *can* be entrapment when, under the circumstances, "such an opportunity would not normally be presented." (Pros Ans, p 10). Here, though, the opportunity presented to Mr. Jade was not normal. There is precisely zero evidence that patrons of Skip the Games (or anyone else soliciting adult prostitutes) routinely encounter underage prostitutes. In fact, the officer in charge in this case testified that she had no previous knowledge of Skip the Games or why it was being used. Nor was there testimony suggesting that underage prostitution was an acute problem in Van Buren County. In short, the bait-and-switch sting was a contrivance, a scenario that would never occur in real life.

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Next, the prosecution spends much of its answer going through the 12 factors identified by this Court in *Johnson*, 466 Mich at 498-499. (Pros Ans, p 11-16). But these factors—even assuming their validity—are not a checklist where more checks mean a higher likelihood of entrapment. Only *one* factor is needed to establish entrapment. See *People v Jamieson*, 436 Mich 61, 89; 461 NW2d 884 (1990), and cases cited therein.

Like the Court of Appeals, the prosecution distinguishes *People v Killian*, 117 Mich App 220; 323 NW2d 660 (1982), on the ground that the police in *Killian* evidently knew that the defendant had not previously been involved in drug sales. (Pros Ans, p 16 n 5). Like the Court of Appeals, though, the prosecution fails to explain why any such distinction should matter. Under the Court of Appeals' formulation of entrapment, furnishing a "mere opportunity" to commit a crime is not entrapment. (Pros Ans, p 16). So why should it matter whether the defendant had previously been involved in drug sales? Wasn't the defendant in *Killian* merely provided an opportunity to commit a crime? Simply put, the Court of Appeals' decision in Mr. Jade's case cannot logically be squared with *Killian*.

This incongruence is the key to a correct understanding of why entrapment exists as a doctrine in our jurisprudence—it's not about the defendant's susceptibility to commit the crime, it's about police machinations that create a crime that otherwise would not have occurred,

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regardless of the defendant's predisposition. To that point, setting aside *Killian*, this Court in *Juillet* noted the accepted rule that entrapment occurs when police invite drug users to become drug dealers when police had no evidence that the user was previously involved in drug sales (not just when police affirmatively knew that the defendant was not involved in drug sales). *Juillet*, 439 Mich at 67. The doctrine of entrapment does not exist to absolve the entrapped defendant; it exists to protect the sanctity of the courts by declining to abet perverse police practices:

> The doctrine rests on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. *Sorrells v United States*, 287 US 435, 457; 53 S Ct 210; 77 L Ed 413 (1932) (ROBERTS, J., concurring) (cleaned up).

These words apply with particular force here. Police concocted a scenario completely unmoored from reality that did nothing to detect actual crimes. Instead, police prostituted the criminal law merely for the sake of obtaining a conviction. This Court should refuse to be a pawn in their scheme.

To be clear, sting operations are a legitimate tactic for investigating sex crimes against children, that is, for

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uncovering people seeking sex with children. But that's the problem in this case—police were not *investigating* crimes that they knew or even suspected anyone was committing. Instead, they invented a crime and trolled for people to commit it. This fits the textbook definition of entrapment: "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*, 287 US at 454. In short, while sting operations can be a useful and legitimate law enforcement tool, the construct of the bait-and-switch sting in this case crossed the line into entrapment.

Finally, the prosecution glosses over the standard-of-review issue, failing to acknowledge that it has flip-flopped. In the Court of Appeals, the prosecution argued that the de novo standard of review should apply to entrapment rulings. (Pros COA Br, p 7-9). Now, though, the prosecution believes that clear-error review should apply. (Pros Ans, p 6). This uncertainty—along with the concerns expressed in Judge MURRAY's concurrence—demonstrate why this Court should grant leave to address this issue along with the other important issues in this case.

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RELIEF REQUESTED

The defense again asks the Court to grant leave in this jurisprudentially significant case.

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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/s/ Timothy A. Doman
Timothy A. Doman (P77811)