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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v

Supreme Court No. 167920
Court of Appeals No. 365951
Circuit Court No. 22-23839-FH

JAYNEEL JADE,
Defendant-Appellant.

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PEOPLE'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

RECEIVED by MSC 3/28/2025 12:45:55 PM

TABLE OF CONTENTES

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF QUESTION INVOLVED v

COUNTERSTATEMENT OF JURISDICTION vi

COUNTERSTATEMENT OF FACTS 1

STANDARD OF REVIEW 6

ARGUMENT 7

I. This Court should deny leave as Michigan's modified objective test for analyzing entrapment is well-settled law and was appropriately applied to analyze Defendant's case for entrapment. 7

A. Defendant fails to demonstrate that this application merits review by this Court under the requirements of MCR 7.305(B)(3). 7

B. Michigan's modified objective test is the well-established standard for analyzing all entrapment defenses, including in undercover chatting operations aimed at investigating CSAA. 10

RELIEF REQUESTED 21

STATEMENT OF WORD COUNT 21

INDEX TO ATTACHMENTS 22

RECEIVED by MSC 3/28/2025 12:45:55 PM

TABLE OF AUTHORITIES

Cases

People v Brown, unpublished opinion of the Court of Appeals, issued July 20, 2023 (Docket No. 360613) 8

People v Butler, 199 Mich App 474; 502 NW2d 333 (1993) 16

People v Butler, 444 Mich 965; 512 NW2d 583 (1994) ..... passim

People v D'Angelo, 401 Mich 167; 257 NW2d 655 (1977) 6

People v Ealy, 222 Mich App 508, 510, 564; NW2d 168 (1997) 10

People v Fabiano, 192 Mich App 523, 482 NW2d 467 (1992) 7, 19

People v Fyda, 288 Mich App 446; 793 NW2d 712 (2010) 13

People v Hartwick, 498 Mich 192; 870 NW2d 37 (2015) 6, 18

People v Jade, ___ Mich App ___, ___ (2024) (Docket No. 365951) 6, 18, 20, 22

People v Jamieson, 436 Mich 61; 461 NW2d 884 (1990) 6, 7

People v Johnson, 466 Mich 491; 647 NW2d 480 (2002) 6, 10, 11, 18

People v Juillet, 439 Mich 34, 55; 475 NW2d 786 (1991) ..... passim

People v Killian, 117 Mich App 220; 323 NW2d 660 (1982) 16

People v LaClear, 442 Mich 867; 497 NW2d 490 (1993) 8

People v Leonard, unpublished opinion of the Court of Appeals, issued November 13, 2003 (Docket No. 236871) 8

People v Martin, unpublished opinion of the Court of Appeals, issued December 28, 2001 (Docket No. 231621) 7

People v Moniz, unpublished opinion of the Court of Appeals, issued July 1, 2003 (Docket No. 234431) 8

People v Sexton, 250 Mich App 211; 646 NW2d 875 (2002) 7

People v Spice, unpublished opinion of the Court of Appeals, issued May 5, 2000 (Docket No. 212716) 8

People v Thousand, 465 Mich 149; 631 NW2d 694 (2001) 9

People v Turner, 390 Mich 7; 210 NW2d 336 (1973) 12, 13

People v Vansickle, 303 Mich App 111; 842 NW2d 289 (2013) 12

People v Wilkinson, unpublished opinion of the Court of Appeals, issued January 14, 2003 (Docket No. 232695) 8

People v Williams, 196 Mich App 656; 493 NW2d 507 (1992) 8, 16, 18

People v Woods, 241 Mich App 545; 616 NW2d 211 (2000) 8

People v Ylen, unpublished opinion of the Court of Appeals, issued July 30, 2015 (Docket No. 320861) 8

People v Zitka, 325 Mich App 38; 922 NW2d 696 (2018) 8

Statutes

MCL 750.145a 3, 5

MCL 750.145c(2)(a) 2

MCL 752.796 3

MCL 752.797(3)(d) 3

MCL 752.797(3)(f); 3

Rules

MCR 7.212(D)(2) vi

MCR 7.305(B)(3) ..... ii, 7, 9

RECEIVED by MSC 3/28/2025 12:45:55 PM

RECEIVED by MSC 3/28/2025 12:45:55 PM

COUNTERSTATEMENT OF QUESTION INVOLVED

I. Whether this Court should deny leave as Michigan's modified objective test for analyzing entrapment is well-settled law and was appropriately applied to analyze Defendant's case for entrapment?

Plaintiff-Appellee says, "Yes."
Defendant-Appellant says, "No."

RECEIVED by MSC 3/28/2025 12:45:55 PM

COUNTERSTATEMENT OF JURISDICTION

Defendant's jurisdictional statement is complete and correct. MCR 7.212(D)(2). The People agree this Court has jurisdiction.

RECEIVED by MSC 3/28/2025 12:45:55 PM

COUNTERSTATEMENT OF FACTS

On April 20, 2022, Defendant Jayneel Jade went to a website that advertised sexual services available for sale from escorts or prostitutes called "Skip the Games." (12/09/2022, 20, 62). One ad listed on Skip the Games was for a female escort in Paw Paw, Michigan, named "DILF Seeker."[1] Attachment 1. The advertisement included photographs of the escort that did not show her face, and an image that stated, "I 'heart' DILFs." *Id*. The advertisement listed twelve different sex acts that the escort was willing to perform, and the escort was able to be reached via phone or email. *Id*.

At 1:40 pm, Defendant responded to the ad for prostitution and initiated contact with "DILF Seeker." Attachment 2, pg 1. After some brief texts, Defendant asked the escort if she was "free this afternoon" and asked the escort where they would meet. *Id*. at 1-2. The following text exchange then occurred:

Defendant:	Where would we meet at?	2:35 PM
"DILF Seeker":	In pawpaw	2:40 PM
"DILF Seeker":	Are you cool with younger chicks?	2:40 PM
Defendant:	I am	2:41 PM
"DILF Seeker":	Ok cool cuz I'm 15	2:41 PM
Defendant:	Got to be 16	2:42 PM
"DILF Seeker":	Nope	2:42 PM
Defendant:	I'm cool if you are older than 15 and want to role play to be 15	2:43 PM
"DILF Seeker":	Sorry Im Actually 15	2:45 PM
"DILF Seeker":	Like real life lol	2:45 PM

[1] "DILF" is an acronym that stands for "Dad/s I'd Like to Fuck." (12/09/2022, 48).

RECEIVED by MSC 3/28/2025 12:45:55 PM

Defendant:	Can we talk on the phone?	2:48 PM
"DILF Seeker":	Yup I will call ya	2:49 PM
Defendant:	Ok	2:52 PM
"DILF Seeker":	So ur cool with $80 to fuck and get a bj?	2:53 PM

Id. at 2-3.

Defendant spoke on the phone with the escort for less than sixty seconds, in the time between the text messages sent at 2:52 pm and 2:53 pm. (12/09/2022, 23, 51). After about forty minutes, Defendant texted the escort again in the following exchange:

Defendant:	Hey	3:35 PM
"DILF Seeker":	Hey	3:36 PM
Defendant:	Would you like to go out to eat instead of having instant noodles?	3:36 PM
"DILF Seeker":	I really just wanna fuck and make some cash	3:37 PM
Defendant:	Can you come down to the back entrance? I'm here	3:37 PM
"DILF Seeker":	Ok hang on	3:38 PM

Attachment 2, pg 3-4.

Defendant was waiting for the escort at the hotel's back entrance, and she opened the door for Defendant. (12/09/2022, 24). The escort was wrapped in a blanket, covering all but her face. *Id*. at 25. Defendant voluntarily entered the escort's hotel room, where he was arrested by law enforcement at approximately 3:45 pm. *Id*. at 24, 28, 29. "DILF Seeker" was actually an adult undercover officer with the Genesee County Sheriff's Office, working in conjunction with the Van Buren County Sheriff's Office. *Id*. at 7-8.

Defendant was charged with the following crimes:

Count 1: Child Sexually Abusive Activity, MCL 750.145c(2)(a);

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Count 2: Using a Computer to Commit a Crime - Maximum Imprisonment of 20 Years or More or Life, MCL 752.796; MCL 752.797(3)(f);
Count 3: Accosting Children for Immoral Purposes, MCL 750.145a; and
Count 4: Using a Computer to Commit a Crime - Maximum Imprisonment of 4 Years or More but Less than 10 Years, MCL 752.796; MCL 752.797(3)(d).

Pretrial Proceedings

Defendant filed a motion to dismiss for entrapment in the trial court. In preparation of the motion hearing, the parties stipulated a set of facts and exhibits to be used by the trial court when evaluating Defendant's motion. (12/09/2022, 3); Attachments 1, 2, 3.

On December 9, 2023, the trial court conducted a hearing on Defendant's motion to dismiss for entrapment. Detective Sharon Van Dam was the lead detective with the Van Buren County Sheriff's Office, and she testified at Defendant's entrapment hearing in the trial court. (12/09/2022, 20). She testified that several officers travelled from Genesee County to assist and train Van Buren County on how to conduct these types of investigations. *Id*. at 7-8. Genesee County did not provide Van Buren officers with any written manuals or policies prior to conducting the investigation. *Id*. at 8. In addition to her observations of the investigation, Detective Van Dam testified that Defendant was not a specific target of the investigation, and that law enforcement only learned of his existence after he sought out the services in the advertisement. *Id*. at 21-22, 28. Prior to Defendant's arrest, law enforcement had no information regarding Defendant's criminal history. *Id*. at 22.

RECEIVED by MSC 3/28/2025 12:45:55 PM

Larry Dalman testified as a "forensic expert" at the hearing. *Id.* at 34. He testified that Skip the Games was a website based in Amsterdam, the Netherlands, and police would likely not be able to coordinate their investigations with the website company. *Id.* at 36, 56. Mr. Dalman testified that the terms and conditions for Skip the Games strictly prohibit minors on the website, both as users of the site and as escorts offering services. *Id.* at 39. Per website policy, escorts are required to be nineteen years old. *Id.* at 50. However, there is no actual age verification procedure to confirm a user's age on the website, meaning that anyone of any age could access and use Skip the Games. *Id.*

Detective Dan Frattura testified that as a detective with the computer crimes unit of the Van Buren County Sheriff's Office's criminal investigations division, he was familiar with Skip the Games. *Id.* at 61. His testimony reaffirmed that there are no age verification procedures required to access Skip the Games. *Id.* at 63. Detective Frattura testified that Skip the Games, in addition to several other websites, was commonly used for CSAA and CSAM, despite the sites having policies prohibiting that type of content. *Id.* at 65-66. Detective Frattura also stated that the ad posted by law enforcement in this case was not any more "attractive or enticing" and did not "offer[] more services or at a cheaper price" than other ads posted on the site. The photographs from the ad were not more or less revealing than other posted ads as well.

Following the motion hearing and before the trial court issued its decision, the parties jointly spoke with the undercover officer, and provided the trial court with an

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amended stipulated set of facts to be used by the trial court in making its entrapment ruling only. (12/20/2022, 5-6); Attachment 4. The trial court agreed not to rely upon the crossed-out sections of the amended stipulated set of facts. *Id*. The following information was included in the stipulated facts that the trial court relied upon.

Prior to meeting the escort, Defendant conducted a "reverse google lookup" of the phone number used by the undercover officer, and alleged that he learned the number was linked to a 34-year-old single woman with no children named Tawny Borah. Attachment 3, pg 3. Law enforcement had not conducted a reverse search of the phone number before using it, but their reverse searches of the number in the months following Defendant's arrest returned multiple other people to whom the number was also linked. *Id*.

The undercover officer was an adult woman, and the photos used in the advertisement were of an adult woman. Attachment 4, pg 2-3. She was trained to act as a decoy and only spoke to suspects on a limited basis. *Id*. at 3. She was not trained to let suspects bring up sex first in her conversations with them. *Id*.

After considering the parties briefing, oral arguments, stipulated facts and exhibits, and the hearing testimony, the trial court denied Defendant's motion to dismiss for entrapment in a written opinion and order. Attachment 5. As part of a plea agreement, Defendant pleaded guilty to Count 3: Accosting Children for Immoral Purposes, MCL 750.145a, and the remaining three counts were dismissed. (05/11/2023, 7).

RECEIVED by MSC 3/28/2025 12:45:55 PM

STANDARD OF REVIEW

A trial court's factual findings regarding a claim of entrapment are reviewed for clear error. *People v Johnson*, 466 Mich 491; 647 NW2d 480 (2002); *People v Jamieson*, 436 Mich 61, 80; 461 NW2d 884 (1990); *People v D'Angelo*, 401 Mich 167, 183; 257 NW2d 655 (1977). Questions of law and application of facts to nonconstitutional common law issues, such as the defense of entrapment, are reviewed de novo. *D'Angelo*, 401 Mich at 177-179; *Jamieson*, 436 Mich at 87. A trial court's fact-dependent ultimate ruling on the issue is reviewed for clear error. *People v Hartwick*, 498 Mich 192, 212-214; 870 NW2d 37 (2015).[2]

[2] This is the standard of review for claims of entrapment, as clarified by the Court of Appeals in *People v Jade*, ___ Mich App ___, ___ (2024) (Docket No. 365951); slip op at 6.

RECEIVED by MSC 3/28/2025 12:45:55 PM

ARGUMENT

I. This Court should deny leave as Michigan's modified objective test for analyzing entrapment is well-settled law and was appropriately applied to analyze Defendant's case for entrapment.

This Court should deny leave in this case for two reasons. First, the continued utilization of Michigan's modified objective test is not an "an issue of major significance to the state's jurisprudence," as is necessary under MCR 7.305(B)(3). Second, the trial court and the Court of Appeals applied the well-established modified objective test in a straightforward manner to evaluate Defendant's claim of entrapment.

A. Defendant fails to demonstrate that this application merits review by this Court under the requirements of MCR 7.305(B)(3).

For the past thirty-five years, Michigan courts have utilized a "modified objective test" for determining whether a defendant was entrapped. *Jamieson*, 436 Mich at 68*; People v Juillet*, 439 Mich 34, 55; 475 NW2d 786 (1991); *People v Fabiano,* 192 Mich App 523, 526, 482 NW2d 467 (1992). Both historically and presently, the overwhelming majority of police undercover operations involve investigation of controlled substances offenses, resulting in the modified objective test most often being used to evaluate claims of entrapment in "reverse-buy stings" or other drug deals. See *People v Butler*, 444 Mich 965; 512 NW2d 583 (1994); *Fabiano*, 192 Mich App 523, etc. However, the modified objective test is also utilized to determine entrapment for a wide array of non-drug offenses, including:

- Child sexually abusive activity (CSAA) and child sexually abusive material (CSAM), *People v Martin*, unpublished opinion of the Court of Appeals, issued December 28, 2001 (Docket No. 231621);
- Solicitation to commit murder, *People v Sexton*, 250 Mich App 211; 646 NW2d 875 (2002);

RECEIVED by MSC 3/28/2025 12:45:55 PM

- Conducting an unlicensed gambling operation and using a computer to commit a crime, *People v Zitka*, 325 Mich App 38; 922 NW2d 696 (2018);
- Solicitation of larceny, *People v Leonard*, unpublished opinion of the Court of Appeals, issued November 13, 2003 (Docket No. 236871);
- Extortion, *People v Wilkinson*, unpublished opinion of the Court of Appeals, issued January 14, 2003 (Docket No. 232695);
- Carrying a concealed weapon, *People v LaClear*, 442 Mich 867; 497 NW2d 490 (1993);
- Falsely reporting the commission of a felony and tampering with evidence, *People v Ylen*, unpublished opinion of the Court of Appeals, issued July 30, 2015 (Docket No. 320861);
- Ballot tampering, *People v Woods*, 241 Mich App 545; 616 NW2d 211 (2000);
- Conspiracy to commit breaking and entering of a building, *People v Spice*, unpublished opinion of the Court of Appeals, issued May 5, 2000 (Docket No. 212716);
- Felon in possession of a firearm and of ammunition, *People v Brown*, unpublished opinion of the Court of Appeals, issued July 20, 2023 (Docket No. 360613); and
- Unlawfully driving away an automobile, second-degree home invasion, unarmed robbery, third-degree fleeing and eluding, and resisting or obstructing a police officer, *People v Moniz*, unpublished opinion of the Court of Appeals, issued July 1, 2003 (Docket No. 234431).

There has never been any crime, nor any law enforcement policy or type of investigation, that is evaluated for entrapment utilizing a different test under Michigan jurisprudence. Nor should there be. Instead, due to the fact-intensive nature of entrapment analysis, trial and reviewing courts apply the modified objective test to the specific facts of the case before them. *People v Williams*, 196 Mich App 656, 662; 493 NW2d 507 (1992). Any overarching change to the entrapment test would unnecessarily affect a broad array of crimes and cases, and any specific change to the test for those seeking to engage children for sex is unwarranted.

There has been no justification provided by Defendant in his application for leave as to why undercover chatting tactics or CSAA-related crimes should be carved

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out as a completely unique exception to Michigan's well-established rule of law, aside from his unsupported argument that there has been a recent increase in undercover chatting tactics to target CSAA-related crimes.

A review[3] of the published and unpublished opinions of this Court and the Court of Appeals reveals that, relatively speaking, there are very few cases in which law enforcement has conducted undercover chatting operations aimed at investigating CSAA. Including the first case, *People v Thousand*, 465 Mich 149; 631 NW2d 694 (2001), and the present case, since 2001 there have been only twenty-six reviewed cases where a defendant was convicted of a CSAA-related offense after engaging with an undercover officer online. Of those twenty-six total cases, only nine defendants raised the issue of entrapment on appeal spanning across the time range, and none of those nine were able to demonstrate they were entrapped by a preponderance of the evidence.

This data indicates that there is not a sweeping trend of increased usage of undercover chatting tactics, or that in most cases where undercover chatting tactics are used, there are not appealable entrapment issues, or a combination of both. The fear mongering rhetoric utilized by Defendant in his application for leave is not supported by the reality of Michigan courts, and thus does not raise an issue involving a "legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(3).

[3] This research was conducted using Westlaw, and was cross-referenced with the Michigan Courts website's case search function.

RECEIVED by MSC 3/28/2025 12:45:55 PM

Finally, existing entrapment law, as established by this Court, is capable of appropriately addressing the issues Defendant raises in his application for leave, as evidenced by the nuanced and measured analysis of the trial court and the Court of Appeals.

B. Michigan's modified objective test is the well-established standard for analyzing all entrapment defenses, including in undercover chatting operations aimed at investigating CSAA.

The appropriateness of the modified objective test's usage for analyzing entrapment in cases involving undercover chatting tactics aimed at investigating CSAA is supported by examining the application of the test to the present case, as the trial court and Court of Appeals previously have.

Under Michigan's established modified objective test, a defendant is entrapped "if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *Johnson*, 466 Mich at 498, citing *Juillet*, 439 Mich 34; *People v Ealy,* 222 Mich App 508, 510, 564; NW2d 168 (1997). Providing a suspect with 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." *Juillet*, 439 Mich at 77-78; *Johnson*, 466 Mich at 498. A defendant has the burden of establishing by a preponderance of the evidence that he was entrapped under either theory. *Johnson*, 466 Mich at 498.

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1. **The trial court and the Court of Appeals did not clearly err when the courts utilized Michigan's modified objective test to determine that Defendant was not entrapped by impermissible inducement from law enforcement.**

When examining whether governmental activity would impermissibly induce criminal conduct, the following factors are considered:

> (1) whether there existed appeals to the defendant's sympathy as a friend;
> (2) whether the defendant had been known to commit the crime with which he was charged;
> (3) whether there were any long time lapses between the investigation and the arrest;
> (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen;
> (5) whether there were offers of excessive consideration or other enticement;
> (6) whether there was a guarantee that the acts alleged as crimes were not illegal;
> (7) whether, and to what extent, any government pressure existed;
> (8) whether there existed sexual favors;
> (9) whether there were any threats of arrest;
> (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant;
> (11) whether there was police control over any informant; and
> (12) whether the investigation was targeted. *Johnson*, 466 Mich at 498-99 (2002), citing *Juillet*, 439 Mich at 56-57.

When these non-exhaustive factors are applied to the facts of the present case, they weigh against the finding that Defendant was entrapped. As such, neither the trial court nor the Court of Appeals clearly erred when they determined that Defendant was not entrapped based upon impermissible inducement.

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a. The trial court made factual findings and analyzed Defendant's case for entrapment utilizing the *Juillet* factors.

1. Whether there existed appeals to the defendant's sympathy as a friend.

"'[F]riendly banter' does not establish 'impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances.'" *People v Vansickle*, 303 Mich App 111, 116; 842 NW2d 289 (2013). In the present case, the trial court found that "[t]here was no evidence of any appeals to defendant's sympathy as a friend," and weighed this factor against a finding of entrapment. Attachment 5, pg 4.

2. Whether the defendant had been known to commit the crime with which he was charged.

The trial court weighed this factor in favor of a finding of entrapment, as Defendant did not have a criminal history that involved CSAA or CSAM. *Id.* It should be noted that this factor weighs towards a finding of entrapment in Defendant's case, yet were the law to revert to *People v Turner*'s purely objective test as Defendant has suggested, it would not be taken into consideration, as this factor relates solely to whether Defendant had the "requisite predisposition" to commit the charged conduct. *People v Turner*, 390 Mich 7, 20; 210 NW2d 336 (1973).

3. Whether there were any long time lapses between the investigation and the arrest.

There were no time lapses between the investigation and arrest. Law enforcement posted the ad on April 20, 2022, and Defendant first contacted the undercover officer at 1:40 pm that same day. The undercover officer informed Defendant that she was fifteen years old at 2:41 pm, and approximately an hour later, Defendant was waiting for her to let him into the hotel's back door. Defendant was then arrested immediately after he voluntarily entered her hotel room to have sex.

RECEIVED by MSC 3/28/2025 12:45:55 PM

Based upon the analysis from *People v Fyda*, 288 Mich App 446, 458; 793 NW2d 712 (2010) and *Turner*, 390 Mich at 23, the trial court held that "the lack of any meaningful delay between the initial investigation and defendant's subsequent arrest indicates this factor does not weigh in favor of finding entrapment." Attachment 5, pg 5.

4. Whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen.

The trial court found that there were no "unusually attractive inducements" in Defendant's case. *Id*. It determined that Defendant "was not threatened or coerced into criminal conduct," nor "offered money or promised anything in return for the act of paying for sex." *Id*. The trial court even evaluated whether "the offer of sex with a minor in exchange for money was in itself an inducement," and concluded it was not. *Id*. The trial court held that because "[a]n otherwise law-abiding adult who is prepared to hire a prostitute can be expected to recoil at the thought of paying to have sex with a 15-year-old child," and when "[p]resented with that opportunity, defendant did not turn away," this factor did not weigh in favor of finding entrapment. *Id*.

5. Whether there were offers of excessive consideration or other enticement.

Similarly, the trial court did not find any evidence that "the services defendant expected to receive were below market rates or that other enticements were offered to encourage defendant to arrange to have sex with the officer," and weighed this factor against a finding of entrapment. *Id*.

6. Whether there was a guarantee that the acts alleged as crimes were not illegal.

There was never any guarantee that the acts were not illegal. The undercover officer told Defendant that she was fifteen years old four times, and initially

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Defendant told her that needed to be sixteen, but that he was "cool if you are older than 15 and want to role play to be 15." The undercover officer reaffirmed that she was fifteen years old, and Defendant did not bring up her age again. The trial court noted that "[b]y asking defendant if he was okay with someone underage, the officer posing as a minor impliedly acknowledged that the conduct at issue was illegal," and weighed this factor against a finding of entrapment. *Id.*

7. Whether, and to what extent, any government pressure existed.

The trial court found that the only potential government pressure that existed in the present case was that the undercover officer indicated she was only available for one night. *Id.* Further, it found that text messaging was a low-pressure mode of communication, and "Defendant was free to tell the officer he did not want to move forward knowing she was underage. He also could have simply stopped communicating with her. There is no evidence the officer otherwise pressured defendant into coming to meet her." *Id.* at 5-6. This factor was weighed against a finding of entrapment.

8. Whether there existed sexual favors.

The trial court noted that "[w]hile the criminal conduct at issue in this case is itself sexual in nature, there was no evidence that Defendant was promised separate sexual favors in exchange for engaging in the charged crimes," and weighed this factor against a finding of entrapment. *Id.* at 6.

9. Whether there were any threats of arrest.

The trial court found that there was "no evidence defendant was threatened with arrest prior to the commission of the charged offense," and thus because

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Defendant "was not coerced into illegal conduct by fear" that he would be arrested, this factor was weighed against a finding of entrapment. *Id.*

10. Whether there existed any government procedures that tended to escalate the criminal culpability of the defendant.

The trial court acknowledged that there was some evidence that the government escalated Defendant's criminal culpability from the misdemeanor offense of soliciting of a prostitute, to the felony offense of CSAA, as Defendant had initially responded to an escort ad seeking sex with an adult woman, and weighed this factor in favor of entrapment.[4] *Id.*

11. Whether there was police control over any informant.

"There is no evidence police relied on an informant in this case," so the trial court weighed this factor against a finding of entrapment. *Id.*

12. Whether the investigation was targeted.

The trial court spent a considerable amount of time analyzing this factor, and noted that this Court has interpreted the fact that an investigation was untargeted to weigh both for and against a finding of entrapment. *Id.* at 7. It determined that the undercover chatting tactics utilized by law enforcement in the present case were comparable to "reverse sting operations" in controlled substance investigations that this Court has previously upheld the use of in *People v Butler*. *Id.* As discussed by the trial court, in *Butler*, this Court reversed the Court of Appeals decision that had

[4] While the People do not dispute that ultimate holding of the trial court, it is the People's position that a preponderance of the evidence did *not* support the conclusion that Defendant did not have the requisite criminal culpability to commit CSAA absent governmental procedures. It is improbable to believe that a person's criminal culpability could escalate from not being willing to have sex with a child, to being open to having sex with a child, to all the way to desiring sex with a child so much so that they are willing to drive to a hotel and pay for it, after just a few hours of texting, if that person did not already have the requisite culpability to do so.

RECEIVED by MSC 3/28/2025 12:45:55 PM

previously ruled the government's methods of "sen[ding] word out on the streets that he had cocaine available for sale [and] ma[king] the number for his electronic beeper available" constituted a "fishing expedition" that impermissibly induced the defendant. *Butler*, 444 Mich at 966; *People v Butler*, 199 Mich App 474, 476; 502 NW2d 333 (1993). In *Butler*, this Court stated that "nothing in the conduct of the government in this particular case rose to the level of entrapment. Law enforcement officials did nothing more than to present defendants with the opportunity to commit the crimes of which they were convicted." *Butler*, 444 Mich at 966.

The trial court similarly cited *People v Williams*, a Court of Appeals case that relied on *Butler*, which also held that the untargeted nature of law enforcement's investigation in *Williams* "merely furnished an opportunity to commit a crime," and "[f]urnishing an opportunity to commit a crime does not constitute entrapment." *Williams*, 196 Mich App at 663; Attachment 5, pg 8. Thus, just as in *Butler* and *Williams*, the trial court determined that "it is clear that the untargeted nature of the investigation at issue in this case does not weigh in favor of a finding of entrapment."[5] Attachment 5, pg 8.

[5] Defendant argues that the lack of targeting by law enforcement in the present case weighs towards a finding of entrapment, and relies on *People v Killian*, 117 Mich App 220; 323 NW2d 660 (1982) to support his argument. The Court of Appeals already addressed this argument, and distinguished Defendant's case from *Killian*. *People v Jade*, ___ Mich App ___, ___ (2024) (Docket No. 365951); slip op at 10. Rather than targeting a suspect that law enforcement knew had no prior involvement in drug sales like in *Killian*, in the present case law enforcement simply provided an opportunity to obtain something illegal, and waited for potential buyers to contact the undercover officer like in *Butler* or *Williams*. *Id.*

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b. The trial court concluded that Defendant was not entrapped by impermissible inducement.

In total, the trial court found that two of the twelve *Juillet* factors weighed in favor of a finding of entrapment. Attachment 5, pg 8. The trial court examined the totality of the circumstances, and found that Defendant's lack of prior criminal history did "not weigh strongly in favor of finding he was entrapped," given that his text messages demonstrated "Defendant had no reservations about arranging for paid sex with someone younger than 18." *Id*. at 8-9.

The trial court also acknowledged that "customers who were ready and willing to commit one type of offense were in essence invited by police to commit a more serious one," which in some circumstances could be "troubling, as police are manufacturing criminal conduct." *Id*. at 9. But, as stated by the trial court, "that is not the case here." *Id*.

The trial court determined that "The 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." *Id*. This "was an opportunity defendant readily seized." *Id*. The trial court found that Defendant's text messages and his conduct displayed "no indication" that he was concerned about the wrongness of sex with a minor. *Id*. at 9-10. Thus, after careful fact finding and legal analysis, the trial court held that "police did not engage in conduct that would impermissibly induce a person similarly situated to the defendant, though otherwise law-abiding, to commit the crime." *Id*. at 10.

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c. The Court of Appeals found that the trial court did not clearly err in its factual findings or legal determinations.

The Court of Appeals held that "the trial court did not err in its application of the legal framework for discerning whether entrapment occurred under the inducement prong of the [modified objective] test," citing *Hartwick*, 498 Mich at 214-215. *Jade*, slip op at 11. The Court of Appeals stated:

> [W]e concur with the trial court findings that law enforcement officers simply presented defendant with the opportunity to engage in criminal activity. This distinction is vital because it underscores the fact that defendant's actions were not coerced or manipulated by law enforcement. Rather, it highlights defendant's voluntary choice to commit the crime for which he was convicted. Law enforcement posed as a 15-year-old who was offering sexual acts in exchange for money, posted an advertisement on an adult-oriented website, and initially claimed to be old enough to post on the site. After defendant responded to the advertisement, defendant was informed in clear and certain terms that the decoy was actually 15 years old. Defendant was thereby presented with an opportunity to either proceed with committing the relevant criminal acts or decline. Merely presenting an opportunity to commit a crime is not entrapment. *Johnson*, 466 Mich at 498; see also *Butler*, 444 Mich at 965-966; *Williams*, 196 Mich App at 662-663. *Jade*, slip op at 9-10.

The Court of Appeals further held that, "based on our review of the record, we are not left with a definite and firm conviction that the trial court made a mistake in its factual findings," and "conclude that its findings were not clearly erroneous." *Jade*, slip op at 11; *Johnson*, 466 Mich at 497-498. It also held that the trial court did not clearly err "in finding that law enforcement in this case did not engage in impermissible conduct that would have induced a law-abiding person to commit the criminal acts in similar circumstances." *Jade*, slip op at 11; *Johnson*, 466 Mich at 498.

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To conclude, neither the trial court, nor the Court of Appeals, clearly erred when they utilized the modified objective test to evaluate the specific facts of Defendant's case, nor when either court determined that law enforcement's conduct did not entrap Defendant by impermissibly inducing him to commit CSAA.

2. The trial court and the Court of Appeals did not clearly err when the courts utilized Michigan's modified objective test to determine that Defendant was not entrapped by the reprehensible conduct of law enforcement.

For entrapment to be found as a result of the government's reprehensible conduct, law enforcement must "commit certain criminal, dangerous, or immoral acts" that are "too reprehensible for a civilized criminal justice system to tolerate," so much so that "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." *Juillet*, 439 Mich at 76 n 3, 78; *Fabiano*, 192 Mich App at 532. Thus, police conduct "must be more reprehensible under the second prong than under the first prong" of the modified objective test." *Fabiano*, 192 Mich App at 531.

The trial court evaluated Defendant's claims of reprehensible conduct, and noted that the police "did take investigative steps that changed the nature of the crimes defendant is alleged to have committed, but there is no evidence that the police took those steps merely to enhance defendant's eventual sentence." *Id.* at 12. Instead, "[i]dentifying 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." *Id.* at 13-14.

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The trial court also again compared law enforcement's undercover operation to the one conducted in *Butler*, "[l]ike the police in *Butler,* the officers in this case created a fictitious criminal opportunity. Like the police in *Butler,* the officers interacted with people who responded to that opportunity," and "[a]rguably, the police in *Butler* went further than the officers in this case." *Id*. The trial court concluded that because police only presented Defendant with the opportunity to commit the charged offense, and when "police do nothing more than provide a defendant with an opportunity to commit a crime, such conduct is not reprehensible," that Defendant was not entrapped due to reprehensible conduct. *Id*. at 14.

Upon review, the Court of Appeals "discern[ed] no error in the trial court's application of the law, nor do we discern clear error in the court's findings." *Jade*, slip op at 12.

3. Conclusion

The appropriateness of Michigan's modified objective test is readily apparent when it is utilized to analyze the facts of Defendant's case, as the test is adaptable to different factual scenarios and focused on deterring police conduct that impermissibly induces otherwise law-abiding citizens and reprehensible police conduct regardless of causation. Additionally, the trial court did not clearly err in its factual determinations, and neither the trial court nor the Court of Appeals cleared erred in their ultimate holding that Defendant was not entrapped.

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RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellee respectfully requests that this Court DENY leave to appeal.

Dated: 3/28/25

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STATEMENT OF WORD COUNT

There are 5,510 countable words in this brief.

Paige J. Petrosky (P86964)

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INDEX TO ATTACHMENTS

Attachment 1 – Advertisement posted by law enforcement on SkiptheGames.com Att1.SkiptheGamesAd.PeoplesAnswertoLTA

Attachment 2 – Entire text message conversation between Defendant and the undercover officer Att2.TextMessages.PeoplesAnswertoLTA

Attachment 3 – Original set of the parties' stipulated facts Att3.OriginalStipFacts.PeoplesAnswertoLTA

Attachment 4 – Amended set of the parties' stipulated facts Att4.AmendedStipFacts.PeoplesAnswertoLTA

Attachment 5 – *People v Jade*, unpublished opinion and order of the 36th Circuit Court, entered December 29, 2022 (Docket No. 22-23839-FH) Att5.Jade36CC.OpandOrder.PeoplesAnswertoLTA