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STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
BORRELLO, 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 BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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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 *People v Jade*, unpublished order of the Court of Appeals, entered October 16, 2023 (Docket No. 365951).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) (Docket No. 365951). Mr. Jade sought leave to appeal in this Court, which was granted on May 30. 2025. *People v Jade*, ___ Mich ___; 20 NW3d 867 (2025). Jurisdiction is proper in this Court. Const 1963, art VI, § 4; MCR 7.303(B)(1).

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STATEMENT OF QUESTIONS INVOLVED

This Court has asked the parties to address whether the Court of Appeals erred by:

> (1) concluding that the standard of review for entrapment rulings requires consideration of whether the ultimate determination of entrapment is clearly erroneous as provided in *People v Johnson*, 466 Mich 491, 497 (2002), as opposed to a standard involving a conclusion or legal determination that is reviewed de novo, see *People v Fyda*, 288 Mich App 446, 456 (2010);
>
> (2) relying on and applying the legal standard that police do not engage in entrapment by merely presenting a defendant with an opportunity to commit the crime with which he was charged without considering the defendant's readiness and willingness to commit the charged crime, as stated in *People v Jamieson*, 436 Mich 61, 68 (1990); and
>
> (3) affirming the trial court's determination that the defendant was not entrapped, see *Johnson*, 466 Mich at 498.

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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 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. Defendants are

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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. The Court of Appeals said no, holding that entrapment does not occur when police merely present an opportunity to commit a crime. But the court omitted the second half of this maxim—entrapment does not occur when police present an opportunity to commit a crime *to a person ready and willing to commit the crime*. Correctly understood, this means that the person would have committed the charged crime even if he had never crossed paths with police. This Court should hold that the Court of Appeals misapprehended this Court's entrapment jurisprudence and reverse and remand.

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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 on how to conduct a child sex trafficking sting. (50a; 2a). The sting used a website called "Skip the Games." (2a). 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). 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 (64a) and former Michigan State Police detective sergeant (72a), provided additional details about Skip the Games (65a). 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." (69a, 70a). The site

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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." (70a-71a). Skip the Games has also voluntarily registered with parental control programs to keep minors off the site. (71a). Mr. Dalman testified that he had no information suggesting that Skip the Games is used as a cover for child sex trafficking operations. (88a).

Dan Frattura, a detective with the Van Buren County Sheriff's computer crimes unit (90a), testified that he had visited Skip the Games "for a couple of cases unfortunately" (91a). 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. (91a-92a). Nothing about minors or child sex trafficking. (91a-92a). Instead, he suggested that the more vexing problem is minors posting nude photos of themselves on social media. (95a-96a).

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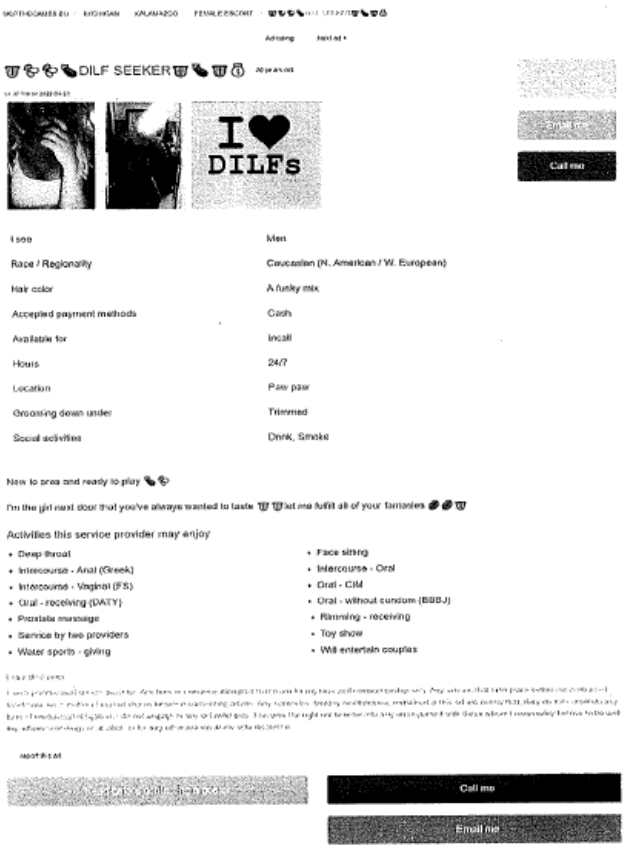
Here, the following ad was posted as part of the sting:



(6a). Although perhaps difficult to see here,[1] the ad lists the escort's age as 20 years old. (6a).[2] "DILF" stands for "dad's I'd like to F." (78a). The woman pictured in the ad—referred to as the "UC" or undercover—was actually an 18-

[1] A full-page version is in the appendix. (6a).

[2] The site does not have age verification for its posters. (80a, 93a).

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year-old working in law enforcement. (2a, 112a).[3] Police did not do a reverse lookup on the phone number they used for the posting. (3a, 53a).

Van Buren Detective Sharon Van Dam was the lead officer in this case. (49a-50a). 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." (50a). She had no previous knowledge of Skip the Games or why Genesee officers used it. (51a). She also testified that she had no experience in these types of sting investigations. (62a).

Jayneel Jade responded to the ad, asking if the decoy[4] was free that afternoon. (8a). The decoy responded that she was. (9a). "Where would we meet at?" Mr. Jade asks. (9a). "In pawpaw," the decoy responds, adding, "Are you cool with younger chicks?":

---

[3] 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. (2a). Genesee deputies would have been in charge of preserving the postings. (52a).

[4] The UC handled any phone calls with suspects while other officers controlled the text exchanges. (112a). "Decoy" as used here means law enforcement collectively impersonating the woman in the posting.

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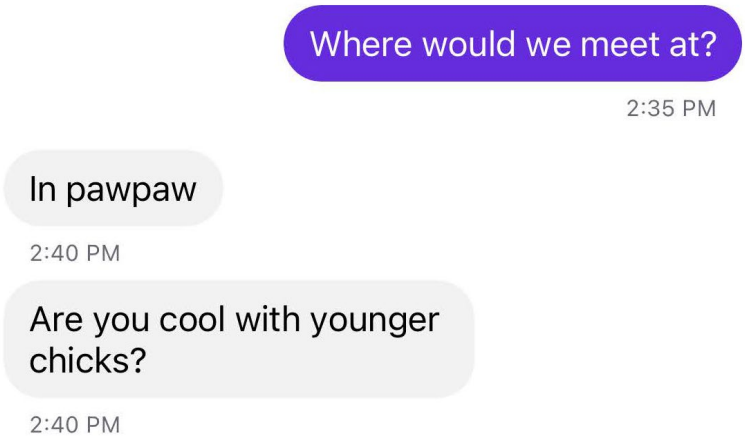

(9a). Mr. Jade says, "I am," and the decoy says, "Ok cool cuz I'm 15." (9a). This provokes hesitance from Mr. Jade:



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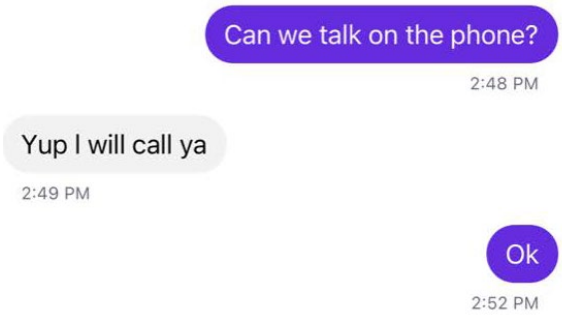
(9a-10a). Mr. Jade googled the decoy's phone number to do a reverse lookup. (3a). It showed that the number belonged to a Tawny Borah, a 34-year-old single woman with no children. (3a).[5]

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



(10a). Inexplicably, police failed to record the phone call. (3a). Detective Van Dam found this unusual. (56a). Mr. Dalman likewise testified that the call should have—and easily could have—been recorded. (74a-75a). Detective Frattura, too, suggested that the call should have been recorded. (98a-100a).

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. (113a). She also admitted that she was not trained to

[5] Police later did another reverse lookup and found that the number came back to "multiple other people." (3a).

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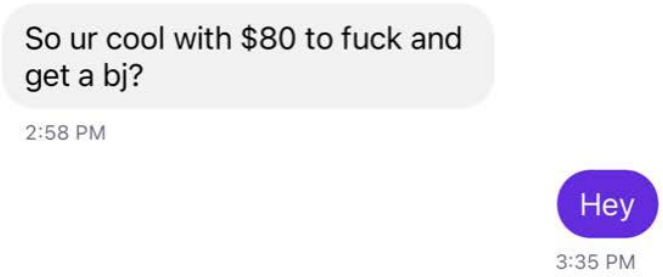
let suspects bring up sex first in her conversations. (112a).[6] She also thought that her call with Mr. Jade had been recorded. (113a).

After the call, the decoy initiated contact with Mr. Jade again, saying, "So ur cool with $80 to fuck and get a bj?" (113a). Mr. Jade waited more than half an hour before simply responding, "Hey":



(11a). 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":

[6] 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. (72a). "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." (72a). Instead, "[t]he person that we are online with or chatting with has to bring it up first." (73a).

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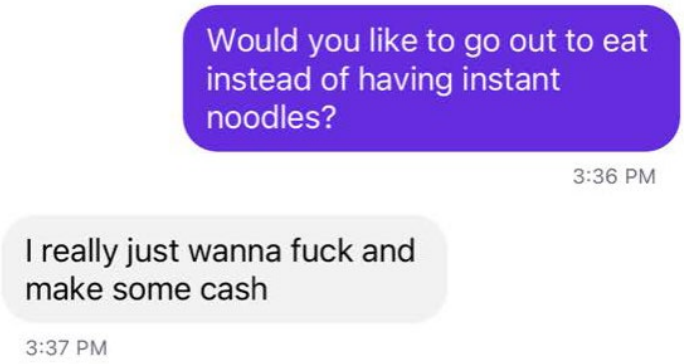

(11a). Mr. Jade asked, "Can you come down to the back entrance? I'm here." (11a). The decoy responded, "Ok, hang on." (11a).

The decoy came out of the hotel covered in a blanket. (54a-55a). It is possible that Mr. Jade saw her face. (113a). As he approached, she turned and went back into the hotel, entering a room close to the entrance. (54a-55a). There is no video of this interaction. Mr. Jade then entered the hotel and was swarmed by police. (54a-55a, 59a). 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. (51a-52a).

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.

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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. (114a-127a). 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. The trial court, considering the mitigating circumstances of the case, ultimately sentenced Mr. Jade to time-served with no probation. Mr. Jade's plea does not waive his entrapment claim. *People v White*, 411 Mich 366, 387 (1981)

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 also 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

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> 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 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. *People v Jade*, ___ Mich App ___; ___ NW3d ___ (2024) (Docket No. 365951). The court's decision will be explored in detail below. Suffice it to say here that the court held that "the trial court's ultimate ruling on the issue of entrapment is reviewed for clear error." *Id.* at ___; slip op at 6. The court also repeatedly stated that Mr. Jade was merely presented with an opportunity to commit a crime, and merely presenting an opportunity to commit a crime does not constitute entrapment. *Id.* at ___; slip op at 7, 9, 10, 11.

Mr. Jade sought leave to appeal in this Court. This Court granted the application, asking the parties to

> address whether the Court of Appeals erred by: (1) concluding that the standard of review for entrapment rulings requires consideration of whether the ultimate determination of entrapment is clearly erroneous as provided in *People v Johnson*, 466 Mich 491, 497 (2002),

as opposed to a standard involving a conclusion or legal determination that is reviewed de novo, see *People v Fyda*, 288 Mich App 446, 456 (2010); (2) relying on and applying the legal standard that police do not engage in entrapment by merely presenting a defendant with an opportunity to commit the crime with which he was charged without considering the defendant's readiness and willingness to commit the charged crime, as stated in *People v Jamieson*, 436 Mich 61, 68 (1990); and (3) affirming the trial court's determination that the defendant was not entrapped, see *Johnson*, 466 Mich at 498. [*People v Jade*, ___ Mich ___; 20 NW3d 867 (2025).]

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ARGUMENT

The defense will take the three questions asked by this Court slightly out of order. First, the defense will examine the entrapment doctrine to elucidate why the Court of Appeals erred by applying an incomplete test. Second, the defense will address the standard of review issue. Third, the defense will explain why the Court of Appeals erred by holding that Mr. Jade was not entrapped.

I. The Court of Appeals misapprehended entrapment

Entrapment is "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 (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." *People v Juillet*, 439 Mich 34 (1991). 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 or manufacture of a new crime by one who would not otherwise have been so disposed." *Id*. "The whole doctrine derives from a spontaneous moral revulsion

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against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist." *United States v Becker*, 62 F2d 1007, 1009 (CA 2, 1933) (opinion by LEARNED HAND). "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." *People v D'Angelo*, 401 Mich 167 (1977). Entrapment is a question for a judge, not a jury, *id*. at 176-177, and the defendant bears the burden of proving entrapment by a preponderance of the evidence, *id*. at 183.

This Court has asked whether the Court of Appeals erred by holding that entrapment does not occur when a defendant is provided with a "mere opportunity" to commit a crime, irrespective of whether the defendant was ready and willing to commit that crime. The defense's analysis in this section will proceed in four parts. First, the defense will give a brief history of the entrapment doctrine to illuminate its theoretical underpinnings. Second, the defense will explore the development of entrapment in Michigan. Third, the defense will examine the unique setting of escalatory entrapment and analogous cases. Fourth, the defense will answer the Court's specific question on whether "mere opportunity" can be divorced from "ready and willing."

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A. Development of the entrapment doctrine

Entrapment as a legal doctrine did not exist at common law. Marcus, *The Development of Entrapment Law*, 33 Wayne L Rev 5, 5-6 (1986).[7] As one court famously put it, "The courts do not look to see who held out the bait, but to see who took it." *People v Mills*, 178 NY 274, 289 (1904). This Court, however, was the first to give serious consideration to the concept that crimes instigated or aided by police should be estopped from prosecution.

In *Saunders v People*, 38 Mich 218 (1878), the defendant, a lawyer, asked a policeman to leave a courtroom unlocked so he could burgle certain documents during the night. *Saunders*, 38 Mich at 219. The policeman consulted his superior, and they decided to lay a trap for the defendant. *Id*. The policeman told the defendant that he would leave the courtroom unlocked as the defendant had asked. *Id*. That night, police laid in wait in the courtroom. *Id*. When the defendant's confederate entered the courtroom and began to take the documents, police arrested him. *Id*.

This Court ultimately overturned the defendant's conviction based on evidentiary errors. *Id*. at 220. Justice MARSTON concurred but was compelled to add that he could not "silently permit the extraordinary course adopted by

[7] Professor Marcus's seminal treatise contains a comprehensive overview of the history of the entrapment doctrine. Marcus, The Entrapment Defense (5th ed), §§ 1.02-1.04G.

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the police officers in this case to pass unnoticed and uncondemned." *Id.* at 221 (MARSTON, J., concurring). As he explained, police should discourage rather than encourage crime:

> The course pursued by the officers in this case was utterly indefensible. Where a person contemplating the commission of an offense approaches an officer of the law, and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance, and to take such steps as would be likely to prevent the commission of the offense, and tend to the elevation and improvement of the would-be criminal, rather than to his farther debasement. . . . The mere fact that the person contemplating the commission of a crime is supposed to be an old offender can be no excuse, much less a justification for the course adopted and pursued in this case. If such were the fact, then the greater reason would seem to exist why he should not be actively assisted and encouraged in the commission of a new offense which could in no way tend to throw light upon his past iniquities, or aid in punishing him therefor, as the law does not contemplate or allow the conviction and punishment of parties on account of their general bad or criminal conduct, irrespective of their guilt or innocence of the particular offense charged and for which they are being tried. Human nature is frail enough at best, and requires no encouragement in wrong-

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> doing. 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. Desire to commit crime and opportunities for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction. [*Id.* at 221-222.]

Chief Justice CAMPBELL agreed with Justice MARSTON's sentiment, adding that "the encouragement of criminals to induce them to commit crimes in order to get up a prosecution against them, is scandalous and reprehensible." *Id.* at 223 (CAMPBELL, C.J., concurring).

One year after *Saunders*, *O'Brien v State*, 6 Tex App 665 (1879), became the first reported decision recognizing entrapment as a defense to a criminal charge. Barlow, *Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment?* 41 Mod L Rev 266, 268 (1978). In 1915, the Ninth Circuit became the first federal court to recognize entrapment. *Woo Wai v United States*, 223 F 412 (CA 9, 1915); *The Development of Entrapment Law*, 33 Wayne L Rev at 13. Within the next 15 years, nearly every federal circuit court had accepted entrapment as a legitimate legal doctrine. *Sorrells v United States*, 287 US 435 (1932) (collecting cases).

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The 1932 decision in *Sorrells* was the first time the United States Supreme Court directly addressed entrapment. While nearly every member of the Court recognized entrapment as a valid legal doctrine centered on estopping police from manufacturing crime, the Court divided on the rationale and test for entrapment. The competing formulations would later become known as the subjective and objective tests. While the United States Supreme Court eventually settled on one test, other states, including Michigan, would chart a different course.

In *Sorrells*, a prohibition agent visited the defendant and asked the defendant to sell him liquor. *Sorrells*, 287 US at 439. The defendant initially refused. *Id*. The prohibition agent learned that he and the defendant had served in the same army division in the First World War, and the agent used this to foster a sense of camaraderie. *Id*. After two more requests for liquor, the defendant relented and procured a half gallon. *Id*. The defendant was charged with and convicted of violating the National Prohibition Act. *Id*. at 438.

The Supreme Court found that it was "clear" that the offense was instigated by the prohibition agent and that the defendant was "otherwise innocent":

> It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of

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> his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War. Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation. [*Id*. at 441 (cleaned up).]

The Court noted that "artifice and stratagem may be employed to catch those engaged in criminal enterprises" and "the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Id*. (cleaned up). But "a different question is presented," the court added, "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Id*. at 442 (cleaned up).

The Court went on to recognize entrapment as a matter of statutory construction. As the Court explained, "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by

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government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Id*. at 448. It would "do violence to the spirit and purpose of the statute" to permit a prosecution under such circumstances. *Id*.

In terms of concrete guidance on what constitutes entrapment, the Court held that "the predisposition and criminal design of the defendant are relevant." *Id*. at 451. The "controlling question" according to the Court, is "whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Id*. "Fundamentally," the Court concluded, "the question is whether the defense, if the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose." *Id*. at 452.

The majority opinion in *Sorrells* provoked an incisive dissent from Justice ROBERTS, joined by two other justices. While agreeing that the defendant had been entrapped, Justice ROBERTS criticized the legislative-intent rationale for entrapment, calling it "a strained and unwarranted construction of the statute; and amounts, in fact, to judicial amendment." *Id*. at 456 (ROBERTS, J., dissenting). Instead, he would have justified entrapment on public policy grounds comparable to equitable doctrines. *Id*. at 455. As

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he explained, "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." *Id*. at 457. Justice ROBERTS also disavowed the majority's focus on the defendant's predisposition, saying, "The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy." *Id*. at 459.

The Supreme Court next had occasion to address entrapment in *Sherman v United States*, 356 US 369 (1958). There, the defendant and a "government informer" met at a doctor's office where both were being treated for narcotic addiction. *Sherman*, 356 US at 372. "Several accidental meetings followed," and they bonded over their mutual experiences with narcotics addiction. *Id*. The informer eventually asked the defendant if the defendant could procure narcotics for him "because he was not responding to treatment." *Id*. The defendant declined, but after numerous requests "predicated on [the informer's] presumed suffering," the defendant relented and procured narcotics that he then shared with the informer. *Id*.

The majority in *Sherman* adhered to *Sorrell*'s legislative-intent rationale, saying, "Congress could not have

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intended that its statutes were to be enforced by tempting innocent persons into violations." *Sherman*, 356 US at 372. The Court once more drew a distinction between detecting and preventing crimes versus creating crimes: "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime." *Id.* at 372. As the Court put it, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Id.* The Court again held that a defendant's predisposition could be considered alongside "the conduct of the government agent." *Id.* at 373.

Applied in *Sherman*, the Court concluded that entrapment had been established as a matter of law since it was "patently clear that [the defendant] was induced by" the informer. *Id.* The Court rejected the prosecution's argument that the defendant's previous criminal history involving narcotics—"a nine-year-old sales conviction and a five-year-old possession conviction"—proved that the defendant "had a readiness to sell narcotics *at the time* [*the informer*] *approached him*, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time." *Id.* at 375-376 (emphasis added).[8] According to the Court, the case exemplified "an evil which the defense

[8] The Court later made clear that the prosecution must show that predisposition existed *before* the police inducement. *Jacobson v United States*, 503 US 540 (1992).

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of entrapment is designed to overcome": "the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes *which he otherwise would not have attempted*." *Id*. at 376 (emphasis added).

Picking up the mantle from Justice ROBERTS, Justice FRANKFURTER, joined by three other justices, dissented. Justice FRANKFURTER once again criticized the legislative-intent rationale for entrapment, saying that "the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged." *Id*. at 379 (FRANKFURTER, J., dissenting). Instead, entrapment is justified on equitable grounds: "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced." *Id*.

To Justice FRANKFURTER, the "crucial question" for purposes of entrapment "is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." *Id*. at 382. As he elaborated, "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced

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society." *Id.* at 382-383. Justice FRANKFURTER cautioned, though, that "this does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise." *Id.* at 383 (cleaned up). On the contrary, "such indeed is their obligation." *Id.* (cleaned up). The line is crossed, however, when police induce a crime that the defendant otherwise would not have committed:

> In holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. . . .The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. [*Id.* at 383-384.]

Echoing Justice MARSTON, Justice FRANKFURTER concluded, "Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime." *Id.* at 384.

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The Supreme Court's next major entrapment decision came in 1973. *United States v Russell*, 411 US 423 (1973), involved the defendant's manufacture of methamphetamine in which a government agent supplied phenyl-2-propanone, an essential ingredient for methamphetamine. *Russell*, 411 US at 425-426. Propanone was legal to possess, and although it was difficult to obtain, "it was by no means impossible." *Id.* at 431. In fact, the defendant had previously obtained propanone without the assistance of the government agent. *Id.* The Court concluded that there was ample evidence of predisposition to negate an entrapment claim, explaining, "He was an active participant in an illegal drug manufacturing enterprise which began before the Government agent appeared on the scene, and continued after the Government agent had left the scene." *Id.* at 436.

Dissenting, Justice STEWART once more championed the entrapment doctrine as conceived by Justices ROBERTS and FRANKFURTER, which by then had become known as the "objective" test for entrapment as opposed to the "subjective" test endorsed by the majority. *Russell*, 411 US at 441 (STEWART, J., dissenting). Like Justices ROBERTS and FRANKFURTER, Justice STEWART criticized the majority's legislative-intent rationale as fictitious. *Id.* at 441-442. He also trenchantly criticized the "otherwise innocent" and "predisposed" terminology used by the majority:

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> To say that such a defendant is 'otherwise innocent' or not 'predisposed' to commit the crime is misleading, at best. The very fact that he has committed an act that Congress has determined to be illegal demonstrates conclusively that he is not innocent of the offense. He may not have originated the precise plan or the precise details, but he was 'predisposed' in the sense that he has proved to be quite capable of committing the crime. That he was induced, provoked, or tempted to do so by government agents does not make him any more innocent or any less predisposed than he would be if he had been induced, provoked, or tempted by a private person—which, of course, would not entitle him to cry 'entrapment.' Since the only difference between these situations is the identity of the tempter, it follows that the significant focus must be on the conduct of the government agents, and not on the predisposition of the defendant.
>
> The purpose of the entrapment defense, then, cannot be to protect persons who are 'otherwise innocent.' Rather, it must be to prohibit unlawful governmental activity in instigating crime. [*Id.* at 442 (cleaned up).]

Thus, according to Justice STEWART, entrapment is justified under a purity-of-the-temple rationale. *Id.* at 442-443.

Like his predecessors, Justice STEWART was careful to note that police are not prohibited from the "use of undercover activity, strategy, or deception." *Id.* at 445. "Thus,"

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he explained, "government agents may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit the crime an opportunity to do so." *Id*. "But," he continued, "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, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred." *Id*. "For in that situation," he concluded, "the Government has engaged in the impermissible manufacturing of crime, and the federal courts should bar the prosecution in order to preserve the institutional integrity of the system of federal criminal justice." *Id*.

After *Russell*, the Supreme Court continued to adhere to the subjective test for entrapment over the objections of its detractors. *Hampton v United States*, 425 US 484 (1976); *Mathews v United States*, 485 US 58 (1988). A different story would play out in Michigan, however.

B. Entrapment in Michigan

In *People v Turner*, 390 Mich 7 (1973)—decided only a few months after *Russell*—this Court considered for the first time whether to adopt the objective or subjective test for entrapment. After surveying *Saunders*, *Sorrells*,

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Sherman, and *Russell*, the Court found that Justice STEWART's dissent in *Russell* "persuasively articulates why the objective test should be adopted in Michigan." *Turner*, 390 Mich at 19. The Court criticized the subjective test because "it fails to focus on the real concern in these cases—whether the actions of the police were so reprehensible under the circumstances, that the Court should refuse, as a matter of public policy, to permit a conviction to stand." *Id.* at 22 (cleaned up). The Court concluded, "We agree with the position of Justices Roberts, Frankfurter, and Stewart of the United States Supreme Court and the view articulated by Justices Marston and Campbell of our Supreme Court and adopt an objective test of entrapment in Michigan." *Id.* Other state courts have likewise adopted the objective test for entrapment relying on the dissenting opinions from the United States Supreme Court. See, e.g., *Grossman v State*, 457 P2d 226 (Alas 1969); *People v Barraza*, 23 Cal 3d 675 (1979).

This Court's next significant entrapment decision came in *Jamieson*, 436 Mich 61. There, the Court considered whether to abandon the objective test in favor of the subjective test. *Jamieson*, 436 Mich at 65. The Court ultimately upheld the objective test, explaining, "We have concluded that there is not sufficient justification or need to change a well-settled principle of law in this state." *Id.*

The Court then went on to give concrete guidance on how to implement the objective test. Especially significant

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to the case at hand, the Court said, "There is no entrapment if a policeman merely furnishes an opportunity for the commission of a crime *by one ready and willing to commit the activity*." *Id.* at 68 (cleaned up). The Court reiterated, "A defense under the objective approach is grounded on ' "whether the police conduct revealed in a particular case falls below the standards, to which the common feelings respond, for the proper use of governmental power." ' " *Id*, quoting *Russell*, 411 US at 441, quoting *Sherman*, 356 US at 382. The Court added that "the purpose of the objective test" "is to prohibit police conduct that is, in an objective sense (not in individual cases), likely to encourage the commission of crime that would not otherwise have been committed." *Jamieson*, 436 Mich at 76. The "driving force of the objective entrapment test," the Court elaborated, "is whether such police conduct has as its probable and likely outcome the instigation rather than the detection of criminal activity." *Id.* at 77. In the same vein, the Court said, " 'The defense is only a remedy for conduct likely, when objectively considered, to induce or instigate the commission of the crime by a person not ready and willing to commit it.' " *Id.* at 82, quoting *People v Crawford*, 143 Mich App 348, 354 (1985). At bottom, "the question of question of entrapment centers on whether the police conduct served to manufacture rather than investigate the crime in question." *Jamieson*, 436 Mich at 82 (cleaned up).

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Similarly, the Court reaffirmed the underlying rationale of the entrapment doctrine—to protect the integrity of the courts: "It is the primary responsibility of courts to protect the integrity of the judicial system when, in furtherance of a conviction, conduct which rises to an outrageous and reprehensible level, as defined by the entrapment defense, is used." *Id*. at 81 (cleaned up). In turn, reprehensibility requires an assessment of whether the police created a criminal offense. *Id*. at 77-78. The test, according to the *Jamieson* Court, is "whether, under the circumstances, the governmental activity would induce a hypothetical person not ready and willing to commit the crime to engage in criminal activity." *Id*. at 80. The Court later cast the test as whether police conduct would "induce or instigate the commission of a crime by the average person, similarly situated to these defendants, who is not ready and willing to commit it." *Id*. at 90.

The Court in *Jamieson* also acknowledged that since *Turner*, the Court of Appeals had issued numerous decisions addressing entrapment, and so "a body of common law has developed in this state to define the standards and boundaries of the defense." *Id*. at 87. The Court gave several "factors" that had been identified in previous cases, saying, "A review of the common law of this state shows that discretionary investigative enforcement measures extend beyond a tolerable level when *by design* the government uses continued pressure, appeals to friendship or

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sympathy, threats of arrest, an informant's vulnerability, sexual favors, or procedures which escalate criminal culpability." *Id.* at 89 (cleaned up).

A year later, this Court again addressed the entrapment doctrine in *People v Juillet*, 439 Mich 34 (1991), which produced four separate opinions, none of which garnered a majority. Justice BRICKLEY, joined by Justices RILEY and GRIFFIN, would have incorporated aspects of the subjective test into Michigan's test. *Juillet*, 439 Mich at 53 (opinion by BRICKLEY, J.). As he saw it, "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 55. In other words, "the circumstances of the particular defendant may be considered by the trial court in analyzing the ready and willing component of the objective entrapment test." *Id.* (cleaned up). This includes any vulnerabilities the defendant may have, *id.*, while prohibiting consideration of predisposition, *id.* at 56.

Meanwhile, Justice CAVANAGH, joined by Justices LEVIN and MALLETT, generally agreed with Justice BRICKLEY's formulation of the "causation prong of the objective entrapment test." *Id.* at 72 (opinion by CAVANAGH, J.). But Justice CAVANAGH disagreed that subjective considerations should be imported. *Id.* Additionally, Justice CAVANAGH

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would have held that entrapment occurs irrespective of causation when police engage in reprehensible conduct. *Id.*

Similarly, Justice BOYLE endorsed a "dual view" of entrapment "that would bar prosecution because of truly reprehensible police conduct and would bar prosecution for conduct that instigates or manufactures crime." *Id.* at 93-94 (opinion by BOYLE, J.). But she would have preferred a subjective test for the causation prong. *Id.* at 94. That said, she ultimately "opted to align myself with the instigation analysis of the lead opinion[, Justice BRICKLEY's,] because to leave the Court in its divided posture is to do, perhaps, greater damage to the Court and the jurisprudence than I fear from either of the new 'objective' tests." *Id.* at 108.

Finally, Justice GRIFFIN would have preferred to severely limit entrapment to circumstances that evince a constitutional due process violation. *Id.* at 109-110 (opinion by GRIFFIN, J.). Nonetheless, he concurred with Justice BRICKLEY's opinion although he disagreed with the result. *Id.* at 109.

In *People v Fabiano*, 192 Mich App 523 (1992), our Court of Appeals parsed the opinions in *Juillet* and gleaned the propositions that had obtained majority support. The court found that four justices had signed onto Justice BRICKLEY's formulation of the "government-instigation" or "impermissible inducement" prong. *Fabiano*, 192 Mich App at 526-528. The court also found that four justices had concurred on a separate "reprehensible-conduct prong." 528-

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530. Thus, entrapment exists when "(1) the police engaged in impermissible conduct that would have induced a person similarly situated as the defendant, though otherwise law-abiding, to commit the crime, *OR* (2) the police engaged in conduct so reprehensible that it cannot be tolerated by the Court." *Id*. at 526. Both tests require reprehensible police conduct, although "the police conduct must be more reprehensible under the second prong than under the first prong." *Id*. at 531. The court likened the second prong "to a due process violation." *Id*. at 532.

While this Court has never explicitly addressed whether *Fabiano* was correctly decided, it has nonetheless applied its two-prong framework in at least one case. *People v Johnson*, 466 Mich 491, 498 (2002). The Court has termed *Fabiano*'s formulation a "modified objective test." *Id*. at 508.[9]

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[9] Judge GRIFFIN, dissenting in *Fabiano*, would have found that *Juillet* "is not binding precedent because a majority of the justices were unable to agree on a new rule of law." *Fabiano*, 192 Mich App at 534 (GRIFFIN, J., dissenting). In the case at hand, the defense argued in its application that Judge GRIFFIN was correct and that this Court should return to a purely objective test as adopted in *Turner* and left substantially unchanged by *Jamieson*. (Def MSC App, p 26-27). The defense also asked the Court to more broadly address the correct articulation of Michigan's entrapment defense given the confusion sown by *Juillet*. (Def MSC App, p 27). Nonetheless, the defense recognizes that this Court has granted leave to consider a more limited question—

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Additionally, based on the "factors" listed in *Jamieson*, 436 Mich at 89, and added to in *Juillet*, 439 Mich at 57, the Court of Appeals has compiled a list of twelve factors that bear on the government-instigation prong, otherwise known as the causation or impermissible-inducement prong:

> (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,
>
> (5) whether excessive consideration was offered to the defendant,
>
> (6) whether the police guaranteed that the acts were not illegal,

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whether the Court of Appeals erred by "relying on and applying the legal standard that police do not engage in entrapment by merely presenting a defendant with an opportunity to commit the crime with which he was charged without considering the defendant's readiness and willingness to commit the charged crime." *Jade*, 20 NW3d at 867 (cleaned up). Therefore, the defense will restrict its analysis to this question.

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> (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 (2012) (cleaned up).]

These factors are evaluated without considering the defendant's subjective predisposition to commit the crime. *Juillet*, 439 Mich at 56. And although the existence of multiple factors can strengthen an entrapment claim, *id*. at 66-69, entrapment has been found where only one factor is present, *id* at 56-57; *Jamieson*, 436 Mich at 89. So these "factors" can also be thought of as examples of scenarios where entrapment has been found.

In sum, as it stands today, entrapment can be shown in one of two ways. First, entrapment occurs when police impermissible induce the defendant to commit a crime. This occurs when the police's conduct would have induced a person similarly situated to the defendant to commit the crime. But entrapment does not occur when police merely

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furnish an opportunity to commit a crime to one ready and willing to commit it. Second, entrapment occurs when police act reprehensibly, regardless of whether their actions caused the defendant to commit the crime.

C. Escalation as entrapment

As mentioned above, this Court recognized that entrapment occurs when police use "procedures which escalate criminal culpability." *Jamieson*, 436 Mich at 89. For that proposition, the Court cited *People v Killian*, 117 Mich App 220 (1982). There, the police had information that the defendant used marijuana and cocaine and had offered to sell marijuana, but "the police had good reason to believe that defendant was not involved in cocaine sales." *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 instigated a crime." *Id.* at 224.

Juillet involved a similar scenario. There, a "police undercover informant" moved to Cheboygan and attempted to infiltrate "an alleged 'drug subculture' " in the area. *Juillet*, 439 Mich at 47. Police paid the informant for his efforts, but they did not track his expenditures or otherwise supervise his activities. *Id.* at 47-48. The informant frequently bought drugs and alcohol and shared them with others, including minors. *Id.* One day, the informant crossed paths with the defendant, who used marijuana but had never sold it. *Id.* at 48, 67. The informant asked the defendant for marijuana, and the defendant said "that although he had some marijuana, it was not for sale." *Id.* at 48. The informant asked again, and the defendant gave him some. *Id.* The informant gave the defendant money for the marijuana, although the defendant had not asked for any. *Id.* The defendant and the informer subsequently struck up a friendship, and the defendant procured drugs for the informer on multiple occasions. *Id.* at 48-50.

This Court held that the defendant had been entrapped. The Court noted that although the defendant was a drug user, there was no evidence that he had ever dealt drugs. *Id.* at 67-68. In this way, the informer escalated the defendant's criminal culpability. *Id.* The Court "noted that courts have found, under either the objective or the subjective test

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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." *Id.* at 67, citing *Shrader v State*, 101 Nev 499 (1985); *State v Soroushirn*, 571 P2d 1370 (Utah, 1977).

In both *Killian* and *Juillet*, it does not appear that much if any pressure was put on the defendants. *Killian* does not articulate any coercive tactics used by police to turn the defendant into a cocaine dealer. Likewise, in *Juillet*, although the informant's requests for drugs were persistent, the defendant's will was not overborne. As Justice BOYLE observed, "Juillet pleaded guilty to delivery of marijuana, the precise activity he engaged in on the very first day he met [the informant], and with little or no inducement." *Juillet*, 439 Mich at 106 (BOYLE, J., dissenting). And yet this Court still concluded that the defendant had been entrapped.

All of this is to say that if "merely providing an opportunity to commit a crime" does not constitute entrapment, *Killian* and *Juillet* would have been decided differently.[10]

[10] 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." *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.

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Implicitly, then, simply providing an opportunity to commit a crime *can* constitute entrapment under certain circumstances. What circumstances? When the defendant was not "ready and willing" to commit the crime in the first place, that is, when the defendant would not have committed the crime but for police involvement. This reading of *Killian* and *Juillet* jibes with the underlying purpose of the entrapment doctrine—to stop police from manufacturing crime.

Judge Posner's counterfeiter hypothetical illustrates this point well, albeit from a different angle than the escalation cases. As Judge Posner framed it,

> Suppose the government went to someone and asked him whether he would like to make money as a counterfeiter, and the reply was, "Sure, but I don't know anything about counterfeiting." Suppose the government then bought him a printer, paper, and ink, showed him how to make the counterfeit money, hired a staff for him, and got everything set up so that all he had to do was press a button to print the money; and then offered him $10,000 for some quantity of counterfeit bills. [*United States v Hollingsworth*, 27 F3d 1196, 1199 (CA 7, 1994).]

Wasn't the defendant in *Killian* provided with a "mere opportunity" to deal cocaine?

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No one would seriously dispute that the would-be counterfeiter has been entrapped. *Id*. And yet he was "merely" presented with an "opportunity" to commit a crime. This highlights the necessity of readiness and willingness on the part of the defendant. "The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation." *Id*. at 1200.

A different iteration of this principle plays out in so-called "drunk decoy" cases. For example, in *Sheriff, Washoe Cnty v Hawkins*, 104 Nev 70 (1988), an undercover police officer posed as an unconscious drunk lying in a doorway alcove with cash hanging out of his pocket. *Hawkins*, 104 Nev at 71. A young passerby pilfered the money and was arrested by police lying in wait. *Id*. at 72. The court concluded that this scheme was entrapment. "The use of exposed money and a supposedly helpless, vulnerable decoy created an extraordinary temptation which resulted in the entrapment of young men who were not at the time discernibly bent on committing a crime." *Id*. at 75. In other words, "the police did not uncover crime; they created it." *Id*. at 72 (cleaned up). The court explained, "A decoy operation must focus upon some real, substantial, and subsisting problem of antisocial behavior, and it must be

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structured so as to identify actual social predators who are engaging in such behavior, rather than merely being structured to ensnare weak and gullible persons." *Id*. at 77 (cleaned up). So the "mere opportunity" in *Hawkins* supported a meritorious entrapment claim. See also *Jamieson*, 436 Mich at 95-96 (CAVANAGH, J., concurring) (opining 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").

Recognizing that a "mere opportunity" can constitute entrapment exposes other potential problems with extant entrapment doctrine. Again, for impermissible inducement, the inquiry has been phrased as whether "the police engaged in impermissible conduct that would have induced a person similarly situated as the defendant, though otherwise law-abiding, to commit the crime." *Fabiano*, 192 Mich App at 526. The rub is that otherwise law-abiding people typically would not commit a crime when presented with a "mere opportunity." This dilemma was identified by the Alaska Supreme Court in *Pascu v State*, 577 P2d 1064, 1067 (Alas 1978), where the court pointed out, "An 'average person' probably cannot be induced to commit a serious crime except under circumstances so extreme as to amount

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to duress."[11] See also *Juillet*, 439 Mich at 96 (BOYLE, J., dissenting) ("The normally law-abiding or average person probably cannot be induced or tempted into criminal conduct absent duress or coercion."). "Yet," the *Pascu* Court continued, "it is clear that entrapment may occur where the degree of inducement falls short of actual duress." *Pascu*, 577 P2d at 1067. The court resolved this tension thus:

> What is prohibited is unreasonable or unconscionable efforts on the part of the police to induce one to commit a crime so that he may be arrested and prosecuted for the offense. In determining whether entrapment has occurred, the trial court must focus upon the particular conduct of the police in the case presented. The question is really whether that conduct falls below an acceptable standard for the fair and honorable administration of justice. [*Id.* (cleaned up).]

In other words, were the police creating crimes that the defendant otherwise would not have committed? Chief Justice CAVANAGH made the same observation in *Juillet*: "Properly understood in light of the true nature of the objective test, I believe Justice BRICKLEY's formulation essentially asks whether the police conduct at issue is, in an

[11] *Pascu* is cited throughout Professor Marcus's entrapment treatise for this point, which some consider a flaw in the articulation of entrapment doctrine. See, e.g., The Entrapment Defense, § 3.05, pp 23-24.

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objective sense, the kind that would generally cause the average, hypothetical person to engage in criminal activity *that such a person would not otherwise have engaged in*." *Juillet*, 439 Mich at 73-74 (opinion by CAVANAGH, C.J.) (emphasis added).

In sum, the escalation cases—along with *Hollingsworth* and *Hawkins*—show that a "mere opportunity" *can* give rise to an entrapment claim. The inquiry is whether the opportunity was designed to ferret out only those who were ready and willing to commit the crime *before* police inducement. This inquiry could also be phrased conversely: were the police detecting crimes, or were they creating them?

D. A defendant's readiness and willingness to commit the charged crime must be shown for the prosecution to avoid entrapment

This Court has asked whether the Court of Appeals erred by "relying on and applying the legal standard that police do not engage in entrapment by merely presenting a defendant with an opportunity to commit the crime with which he was charged without considering the defendant's readiness and willingness to commit the charged crime." *Jade*, 20 NW3d at 867 (cleaned up). The answer to that question is easy—yes. In *Jamieson*, this Court held, "There is no entrapment if a policeman merely furnishes an opportunity for the commission of a crime *by one ready and*

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willing to commit the activity." Again, the criminal opportunity must be designed to ensnare those who were ready and willing to commit the crime *before* police entered the picture. So offering a "mere opportunity" to commit a crime *can* constitute entrapment when the opportunity is targeted at those not ready and willing to commit the crime.

The Court of Appeals failed to grasp this distinction. At no point in its opinion did it consider whether the "mere opportunity" concocted by police in this case was targeted at those "ready and willing" to commit the charged crimes. Instead, the court repeatedly said that offering an opportunity to commit a crime does not constitute entrapment. *Jade*, ___ Mich App at ___; slip op at 7, 9, 10, 11, 12. By only considering half of this precept, the Court of Appeals committed an error of law.

To be sure, prior decisions have indulged in some imprecision with "mere opportunity" and "ready and willing." The panel in *Jade* cited cases in which this Court and the Court of Appeals have said that entrapment does not occur when police present an opportunity to commit a crime. *Id.* at ___; slip op at 7, quoting *Johnson*, 466 Mich at 498; *id.* at ___; slip op at 9, quoting *People v Butler*, 444 Mich 965, 965-966 (1994); *id.*, quoting *People v Williams*, 196 Mich App 656, 662-663 (1992); *id.* at ___; slip op at 11, citing *Johnson*, 466 Mich at 508. The defense sees these statements as imprecise shorthand. See, e.g., *Woodford v Visciotti*, 537 US 19, 23-24 (2002) (condoning "probable" as

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shorthand for "reasonable probability" in the ineffective-assistance-of-counsel context while recognizing its "imprecision"). Plus, in *Butler*, *Williams*, and *Johnson*, the evidence showed that the defendant had intended to commit the same crime even without police inducement. *Butler*, 444 Mich at 966;[12] *Williams*, 196 Mich App at 662-663; *Johnson*, 466 Mich at 503. In other words, "ready and willing" were not at issue in those cases. This Court has never held that presenting an opportunity to commit a crime is not entrapment irrespective of the defendant's readiness and willingness to commit the crime.

Although alluded to above, a closer examination of the meaning of "ready and willing" should be undertaken at this point. The common usage of these terms would indicate that the defendant must be both prepared and intent on committing the crime. *Merriam-Webster's Collegiate Dictionary* (11th ed). But as some have pointed out, the phrase runs the risk of importing notions of predisposition into the objective test. As Chief Justice CAVANAGH lamented, "Unfortunately, the 'ready and willing to commit the crime' language has, in my view, sown confusion and lent itself to misinterpretation." *Juillet*, 439 Mich at 74 (CAVANAGH, C.J., dissenting). He explained, "The language seems to offer an ever-present

[12] *Butler* is addressed in detail below, as it was relied on heavily by the trial court.

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temptation to embark down the forbidden path of considering whether the particular defendant at bar was 'ready and willing to commit the crime,' thus in effect adopting the subjective test's focus on individual predisposition." *Id.* It also leads to the circular conclusion that the defendant's commission of a crime shows that he was ready and willing to commit it—an ouroboros that would swallow nearly any entrapment claim. *Russell*, 411 US at 442 (STEWART, J., dissenting).

And yet "ready and willing" can be viewed from an objective perspective. The focus must shift to "the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime." *Sherman*, 356 US at 384 (FRANKFURTER, J., dissenting). In other words, would the police conduct create crimes that never would have been committed without their involvement? *Id.* ("The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law.").

Williams, 196 Mich App 656—a case relied on heavily by both lower courts—is an apt example. 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

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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 "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.

This is the correct analysis under the objective test. 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 buyers had set out to buy cocaine before any interaction with police, since, objectively considered, only people who set out to buy drugs would approach a man standing on the corner *and ask for drugs*. In other words, if the undercover officers had not been on the corner, the buyers likely would have sought drugs elsewhere.

This, the defense contends, is what "ready and willing" truly means—that the defendant planned on committing the crime before police ever came on the scene. From a subjective-test perspective, this is the "pre" in predisposition: it must be shown that "the defendant was disposed to commit the criminal act *prior* to first being approached by Government agents." *Jacobson*, 503 US at 549 (emphasis added). See also *Sherman*, 356 US at 375 (stating that the

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evidence did not demonstrate that the defendant "had a readiness to sell narcotics *at the time* [*the informer*] *approached him*") (emphasis added). The question is whether the defendant was going to commit the crime before he encountered police, not whether the defendant became disposed once offered the opportunity. Entrapment occurs when police induce a defendant to commit a crime "which he otherwise would not have attempted." *Id*. at 376.

In sum, the Court of Appeals erred by divorcing "ready and willing" from "mere opportunity." Correctly understood, entrapment does not occur when police provide an opportunity to commit a crime to a person who had already planned to commit the same crime.

II. A trial court's ultimate determination of entrapment—its application of the law to the facts—should be reviewed de novo

In its order granting leave, the Court of Appeals asked the parties to address the correct standard of review for entrapment claims, noting an inconsistency in the caselaw. *Jade*, unpub ord. Specifically, in *Johnson*, 466 Mich at 497, this Court said, "A trial court's finding of entrapment is reviewed for clear error." But in *Fyda*, 288 Mich App at 456, 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."

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Following the citations in *Johnson* and *Fyda*, both end at *D'Angelo*, 401 Mich 167.[13] There, this Court announced several procedural rules for assessing entrapment claims, including that entrapment is a question for a 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.*]

Here, 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 *Jamieson*, 436 Mich at 80, which cites *D'Angelo*, 401 Mich at 183, whereas *Fyda* cites *People v Milstead*, 250 Mich App 391, 397 (2002), which cites *People v McGee*, 247 Mich App 325, 344 (2001), which cites *People v Patrick*, 178 Mich App 152, 154 (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 (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 (2017). There is no reason why the same would not 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 (1993); *People v Akins*, 259 Mich App 545, 563 (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 (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

[14] *People v Walker*, 374 Mich 331 (1965) (requiring an evidentiary hearing when a defendant claims that a confession was involuntary).

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be treated equally. See, e.g., *Griffith v Kentucky*, 479 US 314, 323 (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. *Ornelas v United States*, 517 US 690, 697 (1996) ("Such varied results would be inconsistent with the idea of a unitary system of law."). 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.[15] This same rationale militates in favor of de novo review for entrapment claims.

And the prosecution agreed. In its brief on appeal in the Court of Appeals, 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.

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[15] The United States Supreme Court gave much the same rationale for holding that reasonable-suspicion and probable-cause determinations by police officers should be reviewed de novo. *Ornelas*, 517 US at 697-698.

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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 those facts." *Jade*, ___ Mich App at ___; slip op at 5-6. But then the Court looked to *People v Hartwick*, 498 Mich 192 (2015), a case involving the immunity provision of the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*. *Id*. at ___; slip op 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*, ___ Mich App at ___; slip 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).

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In a concurring opinion, Judge MURRAY found that *Fyda* "was not necessarily inconsistent with" *Johnson*. *Jade*, ___ Mich App at ___; slip 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 review had actually referred to a trial court's finding of fact, not ultimate ruling. *Id*. at ___; slip op 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 ___; slip op at 2, quoting *People v Flansburgh*, 71 Mich App 1, 5 (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." *Id*. 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 ___; slip op at 3 (cleaned up). *Fyda*, then, correctly articulated the standard of review for entrapment. *Id*. at ___; slip op at 2.

That said, Judge MURRAY acknowledged that the majority's holding—that a trial court's "ultimate ruling" is

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reviewed for clear error—was consistent with *Hartwick*. *Id.* at ___; slip op 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 conclusion of whether a defendant was entrapped is reviewed for clear error. *Id.* 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 ___; slip op at 3-4, 4 n 5.

Judge MURRAY is correct. Again, the notion that legal conclusions about whether a defendant was entrapped are reviewed for clear error emanates from *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.

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To be sure, entrapment claims will often turn on disputed issues of fact. Suppose, for example, that a police officer in *Killian* had testified that he received information that the defendant was a cocaine dealer. The entrapment claim—that is, the assessment of whether police were manufacturing versus investigating crimes—could largely turn on the trial court's appraisal of the police officer's credibility. When an entrapment claim rises or falls on this kind of factual determination, appellate review will effectively be for clear error.

But a different analysis is required when—as in Mr. Jade's case—a reviewing court is tasked with applying the law to undisputed facts.[16] In this scenario, as discussed above, there is no reason why the application of the law to the facts should not be reviewed de novo, just as it is in every other analogous setting. This Court should clarify that "findings" as used in *D'Angelo* and *Johnson* refer only to factual findings, not a trial court's ultimate determination on an entrapment claim. This clarification would not require the Court to overrule these cases.[17]

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[16] To be clear, while the parties previously disputed issues surrounding Mr. Jade's actions, intent, and culpability, the conduct by police officers was not generally disputed.

[17] Nor would the Court need to call *Hartwick* into question, as *Hartwick* simply cited *Johnson* for the proposition that fact-dependent determinations are reviewed for clear error.

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If this Court disagrees with the defense's interpretation of the statements in *D'Angelo* and *Johnson*, the Court otherwise has the authority to modify the standard of review. Const 1963, Art VI, § 5[18] and § 6[19] imbue this Court with "broad jurisdiction and far-reaching powers in the area of appellate review." *People v Coles*, 417 Mich 523 (1983), overruled on other grounds by *People v Milbourn*, 435 Mich 630 (1990). This Court retains the power to expand the scope of appellate review. *Coles*, 417 Mich at 542. See also LaFave, Criminal Procedure (4th ed), § 27.5(e) ("When not specified by statute, courts will choose the standard to apply."). If this Court considers the statements in *D'Angelo* and *Johnson* to be incorrect, it should "refine" the standard of review to provide that the application of the law to the facts is reviewed de novo. See *Herald Co, Inc v E Michigan Univ Bd of Regents*, 475 Mich 463, 471 (2006) (opting to "refine" the standard of review after a previous case

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The defense does not disagree with this premise, as explained in the modified-*Killian* hypothetical.

[18] This section provides in pertinent part, "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."

[19] This section provides in pertinent part, "The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court." (Cleaned up).

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"inadvertently misstated the appropriate standard of review for discretionary determinations in FOIA cases"). Otherwise, as Judge MURRAY observed, this Court will leave an anomaly in the law of appellate review.

III. The Court of Appeals erred by holding that Mr. Jade was not entrapped.

Under either or both prongs of Michigan's entrapment test, this Court should hold that Mr. Jade was entrapped and that the Court of Appeals erred by holding otherwise.

A. Reprehensible conduct

As outlined above, police conduct is "reprehensible" for purposes of entrapment when it creates rather than detects crimes. *Jamieson*, 436 Mich at 77-78. Here, the bait-and-switch sting was reprehensible.

First, the evidence shows that police were not investigating a known or suspected criminal enterprise. The lead detective testified that she had never heard of Skip the Games and didn't know why it was being used. (51a). There was no evidence presented that Skip the Games is a front for underage prostitution or that underage prostitution is an acute problem in Van Buren County. In short, police were not detecting crimes they had reason to believe anyone was committing. Instead, they invented a crime and

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trolled for people to commit it. This was a classic "fishing expedition" emblematic of entrapment. *Jamieson*, 436 Mich at 91.

Second, the sting did not target people soliciting underage prostitutes. Skip the Games is an adults-only site, and, again, there is no evidence that underage prostitutes use the site. The decoy posting the police created also did not hint or insinuate that the escort was underage. So police were not targeting people who were ready and willing to solicit sex with a minor. Instead, they targeted people who were ready and willing to solicit an adult escort and then goaded them to go one step farther. As in *Killian* and *Juillet*, while prospective patrons were inclined to commit one crime, the police conduct was designed to bamboozle them into a crime they never set out to commit.

At least one federal court has held that a substantially similar sting operation was sufficiently problematic to bar prosecution. In *United States v Lofstead*, 574 F Supp 3d 831 (D Nev 2021), 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

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to confirm that she was at least 16 years old.[20] *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").[21] The court found the FBI's conduct in *Lofstead* outrageous. *Lofstead*, 574 F Supp 3d at 849. First, there was no evidence that the defendant or anyone else was using Skip the Games to solicit sex with minors. *Id.* at

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[20] 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.

[21] In *Russell*, the Supreme Court majority suggested that certain police conduct could be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Russell*, 411 US at 431-432.

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849-851. Next, "the proposed 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. 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. 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, then altering the poster's age, and finally

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encouraging [the defendant] to continue with an in-person meeting after he showed hesitation." *Id*. at 849.

The trial court, though, held otherwise. The 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. [124a.]

But the court held that "[w]hatever persuasive value *Lofstead* might have, this court is required to follow precedentially binding authorities." (124a). The court then held that *Butler*, 444 Mich 965, "condoned the use of untargeted, dragnet-style solicitations of criminal activity." (124a). 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 (1993). One co-defendant, Duane Sturges, paged the agent, and the agent called and spoke to Mr. Sturges

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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 added, "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." *Id.* at 966 (cleaned up).

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." (124a-125a). 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*." (125a).

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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. And while "some degree" of manipulation is acceptable under *Butler*, that manipulation must be used to detect rather than create criminals.

The trial court's decision also rested largely on the premise that offering a "mere opportunity" to commit a crime does not constitute entrapment (125a), a premise that—as discussed above—the Court of Appeals afforded uncritical acceptance. As already discussed, though, this is an erroneous statement of the law.[22]

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[22] This Court may wish to clarify the holding in *Butler*. The defense presumes that this Court did not intend to promulgate any wholesale changes to the entrapment doctrine

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The trial court also found that the Court of Appeals and this Court "have repeatedly condoned escalatory tactics." (126a). For this proposition, the court cited *People v Ealy,* 222 Mich App 508 (1997). (126a). 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

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in its one-paragraph opinion. Yet the trial court and Court of Appeals in this case effectively read such a change into *Butler*, as they interpreted that decision as deleting "ready and willing" from the "mere opportunity" maxim. As argued above, *Butler*'s recitation of this principle should be regarded as imprecise shorthand.

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defendant in order to determine defendant's selling capabilities and to discover the identity of defendant's supplier." *Id*. at 511.

Ealy is readily distinguishable from Mr. Jade's case. In *Ealy*, police were *detecting* the scope of defendant's ongoing drug-trafficking activity. They were not inviting 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. *Killian* and *Juillet* explicitly hold otherwise. And here, police were not trying to detect the scope of criminal activity they had reason to believe Mr. Jade was already committing. So the escalation did not have a legitimate investigatory purpose.

Yet the trial court found that "[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." (126a-127a). The Court of Appeals accepted this assertion without scrutiny. *Id*. at ___; slip op at 12. But this turns entrapment upside down. 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."

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Juillet, 439 Mich at 76 n 3 (opinion by CAVANAGH, C.J.) (cleaned up). "To encourage the commission of a crime in the absence of any reason to believe the individual is already engaged in a course of criminal conduct is to be a tester of virtue, not a detector of crime." Dworkin, *The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime*, 4 Law and Philosophy 17, 33 (1985). If concocting a scheme "to see whether a defendant's conduct might expose him to heightened criminal liability" was a legitimate law enforcement goal, *Killian* and *Juillet* would have been decided differently. So this is yet another facet of entrapment doctrine that the lower courts fundamentally misunderstood.

All told, the sting operation in this case perverted the role of law enforcement officers as investigators rather than instigators of crime. It also did nothing to stop or deter actual child sex trafficking. It was an improper use of governmental power and resources, and this Court should call it what it was—reprehensible.

To be clear, the defense contends that the entire bait-and-switch construct of the sting operation in this case is reprehensible. That is, from its inception, the scheme constituted entrapment because it was designed to manufacture otherwise nonexistent crimes. In other words, the Court need not consider Mr. Jade's actions nor those of any similarly situated defendants. "Permissible police activity does not vary according to the particular defendant

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concerned." *Jamieson*, 436 Mich at 92, quoting *Sherman*, 356 US at 383 (FRANKFURTER, J., dissenting) (cleaned up). So any relief granted to Mr. Jade should be extended to other defendants entrapped in similar sting operations.

B. Impermissible inducement

Again, the impermissible-inducement prong has been framed as "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. As outlined above, properly understood, the question is "whether the police conduct at issue is, in an objective sense, the kind that would generally cause the average, hypothetical person to engage in criminal activity that such a person would not otherwise have engaged in." *Juillet*, 439 Mich at 73-74 (opinion by CAVANAGH, C.J.) (emphasis added). Here, the sting operation was implicitly designed to cause the targets to commit crimes they otherwise would not have committed.

First, the ad the police posted on Skip the Games—a website for "consenting adults"—showed a 20-year-old woman, not a minor. So none of the targets were trolling for sex with an underage girl. Instead, police drew from a pool of suspects inclined to commit one crime and lured them into committing a far more serious one. In this way,

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the police substantially escalated the targets' criminal culpability.

Next, it was the decoy 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 the target, unlike with a valid sting operation where officers allow the target to introduce and press the topic of sex.

What's more, at least in Mr. Jade's case, once police had hooked him, their efforts to land him—untethered to any operational constraints—were heedless. For example, they repeatedly propositioned him despite his clear hesitance, and they failed to video- or audio-record two interactions Mr. Jade had with the UC, including the phone call, which would have supplied the best evidence of his intent. See *Williams*, 196 Mich App at 664 (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 all, the sting in this case would not only have "generally caused" an average, hypothetical person to engage in unintended criminal activity—that was the entire object of the sting.

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

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criminal history and escalation. (117a-122a). But the court held that "the totality of the circumstances" cut against a finding of entrapment based on these two factors. (121a).

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." (121a-122a). 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." (122a). 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." (122a).

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 police to commit a more serious one." (122a). 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." (122a). 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

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of 18. While he did initially indicate that the officer had to be at least 16, he ultimately arranged to meet the officer." (122a).

The court also found "not particularly persuasive" evidence that Mr. Jade believed the decoy was lying about her age. (122a-123a). The court thus concluded that police had not impermissible induced Mr. Jade to commit the charged crimes. (123a).

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. Plus, Mr. Jade was able to glimpse the UC—undisputedly an adult—before entering the hotel, lending credence to his contention that he did not believe she was a minor.

Second, and more importantly, the court erred by focusing on Mr. Jade's subjective perspective. Again, impermissible inducement is evaluated without considering the defendant's subjective predisposition to commit the crime. *Juillet*, 439 Mich at 56 (opinion by BRICKLEY, J.). But the trial court lapsed into the tautology that Mr. Jade's commission of the crime demonstrates that he was ready and willing to commit it. See *Turner*, 390 Mich at 20. Instead, the trial court should have focused on the police behavior and whether it caused the charged offenses.

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The Court of Appeals likewise erred in its appraisal of the impermissible-inducement prong. In addition to divorcing "ready and willing" from "mere opportunity" as explored above, the court 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 this misconstrues the doctrinal roots of entrapment. As already discussed, entrapment is not a duress defense; it is an equitable doctrine employed to preserve the sanctity of the judicial system. The objective test of entrapment asks whether police were impermissibly manufacturing crime, not whether the defendant's actions were involuntary. So the Court of Appeals' voluntariness musings are irrelevant.

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 this omits consideration of whether the defendant would have otherwise engaged in that activity. And under *Juillet*, the analysis takes into account criminal activity the defendant has already engaged in. *Juillet*, 439 Mich at 65-66 (opinion by 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.

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 their involvement. 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 trial court erred by finding no entrapment, and the Court of Appeals erred by affirming that decision.

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RELIEF REQUESTED

"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.' " *Jamieson*, 436 Mich at 87, quoting *White*, 411 Mich at 387. To preserve this heritage, the defense asks this Court to hold as follows:

1. That the Court of Appeals erred by relying on and applying the legal standard that police do not engage in entrapment by merely presenting a defendant with an opportunity to commit the crime with which he was charged without considering the defendant's readiness and willingness to commit the charged crime. And a defendant is "ready and willing" to commit the charged crime when the defendant would have committed the same crime without police involvement. Properly understood, then, the touchstone of an entrapment claim is whether police were detecting rather than creating crimes and whether the defendant would have committed the charged crime irrespective of police participation.

2. That a trial court's ultimate determination of entrapment—that is, the applicable of the law to the facts as found—is reviewed de novo on appeal.

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3. That the Court of Appeals erred by affirming the trial court's determination that Mr. Jade was not entrapped.

Accordingly, the defense asks this Court to vacate Mr. Jade's conviction and dismiss this case.

Respectfully submitted,

/s/ Scott A. Grabel
/s/ Timothy A. Doman

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