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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v.

JAYNEEL RAVINDRA JADE **No. 167920**
Defendant-Appellant.

COA No. 365951
Circuit Court No. 22-23839-FH

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

A trial court's decision that the defendant has not carried his burden of demonstrating entrapment by a preponderance of the evidence is reviewed for clear error; that is, whether the reviewing court is left with a firm and definite conviction that the trial court made a mistake. The trial court applied all appropriate factors, and defendant had "no reservations about arranging for paid sex with someone younger than 18." Did the trial court clearly err?

Defendant answers: YES

The People answer: NO

Amicus answers: NO

Statement of Facts

Amicus joins in the Statement of Facts of the People.

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Argument

I.

A trial court's decision that the defendant has not carried his burden of demonstrating entrapment by a preponderance of the evidence is reviewed for clear error; that is, whether the reviewing court is left with a firm and definite conviction that the trial court made a mistake. The trial court applied all appropriate factors, and defendant had "no reservations about arranging for paid sex with someone younger than 18." The trial court did not clearly err.

A. Introduction

This Court has granted defendant's application for leave to appeal, directing that the issue to be addressed are whether the Court of Appeals erred by:

- 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);

- 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

- affirming the trial court's determination that the defendant was not entrapped, see *Johnson*, 466 Mich at 498.

Amicus answers that 1) the standard of review should continue to be clearly erroneous; indeed, that it is more than passing strange to ask whether the Court of Appeals "erred" by following the standard "provided in *People v. Johnson*," as in a hierarchical judicial system that was its duty; 2) the Court of Appeals properly

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applied *Jamieson*; and 3) the Court of Appeals properly concluded that defendant was not entrapped. Further, amicus submits that the entrapment defense is not part of the common law nor of statute, and that the Court invented it as a matter of pure legislation and should jettison it, leaving whether or not to create it, and its parameters, to the legislature.

First, the invention of the entrapment "defense."[1]

[1] "'Question authority' is a popular slogan often used on bumper stickers, T-shirts and as graffiti. The slogan was popularized by controversial psychologist Timothy Leary, although some people have suggested that the idea behind the slogan can be traced back to the ancient Greek philosopher Socrates. Benjamin Franklin is often quoted saying 'It is the first responsibility of every citizen to question authority,' although the quote cannot be positively attributed to him." https://en.wikipedia.org/wiki/Question_authority

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B. The entrapment "defense" is a modern judicial invention

> *That defense [entrapment] was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any court of civilized...ethics, it never will.*[2]
>
> *"It is not wisdom, but Authority that makes a law."*[3]

Defendant cannot meet his burden in this case, as will be discussed subsequently, however the defense of entrapment can be said to be defined in Michigan. And the People well make that case. But amicus would be remiss by failing to point out briefly the lack of a source of law for the creation of the defense by the judiciary.[4]

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[2] *Board of Commissioners v. Backus,* 29 How. P.r 33 (N.Y. Sup, 1864). See *Genesis* 3, 11-19:

> Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat? And the man said, The woman whom thou gavest to be with me, she gave me of the tree, and I did eat. And the LORD God said unto the woman, What is this that thou hast done? And the woman said, *The serpent beguiled me*, and I did eat. Unto the woman he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee. And unto Adam he said, Because thou hast hearkened unto the voice of thy wife, and hast eaten of the tree, of which I commanded thee, saying, Thou shalt not eat of it: cursed is the ground for thy sake; in sorrow shalt thou eat of it all the days of thy life; thorns also and thistles shall it bring forth to thee; and thou shalt eat the herb of the field; in the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it wast thou taken: for dust thou art, and unto dust shalt thou return.

[3] Thomas Hobbes, *Dialogue of the Common Laws* (1670).

[4] As the Supreme Court noted in *Johnson*, "[A]fter review of our entrapment defense law, we note that Chief Justice Corrigan has raised serious questions regarding the constitutionality of any judicially created entrapment test in Michigan. [*People v. Maffett*, 464 Mich. 878, 878–899; 633 N.W.2d 339 (2001)] (CORRIGAN, C.J., dissenting)." *Johnson*, 466 Mich. at 509.

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In the United States, substantive law—causes of action, crimes, and defenses—has three legitimate sources: constitutions, statutes, and the existing common law, with the ultimate source of law—the sovereign power—residing in the People. In this country, a written constitution is the durable expression of the will of the People, both authorizing and limiting government and standing outside of and superior to all agencies of government. As brilliantly expressed by Thomas Tudor Tucker over 200 years ago in his pamphlet *Conciliatory Hints, Attempting by a Fair State of Matters, to Remove Party Prejudice*:

> The constitution should be the avowed act of the people at large. It should be the first and fundamental law of the State, and should prescribe the limits of all delegated power. It should be declared to be paramount to all acts of the Legislature, and irrepealable and unalterable by any authority but the express consent of a majority of the citizens collected by such regular mode as may be therein provided.[5]

Under our State Constitution, the legislature has all authority to enact statutes and the exclusive authority to define crimes and defenses to them and to ordain their punishment,[6] save that which the constitution specifically prohibits; for example, the power to legislate a death penalty, see Mich Const. Art. 4, § 46. As Michigan's preeminent jurist, Thomas Cooley, put it in his famous treatise *Constitutional Limitations* regarding the legislative power under state constitutions: "In creating a legislative department and conferring upon it the legislative power, the people must

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[5] In Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, p. 281.

[6] *United States v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 37, 5 Wheat. 76 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment"); *People v. Turmon*, 417 Mich. 638, 650 (1983) ("the creation of crimes is an inherently legislative task")(citing *Wiltberger*); *People v. Hanrahan*, 75 Mich. 611, 619 (1889) ("To declare what shall constitute a crime, and how it shall be punished, is an exercise of the sovereign power of a state, and is inherent in the legislative department of the government"); *People v. Lugo*, 214 Mich. App. 699, 706 (1995) ("the power to define crime and fix punishment is wholly legislative").

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be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose."[7] The legislature has the authority under the Michigan Constitution to "make laws, and to alter and repeal them," and included among the laws that the legislature may enact are those that constitute rules of civil conduct, and also those within the police power, which includes the system of internal regulation of the state,

> by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.[8]

The making of a law is a "predetermination of what the law shall be for the regulation of all future cases falling under its provisions."[9]

The judicial power is distinct from, and may not exercise the authority of, the legislative power. "It is emphatically the province and duty of the judicial department to say what the law *is*."[10] The judicial power does not encompass *lawmaking*; the

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[7] Cooley, *Constitutional Limitations* 87 (8th ed. 1927); see also *Moore v. Harrison*, 224 Mich 512(1923).

[8] Cooley, p. 90, 572.

[9] Cooley, p. 91.

[10] *Marbury v. Madison*, 1 Cranch 137, 2 L Ed 60, 73 (1803). See also *American Trucking Assns* v. *Smith*, 496 US 167, 110 L Ed 2d 148, 110 S Ct 2323 (1990), separate concurring opinion of Justice Scalia, and dissenting opinion of Justice Stevens; and *James Beam Distilling Co* v. *Georgia*, 501 US 529, 111 S Ct 2439, 115 L Ed 2d 481 (1991), separate concurring opinion of Justice Blackmun, joined by Justices Marshall and Scalia, and separate concurring opinion of Justice Scalia, joined by Justices Blackmun and Marshall.

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creation of substantive law is not within the rightful authority of the judiciary. While it is true that formerly judges established causes of action and crimes through development of the common law, that is not now our system of government: "All of this [judicial lawmaking] would be an unqualified good were it not for a trend in government that has developed in recent centuries, called democracy."[11] "Now the job of a judge is not to make law, but rather to apply the law that has been created by the people of the nation through the democratic process,"[12] so that the problem with judges "attempting to make the 'right' decision, rather than the one arguably dictated by the law, is that in our system that is not the proper role for a judge."[13]

Michigan has always been very clear on the point that the powers of the departments of government are separate, and that no department or branch may exercise power granted to another. While separation of powers is a structural concept implicit in the federal constitution, it is *explicit* in the Michigan constitution.[14] An exercise of legislative authority by the judicial branch is thus beyond the scope of the judicial power, and at once a violation of the principle of separation of powers. As well put by Justice Cooley, ""(t)he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law."[15]

Michigan precedent exists on the point, extending to the early days of Michigan law. In 1859 one of the greats of Michigan jurisprudence, Justice

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[11] Antonin Scalia, *A Matter of Interpretation* 10 (1997).

[12] Timothy P. O'Neill, "Scalia's Poker: Puzzles and Mysteries in Constitutional Interpretation," 24 Const. Comment. 663, 673 (2007).

[13] Tony Cole, "Scalia and the Institutional Approach to Law," 34 U. Tol. L. Rev. 559, 562 (2003)

[14] 1963 Mich Const, Art. 3, § 2.

[15] Cooley,at 183.

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Campbell (the "Big Four" of Michigan jurisprudence consisting of Justices Campbell, Christiancy, Cooley, and Graves), stated that "[b]y the judicial power of courts is generally understood the power to hear and determine controversies between adverse parties, and questions in litigation."[16] The Court has also said that "the exercise of judicial power in its legal sense can be conferred only upon courts named in the Constitution. The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them."[17] Some seven decades later the Court reiterated that "The power given to a court is judicial power....'to declare what the law is and to determine the rights of parties conformably thereto'....'to hear and decide controversies, and to make binding orders and judgments respecting them.'"[18]

The preeminent figure in Michigan jurisprudence, Justice Cooley, made the same observations. Quoting Chief Justice Marshall from *Wayman* v. *Southard*,[19] Justice Cooley observed that "'The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law.'" Further, "to adjudicate upon, and protect, the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department." Distinguishing the construction of positive law from its creation, Justice Cooley wrote that

> those inquiries, deliberations, orders, and decrees, which are peculiar to such a department [the judicial department], must in their nature be judicial acts. Nor can they be both judicial and legislative; because

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[16] *Daniels* v. *People*, 2 Mich 380, 388 (1859), citing *Story on the Constitution*, sec. 1640. Justice Campbell said much the same thing several years later in *Underwood* v. *McDuffee*, 15 Mich 361 (1867).

[17] *Risser* v. *Hoyt*, 53 Mich 185,193 (1884).

[18] *Johnson* v. *Kramer Freight Lines*, 357 Mich 254, 258 (1959).

[19] *Wayman* v. *Southard*, 10 Wheat 46 (1824).

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> a marked difference exists between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be found. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore—to compare the claims of parties with the law of the land before established,—is in its nature a judicial act. But to do the last—to pass new rules for the regulation of new controversies—is in itself a legislative act. [20]

C. The absence of a source of law for the defense of entrapment

Because Justice Corrigan has well made the point that the entrapment defense was created without a source of authority,[21] amicus will not tarry long here.

1. The fictional basis of the federal entrapment defense

Entrapment as a defense was not known at the common law.[22]

> *The development of the entrapment doctrine presents something of a historical puzzle. Although entrapment was unknown at common law, it rapidly entered into American law (and only American law) during the first few decades of the twentieth century*.[23]

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[20] Cooley, p. 91-92 (emphasis in the original).

[21] *People v. Maffett*, 464 Mich. 878 (2001) (Corrigan, C.J., dissenting).

[22] *People v. Pugh*, 48 Mich. App. 242, 244 (1973); *State v. Good*, 165 N.E.2d 28 (Ohio Ct. App., 1960) ("The defense of entrapment was not known at the common law").

See F. Lee Bailey & Kenneth J. Fishman, 1 Criminal Trial Techniques § 34:5 (Aug. 2024 update) ("The defense of entrapment was not known at [English] common law, and for many years was not recognized in some states"); Erich Weyand, "Entrapment: From Sorrells to Jacobson—The Development Continues," 20 Ohio N. Univ. L. Rev. 294 (1993) ("Entrapment is a relatively recent phenomenon which was created by the courts in response to the increased use of undercover 'sting' operations by police and other agencies. Judges have become concerned with the potential result that innocent individuals may be wrongly accused and convicted").

[23] T. Ward Frampton, "Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine," 103 J. Crim. L. & Criminology 111, 114 (2013).

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Unlike defenses such as duress or self-defense, the source of the defense of entrapment cannot be found in the common law, nor does the defense have a statutory or constitutional source. Michigan is a common-law jurisdiction, the common law having been brought into this country by the English colonists in 1607, adopted in the Northwest Ordinance of 1787, and carried forward by every Michigan Constitution.[24] The common law adopted here is the "English common law, unaffected by statute."[25] And entrapment was unknown in the English common law; "[n]one of the English writers on criminal law, ancient or modern, mentions entrapment as a defense to a charge of crime," entrapment appearing to be a "purely American doctrine."[26] In this country, as late as 1880, Wharton declared that entrapment was not a defense,[27] the defense being created by various courts between that time and Wharton's 10th edition in 1896.[28]

The modern concept of the entrapment defense can be traced to 1932 with the decision of *Sorrells v. United States*.[29] The case was a prohibition case, the defendant accused of supplying an undercover federal agent with liquor and defending by claiming that he was a law-abiding citizen and that the agent had "enticed" him into the delivery by posing as a comrade in arms from World War I and asking him four or five times to make the delivery. The Supreme Court, while

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[24] Mich Const 1835, schedule, § 2; Mich Const 1850, schedule, § 1; Mich Const 1908, schedule, § 1, Mich Const 1963, art 3, § 7.

[25] *In re Lamphere*, 61 Mich 105, 108 (1886).

[26] William E. Mikell, "The Doctrine of Entrapment in the Federal Courts," 90 Pa. L. Rev. 245, 245-246 (1942).

[27] Wharton, 1 *Criminal Law* (8th Edition, 1880), 142.

[28] Wharton, 1 *Criminal Law* (10th Edition, 1896), 166: "the government is precluded from asking that the offenders thus decoyed should be convicted. They are associated with the government in the commission of the crime, and the offense being joint, the prosecution must fail."

[29] *Sorrells v. United States*, 287 US 435, 53 S Ct 210, 77 L Ed 413 (1932).

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agreeing that "[a]rtifice and stratagem" are necessary tools of law enforcement and that "merely afford[ing] opportunities or facilities for the commission of an offense" is unobjectionable, found the government conduct a "gross abuse of authority" because the defendant was a "law-abiding" citizen, not previously disposed to commit the crime, who had committed the offense only after "repeated and persistent solicitation" that included playing upon sentiment aroused by the common experiences of the agent and the defendant.

But this being its view, the Court needed to find a source of law if the conduct of the government was to extricate the defendant from the offense he had unquestionably committed.[30] Clemency, the Court observed, is an executive function, and the assumption of an "implied judicial power" to simply turn the judicial face from the conduct of the defendant, the Court believed, would inevitably "result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced."[31] So the Court turned to statutory construction, a task unquestionably within the judicial role. The Court concluded that it was not the intention of Congress "in enacting this statute" that "its processes of detection and enforcement should be abused by the instigation of government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."[32] Thus was born the "subjective" entrapment test, created by use of a legislative intent analysis that was, as Justice Frankfurter later observed, "sheer

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[30] Indeed, it has been suggested that lack of authority is the major reason why England has rejected the entrapment defense. G. Williams, *Criminal Law: The General Part* (2nd Edition, 1961), § 256, p. 784.

[31] *Sorrells*, at 449.

[32] *Sorrells*, at 48-449.

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fiction."[33] The Court simply wished to control executive branch action it found distasteful.

In *United States v. Russell*,[34] the Court continued to reject the "objective" test of entrapment, which focuses not on predisposition but on the nature of the conduct of the government, in favor of the subjective/predisposition test. But the Court noted, in rejecting the objective test, that "[w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from involving judicial processes to obtain a conviction...the instant case is distinctly not of that breed."[35] The author of *Russell*, Justice (now Chief Justice) Rehnquist, repudiated this *dicta* later in *Hampton v. United States,*[36] joined by a plurality. The subjective test was continued in *Jacobson v. United States*.[37]

Federally, attempts have been made to apply the objective test of entrapment by calling it a separate defense of "outrageous governmental conduct" grounded in due process, based on the *dicta* in *Russell*. The attempt has been almost entirely unavailing in achieving the reversal of convictions, and several circuits have officially interred it. For example, the Sixth Circuit in *United States v. Tucker*[38]

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[33] *Sherman v. United States*, 356 U.S. 368, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958)(opinion of Justice Frankfurter). See also John David Buretta, "Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines," 84 Geo L J 1945, 1953 (1996): "Justice Hughes's exercise of statutory interpretation was baseless."

[34] *United States v. Russell*, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973).

[35] *Russell*, at 431-432.

[36] *Hampton v. United States*, 425 U.S. 848, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976).

[37] *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992): the dissent argued that the majority modified the predisposition test to some extent with regard to the time at which predisposition is examined.

[38] *United States v. Tucker*, 28 F3d 1420 (CA 6, 1994).

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found a due process test inconsistent with the holding in *United States v. Payner*.[39] There the Court held that a freestanding due-process challenge to a criminal prosecution cannot succeed because "the fact remains that '[t]he limitations of the Due Process Clause...come into play only when the government activity in question *violates some protected right of the defendant*.'"[40] The Seventh Circuit has also made clear that no due process/outrageous conduct defense exists in that circuit,[41] as Chief Judge Posner for the court called the doctrine not simply moribund, but "stillborn," for "it never had any life."[42] Judge Easterbrook had previously made the point that "[i]f the investigators were too creative or squandered their limited resources, this is a political problem. Congress can hold oversight hearings or pass a law; we shouldn't apply a chancellor's foot veto."[43] An "outrageous governmental conduct" defense is "more like a claim that the government is violating the community's moral standards,"[44] and for a court to accept it is to impose its will over that of the executive, and without authority, violating separation of powers. The judiciary does not have supervisory authority over the executive.

2. The Michigan entrapment test: confusion sewn

Federally, then, the existence of the entrapment defense rests on a theory of statutory interpretation that is a complete fiction—there is no source of authority for the creation of the defense. So, too, in Michigan. There is no constitutional, statutory, or common-law source for the creation of the defense, and yet it appears.

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[39] *United States v. Payner*, 447 US 727, 100 S Ct 2349, 75 L Ed 2d 468 (1980).

[40] *Payner*, at 737 (emphasis supplied).

[41] *United States v. Boyd*, 55 F3d 239 (CA 7, 1995).

[42] *Boyd*, at 241.

[43] *United States v. Miller*, 891 F2d 1265, 1271 (CA 7, 1989).

[44] *Miller*, at 1271.

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Over 100 years ago Justice Marsten first expressed concern regarding law-enforcement participation in criminal schemes so as to catch the criminal, but his concerns not only were not the source of the reversal in the case, and his opinion cites no authority at all.[45] Following *Sorrells*, Michigan cases essentially followed the federal subjective entrapment view[46]—without ever indicating the source of the defense—until 1973.

Michigan's modern view of the entrapment defense begins with *People v. Turner*[47] and the rejection of the subjective test and the later placement of the question of entrapment in the hands of the court and not the jury.[48] In *Turner,* the Court found that, in its view, the conduct of the government there was "outrageous," and held that the predisposition of the accused to commit the offense should not open him up to police conduct of a kind "that could induce or instigate the commission of a crime by one not ready and willing to commit it."[49] A search for a source for the Court's authority to order prosecutions terminated because of its view that the conduct of the law-enforcement agents was "outrageous" was not even attempted, the Court apparently feeling it unnecessary to locate authority for its actions in the constitution, legislation, or the common law, finding its *power* to act sufficient justification. But power and authority are not synonymous.[50]

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[45] *Saunders v. People*, 38 Mich 218 (1978). See concurring opinion of Justice Marsten.

[46] See e.g *People v. Smith*, 296 Mich 176 (1941); *People v. Mitchell*, 298 Mich 172 (1941). See especially the jury instruction in *Mitchell*.

[47] *People v. Turner*, 390 Mich 7 (1973).

[48] *People v. D'Angelo*, 401 Mich 167 (1977).

[49] *Turner*, at 21.

[50] The distinction between power and authority was aptly described by G. K. Chesterton: "If a rhinoceros were to enter this room, he would enter with great power; but I would be the first to rise to tell the beast he had no rightful authority in the premises." https://www.azquotes.com/author/2799-Gilbert_K_Chesterton/tag/authority

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The Court's subsequent pronouncements on entrapment leave the area confused. In *People v. Juillet,*[51] the lead opinion was written by Justice Brickley, joined by Justices Riley and Griffin. That opinion explains that the trial judge must determine "whether the police conduct in question had as its probable and likely outcome the instigation rather than the detection of criminal activity," and in making this determination the judge must consider also "the willingness of the accused to commit the act weighed against how a normally law-abiding person would react in similar circumstances," allowing the court to review the circumstances of the particular defendant. This description of the Michigan "objective" test sounds much like a hybrid "subjective/objective" test, allowing some consideration of predisposition. Chief Justice Cavanagh essentially agreed, but would not have allowed consideration of the circumstances of the specific defendant, instead requiring consideration of a "hypothetical person who had not yet reached that level of criminal activity." Justice Boyle, in contrast, accepted Justice Brickley's approach in order to achieve stability in the law but would have allowed full inquiry into "all evidence bearing on the question, including predisposition." Justice Boyle would have preferred moving to a subjective test, along with an objective government misconduct test "that bars prosecution in those rare cases in which the government's conduct is truly reprehensible."[52] Justice Griffin, in *People v. Jamieson,*[53] called for elimination of the entrapment defense, except for circumstances where a due process violation because of objective governmental misconduct can be shown. Currently,

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[51] *People v. Julliet*, 439 Mich 34 (1991).

[52] But later, in *People v. Sierb*, 456 Mich 519, 526 (1998), Justice Boyle, in a different context, recognized that "[t]he United States Supreme Court has declined to expand substantive due process as an independent source of limitation on government," quoting also from *Mays v. East St Louis*, 123 F3d 999, 1003 (CA 7, 1997): "Which policy is best for the people...is a question about moral and efficient law enforcement for the people to debate and resolve. It is not a question whose only answer must be given by the judicial branch on the basis of 'substantive due process.'"

[53] *People v. Jamieson*, 436 Mich 61 (1990)(concurring opinion of Justice Griffin).

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Michigan entrapment law appears to be governed by the parsing of *Julliet* made in the 2-1 decision of *People v. Fabiano*.[54]

For the reasons stated by Chief Justice Corrigan in *Maffett*, the defense should be abolished and left to the legislature:

> absent a valid rule establishing the entrapment defense, a court may not cite "entrapment" as a reason for refusing to apply the law to the facts of a given case. In such circumstances, the judicial decision to "bar the prosecution in order to preserve the institutional integrity,". . . would impermissibly infringe both legislative and executive functions in violation of Const. 1963, art. 3, § 2. It is manifestly the function of the Legislature, and not the courts, to define illegal conduct. . . . Further, it is properly the function of the executive, and not the courts, to determine whether to "proceed with the prosecution" under the law as defined by the Legislature. . . . Finally, the judicial branch lacks the authority to oversee the executive branch by wielding a "chancellor's foot" veto over disfavored law enforcement practices. . . . In sum, "[i]t is the responsibility of the court to determine the guilt or innocence of the offender. It is not the responsibility of the judiciary to supervise law enforcement procedure."[55]

D. The standard of review of a trial court's entrapment decision is, and should remain—if entrapment remains a defense—clear error

In *Johnson,*[56] this Court said that that a trial court's findings of fact are reviewed for clear error, legal determinations made along the way to an ultimate conclusion are reviewed de novo, and the ultimate decision on entrapment is

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[54] *People v. Fabiano*, 192 Mich App 523 (1992).

[55] *Maffett*, supra at 878 (Corrigan, C.J. dissenting from the order vacating the grant of leave).

[56] *People v. Johnson*, 466 Mich. 491, 497–498 (2002) ("A trial court's finding of entrapment is reviewed for clear error.. . . Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made").

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reviewed for clear error.[57] But that which is being reviewed for clear error is the trial judge's finding that the *defendant* failed to carry *his* burden that he was entrapped by a preponderance of the evidence.[58] These are clear from *Johnson*. And so it is puzzling that the Court asks whether the Court of Appeals erred in following precedent from this Court rather than perhaps a different standard articulated in the later Court of Appeals case of *People v. Fyda*.[59] But the Court of Appeals cannot err by following precedent, nor can the Court of Appeals articulate a different standard of review than that stated by this Court. And *Fyda* errs in this regard.

The case was a solicitation-to-murder case. Defendant spoke often of his desire to kill his ex-wife. When he became aggressive in these statements, a friend to whom he made them reported them to the police, believing the ex-wife to be in danger (she was attempting to recover money from Fryda in a court proceeding). A meeting was set up with an undercover officer posing as a "hit man," and at the meeting "Fyda asked the officer to "pop" Cunnellon and provided the officer with the following items: a handgun that Fyda portrayed as not traceable, pictures of Cunnellon and her car, Cunnellon's work address, and a $200 down payment on a negotiated contract price of $700."[60] Fyda was arrested and charged.

Defendant argued entrapment and the trial court rejected the claim. Along the way the court said, without analysis, that "[w]hether entrapment occurred is determined by considering the facts of each case and is a question of law for this

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[57] "A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made.." *Moore v. Secura Ins*., 482 Mich. 507, 516, (2008).

[58] *People v. D'Angelo*, 401 Mich. 167, 182 (1977).

[59] *People v. Fyda*, 288 Mich. App. 446, 456 (2010).

[60] Id, at 449.

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Court to decide de novo."[61] This statement is obviously inconsistent with the holding in *Johnson* that "[a] trial court's *finding* of entrapment is reviewed for clear error," and *Fyda* cites *Johnson* only with regard to the twelve factors to be considered. And the only support offered by *Fyda* for its statement that review is de novo is a pre-*Johnson* case (by four months), *People v. Milstead*,[62] which says that "[w]hether entrapment occurred must be determined by considering the facts of each case and is a question of law for the court to decide."[63] The case in turn cites an earlier case to that effect,[64] which in turn cites a still earlier case,[65] which cites this Court's decision in *People v. D'Angelo*.[66] But the cited page, p. 177, says nothing about the standard of review, and the case is consistent with *Johnson*, saying that "[i]n 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."[67] The "finding"—singular—is not the "findings"—plural—of fact made along the way but must refer to the ultimate "finding" on the question of entrapment, all of which then are reviewed for clear error.

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[61] Id, at 456.

[62] *People v. Milstead*, 250 Mich. App. 391 (2002).

[63] Id, at 397.

[64] *People v. McGee*, 247 Mich. App. 325 (2001).

[65] *People v. Patrick*, 178 Mich. App. 152, 155 (1989).

[66] *People v. D'Angelo*, 401 Mich. 167 (1977).

[67] Id., at 183.

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As the Court of Appeals here pointed out, "the question whether entrapment occurred is a highly fact-intensive question,"[68] involving an evidentiary hearing and consideration of 12 different factors. While legal questions resolved by the trial judge along the way to its ultimate conclusion are reviewed de novo, the ultimate decision on this fact-intensive inquiry should continue to be reviewed for clear error, rather than an appellate court essentially acting as a trial court and considering the matter anew de novo. The matter does not lend itself to this sort of review,[69] and so *Johnson* should not be overruled (for this reason, as well as principles of stare decisis on this 23-year-old decision).[70] This defense—which should not exist—is not a burden-shifting affirmative defense, with the prosecution carrying the burden at trial beyond a reasonable doubt if a prima facie case of the defense is made out, but is a sort of trial to the court with the defendant carrying the burden of persuasion. And so the trial court's ultimate conclusion should be affirmed if supported by the evidence—that is, the reviewing court is not left with a firm and definite conviction that on the evidence a mistake was made—and considers the appropriate factors. The review is much like a sufficiency of the evidence review on a conviction.

E. The trial judge and the Court of Appeals considered the appropriate factors

The Court's statement of the question—whether the trial court 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

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[68] *People v. Jade*, —Mich. App.—, 2024 WL 4595493, at 3 (No. 365951, Mich. Ct. App. Oct. 28, 2024), appeal granted, 20 N.W.3d 867, 2025 WL 1543750 (Mich. 2025).

[69] And see *People v. Hartwick*, 498 Mich. 192, 215 (2015) ("the trial court's ultimate grant or denial of immunity is fact-dependent and is reviewed for clear error"), citing *Johnson*.

[70] "If stare decisis means anything, it means not every judicial decision is up for grabs from scratch." *People v. Stovall*, 510 Mich. 301, 331 (2022) (McCormack, C.J., concurring).

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to commit the charged crime"—begs the question by assuming that the defendant's readiness and willingness—that is, predisposition—was not considered. But it was.

That a person is "ready and willing" to commit the crime is another way of saying he or she has a predisposition to do so and was not unfairly enticed or coerced into an action he or she would not have otherwise taken when presented the opportunity. As this Court has said,,"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. 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, as we stated in *Jamieson*."[71] Here, the Court of Appeals cited this language in its review of the trial court's findings and conclusion and found no clear error. There is nothing wrong with this. And the trial judge said "the police presented defendant with an opportunity to commit a crime. While defendant hesitated somewhat when the officer indicated she was 15 years old, his subsequent texts and behavior demonstrate he was willing to arrange for sex with a minor," and further concluded that "identifying individuals willing to make plans to engage in sex with minors is a legitimate law enforcement goal that justifies the decision to see whether defendant's conduct might expose him to heightened criminal liability. When the police do nothing more than provide a defendant with an opportunity to commit a crime, such conduct is not reprehensible and does not establish entrapment."[72] And so defendant was not enticed or coerced to engage in conduct that he was not ready and willing to commit. The findings were correct, and certainly not clearly erroneous.

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[71] *People v. Juillet*, 439 Mich. 34 (1991).

[72] Quoted in *People v. Jade*, —Mich. App.—, 2024 WL 4595493, at 9 (No. 365951, Mich. Ct. App. Oct. 28, 2024), appeal granted, 20 N.W.3d 867, 2025 WL 1543750 (Mich. 2025).

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F. Defendant was not entrapped

As review of the trial court's conclusion that defendant was not entrapped is for clear error, a close reading of the trial court's careful and thorough findings and conclusion is required, and amicus will not belabor the point, but join the review made by the People, as well as the Court of Appeals.

The crux of defendant's claim is that the police conduct is conduct "that a civilized society simply will not tolerate, and the basic fairness that due process requires precludes continuation of the prosecution where the police have gone beyond the limit of acceptable conduct in ensnaring the defendant, without regard to causation"[73] (could a more amorphous test be devised that allows the judiciary to supply a chancellor's foot veto to executive branch conduct it finds distasteful, so as to exercise supervisory control over investigative practices?).[74] Defendant cites *United States v. Lofstead.*[75] Federal cases are not binding on Michigan, save those by the United States Supreme Court, and federal district court opinions are not even

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[73] *Fabiano*, at 532.

[74] As the United States Supreme Court has said, "the defense of entrapment enunciated in those opinions was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations. We think that the decision of the Court of Appeals in this case quite unnecessarily introduces an unmanageably subjective standard." *United States v. Russell*, 93 S. Ct. at 1644. And so federally "What authority the due process clause does give courts to oversee the execution of the laws 'come[s] into play only when the Government activity in question violates some protected right of the [d]efendant.'... . The fact that officers may engage in outrageous conduct is not enough: the remedy in those cases lies 'not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.'" *United States v. Dyke*, 718 F.3d 1282, 1285 (CA 10, 2013).

[75] *United States v. Lofstead*, 574 F.Supp.3d 831 (D. Nev. 2021).

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binding on any other judge in the district; they are simply not precedential.[76] But that case is quite different than the instead case in any event:

> When the agent responded that she had a house in South Reno, Lofstead asked "If your [sic] in a house, aren't there roomates [sic]." (ECF No. 21-2 at 2.) The agent responded "no my parents are out of town." (Id.) Less than a minute later Lofstead asked the agent "how old are you really," clarifying "I don't want 15," asking for confirmation that the person he was texting was at least 16. (Id.) The agent said "Emma" was 16. (Id.) After receiving that reassurance, Lofstead asked if she would be interested in smoking marijuana, and if she would join him at his house "at the lake" instead of meeting at her parents' house. (Id.) The agent responded that "Emma" would meet with Lofstead if he would pick her up because she did not have a car. (Id.)
>
> Lofstead again attempted to confirm "Emma" 's age, asking her to send a picture of her ID "so I know your [sic] at least 16." (Id.) The agent responded that she did not have an ID with her date of birth. (Id.) Lofstead also asked for a photo that was different from the ones posted on the website, for a "kind of verification." (Id. at 3.) The agent sent another photo. (Id.) After they had been texting for about an hour, the agent asked, "So u coming or what?" (Id.) Lofstead responded, "To be honest I'm worried you may not be 16." (Id.) After the agent again assured him "Emma" was 16, Lofstead responded "Maybe I'll come you can Get high and we can meet each other." (Id.) The agent rejected this offer, texting "Not to be rude baby, but if ur coming I need the $$ for the time ya know." (Id.)
>
> After this exchange, Lofstead attempted to call the agent, but she did not pick up and said that her "girlfriend" had come over. (Id.) Lofstead asked "Does she do this too," to which the agent responded yes, but said "she's under your limit tho." (Id.) Lofstead then changed the subject back to the agent, asking her how long she had been "doing this" and asking if she was aroused. (Id.) The agent affirmed, and reintroduced the subject of her "under-limit" friend. (Id.) The

[76] "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709, 131 S. Ct. 2020, 2033, 179 L. Ed. 2d 1118 (2011); *People v. Gillam*, 479 Mich. 253, 261 (2007) ("Although state courts are bound by United States Supreme Court decisions construing federal law, they are not similarly bound by the decisions of the lower federal courts").

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> agent and Lofstead then spoke on the phone, and Lofstead responded that he "can't do that." (ECF No. 21 at 5.) When the agent responded that it was only "a year difference," Lofstead said that in Nevada "that's a big thing." (Id. at 6.)
>
> Having clarified that Lofstead was not interested in paying for sex with "Emma" 's 15-year-old friend and that "Emma" was 16, Lofstead texted that he was getting ready to leave at 9:46 p.m. (ECF No. 21-2 at 3.) The agent told him to "hurry." (Id.) Less than 15 minutes later, the agent asked "on ur way still?" (Id. at 4.) When Lofstead arrived at the agreed upon location at approximately 10:45 p.m., he was arrested.[77]

This is not what happened in the present case, as laid out by the People. There is no basis on this record for the court to be left with a firm and definite conviction that the trial court erred in finding that defendant had not carried *his* burden of demonstrating entrapment.

[77] *Lofstead*, at 836-837.

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Relief

Wherefore, amicus requests that the trial court be affirmed.

Respectfully submitted,

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Certificate of Compliance

I certify that the foregoing brief text font is 12 point set to 150% line spacing. This document contains 7338 countable words.

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