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STATE OF MICHIGAN

IN THE SUPREME COURT

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

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

DEFENDANT JAYNEEL JADE,
Defendant-Appellant.

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# BRIEF ON APPEAL OF PEOPLE OF THE STATE OF MICHIGAN

**ORAL ARGUMENT REQUESTED**

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## COUNTERSTATEMENT OF QUESTIONS INVOLVED

In this Court's order granting leave to appeal, it sought briefing on three questions:

I. Did the Court of Appeals err 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)?

Defendant-Appellant's answer: Yes.

Plaintiff-Appellee's answer: No.

Court of Appeals' answer: No.

II. Did the Court of Appeals err 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, as stated in *People v Jamieson*, 436 Mich 61, 68 (1990)?

Defendant-Appellant's answer: Yes.

Plaintiff-Appellee's answer: No, the Court of Appeals properly considered Defendant's readiness and willingness to commit the charged crime as required by Michigan's modified objective test.

Court of Appeals' answer: No.

III. Did the Court of Appeals err by affirming the trial court's determination that Defendant was not entrapped, see *Johnson*, 466 Mich at 498?

Defendant-Appellant's answer: Yes.

Plaintiff-Appellee's answer: No.

Court of Appeals' answer: No.

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## COUNTERSTATEMENT OF JURISDICTION

Defendant's jurisdictional statement is complete and correct. MCR 7.212(D)(2); MCR 7.303(B)(1). The People agree this Court has jurisdiction.

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## INTRODUCTION

It has never been easier than the present moment to purchase sexual gratification from a child. What previously had to be arranged via underground whisper-networks of pedophiles and human traffickers can now be conducted from one's home, with a few clicks of a button and in total anonymity. There are a multitude of variables contributing to this crisis, such as children having ever-increasing amounts of unsupervised screen time, online payment systems facilitating commercial sex exploitation without face-to-face interaction, and the ability of perpetrators to endlessly create different anonymous accounts to evade detection. Latonero, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, Data & Society Research Inst, p 12 (2012).

The internet has remained the most common location for recruitment of victims of trafficking for over two decades, with most victims recruited online "primarily through social media platforms, web-based messaging applications, online chat rooms, dating apps, classified advertisements, or job boards." Lane, et al, *2022 Federal Human Trafficking Report*, Hum Trafficking Inst, p 59 (2022). In 2022, SkipTheGames was the sixth most common online platform used to recruit sex trafficking victims in federal cases. *Id*. at 60. The primary method used by buyer defendants[1] to solicit commercial sex from a sex trafficking victim is the internet. *Id*. at 66. In federal cases, minor victims made up approximately 31% of all sex-

[1] "Buyer defendants," are defendants who were charged with buying or attempting to buy commercial sex from a victim of sex trafficking, and not the actual trafficking itself. Lane, at 18.

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trafficking victims, and 100% of real victims[2] in buyer defendant cases were minors. *Id*. at 60. The most commonly used online platform to solicit these real children for sex in 2022 was SkipTheGames. *Id*. at 68.

In the face of this overwhelming problem, there are limited tools available to prevent the sexual exploitation of children online. When a site is shut down for child sexually abusive activity (CSAA) or child sexually abusive material (CSAM), new websites are quickly created and perpetrators shift their business there. Latonero, at 19. Investigations of ads posted on classified websites require prohibitive amounts of time to conduct and are entirely reliant on the investigating officer's knowledge of changing code words and emojis used by suspects to advertise that an escort is underage while avoiding detection from website monitors. *Id*. Efforts to create technology capable of reviewing these classified ads are slowed or stymied by a variety of factors, including resistance from the online platforms themselves. Cartwright, et al, *Deploying artificial intelligence to detect and respond to the use of digital technology by perpetrators of human trafficking*, p 29 (2022). Only 7% of buyer defendants in federal cases were registered sex offenders at the time they committed the offense, indicating that law enforcement cannot even properly address the issue of online CSAA by focusing their investigative efforts on those who have already been convicted of sex offenses. Lane, at 30.

"Unlike an impulsive or opportunistic crime," crimes involving CSAA and CSAM—to an even further extent than "traditional" vice crimes like the distribution

[2] This dataset "intentionally excluded" cases where the defendant attempted to solicit a fictitious child for sex in a law enforcement sting operation. Lane, at 38, 89.

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of narcotics or adult prostitution—involve "secretive, complex, and consensual activities." Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 Stan L Rev 155, 162 (2009). These crimes are "difficult, if not impossible, to investigate if the police must wait for victim complaints, witness statements, or physical evidence. If these crimes are to be prosecuted successfully, then the police must infiltrate criminal ranks or play willing victims." *Id*. at 163. With the safeguard of Michigan's modified objective test for entrapment in place, law enforcement is able to conduct proactive undercover investigations into crimes that exploit the most vulnerable in our society, without ensnaring the otherwise innocent.

The specifics of how these operations are conducted vary, but generally law enforcement posts an escort advertisement on a commercial sex website where CSAA is often facilitated and waits until a potential suspect responds to the escort ad. Once plans are made for the solicited sex to occur, the officer informs the potential suspect that she is underage[3] and asks if the potential suspect still wants to meet. If the potential suspect stops responding or otherwise affirms that he does not want to pay a child for sex, law enforcement ceases investigating that individual. If after learning that the escort is a child, he still continues to make plans to meet for sex,[4] the

[3] The average age of sex trafficking victims in federal cases was sixteen in 2022, and the youngest victim was only seven years old. Lane, at 38.

[4] Under Michigan's CSAA statute, a person commits CSAA when that person attempts, prepares, or conspires to arrange for or finance any child sexually abusive activity. MCL 750.145c(2). Thus, the suspect initially commits the offense of CSAA when he continues to make plans to have sex with the escort after he knows she is a child and continues to commit acts of CSAA with every step he takes in furtherance of that goal. Law enforcement typically waits to arrest until the suspect arrives at the agreed upon location because at that point, the suspect has engaged in *multiple* acts of attempt, preparation, or conspiracy, and his criminal intent is crystal clear. But the suspect engages in conduct legally sufficient to convict as CSAA simply by continuing to message about procuring sex with the escort once learning she is a child.

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investigation and conversation continue, as law enforcement now knows that this person is, at minimum, interested in purchasing sex from children. Law enforcement then provides the suspect with the opportunity to commit CSAA by agreeing upon a time and place to meet for sex. If the suspect travels to the set time and place despite knowing he is meeting a child to purchase sex,[5] he is arrested by law enforcement for attempting, preparing, or conspiring to commit child sexual abusive activity. If the suspect does not seize the chance to have sex with a child and fails to appear, the investigation ceases.

Legal discussion about entrapment doctrine often skews philosophical or academic, and this brief will undoubtedly stray into those weeds as well, but it must be remembered that these are very real harms that undercover investigations seek to address. The People will first examine how the Court of Appeals accurately restated the applicable mixed standard of review to apply when the issue of entrapment is raised, and was correct to overrule *People v Fyda*[6] to the extent it was inconsistent with the standard established by this Court in *People v D'Angelo*[7] and *People v Johnson*.[8]

[5] A child cannot consent to child sexual abusive activity, and "[i]t is undisputed that consent is not a defense to a charge under MCL 750.145c(2)." *People v Wilkens*, 267 Mich App 728, 737 (2005). So, when the escort informs the potential suspect that she is a child, she also informs him that she is incapable of consenting to the sexual activity. To conclude that an otherwise law-abiding person willing to purchase sex from a consenting adult would have their will overcome merely by being offered the opportunity to sexually exploit someone incapable of consenting to sex is absurd and morally repugnant.

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

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

[8] *People v Johnson*, 466 Mich 491 (2002).

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Next, the People will discuss how the Court of Appeals properly applied the legal standard that "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," when it examined whether law enforcement engaged in conduct that would impermissibly induce a person in Defendant's circumstances to commit CSAA by merely providing Defendant with the opportunity to commit CSAA. The People will discuss several early Michigan entrapment cases and how two important legal concepts in modern entrapment doctrine are present and interpreted at those times in history: (1) the purpose of entrapment doctrine is to deter law enforcement conduct that would induce an otherwise law-abiding person to commit the charged crime, and (2) the law enforcement tactic of merely presenting a suspect with the opportunity to commit a crime is insufficient to establish entrapment, as this conduct would not impermissibly induce an otherwise law-abiding person to commit the charged crime.

Then the People will examine how in the present case, the Court of Appeals properly applied the *Juillet*[9] factors, which are intended to determine the extent of any inducement utilized by law enforcement, and evaluated Defendant's readiness and willingness to pay a child for sex in comparison to how an otherwise law-abiding person (who initially set out to purchase sex from an adult) would have responded to law enforcement's actions.

Finally, the People will walk through how both the trial court and the Court of Appeals did not clearly err in their findings of fact, improperly apply the law, or

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

clearly err in the highly-fact intensive ultimate determination that Defendant was not entrapped by impermissible inducement or reprehensible conduct.

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## COUNTERSTATEMENT OF FACTS

On April 20, 2022, Defendant Jayneel Jade went to a website that advertised sexual services available for sale from escorts or prostitutes called "SkiptheGames.com." (12/09/2022, 20, 62). One ad listed on SkiptheGames was for a female escort in Paw Paw, Michigan, named "DILF[10] Seeker." (Defendant-Appellant's Appendix,[11] 6a). The advertisement included photographs of the escort that did not show her face, and an image that stated, "I 'heart' DILFs." *Id.* The advertisement listed twelve different sex acts that the escort was willing to perform, and the escort was able to be reached via phone or email. *Id.*

At 1:40 pm, Defendant responded to the ad for prostitution and initiated contact with "DILF Seeker." *Id.* at 8a. After some brief texts, Defendant asked the escort if she was "free this afternoon" and asked the escort where they would meet. *Id.* at 8a-9a. The following text exchange then occurred:

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

[10] "DILF" is an acronym that stands for "Dad/s I'd Like to Fuck." (12/09/2022, 48).
[11] The People will refer to Defendant-Appellant's Appendix as "DA App" in this brief.

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

*Id.* at 9a-10a.

After learning the escort was a child, Defendant spoke on the phone with her for less than sixty seconds, in the time between the text messages sent at 2:52 pm and 2:53 pm. (12/09/2022, 23, 51).

After about forty minutes, Defendant voluntarily reinitiated contact with the child escort in the following exchange:

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

(DA App, 11a).

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

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### *Pretrial Proceedings*

Defendant was charged with the following crimes:

> Count 1: Child Sexually Abusive Activity (CSAA), MCL 750.145c(2)(a).
> Count 2: Using a Computer to Commit a Crime - Maximum Imprisonment of 20 Years or More or Life, MCL 752.796; MCL 752.797(3)(f).
> Count 3: Accosting Children for Immoral Purposes, MCL 750.145a; and
> Count 4: Using a Computer to Commit a Crime - Maximum Imprisonment of 4 Years or More but Less than 10 Years, MCL 752.796; MCL 752.797(3)(d).

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

On December 9, 2023, the trial court conducted a hearing on Defendant's motion to dismiss for entrapment. Detective Sharon Van Dam was the lead detective with the Van Buren County Sheriff's Office, and she testified at Defendant's entrapment hearing in the trial court. (12/09/2022, 20). She testified that several officers travelled from Genesee County to assist and train Van Buren County on how to conduct these types of investigations. *Id*. at 7-8. Genesee County did not provide Van Buren officers with any written manuals or policies before conducting the investigation. *Id*. at 8. In addition to her observations of the investigation, Detective Van Dam testified that Defendant was not a specific target of the investigation, and that law enforcement only learned of his existence after he sought out the services in the advertisement. *Id*. at 21-22, 28. Before Defendant's arrest when he walked into

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the hotel room, law enforcement had no information regarding Defendant's criminal history. *Id*. at 22.

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

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

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Following the motion hearing and before the trial court issued its decision, the parties jointly spoke with the undercover officer and provided the trial court with an amended stipulated set of facts to be used by the trial court in making its entrapment ruling only. (12/20/2022, 5-6). The trial court agreed not to rely upon the crossed-out sections of the amended stipulated set of facts. *Id*. The following information was included in the stipulated facts that the trial court relied upon.

Before meeting the escort, Defendant conducted a "reverse google lookup" of the phone number used by the undercover officer and alleged that he learned the number was linked to a 34-year-old single woman with no children named Tawny Borah. (DA App, 112a). Law enforcement had not conducted a reverse search of the phone number before using it, but law enforcement's reverse searches of the number in the months following Defendant's arrest returned multiple other people to whom the number was also linked. *Id*.

The undercover officer was an adult woman, and the photos used in the advertisement were of an adult woman. *Id* at 111a. She was trained to act as a decoy and only spoke to suspects on a limited basis. *Id*. at 112a. She was not trained to let suspects bring up sex first in her conversations with them. *Id*.

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

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***Post-conviction Proceedings***

Defendant filed a delayed application for leave to appeal in the Court of Appeals on May 2, 2023, just prior to entering his guilty plea. The Court of Appeals granted Defendant's application and requested briefing on the proper standard of review for entrapment. *People v Jade*, __ Mich App __, __ (2024) (Docket No. 365951); slip op at 3. The Court of Appeals determined that the proper standard of review was a mixed standard, in which the trial court's factual findings are reviewed for clear error, application of law to those facts is reviewed de novo, and the ultimate ruling on entrapment is reviewed for clear error. *Jade*, slip op at 6. The Court of Appeals also held that the trial court did not make clearly erroneous findings of fact, did not err in its application of law to the facts, and did not clearly err in its ultimate ruling that Defendant was not entrapped under the modified objective test by either impermissible inducement or reprehensible conduct. *Jade*, slip op at 11-12.

Defendant filed an application for leave to appeal in this Court on December 23, 2024. After receiving briefing on the application from both parties, this Court granted Defendant's application for leave and directed 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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## LAW AND ARGUMENT

### I. The Court of Appeals did not err when it held that a mixed standard of review was applicable to claims of entrapment, consistent with this Court in *D'Angelo* and *Johnson*.

As a preliminary matter, the language used by attorneys and courts alike can substantially affect how the law is understood and applied, and "[a]mbiguity in human language often has very serious ramifications for the judicial system." Solan, *The Language of Judges* (University of Chicago Press, 2010), ch 3, p 64. Although the term "finding" has frequently been used to refer to a trial court's ruling, conclusion, or determination on whether a defendant was entrapped, the word is separately used to refer to the trial court's "findings of fact" that must be made in actions held before the trial judge. MCR 2.613(C). This overlap in use has the potential to create unnecessary confusion, and it is the People's position that an effort must be made to use precise language. As such, in this brief the People will exclusively use the terms "finding" to refer to a trial court's findings of fact, and "ruling" to refer to the trial court's ultimate ruling or determination of whether a defendant was entrapped.

#### *A.* People v D'Angelo *established a standard of review for entrapment claims.*

In *People v D'Angelo*, this Court decided several procedural issues related to entrapment following the adoption of the objective test in *People v Turner*,[12] including the standard of review to be utilized in cases raising entrapment. *D'Angelo* held:

> 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

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

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> 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. *People v D'Angelo*, 401 Mich 167, 183 (1977) (emphasis added).

By ruling in this manner, the *D'Angelo* Court established that the trial court must make plural *findings* of fact, as well as make a singular *finding* (or ruling) on whether the defendant's claim of entrapment was proven, following the entrapment hearing.[13] The trial court's singular *finding* (or ruling) is subject to clear error review, and the Court did not provide a standard for the trial court's plural *findings* of fact. *Id.* But this Court had recently held that Michigan's General Court Rules applied equally to civil and criminal cases. *People v Jackson*, 390 Mich 621, 627 (1973); *People v Scott*, 21 Mich App 217 (1970). The General Court Rules included GCR 1963, 517.1, which stated that in "all actions tried upon the facts without a jury," the trial court must make "findings of fact and conclusions of law." GCR 1963, 517.1. The trial court's "[f]indings of fact shall not be set aside unless clearly erroneous."[14] *Id.*

*D'Angelo* also noted that the "policy considerations which moved [the Court] to adopt the objective test of entrapment [in *Turner*] compel with equal force the conclusion that the judge and not the jury must determine its existence," and quoted Justice Stewart's dissent in *Russell*:

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[13] This Court noted that this procedure is analogous to the procedure in *Walker* hearings. *D'Angelo*, 401 Mich at 177-179, citing *People v Walker (On Rehearing)*, 374 Mich 331 (1965).

[14] When the Michigan Court Rules were enacted in 1985, the language and provisions of GCR 1963, 517.1 were split into MCR 2.517 and MCR 2.613. See Staff Comment to 1985 Adoption for both MCR 2.517 and MCR 2.613.

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> But since the appellate court did not remand for consideration of the issue by the [trial court] under an objective standard, but rather *found entrapment as a matter of law* and directed that the indictment be dismissed, we must reach the merits of the respondent's entrapment defense." *D'Angelo*, 401 Mich at 173, quoting *US v Russell*, 411 US 423, 446 (1973) (emphasis added).

So, under *D'Angelo* and the applicable court rules, the trial court was to make findings of fact reviewable for clear error and an ultimate ruling on the issue of entrapment reviewable for clear error, and the issue of entrapment was a matter of law to be decided by the judge, not the jury.

### *B. Courts inconsistently applied* D'Angelo*'s standard of review.*

In the following years, courts looked to *D'Angelo* for the applicable standard of review for entrapment, but applied *D'Angelo* inconsistently.[15] Many cases exclusively reviewed the trial court's ultimate ruling for clear error without addressing the standard for its factual findings, see *People v Alford*, 405 Mich 570, 591 (1979); *People v White*, 411 Mich 366, 403 (1981); *People v Smalls*, 139 Mich App 759, 765 (1984); *People v Reynolds*, 139 Mich App 471, 476 (1984); *People v Matthews*, 143 Mich App 45, 54 (1985); *People v Graczyk*, 156 Mich App 632, 634 (1986); *People v Rowell*, 153 Mich App 99, 103 (1986); *People v Forrest*, 159 Mich App 329, 336 (1987); *People v Rezendes*, 164 Mich App 332, 335 (1987); *People v Moore*, 180 Mich App 301, 309 (1989); *People v Holst*, 186 Mich App 473, 474 (1990); *Jamieson*, 436 Mich 61, 80; *People v Griffin*, 187 Mich App 28, 29 (1991); *People v Fabiano*, 192 Mich App 523, 526 (1992); *People v Ealy*, 222 Mich App 508, 512 (1997); *People v Connolly*, 232 Mich

[15] Despite this variety in application, Michigan courts have been consistent that the issue of entrapment is a matter of law to be decided by the trial court and not the jury, and that the trial court must make factual findings. See for example *People v Wisneski*, 96 Mich App 299 (1980), *People v Mulkey*, 153 Mich App 737, 738–739 (1986); and *People v Milstead*, 250 Mich App 391, 397 (2002).

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App 425, 429 (1998); *People v Hampton*, 237 Mich App 143, 156 (1999); and *People v McGee*, 247 Mich App 325, 345 (2001), judgment vacated on other grounds 469 Mich 956 (2003).

Another subset of entrapment cases exclusively reviewed the trial court's findings of facts for clear error, though some of these cases also relied upon GCR 1963, 517.1 or MCR 2.613(C) in addition to *D'Angelo*, see *People v LaBate*, 122 Mich App 644, 647-648 (1983); *People v Hentkowski*, 154 Mich App 171, 174 (1986); and *People v Patrick*, 178 Mich App 152, 154 (1989).

Still another subset of cases noted that the trial court must make findings of fact, but did not state the applicable standard of review for those factual findings, while also applying the clearly erroneous standard to the trial court's ultimate ruling on entrapment, see *People v Duke*, 87 Mich App 618, 622-624 (1978); *People v Larcinese*, 108 Mich App 511, 515 (1981); *People v Harding*, 163 Mich App 298, 310 (1987), vacated 430 Mich 859 (1988); *People v Juillet*, 439 Mich 34, 61 (1991); *People v Williams*, 196 Mich App 656, 661-662 (1992); *People v Sexton*, 250 Mich App 211, 217 (2002); and *People v Milstead*, 250 Mich App 391, 397 (2002).

Finally, there were numerous cases that reviewed both the trial court's factual findings *and* ultimate ruling on entrapment for clear error, see *People v Edwards*, 107 Mich App 767, 769 (1981); *People v Killian*, 117 Mich App 220, 222 (1982); *People v Weatherford*, 129 Mich App 359, 360 (1983); *People v Kolaski*, 147 Mich App 636, 642 (1985); *People v Mulkey*, 153 Mich App 737, 738–739 (1986); *People v Steele*, 150 Mich App 728, 736 (1986); *People v Jones*, 165 Mich App 670, 674-676 (1988); *People*

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*v LaClear*, 196 Mich App 537, 543 (1992), lv gtd, rev'd 442 Mich 867 (1993); and *Johnson*, 466 Mich at 497-498.

Regardless of which standard these post-*D'Angelo*, pre-*Fyda* cases used, they all either directly cited *D'Angelo* in support, or cited cases that cited *D'Angelo*.

### *C.* People v Fyda *attempted to state a consistent standard of review but overlooked this Court's precedent in* D'Angelo *and* Johnson.

The inconsistency continued when the Court of Appeals in *People v Fyda* held that:

> 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. The trial court must make specific findings regarding entrapment, and this Court reviews its findings under the clearly erroneous standard. The findings are clearly erroneous if this Court is left with a firm conviction that a mistake was made. *Fyda*, 288 Mich App 446, 456 (2010), citing *Milstead*, 250 Mich App at 397.[16]

*Fyda* both adhered to the existing standard of review and ignored it. By stating that entrapment "is a question of law for this Court to decide," *Fyda* relied upon established precedent that entrapment is a "matter of law" to be decided by the trial court. *People v Sinclair*, 387 Mich 91, 122 (1972); *D'Angelo*, 401 Mich at 173; *People v Vansickle*, 303 Mich App 111, 114 (2013). Questions, applications, or matters of law are generally reviewed de novo, so *Fyda* followed the standard that "entrapment is a matter of law," to its logical legal conclusion of being reviewed de novo.

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[16] *Milstead* cites *McGee* in support of this standard. *Milstead*, 250 Mich App at 396-397. *McGee* cites *Patrick*, *Juillet*, and *Connolly*. *McGee*, 247 Mich App at 344. *Patrick* and *Juillet* cite *D'Angelo* directly. *Patrick*, 178 Mich App at 154; *Juillet*, 439 Mich at 61. *Connolly* cites *Williams*, which in turn cites *Juillet* and *Jamieson*. *Connolly*, 232 Mich App at 428; *Williams*, 196 Mich App at 661. *Jamieson* cites *D'Angelo*. *Jamieson*, 436 Mich at 80. *D'Angelo* thus is the basis for the standard articulated in *Fyda*.

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Where *Fyda*'s analysis fell short was overlooking half of the established standard from *D'Angelo*—that the trial court's ultimate ruling on the issue of entrapment is to be reviewed for clear error. In noting that deciding entrapment is a matter of law, the *Fyda* Court conflated the trial court's application of law, which is reviewed de novo, with the trial court's ultimate ruling on entrapment, which is reviewed for clear error under this Court's precedent in *D'Angelo* and *Johnson*. The Court in *Fyda* thus failed to consider *D'Angelo* and *Johnson*, lowered the level of deference afforded to the trial court in the highly-fact intensive determination of entrapment, and contributed to the ongoing confusion surrounding the appropriate standard of review.

### *D. The Court of Appeals in the present case succeeded in clearly stating the mixed standard of review applicable to entrapment claims while adhering to this Court's precedent in* D'Angelo *and* Johnson.

The Court of Appeals granted leave to appeal in the present case "to resolve this conflict in Michigan law," a goal it achieved. *Jade*, slip op at 3. The Court of Appeals held that the "complete standard of review that is applicable to a trial court's entrapment ruling" is:

> [T]he 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*, slip op at 6.

In coming to its conclusion, the Court of Appeals reviewed the various existing standards of review applicable to entrapment rulings, as well as the standards of review applicable in analogous legal frameworks. It noted that this Court "has made clear that the question whether entrapment occurred is a highly fact-intensive question, requiring the trial judge to conduct an evidentiary hearing on the issue and

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to make specific findings of fact." *Jade*, slip op at 5, citing *Johnson*, 466 Mich at 497-498; *Jamieson*, 436 Mich at 80; *D'Angelo*, 401 Mich at 172-174, 177-178, 183. The Court of Appeals also noted that this Court previously determined a trial court's factual findings regarding a claim of entrapment are reviewed for clear error. *Jade*, slip op at 4-5, citing *Johnson*, 466 Mich at 497-498; *Jamieson*, 436 Mich at 80; *D'Angelo*, 401 Mich at 183.

The Court of Appeals further noted that this Court has determined that questions of law and application of facts to constitutional issues or nonconstitutional common law issues are reviewed de novo. *Jade*, slip op at 5, 5 n 7, citing *People v Daoud*, 462 Mich 621, 629-630 (2000); *D'Angelo*, 401 Mich at 177-179; *People v Sammons*, 505 Mich 31, 41 (2020); *People v Gafken*, 510 Mich 503, 510 (2022). The Court of Appeals noted that whether a defendant may raise the defense of entrapment is a nonconstitutional common law issue. *Jade*, slip op at 5 n 7, citing *Jamieson*, 436 Mich at 87.

Finally, the Court of Appeals examined the establishment of a standard of review for the determination of a person's entitlement to immunity of § 4 of the Michigan Medical Marihuana Act by this Court in *People v Hartwick*, as deciding a claim of immunity is legally analogous to deciding a claim of entrapment. Because the determination of immunity requires the trial court to make factual findings then apply the law to those findings, the proper standard of review is:

> [S]pecific factual findings made by the trial court in a § 4 immunity hearing are reviewed under the clearly erroneous standard, and questions of law surrounding the grant or denial of § 4 immunity are reviewed de novo. Further, the trial court's ultimate grant or denial of

> immunity is fact-dependent and is reviewed for clear error. *Jade*, slip op at 6, citing *People v Hartwick*, 498 Mich 192, 212-14 (2015).

This mixed standard, where "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," clearly distinguishes the various standards from each other, while still subjecting the trial court to appellate review.

In addition to resolving the inconsistencies between previously utilized standards, the standard of review stated by the Court of Appeals in *Jade* is legally and logically sound and straightforward to apply. Using the present case as an example, if the trial court had made the factual finding that Defendant had insisted the escort be an adult (rather than a sixteen year old child, as the text messages indisputably reflect), a reviewing court would examine the record and determine that the trial court's factual finding was clearly erroneous, as it would be "left with the definite and firm conviction that a mistake has been committed." *Jamieson*, 436 Mich at 123 (citation omitted).

If, after making its findings of facts in the present case, the trial court decided to improperly apply the federal subjective test for entrapment, a reviewing court would determine, without deference to the trial court, that the trial court's application of law was in error. But say that the trial court had applied the federal subjective test but still ultimately ruled that Defendant was not entrapped. A reviewing court would examine the totality of the circumstances, properly apply the modified objective test to the trial court's non-clearly erroneous findings of fact, and also ultimately rule that Defendant was not entrapped. Even if a reviewing court



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determines that the trial court erroneously applied the law, the reviewing court would not reverse the ultimate ruling, as the ultimate ruling itself would not leave the reviewing court with the definite and firm conviction that a mistake was committed.[17]

**II. Law enforcement does not engage in entrapment by merely presenting a defendant with the opportunity to commit a crime, as this conduct is insufficient to induce a person not ready and willing to seize the opportunity to do so.**

Michigan entrapment doctrine has developed substantially in a relatively short period of time. In Michigan, the entrapment defense evolved from its first acknowledgement as a concept in *Saunders v People* to the adoption of the objective test in *Turner* to the modified objective test acknowledged and adopted in *Jamieson*, *Juillet*, and *Johnson*, and used today. There are two important legal concepts present in nearly all Michigan entrapment cases: (1) the purpose of entrapment doctrine is to deter law enforcement conduct that would induce an otherwise law-abiding person to commit the charged crime, and (2) the law enforcement tactic of merely presenting a suspect with the opportunity to commit a crime is insufficient to establish entrapment, as this conduct would not impermissibly induce an otherwise law-abiding person to commit the charged crime. The modern legal consensus on these ideas will be discussed in § II.B of this brief, but first, five early Michigan entrapment cases provide useful context for how these concepts were interpreted before and at the time the objective test was adopted.

[17] This is consistent with "the widely recognized and entirely uncontroversial principle that a correct result may be affirmed even if reached for an incorrect reason." *People v Grissom*, 492 Mich 296 (2012) (ZAHRA, J., concurring in part and dissenting in part), citing *People v Cooper*, 328 Mich 159 (1950).

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### *A. From the inception of entrapment doctrine, merely presenting the opportunity to commit a crime was insufficient to induce a person not ready and willing to seize the opportunity and commit a crime.*

For the first century of entrapment doctrine's existence, acceptance and application of the doctrine varied. *Saunders v People* is generally regarded as the first case in American jurisprudence to discuss without disregarding[18] the concept of entrapment, and even at this early time, this Court distinguished between entrapping conduct and merely presenting a suspect with the opportunity to commit a crime. This Court went on to analyze the conduct of a private citizen for entrapment in *People v McCord*, and again, distinguished between presenting an opportunity and entrapment. Over fifty years later, this Court in *People v Smith* determined that merely providing the opportunity to act in furtherance of a criminal conspiracy does not establish entrapment and used an early version of the entrapment test sometimes known as the "original intent" test. Later, the Court of Appeals in *People v Ovalle* applied the federal subjective test established in *US v Sherman*, but consistent with Michigan jurisprudence, held that merely presenting a suspect with an opportunity was insufficient to establish entrapment. Finally, this Court in *People v Turner* formally adopted the objective test for entrapment and clarified how the longstanding Michigan precedent that merely providing an opportunity is insufficient to establish entrapment was to be applied under the objective test.

[18] The first American case to actually discuss entrapment doctrine, *Bd of Commissioners v Backus*, famously denounced entrapment as a defense, stating, "Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the pleas as ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.' " *Bd of Commissioners of Excise of Onondaga Cnty v Backus*, 29 How Pr 33, 42 (NY Gen Term, 1864).

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### 1. *Saunders v People*, 38 Mich 218 (1878).

At issue in *Saunders* was the trial court's exclusion of two areas of examination related to the surrounding circumstances of the charged crime, breaking and entering a courtroom to steal contracts and public records. *Saunders v People*, 38 Mich 218, 220 (1878). Before committing the charged offenses, the defendant, a lawyer, asked a police officer to leave the courtroom unlocked so that the defendant could steal the documents. *Id*. at 219. The police officer consulted with his supervisor, and they left the courtroom unlocked for the defendant as a trap. *Id*. At trial, the defendant sought to cross-examine the police officer on whether he "had not once put in some false swearing" on the defendant's behalf, and to examine a lay witness "to show that [the defendant] was in the habit of frequenting that neighborhood day and night," but this evidence was excluded by the trial court. *Id*. at 220.

This Court overruled the trial court, holding that "the jury ought to have had the benefit of all the light the former dealings of the parties would have thrown upon the transaction." *Id*. The Court emphasized that even though the police officer's testimony established "he was apparently conniving at and assisting in the crime charged," the officer did so "not by way of enticing defendant into crime, but only by allowing him the opportunity he sought and requested." *Id*. This reasoning "suggests that even at this early date a distinction was already manifest between providing an opportunity for an already predisposed defendant and actually instigating the criminal activity." Marcus, *The Development of Entrapment Law*, 33 Wayne L Rev 10 n 25 (1986).

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Although a powerful critique and a reminder of the high standard government actors must hold themselves to, Justice Marston's concurrence was not a denouncement of law enforcement practices that would induce someone not otherwise ready and willing to commit the at issue crime. He wrote:

> 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. *Saunders*, 38 Mich at 222.

His concurrence has often been cited by those who argue that *all* undercover police conduct constitutes entrapment, but their reliance is misplaced. Instead, operating under the presumption that the entrapped individual was ready and willing to commit the crime, Justice Marston argued that law enforcement's conduct was improper because police waited to catch the ready and willing defendant rather than simply preventing the crime from occurring in the first place. Properly construed, Justice Marston was not addressing whether mere presentation of the opportunity to commit a crime would improperly induce the defendant, but rather whether law enforcement engaged in reprehensible conduct.

**2. *People v McCord*, 76 Mich 200 (1889).**

Eleven years after *Saunders*, this Court again addressed the doctrine of entrapment in *People v McCord*, albeit in the context of a private citizen rather than law enforcement taking steps to entrap. In *McCord*, a private investigator had informed the owners of a store that the defendant would be breaking into the store that night. *People v McCord*, 76 Mich 200, 201 (1889). Several people waited inside

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the store for the defendant to break in, and when the defendant did so, they attacked and severely injured him. *Id.* The defendant was charged with breaking and entering, and he claimed that he was induced by the private investigator to commit the offense. *Id.* This Court noted without deciding the issue that it was possible "leaving temptation in the way without further inducement will not destroy the guilt in law of the person tempted … But it would be a disgrace to the law if a person who has taken active measures to persuade another to enter his premises, and take his property, can treat the taking as a crime." *Id.* at 205-06. This dicta was further development of the legal standard that merely presenting the opportunity to commit a crime, without other conduct that would induce someone not ready and willing to commit it, is not conduct rising to the level of entrapment.

**3. *People v Smith*, 296 Mich 176 (1941).**

In *Smith*, this Court ruled that the co-defendants were not entrapped, in part because the conspiracy was completed before law enforcement became involved. *People v Smith*, 296 Mich 176, 181-182 (1941). The Court noted that "[a]lthough at an early day exposing persons to temptation to commit crime was looked upon as a diabolical business, it is only active measures of persuasion that may stamp the crime as the product of entrapment." *Id.* at 182. The Court quoted the 8th Circuit decision *Butts v United States*, "where the criminal intent originates in the mind of the defendant, the fact that the officers of the government used decoys or truthful statements to furnish opportunity for or to aid the accused in the commission of a crime, in order successfully to prosecute him therefor, constitutes no defense to such a prosecution.'" *Id.*, quoting *Butts v US*, 273 F 35 (CA 8,

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1921). Because the defendants were "not inspired into crime by the police authorities; they merely furnished opportunity or aid in furtherance of an already completed conspiracy in order to acquire evidence of the consummated crime," the Court ruled that the defendants had not been entrapped. *Id.*

**4. *People v Ovalle*, 10 Mich App 540 (1968).**

The Court of Appeals in *People v Ovalle* applied the subjective test to evaluate the case for entrapment, following *United States v Sherman*. *People v Ovalle*, 10 Mich App 540, 543 (1968), citing *US v Sherman*, 200 F2d 880 (CA 2, 1952). In determining that the defendant was "ready and willing to commit the offense charged, whenever the opportunity [was] offered," the Court of Appeals noted that "[t]he mere fact that an opportunity was furnished to defendant to commit a crime, absent reprehensible creative activity or persistent overexertion, is no defense to subsequent prosecution." *Id.* at 544. And so, the trial court did not err in rejecting the defendant's defense of entrapment. *Id.*

**5. *People v Turner*, 390 Mich 7 (1973).**

*People v Turner* marked the beginning of a new era of entrapment doctrine in Michigan with this Court's adoption of the federal objective test. This Court quoted extensively from Justice Stewart's dissent in *US v Russell* and used it as the foundation of Michigan's objective test. *People v Turner*, 390 Mich 7, 19-22 (1973). The Court noted that the very basis of the entrapment defense, deterring law enforcement conduct that would improperly instigate crime, "demands adherence to an approach that focuses on the conduct of the governmental agents, rather than on whether the defendant was 'predisposed' or 'otherwise innocent.' " *Id.* at 19, quoting

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*Russell*, 411 US at 441 (STEWART, J., dissenting). Thus under *Turner*'s objective test, entrapment is established when there is sufficient evidence that law enforcement's conduct "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 ... regardless of the character or propensities of the particular person induced." *Id.* at 22, quoting *Russell*, 411 US at 446.

***B. Under Michigan's modified objective test, law enforcement's conduct--including merely presenting a suspect with the opportunity to commit a crime--is evaluated to determine whether the conduct would induce a person not ready and willing and similarly situated to the defendant to seize the opportunity to commit the charged crime.***

In 1991, this Court defined entrapment under Michigan's modified objective test as occurring in *People v Juillet*:

> We previously defined Michigan's entrapment defense:
>
> > 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. For in that situation, the Government has engaged in the impermissible manufacturing of crime...
>
> However, when a defendant is only given the opportunity to commit a crime, or is given aid in furthering an already committed conspiracy so that the government can acquire evidence of that crime, the defendant cannot claim entrapment as a defense. *Juillet*, 439 Mich at 52-53 (emphasis in original), quoting *Russell*, 411 US at 446; *Smith*, 296 Mich at 182.

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The "overall purpose" of entrapment doctrine under Michigan's modified objective test 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." *Juillet*, 439 Mich at 52, citing *D'Angelo,* 401 Mich 167; *Turner,* 390 Mich 7; *Sinclair*, 387 Mich 91. The entrapment defense is "not intended to be the remedy for any and all misconduct or neglect by police and their agents," and 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." *Jamieson*, 436 Mich at 82, quoting *People v Crawford*, 143 Mich App 348, 354 (1985). Throughout the years, Michigan courts have interchangeably used a variety of synonyms for "a person not ready and willing to commit the charged crime," such as the "unwary innocent,"[19] the "otherwise innocent,"[20] the person "not otherwise … so disposed,"[21] the "otherwise law-abiding person,"[22] and the "normally law-abiding person."[23] *Juillet*, 439 Mich at 54.

Michigan's modified objective test remains extremely similar to the objective test detailed in Justice Stewart's *Russell* dissent and adopted by this Court in *Turner*, in that the focus of the analysis remains on law enforcement's conduct rather than the defendant's predisposition to commit the charged crime. *Jamieson*, 436 Mich at

[19] *Jamieson*, 436 Mich at 68.
[20] *Id*. at 69.
[21] *Juillet*, 439 Mich at 52.
[22] *People v Fabiano*, 192 Mich App 523, 526 n 3 (1992); *Johnson*, 466 Mich at 497.
[23] *Jamieson*, 436 Mich at 74.

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72, 77; *Juillet*, 439 Mich at 53-54. But as noted by the Court of Appeals in the present case, the modified objective test "allow[s for] evaluation of the defendant's circumstances, in light of an otherwise law abiding disposition" to determine whether law enforcement's conduct would induce the commission of the charged crime by an otherwise law-abiding person similarly situated to the defendant.[24] *Juillet*, at 56; *Jade*, slip op at 11. This enables courts to "avoid dealing with hypothetical situations, trying to identify what a 'normal' person is and what a 'normal' person does," and is "more in keeping with the purpose of the entrapment defense." *Id.*

To determine whether a defendant was entrapped under the modified objective test, the court must consider the two means by which entrapment can be established: impermissible inducement and reprehensible conduct. A defendant is entrapped "if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *Johnson*, 466 Mich at 498, citing *Juillet*, 439 Mich 34; *People v Ealy*, 222 Mich App 508, 510, 564 (1997). This legal standard was properly stated and applied by the Court of Appeals in the present case. *Jade*, slip op at 7. Under the first prong, when "examining whether governmental activity would impermissibly induce criminal conduct," or, whether

[24] This consideration of the defendant's circumstances does not improperly consider the defendant's predisposition to commit the charged crime like the subjective test and instead examines whether the at-issue conduct would convince someone not ready and willing. Entrapment is generally raised in cases where it is undisputed that the defendant was ready and willing to commit the charged crime based upon his seizing of the presented opportunity. "[T]o 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." *Jamieson*, 436 Mich at 72-73, quoting *Turner*, 38 Mich at 20.

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governmental activity would impermissibly induce someone not ready and willing to commit the crime, a reviewing court considers twelve non-exhaustive factors, often referred to as the *Juillet* factors.[25] *Johnson*, 466 Mich at 498-499, citing *Juillet*, 439 Mich at 56-57. Under the second prong, the focus of the reprehensible conduct prong is exclusively on whether "the police have gone beyond the limit of acceptable conduct in ensnaring the defendant, without regard to causation;" thus, it is irrelevant for purposes of analysis under this prong whether the conduct would have induced an otherwise law-abiding person in the defendant's circumstances. *Juillet*, 439 Mich at 76 n 3, 78; *Fabiano*, 192 Mich App at 532.

For the first prong, impermissible inducement, it is well-established[26] that "[t]here 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." *Jamieson*, 436 Mich at 68. This is because simply providing a suspect with an opportunity, absent other, improper police action, is insufficient to overcome the will of an otherwise law-abiding citizen, who would simply decline to commit the offense. "Such persons who need only that incentive to commit crime are a danger to society and therefore proper detective targets. Generally they are the 'unwary criminals' rather than the 'unwary innocent.'" Barlow, *Entrapment and the Common Law: Is there a Place for the American Doctrine of Entrapment?*, 41 Mod L Rev 266, 282

[25] See §§ III.A & III.B for discussion regarding the application of the *Juillet* factors by the Court of Appeals and trial court, and their ultimate rulings that Defendant was not impermissibly induced.
[26] This precedent is undisputed to the extent that, "in the doctrine of entrapment 'opportunity' has become a term of art that generally encompasses official activity not reaching the level of inducement." Carron, *Entrapment: A Critical Discussion*, 37 Mo L Rev 648 (1972).

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(1978). Unless the defendant can demonstrate by a preponderance of evidence that there was *additional* improper police conduct that would have caused someone not ready and willing to commit the offense, police did not engage in conduct that would overcome the will of an otherwise law-abiding person when they merely present the defendant with the opportunity to commit a crime.

Similarly, the mere presentation of the opportunity to commit a crime is not entrapment by reprehensible conduct unless "the mere furnishing of the opportunity requires the police to commit certain criminal, dangerous, or immoral acts." *Juillet*, 439 Mich at 77-78; *Johnson*, 466 Mich at 498. Absent a preponderance of evidence demonstrating that law enforcement engaged in "certain criminal, dangerous, or immoral acts," in order to provide the suspect with the opportunity, their conduct does not rise to the level of reprehensible conduct necessary to establish entrapment.

If merely presenting an opportunity to commit the charged crime *was* sufficient to establish an entrapment defense, the entire public policy foundation of the entrapment doctrine would be undermined, as the doctrine would then be used to deter law enforcement conduct *that does not rise to the level of inducement and is not reprehensible*. Law enforcement would be deterred from "practices that on their face are nothing short of good law enforcement techniques," and the Court would be engaging in the very "far-reaching supervision of police investigative techniques and procedures unrelated to the driving force of the objective test" it warned against in *Jamieson*. *Jamieson*, 436 Mich at 77, 89.

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***C. The Court of Appeals and the trial court did not err by relying upon the longstanding legal standard that police do not engage in entrapment by merely presenting a defendant with the opportunity to commit the crime with which he was charged and properly considered Defendant's readiness and willingness to commit the charged crime.***

In the present case, the Court of Appeals considered whether the police conduct—presenting Defendant with the opportunity to commit CSAA online—constituted entrapment and relied upon *Johnson* as the basis of this legal standard. *Jade*, slip op at 7-8.[27] The Court of Appeals noted that police conduct of merely presenting a suspect with an opportunity to commit a crime is insufficient to establish entrapment, and that entrapment is established under the impermissible inducement prong if the police "engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances." *Id.* at 7. The Court of Appeals then used the *Juillet* factors to evaluate whether law enforcement's conduct, providing Defendant with the opportunity to pay a child for sex, would impermissibly induce a person in Defendant's circumstances who was not ready and willing to pay a child for sex to do so. *Id.* at 7-11.

The Court of Appeals concurred with the trial court's application of the *Juillet* factors to the case, and explained that the distinction[28] between merely presenting the opportunity to commit a crime and actually impermissibly inducing someone to commit a crime

[27] *Johnson* relied upon *Juillet*, *Ealy*, and *Butler* as the basis of this legal standard. *Johnson*, 466 Mich at 498.

[28] The importance of this distinction has been discussed by legal scholars since the early days of Michigan's objective test, see Barlow at 282, "Presenting opportunity as distinct from encouragement does not fall into this category," of police conduct that "stimulat[es] crime for the sake of obtaining convictions," as the police "cannot be said to be engaged in reprehensible practices and the acceptance of such opportunity excludes the suggestion of solicitation."

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> is vital because it underscores the fact that defendant's actions were not coerced or manipulated by law enforcement. Rather, it highlights defendant's voluntary choice to commit the crime for which he was convicted. Law enforcement posed as a 15-year-old who was offering sexual acts in exchange for money, posted an advertisement on an adult-oriented website, and initially claimed to be old enough to post on the site. After defendant responded to the advertisement, defendant was informed in clear and certain terms that the decoy was actually 15 years old. Defendant was thereby presented with an opportunity to either proceed with committing the relevant criminal acts or decline. Merely presenting an opportunity to commit a crime is not entrapment. *Id*. at 9-10, citing *Johnson*, 466 Mich at 498; *People v Butler*, 444 Mich 965, 965-966 (1994); *People v Williams*, 196 Mich App 656, 662-663 (1992).

By using the *Juillet* factors to analyze the case, the Court of Appeals directly considered whether the mere presentation of the opportunity was sufficient to induce a person in circumstances similar to Defendant, who was not ready and willing, to commit CSAA, exactly as this Court stated it should in *Jamieson*, *Juillet*, and *Johnson*. The Court of Appeals did not err in its application of the law.

Additionally, providing a suspect with an "opportunity to commit an offense does not ordinarily constitute entrapment unless (1) the circumstances indicate that such an opportunity would not normally be presented or (2) the mere furnishing of the opportunity requires the police to commit certain criminal, dangerous, or immoral acts."[29] *Fabiano*, 192 Mich App at 529, quoting *Jamieson*, 436 Mich at 95-96 (CAVANAGH, J., concurring). By considering whether the circumstances indicate that the opportunity would not normally be presented, the reviewing court analyzes whether the presenting of the opportunity itself could impermissibly induce a person

[29] The former applies to impermissible inducement analysis, and the latter applies to reprehensible conduct analysis. *Fabiano*, 192 Mich App at 529, citing *Juillet*, 439 Mich at 77-78 (CAVANAGH, J., concurring).

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not ready and willing to commit the crime. If the circumstances indicate that the opportunity would not normally be presented, then it is more likely that law enforcement impermissibly induced someone with an otherwise law-abiding disposition to commit the crime, as police did not give the defendant "a fair opportunity to exercise his powers of self-control." Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 Va L Rev 1094 n 255 (1987).

In the present case, Defendant failed to establish by a preponderance of the evidence that the opportunity to commit the charged crime, CSAA, would not normally be presented on the adult-oriented website, SkipTheGames. It was established on the record that, although SkipTheGames's policy requires escorts to list their age as at least nineteen years old, there is no actual age verification procedure to confirm a user's age on the website. (12/09/2023, 50, 63). This means that anyone of any age could access the website and advertise their services. Further, there was testimony from Detective Frattura that established that SkipTheGames was commonly used for CSAA and CSAM, despite the website's policies. *Id*. at 65-66.

Detective Frattura's testimony is consistent with the known reality of online child exploitation, and is supported by the plethora of cases across the country where SkipTheGames was used to facilitate the commission of CSAA and CSAM, see for example:

- A defendant was convicted of multiple counts of sex trafficking of minors after he posted advertisements on SkipTheGames using the children's images to traffick them. *Scott v State*, unpub op of the Court of Appeals

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of Texas, issued August 27, 2025 (Docket Nos. 09-24-00437-CR, 09-24-00438-CR).

- A defendant was charged with crimes related to sex trafficking minors and pleaded guilty to conducting a criminal enterprise, after defendant advertised the services of a child victim on SkipTheGames and facilitated the trafficking of the child. *People v Jeske*, unpub op of the Court of Appeals, issued July 16, 2025 (Docket No. 372086).
- A defendant was convicted of multiple counts of sex trafficking a minor and related crimes after he posted advertisements on SkipTheGames using the child's images to traffick her. *US v Midder*, 139 F4th 649 (CA 8, 2025).
- A defendant was convicted of sex trafficking a minor and related crimes after he posted advertisements on SkipTheGames using the child's images to traffick her. *US v Watson*, unpub op of the United States Court of Appeals, Eleventh Circuit, issued August 19, 2024 (Docket No. 22-13652).
- A defendant was convicted of sex trafficking a minor after making several dozen accounts on SkipTheGames and posting advertisements on the site using the child victim's image to traffick her. *Simon v State*, unpub op of the Court of Appeals of Texas, issued June 26, 2024 (Docket No. 09-23-00095-CR).
- A defendant pleaded guilty to fifteen counts of sex trafficking of a minor and related crimes, as well as possession of CSAM after he posted advertisements selling sadomasochistic sexual services to be performed by the child victim on SkipTheGames, as well as using the child's images to traffick her on the site. *State v Lazzari*, unpub op of the Superior Court of Conn, issued June 20, 2024 (Docket Nos. NNH-CR21-0348534-T, NNH-CR23-0354356-T, and N07M-CR23-0354097-S).
- Co-defendants were convicted of aggravated sex trafficking of a minor and related crimes after they posted CSAM on SkipTheGames to traffick the child victim. *People v Johnson*, unpub op of the California Court of Appeal, Sixth District, issued December 29, 2022 (Docket Nos. H048633, H048722).
- A defendant was convicted of persuading, inducing, enticing, or coercing a minor to engage in prostitution after he responded to the child's advertisement on SkipTheGames, exchanged explicit photos with the child, and paid the child for sex four or five times. *US v Jarcord*, unpub op of the United States Court of Appeals, Eleventh Circuit, issued October 5, 2022 (Docket No. 21-13975).
- A defendant was charged with multiple counts of sex trafficking perpetuated against two victims, one of whom was a child. The child victim had been reported missing, and the defendant had posted advertisements on SkipTheGames using the child's images to traffick

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her. *US v Chatman*, unpub op of the United States District Court, D Neb, issued June 6, 2022 (Docket No. 8:21CR295).

- A defendant was charged with sex trafficking of a minor, cyberstalking, and production, transportation, and possession of CSAM, after he posted 400 advertisements on SkipTheGames using the child's images to traffick her. *US v Jackson*, 535 F Supp 3d 809, 813-814, (ND Ind, 2021).

It simply cannot be said that Defendant would not have otherwise had the opportunity to purchase sex from a child had he not responded to law enforcement's ad.

The Court of Appeals also properly considered whether the presentation of an opportunity to commit a crime was reprehensible conduct, without regard to whether the conduct would cause a person not ready and willing to commit the crime. It noted that law enforcement's conduct "primarily involved presenting defendant with the opportunity to engage in the criminal acts," and cited this Court in support of the legal standard that "the mere presentation of the opportunity to commit criminal acts in a non-targeted manner does not constitute reprehensible conduct amounting to entrapment." *Jade*, slip op at 11, citing *Johnson*, 466 Mich at 508. Additionally, Michigan courts have determined that the following actions taken by law enforcement, in the context of the "particular nature" of the crime being investigated, are not reprehensible conduct constituting entrapment:

- Using deceit or decoys, generally: *Smith*, 296 Mich at 182*; Jamieson*, 436 Mich at 68; *Williams*, 196 Mich App at 663.
- Posing as a minor on adult-oriented websites: *People v Martin*, unpub op[30] of the Court of Appeals, issued December 28, 2001 (Docket No. 231621), lv den *People v Martin*, 467 Mich 946 (2003); *People v Chow*, unpub op of the Court of Appeals, issued May 3, 2002 (Docket No.

[30] "Although unpublished opinions of this Court are not binding precedent, they may ... be considered instructive or persuasive." *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3 (2010) (citations omitted).

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229036); *People v Cobb*, unpub op of the Court of Appeals, issued August 28, 2007 (Docket No. 269880); *People v Kelley*, unpub op of the Court of Appeals, issued September 6, 2007 (Docket No. 265700).

- Using actual minors in sting operations: *Vill of Spring Lake v Gardner*, 38 Mich App 189, 189 (1972); *People v Reynolds*, 139 Mich App 471, 476 (1984); *Jamieson*, 436 Mich at 84.
- Reverse sting operations and undercover sales operations; *People v Roy*, 80 Mich App 714 (1978), lv den 402 Mich 903 (1978); *Duke*, 87 Mich App 618 ; *Williams*, 196 Mich App at 663; *Butler*, 444 Mich at 965; *Connolly*, 232 Mich App 425.
- Conducting an investigation without targeting a specific individual; *Williams*, 196 Mich App at 662-663; *Butler*, 444 Mich at 965-966; *Fyda*, 288 Mich App 446; *Vansickle*, 303 Mich App 111.

Law enforcement's investigative techniques and procedures cannot be evaluated "without reference to the particular nature" of the crime being investigated, and "[i]n practice, government undercover activity may be the only way to detect some criminal acts carried on in secret." *Jamieson*, at 436 Mich at 82, 88. CSAA and related crimes are often conducted anonymously, initiated online on adult-oriented websites, and consummated in private. By concurring with the trial court's application of the law, the Court of Appeals properly considered that the nature of these crimes necessitated law enforcement's conduct. *Jade*, slip op at 12.

**III. The Court of Appeals did not err by affirming the trial court's determination that Defendant was not entrapped by impermissible inducement or reprehensible conduct.**

When the ultimate rulings of the trial court and the Court of Appeals are examined, one cannot be left with the "definite and firm conviction that a mistake has been made." *Johnson*, 466 Mich at 498-499. First, the trial court properly analyzed its factual findings using the *Juillet* factors, as is necessary to evaluate for entrapment via impermissible inducement. As the trial court's factual findings were not clearly erroneous and it did not err in its application of the law, the trial court did

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not clearly err when it considered the totality of the circumstances and ultimately ruled that Defendant was not entrapped by impermissible inducement. Second, the Court of Appeals properly determined that the trial court's factual findings were not clearly erroneous, its application of the law was proper, and its highly fact-intensive ultimate determination that Defendant was not entrapped by impermissible inducement was not clearly erroneous. Third, both the trial court and the Court of Appeals properly applied the law to the trial court's not clearly erroneous findings of fact and did not clearly err in their ultimate determinations that Defendant was not entrapped by reprehensible conduct.

***A. The trial court's factual findings were not clearly erroneous, the trial court properly applied the law, and the trial court's ultimate ruling that Defendant was not entrapped by impermissible inducement was not clearly erroneous.***

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

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

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(11) whether there was police control over any informant; and
(12) whether the investigation was targeted. *Johnson*, 466 Mich at 498-499, citing *Juillet*, 439 Mich at 56-57.

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

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

"[F]riendly banter does not establish impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances." *Vansickle*, 303 Mich App at 116 (quotations omitted). In the present case, the trial court found that "[t]here was no evidence of any appeals to defendant's sympathy as a friend," and weighed this factor against a finding of entrapment. (DA App, 117a).

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

The trial court weighed this factor in favor of a finding of entrapment, as Defendant did not have a criminal history that involved CSAA or CSAM. *Id.*

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

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

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then arrested immediately after he voluntarily entered her hotel room to have sex. Based upon the analysis from *Fyda* and *Turner*, the trial court properly held that "the lack of any meaningful delay between the initial investigation and defendant's subsequent arrest indicates this factor does not weigh in favor of finding entrapment." *Id*. at 118a.

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

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

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

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

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

There was never any guarantee that the acts were not illegal. The undercover officer told Defendant that she was fifteen years old four times, and initially Defendant told her that needed to be sixteen, but that he was "cool if you are older than 15 and want to role play to be 15." The undercover officer reaffirmed that she was fifteen years old, and Defendant did not bring up her age again. The trial court noted that "[b]y asking defendant if he was okay with someone underage, the officer posing as a minor impliedly acknowledged that the conduct at issue was illegal," and weighed this factor against a finding of entrapment. *Id.*

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

The trial court found that the only potential government pressure that existed in the present case was that the undercover officer indicated she was only available for one night. *Id.* Further, it found that text messaging was a low-pressure mode of communication, and "Defendant was free to tell the officer he did not want to move forward knowing she was underage. He also could have simply stopped communicating with her. There is no evidence the officer otherwise pressured defendant into coming to meet her." *Id.* at 118a-119a. This factor was weighed against a finding of entrapment.

**8. Whether there existed sexual favors.**

The trial court noted that "[w]hile the criminal conduct at issue in this case is itself sexual in nature, there was no evidence that Defendant was promised separate

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sexual favors in exchange for engaging in the charged crimes," and properly weighed this factor against a finding of entrapment. *Id.* at 119a.

**9. Whether there were any threats of arrest.**

The trial court found that there was "no evidence defendant was threatened with arrest prior to the commission of the charged offense," and thus because Defendant was not coerced into illegal conduct by fear that he would be arrested, weighed this factor against a finding of entrapment. *Id.*

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

The trial court acknowledged that there was some evidence that the government escalated Defendant's criminal culpability from the misdemeanor offense of soliciting of a prostitute, to the felony offense of CSAA, as Defendant had initially responded to an escort ad seeking sex with an adult woman, and weighed this factor in favor of entrapment.[31] *Id.*

**11. Whether there was police control over any informant.**

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

**12. Whether the investigation was targeted.**

The trial court spent a considerable amount of time analyzing this factor and noted that this Court has interpreted the fact that an investigation was untargeted

[31] While the People do not dispute the ultimate ruling of the trial court, it is the People's position that a preponderance of the evidence did not support the conclusion that Defendant did not have the requisite criminal culpability to commit CSAA absent governmental procedures. When informed of the escort was fifteen near the beginning of their conversation, Defendant first responded, "Got to be 16." MCL 750.145c(1)(b) and (c) define a child as "a person who is less than 18 years of age." As such, Defendant explicitly demonstrated his readiness and willingness to have sex with a child *long* before he was arrested walking into the escort's hotel room.

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to weigh both for and against a finding of entrapment. *Id*. at 120a. It determined that the undercover chatting tactics utilized by law enforcement in the present case were comparable to "reverse sting operations" in controlled substance investigations that this Court has previously upheld the use of in *People v Butler*. *Id*. As discussed by the trial court, in *Butler*, this Court reversed the Court of Appeals decision that had previously ruled the government's methods of "sen[ding] word out on the streets that he had cocaine available for sale [and] ma[king] the number for his electronic beeper available" constituted a "fishing expedition" that impermissibly induced the defendant. *Butler*, 444 Mich at 966; *People v Butler*, 199 Mich App 474, 476 (1993). In *Butler*, this Court stated that "nothing in the conduct of the government in this particular case rose to the level of entrapment. Law enforcement officials did nothing more than to present defendants with the opportunity to commit the crimes of which they were convicted." *Butler*, 444 Mich at 966.

The trial court similarly cited *People v Williams*, a Court of Appeals case that relied on *Butler*, which also held that the untargeted nature of law enforcement's investigation in *Williams* "merely furnished an opportunity to commit a crime," and "[f]urnishing an opportunity to commit a crime does not constitute entrapment." *Williams*, 196 Mich App at 663; (DA App, 121a). Thus, just as in *Butler* and *Williams*, the trial court determined that "it is clear that the untargeted nature of the investigation at issue in this case does not weigh in favor of a finding of entrapment."[32] (DA App, 121a).

[32] Defendant argues that the lack of targeting by law enforcement in the present case weighs towards a finding of entrapment, and relies on *Killian*, 117 Mich App 220 to support his argument. The Court

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In total, the trial court found that two of the twelve *Juillet* factors weighed in favor of a finding of entrapment. *Id.* The trial court examined the totality of the circumstances and found that Defendant's lack of prior criminal history did "not weigh strongly in favor of finding he was entrapped," given that his text messages demonstrated "Defendant had no reservations about arranging for paid sex with someone younger than 18." *Id.* at 121a-122a. The trial court also acknowledged that "customers who were ready and willing to commit one type of offense were in essence invited by police to commit a more serious one," which in some circumstances could be "troubling, as police are manufacturing criminal conduct." *Id.* at 122a. But as stated by the trial court, "that is not the case here." *Id.*

The trial court determined that "[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." *Id.* This "was an opportunity defendant readily seized." *Id.* The trial court found that Defendant's text messages and his conduct displayed "no indication" that he was concerned about the wrongness of sex with a child. *Id.* at 122a-123a. Thus, after careful fact finding and legal analysis, the trial court held that "police did not engage in conduct that would impermissibly induce a person similarly situated to the defendant, though otherwise law-abiding, to commit the crime." *Id.* at 123a.

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of Appeals addressed this argument, and distinguished Defendant's case from *Killian*. *Jade*, slip op at 10. Rather than targeting a suspect that law enforcement knew had no prior involvement in drug sales like in *Killian*, in the present case law enforcement simply provided an opportunity to obtain something illegal and waited for potential buyers to contact the undercover officer like in *Butler* or *Williams*. *Id.*

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***B. The Court of Appeals properly determined that the trial court's factual findings were not clearly erroneous, the trial court properly applied the law, and the trial court's ultimate ruling that Defendant was not entrapped by impermissible inducement was not clearly erroneous.***

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

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

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

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To conclude, neither the trial court, nor the Court of Appeals, made clearly erroneous findings of fact, nor did they err in the application of the modified objective test to those facts in the present case. Both the trial court and the Court of Appeals properly engaged in the fact-intensive ultimate determination of entrapment using the modified objective test and related law and did not clearly err in their ultimate rulings that Defendant was not entrapped by impermissible inducement.

***C. The Court of Appeals properly determined that the trial court's factual findings were not clearly erroneous, the trial court properly applied the law, and the trial court's ultimate ruling that Defendant was not entrapped by reprehensible conduct was not clearly erroneous.***

The trial court evaluated Defendant's claims of reprehensible conduct and noted that the police "did take investigative steps that changed the nature of the crimes defendant is alleged to have committed, but there is no evidence that the police took those steps merely to enhance defendant's eventual sentence." *Jade*, slip op at 12. Instead, "[i]dentifying individuals willing to make plans to engage in sex with minors is a legitimate law enforcement goal that justifies the decision to see whether defendant's conduct might expose him to heightened criminal liability." *Id*.

The trial court also again compared law enforcement's undercover operation to the one conducted in *Butler*, "[l]ike the police in *Butler*, the officers in this case created a fictitious criminal opportunity. Like the police in *Butler*, the officers interacted with people who responded to that opportunity," and "[a]rguably, the police in *Butler* went further than the officers in this case." (DA App, 125a). The trial court concluded that because police only presented Defendant with the opportunity to commit the charged offense, and when "police do nothing more than provide a defendant with an

opportunity to commit a crime, such conduct is not reprehensible," that Defendant was not entrapped due to reprehensible conduct. *Id*. at 127a. Upon review, the Court of Appeals "discern[ed] no error in the trial court's application of the law, nor do we discern clear error in the court's findings." *Jade*, slip op at 12.

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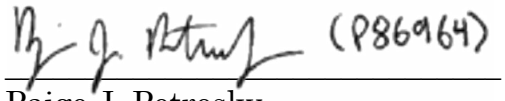
## RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellee respectfully requests that this Honorable Court AFFIRM Defendant-Appellant's conviction.

Respectfully submitted,

Susan K. Zuiderveen (P76985)
Prosecuting Attorney, Van Buren County

Dated: December 4, 2025



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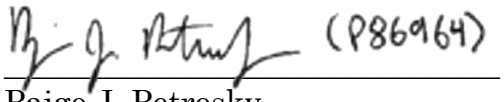
## STATEMENT OF WORD COUNT

There are 13,769 countable words in this brief.



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