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State of Washington  
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No. 53260-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

EZRA WRIGHT,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

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APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

In this era of mass incarceration, in which we already lock up more of our population than any other nation on Earth, it is especially curious that the government feels compelled to invent fake crimes and imprison people for long periods of time for agreeing to participate in them – people who but for the government's scheme might not have ever entered the world of major felonies.

United States v. Black, 750 F.3d 1053, 1057-58 (9th Cir. 2014) (Reinhardt, J., dissenting).

Ezra Wright, a 20-year-old soldier, was serving his country on base at Joint Base Lewis-McChord (JBLM), when he was suddenly arrested in September of 2016. With no experience in the criminal justice system, Ezra was frightened and confused; he immediately cooperated with law enforcement, consenting to a search of his cell phone and his vehicle, as well as his barracks at JBLM.

Ezra had been “catfished”<sup>1</sup> by a sting operation conducted by the Washington State Patrol and the Missing and Exploited Children’s Task Force, assisted by the Washington State Patrol. A female officer, posing as a mother of young children, solicited men to meet her, promising “taboo” sex in return. After Ezra agreed to drive to meet her,

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<sup>1</sup> “A fake or stolen online identity created or used for the purposes of beginning a deceptive relationship.”  
<https://www.urbandictionary.com/define.php?term=catfish>.

a surveillance team arrested him at the “trap house.” Nothing was found on Ezra’s devices or in his barracks to suggest he had ever shown an interest in child pornography or in underage sex until that day. Nor did the State show at trial that Ezra had a predisposition to commit any crime until the State induced him to.

Reversal is required because Ezra’s proposed entrapment instruction was denied by the court, depriving him of the opportunity to present a defense, and because the prosecution was premised on outrageous government conduct in violation of due process.

**B. ASSIGNMENTS OF ERROR**

1. The trial court denied Ezra a fair trial by refusing to instruct the jury on the defense of entrapment.

2. The prosecution was premised on outrageous government conduct in violation of due process.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where there is evidence to support the defense theory, the trial court commits reversible error when it fails to instruct the jury as to a legitimate defense advanced by the defendant. Where the evidence showed undercover officers lured Ezra to commit an offense he was not

predisposed to commit, did the trial court's refusal to instruct the jury on the defense of entrapment deny Ezra a fair trial?

2. The conduct of law enforcement officers may be so outrageous that due process principles bar the government from invoking judicial processes to obtain a conviction. Due process is violated when police conduct violates a universal sense of fairness. Did the government conduct inducing Ezra to engage in illegal conduct offend due process, requiring reversal of the conviction?

#### D. STATEMENT OF THE CASE

On September 9, 2016, the State charged Ezra Wright, a 20-year-old JBLM soldier, with one count of attempted rape of a child in the first degree. CP 2. Before this date, Ezra had never been arrested and had no previous contact with the criminal justice system. CP 167, 241. The prosecution of Ezra was the result of a well-orchestrated "net nanny" sting operation conducted by the Washington State Patrol's (WSP) Missing and Exploited Children's Task Force (MECTF or "task force"). RP 434. Most of the detectives on this sting operation had worked in law enforcement since before Ezra was born. RP 344, 432. (Det. Rodriguez: over 25 years; Det. Kleinfelder: over 19 years; Det. Maijala: over 23 years).

1. The “Net Nanny” Sting Operation.

This MECTF was created by the Legislature in 1999 to “address the problem of missing children,” including those abducted by strangers, due to custodial interference or classified as runaways. RCW 13.60.100. For this reason, the Legislature created “a multiagency task force within the Washington State Patrol.” *Id.* MECTF’s authority is limited to assisting other law enforcement agencies upon their request. RCW 13.60.110(2). In addition, MECTF is funded by “public and private grants and gifts to support the work of the task force.” RCW 13.60.110(4).

Detective-Sgt. Carlos Rodriguez acknowledged at Ezra’s trial that the work of MECTF has evolved from its initial function, which was to save actual children. RP 376-77. At the time of Ezra’s arrest in September 2016, the task force in Thurston County was conducting a “proactive undercover operation” – that is, manufacturing artificial situations with fictitious “children.” RP 376 (“We were looking to arrest people who were looking to have sex with children”).

Rodriguez testified that in a “net nanny” operation, undercover officers are assigned to play all roles, so the personas of the “mother” and any “children” – whether through photographs, voices, or chats –

are actors played by undercover officers. RP 378. Rodriguez stated that his task force includes several detectives, along with surveillance, arrest, interview, and forensics units. RP 378, 422.

Rodriguez estimated it takes “50 to 60 people” from various law enforcement agencies to conduct an operation like the net nanny sting in which Ezra was arrested. RP 378. These agencies include the FBI, Homeland Security, the Postal Inspector Service, Thurston County, and WSP. RP 378-79. MECTF relies upon funding from the Department of Justice (DOJ), and local partners like the Internet Crimes Against Children (ICAC) Task Force in Seattle, which requires the task force to follow the ICAC operational standards. RP 416-17.<sup>2</sup>

2. The task force places a false ad on Craigslist to seek out suspects.

On September 9, 2016, Rodriguez’s team placed a personal ad in the Casual Encounters section of Craigslist, stating the following:

Family playtime!?!? – w4m.

Mommy/daughter, Daddy/daughter, Daddy/son,  
Mommy/son ... You get the drift. If you know what I'm  
talking about, hit me up, we'll chat more about what  
I have to offer you.

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<sup>2</sup> The ICAC operational standards include the following guidelines, in order to prevent entrapment: “[D]uring online dialogue, officers shall allow the investigative target to set the tone, pace, and subject matter of the online conversation.” RP 424.

CP 4; RP 441.

The advertisement was designed to steer Craigslist users who were seeking sexual or intimate encounters into communicating with an undercover detective, who would pose as the “mother” character. RP 363, 377.<sup>3</sup> Once contact was established, the detectives monitoring the chat sessions would attempt to determine which individuals seemed to be interested in sexual contact with minors, and the task force would turn their focus to those individuals as potential suspects. RP 377.

Detective Krista Kleinfelder testified that she portrayed the “mother” character named “Hannah” in the ruse, pretending to have three children: two girls, “Anna” (age 11) and “Sam” (age 6), and a boy, “Jay” (age 12). RP 440; Ex. 16 at 12.<sup>4</sup>

3. Ezra responds to the Craigslist ad.

Ezra responds to the above ad on September 9<sup>th</sup>, at 1:19 p.m., with a request to “Chat now.” This initiates the task force’s contact with him, and for the next several hours, Ezra and Detective Kleinfelder (“Hannah”) chat back and forth. Ex. 16. Ezra’s texts and emails are

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<sup>3</sup> The term “w4m” was defined by detectives as an abbreviation for “women for men.” RP 441.

light in tone, and he continually diverts the conversation away from the topic of sex. “Hannah” is the first to mention sex, and she consistently attempts to steer Ezra back to a discussion of sex with her fictitious “children.” Ex. 16.

Early in the chat, at 1:21 p.m., “Hannah” texts Ezra an ambiguous question, “Did you have experience with younger kids?” Ex. 16 at 12. Ezra responds, “How much experience do you need? And what exactly would I do?” Id. Almost immediately, “Hannah” replies, “I just want someone you [sic] knows how to make it fun for my girls without them experiencing pain.” Id. More than 20 minutes elapse before Ezra responds, “What do you want me to do with them?” Id. Sex has not entered into the conversation yet.

The first suggestion of sex is introduced by Detective Kleinfelder, who writes, “I’d like to watch someone have sex with them.” Ex. 16 at 12 (line 184, 1:53 p.m.). Ezra never responds to “Hannah’s” text about sex. Instead, Ezra continues to send innocuous messages about other topics. Id.

He and “Hannah” spend the next several hours chatting and sending texts and emails. After a discussion concerning pictures of the

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<sup>4</sup> Exhibit 16, a Cellebrite© extraction report, contains all of the messages sent to and from Ezra’s cell phone on the night of his arrest. The messages

“children,” Ezra encourages “Hannah” to send a picture of herself. Ex. 16 at 11 (lines 172, 173, 2:41 p.m., 2:42 p.m. “What about of you? ... and why not?”). The two spend a great deal of time discussing their various technological challenges with their phones and computers. Id. at 6, 8, 10; RP 446-47 (“Wow, that was starting to – wow, that was starting to hurt my head, By the way, tech support said there is nothing wrong with my phone”).

“Hannah” ultimately sends Ezra a picture of herself and two undercover troopers with Snapchat© filters on their faces, so that they seem to have dog ears and noses, appearing younger. RP 447. Ezra sends a picture of himself and a friend’s dog. Ex. 16 at 7. Ezra never sends revealing pictures, nor does he ask for any. He never engages in conversation with “Hannah” that is risqué or off-color; nor does he engage in conversation of any kind with the fictitious “children.”

Ezra repeatedly tells “Hannah” that he would rather they just meet somewhere else, such as a neutral location, so that he can meet her, the “mother.” Ex. 16 at 8. When “Hannah” refuses or changes the subject, Ezra finally says, “I’ll have sex with the girls.” Id. at 7. This is the first comment Ezra makes that refers to any sexual activity, and it is five hours after Detective Kleinfelder’s initial suggestion. Ezra tells

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appear in reverse chronological order.

“Hannah” he is from JBLM, and that he is only coming to see the 11-year-old. Id. at 5.

During the same time period, Ezra engages in a number of chats with different women. Ex. 16 at 1, 2, 4, 10, 11. At the same time he is discussing meeting “Hannah,” he is negotiating a price for a sexual liaison with a woman named “Amanda” at a different cell phone number. Id. at 1, 2.<sup>5</sup>

4. Ezra arrives to meet “Hannah” at the trap house.

As Detective Kleinfelder directs, Ezra arrives at a local 7-11 where he is observed by the task force surveillance team. RP 382-84, 459. After he arrives at the 7-11, Ezra drives to the apartment he believes is “Hannah’s” home; Detective Kleinfelder quickly runs across the parking lot from the command post to the “target apartment” or “trap house.” RP 461-62. “Hannah” and Ezra engage in a brief conversation in the doorway of the apartment, during which Ezra expresses concern that this feels like a scenario like “To Catch a Predator.” RP 463. “Hannah” teases Ezra, asking if he thinks she is pretty enough to be on TV; at the same time, the arrest team is hiding in the kitchen. RP 465. “Hannah” leaves Ezra in the hallway of the

apartment for a moment and the arrest team emerges, placing Ezra under arrest. Id.

Ezra is charged with one count of attempted rape of child in the first degree. CP 2. He consents to a search of his phone, vehicle, and barracks; no child pornography or anything showing he is interested in minors is found. RP 415, 425. He is carrying condoms, which is consistent with his upcoming liaison with “Amanda” that evening. Ex. 16 at 1-2.

At trial, Ezra proposed a jury instruction on entrapment, which the court denied. RP 560, 572; CP 90. Without this instruction, Ezra was unable to present his entrapment defense, and was convicted as charged. CP 159.

The trial court found Ezra’s youth, as well as his sexual and social immaturity and impulsiveness, were contributing factors to his offense, justifying an exceptional minimum sentence below the standard range. CP 240-53. Ezra is subject to an indeterminate sentence of community custody for the remainder of his life. CP 251-53.

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<sup>5</sup> The Cellebrite report indicates Ezra was negotiating a price with “Amanda” just before his arrival at the trap house and his arrest. Ex. 16 at 1-2

E. ARGUMENT

**1. The trial court erroneously refused to instruct the jury on entrapment, depriving Ezra of his right to present a defense.**

Ezra proposed a jury instruction on entrapment, because the evidence showed the design for this crime did not originate with him, but with law enforcement. RP 560. Given the tone of the conversation with the undercover, as well as the lack of evidence that Ezra had any predisposition to commit this type of crime, the instruction should have been given.

*a. An instruction on entrapment is proper where the criminal design originated in the mind of law enforcement and the actor was lured into committing a crime he did not otherwise intend to commit.*

It is an affirmative defense that the criminal plan originated with law enforcement, and that a suspect was lured or induced to commit a crime he would not otherwise have intended to commit. RCW 9A.16.070; State v. Lively, 130 Wn.2d 1, 9-10, 921 P.2d 1035 (1996).

Under RCW 9A.16.070, the defense of entrapment is defined as follows:

(1) In any prosecution for a crime, it is a defense that:

(a) The criminal design originated in the mind of law enforcement officials, or any person acting

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(lines 3-6, 9-17).

under their direction, and

(b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070.

Accordingly, the corresponding pattern jury instruction, WPIC 18.05, makes clear that the issue of fact for the jury would be whether there was luring by police, and whether officers used more than “a reasonable amount of persuasion” to overcome reluctance on Ezra’s part.

Entrapment is a defense to a charge of attempted rape of a child in the first degree if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and the defendant was lured or induced to commit a crime that the defendant had not otherwise intended to commit.

The defense is not established if the law enforcement officials did no more than afford the defendant an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance means you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

11 Wash. Prac. Pattern Jury Instr. Crim. WPIC 18.05 (4th Ed); CP 90  
(defendant’s proposed Instruction 14).

There was sufficient evidence presented at trial to support the entrapment instruction, between the evidence presented in the State’s case, as well as the additional text messages presented as part of the defense case. Ex. 16; see Lively, 130 Wn.2d at 13; State v. Trujillo, 75 Wn. App. 913, 917, 883 P.2d 329 (1994).

The burden is on the defendant to prove the defense of entrapment by a preponderance of the evidence. Lively, 130 Wn.2d at 13; Trujillo, 75 Wn. App. at 917. Here, the trial court erred in two ways – first, the court improperly weighed the proof and evaluated witness credibility – issues not appropriately before the court in a jury trial. RP 572-73.

Second, when the court found the evidence to support entrapment was “quite limited,” this was error, in light of a defendant’s right to have the jury instructed with an affirmative defense if “some evidence” supports the instruction. State v. Fisher, 185 Wn.2d 836, 852, 374 P.3d 1185 (2016). Even where evidence supporting an affirmative defense may be “‘weak, insufficient, inconsistent, or of doubtful credibility,’ the instruction should be given.” Id. (quoting

U.S. v. Zuniga, 6 F.3d 569, 570 (9<sup>th</sup> Cir. 1993) (internal quotation omitted)).

Finally, it is illogical to require a defendant to prove a defense before ever getting the instruction. Rather, Trujillo indicates the standard of evidence necessary to obtain the instruction, which a jury may ultimately reject if it does not find sufficient evidence to support it after weighing the evidence. See Trujillo, 75 Wn. App. at 917.<sup>6</sup>

The evidence presented was sufficient for the instruction to be given to the jury; the court erred because the jury was not given the proper tools to guide its deliberations.

*b. Both prongs of the entrapment defense were supported by sufficient evidence.*

The evidence presented at trial showed clearly that the criminal design originated in the minds of MECTF task force officers. Sgt. Rodriguez testified that the task force is an interagency “proactive” operation that requires “50 to 60” officers to effectuate the arrest of a suspect. RP 376, 378.

Rodriguez detailed the manner in which the MECTF placed an advertisement in Craigslist, designed to search for a particular type of

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<sup>6</sup> This Court’s application the affirmative defense of entrapment has not been reviewed by the Supreme Court, as Trujillo was a 1994 Court of Appeals case.

individual. RP 376. Detectives with several decades of law enforcement training and experience work as a team to lure and induce individuals to respond to the ad, by including language that is deliberately suggestive, but not outright pornographic. RP 440-41.<sup>7</sup>

Once an individual like Ezra was lured into a conversation, the detective portraying the “mother” quickly turned the conversation to sex; Detective Kleinfelder was the first person to refer to sex at 1:53 p.m., and was the only person to refer to sex at all for approximately five hours. Ex. 16 at 12 (line 184). The reference to sex was so fleeting that the detective and Ezra proceeded to chat for another five hours without another reference to it. Ex. 16 at 7-12.

Each time Ezra attempted to steer the conversation to a topic that felt more safe and comfortable to him, the detective returned to talking about sex with her fictional “children.” For example, Ezra expressed an interest in seeing a picture of the mother, “Hannah,” instead of pictures of the “children.” Ex. 16 at 11 (lines 172-73). The detective quickly changed the topic, texting Ezra that she was having trouble with her wifi and could not send pictures for the moment. Id.

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<sup>7</sup> A sexually inexperienced young person, such as the court found Ezra to be, could have misunderstood the “mother’s” vague and ambiguous references to “playtime,” and “teaching” her children.

(line 171); RP 452.<sup>8</sup> When the detective finally sent Ezra a picture, she ignored his request for a picture of herself, and sent him a picture of the “children” with Snapchat© filters on their faces. Ex. 16 at 9; RP 454. This again pushed Ezra in the direction of the “children,” rather than toward “Hannah,” the woman Ezra wanted to meet.

As to the second prong, there was ample evidence that Ezra was lured or induced to commit a crime that he had no predisposition to commit before the day the task force entered his life.

First, officers agreed that no evidence showed Ezra had a pre-existing interest in sexual contact with minors. Ezra voluntarily consented to a search of his cell phone, his vehicle, and his barracks at JBLM; no evidence suggested that any child pornography, sex toys, or anything inappropriate was found. RP 415, 425. There was no evidence presented that Ezra had any intention of committing this crime before law enforcement induced him to do so.

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<sup>8</sup> Detective Kleinfelder misread the text messages during her testimony. RP 452. The detective erred when she testified that Ezra texted, “What about you and why not?” in reference to “Hannah” sending a picture of herself, rather than of the “children.” RP 452. According to the Cellebrite report, Ezra actually texted, “What about of you and why not?” Ex. 16 at 11 (line 173) (emphasis added). This is a critical difference when considering whether Ezra had the predisposition to commit this crime against a child and whether he was entitled to the entrapment instruction.

In addition, Ezra had a logical and legitimate explanation for the condoms he carried, which was borne out by his cell phone records.

Ex. 16. At the same time Ezra was communicating with “Hannah,” he was also engaged in several other chats with women on Craigslist. Ex. 16 at 1, 2, 4, 10, 11. Between the time Ezra left JBLM to meet “Hannah,” and indeed, even as he approached the “trap house,” he was still arranging the terms of his date with “Amanda” for later that evening in Fife. Ex. 16 at 1, 2.

There was more than sufficient evidence that attempted rape of a child was a crime Ezra did not otherwise intend to commit, until such time that experienced law enforcement operatives lured him into doing so. The State provided no evidence that predisposition existed before the net nanny operation entered Ezra’s life on September 9, 2016. Whatever foolish choices Ezra made by following the lead of detectives on that fateful day, Ezra’s conduct was induced, ultimately, by State experts in manipulation. See, e.g., State v. Chapman, 7 Wn, App.2d 1026, 2017 WL 7362790, \*5 (2019).<sup>9</sup>

In Chapman, this Court reversed an attempted first degree rape of a child conviction in a net nanny case, where the trial court failed to

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<sup>9</sup> Unpublished opinions have no precedential authority and are cited to provide guidance to the Court. GR 14.1.

instruct the jury on entrapment. Id. In facts similar to this case, there was no evidence presented that Mr. Chapman had a predisposition to commit the offense. In determining whether to give the entrapment instruction, the trial court relied upon Mr. Chapman's response to the online ad, his failed opportunities to discontinue the conversation, and his chat with a person he believed to be a minor. State v. Chapman, No. 50089-2-II, Opening Brief at 50 (filed September 20, 2017).

These events, however, took place after law enforcement's intervention, and were part and parcel of the net nanny sting operation. "The relevant time frame for assessing a defendant's disposition comes before he has any contact with government agents, which is doubtless why it's called predisposition." (emphasis in original). U.S. v. Poehlman, 217 F.3d 692, 703 (9<sup>th</sup> Cir. 2000) (citing Jacobson v. U.S., 503 U.S. 540, 549, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1972)).

There was no evidence presented that Ezra was predisposed to commit this offense; conversely, the evidence plainly showed the crime was methodically planned and induced by detectives in Sgt. Rodriguez's task force. Because both prongs were satisfied under RCW 9A.16.070, the court erred when it failed to instruct the jury on entrapment. Lively, 130 Wn.2d at 9-10; Trujillo, 75 Wn. App. at 917.

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c. *Ezra was entitled to the entrapment instruction; the failure to properly instruct the jury deprived him of the right to present a defense.*

“A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case.” State v. Fernandez-Medina, 141 Wn.2d 448, 461-62, 6 P.3d 1150 (2000) (quoting State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)); State v. May, 100 Wn. App. 478, 482, 997 P.2d 956. A requested jury instruction must be evaluated by the trial court in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. In general, “instructions are sufficient if they properly state the applicable law without misleading the jury and permit each party to argue its theory of the case.” State v. Scherz, 107 Wn. App. 427, 431, 27 P.3d 252 (2001) (citing State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999)). “Some evidence,” even where the evidence is not overwhelming, is sufficient for an affirmative defense instruction to be given. Fisher, 185 Wn.2d at 852 (reversing for lack of instruction, even where defendant did not testify).

The right to a fair trial includes the right to present a defense; the Sixth and Fourteenth Amendments of the Federal Constitution, and article 1, sections 21 and 22 of the Washington Constitution, guarantee

the right to trial by jury and to defend against the State's allegations.

U.S. Const. amends. VI, XIV; Const. art. I, § 21, 22.

The court's erroneous refusal to instruct the jury on the entrapment instruction deprived Ezra of his right to present a defense. U.S. Const. amend. VI; Const. art. I, § 21, 22. Without the necessary instruction, Ezra was unable to argue his affirmative defense of entrapment to the jury. This Court should reverse for a new trial in which the jury is appropriately instructed, so that Ezra can present his defense in a new trial.

**2. The police conduct violated Ezra's right to due process, because the law enforcement conduct shocks the conscience and our universal sense of fairness.**

Outrageous police conduct that shocks our universal sense of fairness violates due process and bars the government from invoking judicial process to obtain a conviction. State v. Solomon, 3 Wn. App.2d 895, 909-10, 419 P.3d 436 (2018); Lively, 130 Wn.2d at 19. This issue implicates due process and may be raised for the first time on appeal. Id.; U.S. Const. amends. VI, XIV.

- a. *The government cannot prosecute individuals for offenses it created, or for conduct that violates a fundamental sense of fairness.*

A claim of outrageous government conduct is founded on the principle that “the conduct of law enforcement officers ... may be so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” Lively, 130 Wn.2d at 19 (internal quotation omitted). Police conduct violates due process when it shocks a universal sense of fairness. Id. The focus is the government’s behavior, not the extent of the defendant’s predisposition. Id. at 21.

To determine whether police conduct violates fundamental fairness, several factors are considered: (i) whether government conduct instigated the crime or merely infiltrated ongoing criminal activity, (ii) whether the defendant’s reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, (iii) whether the government controls the criminal activity or simply allows it to occur, (iv) whether law enforcement’s motive was to prevent crime or protect the public, and (v) whether the government’s conduct itself amounted to criminal activity or conduct repugnant to a sense of justice. Lively, 130 Wn.2d at 22.

Recently, this Court found a similar net nanny sting operation constituted outrageous government misconduct in violation of a defendant's constitutional right to due process and fundamental fairness in Solomon. 3 Wn. App.2d at 909-10. In Solomon, this Court affirmed the trial court's dismissal of all counts against the defendant,<sup>10</sup> upholding the trial court's finding that the State had engaged in outrageous misconduct in violation of Mr. Solomon's due process rights.

The circumstances in the sting operation here are similar to Solomon; this Court should consider the State action in Ezra's case to be fundamentally unfair as well.

*b. This government conduct offends fundamental fairness because the police instigated and controlled the activity, and the law enforcement conduct was repugnant to our sense of justice.*

The totality of the circumstances prove the government's conduct here was outrageous. The first factor, whether government conduct instigated the crime or merely infiltrated ongoing criminal activity, points toward outrageous conduct, because the government had no basis to suspect or target Ezra prior to this operation. See Lively,

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<sup>10</sup> Mr. Solomon was charged with communication with a minor for immoral purposes, commercial sex abuse of a minor, and attempted rape of a

130 Wn.2d at 22-24 (police aware of no prior criminal activity). Before this operation, there was no evidence to suggest that Ezra was anything but a young soldier serving at JBLM, with no predisposition to anything unlawful. This factor weighs in favor of a violation of fundamental fairness.

The detectives also tightly controlled the activity to lure Ezra in further. When Ezra asked to a picture of the “mother,” the detective sent him a picture of the fictitious “children,” with Snapchat© filters on their faces, instead. Ex. 16 at 7. When Ezra suggested meeting at a neutral location, the detective threatened to cut off the conversation entirely. Ex. 16 at 3 (lines 30-31). The detective responded that Ezra must either come to her “home,” or “this just isn’t for you.” Ex. 16 at 2-3 (lines 28-29). “Hannah” resisted any attempt by Ezra to arrange a lawful meeting. Id.

In Lively, the Court held the government controlled the criminal activity because police conduct was “so closely related” to the defendant’s actions. 130 Wn.2d at 25-26. The same is true here. Law enforcement posted the false ad that prompted Ezra’s response; it outlined the terms that it believed constituted attempted criminal

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child in the third degree in Skagit County. Solomon, 3 Wn. App.2d at 897-98. He had responded to a Craigslist ad posted by the task force.

conduct (such as the ages of the “children”); it dictated the media on which the communication continued. Law enforcement particularly set the terms of the eventual meeting. In fact, even more than in Lively, where the police used an informant, the criminal activity here was entirely conducted by police officers themselves. See, e.g., Lively, 130 Wn.2d at 33-34; Solomon, 3 Wn. App.2d at 914.

The next factor looks at whether law enforcement’s motive was to prevent crime or protect the public. In Lively, the Court found the government conduct demonstrated greater interest in creating crimes to prosecute than in protecting the public from further criminal behavior, because law enforcement targeted a recovering drug addict who had no known prior connection to the sale of drugs or any other known criminal predisposition. 130 Wn.2d at 26. Here, too, the government’s conduct, viewed objectively, created crimes to prosecute.

The Task Force depends on private donations. RCW 13.60.110(4). Those donations will only continue if law enforcement can show results in the form of arrests and prosecutions. See RCW 13.60.110(4) (“The chief of the state patrol shall seek public and private grants and gifts to support the work of the task force.”). In this case and

in related cases, the conduct targeted individuals with no known criminal history and no known predisposition.<sup>11</sup>

The Task Force's conduct puts the police "in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing." U.S. v. Twigg, 588 F.2d 373, 379 (3d Cir. 1978) (quoting U.S. v. West, 511 F.2d 1083, 1085 (3d Cir. 1975)).

The final factor considers whether the government's conduct itself amounted to criminal activity or conduct repugnant to a sense of justice. The police placed vague advertisements on a free website pursuing anyone who might be curious enough to show up – not limited to sex offenders or those with a predisposition to sexual contact with minors. In this case, the police took playful pictures, including using Snapchat© filters to disguise their own faces. RP 447. The task force distributed pictures of state troopers who seemed youthful and enlisted those troopers in the Task Force. "Hannah" repeatedly deflected Ezra's attempts to elevate the correspondence to a more neutral or non-sexual tone, or to reply to his interest in her as an adult. Even if Ezra's

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<sup>11</sup> Drew, Kristen, "WSP arrests 9 in child exploitation operation in Kitsap Co.," KOMO News, <http://komonews.com/news/local/wsp-arrests-9-in-child-exploitation-operation-in-kitsap-co-11-21-2015> (Sept.

attempts to exit the scheme were not entirely unequivocal, the role of law enforcement is not to lure a reluctant citizen into criminal activity.

Moreover, in operating this scheme, the Task Force completely controls the age of the fictitious minor and the terms of engagement, thereby directing the level of crime with which Ezra and others could eventually be charged. “[W]hen the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative.” Twigg, 588 F.2d at 379 (quoting Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971)).

On the whole, the government’s conduct in this net nanny sting was so outrageous that it violates the common sense notion of fundamental fairness. Because the government’s conduct offends due process, this Court should reverse Ezra’s conviction.

#### F. CONCLUSION

The court’s refusal to instruct the jury on entrapment deprived Ezra of his right to present a defense, requiring reversal. In addition,

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4, 2015) (“According to the prosecuting attorney, none of the suspects arrested in ‘Operation Net Nanny’ have any prior felony convictions”).

the law enforcement in this case conduct shocks the conscience and requires reversal, due to its lack of fundamental fairness.

Respectfully submitted this 1<sup>st</sup> day of November, 2019.

s/ Jan Trasen

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Washington Appellate Project - 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 53260-3-II
	)	
EZRA WRIGHT,	)	
	)	
Appellant.	)	

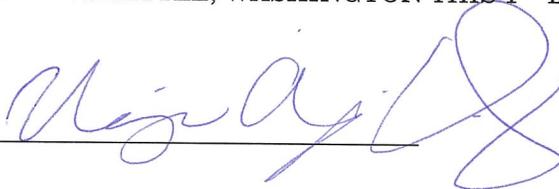
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