

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)**

B E T W E E N:

MUHAMMAD ABBAS JAFFER

APPELLANT
(Appellant)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. On October 24, 2014, the Appellant, Mr. Muhammad Abbas Jaffer, arranged a sexual encounter over the internet with an escort named “Kathy.” “Kathy”, however, was an undercover police officer, posing as an escort as part of a police operation to curb underaged prostitution believed to be taking place on the Backpage.com website. The ad was posted on a portion of the site restricted to individuals over the age of 18. It indicated that “Kathy” was 18 years old and included a photograph of a female in her twenties. After the sexual encounter had been agreed upon, “Kathy” indicated that she would be turning 16 in a few days. When Mr. Jaffer attended her hotel room, he was arrested.

2. At the time of his arrest, Mr. Jaffer was 22 years old. He had graduated from the University of Toronto with an A- average, had a good employment record, and was actively involved in his community. On the evening of the offence, he had viewed more than two dozen ads for escorts ranging from 18 to 40 years of age. He had also made arrangements to see an escort of legal age later the same evening and, at the time of his arrest, only had enough cash on hand to pay for one escort. All the while, however, Mr. Jaffer was suffering from undiagnosed Asperger’s Syndrome, including at the time of the offence. It was difficult for him to form and maintain relationships, and difficult to communicate with others or participate in social interactions. These traits and difficulties, common amongst individuals with Asperger’s Syndrome,¹ led to Mr. Jaffer’s presence

¹ *R v Kagan*, 2009 NSCA 43 at para 41 [*Kagan*]; *R v Harvey*, 2006 BCCA 355 at para 10; *R v J(M)*, 2016 ONSC 2769 at para 13 Appellant’s Book of Authorities, Tab 1; *R v Mcpherson*, 2019 NSCA 70 at para 46; *R v ZG*, 2009 ONCJ 798 at para 32 [*ZG*]; *R v MDW*, 2001 NSPC 19 at para 56; *R v Kunzig*, 2011 MBPC 81 at para 33; *R v Minassian*, 2021 ONSC 1258 at para 36; *R v JED*, 2017 MBPC 33 at paras 37, 44 [*JED*]; American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, 5th ed (Washington, DC: American Psychiatric Association, 2013) [*DSM 5*], Appellant’s Book of Authorities, Tab 3; Michael Hogan & Joseph Micucci, “Same-Sex Relationships of Men With Autism Spectrum Disorder in Middle Adulthood: An Interpretive Phenomenological Study” (2020) 7:2 *Psychology of Sexual Orientation & Gender Diversity* 176 at 176-177, Appellant’s Book of Authorities, Tab 4; Matthew Roth & Jennifer Gillis, “Convenience with the Click of a Mouse: A Survey of Adults with Autism Spectrum Disorder on Online Dating” (2015) 33:1 *Sexuality & Disability* 133 at 134, Appellant’s Book of Authorities, Tab 5.

on “Backpage”. They also impacted his communications with the undercover police officer, whom he believed to be an escort.

3. Entrapment is not a traditional defence which excuses an accused from the commission of a crime, but “an aspect of the abuse of process doctrine which enabled a court to enter a stay of proceedings in circumstances where allowing the accused to stand trial would offend the court’s sense of justice.”² Part of the purpose behind the entrapment doctrine is society’s distaste that police manufacture crime. As a result, the two-pronged entrapment test articulated in *Mack* aims to allow police to pursue important investigative techniques but avoid random virtue testing of individuals. As a result, rather than focusing subjectively on the particular accused and their circumstances, an entrapment analysis focuses objectively on police conduct in determining whether it has exceeded legal limits, therefore constituting an abuse of process.³ As will be articulated below, it is submitted that the circumstances of this case demonstrate a disconnect between the objective approach and the determination of whether an accused was in fact entrapped.

4. This appeal focuses on two broad issues. To begin with, Mr. Jaffer adopts the appellants’ submissions regarding the first branch of the entrapment test in three other appeals that arose out of the same police project: *R. v. Ramelson* (39664), *R. v. Haniffa* (39803), and *R. v. Dare* (39871). Mr. Jaffer will not reproduce the arguments already submitted by his co-appellants. However, the *Ramelson* factum argues that the entrapment analysis must include a consideration of the information that police had about the Backpage website *and* the information specific to each accused.⁴ This factum will set out the analysis of this argument with respect to the specific facts of Mr. Jaffer’s case.

5. Beyond the arguments raised by the co-appellants, Mr. Jaffer submits that subjective factors related to an accused—known or unknown to the police at the time an opportunity to commit an offence is provided— must be considered in assessing whether or not allowing the accused to stand trial would offend the court’s sense of justice. On this second issue, Mr. Jaffer

² *R v Mack*, [1988] 2 SCR 903 at paras 24, 70-77, 137 [*Mack*]; see also *R v Amato*, [1982] 2 SCR 418.

³ *Mack*, *supra* at paras 99, 109.

⁴ *R v Ramelson* (SCC File No 39644), Factum of the Appellant.

will make three arguments. First, the facts in Mr. Jaffer's case demonstrate that he was subjected to random virtue testing.

6. Second, subjective features of an accused's situation must be assessed in determining whether the accused has been entrapped. Presently, the analysis under the inducement branch requires the trier of fact to consider whether the conduct of the police would have induced an average person, with both the strengths and weaknesses of the accused, into committing the offence.⁵ This Court has also provided other factors for consideration when determining whether particular police conduct has gone beyond providing an opportunity to commit an offence, including "whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction."⁶ Both the hypothetical person test and the exploitation of vulnerability suggest that certain characteristics of the accused are relevant and ought to be considered when determining whether he or she has been unlawfully induced. However, the analysis remains objective, with a focus on the police conduct and knowledge, rather than the accused's state of mind or individual characteristics.⁷

7. Given the focus on police conduct, even the consideration of individual vulnerabilities—including, but not limited to, mental disorders or addictions—must be viewed objectively. That is, for a vulnerability of the accused to be exploited by the police, the police officers must have been aware of that vulnerability. That reasoning becomes an issue when police operations move to the virtual realm, away from face-to-face contact with those under investigation. Of interest in this case, individuals with mental disorders and disabilities that impact in-person social interactions, skills, and beliefs, such as Asperger's Syndrome, face an increased risk of being induced into the commission of an offence – and therefore entrapped – when they become the subject of police operations that take place virtually, such as Project Raphael. These symptoms are often easily detectable when the individual experiencing them participates in face-to-face social interactions, but this may not be as apparent during on-screen interactions. Because undercover officers working online only interact with individuals virtually, they are unable to recognize those vulnerabilities that are readily apparent in other situations. In other words, these officers interact

⁵ *Mack, supra* at para 123; *R v D Argent*, 2014 ONSC 4270 at para 19.

⁶ *Mack, supra* at para 145.

⁷ *Mack, supra* at paras 123, 137, 151.

with individuals virtually, through text, thereby avoiding the possibility of relying on a person's vulnerabilities that would otherwise signal to the officers that that person may be more susceptible to inducement. In adopting these tactics, officers are unable to gauge the suspect's vulnerabilities, or their impact on the virtual interaction. Police officers in these situations may not be exploiting a person's mental disorder or other vulnerability intentionally, but these operational designs fail to provide the opportunity for participating officers to be exposed to characteristics of an accused that may increase the likelihood of inducement.

8. Finally, the particular facts in each case—known or unknown to the police at the time the offer is made—may demonstrate that the accused's virtue has been randomly tested. In this case, Mr. Jaffer's browser history indisputably demonstrated that he was not searching for underaged escorts. On the evening of the offence, Mr Jaffer viewed ads for more than two dozen escorts, ranging in age from 18-40. Only 3 of these escorts, including "Kathy", were purportedly 18 years of age.⁸ Further, according to Mr. Jaffer's testimony, he had arranged a meeting with another escort, of legal age, after his meeting with "Kathy" and he only had enough money with him to pay for one.⁹ This was corroborated by the testimony of the police witness, Officer Salhia, who arrested Mr. Jaffer and stated that he was in possession of \$145 at the time of the arrest.¹⁰

9. Entrapment is not about placing blame on the police for their operations or conduct. It is broader. As stated in *Amato*, the purpose of the entrapment doctrine is to prevent bringing the administration of justice into disrepute.¹¹ In the virtual realm, the police may not be aware of vulnerabilities or circumstances specific to an accused. Nonetheless, where a bona fide operation induces a person into committing an offence, the accused has been entrapped and a stay of proceedings is warranted.¹²

⁸ Trial Exhibit 7, Appellant's Record, Vol II, pp 34-35.

⁹ Evidence of Mr. Jaffer, Appellant's Record, Vol III, pp 151, 165-167, 174.

¹⁰ Evidence of Officer Salhia, Appellant's Record, Vol III, pp 110-112.

¹¹ *Amato*, *supra* at 446.

¹² *Mack*, *supra* at 559.

B. Factual Background

i. The undercover operation and the advertisement

10. On October 24, 2014, Det. Truong, a member of the York Regional Police Force, was involved in an undercover police operation called, Project Raphael, aimed at identifying and arresting individuals engaged in child prostitution. It aimed to be proactive in investigating juvenile prostitution, which often presents difficulties in both identifying children involved in the sex trade and obtaining information from those children. Given these difficulties, the police strategy focused on the “demand side” of the equation, aiming to identify purchasers of juvenile sex. Officers posted ads for the sale of sexual services on “Backpage,” a website which, based on police experience, was said to be commonly associated with child prostitution.¹³

11. Similar to websites like “Craigslist” or “Kijiji”, “Backpage” was a website where users could post classified ads. The ads were divided into categories, including a designated “adult section”, which further contained a subcategory for escort services. To pursue escort services, each user needed to agree that they had read the disclaimer – which indicated that this section of the site could only be used by individuals over the age of 18 – and that they were willing to follow the rules of the site. Additionally, in order to post an ad under this subcategory, “Backpage” charged a fee which required the ad’s poster be connected with a credit card belonging to an individual over the age of 18. Escort services ads typically include a photo and a phone number that interested clients can call or text in order to set up a date.¹⁴

12. During Project Raphael, Det. Truong posted an ad in the “adults only” section of the site under the escort services subcategory. The ad advertised the services of an 18-year-old female named “Kathy Blunt” – i.e., not a minor. The ad described a young girl with a tight body who was into sex and looking for fun. It provided a cell phone number to call or text, along with an email. The ad included photographs of an undercover officer. Det. Truong explained the reasoning of the ad’s wording as follows: the phrase, “tight brand new girl”, was meant to portray a “young girl.”

¹³ Evidence of Det. Truong, Appellant’s Record, Vol III, pp 25-27, 61-64.

¹⁴ Evidence of Det. Truong, Appellant’s Record, Vol III, pp 26-41; Trial Exhibit 2: PowerPoint Presentation, Appellant’s Record, Vol II, pp 2-13.

In both the header and body of the ad, “Kathy’s” age was unambiguously 18. Further, the photographs included in the ad did not establish that “Kathy” was underaged.¹⁵

ii. Mr. Jaffer’s communications with the undercover officer

13. Shortly after 9:00 p.m., Mr. Jaffer texted the number on “Kathy’s” ad asking for her rates. Det. Truong replied, stating half an hour would cost \$120. Twelve texts into their exchange, Det. Truong volunteered, “I’m not quite 18 yet. Are you okay with that?” Mr. Jaffer replied, “Yeah, I’m okay, but how much younger are you? 17?” Det. Truong texted back, “I’m turning 16 on Sunday.” This discussion was prompted by Det. Truong, despite his testimony that, in his extensive experience investigating prostitution offences, age is never discussed in most cases of juvenile prostitution. Child sex workers will rarely offer information regarding their actual age out of fear they will be caught by police or suffer violence at the hands of their pimps.¹⁶

14. The text exchange continued until about 11:30 p.m. that night. During the exchange, Mr. Jaffer confirmed that “Kathy” was not a police officer, indicating he did not want to get in trouble. Mr. Jaffer asked “Kathy” why she was escorting, noting that “people your age don’t know about the industry.” “Kathy” told Mr. Jaffer her friend “got her into it” and that she was escorting for money. “Kathy” then asked Mr. Jaffer to bring a condom, saying she only had one left. Mr. Jaffer responded that he would have to go back home to get one and asked if they could use hers. “Kathy” told Mr. Jaffer to come to the Staybridge Suites at Leslie and Highway 7 in Markham. At 11:26 p.m., Mr. Jaffer messaged, “I think I’m there.” Det. Truong, still posing as “Kathy”, told him to come to the room.

15. The entire text exchange read as follows:¹⁷

25/10/2014 1:22:33 AM(UTC+0),

Hey, was just wondering what your rates are. Also great job with your body, you look fit as hell :)

25/10/2014 1:23:21 AM(UTC+0), 8193038846

120 hh hun no greek

¹⁵ Evidence of Det. Truong, Appellant’s Record, Vol III, pp 43-47.

¹⁶ Evidence of Det. Truong, Appellant’s Record, Vol III, pp 73-78.

¹⁷ Trial Exhibit 5, Appellant’s Record, Vol II, pp 26-29.

25/10/2014 2:38:23 AM(UTC+0),

Can I come for 100? That's all I can do with right now

25/10/2014 2:41:41 AM(UTC+0), 8193038846

ok for 20 mins no bareback or anal ok

25/10/2014 2:51:03 AM(UTC+0),

Ok I think I can come then..but I forgot to ask if you do foot fetish

25/10/2014 2:51:43 AM(UTC+0),

If it helps I'm really for like you so you'll enjoy it ;)

25/10/2014 2:54:00 AM(UTC+0),

oops meant to say ..I'm a bodybuilder like you * so you'll enjoy it

25/10/2014 2:58:11 AM(UTC+0), 8193038846

wow how old r u

25/10/2014 2:57:00AM(UTC+0),

22

25/10/2014 2:57:42 AM(UTC+0),

I know you're probably asking why a bodybuilder like me doesn't have a gf..it's because I'm way too busy with my job. One day..

25/10/2014 2:58:32 AM(UTC+0),

For now I've gotta have a sex release through escorts since it takes less time and no commitments

25/10/2014 3:00:14 AM(UTC+0), 8193038846

lol ok...well im not quite 18 yet r u ok with that

25/10/2014 3:00:19 AM(UTC+0),

So...do you do foot fetishes lol?I've got a thing for sweat (figures lol) so if u can wear your sweaty socks that'd be even better

25/10/2014 3:00:48 AM(UTC+0), 8193038846

sure hun i can try

25/10/2014 3:00:59 AM(UTC+0),

Yeah I'm ok...but how much younger are u? 17?

25/10/2014 3:01:52 AM(UTC+0), 8193038846

im turning 16 on Sunday but i look 18

25/10/2014 3:02:22 AM(UTC+0),

Urn...ok but how do I know you're not a cop?

25/10/2014 3:02:45 AM(UTC+0),

I really don't want to get in trouble ya know

25/10/2014 3:03:28 AM(UTC+0), 8193038846

and i definitely don't want trouble

25/10/2014 3:03:57 AM(UTC+0),

Ok can I ask why you're escorting if it's ok with u? Usually people your age don't know about this industry

25/10/2014 3:04:48 AM(UTC+0),

Just curios

25/10/2014 3:04:52 AM(UTC+0), 8193038846

my friend got me into it...i just need the money i dont do this all the time its my second time honestly i need the money :)

25/10/2014 3:05:27 AM(UTC+0),

I see...I like that you're honest, i can trust u then:). So I'll come then but please please let's keep this between ourselves

25/10/2014 3:06:38 AM(UTC+0), 8193038846

lol r u crazy no im not a cop..i should be the one worried ur thr bodybuilder

25/10/2014 3:05:59 AM(UTC+0), 8193038846

u better promise not to tell

25/10/2014 3:06:06 AM(UTC+0),

Lol I'm a very nice guy and would never ever hurt a woman. Even though I'm Strong ;D

25/10/2014 3:06:22 AM(UTC+0),

So can you wear your sweaty socks then?

25/10/2014 3:06:40 AM(UTC+0),

I promise

25/10/2014 3:06:49 AM(UTC+0), 8193038846

u want me to wear socks while u fuck me?

25/10/2014 3:07:09 AM(UTC+0),

Sweaty ones yeah I love the smell of a sweating tough girl

25/10/2014 3:07:46 AM(UTC+0),

Btw where are u located? Because I'm about to leave

25/10/2014 3:08:18 AM(UTC+0), 8193038846

lol ok but be gentle ok..and do u have a condom cause i only have one left

25/10/2014 3:08:42 AM(UTC+0),

Shoot I think I have one or 2

25/10/2014 3:09:01 AM(UTC+0),

But I already left te house so it'll be annoying toget back

25/10/2014 3:09:08 AM(UTC+0),

Can we just use that one?

25/10/2014 3:08:16 AM(UTC+0), 8193038846

ok leslie n hwy 7 txt me when u get there n i will givr u hotel

25/10/2014 3:10:02 AM(UTC+0),
Ok :)

25/10/2014 3:10:13 AM(UTC+0), 8193038846
how long hun

25/10/2014 3:10:45 AM(UTC+0),
I'll probably be there in 10 min

25/10/2014 3:11:28 AM(UTC+0),
I live close

25/10/2014 3:11:42 AM(UTC+0),
Maybe 15 min

25/10/2014 3:13:22 AM(UTC+0), 8193038846
ok hun just waha make sure im ready for u

25/10/2014 3:14:03 AM(UTC+0),
Thank you :) u sound sweet in a hot way

25/10/2014 3:17:25 AM(UTC+0),
Ok so I'm just at leslie now and highway 7

25/10/2014 3:19:02 AM(UTC+0),
Hello hello

25/10/2014 3:21:11 AM(UTC+0),
1 outgoing call

25/10/2014 3:21:35 AM(UTC+0), 8183038846
sorry hun staybridge suites

25/10/2014 3:21:50AM (UTC+0),
Ok

25/10/2014 3:21:56 AM(UTC+0), 8183038846
355 south park rd

25/10/2014 3:26:11 AM(UTC+0),
Ok I think I'm there

25/10/2014 3:26:40 AM(UTC+0),
Yup this is it

25/10/2014 3:26:48 AM(UTC+0), 8193038846
rm 319 hun

25/10/2014 3:27:38 AM(UTC+0), 8193038846
come up hun

25/10/2014 3:27:55 AM(UTC+0),
Sure thing :)

iii. Mr. Jaffer arrives at “Kathy’s” hotel room

16. Mr. Jaffer knocked on the door of “Kathy’s” room. He was greeted by Det. Truong and other officers of the York Regional Police. He was arrested. His pockets were searched. Police found \$145 cash and the iPhone used to text “Kathy”.¹⁸

iv. Mr. Jaffer’s evidence

17. At the time of his arrest, Mr. Jaffer was 22 years old and resided with his family in Toronto. After completing high school, he studied at the University of Toronto, where he obtained a Bachelor of Science degree with a focus on environmental biology and psychology. He was an honours student, completing his degree in June 2014 with an A- average. Outside of school, he was actively involved with his mosque, as well as in volunteer activities that aided the homeless population. He was employed by his father’s company and worked as a part-time teaching assistant

¹⁸ Evidence of Officer Salhia, Appellant’s Record, Vol III, pp 110-113; Trial Exhibit 4, Appellant’s Record, Vol II, pp 24-25.

at the University of Toronto. Apart from his family, Mr. Jaffer only had four or five friends that he saw every few months. He did not share a close relationship with any of them, and he had never had a girlfriend.¹⁹

18. In his testimony, Mr. Jaffer explained that, when he contacted “Kathy”, he was interested in a sexual relationship; however, this purpose changed once she told him her age. Mr. Jaffer, who was admittedly odd, lacking in social relationships, and suffering from undiagnosed Asperger’s Syndrome, often met with adult escorts and communicated with them online. On the evening of his arrest, he was looking for an escort to have sexual contact with. When “Kathy” told him she was underaged, he was worried, viewing the admission as a “cry for help”. Based on his experience speaking with escorts online, it was not normal for an escort to admit they were a minor.²⁰ Det. Truong – an officer with extensive experience investigating the sex trade – also testified that the communications were atypical. Underaged escorts would not normally reveal their age out of concern they would be robbed or abused by a patron, caught by police, or harmed by their pimp.²¹

19. Deciding he needed to help “Kathy,” Mr. Jaffer continued the conversation for the purpose of determining her location, in order to meet with her and then contact the police. Based on his experience, Mr. Jaffer knew of the precarious situations sex workers often find themselves in and the fear and harm they suffer at the hands of pimps. He wanted to help “Kathy” get out of the sex trade.²²

20. In fact, this was not Mr. Jaffer’s first time cooperating with a police investigation in the sex industry. In the months prior, Mr. Jaffer had provided a police officer with information about a sex worker for whom he was genuinely concerned. That officer, Cst. Kang, gave Mr. Jaffer his business card. He asked Mr. Jaffer to contact him with any further information he may obtain

¹⁹ Evidence of Mr. Jaffer, Appellant’s Record, Vol III, pp 133-37, 174.

²⁰ Evidence of Mr. Jaffer, Appellant’s Record, Vol III, pp 138-40.

²¹ Evidence of Det. Truong, Appellant’s Record, Vol III, pp 73-78.

²² Evidence of Mr. Jaffer, Appellant’s Record, Vol III, pp 138-140, 149-151, 164, 171-174.

related to the sex industry. Cst. Kang testified at trial and confirmed this version of events. Mr. Jaffer explained that, once he located “Kathy”, he intended to call police immediately.²³

21. Mr. Jaffer’s version of events, including the fact that he was not meeting “Kathy” for sex, was corroborated by other evidence, namely that he made arrangements to meet another escort after meeting with “Kathy”. Not only did Mr. Jaffer testify that he had arranged a meeting with a different escort at 11:45 p.m. that same evening, but the later meeting was also corroborated by his phone records which were admitted at trial, as well as the fact that he was arrested in possession of \$145—only enough money to pay for one escort. Further, Mr. Jaffer’s browser history demonstrated that he looked at ads for escorts ranging in age from 18 to 40, with no suggestion that he was seeking out an underaged escort.²⁴

22. Upon arriving at the hotel and entering “Kathy’s” room with the intention of helping her, Mr. Jaffer was arrested. He told police, “I’m here to help you. I am trying to catch the pimp involved in this process. I wanted to help this underaged girl.” He told the officers about his previous encounter with Cst. Kang. In response, the arresting officers laughed at him and called him a liar.²⁵

v. Post-conviction psychological testing

23. After his conviction, Mr. Jaffer underwent testing by Dr. Monik Kalia, a forensic and clinical psychologist. Dr. Kalia administered a variety of psychological tests in light of Mr. Jaffer’s convictions. Having interviewed Mr. Jaffer and his father, reviewed an excerpt of Mr. Jaffer’s trial and cellphone extraction, and administered the psychological tests, Dr. Kalia produced a report which was admitted on sentencing.²⁶

²³ Evidence of Mr. Jaffer, Appellant’s Record, Vol III, pp 147-149; Evidence of Cst. Kang, Appellant’s Record, Vol IV, pp 59-62, 66-68; Trial Exhibit 6, Appellant’s Record, Vol II, pp 31-32

²⁴ Trial Exhibit 7, Appellant’s Record, Vol II, pp 34-35; Trial Exhibit 8, Appellant’s Record, Vol II, pp 36-37; Evidence of Mr. Jaffer, Appellant’s Record, Vol III, pp 151, 165-167, 174; Evidence of Officer Salhia, Appellant’s Record, Vol III, pp 110-112.

²⁵ Evidence of Mr. Jaffer, Appellant’s Record, Vol III, pp 150-152.

²⁶ Report of Dr. Kalia, Appellant’s Record, Vol II, pp 228-229.

24. During interviews with Dr. Kalia, Mr. Jaffer explained his life experiences relevant to the conviction. Mr. Jaffer felt his parents were caring and affectionate, and he did well in school. However, he did act out to gain acceptance from his peers; he had difficulty making friends.²⁷ Mr. Jaffer graduated with honours from the University of Toronto in 2014. While there he was also paid to be a peer teacher and volunteered at various camps.²⁸

25. Mr. Jaffer explained that he attempted to approach women through online dating services, but they always found him “weird”. He did not understand why this was the case, and assumed they were being mean. In university he developed an attraction to his 40-year-old biology teacher, which he thought was mutual. When he asked if they could be in a relationship, she laughed at him and told him she was married. Mr. Jaffer also attempted to have a relationship with a woman he met at a meditation class that he believed was 35 to 40 years old, but upon approaching her, Mr. Jaffer learned she was 51 years old, and considered Mr. Jaffer “too young”. These setbacks upset him.²⁹

26. Mr. Jaffer also told Dr. Kalia that, if he had encountered a female less than 18 years old, he would have asked for identification. He explained that contacting minors for sexual purposes is wrong because it is against the law as minors are not developmentally grown and mature enough to make decisions regarding sexual activity. There was no history of criminality in his family, and he had never been seen by a mental health professional and never took and psychotropic medications.³⁰ Actuarial assessment tools used by Dr. Kalia indicated a low to moderate chance of reoffending, and none of the features associated with a risk of committing sexual violence.³¹

27. Among the various tests Dr. Kalia used were the Personality Assessment Inventory (PAI) and the Millon Clinical Multiaxial Inventory-III (MCMI-III). The PAI assesses psychopathological syndromes and provides information for the diagnosis, treatment planning, and

²⁷ Report of Dr. Kalia, Appellant’s Record, Vol II, pp 229-230.

²⁸ Report of Dr. Kalia, Appellant’s Record, Vol II, p 238.

²⁹ Report of Dr. Kalia, Appellant’s Record, Vol II, p 231.

³⁰ Report of Dr. Kalia, Appellant’s Record, Vol II, p 232.

³¹ Report of Dr. Kalia, Appellant’s Record, Vol II, p 241.

screening for psychopathology. The MCMI-III assesses the interaction between disorders based on the DSM-IV classification system and identifies deeper pervasive personality characteristics.³²

28. Dr. Kalia found that Mr. Jaffer responded to these tests in a forthright manner, with no indication that he distorted his responses. The PAI revealed no presence of any major mental illness or personality disorder. Mr. Jaffer was found to be a person of rigid attitudes and behaviors. Unexpected events and contradictory information likely generated untoward stress in him. Dr. Kalia also found Mr. Jaffer to be hypervigilant, often questioning and mistrusting the motives of those around him. The MCMI-III test found no evidence of antisocial attitudes or behaviors. However, the profile demonstrated avoidant and depressive personality traits, and high levels of anxiety and depressive experience.³³

29. Mr. Jaffer also underwent phallometric testing at Dr. Kalia's laboratory. Mr. Jaffer did not attempt to manipulate the testing, and his results demonstrated a clear preference for adult females. There was no evidence of pedophilia, and his response profile did not indicate any pedophilic interest.³⁴

30. Dr. Kalia concluded that Mr. Jaffer's difficulties are probably best understood within the diagnosis of Asperger's Syndrome. The interplay between symptoms of Asperger's Syndrome and depression appeared to be a constant feature in Mr. Jaffer's life and caused bouts of hopelessness and suicidal thoughts. Dr. Kalia believed it unlikely that Mr. Jaffer suffered from pedophilia, and he never showed any behaviors that raised any suspicion of having deviant sexual interests.³⁵

vi. Judicial history

31. At trial, the sole issue for the jury was whether Mr. Jaffer's purpose in communicating with "Kathy" was to obtain sexual services for consideration. The Crown's case turned on the

³² Report of Dr. Kalia, Appellant's Record, Vol II, p 234.

³³ Report of Dr. Kalia, Appellant's Record, Vol II, pp 236-237.

³⁴ Report of Dr. Kalia, Appellant's Record, Vol II, pp 239-240.

³⁵ Report of Dr. Kalia, Appellant's Record, Vol II, pp 242-243.

communications themselves—purportedly establishing a sexual purpose. The defence’s theory was corroborated by independent evidence.

32. Based on Mr. Jaffer’s evidence, the defence argued that, while initially seeking sexual services on the evening of his arrest, his intentions changed when he learned that “Kathy” was underaged. His intentions then turned to helping “Kathy”, whom he believed was in danger. Despite this cogent body of evidence, the jury convicted. Following his conviction, Mr. Jaffer applied for a stay of proceedings based upon entrapment. That application was dismissed.

33. Mr. Jaffer appealed his conviction and was joined with the appeals of *R. v. Ramelson*, *R. v. Haniffa*, and *R. v. Dare*, as they all stemmed from Project Raphael.³⁶ Mr. Jaffer argued the trial judge erred in the entrapment analysis by giving insufficient reasons, improperly focusing on the harm caused by the offence, and misapprehending the evidence. Specifically, Mr. Jaffer argued the trial judge erred by concluding that Project Raphael was a bona fide inquiry and failing to find that he was entrapped, and by failing to find he had been induced into committing the offence. On a thorough review of the record, Mr. Jaffer submitted the trial judge ought to have concluded he was entrapped and ordered the proceedings stayed. On sentence, Mr. Jaffer sought to have fresh evidence admitted, demonstrating his ongoing pro-social behaviours and strong community ties. He also argued that the trial judge erred in not imposing a conditional sentence and failing to give proper consideration to mitigating factors.

34. The Court of Appeal dismissed Mr. Jaffer’s appeal.³⁷ Regarding opportunity-based entrapment and the bona fide inquiry requirement, the Court concluded that, based on Det. Truong’s experience and testimony, the trial judge was given an evidentiary basis for concluding the police had reasonable suspicion that people were going to Backpage for the purpose of obtaining sexual services from a minor.³⁸ With regard to inducement-based entrapment, the Court concluded Mr. Jaffer had not been induced into committing the offence. Rather, the messages between Mr. Jaffer and “Kathy” provided a basis for the trial judge to conclude he was determined

³⁶ *R v Jaffer*, 2021 ONCA 325 [*Jaffer*]; *R v Haniffa*, 2021 ONCA 326; *R v Dare*, 2021 ONCA 327.

³⁷ *Jaffer*, *supra*.

³⁸ *Jaffer*, *supra* at para 15.

to purchase sexual services from “Kathy” and considered her age before acting. With respect to sentence, the Court held that the trial judge’s reasons sufficiently explained her refusal to order a conditional sentence.

PART II – STATEMENT OF QUESTIONS IN ISSUE

35. In addition to the issues raised by *Ramelson*, *Hanniffa*, and *Dare*, this factum addresses the following two issues:

- a. On a correct interpretation of the reasonable suspicion standard, involving consideration of both the virtual space and the information obtained from the chat, Mr. Jaffer was entrapped.
- b. When, if ever, can individual vulnerabilities or relevant facts, unknown to the police at the time of the operation, support a finding that the accused was entrapped?

PART III - STATEMENT OF ARGUMENT

A. The police did not have reasonable suspicion in the circumstances of this case

36. Det. Truong had no reasonable suspicion into Mr. Jaffer at the time he indicated that “Kathy” was underage. Nothing in the advertisements, messages, or site suggested that Mr. Jaffer was interested in an underaged prostitute. In fact, much of the evidence was to the contrary. As noted above, Mr. Jaffer had looked at dozens of escort ads that evening, with most of them being 19 years of age or older. He had also arranged a meeting with another escort to follow his meeting with “Kathy”, and nothing in his conversation with that escort indicates a desire to engage in underaged prostitution.

37. With respect to the chat itself, it proceeded for over an hour and a half before “Kathy” indicated that she was “not quite 18 yet.” During that time, the sexual interaction had been arranged and Mr. Jaffer indicated that he was 22 years old. Moments later, Kathy indicated that she was turning 16 on Sunday. During this portion of the chat there is no reference to anything suggesting that “Kathy” was a minor.

B. The entrapment test should include consideration of personal vulnerabilities and features of the accused

a. The facts of Mr. Jaffer’s case demonstrate that he was randomly virtue tested

38. In the event that the reasoning of the Court of Appeal is correct (i.e., that reasonable suspicion in the Backpage site was sufficient to provide the opportunity and that Mr. Jaffer was not induced), it is submitted that there is a disconnect between the purpose of the entrapment doctrine and the facts of this case. Entrapment may arise in one of two ways:

- a. When police provide an opportunity to a subject to commit a criminal offence, without having a reasonable suspicion at the time:
 - i. That the subject was already involved in the particular criminal activity; or
 - ii. That the subject is associated with a particular location where the particular criminal activity is likely occurring; or
- b. When police go beyond providing “an opportunity” and actually “induce” the commission of the offence.³⁹

39. This Court in *Mack* narrowly sanctioned the power of police to step beyond their normal investigative role and tempt people into committing criminal offences. Where police do so without reasonable suspicion, or where they go further and induce the commission of a criminal offence, they commit entrapment. Without the reasonable suspicion requirement, police could target individuals at random, invading people’s privacy and generating crimes that would not otherwise have occurred. Such conduct threatens the rule of law, undermines society’s sense of decency, justice, and fair play, and amounts to an abuse of the legal process of such significance that a stay of proceedings is required.

40. At a more general level, the doctrine exists because “[i]t is a deeply ingrained value in our democratic system that the ends do not justify the means”. Some investigative means are unacceptable in a free society with strong notions of fairness, decency, and privacy. Although police must be

³⁹ *Mack, supra* at paras 122, 133-135.

afforded investigative latitude, entrapment is a species of abuse of process because police involvement in the commission of a crime can bring the administration of justice into disrepute.

41. Here the following features of Mr. Jaffer's circumstances suggest that he was subjected to random virtue testing; but for the police operation, he would not have committed the offence:

- The ad was located on a portion of the site restricted to over age use, including a disclaimer;
- The ad indicated that "Kathy" was of legal age;
- The photograph in the ad depicted a female who was of legal age;
- The initial conversation leading up to the change in age did not contain any communications that might support an inference that "Kathy" was underage;
- He was a 22-year-old young man with no prior criminal record;
- He had family support and strong community ties;
- He suffered from undiagnosed Asperger's Syndrome;
- He had trouble forming relationships and as a result needed to use escorts;
- The post-conviction testing demonstrated that he was not a paedophile and had a preference for adult females; and
- The browser history demonstrated that he was not searching for an escort that was necessarily young in age.

b. Subjective features of the accused must be assessed in determining whether the accused has been entrapped

42. With respect to the inducement branch, this Court has set out several factors to consider in determining whether police conduct has gone beyond providing an opportunity to commit an offence that appear to consider subjective features of the accused. These factors include "whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime" and "whether the police appear to have exploited a

particular vulnerability of a person such as a mental handicap or a substance addiction.”⁴⁰ Both the hypothetical person standard and the consideration of exploitation suggest that certain characteristics of an accused person are relevant and ought to be considered when determining whether the accused has been induced under the second branch. However, this analysis remains purely objective, with a focus on police conduct rather than the accused’s state of mind or individual characteristics.⁴¹

43. Further, a review of reported cases dealing with the inducement branch demonstrates that the focus of the analysis is the average person. In *Darnley*, for example, the Court of Appeal for Ontario discussed the average person standard for the inducement branch of entrapment. At trial, the judge found that the accused being a police officer gave them elevated standards of moral restraint and fortitude. Additionally, the trial judge framed the fundamental question as whether the average Ontario Provincial Police officer would have inevitably committed the relevant breach of trust. The Court of Appeal found that, while accounting for the fact the accused was a police officer was appropriate, it was improper to ascribe elevated moral standards simply because an individual was a police officer. *Mack* requires considering whether an average person, in the position of the accused, would be induced into committing the offence.⁴²

44. In *NRR*, however, inducement was made out upon consideration of all the factors, with a particular focus on the vulnerability of the accused. During an undercover operation, the police suggested the accused use a hitman to kill his girlfriend’s husband. Police knew the accused had a tumultuous background and was a victim of sexual abuse. The judge noted that entrapment requires an objective assessment of the police conduct and is not dependent on the effect of the police conduct on the accused’s state of mind. The judge ordered a stay of proceedings, given the police’s active role inducing the offence, and the court’s concerns over police conduct.⁴³

⁴⁰ *Mack, supra* at paras 139-148.

⁴¹ *Mack, supra* at paras 123, 137, 151.

⁴² *R v Darnley*, 2020 ONCA 179 at paras 60-76.

⁴³ *R v NRR*, 2014 ABQB 282 at paras 41-63.

45. Given the primary focus on police conduct, even considerations of individual strengths, weaknesses, and vulnerabilities are viewed through an objective lens. As such, for a vulnerability of the accused to be considered exploited by police, the officer(s) must have been aware of that vulnerability. This becomes a more complex issue when police operations take place online or through telecommunications, as opposed to in-person, where officers engage in face-to-face interaction with the subjects of their investigations.

46. The current entrapment analysis, when applied to online undercover operations, fails to account for vulnerabilities that police officers cannot detect virtually. This reflects a disconnect with the key principles underlying the entrapment doctrine, namely that courts must maintain their integrity by upholding essential social views; that, in our democratic system, the ends do not justify the means; and that the price for which convictions are obtained can sometimes be prohibitively high.⁴⁴

47. When police investigations produce the convictions of individuals whose specific vulnerabilities lead to their inducement, the integrity of the legal system, which prides itself on “its commitment to justice and truth”, is called into question. This reality is particularly poignant when certain individual vulnerabilities, which would be apparent in face-to-face interactions, are obscured from view in online, virtual settings. The price at which such convictions are obtained, i.e. at the expense of mentally vulnerable individuals, should be considered prohibitively high.

c. The current analysis of entrapment fails to adequately consider the unknown vulnerabilities or personal circumstances of an accused person in the context of virtual operations

(i) Unknown Mental Health issues or other vulnerabilities

48. The number of Canadians with mental health issues has increased such that the over-representation of individuals with mental disorders in the criminal justice system “is a reality beyond debate”.⁴⁵ As research in this area develops, academic literature, legal decisions, and

⁴⁴ *Mack, supra* at para 71.

⁴⁵ Justice Richard Schneider, “The Mentally Ill: How They Became Enmeshed in the Criminal Justice System and how We Might Get Them Out” (2015), online (pdf): *Government of Canada* <justice.gc.ca/eng/rp-pr/jr/mental/mental.pdf>; *R v Verwindt*, 2016 ABPC 70 at paras 55-56;

policy frameworks have begun to advocate for accommodation of these individuals in the criminal justice system and being conscious of their needs. In fact, the need to accommodate offenders with mental disorders by providing individualized assessments and opportunities for treatment was reflected by the 1991 enactment of Part XX.1 of the *Criminal Code*, an entire part dedicated to the treatment of mental disorders within the court system.⁴⁶ In keeping with the values reflected in Part XX.1, a line of jurisprudence has developed recognizing mental disorder both as a mitigating factor in sentencing and as a factor reducing the moral culpability of offenders.⁴⁷

49. The literature and policy in this area point in the same direction: “Efforts should be directed at ensuring that as many mentally disordered offenders as possible are kept out of the justice system.”⁴⁸ This goal can be promoted by providing police officers with training regarding the recognition of signs and behaviours related to mental disorders in order to reduce interactions between the criminal justice system and individuals with mental disorders.⁴⁹

50. Specifically, individuals with mental disorders and disabilities that have symptoms which impact their in-person social interactions, skills, and beliefs, such as Asperger’s Syndrome, face an increased risk of being induced into the commission of an offence – and therefore entrapped – when they become the subject of police operations that take place virtually, such as Project Raphael. While these symptoms may be easily detectable when the individual experiencing them participates in face-to-face social interactions, they may not be apparent during interactions through a screen. Because police officers in online undercover operations only interact with individuals virtually, they are unable to detect those vulnerabilities that are readily apparent in

CAMH, “Mental Health and Criminal Justice Policy Framework” (2013) at 2, online (pdf): *CAMH* <camh.ca/-/media/files/pdfs---public-policy-submissions/mh_criminal_justice_policy_framework-pdf.pdf>.

⁴⁶ *Criminal Code*, RSC 1985, c C-46, Part XX.1; *Winko v Forensic Psychiatric Institute*, [1999] 2 SCR 625, [1999] SCJ No 31 at paras 20, 22, 43.

⁴⁷ *R v Adamo*, 2013 MBQB 225 at paras 29, 31, 34; *R v Carter*, 2014 SKPC 150 at para 311; *R v Bourgeois*, 2018 NLCA 13 at para 24; *R v Brennan*, 2019 CanLII 89962 (NLPC) at paras 13-20.

⁴⁸ John Hylton, “Care or Control: Health or Criminal Justice Options for the Long-Term Seriously Mentally Ill in a Canadian Province” (1995) 18:1 Intl JL & Psych 45 at 54, *Appellant’s Book of Authorities*, Tab 2.

⁴⁹ CAMH, “Mental Health and Criminal Justice Policy Framework” (2013), online (pdf): *CAMH* <camh.ca/-/media/files/pdfs---public-policy-submissions/mh_criminal_justice_policy_framework-pdf.pdf>.

other situations. In other words, undercover officers are interacting with individuals virtually, through text, and therefore avoiding the possibility of recognizing a potential vulnerability that would signal the suspect's increased susceptibility to inducement. In adopting these tactics, officers participating in these operations are unable to gauge the accused person's vulnerabilities and the impact that they may have on the interactions. While police officers in these situations may not be exploiting a person's vulnerabilities or mental disorder intentionally, the nature of online operations fails to provide the opportunity for participating officers to recognize characteristics of an accused that may increase the likelihood of inducement.

51. Individuals with Asperger's Syndrome (now part of the broader category of Autism Spectrum Disorder), such as Mr. Jaffer, often have symptoms and characteristics that may render them susceptible to inducement in the context of virtual undercover operations. Specifically, the following symptoms are common among those with Asperger's and may impact interactions with police officers engaged in undercover operations, therefore elevating the risk of inducement: (i) difficulty developing relationships, communicating with others, and interacting socially;⁵⁰ and (ii) rigid compliance with rules.⁵¹

- ***Difficulty developing relationships and engaging in social interactions***

52. People with Asperger's Syndrome commonly experience deficits in social communication and interactions, oftentimes resulting in difficulties developing and maintaining relationships.⁵² These deficits may be observable when interacting with an individual with Asperger's Syndrome face-to-face (e.g., difficulty in making and maintaining eye contact; difficulty reading body language; struggling to pick up on social cues and customs; and naivety),⁵³ but they may be less readily detectable when interacting with that same individual via virtual text communication of one mode or another. Accordingly, while police officers executing in-person undercover operations are given the opportunity to interact with suspects face-to-face, and therefore have the opportunity to observe these characteristics, police officers involved in virtual operations, such as

⁵⁰ *DSM 5, supra.*

⁵¹ *R v Collier*, 2019 ONSC 7021 at para 27 [*Collier*]; *ZG, supra* at para 32.

⁵² *DSM 5, supra.*

⁵³ *Kagan, supra* at para 41; *ZG, supra* at para 32; *DSM 5, supra*; *JED, supra* at para 37; *W(MD), supra* at para 56.

Project Raphael, are not. Indeed, individuals with Asperger's Syndrome who become the subject of virtual police operations may more easily mask these vulnerabilities despite the fact that those vulnerabilities and symptoms remain ever present in both settings and have the same impact on a suspect's behaviour.

53. This issue is observable in the present case. While Mr. Jaffer is admittedly odd and lacking in social skills, these characteristics were not readily identifiable through his interactions with Det. Truong over text message. As such, Det. Truong was not made aware of Mr. Jaffer's vulnerabilities, despite their impact on the communications between the two men. Even though Det. Truong was unaware that he was exploiting Mr. Jaffer's vulnerabilities by engaging in conversation with him, Mr. Jaffer's lack of social understanding and communication skills nonetheless impacted his interactions.

54. Further, these difficulties in social settings and in forming relationships are often what lead individuals with Asperger's Syndrome to online forums and webpages in the first place. Given their difficulties in understanding social situations and developing intimate relations, people with these mental disorders often turn to pornography or online dating sites in order to satisfy their desires.⁵⁴ There is a lack of data regarding the frequency at which individuals with these disorders visit online dating services and forums. However, research does suggest that such individuals report feeling more comfortable engaging in online interactions as opposed to face-to-face communication.⁵⁵ Despite these reports, the virtual world of dating and escorting still presents several difficulties for individuals with Asperger's Syndrome and similar disorders. Specifically, the virtual environment of these websites and communication methods present their users with "unwritten social rules and subtle social customs" that individuals with Asperger's Syndrome often have difficulty understanding, including the idea that individuals will often misrepresent themselves online.⁵⁶ Given these issues, some studies have proposed that individuals with these symptoms and disorders may be at an increased risk of victimization when using the internet or other forms of virtual communication.⁵⁷

⁵⁴ *JED*, *supra* at para 45; Roth & Gillis, *supra* at 133.

⁵⁵ Roth & Gillis, *supra* at 134; Hogan & Micucci, *supra* at 178.

⁵⁶ Roth & Gillis, *supra* at 134-135.

⁵⁷ *Ibid.*

55. The increased presence of individuals with Asperger's Syndrome on online forums and escorting pages such as Backpage, combined with the added difficulties that accompany virtual communication methods, suggests these individuals may be more susceptible to inducement in virtual contexts. By posting ads during undercover operations on webpages that are frequented by individuals whose mental disorders include symptoms that lead them to such forums and who have difficulty interpreting and understanding communications that take place in such contexts, police are therefore moving beyond merely providing the opportunity to commit an offence. Instead, they are inducing individuals into the commission of offences by exploiting, albeit unintentionally, the vulnerabilities and mental disorders that bring them to these websites to begin with.

56. Again, Mr. Jaffer's case provides an example of this. As stated in his evidence, Mr. Jaffer began seeing escorts after being directed to "Backpage" by a friend who had advised him that, if he could not get a girlfriend, he should do so through the website. Mr. Jaffer's symptoms and the difficulties associated with his undiagnosed Asperger's Syndrome brought him to "Kathy's" ad in the first place. His symptoms compelled him to continue the interaction after learning that "Kathy" was underaged.⁵⁸

57. In the context of virtual police operations, these issues are not accounted for under the inducement branch of entrapment. Focusing on police conduct, the analysis ignores the fact that police officers act in these situations without meaningfully interacting with the subjects of their investigation. Police officers participating in virtual operations are deprived of the opportunity to uncover any vulnerabilities of a suspect, even when they may be experiencing a mental disorder that significantly influences their interactions.

- ***Rigid compliance with rules***

58. Individuals with Asperger's Syndrome often display an inflexible adherence to rules, and the corresponding belief that others will follow rules in the same way.⁵⁹ In cases involving sexual offences with underaged children on online forums, this symptom may manifest itself in a genuine belief that, when a website requires individuals using the site to be over the age of 18, individuals

⁵⁸ This latter proposition is discussed in the following section.

⁵⁹ *Collier, supra* at para 27.

on that website would follow that age rule and therefore be over 18.⁶⁰ While this may not have been the case for Mr. Jaffer – who was admittedly shocked when “Kathy” revealed that she was underaged and believed that she needed his help – the circumstances of his case do reveal another instance of strict adherence to a rule or request by a police officer with legal authority.

59. In his testimony, Mr. Jaffer recounted his previous encounter with Cst. Kang, during which he provided the officer with information about an escort he had been seeing, as well as her pimp. In return, Cst. Kang provided Mr. Jaffer with his business card, telling him to contact him if he learned of any additional information. Mr. Jaffer testified that, upon learning “Kathy” was underaged, he continued the conversation in order to obtain information to provide to the police. He planned to meet her to confirm her location before alerting authorities. Mr. Jaffer’s behaviour and explanation are in line with the tendency of individuals with Asperger’s Syndrome to strictly adhere to rules. A law enforcement officer told him to do something; he believed he was complying.

60. Whether an individual experiencing this symptom of Asperger’s Syndrome when faced with a virtual police operation genuinely believes that their interlocutor is of age, or instead finds themselves in a situation in which they believe they must continue communicating so as to fulfill a request by a person in authority, the individual’s disorder is impacting their decision to continue communications. Police conduct is therefore exploiting a vulnerability of the accused that is unknown to the officer. Because the operation is taking place virtually and, therefore, the police officer involved is not given the opportunity to detect symptoms or vulnerabilities arising as a result of a mental disorder, such conduct cannot amount to inducement, according to the current objective analysis focused on police conduct employed under the second branch.

61. Asperger’s Syndrome and the symptoms discussed above– from which Mr. Jaffer suffered at the time of his arrest – are merely one example of a mental disorder that may increase an individual’s susceptibility to inducement in the context of virtual police operations, unbeknownst to the officers involved in virtual investigations.

⁶⁰ See, for example, *Collier, ibid.*

ii. *Other factors that indicate the accused was entrapped*

62. In Mr. Jaffer's case, police were also unaware that he had viewed dozens of online escort ads that evening, only three of which purported to be posted by an 18-year-old. Otherwise, the listed ages on these ads ranged from 19 to 40 years of age. Further police did not know that Mr. Jaffer had already engaged another escort for later in the evening, after his meeting with "Kathy". Finally, the post-conviction testing demonstrated that Mr. Jaffer was not a paedophile and had a preference for woman who were of age. Unfortunately, however, as none of these features were known to the police at the time, they are irrelevant to the entrapment analysis. The problem however, is that these features support a strong inference that Mr. Jaffer was in fact entrapped. These circumstances raise the question of whether, despite police knowledge, Mr. Jaffer's conviction bring the administration of justice into disrepute.

d. Conclusion

63. Although the current law surrounding inducement-based entrapment hints that individual characteristics of an accused person ought to be considered (at least objectively) in determining whether police conduct constituted inducement, the use of virtual police operations in this case reveals the difficulty of meaningfully applying such a standard in a purely objective manner. Without the opportunity for face-to-face interaction, individuals with mental disorders or other vulnerabilities impacting their communications, understandings, and beliefs are caught in a web of police operations that prevent officers from avoiding reliance on the vulnerabilities of their subjects. Literature suggests that police training is already insufficient to prepare officers to identify and manage individuals with mental disorders.⁶¹ The added complication of virtual communication through a computer or telephone screen only adds to that difficulty, putting individuals with mental health issues at an even higher risk of being criminalized and victimized. Moreover, turning a blind eye to facts that suggest the police have manufactured crime simply

⁶¹ Richard Lamb, Linda Weinberger & Bruce Gross, "Mentally Ill Persons in the Criminal Justice System: Some Perspectives" (2004) 75:2 Psych Q 107, Appellant's Book of Authorities, Tab 6..

because the police were unaware of them, does little to advance society's interest in the proper administration of justice

64. To be clear, the problems with the current entrapment analysis, as highlighted above, are not due to intentional police conduct. Nor is the purpose here to criticize proper investigative techniques. Rather, an entrapment analysis that fails to account for the particular vulnerabilities of accuseds in virtual undercover operations both offends social views of fair play and threatens to call the integrity of the courts into question.

PART IV – SUBMISSION ON COSTS

65. The applicant does not seek costs and asks that no costs be awarded against him.

PART V – ORDER REQUESTED

66. It is respectfully requested that that the appeal be granted and a stay of proceedings entered.

67. Such further and other remedies as this Honourable Court deems appropriate.

DATED at Toronto, Ontario this 10th day of March, 2022.

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**PART VI: SUBMISSION ON IMPACT OF SEALING OR CONFIDENTIALITY
ORDER, PUBLICATION BAN, ETC.**

There are no sealing or confidentiality orders, publication bans, classification of information in the file as confidential under legislation or restriction on public access to information in the file that could have an impact on the Court's reasons.

PART VII: TABLE OF AUTHORITIES & LEGISLATIVE PROVISIONS

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