No. 126705

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- SHANE LEWIS, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-17-0900. There on appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, No. 15 CF 44. Honorable Linda Abrahamson, Judge Presiding.

BRIEF OF APPELLEE.
CROSS-RELIEF REQUESTED.

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

ISSUES PRESENTED FOR REVIEW

I. Whether the appellate court properly found that Shane Lewis was deprived of his constitutional right to the effective assistance of counsel where counsel made several errors in presenting Lewis's entrapment defense.

II. Whether the State failed to prove beyond a reasonable doubt that Lewis was not entrapped into committing the offenses. (Cross Relief Requested)

III. Whether the State failed to prove Lewis guilty of involuntary sexual servitude of a minor where that statute applies to sex traffickers, but not patrons, like him. (Cross Relief Requested)

IV. Whether Lewis's Class X conviction and sentence for involuntary sexual servitude of a minor must be vacated because, as applied to Lewis, the statute violates Illinois' proportionate penalties clause. (Cross Relief Requested)

STATUTES INVOLVED

720 ILCS 5/7-12 (2015). Entrapment

A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was pre-disposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense.

720 ILCS 5/10-9 (2015). Trafficking in persons, involuntary servitude, and related offenses

(a) Definitions. In this Section:

(1) "Intimidation" has the meaning prescribed in Section 12-6.
(2) "Commercial sexual activity" means any sex act on account of which anything of value is given, promised to, or received by any person.
(3) "Financial harm" includes intimidation that brings about financial loss, criminal usury, or employment contracts that violate the Frauds Act.
(4) (Blank).
(5) "Labor" means work of economic or financial value.
(6) "Maintain" means, in relation to labor or services, to secure continued performance thereof, regardless of any initial agreement on the part of the victim to perform that type of service.
(7) "Obtain" means, in relation to labor or services, to secure performance thereof.
(7.5) "Serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.
(8) "Services" means activities resulting from a relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor. Commercial sexual activity and sexually-explicit performances are forms of activities that are "services" under this Section. Nothing in this definition may be construed to legitimize or legalize prostitution.
(9) "Sexually-explicit performance" means a live, recorded, broadcast (including over the Internet), or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.

(10) "Trafficking victim" means a person subjected to the practices set forth in subsection (b), (c), or (d).

(b) Involuntary servitude. A person commits involuntary servitude when he or she knowingly subjects, attempts to subject, or engages in a conspiracy to subject another person to labor or services obtained or maintained through any of the following means, or any combination of these means:

(1) causes or threatens to cause physical harm to any person;
(2) physically restrains or threatens to physically restrain another person;
(3) abuses or threatens to abuse the law or legal process;
(4) knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person;
(5) uses intimidation, or exerts financial control over any person; or
(6) uses any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform the labor or services, that person or another person would suffer serious harm or physical restraint.

Sentence. Except as otherwise provided in subsection (e) or (f), a violation of subsection (b)(1) is a Class X felony, (b)(2) is a Class 1 felony, (b)(3) is a Class 2 felony, (b)(4) is a Class 3 felony, (b)(5) and (b)(6) is a Class 4 felony.

(c) Involuntary sexual servitude of a minor. A person commits involuntary sexual servitude of a minor when he or she knowingly recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, provide, or obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity, a sexually-explicit performance, or the production of pornography, or causes or attempts to cause a minor to engage in one or more of those activities and:

(1) there is no overt force or threat and the minor is between the ages of 17 and 18 years;
(2) there is no overt force or threat and the minor is under the age of 17 years; or
(3) there is overt force or threat.

Sentence. Except as otherwise provided in subsection (e) or (f), a violation of subsection (c)(1) is a Class 1 felony, (c)(2) is a Class X felony, and (c)(3) is a Class X felony.

* * * * *

720 ILCS 5/11-18.1 (2015). Patronizing a minor engaged in prostitution

(a) Any person who engages in an act of sexual penetration as defined in Section 11-0.1 of this Code with a person engaged in prostitution who is under 18 years of age or is a person with a severe or profound intellectual disability commits patronizing a minor engaged in prostitution.

(a-5) Any person who engages in any touching or fondling, with a person engaged in prostitution who either is under 18 years of age or is a person with a severe or profound intellectual disability, of the sex organs of one person by the other person, with the intent to achieve sexual arousal or gratification, commits patronizing a minor engaged in prostitution.

(b) It is an affirmative defense to the charge of patronizing a minor engaged in prostitution that the accused reasonably believed that the person was of the age of 18 years or over or was not a person with a severe or profound intellectual disability at the time of the act giving rise to the charge.

(c) Sentence. A person who commits patronizing a juvenile prostitute is guilty of a Class 3 felony, unless committed within 1,000 feet of real property comprising a school, in which case it is a Class 2 felony. A person convicted of a second or subsequent violation of this Section, or of any combination of such number of convictions under this Section and Sections 11-14 (prostitution), 11-14.1 (solicitation of a sexual act), 11-14.3 (promoting prostitution), 11-14.4 (promoting juvenile prostitution), 11-15 (soliciting for a prostitute), 11-15.1 (soliciting for a juvenile prostitute), 11-16 (pandering), 11-17 (keeping a place of prostitution), 11-17.1 (keeping a place of juvenile prostitution), 11-18 (patronizing a prostitute), 11-19 (pimping), 11-19.1 (juvenile pimping or aggravated juvenile pimping), or 11-19.2 (exploitation of a child) of this Code, is guilty of a Class 2 felony. The fact of such conviction is not an element of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial.

STATEMENT OF FACTS

Shane Lewis was charged by indictment with the Class X felony offense of involuntary sexual servitude of a minor. (C. 36). The charge alleged that Lewis knowingly attempted to obtain, by any means, another person under 18 years of age, knowing that person would engage in commercial sexual activity, in that he agreed to pay money for an act of sexual penetration with a minor under the age of 17. (C. 36). Lewis was also charged with the Class 3 felony offense of traveling to meet a minor, and the Class 4 felony offense of grooming, based on the same facts. (C. 37-38). The case proceeded to a jury trial where Lewis raised an entrapment defense.

Pre-trial proceedings

Lewis filed a motion to dismiss the involuntary sexual servitude of a minor charge, arguing that the statute was unconstitutional as applied to him. (C. 96). He alleged that because the Class X felony offense of involuntary sexual servitude of a minor contained identical elements to the Class A misdemeanor offense of attempt patronizing a minor engaged in prostitution, the offense as charged violated Illinois' proportionate penalties clause. (R. 141).

The court denied the motion finding that the law had changed so that minors could not be prosecuted as prostitutes. (R. 160). For this reason, the trial court found that patronizing a minor engaged in prostitution was no longer good law and therefore that offense was not comparable to the charged offense. (R. 160).

Lewis filed a motion to reconsider the court's ruling. (C. 101). The court denied the motion, reiterating its belief that attempt patronizing of a minor engaged

in prostitution should no longer be "on the books." (R. 191). The court also found that the same criminal behavior can result in different penalties without offending the proportionate penalties provision. (R. 190).

Trial proceedings

During the jury trial, Shane Lewis testified on his own behalf. (R. 750). At the time of trial, he was 38 years old, and had been married to his wife Susana for 14 years. (R. 750). They lived in Kennett Square, Pennsylvania. (R. 751). In 2015, Lewis was the vice president of sales at Sundance Vacations where he supervised about 400 people. (R. 752). He frequently traveled to Chicago and worked out of the Downers Grove office. (R. 754). By January of 2015, he and his wife had been separated for six months. (R. 758). His wife suffered a miscarriage which caused a rift in their relationship. (R. 758). Lewis spent the winter holidays alone. (R. 755).

On January 8, 2015, Lewis was in Downers Grove and he left the office at 8:30 p.m. (R. 756). He went to his hotel parking lot, sat in his car, and cried. (R. 757). He was depressed and "didn't want to be alone." (R. 758). After about twenty minutes, he used his phone to open "Backpage.com." (R. 757). He had looked at the website once before, and had learned about it from a fellow business traveler. (R. 758, 776). The traveler suggested that Lewis look up Backpage.com to meet an adult to spend time with and "cuddle." (R. 776).

Lewis went to the "adult services" section of the website, and clicked on "adult escort." (R. 759). To access this section, he checked a box confirming that he was over 18 years old. (R. 761). He responded to four different ads via text

message. (R. 760). He was looking for company. (R. 759). He was not seeking to contact any minors for any purpose. (R. 760-61).

After about ten minutes, he received one response. (R. 760). It came from an advertisement titled "young warm and ready :) - 18". (St. Ex. 3; E. 5). The ad also included a body shot of a young girl, without showing her face. (E. 5). The girl in the photo was in her mid-20s. (R. 567). The body of the ad read:

> its ssooooooo cold outside, come warm up with a hot little coed. lm young, eager to please and more than willing to meet all your desires. come keep me warm and I promise to return the favor: O:):) ask about my two for one special
> text me at 630-five 2 four-four 8 four 8 ..
> 100 donation for hh
> 150 donation full hour
> Poster's age: 18 (St. Ex. 3).

Unbeknownst to Lewis, the above ad had been posted as part of an undercover police operation. (R. 375). Special Agent Geoffrey Howard of Homeland Security testified that he was coordinating this operation with the Aurora police. (R. 334). He referred to it as "Operation Child Shield." (R. 335). He described Backpage.com as a website that has ads for maintenance, used cars, housecleaning, and an adult services section. (R. 335). The ads were often for commercial sex and sometimes involved underage women. (R. 336). To post an ad on Backpage.com, a person had to certify that he or she was eighteen years old. (R. 336).

Agent Howard said the goal of this operation was to arrest multiple people on the "demand side" of human trafficking. (R. 354). As a matter of protocol, the officers were supposed to stop talking or texting with a suspect if the suspect wanted to have sex with an adult and not a minor because that was not the operation's purpose. (R. 359).

Aurora Police Officer Erik Swastek testified that he wrote and posted the advertisement. (R. 371). He acknowledged that a person had to be eighteen or older to post an ad in the adult section of Backpage.com, and he expressly stated in the ad that the poster was eighteen years old. (R. 376). Swastek had been told that by posing as an eighteen-year-old, the youngest age legally possible, he would be more likely to get responses from somebody seeking underage women. (R. 567). A "naive" person could think the ad was merely for comfort and companionship rather than for sexual purposes. (R. 569).

The phone number in the ad was a "spoof number" that did not link to an actual phone. (R. 380). Instead, the text messages went into a software system called CALLYO that allowed multiple officers to read and respond to the text messages at the same time. (R. 381). Eighty-six people responded to the ad and there were four or five officers responding to those messages. (R. 380). The texting officers were instructed to mention the fact that the texter was the mother of the minors, the age of both minors available for sex, sex acts to be undertaken, and money to be exchanged. (R. 386).

Homeland Security Investigator Spencer Taub was the assigned texter who responded to Lewis's texts. (R. 618). The following text message conversation occurred between Lewis and Taub:

L: Hey looking to get warm
T: hey - my girls could use some warming up 2 ;)
L: What's up with 2 girl. I only see pic of one ?
T: no can't post pix of my daughters, 2 risky
L: Haha. Well what's the the 2 girl special ? And do u serve downers grove
T: no we r in aurora. infall only
L: Well it's not far from me but to come out in this weather I would

have to know what they look like. U don't have to post a pic. U can text some
T: 200 for 2 grls
L: That's fine but I need to know what they look like
T: the 14 yrs is blond and 15 yrs is brunet - both r in sports
L: wtf?? Not interested in minors. You crazy?
L: I'm 32
L: 18 is good but nothing under that too risky !!
T: as long as u r gentle and treat my girls good
T: I'm here to protect my grls
L: Are you a female ?
L: Are u affiliated with the law or something ?
T: yes
L: Yes your with the law
T: ummm... no... r u?
L: No.
L: Are u affiliated with the law. I want to make this question clear. Please answer in your next text.
L: I am not!!
L: What if I just see u. Since your above 18
T: no - wat r u talking about? r u a cop? ur txt sounds like u r
L: No im not ! But why wud u advertise their age when u know that's illegal under 18.
T: I said yes to being a female - u txt way 2 fast
L: Haha sorry for fast text.
T: because I don't want fricken cops at my fucking door
L: I think naturally they are old enough but the law says they are not.
T: I do 2 - my girls want 2 do this
L: Send me a pic
T: I won't put them into sum thing they don't wanna do.
L: Ok where u at
T: haha my txts are cumin in so fucked up
T: im in aurora
L: Where you at. I'll come only if your there watching
L: I know aurora. Where at ?
T: yea - I'll watch - u b 2 ruf on my girls I'll kick ur ass
T: which one u want? 14 yr or 15, or both? both is 200?
L: What about u how muck for u
T: not a ? ... both is 200.
L: How much for all 3 of u
T: I'm not in hun
L: U sure this is safe ?
L: Ok tell me where to come
T: what u want?
L: Both

T: k 14 yr old is shy - so b gentle. no anal, must wear condom
L: No anal for sure and condom yes
L: If she doesn't want to she doesn't have to
T: ok 88 and orchard
L: Hotel ?
T: I appreciate that. so just sex? if something else let me tell her
T: yes hotel
L: On my way. (St. Ex. 2).

Lewis testified that his initial text, "hey looking to get warm," was a response to the title of the ad. (R. 762). He had "no idea at all" that the ad was for minors. (R. 762). He thought he was pursuing an adult woman. (R. 762). After the first couple of texts, he could tell that there was a "sexual agenda." (R. 760). Lewis repeatedly tried to explain to the texter that he was not interested in minors. (R. 763). Eventually, he agreed to go to the hotel in Aurora. (R. 764). His "goal" that evening was not to have sex with minors. (R. 772).

Lewis explained that when he said "naturally they are old enough" he meant that he knew girls had sex and got pregnant at the ages of fourteen and fifteen. (R. 765). He requested to be with the girls and their mother because he "didn't want to be alone with anyone underage." (R. 773).

When Lewis left for the Holiday Inn in Aurora, he still believed he would speak with and possibly convince the purported "mother" to have sex with him. (R. 772-73). He already had several hundred dollars of cash with him, and he bought a box of condoms on his way to the hotel. (R. 779-80). He found the situation involving this mother and her daughters to be "unbelievable," and he was in shock. (R. 794).

Homeland Security Agent Melissa Sifferman was the primary undercover agent waiting in the hotel room to meet Lewis. (R. 668). She put clothes and

bathroom products around the room to make it look like teenage girls were there. (R. 671). At 11:19 p.m. she heard a knock on the door. (R. 672). She greeted Lewis and described him as "very well dressed and very polite." (R. 672). She said he "appeared nervous but very willing to talk and very friendly." (R. 673). A full transcript of their conversation was admitted into evidence. (St. Ex. 10; E. 20-26). The encounter within the hotel room was also recorded on video and played for the jury. (St. Ex. 9). The conversation between Sifferman and Lewis was, in pertinent part, as follows:

> SIFFERMANN: So, um, so you're good, you want the 14 year old and ...
> LEWIS: I'm, I'm a little nervous, the age like, it's not like I'm even in to that, honestly.
> SIFFERMANN: Ok.
> LEWIS: Um, I didn't have any clue like that when I texted you originally.
> SIFFERMANN: Ok.
> LEWIS: But I put four or five hits out here, you're the only one to answer me.
> SIFFERMANN: Ok, ok.
> LEWIS: So I don't, in all honestly I'm very nervous to tell you the truth, like I feel. ..
> SIFFERMANN: Sure.
> LEWIS: ... weird about it with them being young like that.
> SIFFERMANN: Yeah, ok, um.
> LEWIS: (laugh) You know what I mean?
> SIFFERMANN: Yeah. Well that's ....
> LEWIS: And I just like.
> SIFFERMANN: ... that's why, I like to, I like to meet the guys first just to make sure that they're not. ..
> LEWIS: I don't even know ...
> SIFFERMANN: ... crazy
> LEWIS: ... like really I just found out, I'm just like I'm curious, that's why I had to ...
> SIFFERMANN: Yeah.
> LEWIS: ... come by. I think I am more, just nervous, like set up or something, you know what I mean?
> SIFFERMANN: Yeah, no, I mean ...
> LEWIS: Like ...

SIFFERMANN: I think it would be too late for that now, you can see me, I'm here, so, everything's fine. I just want to make sure that you're not ....
LEWIS: It just makes me nervous, I don't know why ...

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LEWIS: It was just, um, you know, I was worried like I don't do this very often and when you're telling me their ages, I'm like this sounds like they 're trying to like lure somebody in ...
SIFFERMANN: Ooooh.
LEWIS: ... that likes younger girls.
SIFFERMANN: Oh fuck no. Yeah.
LEWIS: Yeah.
SIFFERMANN: I just like to meet everyone first ahead of time just to make sure that they' re safe. You know .. .

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SIFFERMANN: Yeah, take your coat off. Relax. So I just want to be sure, um, before ahead of time, like I like to meet everybody, but you know you look like a nice guy so I'm not as worried. You can get some real creeps out there.
LEWIS: Sure.
SIFFERMANN: ... you know what I mean? Um . ..
LEWIS: I just wanna get shizzed.[1]
SIFFERMANN: Yeah. (laughing) So, I just want to make sure that: no anal,
LEWIS: No.
SIFFERMANN: Yeah, and condoms.
LEWIS: Fine.
SIFFERMANN: No matter what. Ok. So, um, I'll bring both girls up, do you, do you know ahead of time, like I just want to prepare them, they have a little bit of experience but obviously they're not like, they' re not pros. You know what I mean.
LEWIS: Sure, sure.
SIFFERMANN: I mean, they're younger so, did you ...
LEWIS: I don't really have much of a plan now I guess I was more just kind of curious and nervous at the same time but um . ..
SIFFERMANN: Yeah.
LEWIS: . .. um, are, I mean we, we can show them the way.
SIFFERMANN: Ok, ok.
LEWIS: You're not weird about that if you're there and I'm like do this or tell them to do that.

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[1]At trial, Officer Sifferman claimed that "shizzed" meant "that you climax intensely as to defecate yourself." (R. 687). However, Lewis denied ever making that statement, and was not aware of that definition. (R. 805-6). On the audio recording, it is clear that Lewis trailed off, simply making a sound without any specific meaning.

SIFFERMANN: No, I'm gonna tell them ahead of time and then I'll be close. I, I will be honest with you, I'll be right outside .. . cuz I don't. .. there's only so much I can do you know, cuz, they'll like, you know, one's my stepdaughter and the other girl's my daughter, the 14 year old's my daughter, so, I'm still like, you know, like, so I' ll be close by.
LEWIS: Well I knew you would be here cuz that kind of makes me more nervous cuz I mean I feel like you're going to leave me alone with them too. And then ...
SIFFERMANN: Ok.
LEWIS: Something's going to happen.
SIFFERMANN: Ok, that's fine, that's fine, I mean I can just stay in the bathroom with the door open.
LEWIS: You know what I'm saying though?
SIFFERMANN: Yeah, I see it, yeah, yeah.
LEWIS: Leave me alone with my pants down and somebody might come in or something.
SIFFERMANN: Oh, fuck no, that would be ... no, no, yeah, urn.

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SIFFERMANN: Yeah, I'm going to call them ahead of time, like it's ok, like I met him, he's not some ugly freak, you know, 'cuz there are some freaks out there and I meet them and I'm like no, sorry pretty much, you know.
LEWIS: This makes me nervous just saying their ages, like why don't you just tell me they are eighteen and nineteen please. (laughs)
SIFFERMANN: Well, yea, (laughs) I, I don' t know 'cuz I don't want anyone to be like, you know go, like if I go psycho on me or anything.
LEWIS: I mean like naturally I think that you know, once a girl has her period she's ready for that kind of thing but. ..
SIFFERMANN: Yeah.
LEWIS: legally, obviously ...
SIFFERMANN: Yeah.
LEWIS: ... it's not the right thing (laughs).
SIFFERMANN: Yeah, well I just want to make sure that you know, that you're not going to do anything freaky or anything else like that but you know I' ll be right in the bathroom then.
LEWIS: And just like that, just sex, like ...
SIFFERMANN: Ok.
LEWIS: Like porno sex, just sex.
SIFFERMANN: Ok, well you're good, you seem like a good guy.
LEWIS: I'm a good man, I'm just really nervous so I don' t really know
SIFFERMANN: Yeah. No.
LEWIS: . .. so you have to stay here too, I don't like you leaving I feel like someone's ...
SIFFERMANN: Oh, I won' t, I won't leave then, I'll just finish

brushing my teeth.
LEWIS: I'm not gonna give any money to them, only to you.
SIFFERMANN: Ok, ok.
LEWIS: (inaudible)
SIFFERMANN: Do you have money?
LEWIS: Yeah.

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POLICE 1: Put your hands behind your back.
LEWIS: I told her I didn't want anything to do with younger, young...

(St. Ex. 10).

At trial, Lewis explained that when he arrived in the hotel room he did not see any fourteen or fifteen-year-old girls. (R. 766). He testified that if a younger girl had been present, "I would like to think I wouldn't have went through with it." (R. 766). He asked the mother to remain present because, "that was a way of me politely saying I do not want to be alone with anyone underage," and he was trying to "politely divert the conversation back to her." (R. 796-97).

Lewis testified that Agent Sifferman made him feel "comfortable,"and he started to think that he could engage in the conduct that she suggested. (R. 767). Whenever he expressed doubt or reluctance, Sifferman diverted and complimented him. (R. 768). The thought of having sexual intercourse with a fourteen or fifteen-year-old, "was never in [his] mind" before the text conversation he had with Taub, and but for Sifferman's comments, he would not have agreed to it. (R. 768-69). Lewis had never in his life had any predisposition or desire to have sex with minors or underage girls, and he has never had sex with a minor. (R. 769). Before responding to the ad, Lewis did not have a specific plan that night. (R. 807). Although he hoped to have sex, he was primarily seeking companionship, meaning "sitting, watching, maybe cuddling, a massage." (R. 809). Lewis testified that he was "induced" by the undercover officers to go to the Holiday Inn hotel that night. (R. 809-10).

After Lewis's arrest, he was searched by Officer Swastek. (R. 393). Swastek found a cell phone, condoms, and money in Lewis's pockets. (R. 393). Swastek searched the cell phone and Lewis's iPad. (R. 576). He did not find anything incriminating beyond the text messages that had been admitted at trial. (R. 576). The spoof number for the undercover officer had been saved in Lewis's phone as "auroro girls". (R. 608). There were no inappropriate pictures of minors on Lewis's phone or computer. (R. 594). If there had been any evidence or information that suggested Lewis had been seeking to have sex with minors, Swastek would have reported it. (R. 615).

Greg Christoffel of the Aurora Police Department interviewed Lewis after his arrest. (R. 690). Christoffel read Lewis his *Miranda* rights, and Lewis signed a waiver. (R. 693-94). Lewis told Christoffel that he had responded to three or four Backpage ads. (R. 697). Lewis said that he was feeling lonely when he received a text message from someone he believed to be the mother of a fourteen-year-old and a fifteen-year-old, stating that they were available for sex. (R. 697). At first he thought the ages were a typo. (R. 697). He responded to the text out of "curiosity," but he had no intention of having sex with a fourteen or fifteen-year-old. (R. 698). Lewis told Christoffel that he believed fourteen and fifteen-year-olds are old enough for sexual intercourse, and he acknowledged that he knew the law does not. (R. 700). Lewis testified that he was "curious" in the sense of investigating a sound in a horror movie, but he was not curious about what it was like to have sex with a fourteen-year-old girl. (R. 806).

Lewis called several character witnesses in his defense. Kevin Carlson testified

that he had known Lewis for over ten years, and they had worked together for eight. (R. 729). Lewis was his "best friend" and a "great mentor." (R. 729). They went to bars together, but they never picked up women. (R. 732). Carlson lived with Lewis and Lewis's wife for two years. (R. 732). He was with Lewis during this business trip. (R. 733). Lewis "never, ever talked about underage girls before." (R. 730).

Adam Kaper testified that he had worked with Lewis for thirteen years, and that they had been friends ever since. (R. 736). They attended charity events, went to football games, and had gone on vacation together several times. (R. 737). They occasionally discussed their sex lives, but they did not pick up women together. (R. 739). Kaper said Lewis, "absolutely has never shown any want to be with an underage person." (R. 736).

Lewis's sister, Krista Jackson, described her close, lifelong relationship with her brother. (R. 742). She testified that he would "never" have sex with an underage girl, and she had never seen him have any inclination, predisposition, or interest in underage girls. (R. 742).

Shane Lewis's 23-year-old niece, Tanisha Lewis, testified that she was very close with him. (R. 746). She even lived with him for a while. (R. 746). She testified that he had no predisposition or interest in having sex with underage girls. (R. 747).

While the jury was deliberating, they asked the judge for a "legal definition of incited and induced and predisposed." (R. 942). The prosecutor recalled previously reading a case holding that defense counsel was not ineffective for agreeing not

to provide definitions for those same terms. (R. 943). Defense counsel then agreed not to provide a definition. (R. 943). Counsel also agreed with the court responding, "You have all of your instructions. Please continue to deliberate." (R. 943). After further deliberation, the jury again asked, "predisposition what does it mean." (R. 948). The parties agreed that the jury should receive the same response that the court gave for their first question. (R. 949). Ultimately, the jury found Lewis guilty of all three charges. (C. 191-93; R. 818).

Lewis filed a motion for a new trial, including allegations that the involuntary servitude statute did not apply to Lewis, his motion to dismiss the involuntary servitude charge should have been granted, and he was not proven guilty beyond a reasonable doubt. (C. 201). The court denied the motion. (R. 1021).

Sentencing Hearing

The pre-sentence investigation report revealed that Lewis had no prior criminal convictions. (SC. 12). The officer who prepared the report found Lewis to be a minimum risk for future criminal conduct. (SC. 18). The sex offender evaluation also deemed Lewis a low-risk for committing a future sexual offense. (SC. 34).

On October 6, 2017, a sentencing hearing was held. (R. 1014). For the defense, Shane's friend Kevin Carlson, his aunt Debra Wolf, his sister Krista Jackson, and his mother Barbara Dixon all testified to Lewis's good character and about the fact that Lewis had never done anything like this before. (R. 1027-40). They all asked the judge for mercy. (R. 1027-40). Lewis also gave a statement in allocution asking for forgiveness. (R. 1055). In a letter to the court, Lewis begged for mercy,

expressing his "deepest regret and remorse." (SC. 36). He said he was "truly sorry" and had "terrible judgment," but his intentions "were never to seek out someone underage!" (SC. 36).

The court merged the grooming charge with the traveling to meet a minor conviction. (C. 220). The court sentenced Lewis to the minimum sentence of six years for involuntary sexual servitude of a minor and a concurrent sentence of two years for traveling to meet a minor, followed by three years mandatory supervised release. (C. 219-20; R. 1061).

Appellate Proceeding

On appeal, Lewis argued (1) that the State failed to prove beyond a reasonable doubt that he was not entrapped, (2) that he was deprived of his constitutional right to the effective assistance of counsel in presenting the entrapment defense, (3) that involuntary sexual servitude of a minor applies to sex traffickers, but not patrons, and (4) that his Class X conviction and sentence for involuntary sexual servitude of a minor must be vacated because, as applied to Lewis, the statute violates Illinois' proportionate penalties clause. *People v. Lewis*, 2020 IL App (2d) 170900, ¶ 1.

The appellate court agreed that Lewis was deprived of his constitutional right to the effective assistance of counsel and reversed Lewis's convictions and remanded for a new trial. *People v. Lewis*, 2020 IL App (2d) 170900, ¶ 1. Because this issue was dispositive, the court did not address the remaining issues on appeal. The State petitioned for leave to appeal the Appellate Court's ruling, and on March 24, 2021, this Court granted the State's request.

I. The Appellate Court Properly Found That Shane Lewis Was Deprived of His Constitutional Right to the Effective Assistance of Counsel Where Counsel Made Several Errors in Presenting Lewis's Entrapment Defense.

The appellate court found that Lewis's trial counsel made three material errors. First, counsel failed to offer a definition of predisposition where the jury asked for a legal definition multiple times, and a definition was readily available. Second, counsel failed to present the jury with the fact that Lewis had no criminal record, which was objective evidence that Lewis was not predisposed to commit the offenses. And third, counsel failed to object when the prosecutor materially misrepresented the law on entrapment to the jury, thereby shifting the burden to the defense and lowering the State's burden of proof. The appellate court concluded that counsel's errors, individually and cumulatively, prejudiced Lewis and rendered the proceeding unreliable. *People v. Lewis*, 2020 IL App (2d) 170900, ¶¶ 51-59.

Where, as here, an ineffective assistance of counsel claim was not raised in the trial court, the claim is subject to *de novo* review. *People. v. Lofton*, 2015 IL App (2d) 130135, ¶ 24.

It is fundamental that an accused is entitled to capable legal representation at his criminal trial. *People v. Wiley*, 165 Ill.2d 259, 284 (1995). Under the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant alleging ineffective assistance of counsel should prevail where he or she is able to show that (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Albanese*, 104 Ill.2d 504, 525 (1984), adopting *Strickland*.

Also, to establish prejudice, the defendant is not required "to show that a different verdict was likely" or that he "would more likely than not have received a different result" without counsel's mistakes. *People v. Fletcher*, 335 Ill. App. 3d 447, 455 (5th Dist. 2002). Rather, the question is whether, with those errors, he received a fair trial. *Fletcher,* 335 Ill. App. 3d at 455. *Strickland's* prejudice prong is not simply an outcome-determinative test, but may be satisfied if the defendant demonstrates that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Jackson*, 205 Ill. 2d 247, 259 (2001).

The State argues that the appellate court erred in finding counsel ineffective. In doing so, the State engages in a bifurcated analysis where it argues it was required to prove *either* that Lewis was not induced into committing the offense *or* that Lewis was predisposed to do so. Using this framework, the State then contends that there was no reasonable probability that counsel's alleged errors affected the jury's assessment of inducement and separately, that there was no reasonable probability that counsel's alleged errors affected the jury's assessment of Lewis's predisposition. (St. Br. 35-37)

Notably, the appellate court rejected the State's approach. The court stated, "The State invites us to engage in a bifurcated prejudice analysis that first considers the question of inducement" and "it argues that because the evidence showed that defendant was not induced beyond a reasonable doubt, it proved that defendant was not entrapped, rendering any deficient performance on the predisposition issue non-prejudicial." *Lewis*, 2020 IL App (2d) 170900, ¶ 54. The court then

"reject[ed] the State's suggestion that its evidence on inducement dispenses with our need to determine prejudice" because inducement and predisposition "are very much interrelated." *Id.*, ¶ 56.

Despite this finding, the State revives its bifurcated analysis in this Court. This framework is flawed, not only because (as the appellate court found) inducement and predisposition are interrelated, but also because, under Illinois law, the State must prove predisposition beyond a reasonable doubt to rebut a defendant's entrapment defense.

Additionally, and on the whole, the State incorrectly applies a sufficiency-of-the-evidence standard in arguing that Lewis was not prejudiced by counsel's errors. By contrast, the appellate court properly considered the law on entrapment and the *Strickland* prejudice standard and found counsel was constitutionally ineffective. Therefore, as argued below, this Court should affirm the appellate court's decision.

A. The State Misapprehends Illinois' Law on Entrapment.

The State asserts that the jury does not need to consider predisposition if the State proves beyond a reasonable doubt lack of inducement. (St. Br. 34) But Illinois' entrapment statute, jury instructions, and case law establish that the State needed to prove that Lewis was ready and willing to commit the offense before any persuasion from the government.

The State recognizes that "[t]o warrant a jury instruction on entrapment, the defendant bears the burden of producing at least 'slight evidence' supporting each element of the defense." (St. Br. 34) (citing *People v. Wielgos*, 142 Ill.2d 133, 136 (1991)). The burden then shifts to the State to prove beyond a reasonable

double that the defendant was not entrapped. *People v. Placek,* 184 Ill. 2d 370, 381 (1998). The State then erroneously claims that "[a]s the appellate court recognized, the People may rebut a defendant's entrapment defense by proving either that the defendant was not incited or induced to commit the offense or that he was predisposed to do so. (St. Br. 34) (citing *People v. Lewis*, 2020 IL App (2d) 170900, ¶ 47). This statement misapprehends the States' burden, and misrepresents the appellate court's decision. Contrary to the States' claim, and as the appellate court correctly stated, "the State was required to prove beyond a reasonable doubt that defendant was willing to commit the crime without persuasion and before his initial exposure to government agents." *Lewis*, 2020 IL App (2d) 170900, ¶ 47.

The affirmative defense of entrapment is codified in Section 7-12 of the Criminal Code which provides:

> A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was pre-disposed to commit the offense ***and*** the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense.

720 ILCS 5/7-12 (2017) (emphasis added). Thus, the State was required to rebut the defense by showing that the defendant was pre-disposed to commit the offense *and* that the government merely afforded him the opportunity to do so.

The Illinois Pattern Jury Instructions further clarify that the State cannot meet its burden by merely arguing a lack of inducement. The burden was on the State to prove that "the defendant was not entrapped if he was predisposed to

commit the offense *and* [a government official] merely afforded to the defendant the opportunity or facility for committing an offense." Illinois Pattern Jury Instructions, Criminal, 24-25.04 (hereinafter IPI Criminal No. 24-25.04)[2] (emphasis added). See also Burden of Proof as to Entrapment Defense-State Cases A.L.R. 4th 775 §5 (1987) (in Illinois, "the burden of proof in an entrapment defense rests on the defendant to prove that inducement to commit the crime occurred and on the prosecution to prove that the accused had a prior disposition to commit the crime").

The State relies on a federal case to support its claim that the State can meet its burden by proving either lack of inducement or pre-disposition. (St. Br. 34) citing *U.S. v. Mayfield*, 771 F.3d 417, 440 (7th Cir. 2014). As a general principle, "[d]ecisions of United States district courts and circuit courts of appeals are not binding upon State courts." *People v. Fields*, 135 Ill. 2d 18, 72 (1990). Further, the federal cases cited by the State are based only on federal common law, whereas Lewis and the precedent Illinois state cases are based on a statutory affirmative defense. *People v. Gillespie*, 136 Ill. 2d 496, 502 (1990); 720 ILCS 5/7-12 (2017). This Court has recognized differences between the federal common law entrapment defense and the Illinois statutory defense. *Gillespie*, 136 Ill. 2d at 502 (under Illinois law, a precondition to raising entrapment is admission of the offense, whereas under federal common law, a defendant can deny commission of the crime). Thus, the procedures and burden shifting analysis of Illinois' affirmative defense of entrapment are not identical to the federal common law defense of entrapment

[2]Citations are to the online Illinois Pattern Jury Instructions.

relied upon in the federal case cited by the State.

Further, *Mayfield* is inapplicable because the court was not addressing the government's burden after it had shifted to them at trial; the case was addressing whether or not the defendant had met his burden thereby entitling him to the jury instruction on entrapment. *Mayfield,* 771 F.3d at 420. In response to the State's motion *in limine* to preclude the entrapment defense, Mayfield proffered that he unknowingly worked with a government informant who repeatedly invited him to join in drug trades and robberies. *Id.* at 421. The informant gave Mayfield money when Mayfield was financially struggling, and they discussed their gang affiliations, which implied threats if the debt was not repaid. *Id.* Mayfield then engaged in a plot to rob a drug wholesaler which turned out to be an undercover sting operation. *Id.* The court found that this was sufficient evidence of inducement to warrant a jury instruction on entrapment. *Id.* at 443. In dicta, the court noted that "the government can defeat the entrapment defense at trial by proving *either* that the defendant was predisposed to commit the crime *or* that there was no government inducement." *Id.* at 440 (citing *U.S. v. Santiago-Godinez*, 12 F.3d 722, 728 (7th Cir. 1993); *U.S. v. Gunter*, 741 F.2d 151, 153 (7th Cir. 1984); *U.S. v. Burkley*, 591 F.2d 903, 915 (D.C. Cir. 1978)).

None of the cases cited by *Mayfield* supports a finding that the jury need only consider inducement. In *Santiago-Godinez*, the court stated, "where there is sufficient evidence that a defendant was predisposed to commit the crime, however, the entrapment defense is properly rejected without a inquiry into the government inducement." *U.S. v. Santiago-Godinez*, 12 F.3d 722, 728 (7th Cir.

1993). The court did not rule that the jury need not consider predisposition. In *Gunter*, the court discussed the lack of evidence of inducement to support its statement that "we have serious doubts as to whether there was enough evidence of inducement or defendants' lack of predisposition to raise the defense of entrapment." *U.S. v. Gunter*, 741 F.2d 151, 153 (7th Cir. 1984). But later in the opinion, when assessing whether the jury properly found that the defendant was not entrapped, the court did not address inducement, it only discussed predisposition, finding that "the evidence was sufficient to prove defendants' predisposition." *Gunter*, 741 F.2d at 154. Similarly, in *Burkley*, the court stated that the jury should not reach the question of predisposition only if it finds "no evidence of inducement." *U.S. v. Burkley*, 591 F.2d 903, 915 (D.C. Cir. 1978). The court elaborated that, "it is only predisposition which the prosecution must prove beyond a reasonable doubt. It need not, though it may, prove that there was no government inducement of or participation in the crime whatsoever." *Burkley*, 591 F.2d at 916. Thus, all of these cases show that once some evidence of inducement has been presented, thereby enabling the defendant to present the entrapment defense, the jury must find that the defendant was predisposed to commit the offense in order to sustain the conviction.

Unlike the federal cases cited by the State, there was no question here whether or not Lewis was entitled to the jury instruction on entrapment, and that he had met his burden of proving at least "slight evidence" of inducement. The trial court found that he met this burden, and the State has not argued on direct appeal, or in this Court, that Lewis was not entitled to the instruction. Further,

the federal cases would only allow the State to defeat the entrapment defense by showing "no" government inducement; the cases do not allow the State to meet its burden merely by arguing insufficient government inducement. See *Mayfield,* 771 F.3d at 44; *Burkley*, 591 F.2d at 915 (the State can prove that there was "no government inducement of or participation in the crime whatsoever"). Thus, even under the federal standard, the State was required to prove predisposition where, as here, there was at least some evidence that the defendant was induced into committing the offenses.

Illinois case law has long established that when entrapment has been presented to the jury, the State bears the burden of proving "that the defendant was ready and willing to commit the crime without persuasion." *People v. Poulos*, 196 Ill. App. 3d 653, 658 (1st Dist. 1990) (emphasis added); see e.g. *People v. Latona*, 268 Ill. App. 3d 718, 725 (2d Dist. 1994) ("In order to sustain its burden of proving that defendant was not entrapped, the State needed to show that defendant was predisposed to commit the offense, i.e., he was ready and willing to commit it without persuasion"); *People v. Colano*, 231 Ill. App. 3d 345, 349 (2d Dist. 1992) ("the defendant first must demonstrate that the State induced him to commit a criminal act; if he does so, then the burden is on the State to prove that the defendant was ready and willing to commit the crime without persuasion, that is, that he had a predisposition to commit the crime."); *People v. D'Angelo*, 223 Ill.App.3d 754, 775 (5th Dist. 1992) ("Once the defendant has demonstrated that the State induced him to commit a criminal act, then the burden is on the State to prove the defendant was ready and willing to commit the crime without persuasion, that is, that he

had a predisposition to commit the crime"). Further, under Illinois law, when assessing whether or not the defendant was predisposed, one of the factors to be considered includes the type and nature of the inducement, as well as the manner it was applied. See *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 38.

Thus, although the nature of the inducement should be considered by the jury, it is not, contrary to the State's position, separate from and prior to the predisposition analysis. Because the State's arguments rest on this misapprehension of Illinois entrapment law, its analysis of Lewis's ineffective assistance of counsel claims is fundamentally flawed. Like the appellate court, therefore, this Court should reject the State's argument that its evidence on inducement dispenses with the need to determine prejudice. *Lewis*, 2020 IL App (2d) 170900, ¶ 56.

B. The Appellate Court Correctly Found That Counsel Failed to Present a Legal Definition of Predisposition When the Jury Asked For One Multiple Times.

Pursuant to Lewis's defense, the jury received the following IPI instruction defining entrapment:

> It is a defense to the charge made against the defendant that he was entrapped; that is, that for the purpose of obtaining evidence against the defendant, he was incited or induced by a public officer to commit an offense. However, the defendant was not entrapped if he was predisposed to commit the offense and a public officer merely afforded to the defendant the opportunity or facility for committing the offense.

(R. 933-34); Illinois Pattern Jury Instructions, Criminal, No. 24-25.04 (4th ed. 2000). While deliberating, the jury asked the court for a "legal definition of incited and induced and predisposed." (C. 188; R. 942). The parties agreed that the court should respond by telling the jurors, "You have your instructions. Please continue to deliberate." (R. 943). After further deliberation, the jury again asked the court,

"predisposition - what does this mean - please give definination [*sic*]." (C. 190; R. 948). Without objection by counsel, the court repeated that the jury had all the information they needed. (R. 949).

"[T]he general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." *People v. Childs*, 159 Ill. 2d 217, 228-29 (1994); *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 26. "This is true even though the jury was properly instructed originally." *Childs,* 159 Ill. 2d at 229. And when a jury asks for a definition of the same term multiple times, the court should attempt to clarify the confusion by providing a definition, even if the term has a generally understood meaning. *People v. Brouder*, 168 Ill.App.3d 938, 948 (1st Dist. 1988) (definition of "knowingly"). Where the jury asks for a legal definition of a term central to the defense, and counsel fails to offer a definition, then counsel's representation is deficient and cannot be deemed reasonable trial strategy. *People v. Lowry*, 354 Ill.App.3d 760, 769 (1st Dist. 2004) (counsel ineffective for failing to submit an instruction for the definition of "knowingly" when critical issue was whether defendant fired gun knowingly or accidentally).

Here, the appellate court found that trial counsel's failure to offer a definition of predisposition was a material error because the commonly understood definition lacks the proper time frame required by the legal definition in the entrapment context. *Lewis*, 2020 IL App (2d) 170900, ¶ 37. As the appellate court noted, "Predisposition" as understood in the entrapment context, "focuses on the defendant's

mens rea before the exposure to government agents," which is established by proof that the defendant "was ready and willing to commit the crime without persuasion *and before his or her initial exposure to government agents*." *Id.* (emphasis added) c*iting People v. Bonner*, 385 Ill. App. 3d 141, 146 (2008) (quoting *People v. Criss*, 307 Ill. App. 3d 888, 897 (1999)); see also *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 38. The common understanding does not focus the jury on the correct time frame for its predisposition analysis, *i.e.*, before defendant's initial exposure to government agents." *Id.* at ¶ 38. The appellate court found that "the failure to properly define predisposition potentially allowed the jury to find that defendant was predisposed to commit the offenses by focusing on the wrong timeframe, e.g., the time he entered the hotel room—a far easier point from which to find predisposition than from the time before defendant's exposure to the government agents." *Id.* The court decided that "[t]o ensure that the jury properly understood the concept of predisposition despite having twice expressed confusion about it," the jury should have received the "readily available explanation of predisposition" as set forth above in *Bonner*. *Id.* at ¶39. Because counsel acquiesced in the court's failure to provide a legal definition, his representation was ineffective. *Id.*

The State disagrees with the appellate court's finding that error occurred and argues that "an explicit reference to the predisposition element's temporal focus was not necessary here, because the common understanding of 'predisposition' as used in the entrapment defense implicitly incorporates that temporal concept." (St. Br. 50-51). The facts contradict the State's argument. First, the jury literally asked for a "legal" definition of predisposition, reflecting their confusion about

how the common definition would apply in the entrapment context. And in closing argument, the prosecutor added to their confusion on how to apply it when he told the jurors that the entrapment instruction contained "legal terms" that only a contract attorney would understand. (R. 912, 916).

The State also argues that this Court "has never held that a trial court must, in response to a jury request, provide the definition of a word used in a jury instruction where the word is not defined in a separate IPI instruction." (St. Br. 57). But it has held that "jurors are entitled to have their inquiries answered" and it established a "general rule" that "the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from the facts about which there is doubt or confusion." *People v. Childs*, 159 Ill. 2d 217, 228-229 (1994).

For instance, in *People v. Landwer*, 279 Ill. App. 3d 306 (2nd Dist. 1996), the jury manifested confusion when it asked for a definition of "originated" in the context of an entrapment defense. *Landwer*, 279 Ill. App. 3d at 314. Th appellate court recognized that, even though "originated" has a generally understood meaning, the jury's question was one of law since the word "originated" appeared in the pattern instruction that was given to the jury and in the statute defining entrapment. *Id.* Following *Childs*, the court found that because the jury demonstrated confusion as to an explicit question of law contained in a jury instruction, it was error not to provide the jurors with a definition. *Id.* The court also decided that the jury was prejudiced because the defendant's entrapment defense relied considerably on the meaning of "originated."

Likewise, in this case, the jury manifested confusion about a legal term - predisposition - that was used in the jury instruction and statute defining entrapment. Given this context, the jury's subsequent request for a definition of predisposition was one of law. *Landwer*, 279 Ill. App. 3d at 314. Therefore, when they expressed their confusion and requested a definition, the court had a duty to provide one for them, and counsel erred by not offering one.

The State also contends that *People v. Sanchez*, 388 Ill. App. 3d 467 (1st Dist. 2009), offers a "better view" because it held that "[w]hen words in a jury instruction have a commonly understood meaning, the court need not define them with additional instructions," especially . . . when the pattern jury instructions do not provide that an additional definition is necessary." (St. Br. 57) In *Sanchez*, as in this case, the jury asked for the definitions of "predisposed," "incite," and "induce," and the appellate court found that counsel was not ineffective for acquiescing in the court's response that the jury had been given all the instructions and to continue deliberating. *Sanchez*, 388 Ill. App. 3d at 477. In this case, the appellate court acknowledged Sanchez but noted it did not address the distinction between the common understanding of "predisposition" and its narrower meaning in the entrapment context. *Lewis*, 2020 IL App (2d) 170900, ¶ 39. For that reason, the court declined to follow *Sanchez*. *Id*.

Furthermore, in *Sanchez*, the appellate court resolved the ineffective assistance of counsel claim specifically on the grounds that based on the facts of the case, the defendant was not prejudiced because "the evidence as to defendant's predisposition was not close," and that the definitions were unnecessary because

the defendant's entrapment defense lacked merit. *Sanchez*, 388 Ill. App. 3d at 475. By contrast, here the appellate court found that the "lack of predisposition was the lynchpin of the defense" and that the error in failing to provide the jury with a legal definition of predisposition prejudiced Lewis. *Lewis*, 2020, IL App (2d) 170900, ¶¶ 39, 57.

The State also argues that counsel's failure to offer a definition of predisposition was not incompetent because counsel could have reasonably concluded that expressly advising the jury that the State had to prove Lewis was predisposed prior to his exposure to the agents was unnecessary because of the short period of time between his initial exposure to the agents and his subsequent commission of the crimes. (St. Br. 54). The State misses the point. It is the time period before his contact with the police – not the time between his contact with them and the crime – that was critical to show whether or not he was not predisposed.

The State also contends that counsel could have reasonably concluded that giving jurors a definition of predisposition was unwarranted because there is no definition in the Illinois Pattern Jury Instructions and it has a commonly understood meaning. (St. Br. 55). However, where the jury showed confusion about a point of law arising from the facts, it cannot be reasonable strategy to fail to clarify their confusion because it creates a real risk that the jury will not properly apply the law to the facts. *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 68 (The purpose of jury instructions is to "give the jurors the correct principles of law applicable to the facts so they can reach a correct conclusion according to the law and the evidence."); *People v. Lowry*, 354 Ill. App. 3d 760, 767 (1st Dist. 2004)(the failure

to offer an instruction essential to the fair determination of the case by the jury cannot be excused as trial strategy).

Also, the State's argument that counsel's acquiescence to the trial court's response was a well thought-out strategy is contradicted by the record. Counsel appeared to be more concerned that he would be found ineffective by offering clarification, so he agreed to forgo a response. During their discussion about how to respond to the jury's first question, the prosecutor mentioned that she had "read a case yesterday about [providing the jury with] legal definitions for incite and induce and predisposed." (R. 943). The prosecutor did not have the case in front of her but recalled, "the defendant afterwards was trying to allege ineffective assistance of counsel because his attorney had agreed to something like, you have all the instructions, something like that." (R. 943).

The court asked if the lawyer in that case was not ineffective for agreeing to the response of "You have your instructions. Please continue to deliberate." (R. 943). When the prosecutor confirmed that counsel was not ineffective, defense counsel stated, "I agree with that response for that question." (R. 943). Counsel did not ask for the case name, or do any independent research; he quickly acquiesced to the State's request to not provide a definition. And when the jury asked a second time for a definition of predisposition, counsel again offered no guidance or objection. This was not a matter of trial strategy, instead it was a matter of trial counsel hoping to avoid being held ineffective. Ironically, by not offering a definition in this case, counsel's performance was deficient.

Thus, based on the facts of this case, the appellate court correctly found

that counsel's error constituted ineffective assistance of counsel. As the court stated: "Simply put, there is not a strategic basis of allowing a confused jury to potentially stray from the proper timeframe – the time before defendant's exposure to government agents – in deciding whether defendant was predisposed to commit the offenses he otherwise admitted committing." *Lewis*, 2020 IL App (2d) 170900, ¶ 40. And "[a]llowing the jury that leeway was deficient performance as it relates to the entrapment defense." *Id.*

C. The Appellate Court Properly Found That Counsel Failed to Present the Jury With the Material Fact That Lewis Had No Criminal Record.

While decisions made by trial counsel regarding what evidence to present are generally considered to be strategic matters that are given great deference, a strategic decision can support ineffective assistance, if the decision was unreasonable. *People v. West*, 187 Ill. 2d 418, 432-33 (1999). Counsel's failure to present evidence to support the defense can be ineffective assistance. *People v. King*, 316 Ill. App. 3d 901, 913 (1st Dist. 2000). Failure to present the jury with the defendant's criminal record can be a form of ineffective assistance of counsel. See *People v. Gunartt*, 218 Ill. App. 3d 752, 763 (1st Dist. 1991) (counsel was deficient for, among other things, failing to subpoena the defendant's criminal record).

"Evidence of the lack of a criminal record is relevant to an entrapment defense," because it tends to show that the defendant was less likely to be predisposed to commit the charged offense. *People v. Criss*, 307 Ill. App. 3d 888, 899 (1st Dist. 1999); *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 38. Here, Lewis had no criminal record of any kind. (SC. 12).Yet despite this readily available

evidence, defense counsel did not elicit any testimony or present any evidence of Lewis's otherwise spotless criminal record.

The State baldly asserts that "there is no reasonable probability that counsel's failure to present evidence that defendant had no prior criminal history affected the jury's verdict." (St. Br. 52). But Lewis's character, reputation, predisposition, and credibility were all at issue in this trial, and knowing that he had no criminal history - including no previous criminal convictions involving sexual conduct with minors - would have had a substantial effect on the jury. As the appellate court properly found, "Defendant's lack of a criminal record was strong evidence demonstrating his lack of predisposition, and counsel's failure to present this evidence is an obvious failure to function as the counsel guaranteed by the sixth amendment." *Lewis*, 2020 IL App (2d) 170900, ¶ 44.

The State also contends that counsel's failure to present evidence of Lewis's lack of any criminal history was not deficient because counsel presented other evidence suggesting that fact. For instance, the State argues that counsel elicited on cross-examination that Lewis was not the target of a sting operation and that the agents had no prior familiarity with him. (St. Br. 60). It notes that a search of Lewis's electronic devices revealed no inappropriate pictures of minors, internet searches for pornography, or prior attempts to solicit sex. (St. Br. 60). The State also points out that counsel presented the testimony of his friends and family to show his lack of predisposition. (St. Br.60). However, unlike that testimony, a clean criminal record was direct, objective proof that Lewis had not engaged in the charged conduct prior to his contact with the police in this case.

Contrary to the State's argument, counsel's failure to present Lewis's lack of criminal record could not be deemed reasonable trial strategy. Such evidence is highly probative of a lack of predisposition because "[i]t is highly improbable that an individual, with no prior record of [criminal] offenses, would voluntarily and unreluctantly engage in criminal conduct unless that person has been induced to violate the law." *People v. Fisher*, 74 Ill. App. 3d 330, 335 (3rd Dist. 1979). Counsel's failure to present this evidence was, therefore, a significant oversight and constituted ineffective assistance. See *People v. Wilson,* 149 Ill. App. 3d 1075, 1079 (1st Dist. 1986) (the failure to present pertinent information as substantive evidence was ineffective assistance of counsel).

D. The Appellate Court Properly Found That Counsel Failed to Object to the Prosecutor's Misrepresentations on the Law of Entrapment.

Counsel's failure to object to improper argument can constitute ineffective assistance of counsel warranting a new trial. *People v. Moore*, 356 Ill. App. 3d 117, 122 (1st Dist. 2005); *People v. Rogers,* 172 Ill. App. 3d 471, 479 (2d Dist. 1988). It is reversible error for a prosecutor to improperly shift the burden to the defense. *People v. Yonker*, 256 Ill. App. 3d 795, 800 (1st Dist. 1993). It is also improper for the prosecutor to make comments during closing argument that tend to lessen the State's burden of proof. *People v. Evans*, 2016 IL App (3d) 140120, ¶ 59.

The appellate court correctly found that counsel rendered deficient performance when he failed to object when the prosecution told the jury during closing argument that, "[i]f you find that the police did incite or induce him, then you can look at the next step," which was predisposition. *Lewis*, 2020 IL App (2d)

170900, ¶ 46. The appellate court explained that "this two-step articulation improperly suggested to the jury that it had to first find inducement before considering the predisposition issue," and that "[t]his articulation ignores that it became the State's burden to disprove inducement, or prove predisposition, beyond a reasonable doubt once the trial court decided there was sufficient evidence to allow the affirmative defense of entrapment." *Id.* citing *Bonner*, 385 Ill. App. 3d at 145. The appellate court further found that counsel was deficient for failing to object when the prosecutor told the jury "what we have to prove is that [defendant] was willing to do this and the opportunity was there," when the State was actually "required to prove beyond a reasonable doubt that defendant was willing to commit the crime without persuasion and before his initial exposure to government agents." *Id.* at ¶ 48 citing *Bonner*, 385 Ill. App. 3d at 145.

The State claims that these arguments were "inartful" but "intended to (correctly) convey to the jury that it need not determine whether defendant was predisposed to commit the offenses if it found that the People proved beyond a reasonable doubt that he was not incited or induced." (St. Br. 45). In fact, as argued in subsection A., the proposition that the jury would not have to consider predisposition if it found that Lewis was not incited or induced is an incorrect statement of the burden under Illinois law. The jury was instructed that it was the State's burden to prove beyond a reasonable doubt that Lewis was not entrapped. Illinois Pattern Jury Instructions, Criminal, 24-25.04A (4th ed. 2000). IPI 24-25.04 instructs that a defendant is "not entrapped" if he was predisposed to commit the offense ***and*** the government merely afforded him the opportunity or facility

for committing the an offense. Illinois Pattern Jury Instruction, Criminal, 24-25.04 (4th ed. 2000) (emphasis added). Thus, the jury instructions recognize that the nature of the inducement is an interrelated consideration to predisposition, and advising the jury that it need not consider predisposition if the State proved lack of inducement conflicted with the instructions given to the jury.

The State also argues that any error was cured by both the prosecutor and defense counsel's arguments that it was the State's burden to prove that the defendant was "not entrapped," and the court instructing the jury that the State must disprove entrapment beyond a reasonable doubt. (St. Br. 45-46). In the same vein, the State argues that counsel's failure to object to the prosecutor's improper argument was not unreasonable because both counsel and the State acknowledged its burden to prove Lewis was not entrapped and "because counsel could be confident that the court would correctly instruct the jury following closing arguments, his performance was not deficient." (St. Br. 58-59). But telling the jury that the State had the burden of proving Lewis was "not entrapped" did not cure the State's improper argument distorting the burden of proof. See *People v. McMillin*, 352 Ill. App. 3d 336, 344 (5th Dist. 2004) (counsel's failure to object to the State's distortion of the evidence in closing argument was professionally unreasonable).

The State also ignores that when defense counsel tried to argue that the State had the burden to present evidence that Lewis was predisposed, the court sustained the objection and admonished counsel "not to talk about the burdens." (R. 900). This gave the incorrect impression that the State did not have the burden to prove predisposition. Later, when counsel argued that "predisposition or lack

thereof to commit the offenses that he's charged with, that's a required part of an entrapment defense," the State objected and told the jury, "That's not the law." (R. 901). The court did not sustain that objection, but told the jury, "what the lawyers say is not the law," only adding to the misunderstanding that the State did not have to prove predisposition. (R. 901). Rather than curing the error, as the State suggests, these arguments and the court's instructions compounded it.

As the appellate court found, counsel's failure to object to the State's "mischaracterization of the burden of proof" and "an improperly broad articulation of predisposition" was objectively unreasonable. *Lewis*, 2020 IL App (2d) 170900, ¶ 49. There is no reasonable strategy in which allowing the State to lessen its burden of proving predisposition could have benefitted Lewis. And therefore, counsel performed deficiently in allowing the State to do so here.

E. The Appellate Court Properly Found That Lewis Was Prejudiced By Each of the Three Material Deficiencies in Trial Counsel's Attempt to Present the Entrapment Defense.

The appellate court found that counsel's errors prejudiced Lewis because they rendered the proceeding unreliable under *Strickland*. *Lewis*, 2020 IL App (2d) 170900, ¶ 59. First, the court found that it "could not say with any certainty that the State proved beyond a reasonable doubt that the defendant was not induced." *Lewis,* 2020 IL App (2d) 170900, ¶ 55. And because of counsel's failure to object to the State's improper burden shifting argument, "any meaningful attempt to parse through the evidence to decide the inducement prong was irreparably thwarted by the State's argument to the jury that it first had to find inducement before reaching the predisposition question." *Id.*

The court next determined that the failure to offer a readily available definition of predisposition was prejudicial because "the refusal to clarify the jury's confusion over the meaning of 'predisposition' created a serious danger that the jury convicted defendant based upon a consideration of predisposition untethered from the relevant timeframe, *i.e.*, prior to his exposure to government agents." *Id.*, ¶ 57.

Finally, the court found that the prejudicial effect of these two errors was compounded by defense counsel's failure to inform the jury that Lewis had no criminal history. *Id.*, ¶ 58. This fact "would have bolstered the argument that [Lewis] was not predisposed to commit the offenses before his exposure to government agents." *Id.*, ¶ 58.

The State argues that the appellate court erred in finding prejudice, claiming that "no reasonable probability exists that, absent the alleged errors, the jury would have found that the People failed to satisfy their burden of proof as to either prong of the entrapment defense." (St. Br. 35). The State asserts that there was "overwhelming evidence" that Lewis was not induced because none of the government conduct "creat[ed] a substantial risk that an otherwise law-abiding citizen [would] commit an offense." (St. Br. 46, 37).

In making this argument, the State misapplies *Strickland's* prejudice standard. It inappropriately balances the good evidence supporting Lewis's entrapment defense versus the bad evidence against him and argues, in the light most favoring the State, that the evidence "convincingly" established that Lewis was not entrapped. *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 37 (in evaluating

prejudice under *Strickland*, the court does not review the sufficiency of the evidence or "weigh 'good' evidence versus 'bad'").

The problem with the State's approach is that the standard is "subject to distortion if the evaluation focuses only on the evidence untouched by the professional errors of counsel," and "falls prey to a seductive simplicity found in the mechanical search for untainted evidence to cleanse the prejudice by providing a sufficient independent evidentiary basis to convict." *People v. Moore*, 279 Ill. App. 3d 152, 161–62 (5th Dist. 1996). As the appellate court explained here, "*Strickland's* prejudice prong is not simply an 'outcome-determinative' test but may be satisfied if the defendant demonstrates that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Lewis*, 2020 IL App (2d) 170900, ¶ 59.

Also, the State's argument that the evidence "overwhelmingly" showed that Lewis was not induced is without merit. A case is closely balanced where there is "the presence of some evidence from which contrary inferences can be drawn." *People v. Reeves*, 314 Ill. App. 3d 482, 489 (1st Dist. 2000). The appellate court recognized that evidence of inducement was close where "on the one hand Agent Taub was the first to mention sex with minors to [Lewis]" and continued to suggest the conduct after [Lewis] expressed disinterest" and where "[o]n the other hand [Lewis] quickly overcame his expressed disinterest in sex with minor and proceeded to plan a sexual encounter with the minors whom Taub described ultimately traveling in a snowstorm to accomplish this purpose." *Lewis*, 2020 IL App (2d) 170900, ¶ 55.

The State characterizes the police conduct in this case as merely offering an ordinary opportunity to commit the charged crime rather than inducement. (St. Br. 36) First, as *Mayfield* recognized, the government's conduct "need not be 'extraordinary' to create this risk" that "a person who otherwise would not commit the crime if left alone will do so in response to the government's persuasion." *Mayfield*, 771 F.3d at 434. "Subtle, persistent, or persuasive" conduct by government agents or informants may qualify as an illegitimate inducement. *Id.* (finding that the defendant met his burden of proving slight evidence of inducement because "the government's solicitation of the crime was accompanied by subtle and persistent artifices and devices that created a risk that an otherwise law-abiding person would take the bait"). Further, the cases relied on by the State as showing lack of inducement were cases addressing the sufficiency of the evidence; they did not address the prejudice prong of *Strickland*. See *e.g. United States v. Poehlman*, 217 F.3d 692, 705 (9th Cir. 2000) (finding inducement where, "[p]rior to his unfortunate encounter with [the government agent], [the defendant] was on a quest for an adult relationship with a woman who would understand and accept his proclivities, which did not include sex with children. There is surely enough real crime in our society that it is unnecessary for our law enforcement officials to spend months luring an obviously lonely and confused individual to cross the line between fantasy and criminality.")

The State also claims that the short amount of time between Lewis's initial contact with the police and his subsequent commission of the crime precludes a finding of inducement. (St. Br. 40). However, the State underestimates the role

of technology, as well as the difference in medium of communication, and the cases cited by it are distinguishable for that reason. *Jacobson* involved a handful of mailings that occurred over several months. *Jacobson v. United States*, 503 U.S. 540, 549 (1992). Similarly, *Poehlman* used email communications, which often involve multiple days between responses. *Poehlman,*217 F.3d at 705. Whereas here, this case involves text messages that occur instantaneously and are quickly responded to. While the exact number of communications is not stated in *Jacobson* or *Poehlman*, the total number of communications exchanged between Lewis and Taub in this case greatly exceeds the number of communications in either *Jacobson* or *Poehlman*. Further, time is not dispositive. Brief conversations have been held to be sufficient. See *Bonner*, 385 Ill. App. 3d at 146 (after initially refusing, the defendant ultimately sold drugs to an undercover officer in exchange for sexual favors, and the court noted that, "Lesser efforts than these have been considered inducement").

Additionally, there was evidence presented that the police went beyond offering an "ordinary" and "customary" execution of the crime. The criminal offense originated with the State's advertisement and Officer Taub's offer of underage girls via text. Lewis responded, "wtf?? Not interested in minors. You crazy?" The State ignores that, as a matter of the operation's protocol, Agent Taub was supposed to stop communicating if the suspect responded that he was interested in adults and not minors. (R. 359). Yet Taub continued to actively encourage the criminal act despite Lewis's repeated attempts at engaging Taub, an adult, in sexual activity. As the appellate court reasonably found, "Taub was the first to mention sex with

minors to defendant, and Taub continued to suggest the conduct after defendant initially expressed disinterest," thus "we cannot say with any certainty that the State proved beyond a reasonable doubt that defendant was not induced." *Lewis*, 2020 IL App (2d) 170900 ¶ 55. Therefore, the State's claim that there was "overwhelming evidence" of no inducement, and subsequently "no reasonable probability" that the verdict would have been different but for counsel's errors is contradicted by the record and the reasonable findings of the trial and appellate courts.

The State also argues that the evidence "convincingly established" that Lewis was predisposed to commit the offenses. (St. Br. 46-50). In fact, there was little to no evidence to suggest that Lewis was predisposed. The State concedes that several factors in the predisposition analysis favor Lewis (St. Br. 47). and indeed, most of the evidence weighed against finding predisposition. Several witnesses testified that he had no interest in sexual activity with minors, he had no criminal record, the government agents initiated the criminal activity, Lewis showed hesitation throughout the text messages, and his hesitation continued during his conversation with the government agent in the hotel room.

To show predisposition, the State points to statements made by Lewis including, "I think naturally they are old enough but the law says they are not," and "I mean like naturally I think that... once a girl has her period she's ready for that kind of thing but... legally, obviously... its not the right thing." (St. Br. 47). Both of these statements by Lewis are crude summaries of basic biology; they are not evidence of a pre-existing intention to engage in sexual conduct with

underage women.

The State also mischaracterizes the evidence by claiming that Lewis did not "exhibit a hesitation that was overcome only by repeated persuasion." (St. Br. 49). Contrary to this claim, Shane Lewis immediately replied, "wtf?? Not interested in minors. You crazy?" and proceeded throughout the text messages to seek sexual conduct with the adult woman rather than the offered minors. And the transcript of the hotel conversation further evidences his ongoing hesitation all the way up to the point where he was arrested.

The State also relies on the length of time between the text messages and Lewis being arrested as showing that "there is no reasonable probability that the jury focused its predisposition analysis on defendant's state of mind when 'he entered the hotel room' rather than 'before [his] exposure to the government agents,' as the appellate court suggested." (St. Br. 52). However, the State focuses on the incorrect time frame. The jury was supposed to consider Lewis's willingness to commit the offense *before any contact from the government*. *Bonner*, 385 Ill. App. 3d at 145. The appellate court properly found that, due to counsel's errors, there was a strong possibility that the jury found "that defendant was predisposed to commit the offenses by focusing on the wrong timeframe, *e.g.,* the time he entered the hotel room–a far easier point from which to find predisposition than from the time before defendant's exposure to the government agents." *Lewis*, 2020 IL App (2d) 170900 ¶ 38.

In sum, after properly applying *Strickland* to the facts of this case, the appellate court correctly determined that trial counsel's errors rendered this

proceeding unreliable and denied Lewis his right to a fair trial. *Lewis*, 2020 IL App (2d) 170900 ¶ 59; *see also People v. Young*, 347 Ill. App. 3d 909, 929 (1st Dist. 2004); *People v. Bell*, 152 Ill. App. 3d 1007, 1019 (3rd Dist. 1987) (the cumulative effect of counsel's errors can produce "such substantial prejudice to the defendant as to deprive him of a trial with a reliable result," even where the effect of the individual errors may not). All three errors went to the central issue of Lewis's entrapment defense. If counsel had clarified the definition of predisposition, presented Lewis's lack of a criminal record, and objected to the State's misrepresentations of the law, there was a reasonable probability that the jury would have found that Lewis was not predisposed to commit the offenses and that he was entrapped. Therefore, based on the cumulative effect of counsel's errors, this Court should affirm the appellate court's decision and remand for a new trial.

II. The State Failed to Prove Beyond a Reasonable Doubt That Shane Lewis Was Not Entrapped Into Committing the Offenses.

Shane Lewis was charged with the offenses of involuntary sexual servitude of a minor and traveling to meet a minor. (C. 36-37). At trial, he raised an entrapment defense. The evidence showed that in a moment of loneliness and despondency, Lewis responded to an online advertisement for an eighteen-year-old adult woman looking to get "warm." (R. 760). Unknown to Lewis, this ad was posted as part of an undercover police operation to catch individuals seeking to illegally have sex with underage women. (R. 567). However, there was no evidence showing that, before his contact with the police, Lewis was predisposed to engage in sexual conduct with minors. At the time of the offense, Lewis only reached out to adult women, he repeatedly told the undercover officers that he was seeking sexual relations with an adult, and when they offered minors to him for sexual purposes, he said he was not interested. Given this evidence, the State failed to prove beyond a reasonable that Lewis was not entrapped. Therefore, this Court should reverse his convictions for involuntary sexual servitude of a minor and traveling to meet a minor.

The affirmative defense of entrapment is codified in Section 7-12 of the Criminal Code which provides:

> A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was pre-disposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense.

720 ILCS 5/7-12 (2017). The line between permissible and impermissible State

action was explained by the Illinois Supreme Court as follows:

> Officers may afford opportunities or facilities for the commission of crime, and may use artifice to catch those engaged in criminal ventures, but entrapment constitutes a valid defense if the officers *inspire, incite, persuade, or lure the defendant to commit a crime which he otherwise had no intention of perpetrating.*

People v. Outten, 13 Ill.2d 21, 24 (1958) (internal citations omitted, emphasis added).

The question of entrapment is usually one to be resolved by the trier of fact. *People v. Bonner*, 385 Ill. App. 3d 141, 145 (2d Dist. 2008). However, where credible evidence shows that entrapment exists as a matter of law, the reviewing court must reverse. *People v. Salazar*, 284 Ill. App. 3d 794, 800 (1st Dist. 1996).

To establish an entrapment defense, the defendant must present evidence "(1) that the State induced or incited him to commit the crimes and (2) that he lacked the predisposition to commit the crimes." *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 28. If the defendant presents "some degree of evidence to support his defense of entrapment," the burden then shifts to the State to rebut that defense beyond a reasonable doubt. *Ramirez*, 2012 IL App (1st) 093504, ¶ 28. This burden requires proof that "the defendant was ready and willing to commit the crime *without persuasion*." *People v. Poulos*, 196 Ill. App. 3d 653, 658 (1st Dist. 1990) (emphasis added); see also *People v. Latona*, 268 Ill. App. 3d 718, 725 (2d Dist. 1994) ("In order to sustain its burden of proving that defendant was not entrapped, the State needed to show that defendant was predisposed to commit the offense, i.e., he was ready and willing to commit it without persuasion").

A. The Evidence Showed That the State Improperly Induced Lewis to Attempt to Engage in Sexual Conduct With a Minor.

An individual is entrapped when the government "incited or induced" his criminal conduct. 720 ILCS 5/7-12 (2017). "To induce" means "to move by persuasion or influence."[3] If the State agent "merely affords [the individual] the opportunity or facility for committing an offense," such person has not been entrapped. 720 ILCS 5/7-12 (2017). The inducement prong is met when "(1) the concept of committing the offense originated with the State, (2) who actively encouraged the defendant to commit the offense, (3) for the purpose of obtaining evidence for his prosecution." *People v. Lozada*, 211 Ill. App. 3d 817, 821 (1st Dist. 1991)[4]; see e.g. *Bonner*, 385 Ill. App. 3d at 146 (after initially refusing, the defendant ultimately sold drugs to an undercover officer in exchange for sexual favors, and the court noted that, "Lesser efforts than these have been considered inducement").

Here, the concept of engaging in sexual activity with a minor originated with the State. The undisputed evidence showed that when Lewis responded to an advertisement on Backpage.com he was seeking adult companionship. (R. 761). The ad was purportedly posted by an eighteen-year-old, in a section of the website where only adults are allowed to enter or post. (R. 376). But, the ad was actually

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[3]http://www.merriam-webster.com/dictionary/induce (last visited July 7, 2021). *See In re Ryan B.*, 212 Ill.2d 226, 232 (2004) (relying on dictionary definitions of statutory terms to determine their ordinary and popularly understood meaning).

[4]Lewis recognizes that the entrapment statute has been amended and no longer requires that the criminal design originated with the government. This amendment lowered the burden on defendants raising the entrapment defense, and the origins of the criminal conduct remain relevant to the inducement analysis. See e.g. *People v. Gonzales*, 125 Ill. App. 2d 225, 232 (2nd Dist. 1970); *People v. Lozada*, 211 Ill. App. 3d 817, 821 (1st Dist. 1991); *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 38.

posted by the police as part of an undercover operation to catch people engaging in commercial sexual activity with minors. (R. 335). And it was undercover officer Taub who, in response to Lewis's text, made the offer for sexual conduct with two underage women rather than the adult services displayed in the ad. (R. 618). Taub was instructed to do this as part of the undercover operation. (R. 386). See *People v. Gonzales*, 125 Ill. App. 2d 225, 232 (2nd Dist. 1970) (the evidence tended to show inducement where the police "conceived and planned" the criminal conduct). Thus, the whole purpose of the operation, advertisement, and text messages was obtaining evidence to prosecute Lewis. (R. 567).

Further, Officer Taub actively encouraged Lewis to commit the offense. After she informed Lewis that the girls were fourteen and fifteen years old, Lewis responded, "wtf?? Not interested in minors. You crazy?" (St. Ex. 2). As a matter of the operation's protocol, Taub was supposed to stop communicating if the suspect responded that he was interested in adults and not minors. (R. 359). Yet, despite Lewis stating that he was "not interested," Taub continued attempting to induce Lewis. She told him, "as long as u r gentle and treat my girls good... I'm here to protect my grls." (St. Ex. 2). Lewis then responded by trying to engage in sexual activity with Taub, knowing she was an adult, and stating, "Are you a female?" and "What if I just see u. Since your [*sic*] above 18." (St. Ex. 2). Taub ignored Lewis and instead assured him that, "my girls want to do this... I won't put them into sum thing they don't wanna do." (St. Ex. 2).

Lewis responded by again engaging Taub, texting, "I'll come only if your [*sic*] there watching." (St. Ex. 2). At trial, Lewis explained he had hoped to convince

the adult he was texting with to engage in sexual conduct rather than the minors. (R. 772). When Taub replied, "yea- I'll watch- u b 2 ruf on my girls I'll kick ur ass," Lewis yet again tried to engage her, stating, "What about u how muck [*sic*] for u... How much for all 3 of u?" (St. Ex. 2). Taub continued to ignore his attempts to engage her and repeatedly offered the underage women instead, and Lewis eventually acquiesced to her. (St. Ex. 2).

At trial, Lewis testified that the thought of sex with fourteen or fifteen year old girls "was never in my mind" before texting with Taub, and he only agreed because she kept diverting him, complimenting him, and assuring him that it was ok, and that they "want to do this." (R. 768-69). Thus, Taub purposefully encouraged the growth of the criminal idea in Lewis's mind. See *Jacobson v. U.S.*, 503 U.S. 540, 551 (1992) (government agents may not originate a criminal design, implant the disposition to commit a criminal act in an innocent person's mind, and then induce commission of the crime).

As the trial court found, the evidence was sufficient to show that Lewis was induced by the police, and that he was therefore entitled to a jury instruction on the entrapment defense. (R. 837). The criminal enterprise originated with the undercover officers when they constructed the online advertisement and sent text messages offering underage women available for sex. The officers then purposefully persuaded Lewis into an agreement by encouraging him, making him feel safe and comfortable with the idea, and ignoring anything he expressed contrary to the officer's goal of arresting him for attempting to have sex with minors. They continued to text message with Lewis, saving those text messages, for the purpose

of using that evidence in a criminal prosecution against him. The State has not argued on direct appeal or in its brief that Lewis did not meet his burden or that he was not entitled to present the entrapment defense. And as the appellate court properly found, "we cannot say with any certainty that the State proved beyond a reasonable doubt that defendant was not induced." *People v. Lewis*, 2020 IL App (2d) 170900 ¶ 55; see also *People v. D'Angelo*, 223 Ill.App.3d 754, 776 (5th Dist. 1992) (defendant met his burden of showing slight evidence of inducement where police informant initiated conversation and provided phone number to engage in smuggling activity). Thus, even though the evidence of inducement was not immense, the State failed to prove beyond a reasonable doubt that there was no inducement.

Because the evidence showed that the police induced Lewis to commit the offenses, the State was required to prove beyond a reasonable doubt that Lewis was predisposed to do so. *People v. Colano*, 231 Ill. App. 3d 345, 349 (2d Dist. 1992) ("the defendant first must demonstrate that the State induced him to commit a criminal act; if he does so, then the burden is on the State to prove that the defendant was ready and willing to commit the crime without persuasion, that is, that he had a predisposition to commit the crime"); *People v. Latona*, 268 Ill. App. 3d 718, 725 (2d Dist. 1994) ("In order to sustain its burden of proving that defendant was not entrapped, the State needed to show that defendant was predisposed to commit the offense, i.e., he was ready and willing to commit it without persuasion"); *People v. D'Angelo*, 223 Ill.App.3d 754, 775 (5th Dist. 1992) ("Once the defendant has demonstrated that the State induced him to commit a criminal act, then the burden

is on the State to prove the defendant was ready and willing to commit the crime without persuasion, that is, that he had a predisposition to commit the crime").

B. The State Failed to Prove Beyond a Reasonable Doubt That Lewis Was Predisposed to Engage in Sexual Conduct With Minors.

Where the government has induced an individual to break the law, the prosecution must prove beyond reasonable doubt that the defendant was predisposed to commit the criminal act before being approached by government agents. *Jacobson v. United States*, 503 U.S. 540, 548–49 (1992). In Illinois, "predisposition is established by proof that the defendant was ready and willing to commit the crime without persuasion and before his or her initial exposure to government agents." *People v. Criss*, 307 Ill. App. 3d 888, 897 (1st Dist. 1999) (internal citations omitted); *People v. Bonner*, 385 Ill. App. 3d 141, 146 (1st Dist. 2008). Factors to consider for predisposition include:

> (1) the character of the defendant; (2) whether the government initiated the alleged criminal activity; (3) whether the defendant had a history of criminal activity for profit; (4) whether the defendant showed hesitation in committing the crime, which was only overcome by repeated persuasion; (5) the type of inducement or persuasion applied by the government, or the way in which it was applied; and (6) the defendant's prior criminal record.

People v. Ramirez, 2012 IL App (1st) 093504, ¶ 38.

Applying these factors here shows that Lewis was not predisposed to engage in sex with minors before his contact with the undercover officers. The first factor, the character of the defendant, favors Lewis. Several witnesses testified about his strong moral character, and good reputation in the community as a law-abiding citizen. See *People v. Perez,* 209 Ill.App.3d 457, 465 (1st Dist. 1991) (a defendant raising entrapment is entitled to call character witnesses to testify about his good

reputation in the community as a law-abiding citizen because it is relevant to his predisposition to commit a crime). At trial, Kevin Carlson testified that he knew Lewis for over ten years, had worked professionally with him for eight years, and lived with him for two years. (R. 730). In all that time, Lewis had "never, ever talked about underage girls before." (R. 730). Adam Kaper knew Lewis for thirteen years. (R. 736). He attended charity events and went on vacations with Lewis. (R. 736). Kaper said that Lewis, "absolutely has never shown any want to be with an underage person." (R. 736). Lewis's sister, Krista Jackson, confirmed that he would never have sex with an underage girl, and that he had no inclination, predisposition, or interest in underage girls. (R. 742). Lewis's 23-year-old niece, Tanisha Lewis, who had lived with him, also testified that he had no predisposition or interest in having sex with underage girls. (R. 747). Thus, nothing about Lewis's character indicated he was predisposed to engage in sexual conduct with underage women before his contact with the police.

Second, as argued in part A, the undercover officers initiated the criminal activity by constructing the sting operation designed to entice individuals seeking sex with minors. Lewis began the evening by responding to ads for adult escorts, and none of the ads he reached out to were soliciting minors for sex. (R. 760). The criminal activity at issue commenced when Taub indicated via text message that the ad was actually for sex with minors. (St. Ex. 2). Thus Taub, not Lewis, initiated the criminal activity.

The third and sixth factors, whether the defendant had a history of criminal activity for profit and his criminal record, both strongly favor Lewis. He had no

criminal history of engaging minors for sex; in fact, he had no criminal record at all. Consequently, it was unlikely that Lewis suddenly and independently of the government's inducement, engaged in the criminal conduct here. *People v. Fisher*, 74 Ill. App. 3d 330, 335 (3rd Dist. 1979) ("It is highly improbable that an individual, with no prior record of [criminal] offenses, would voluntarily and unreluctantly engage in criminal conduct unless that person has been induced to violate the law").

The fourth factor - whether the defendant showed hesitation in committing the crime - also favors Lewis. When Officer Taub revealed that she was offering sex with underage women, not adults, Lewis immediately stated he was "not interested." (St. Ex. 2). And, when Taub persisted, he tried to engage her in sexual conduct, knowing that she was an adult. Further, when he met with the Officer Sifferman acting as the "mother" in the hotel room, he continued to show hesitation. He told her, "I'm, I'm a little nervous, the age like, it's not like I'm even in to that, honestly,"and "I'm very nervous to tell you the truth, like I feel weird about it with them being young like that." (St. Ex. 9). Lewis testified that he was politely trying to convince the adult to have sex with him and that he repeatedly told her not to leave because he did not want to be alone with minors. (R. 796). Lewis's hesitation and his ongoing reluctance to actually have sex with a minor contradicted a finding that he was ready and willing to commit the crime before any persuasion by the police.

The fifth factor, the type and manner of inducement and persuasion used by the police, shows that the undercover agents persuaded Lewis by presenting

the conduct as acceptable and normal. Although the police did not physically force Lewis into agreeing to commit a crime, using persuasion and manipulation to make a defendant comfortable with the criminal act can be sufficient inducement. For example, in *Jacobson v. U.S.*, 503 U.S. 540 (1992), federal postal inspectors induced a defendant into receiving child pornography through the mail when they sent mailings to him about sexual attitudes towards children, and eventually the defendant ordered a magazine depicting young boys sexually. *Jacobson*, 503 U.S. at 551. The Supreme Court held that, although the defendant had a predisposition to view legal sexually oriented photographs, and he expressed a belief that young boys should be legally allowed to be sexual, no rational juror could have concluded that the defendant was predisposed to receive child pornography through the mail independent of the police operation. *Id.* at 554.

Similarly here, the undercover officers befriended Lewis, and said that the underage women consented and wanted to have sex with him, that their mother was "ok" with it, and that Lewis was "not crazy," or a "creep," or an "ugly freak" for agreeing to engage in this criminal conduct. (St. Ex. 2; 9). Furthermore, whether a defendant is particularly susceptible to a type of inducement is a relevant factor to consider for purposes of entrapment. *People v. Kulwin*, 229 Ill. App. 3d 36, 39 (1st Dist. 1992) (defendant who was in a dire financial situation was induced into a narcotics sale by government agents). Here, Lewis's wife had suffered a miscarriage, and subsequently their marriage of fourteen years was falling apart. (R. 758). He had just spent the holiday season alone and he was searching the website for adult companionship. (R. 757). Given his vulnerability, Lewis was

particularly susceptible to acquiesce in Taub's persistent coaxing to engage in the illegal activity. Lastly, when he expressed his uneasiness with engaging in this activity, the undercover officer repeatedly assured him that it was consensual and natural. Thus, it was only after the officer's repeated insistence that the conduct was normal that Lewis indicated a willingness to engage in any kind of sexual activity with underage women.

In sum, although the evidence of inducement was not immense, there was sufficient evidence of inducement to raise the entrapment defense. The burden was then on the State to prove beyond a reasonable doubt that Lewis was ready and willing to commit the offense before and without exposure to government agents, and that the government merely afforded him an opportunity. However, there was little to no evidence that Lewis was predisposed to engage in sexual conduct with minors before texting with Taub. Therefore, as a matter of law, Lewis established the defense of entrapment, and the State failed to prove beyond a reasonable doubt that he was not entrapped. This Court should, therefore, reverse Lewis's convictions for involuntary sexual servitude of a minor and traveling to meet a minor.

III. The State Failed to Prove Lewis Guilty of Involuntary Sexual Servitude of a Minor Where That Statute Applies to Sex Traffickers, but not Patrons, Like Him.

Lewis was convicted of involuntary sexual servitude of a minor by knowingly attempting to obtain by any means another person under 18 years of age, knowing that the minor would engage in commercial sexual activity. (C. 36, 191). The facts showed that Lewis agreed to pay money to have sexual intercourse with two minors. The plain language of the statute, and the definitions contained therein, show that the statute applies to sex traffickers (pimps) and not purchasers of sexual services (patrons). Because Lewis did not attempt to obtain anyone for the purpose of economic benefit, the State failed to prove him guilty of the charged offense.

Due process requires the State to introduce sufficient evidence to prove beyond a reasonable doubt all of the elements of the charged offense. U.S. Const. amend. XIV, § 1; Ill. Const. 1970, art. I, § 2; *In re Winship*, 397 U.S. 358, 364 (1970). When a defendant challenges the sufficiency of the evidence supporting a conviction, a reviewing court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). However, where, as here, a sufficiency claim challenges only whether the undisputed facts presented at trial were sufficient to prove the elements of the offense, the issue is a question of law subject to *de novo* review. *People v. Montoya*, 373 Ill. App. 3d 78, 81 (2d Dist. 2007), citing *People v. Smith*, 191 Ill. 2d 408, 411 (2000).

Under the "trafficking in persons" statute, involuntary sexual servitude

of a minor occurs when a defendant knowingly "attempts to recruit, entice, harbor, provide, or obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity." 720 ILCS 5/10-9(c)(2) (2015). As argued below, the plain language of the statute and the statutory definitions provided therein support the conclusion that the statute applies only to persons receiving an economic benefit from their relationship with the victim, not patrons of the commercial sexual activity like him, and therefore, he was not guilty of this offense.

The primary goal in construing a statute is to ascertain and give effect to the intent of the legislature. *People v. Hart*, 313 Ill. App. 3d 939, 941 (2d Dist. 2000). In doing so, the statutory language is given its plain and ordinary meaning. *Hart*, 313 Ill. App. 3d at 941. Where the language is clear and unambiguous, no further aids of statutory construction will be applied. *Id.* Also, where a term is defined by the statute, courts should not resort to relying on a different meaning. *People v. Howard*, 2017 IL 120443, ¶ 23.

Lewis was convicted of knowingly attempting to obtain another person under 18 knowing that the person will engage in commercial sexual activity. The term "obtain" is defined by the statute as, "in relation to labor or services, to secure performance thereof." 720 ILCS 5/10-9(a)(7)(2015). For the purposes of obtaining another person, "labor" and "services" are also defined by the statute. Labor is defined as, "work of economic or financial value." 720 ILCS 5/10-9(a)(5)(2015). And services is defined as, "activities resulting from a relationship between a person and the actor in which the person performs activities under the supervision of

or for the benefit of the actor."720 ILCS 5/10-9(a)(8)(2015). Taking the definitions together, "obtain" means to secure performance of work of economic or financial value or to secure performance of activities resulting from a relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor.

The definitions provided by the trafficking in persons statute contemplate a principal-agent relationship where the agent performs services, sexual or non-sexual, for the economic benefit of the principal. Based on the plain language of the statute, the "pimp" is the actor who secures performance of the work of economic or financial value. The pimp also secures performance of activities resulting from a relationship between the victim and the pimp in which the victim performs activities under the pimp's supervision or for the pimp's benefit. By the plain meaning of the statute, and the definitions provided therein, the word "obtains" does not apply to the patron of the commercial sexual activity; it only applies to the person controlling the victim and receiving economic benefit from their relationship with the victim.

In this case, the undercover officers set up a sting operation where they surreptitiously portrayed a mother soliciting the sexual services of her underage daughters. Acting collectively as the "mother," the undercover officers fulfilled the role of the pimp who was in possession of the victims. The mother was supervising her daughters, controlling them, securing the performance of the sexual acts, and receiving the economic benefit. Lewis was a patron who did not attempt to secure performance of work of economic or financial value, nor did he supervise

the minors. Further, he did not attempt to secure performance of activities resulting from a relationship between the minors and himself in which the minors would perform activities for the economic benefit of himself. He did not attempt to secure performance of anything because, unlike the mother acting as their pimp, he had no relationship with the minors, and the statute requires an ongoing relationship between the victim and the trafficker. Application of the definitions provided by the statute show that the "mother," not Lewis, would have been guilty of involuntary sexual servitude of a minor.

The statute also defines the methods of obtaining a victim for purposes of non-sexual involuntary servitude. 720 ILCS 5/10-9(b) (2015). When a word is used in multiple parts of the same statute, courts should apply a consistent meaning. *People v. Maggette*, 195, Ill. 2d 336, 348 (2001). The statute states that a defendant commits involuntary servitude when he knowingly subjects another person "to labor or services obtained or maintained" by any of the following means:

> (1) causes or threatens to cause physical harm to any person;
> (2) physically restrains or threatens to physically restrain another person;
> (3) abuses or threatens to abuse the law or legal process;
> (4) knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person;
> (5) uses intimidation, or exerts financial control over any person; or
> (6) uses any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform the labor or services, that person or another person would suffer serious harm or physical restraint. 720 ILCS 5/10-9 (b) (2015).

Thus, a defendant "obtains" another person for involuntary servitude if the defendant uses one of those methods listed in the statute, including physical

force, harm, restraint, intimidation, or threat. Lewis attempted to pay money in exchange for sexual services, but he did not employ any of the methods listed in the statute. Therefore, he did not attempt to obtain anyone.

The issue of whether the federal sex trafficking statute applied only to traffickers and not to patrons was addressed in *United States v. Bonestroo*, 2012 WL 13704, at *4 (D.S.D. Jan. 4, 2012)[5], where the court granted the defendant's motion for judgment of acquittal and found that the statute did not apply to patrons. *Bonestroo* was then reversed in *United States v. Jungers*, 702 F.3d 1066, 1070 (8th Cir. 2013), the case involving Bonestroo's co-defendant. The analyses from both cases provides guidance here because of the similarities between the federal statute and the Illinois statute, and more importantly, because of their differences.

In *Bonestroo*, the defendant was convicted of attempt commercial sex trafficking of a child when he "knowingly, in and affecting interstate commerce, attempted to recruit, entice and *obtain a person* who had not attained the age of 18 years, and knew that the person would be caused to engage in a commercial sex act." *Bonestroo*, 2012 WL 13704, at *1 (emphasis added). The federal statute included the following list of verbs: "recruits, entices, harbors, transports, provides, obtains, or maintains by any means." *Id.* (interpreting 18 U.S.C.A. § 1591 (2010)). The court applied the statutory canon, *noscitur a sociis*, which provides that words grouped in a list should be given related meaning. *Id.* (citing *Dole v. United*

[5]Lewis recognizes that *Bonestroo* is an unpublished decision and therefore, has no precedential value. He cites it primarily for context as it provides the procedural history for *U.S. v. Junger*, 702 F.3d 1066, 1070 (8th Cir. 2013) where *Bonestroo's* ruling was reversed.

Steelworkers of Am., 494 U.S. 26, 36 (1990)). The court found that:

> [E]ach verb represents a potential step in the process of engaging in a child sex trafficking business. The first step in the child sex trafficking business is to bring these children into the trafficker's control. These traffickers can "recruit" children by lying about the work they will be doing or "enticing" them into the sexual servitude enterprise by luring them with financial reward. Next the original trafficker may "harbor" or provide refuge to this trafficked child in preparation for sale or movement within the operation. Then the source trafficker will "transport" the child from his or her home community to a brothel, another trafficker, or another country. These children will then be "provided" to receiving traffickers, like distributors, brothel owners, or pimps who want to "obtain" the trafficked children for their own localized business...Only after someone else has completed a combination of these steps within a sex trafficking chain, could a john like Bonestroo attempt to purchase sex with these children.

Bonestroo, 2012 WL 13704, at *4. Thus, the court found that each of the verbs listed in the statute describes a method of gaining control over a minor, knowing that the minor will be caused to engage in sexual activity, and patrons do not fit that definition. Therefore, the defendant in *Bonestroo* was not guilty of sex trafficking because he was only a patron who had not attempted to obtain anyone. *Id.* at *7.

On the other hand, in *Jungers,* the Court of Appeals held that the statute did apply to patrons because nothing in the statute "expressly limits its provisions to suppliers or suggests Congress intended categorically to exclude purchasers or consumers (johns) of commercial sex acts." *Jungers*, 702 F.3d at 1070. The court also noted that the federal statute did not provide a definition for "obtain," but the statute did provide broad language such as "whoever," and "any," which encompassed a legislative intent for a broad interpretation. *Id.* at 1071.

Unlike the federal statute, the Illinois statute for trafficking in persons

defined the term "obtain." For that reason, it differs from *Jungers* where the court applied a broad interpretation of "obtain" expressly because the legislature did not provide a definition. See *Jungers*, 702 F.3d at 1071; Compare 18 U.S.C.A. § 1591 (2010)[6] and 720 ILCS 5/10-9(c)(2015). The definition of "obtain" provided by the Illinois legislature, as argued above, applies to a relationship between the defendant and the victim in which the defendant receives economic benefit from the victim's services, and can only be accomplished by physical force, harm, restraint, intimidation, or threat as described by the statute.

At the same time, the Illinois statute has the same list of verbs as the federal statute, "recruits, entices, harbors, transports, provides, or obtains." 720 ILCS 5/10-9(c) (2015). And when the principle of *noscitur a sociis* is applied, as was done in *Bonestroo*, it shows that each of the verbs listed describes a method of gaining control over a minor, knowing that the minor will be caused to engage in sexual activity, for the purpose of self-enrichment. See *Bonestroo*, 2012 WL 13704, at *4; 720 ILCS 5/10-9 (c) (2015). Therefore, when obtains is construed in the context of the statute, it supports the conclusion that the statute does not apply to patrons.

Consistent with the Illinois statute's plain language, its legislative history also evinces an intent to use the trafficking in persons statute to prosecute traffickers, not patrons. Representative Cassidy alluded to the injustice that the

[6]The federal statute has since been amended to add the words "solicits" and "patronizes" to the list of verbs to make it "absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case." Pub. Act 114-0022 (eff. May 29, 2015) (amending 18 U.S.C.A. § 1591).

law was designed to ameliorate, explaining, "We previously dealt with trafficking victims more as defendants where women and children were being used by traffickers to enrich themselves, forced into primarily sex trafficking crimes." 97th Ill. Gen. Assem., House Proceedings, March 27, 2012, at 15 (statements of Representative Cassidy). As Representative Cassidy noted, the traffickers that the statute is aimed at are the people who "enrich themselves," by exploiting women and children.

In fact, there was an amendment proposed to add "purchases the sexual services of a minor, whether from the trafficker or minor" to the involuntary sexual servitude of a minor provision, thereby incorporating patrons into the statute. 101st Ill. Gen. Assem., Senate Bill 1693, 2019 Sess. The fact that the legislature proposed, and rejected, an amendment to the law to include purchasers of the sexual services implies that the current text of the statute does not include purchasers. See *Ready v. United / Goedecke Servs., Inc.*, 232 Ill. 2d 369, 380 (2008) (an amendment to a statute creates a presumption that the amendment was intended to change the law).

Finally, a broad interpretation of "obtain" is unnecessary and unreasonable here because paying money to have sex with a minor is already illegal. Whenever two statutes address the same subject matter, the statutes should be construed together and are presumed to be harmonious. *People ex rel. Illinois Department of Corrections v. Hawkins*, 2011 IL 110792, ¶ 24. Attempt patronizing a minor engaged in prostitution already criminalizes the conduct Lewis was charged with because it occurs when a defendant pays money to attempt to sexually penetrate a minor. 720 ILCS 5/11-18.1 (2015); 720 ILCS 5/8-4(c)(5) (2015). If involuntary

sexual servitude of a minor applies to patrons, then the patronizing a minor engaged in prostitution statute would be rendered superfluous. This would be an unreasonable interpretation that the courts should avoid. See *Hawkins*, 2011 IL 110792, ¶ 29 (statutes should be read as a whole and should be given a reasonable interpretation so as not to render portions of either statute superfluous).

In conclusion, based on the plain language of the statute, the definitions provided therein, and methods of statutory interpretation, the word "obtain" as used in the trafficking in persons statute does not apply to patrons of commercial sexual activity. Because Lewis was a patron who did not obtain anyone, the State failed to prove that he committed the offense of involuntary sexual servitude of a minor. Therefore, Lewis's conviction for that offense should be vacated.

IV. Lewis's Class X Conviction and Sentence For Involuntary Sexual Servitude of a Minor Must Be Vacated Because, As Applied to Lewis, The Statute Violates Illinois' Proportionate Penalties Clause.

Lewis was charged with involuntary sexual servitude of a minor, a Class X felony. As charged, the involuntary sexual servitude of a minor statute contains identical elements to attempt patronizing a minor engaged in prostitution, a Class A misdemeanor. (C. 96). Because the offenses have identical elements, and one carries a far greater sentencing range, Lewis's sentence violates the proportionate penalties clause of the Illinois Constitution. See e.g., *People v. Baker*, 341 Ill.App.3d 1083, 1088 (4th Dist. 2003). Before trial, counsel filed a motion to dismiss the charge on these grounds, but the court denied the motion. The court erred in doing so. Therefore, this Court should vacate Lewis's conviction and sentence for involuntary sexual servitude of a minor.

The constitutionality of a statute, and whether that statute violates the proportionate penalties clause, is a matter of law, therefore this Court reviews the question *de novo*. *People v. Ligon*, 2016 IL 118023, ¶10.

The proportionate penalties clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, sec. 11. There are two ways that a defendant's sentence can violate the proportionate penalties clause: (1) if the sentence is "cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community"; or (2) if the sentence for the offense "is greater than the sentence for an offense with identical elements." *People v. Hauschild*, 226 Ill.2d 63, 74 (2007).

Under the identical elements form of proportionality review, "the proportionate penalties clause is violated where two offenses have identical elements, but are subject to different sentencing ranges." *Baker,* 341 Ill.App.3d at 1088 (quoting *People v. Davis*, 177 Ill.2d 495, 503 (1997)).

In cases such as this one, where a defendant argues that his sentence violates the proportionate penalties clause because it is greater than the sentence for an offense with identical elements, our Supreme Court has repeatedly observed that, "[i]f the legislature determines that the exact same elements merit two different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense." *People v. Hernandez*, 2016 IL 118672, ¶9, *quoting People v. Sharpe*, 216 Ill. 2d 481, 522 (2005). An expectation of identical penalties for identical offenses comports with "common sense and sound logic," *People v. Christy*, 139 Ill. 2d 172, 181 (1990), and also gives effect to the plain language of the Illinois Constitution. *People v. Clemons*, 2012 IL 107821, ¶30. Thus, where identical offenses do not yield identical penalties, our Supreme Court has held that the penalties are unconstitutionally disproportionate and the greater penalty cannot stand. *Sharpe*, 216 Ill.2d at 504, *citing Christy*, 139 Ill.2d at 181.

Lewis was charged with involuntary sexual servitude of a minor under section 10-9(c)(2), when he "knowingly attempted to obtain by any means another person under 18 years of age, knowing that the minor would engage in commercial sexual activity, and there was no overt force or threat of force and the minor was under the age of 17 years, in that the defendant agreed to pay money for an act of sexual penetration with a minor under the age of 17." (C. 36); 720 ILCS 5/10-9(c)(2)

(2015). Commercial sexual activity is defined by statute as "any sex act on account of which anything of value is given, promised to, or received by any person." 720 ILCS 5/10-9(a)(2) (2015). Involuntary sexual servitude of a minor is a Class X felony with a sentencing range of 6 to 30 years. 720 ILCS 5/10-9(c) (2015); 730 ILCS 5/5-4.5-25 (2015).

In comparison, a defendant is guilty of attempt patronizing a minor engaged in prostitution if he attempts to engage "in an act of sexual penetration" with a person "engaged in prostitution who is under 18 years of age." 720 ILCS 5/11-18.1(a) (2015). Prostitution is defined by statute as "any person who knowingly performs, offers or agrees to perform any act of sexual penetration as defined in Section 11-0.1 of this Code for anything of value, or any touching or fondling of the sex organs of one person by another person, for anything of value, for the purpose of sexual arousal or gratification commits an act of prostitution." 720 ILCS 5/11-14(a) (2015). Attempt patronizing a minor engaged in prostitution is a Class A misdemeanor with a sentencing range of up to one year in jail. 720 ILCS 5/11-18.1(c) (2015); 720 ILCS 5/8-4(c)(5) (2015); 730 ILCS 5/5-4.5-55 (2015).

When compared, the elements of the charged offense are identical to the elements of attempt patronizing a juvenile prostitute. Lewis allegedly committed involuntary sexual servitude of a minor by (1) knowingly attempting to obtain a person, (2) to engage in any sex act in exchange for value, (3) and that person was a minor. 720 ILCS 5/10-9(c)(2) (2015). Likewise, he would have committed attempt patronizing a prostitute by (1) giving something of value, (2) to attempt to engage in sexual penetration or fondling of sex organs, (3) with a minor. 720

ILCS 5/11-18.1(a) (2015). As the State explained in its closing argument, involuntary sexual servitude of a minor is basically "someone willing to pay someone to have sex with minors, someone under the age of 17. Some people call that prostitution of minors. Human trafficking is actually what it is." (R. 912). Both crimes were simultaneously and identically committed when Lewis agreed to pay money to someone for an act of sexual penetration with a minor.

In *Christy*, the defendant's sentence for armed violence violated the proportionate penalties clause because that crime had identical elements to aggravated kidnaping and carried a harsher sentence. *Christy*, 139 Ill. 2d at181. The Court noted that aggravated kidnaping was a Class 1 felony with a sentencing range of four to fifteen years, and it occurred when a defendant knowingly and secretly confined another against their will while armed with a dangerous weapon. *Id.* citing 720 ILCS 10-1 (a)(1) (1987). Also, armed violence was a Class X felony with a sentencing range of six to thirty years, and it occurred when a defendant committed any felony while armed with a dangerous weapon. *Id.* citing 720 ILCS 5/33-A(2) (1987). The Court recognized that, although either crime could be charged multiple ways with varying degrees of severity, as applied to the defendant, the sentence violated the proportionate penalties clause because the elements were identical and carried disproportionate penalties. *Id.*

Similarly here, involuntary sexual servitude of a minor and attempt patronizing a juvenile engaged in prostitution have identical elements, yet one is punishable as a Class X felony, and one is punishable as a Class A misdemeanor. This is especially problematic when, as here, the punishment for one offense carries

a six to thirty year prison sentence, while the other carries at most one year in jail. See *People v. Christy*, 188 Ill. App. 3d 330, 333 (3rd Dist. 1989), aff'd, 139 Ill. 2d 172 (1990) ("It is illogical that identical facts can render two different conclusions"). As in *Christy*, the crimes could be charged under different circumstances that would involve different elements and different sentencing ranges, however, as applied to Lewis, the elements are identical and one carries a far harsher sentence.

Counsel raised this proportionate-penalties challenge in a motion to dismiss the charge before trial.(C. 96). The trial court denied counsel's motion and relied on a change in the law that immunized minors from being prosecuted for prostitution. (R. 160, 191). The court concluded that because juveniles can no longer constitute prostitutes, patronizing a minor engaged in prostitution was no longer good law, and therefore could not be the basis for an identical-elements challenge. (R. 160, 191, 1021). But, while juveniles may no longer be criminally prosecuted as prostitutes, the offense of "patronizing a minor engaged in prostitution" still exists. 720 ILCS 5/11-18.1 (2017). And, as shown, attempt patronizing a minor engaged in prostitution has identical elements to involuntary sexual servitude of a minor. Therefore, the trial court's reasons for denying Lewis's motion were unfounded.

In conclusion, Lewis's right to due process and the proportionate penalties provision of the Illinois Constitution were violated because, as applied, the Class X felony offense of involuntary sexual servitude of a minor has identical elements and carries with it a much more severe sentence compared to attempt patronizing

a minor engaged in prostitution, a Class A misdemeanor. Therefore, this Court should vacate Lewis's conviction and sentence for involuntary sexual servitude of a minor. See *Christy*, 139 Ill. 2d at 174 (vacating defendant's conviction and sentence after finding that the statute's sentencing scheme was unconstitutionally disproportionate).

CONCLUSION

For the foregoing reasons, Shane Lewis, Defendant-Appellee, respectfully requests that this Court (I) reverse and remand this cause for a new trial, (II) vacate his convictions for involuntary sexual servitude of a minor and traveling to meet a minor, or (III, IV) vacate his sentence and conviction for involuntary sexual servitude of a minor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 73 pages.

/s/Bryan G. Lesser
BRYAN G. LESSER

No. 126705

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- SHANE LEWIS, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-17-0900. There on appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, No. 15 CF 44. Honorable Linda Abrahamson, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 10, 2021, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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