SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

NOV 5 2009

Frederick K. Ohlrich Clerk

Deputy

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOMO ZAMBIA, Defendant and Appellant.	Crim. No. S173490 (Court of Appeal No. B207812 Sup. Ct. No. LA055997)

BRIEF ON THE MERITS

VANESSA PLACE (SBN 116093)
Attorney at Law
Post Office Box 198613
Los Angeles, California 90018
Telephone: (323) 730-9915

Attorney for Appellant
Jomo Zambia

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOMO ZAMBIA, Defendant and Appellant.	)	Crim. No. S173490 (Court of Appeal No. B207812 Sup. Ct. No. LA055997)

BRIEF ON THE MERITS

VANESSA PLACE (SBN 116093)
Attorney at Law
Post Office Box 198613
Los Angeles, California 90018
Telephone: (323) 730-9915

Attorney for Appellant
Jomo Zambia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Docketed Cases

United States Constitution

Miscellaneous Authority

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	
	)	Crim. No. S173490
v.	)	
	)	(Court of Appeal No. B207812
	)	Sup. Ct. No. LA055997)
JOMO ZAMBIA,	)	
	)	
Defendant and Appellant.	)	
	)	

ISSUE ON REVIEW

Does substantial evidence support the defendant's conviction for pandering by encouraging under Penal Code section 266i, subdivision (a)(2), when he attempted to solicit an undercover police officer, posing as a prostitute, to "change management"?

STATEMENT OF THE CASE

An information was filed charging appellant with pandering by encouraging (Pen. Code § 266i(a)(2)). (CT 13-14) Appellant pled not guilty. (CT 15) Appellant was found guilty as charged. (CT 143-145; RT 2:231-232) Appellant was sentenced to the midterm of 4 years, credit for 49 days precommitment confinement, including 16 days conduct credit.[1] (CT 148-149; RT 2:D-5-D9) Appellant filed a timely notice of appeal from the judgment. (CT 150) The judgment was affirmed in a published opinion by the Second District Court of Appeal, Division Five, in *People v. Zambia*, Case No. B207812.

STATEMENT OF APPEALABILITY

This is an appeal from a judgment that finally disposes of all the issues between the parties. (Cal. Rules of Court, rule 8.200.) It follows a jury trial and is authorized by Penal Code section 1237 and rule 8.308 of the California Rules of Court.

STATEMENT OF FACTS

Prosecution Case

At 8:00 p.m. on June 8, 2007, Los Angeles Police Officer Erika Cruz was working undercover investigating prostitution activity at the corner of Sepulveda and Valerio, part of the "Sepulveda Corridor," a location in the Van Nuys area of Los Angeles County

[1] Petitioner was also sentenced for violating probation in Case No. BA320486, a violation of Health and Safety Code section 11359, to two years in prison, to run concurrent. (RT 2:D-8)

known for street prostitution. Cruz had previously made between 50 and 80 prostitution-related arrests at that corner. Undercover activities include "improptus," spontaneous investigations in which a female officer attempts to get a customer (John) to pick them up. (RT 2:26-27, 2:42, 2:55-57, 2:78-80, 2:124)

Cruz saw appellant driving down Sepulveda. He turned onto Valerio, made a "harsh" U-turn, and stopped at the red tri-light about 15 feet across the street from Cruz. This sort of driving is consistent with how pimps and Johns drive. Appellant rolled down his window and told Cruz to get in; she asked what for, and appellant said that he was a pimp. Cruz told appellant to back up, he reversed and parked. She walked towards appellant while calling Officer Paschal on her cell phone and letting her know that Cruz was possibly "working a pimp." Paschal was Cruz's security officer.[1] (RT 2:28-33, 2:37-39, 2:41-46, 2:50-53, 2:60-61, 2:69, 2:71)

Cruz approached appellant's passenger window and he told her to get into the car, she asked what for, he said he was a pimp, she asked what that entailed, and he said he would take care of her. Appellant asked how much money she had; Cruz said $400. Appellant said if she gave him the money, he would house and clothe her. Cruz said she didn't want to get in his truck if she didn't feel comfortable. Appellant said he was a legit

---

[1] Paschal was a more experienced officer than Cruz, and had made numerous prostitution-related arrests in the area. He watched the exchange with appellant while parked across the street, but did not recall anything unusual about appellant's U-turn. (RT 2:67-70, 2:99-107) Paschal overheard appellant and Cruz discuss her working for him and him taking care of her in terms of housing and clothing. He did not hear appellant say that he was a pimp. (RT 2:67, 2:70-71, 2:108-110)

businessman, and took a business card from the center console and waved it at her. Cruz could not read the card. She saw multiple cell phones in the center console. Appellant continued to tell Cruz to get in the car, saying he would not "strongarm" her. "Strongarm" means to take something from someone by force or fear: prostitutes worry pimps or johns will strongarm them for their money. Cruz asked if she could continue working that area, and appellant said yes. Appellant's tone was aggressive. (RT 2:33-35, 2:39, 2:44, 2:53)

Cruz signaled her partners that she had a violation and told appellant to park on the other side of the street. Appellant crossed the tri-light, parked, and was taken into custody. (RT 2:36) Some pimps wear flashy clothing; Cruz could not recall what appellant was wearing. Appellant was driving an ordinary Ford truck. There were no spinner rims, and the stereo was not on. (RT 2:43-44, 2:11-113)

A "gorilla pimp" is a pimp who is aggressive towards prostitutes. Johns, on the other hand, are typically meek, or shy. (RT 2:35, 2:44) "Reckless eyeballing" is when a prostitute makes eye contact with a pimp other than her pimp; once she does so, the new pimp owns her. (RT 2:36-37, 2:62-63) Pimps tend to carry weapons, such as canes, guns and knives, multiple cell phones, money, and condoms.[2] When arrested, appellant had no cane, gun or knife. He also had no money. This was not unusual, as appellant could have dropped off money at his house or at the bank before meeting Cruz. Appellant's center

[2] Different cell phones are used to contact different prostitutes. It is also common for Johns to carry condoms. (RT 74)

console contained three cell phones, a package of condoms, and a business card. Police did not determine if the cell phones were working. Pimps expect prostitutes to return from work with empty condom wrappers and matching amounts of money. Condoms by themselves are not an indicia of pimping. There were no empty wrappers in appellant's truck. Appellant's business card had appellant's name and "FCBM, First Class Building Maintenance," with a Hollywood address. According to Cruz, pimps carry many kinds of business cards, some real, some fake. About half of all pimps have jobs other than pimping. (RT 2:58, 2:71-74, 2:111-117)

The business relationship between pimp and prostitute involves the woman performing sex for money, then giving the money to the pimp. The pimp puts the prostitute up in a hotel room or lets them stay at the pimp's home; the pimp gives the prostitute food and clothes, and pays for them to get their hair and nails done. Between 95 and 98 percent of the pimps in the Van Nuys area are black men. (RT 2:74-75, 2:110)

Assistant Watch Commander Sergeant Alan Kreitzman was the officer in charge of the investigation. At the time of appellant's arrest, the19-year-LAPD veteran was on his second tour as a Vice investigator. He described the prostitution activities in the area, as well as the nature of improptus. (RT 2:119-122, 2:125-129) According to Kreitzman, pimps are typically young African American males. Pimps pick up the women that come to work the Sepulveda Corridor from other areas, showing them a business card to demonstrate that they are legitimate businessmen. The relationship between a pimp and

prostitute is like a situation involving domestic violence. The woman is so involved with the person supporting her that she is not willing to betray him. The prostitute is also afraid of losing her income and being hurt by the pimp: pimps are controlling and aggressive. The prostitute gives the pimp the money she earns from sex, and he gives her money in turn. Pimps' vehicles are often rentals; pimps and prostitutes may stay in motel/hotels, or sleep in their vehicles. (RT 2:122-125, 2:139-142)

Kreitzman also watched the encounter between Cruz and appellant, finding nothing unusual in appellant's U-turn. Appellant's cell phones, however, were significant because pimps generally carry more than one cell phone. Kreitzman did not know if the phones in appellant's truck were operable, and did not know if anyone checked their content. A follow-up investigation was done on the business card, but Kreitzman did not know if it was a legitimate business. Even if a pimp has a legitimate job, that doesn't mean he is not pimping. Kreitzman did not see appellant engage in any aggressive behavior. (RT 129-144)

Defense Case

Barbara Zambia is appellant's mother. On June 8, 2007, appellant was living with her and her husband. Zambia's family has owned First Class Building Maintenance, located in Hollywood, for 32 years. Appellant works for the business as a janitor. Appellant's hours were from 6:00 or 7:00 p.m. until midnight because that is when the clients' offices are available for cleaning. He worked with his father, though occasionally

cleaned a building alone. Appellant worked 40 hours a week, and carried one working cell phone. Appellant "goes through" cell phones, keeping broken and loaner phones in his truck. Zambia recognized two of the three phones found in appellant's truck, as well as appellant's FCBM business card. (RT 2:148-153, 2:156-160, 2:164-165)

Appellant used his cell phone to talk to his fiancé, Celina, his sisters, and his male friends. At the time of trial, appellant and Celina had been together for two years, and had a 2 month old daughter. There was nothing about appellant's lifestyle that suggested appellant was pimping. (RT 2:153-154)

Celina Payano is appellant's fiancé. They have been together for two and a half years. Payano works for the Los Angeles County Department of Probation. Appellant is a janitor for his family's business, working 7:00 p.m. to 12:00 p.m., though sometimes he needs to go in to work during the day to get equipment. Payano has never had any reason to believe appellant was engaged in any other business. Appellant uses one cell phone, but often has more than one because he breaks them regularly. Payano recognized all three of the phones found in appellant's truck. Payano and appellant use condoms. Payano was not aware that appellant had relationships with any other women, and had no reason to suspect he might be pimping. (RT 2:166-178)

ARGUMENT

SOLICITATION OF A PROSTITUTE, OR SOMEONE BELIEVED TO BE A PROSTITUTE, TO "CHANGE MANAGEMENT" DOES NOT CONSTITUTE PANDERING BY ENCOURAGEMENT UNDER PENAL CODE SECTION 266i, SUBDIVISION (A)(2)

Penal Code section 266i, subdivision (a)(2) reads in pertinent part:

> (a) Except as provided in subdivision (b), any person who does any of the following is guilty of pandering, a felony, and shall be punishable by imprisonment in the state prison for three, four, or six years: [¶] (2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute.

There are, at present, two interpretations of section 266i, subdivision (a)(2). In one, pandering by encouragement means to encourage another person "to become" a prostitute, *i.e.*, to actively encourage someone who is not a prostitute to become one. (*People v. Wagner* (2009) 170 Cal.App.4th 499, 506.) In the other, pandering by encouragement means to encourage someone to prostitute, including encouraging someone to continue prostituting. (*People v. Bradshaw* (1973) 31 Cal.App.3d 421, 425-426.) Looked at another way, one proscribes encouraging assumption of a new status, the other, participation in an ongoing activity. (*See generally*, *People v. Montgomery* (1941) 47 Cal.App.2d 1, 24 [purpose of pandering statute to "cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime, with a view of effectively combating the evil sought to be condemned"], disapproved on other grounds, *Murgia v. Superior Court* (1975) 15 Cal.3d 286, 301, fn. 11.) In finding that encouragement of someone whom appellant mistakenly believed to be a prostitute to

continue prostituting constituted pandering by encouragement, the court in appellant's case incorrectly ratified the more expansive interpretation. (Opn., at pp. 4-6.) The statutory scheme as a whole, as well as the plain language of the statute, mandate that pandering by encouragement under section 266i, subdivision (a)(2) does not include encouraging someone whom one believes to be a prostitute to simply continue prostituting with no appreciable change in circumstance. (*See generally*, *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 632 ["Penal statutes will not be made to reach beyond their plain intent; they include only those offenses coming clearly within the import of their language."].)

In *People v. Bradshaw*, *supra*, 31 Cal.App.3d 421, relied upon by the lower court here, the defendant solicited an undercover police officer whom he believed was a prostitute to enter a brothel under his supervision. On appeal, the defendant argued that "encouragement" to pander implied actual success and that one could not encourage someone to become a prostitute who already was (or who was believed to already be) a prostitute. (*Id.*, at p. 424.) The appellate court rejected these arguments, holding that the crime of pandering does not require either that active encouragement lead to success in securing a prostitute or that the person pandered be new to prostitution. (*Id.*, at pp. 425-426.) In so holding, the court did not define "encourage" beyond rejecting standard dictionary definitions as impermissibly overbroad: "[r]eferences to dictionary definitions of the word 'encourage' are not helpful, since the word may, in proper context, refer

either to a successful persuasion or to a mere urging." (*People v. Bradshaw*, *supra*, 31 Cal.App.3d at p. 424.) So that while something less than success was needed, something more than urging was required. But it is significant to note, which appellant's court did not, that the offense the *Bradshaw* court was addressing was *entering a house of prostitution.*[1] (*People v. Bradshaw*, *supra*, 31 Cal.App.3d at p. 423.) For it is a distinction with a difference:

Section 266i, subdivision (a)(4) specifically addresses pandering relative to brothel-working,[2] prohibiting encouragement of "an inmate of a house of prostitution…to remain therein as an inmate." Subdivision (a)(4) follows, both numerically and logically, subdivision (a)(3), which prohibits pandering by procuring "for another person a place as an inmate in a house of prostitution." By way of contrast, subdivision (a)(2), the subsection appellant was convicted of violating, contains no such course of conduct-type language. In fact, its preceding subsection, subdivision (a)(1), simply prohibits procuring someone for the purpose of prostitution—regardless of the final location of the intended commercial activity. In other words, the statutory scheme of section 266i itself evidences

---

[1] *See also*, *People v. Patton* (1976) 63 Cal.App.3d 211, in which the defendant, convicted of pandering a minor, claimed that the court erred in finding evidence that the minor had previously engaged in prostitution was inadmissible because one could not be convicted of encouraging someone who was a prostitute to become a prostitute. (*Id.*, at p. 215.) Citing *Bradshaw*, the Fourth District rejected the argument, noting the potential for social harm in encouraging established prostitute to "alter her business relations." (*Id.*, at p. 218.) The *Patton* court adopted the *Bradshaw* analysis without considering that the prior case involved brothel work, and that other cases cited also involved encouraging a prostitute to remain in a house of ill-fame (*id*, at p. 217, also citing *Aguilera v. Superior Court* (1969) 273 Cal.App.2d 848, 851.)

[2] "Brothel" in the broadest sense of the term. (*People v. Marron* (1934) 140 Cal.App.432, 434.)

a legislative desire to punish people for turning those who are not prostitutes into prostitutes, *except* in the case of brothel-workers.[3] In the case of brothel-workers, the Legislature went that one step further, and criminalized encouraging someone to remain prostituting—in a "house of ill-repute." (*see e.g.*, *Aguilera v. Superior Court*, *supra*, 273 Cal.App.2d at pp. 850-851.) This might be related to the relative lack of choice between "house" and "non-house" prostitutes: it is easy to imagine that the former would be more vulnerable to encouragements (or threats, or violence) to stay in-house/continue prostituting than the latter might be.[4] Similarly, even if the brothel is one's own apartment or a room in a non "house" house (*People v. Marron*, *supra*, 140 Cal.App. at p. 434 [house of prostitution "may be a flat-boat with a cabin on it; a tent; one room of a steamship; or a single room..."]), one is more susceptible to incentives to continue prostituting than if one has some neutral harbor for either working or living. (*Aguilera v. Superior Court*, *supra*, 273 Cal.App.2d at p. 850 [in-house prostitute testified that "Once girls are started in this type of prostitution, the experience is that they remain in it; they cannot get out of it."].) But regardless of the genesis of the distinction, the principle of

---

[3] Section 266 prohibits enticing or inveigeling unmarried chaste women under the age of 18 into entering a house of ill-repute.

[4] *See e.g.*, Kristof, N., "If this Isn't Slavery, What Is?" *The New York Times*, January 3, 2009, [http://www.nytimes.com/2009/01/04/opinion/04kristof.html] for an account of enslavement of Thai brothel workers. By comparison, restrictions on the freedom of legalized brothel prostitutes are considered in Brents and Hausbeck, "Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy," J. of Interpersonal Violence, vol. 20 no. 3, March 2005 270-295, at pp. 284-285 [http://faculty.unlv.edu/brents/research/violence.pdf]. The large difference is that restrictions on the freedoms of legal brothel-workers are aimed at preserving their health and the health of the brothel customers, and are not enforced via

noscitur a sociis (it is known by its associates) would apply to maintain the difference. Under this principle, "'a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant.'" (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 307.) If encouraging someone to continuing prostituting is pandering under subdivision (a)(2), then the "to remain" language in subdivision (a)(4) is patently redundant/unnecessary. However, an intentional distinction between encouraging someone to become a prostitute in the first instance and encouraging someone to remain in a house of ill-fame both saves the language of subdivision (a)(4) from redundancy and preserves the intent of the legislature in itemizing that act, and the separate act of recruiting prostitutes. (*People v. Athar* (2005) 36 Cal.4th 396, 409 ["when the Legislature uses a critical word or phrase in one statute, the omission of that word or phrase in another statute dealing with the same general subject generally shows a different legislative intent"].)

Moreover, it is a more specified legislative concern that seems to carry through the entire statutory scheme. (*People v. Honig* (1996) 48 Cal.App.4th 289, 327 ["the rule of statutory construction governing statutes in pari materia describes a process of interpretation by reference to related statutes."].) As is hornbook, statutes are to be read with an eye towards inner and outer harmony. (*People v. Acosta* (2002) 29 Cal.4th 105, 134, quoting *People v. Murphy*, *supra*, 25 Cal.4th at p. 142; *Summers v. Newman* (1999)

---

violence/enslavement.

20 Cal.4th 1021, 1026 ["To resolve ambiguities, courts may employ a variety of extrinsic construction aids, including legislative history, and will adopt the construction that best harmonizes the statute both internally and with related statutes].) Plain meaning, unless absurd, is preferred. (*People v. Hammer* (2003) 30 Cal.4th 756, 762 ["We begin by examining the statute's words, giving them a plain and commonsense meaning."].) While there is no rule of strict construction of penal statutes in California (Pen. Code § 4; *People v. Bamberg* (2009) 175 Cal.App.4th 618, 627), the rule of lenity will apply if there is statutory ambiguity. (*People v. Avery* (2002) 27 Cal.4th 49, 57 ["....when a statute is capable of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant."]; *see also*, *Ladner v. United States* (1958) 358 U.S. 169, 177-178.)

As judicially-articulated, the purpose of the pandering statute is to "'cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime, with a view of effectively combating the evil sought to be condemned.'" (*People v. Fixler* (1976) 56 Cal.App.3d 321, 327, quoting *People v. Montgomery* (1941) 47 Cal.App.2d 1, 24.)[5] Just as the various provisions of section 266i explicitly distinguish among acts of pandering by differentiating between encouraging someone to become a prostitute and encouraging someone to remain a prostitute in-house, section 266i is to be distinguished from its near relations—such as section 266h, the

[5] *Fixler* was disapproved on another point in *People v. Freeman* (1988) 46 Cal.3d 419, 428.

prohibition against pimping. For inasmuch as section 266h prohibits pimping itself, it proscribes the ongoing facilitation/encouragement of prostitution itself, and thus implicates the same conduct that the lower court here attempted to graft onto section 266i. (*Contra*, *Britton v. Dallas Airmotive Inc.* (2007) 153 Cal.App.4th 127, 134, quoting *Cal. Pacific Collections, Inc. v. Powers* (1969) 70 Cal.2d 135, 139 [construction that renders statute "redundant and a nullity" violates "one of the most elementary principles of statutory construction."].)

For its part, the pimping statute forbids anyone from earning any portion of his living from another person's prostitution activity. (Pen. Code § 266h.) If pimping is defined as deriving some aspect of one's maintenance from another's prostitution, and pandering is defined to include encouraging someone to remain prostituting, then pimping would definitionally include pandering, given that every time someone "pimps" a prostitute, he is in some manner encouraging their prostitution.[6] This holds true whether the pimp is introducing the woman to a new customer, a new corner, or a new police ruse, or giving her a lift to work or providing more material inducements, such as clothes, food, etc.—even the standard promise of street protection—would encourage someone to continue prostituting. (*C.f.*, *People v. Bogan* (2007) 152 Cal.App.4th 1070, 1075-1077 [pimp may be convicted of conspiracy to solicit prostitution with prostitutes as uncharged co-conspirators].) In fact, the constituent fact of the pimp/prostitute arrangement itself

[6] There is no requirement that the encouragement be successful. (*People v. Bradshaw*, *supra*, 31 Cal.App.3d at p. 425; *People v. Hashimoto* (1976) 54 Cal.App.3d 862, 866.)

enables and thereby encourages the prostitute to continue to support the pimp, *i.e.*, to keep working, and thus would constitute pandering under the expansive interpretation of section 266i proposed by the lower court. (*Contra*, *People v. Courtney* (1960) 176 Cal.App.2d 731, 741 ["Section 266h (pimping) and 266i (pandering) were enacted by the same legislature and should be treated together.].) Given the presumption against statutory redundancy or duplicity, pandering so construed would become a necessarily included offense of pimping, and the rule against multiple convictions would apply to bar conviction under both sections 266h and 266i (*People v. Sloan* (2007) 42 Cal.3d 110, 116; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034). Put yet another way, if the crime of pandering includes encouraging a prostitute to continue prostituting, then each act of pimping under section 266h would also be an act of pandering, making the pandering statute either duplicative or overbroad. (*Contra*, *People v. Gilbert* (1969) 1 Cal.3d 475, 480.) Furthermore, if one can commit the crime of (non-brothel-related) pandering by simply encouraging someone to continue prostituting with no appreciable change in circumstance, then section 266i, subdivision (a)(2) could also be used against a host of unwitting prostitution enthusiasts. Everyone from prostitutes encouraging each other's prostitution (*e.g.*, dissuading one of their fellows from quitting the pimp or the game or giving tips on the best tracks) to health care providers whose treatments enable those who they know to be prostitutes to continue prostituting to managers of Hollywood motels that offer working girls an hourly rate, would be potentially liable for pandering. But that is

not what the pandering statute contemplates: "In adopting the section making pandering a crime, the legislature undoubtedly had in mind to discourage the nefarious business of replenishing the houses of prostitution with inmates." (*People v. Courtney*, *supra*, 176 Cal.App.2d at p. 741 ["Certainly, pimping is equally nefarious."].)

Too, subdivision (b) refers to *all* of the acts in subdivision (a). Thus, the application of subdivision (b) to any one particular prosecution depends on the kind of act charged: if the act at issue is brothel-working, then the "to remain" language of subdivision (a)(4) would apply to prosecutions under subdivision (b)(1). If the act at issue is procurement, the "to remain" language would be inapplicable. So that in its analysis of subdivision (a)(2), the lower court in appellant's case mistakenly relied upon case law that involved pandering by way of encouraging someone to work in a house of ill-fame (subdivision (a)(4)) rather than pandering by way of encouraging someone to become a prostitute (subdivision (a)(2)). For example, in *People v. Montgomery*, *supra*, 47 Cal.App.2d 1, 8, the defendant was charged with pandering based on transporting women to and from various houses of prostitution, and for his part in a procurement scheme which recruited women form dance halls "or similar places of amusement." Because the charged conduct involved brothel-working, the Second District Court of Appeal could find guilt regardless of the woman's participation or status. (*Id.*, at p. 12.)

> It is immaterial whether the female "procured" is an innocent girl or a hardened prostitute of long experience; nor is it material that the procurement was either at her request or upon the defendant's own initiative. In either case the defendant has "procured" a female within the

meaning of the statute and is guilty of pandering.

(*Id.*, at pp. 12-13.) In perfect accordance with the language of subdivision (a)(4).

Another case relied on by the lower court was *People v. Hashimoto*, *supra*, 54 Cal.App.3d 862. In *Hashimoto*, the Second District Court of Appeal adopted without comment that part of the *Bradshaw* opinion that held neither success nor status was relevant, and confined its independent analysis to whether the encouragement was "active." (*Id.*, at p. 866.) The *Hashimoto* defendant, a travel agent seeking to provide fuller service for his international customers, offered to regularly refer Japanese tourists to an undercover police officer posing as a prostitute. (*Id.*, at pp. 864-865.) Unlike Division Four of the Second District, which had decided *Bradshaw*, Division Two in *Hashimoto* looked at the dictionary meaning of "encourage" ("to urge, foster, stimulate, to give hope or help"), relying upon at least one of the reference works rejected by its fellow court.[7] In so doing, Division Two found "active encouragement" lay in the defendant's proposal to change the solicitee's "business relations by reducing her price in exchange for volume," noting that the pandering statute was intended to discourage prostitution by discouraging augmentation and expansion of a prostitute's business, or increasing the supply of prostitutes. (*Id.*, at pp. 866-867; *accord*, *People v. Almodovar* (1987) 190 Cal.App.3d 732, 736-738 [traffic officer turned prostitute pandered by setting

---

[7] Specifically, Hayakawa, *Use the Right Word* (1968) p. 188. (*People v. Hashimoto*, *supra*, 54 Cal.App.3d at p. 867.) In *People v. Bradshaw*, *supra*, 31 Cal.App.3d at p. 424, fn. 4, Division Four emphasized that this definition is improper as the examples provided demonstrate its relation to "some kind of preliminary activity sometimes but not necessarily resulting in action."

up "date" for traffic officer she was encouraging to prostitute]; *People v. Patton*, *supra*, 63 Cal.App.3d at pp. 213-215 [defendant pandered by encouraging 16-year-old runaway to work for him as a prostitute].) "Active 'encouragement," according to the *Hashimoto* court, must mean something more than simply urging someone to prostitution. (*People v. Hashimoto*, *supra*, 54 Cal.App.3d at p. 865.)

This was the primary basis for appellant's sufficiency argument on appeal. The familiar test to determine sufficiency of the evidence is "whether, on the entire record, a rational trier of fact could find appellant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578; *People v. Davis* (1995) 10 Cal.4th 463, 509 [facts viewed in light most favorable to the prosecution].) As the Court said in *Johnson*, "our task... is twofold. First, we must resolve the issue in light of the *whole record*.... Second, we must judge whether the evidence of each of the essential elements... is *substantial*...." (*Id.*, at pp. 576-577, italics in the original]; *see also*, *People v. Barnes* (1986) 42 Cal.3d 284, 303.) Evidence that fails to meet this substantive standard violates the Due Process Clause of the Fourteenth Amendment and article I, § 15 of the California Constitution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson*, *supra*, 26 Cal.3d at pp. 575-578.) The court here rejected appellant's argument that his encouragement was of the (constitutionally insufficient) inactive variety, basing its conclusion on appellant's possession of "some of the accoutrements typical of a pimp"

This would be "mere urging," which is not sufficient. (*Id.*, at p. 424.)

(such as cell phones and condoms), his request that the undercover officer come with him, and his offer to trade housing/clothing for her earnings. (Opn., at pp. 4-5.) But this does not address whether appellant actually encouraged anyone to *become* a prostitute. Appellant promised the undercover police officer—whom he approached on the street, believing her to be a working prostitute— no change in her business other than a change in management. (*Contra*, *People v. Hashimoto*, *supra*, 54 Cal.App.3d at p. 866 [defendant requested the woman reduce her price "in exchange for volume"].) Asking someone to continue to work under the same terms and conditions as they are already working is not evidence of active encouragement. Unlike the defendants in *Bradshaw* and *Hashimoto*, petitioner didn't promise opportunity for advancement, expansion, a profitable new market or even a change of scenery; unlike the defendants in *Patton* and *Almodovar*, petitioner was simply attempting to continue the prostitute's status quo. More of the same is not more.[8] (*People v. Bradshaw*, *supra*, 31 Cal.App.3d at p. 424.)

Preliminarily, "active" according to www.dictionary.reference.com (citing the Random House Unabridged Dictionary (2006), means, in part: "1. engaged in action; characterized by energetic work, participation, etc.; busy: an active life. 2. being in a state of existence, progress, or motion: active hostilities. 3. involving physical effort and action: active sports... 5. characterized by action, motion, volume, use, participation, etc.: an active market in wheat; an active list of subscribers. 6. causing activity or change;

[8] "Take some more tea," the March Hare said to Alice, very earnestly. "I've had nothing yet,"Alice replied in an offended tone, "so I can't take more." (Carroll, Lewis, *Alice in*

capable of exerting influence (opposed to passive): active treason... 9. requiring or giving rise to action; practical: an active course." "Active encouragement" is thus to be qualitatively distinguished from "encouragement" just as "active discouragement" would be different from "discouragement." Discouragement, standing alone, includes simply expressing disapproval[9]; active discouragement is the stuff of criminal sanctions. It is useful in this regard to consider the difference between crimes of solicitation, in which the articulated offer completes the crime (*see e.g.*, *People v. Foster* (2007) 155 Cal.App.4th 331, 336), and crimes of encouragement, which contemplate some present ability to effect the target offense (*see e.g.*, *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 18, fn. 8, dis. opn. Werdegar, J.).

The term "encouragement" is a synonym for "aid" in the aiding and abetting context, so that CALCRIM No. 401 [Aiding and Abetting: Intended Crimes] provides:

> Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

(*People v. Campbell* (1994) 25 Cal.App.4th 402, 412; *People v. Lewis* (1903) 9 Cal.App. 279, 281 ["abet" includes "encouragement in the crime"].) By comparison, "solicitation" requires the State prove:

> 1. The defendant requested [] another person to commit [or join in the commission of] the crime of _____; [][AND] [] 2. The defendant intended that the crime of _____ be committed.

Wonderland, ch. 7, available at http://www.cs.indiana.edu/metastuff/wonder/ch7.html.)

[9] (http://dictionary.reference.com/browse/discourage.)

(CALCRIM No. 441 [Solicitation: Elements].)

Encouragement, sans "active," is thus solicitation, and there is no proscription against solicitation in section 266i, subdivision (a)(2). (*See generally, In re Ryan N.* (2002) 92 Cal.App.4th 1359, 1377-1378.) For the aim of the anti-pimping/pandering legislation as a whole is equally active: "to discourage prostitution by discouraging persons other than the prostitute from augmenting and expanding a prostitute's operation, or increasing the supply of available prostitutes." (*People v. Hashimoto*, *supra*, 54 Cal.App.3d at p. 867; *c.f.*, *People v. Hernandez* (1998) 46 Cal.3d 194, 201 [words and phrases to be construed in light of statutory scheme].)

The appellate court in *People v. Wagner*, *supra*, 170 Cal.App.4th 499, employed some of this logic in rejecting the Government's argument that encouraging a change in business relationship qualified as pandering under *Bradshaw* and *Hashimoto*. The Fourth District in *Wagner* found that *Bradshaw*, the first case to propose that pandering included soliciting someone to engage in prostitution who was already a prostitute did so "in an utterly unconvincing fashion." (*People v. Wagner*, *supra*, 170 Cal.App.4th at p. 506.) In its expansion of the statutory definition of pandering, the *Bradshaw* court had relied upon the opinion in *People v. Frey* (1964) 228 Cal.App.2d 33, 39, though the *Frey* opinion itself "*did not actually address the issue.*" (*People v. Wagner*, *supra*, 170 Cal.App.4th at p. 506, original emphasis.) The Fourth District could

find no support for the proposition "anywhere else."[10] (*Ibid.*) Given the principle that "cases are not authority for propositions not considered" (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 198), and the rule of lenity (*People v. Avery*, *supra*, 27 Cal.4th at pp. 57-58, it was clear to the Fourth District that the statute was to be read on its face. (*People v. Wagner*, *supra*, 170 Cal.App.4th at p. 888; *c.f.*, *Wooten v. Superior Court* (2002) 93 Cal.App.4th 422, 432.) And, like the statute says, the crime of pandering occurs when someone causes/induces/persuades/encourages someone else "*to become*" a prostitute, not by causing/inducing/persuading/encouraging someone to remain a prostitute. (*People v. Wagner*, *supra*, 170 Cal.App.4th at p. 883; Pen. Code § 266i(a)(2).)

In appellant's case, the Second District, relying on *Bradshaw*, maintained *Wagner* was inapplicable because the individual solicited was not actually a prostitute, but an undercover police officer. (Opn., at p. 6.) In a footnote, the court asided that the "strong weight of authority" was contra *Wagner*. (opn., p. 6, fn. 3) But as the *Wagner* decision makes explicit, there is no "strong weight of authority" in this matter—the *Bradshaw* "rule" is built on nothing but notions, and the cases subsequently relying on

---

[10] In *Bradshaw*, the court cited *People v. Charles* (1963) 218 Cal.App.2d 812; *People v. Frey*, *supra*, 228 Cal.App.2d 33; *People v. Lax* (1971) 20 Cal.App.3d 481 for the proposition that pandering could occur without the woman "becoming" a prostitute. But, as inimated by the *Wagner* court, *Charles* involved an attempt to induce two waitresses to become brothel-workers (*People v. Charles*, *supra*, 218 Cal.App.2d at pp. 816-817; *Frey* involved solicitation of women to prostitute in defendant's hotel (*People v. Frey*, *supra*, 228 Cal.App.2d at p. 50-51); and *Lax* involved solicitation of a female bank teller to prostitute at defendant's secretary's apartment (*People v. Lax*, *supra*, 20 Cal.App.3d at p. 484-485). Given that each of these instances concerned an invitation to work in a house of ill-fame, they fall under the rubric of subdivision (a)(4), not subdivision (a)(2).

Bradshaw, like appellant's case, built on top of the airy that. (*People v. Wagner*, *supra*, 170 Cal.App.4th at pp. 507-508.) For, as plainly put by the plain words of the statute, and as understood by the Fourth District in *Wagner*, the crime of pandering is the crime of encouraging someone "*to become a prostitute*." The anti-pandering statute, targets the specific evil of "turning" women to prostitution, not that of playing pimp: if someone is already a prostitute, the crime of pandering by encouraging cannot be committed. This reasoning also extends to those situations where the person is not really a prostitute. Because the self-same illicit encouragement is present (to get someone to *become* a prostitute), involving the same legislative aim (to discourage prostitution), the fact that the intent to pander is unable to be effectuated is irrelevant. In short, trying to get someone to become a prostitute who can't or won't become a prostitute because she is already a working prostitute or incorruptible police officer or devoted wife and mother is not enough to sustain a pandering conviction. (*People v. Wagner*, *supra*, 170 Cal.App.4th at p. 507 ["We can certainly sympathize with the *Bradshaw* court....[T]hey were groping for a solution without any precedential illumination."].)

Appellant's encouragement was of the inactive variety insofar as there was nothing but talk behind it and nothing put up front. Appellant promised Cruz no business augmentation, no expansion, no increase in either demand or supply. There was no evidence that appellant could have (or did) actively encourage anyone's prostitution. The business card waved at Officer Cruz was not for an escort service or adult film production

company, offered no Internet dating, lingerie modeling or XXX massage, but just an honest janitorial service. Appellant flashed no great wad of cash, sported no fine clothes or jewelry, drove no fancy car with spinning wheels – any or all of which might have been implicit promises of coming riches, *i.e.*, at the very least some form of latent "active" encouragement. Rather, appellant drove a regular pickup truck, wore ordinary clothes, and looked like no more than he mostly was, a night janitor in the family business. In short, appellant offered nothing to Cruz but the chance to give him her money in exchange for her to keep on as she had presumably been kept before.

Since section 266i was enacted in 1953, it has been amended seven times: in 1969 [specifying "female" re: person], 1976 [determinate to indeterminate sentencing], 1981 [setting determinate terms], 1982 [reduction in determinate terms], 1983 [partial prohibition of probation], 1997 [revision of subsection][11], and 2004 [elevation of determinate terms]. At no point during the section's 56-year history has the Legislature

---

[11] Before its revision in 1997, the subsection read: "Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for three, four, or six years, or, where the other person is under

apparently been inclined to change "to become a prostitute" to "to become or to remain a prostitute" relative to subsection (a)(2). (*People v. Courtney*, *supra*, 176 Cal.App.2d at p. 741.) Where the Legislature could have added language, and has not, a court should not. (*Budrow v. Dave & Buster's of California, Inc.* (2009) 171 Cal.App.4th 875, 879; *Estate of Griswold* (2001) 25 Cal.4th 904, 911.) Where the plain meaning of the language is unambiguous, it must govern: "to become" is "to become," not "to remain." As the *Wagner* court said, "We understand the point that interpreting section 266i, subdivision (a)(2) to apply to encourage a prostitute to change management or being working for a pimp might make the statutory scheme more effective. But that is a legislation call, not a judicial one." (*People v. Wagner*, *supra*, 170 Cal.App.4th at p. 510; *see generally*, *People v. Howard* (2002) 100 Cal.App.4th 94, 97.)

But if the crime of pandering cannot be effected by the mere fact of soliciting someone to prostitute, the question becomes whether one is then guilty of attempted pandering? Again citing *People v. Bradshaw*, *supra*, 31 Cal.App.3d at p. 425, appellant's court said no, because success is not a necessary element of the offense. (Opn., at p. 7.) However, this conclusion does not address the issue at issue in appellant's case: *i.e.*, what, if any, crime is committed when a person attempts to pander, but cannot, because the object of his attentions is not a prostitute? (*People v. Wagner*, *supra*, 170 Cal.App.4th at pp. 510-511.) And this is where the standard definition of attempt is most

---

16 years of age, is punishable by imprisonment in the state prison for three, six, or eight years."

apropos. (Pen. Code § 21a ["An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done towards its commission."]; *People v. Superior Court (Decker)*, *supra*, 41 Cal.4th at pp. 7-8 [attempt to murder proved by retaining assassin].) By soliciting one to "become" a prostitute, who, by virtue or vice cannot "become" a prostitute, one has successfully attempted to pander—there has been, as there must be, "'some appreciable fragment of the crime committed, (and) it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter.'" (*People v. Camodeca* (1959) 52 Cal.2d 142, 145, quoting *People v. Buffum* (1953) 40 Cal.2d 709, 718; Pen. Code § 663 [a defendant may be found guilty of an attempt to commit any offense necessarily included in the offense for which he was charged].)

> Pandering is established when the evidence shows that the accused has succeeded in inducing his victim to become an inmate of a house of prostitution. [Citations.] Attempted pandering is proved by evidence of the acts of the accused which have failed to accomplish the actor's purpose by reason of its frustration by extraneous circumstances rather than by virtue of a change of heart on the part of the one who made the attempt.

(*People v. Charles*, *supra*, 218 Cal.App.2d at p. 819, quoting *People v. Mitchell* (1949) 91 Cal.App.2d 214, 217-218; *see also*, *People v. Grubb* (1914) 24 Cal.App. 604, 608; *People v. Matsicura* (1912) 19 Cal.App. 75, 78.) More precisely, that the woman in question is an undercover police officer is one such extrinsic circumstance, and a common one at that. (*People v. Mitchell*, *supra*, 91 Cal.App.2d at pp. 217-219.)

In *People v. Mitchell*, *supra*, 91 Cal.App.2d 214, police surveillance

indicated the defendant was apparently keeping a house of prostitution. An undercover police officer was telephoned by the defendant, who inquired as to whether the officer had worked "in a house" before. During their subsequent in-person appointment, the defendant told the officer that she had been working for 12 years; had four girls working for her; her girls made $100 a night, halved with the defendant; she had been arrested many times, but done no time; and would take care of negotiating with customers. A customer arrived during the meeting, the defendant escorted him to another room, and then asked the officer to handle the trick; the officer declined. There was a follow-up telephone conversation, and a work start-date was set. The defendant was later convicted of attempted pandering. (*Id.*, at pp. 216-218.) Affirming the conviction, the appellate court found substantial evidence of overt acts, coupled with the impossibility of success, necessary to constitute an attempt.[12] (*Id.*, at p. 219; *see generally*, *In re Ryan N.*, *supra*, 92 Cal.App.4th at pp. 1377-1378 [discussion of distinction between crimes of solicitation and attempts]; Pen. Code § 21a.)

Similarly, in *People v. Grubb*, *supra*, 24 Cal.App. 604, the defendant could be found properly guilty of attempted pandering because he put prosecutrix into house of prostitution, where she "was importuned to engage in sexual intercourse by visitors to the brothel, but refused all such importunities." (*Id.*, at p. 606; *see also*, *People v. Charles*,

---

[12] In *People v. Frey*, *supra*, 228 Cal.App.3d at pp. 44-45, 50, the defendants were convicted of a number of counts of pandering, some involving an undercover police officer. Division One did not consider the application of attempt principles relative to those counts.

supra, 218 Cal.App.2d at p. 819.) And in *People v. Petros* (1914) 25 Cal.App. 236, the defendant's planned prostitution of the prosecutrix was thwarted when a known prostitute took the woman away and called the police. (*Id.*, at pp. 241-243.) That the prosecutrix did not become a prostitute was due to the timely and unexpected intervention of another:

> And it was this most commendable and humane intervention in the malodorous transaction by the fallen woman, Teddie Smith, that constituted the 'extraneous circumstances' – circumstances arising independently of the will of the accused –which frustrated or prevented the execution of his purpose to place her in a house of prostitution as an inmate thereof.

(*Id.*, at p. 246; *People v. Matsicura*, *supra*, 19 Cal.App. at pp. 77-78 [defendant arranged for woman to prostitute in house, no evidence she ever did so]; *People v. Snyder* (1940) 36 Cal.App.2d 258, 533-534 [idem].)

The court in *People v. Bradshaw*, *supra*, 31 Cal.App.3d 421, distinguished *Matsicura* on grounds that the earlier opinion "does not mention the word 'encourage.'" However, the *Bradshaw* court did not consider whether a conviction for attempt would properly lie—nor did it need to, because the question before the court was whether a section 995 motion had been properly granted on a theory of entrapment when the defendant had "willingly and enthusiastically entered into negotiations for the [undercover] police woman's services." (*Id.*, at p. 423.) Too, the *Bradshaw* opinion did not address the fact that the version of section 266i, subdivision (a)(2) applied in *People v. Mitchell*, *supra,* 91 Cal.App.2d at p. 216, fn. 1, *included* a proscription against pandering by encouraging. Contrary to the implication made by the lower court's opinion

here, the *Bradshaw* opinion does not suggest that attempted pandering cannot be a lesser included offense to pandering, and numerous earlier cases have held that convictions for attempted pandering are proper where unforseen circumstance thwarts the intended procurement. (*Accord*, *People v. Mitchell*, *supra*, 91 Cal.App.2d at pp. 217-219;) *People v. Siu* (1954) 126 Cal.App.2d 41, 43; *People v. Petros*, *supra*, 25 Cal.App. at p. 245; *see generally*, 1 Witkin, Cal.Crim.Law 3d (2000) Elements, § 61, p. 269.)

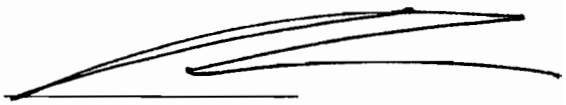
Given that all the evidence indicated appellant fully believed, as the police encouraged him to believe, that the undercover officer was currently a prostitute at the time he approached her, and that at most he approached her with an offer to "change management" (*People v. Wagner*, *supra*, 170 Cal.App.4th at p. 888), appellant's conduct does not fall within the purview of the anti-pandering statute, and there is constitutionally insufficient evidence to sustain his conviction for pandering. (*Id.*, at p. 889; U.S. Const., Fourteenth Amend.; Cal. Const., art. I, § 15; *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *People v. Johnson*, *supra*, 26 Cal.3d at p. 576-578.) Given further that the undercover officer was not a prostitute, and had no intention of becoming a prostitute, "the intended crime could not have been completed, due to some intrinsic fact unknown to" appellant. (*People v. Siu*, *supra*, 126 Cal.App.2d at p. 43.) So if there were sufficient evidence of active encouragement, appellant could only be properly found guilty of attempted pandering. (*People v. Petros*, *supra*, 25 Cal.App. at p. 245.)

CONCLUSION

For the foregoing reasons, appellant's conviction must be reversed.

Dated: November 1, 2009

Respectfully submitted,



VANESSA PLACE
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	
	)	Crim. No. S173490
v.	)	
	)	(Court of Appeal No. B207812
	)	Sup. Ct. No. LA055997)
JOMO ZAMBIA,	)	
	)	
Defendant and Appellant.	)	
	)	

CERTIFICATION

Pursuant to California Rules of Court, rule 8.504, I certify that this brief on the merits was prepared on a computer using Microsoft Word, and that, according to that program, contains 8,035 words.

Vanessa Place
Attorney for Appellant

Proof of Service

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is Post Office Box 18613, Los Angeles, California 90018. I am a member of the bar of this Court.

On November 3, 2009, I served the within

BRIEF ON THE MERITS

in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

Edmund G. Brown, Jr., Attorney General
300 South Spring Street, North Tower
Suite 5212
Los Angeles, California 90013

California Appellate Project
520 S. Grand Str., 4th Floor
Los Angeles, California 90071

The Clerk of the Court for delivery to
The Hon. Dennis Mulcahy, Judge Presiding
Department 115
14440 Erwin Street Mall
Van Nuys, California 91401

Steve Cooley, District Attorney
14400 Erwin Street Mall
Van Nuys, California 91401

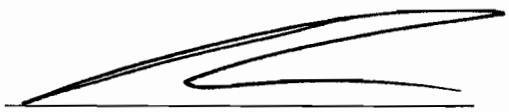
John R. Blanchard
Attorney at Law
9818 Belmont Str.
Belmont, California 90706

Jomo A. Zambia, G-15631
Centinela State Prison (LA County)
Post Office Box 911, B-4-108
Imperial, California 92251

Second District Court of Appeal
Division Five
300 S. Spring Str., 2nd Flr., No. Tower
Los Angeles, California 90013

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of November, 2009 at Los Angeles, California.



Vanessa Place