

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOMO ADOULA ZAMBIA,

Defendant and Appellant.

Case No. S173490

Central Appellate District Case No. B207812
Los Angeles County Superior Court Case No. LA055997
The Honorable Dennis E. Mulcahy, Judge

SUPREME COURT

FILED

JAN 19 2010

ANSWER BRIEF ON THE MERITS

Frederick K. Ohlrich Clerk

Deputy

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
SCOTT A. TARYLE
Supervising Deputy Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
RAMA R. MALINE
Deputy Attorney General
State Bar No. 187923
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2287
Facsimile: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

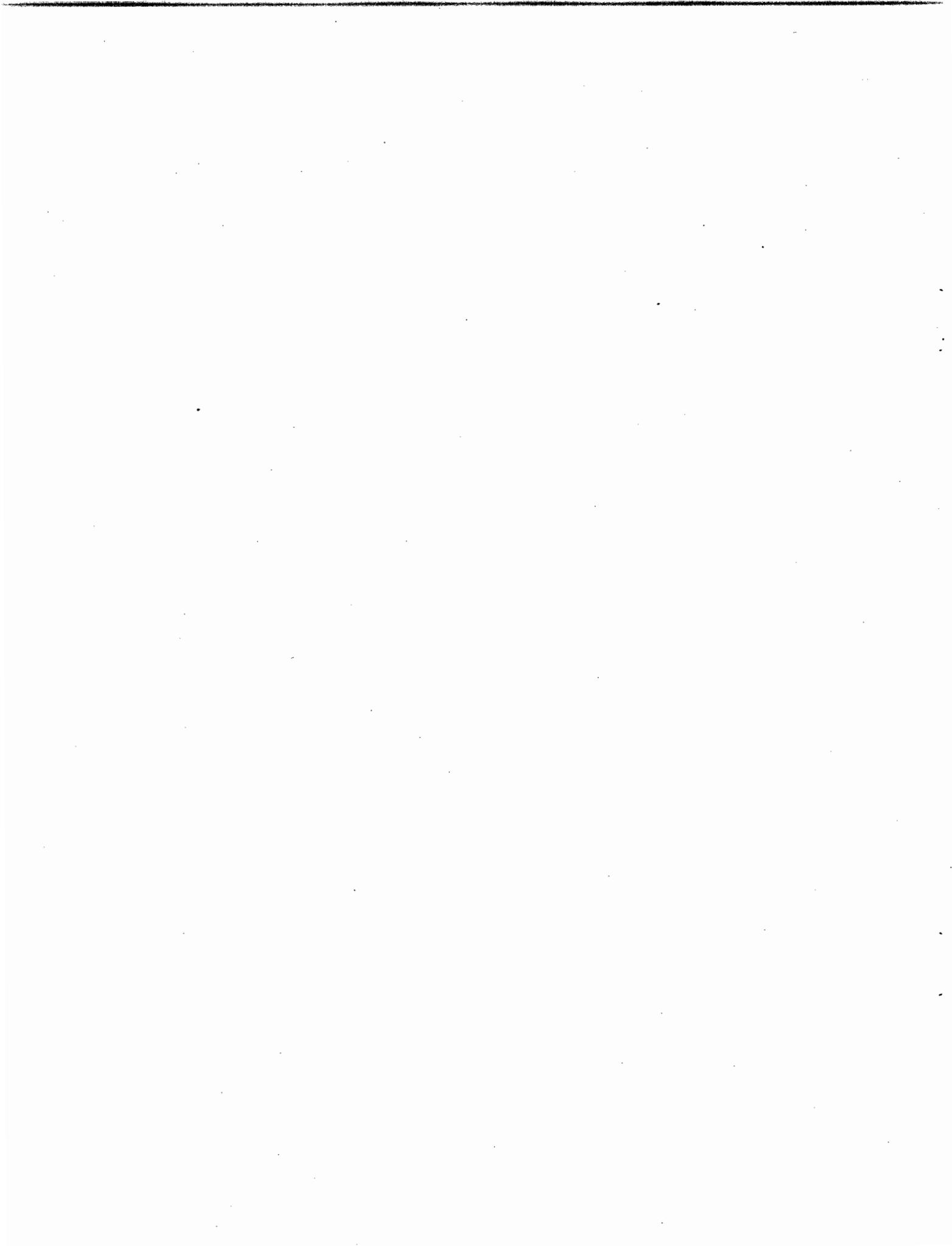
TABLE OF CONTENTS

	Page
Issue Presented.....	1
Introduction.....	1
Statement of the Case.....	2
Statement of Facts.....	3
A. Prosecution.....	3
B. Defense.....	6
Summary of Argument.....	7
Argument.....	9
I. This court should adopt the prevailing interpretation of section 266i, subdivision (a)(2) that the victim of pandering may be an existing prostitute.....	9
II. This court should reject appellant's narrower construction of section 266i, subdivision (a)(2).....	14
A. This court should disapprove the outlying decision of the court of appeal in <i>People v Wagner</i>	14
B. The "remain" language in subdivision (a)(4) does not compel or support appellant's narrow reading of subdivision (a)(2), and the rule of lenity is not applicable to correct any perceived ambiguity on appellant's part.....	17
C. A question of whether pandering is necessarily included within pimping is irrelevant to the question on which this court granted review.....	20
III. The evidence was sufficient to support appellant's conviction.....	21
Conclusion.....	25

TABLE OF AUTHORITIES

	Page
CASES	
<i>In re Davis</i>	
(1936) 18 Cal.App.2d 291	16
<i>People v. Avery</i>	
(2002) 27 Cal.4th 49.....	19
<i>People v. Bell</i>	
(1988) 201 Cal.App.3d 1396.....	24
<i>People v. Bradshaw</i>	
(1973) 31 Cal.App.3d 42	<i>passim</i>
<i>People v. Cason</i>	
(2009) 179 Cal.App.4th 1419.....	<i>passim</i>
<i>People v. Charles</i>	
218 Cal.App.2d 812.....	10, 16
<i>People v. Deloach</i>	
(1989) 207 Cal.App.3d 323	9, 10, 16
<i>People v. Frey</i>	
(1964) 228 Cal.App.2d 33	23
<i>People v. Hashimoto</i>	
(1976) 54 Cal.App.3d 862	<i>passim</i>
<i>People v. Howard</i>	
(1995) 33 Cal.App.4th 1407.....	19
<i>People v. Jackson</i>	
(1980) 114 Cal.App.3d 207	24
<i>People v. Jones</i>	
(1988) 46 Cal.3d 585.....	19
<i>People v. Lax</i>	
(1971) 20 Cal.App.3d 481	10, 16

<i>People v. Mitchell</i> (1949) 91 Cal.App.2d 214	23, 24
<i>People v. Montgomery</i> (1941) 47 Cal.App.2d 1	10, 16
<i>People v. Palmer</i> (2005) 133 Cal.App.4th 1141	19
<i>People v. Patton</i> (1976) 63 Cal.App.3d 211	11, 12, 13
<i>People v. Wagner</i> (2009) 170 Cal.App.4th 499	14, 15, 17, 22
<i>People v. White</i> (1979) 89 Cal.App.3d 143	24
STATUTES	
Pen. Code	
§ 266h	9, 10, 20
§ 266i	<i>passim</i>
COURT RULES	
Cal. Rules of Court, rule 8.516	20, 22
OTHER AUTHORITIES	
Witkin & Epstein, Cal. Criminal Law (3d ed. 2000)	
Introduction to Crimes, § 24	19



ISSUE PRESENTED

Does a defendant encourage another person to become a prostitute within the meaning of the pandering statute when he approaches an undercover officer posing as a prostitute, tells her that he is a pimp, and requests that she give him her money in exchange for housing and clothing?

INTRODUCTION

For decades, California courts, with one recent exception, have understood pandering to encompass not only non-prostitutes as victims, but prostitutes as well. These courts have implemented the Legislature's intent in enacting the pandering statute to combat the social evil of pandering and include within its ambit the various ways that people can urge others, through promises, threats, violence, devices or schemes, to engage in this illegal activity. As a result, these courts have held that encouraging a prostitute to "change management" (or, as in this case, become managed) falls under the statutory prohibition.

In an effort to overturn his pandering conviction, appellant would have this Court break this understanding and find that the Legislature would not have wanted to criminalize the promotion of prostitution where a pimp urges a prostitute to work for him. This narrow view of pandering flies in the face of a common-sense construction of the statute, and pays no deference to the Legislature's purpose in enacting it. Respondent asks this Court instead to uphold the Legislature's desire to stem this type of criminal activity, and particularly its desire to prohibit the recruiting of prostitutes, as happened in this case.

There is no doubt that substantial evidence showed appellant aggressively tried to become the undercover officer's pimp. There is also no doubt that this constituted encouragement for her to engage in prostitution for him. Under the traditional understanding of the pandering

statute, this Court should find that sufficient evidence supported appellant's conviction, and affirm the judgment of the Court of Appeal.

STATEMENT OF THE CASE

Appellant was convicted of pandering by encouraging in violation of Penal Code¹ section 266i, subdivision (a)(2). (1CT 143-145.) The trial court sentenced appellant to the middle term of four years in state prison. (1CT 147-149.)

Appellant filed an appeal challenging the sufficiency of the evidence to support his pandering conviction. (See Appellant's Opening Brief (AOB) 9-17.) The Court of Appeal affirmed appellant's conviction, and rejected appellant's insufficiency argument, reasoning:

Defendant, who carried with him some of the accoutrements typical of a pimp, represented himself as a "pimp" to a person posing as a prostitute in a location known for prostitution activity. He repeatedly requested that the undercover officer come along with him and told her that he would provide her with housing and clothing in exchange for her cash. This is consistent with the typical pimp/prostitute relationship whereby a prostitute turns over money to the pimp, who provides the prostitute with food, clothing, and other services in return. This was substantial evidence of inducement, persuasion, or encouragement for Officer Cruz to engage in prostitution on defendant's behalf.

(Slip Opn. at 5.) The Court of Appeal declined to assess the argument that appellant could not be guilty of pandering of a woman that was already a prostitute, because in this case, Officer Cruz was not actually a prostitute. (Slip Opn. at 6.) Still, the court in passing did note "the strong weight of authority" contrary to appellant's argument. (Slip Opn. at 6, fn. 3.)

¹ All further statutory references will be to the Penal Code.

Appellant then filed a petition for review asking this Court to consider the following issue: “Does solicitation of a person to be a prostitute to continue prostituting constitute pandering by encouragement?” (Pet. for Review at 2.) This Court granted the petition for review.

STATEMENT OF FACTS

A. Prosecution

On June 8, 2007, at approximately 8:00 p.m., Los Angeles Police Department (L.A.P.D.) Officer Erika Cruz was working undercover at the northwest corner of Sepulveda and Valerio, a highly visible area for prostitutes. (2RT 26-28, 120.) Officer Cruz was conducting a spontaneous investigation where undercover officers disguised as prostitutes worked on the street. Officer Cruz had made numerous prostitution-related arrests on that corner. (2RT 26-27.) Valerio and Sepulveda was the “number one spot for pimping and prostitution in the San Fernando Valley.” (2RT 122.) L.A.P.D. Sergeant Alan Kreitzman was in charge of the investigation. (2RT 119.) Other undercover officers, including L.A.P.D. Officer Kathryn Paschal, were in the area. (2RT 28, 67-68.)

At some point, officers saw appellant drive a green truck southbound on Sepulveda Boulevard. (2RT 28-29, 43.) Appellant turned westbound and looked at Officer Cruz. Appellant made a U-turn, stopped at a red light facing east on Valerio, and drove toward Officer Cruz. (2RT 29-31.) Appellant rolled down his window and told Officer Cruz to come over and get in. Officer Cruz asked him, “What for?” Appellant said that he was a pimp. Officer Cruz told appellant to back up his vehicle so they could have a conversation. Appellant reversed his vehicle and parked. (2RT 31-32.) Officer Cruz notified Officer Paschal that she was “possibly working a pimp” and crossed the street. (2RT 32-33, 68-69.)

Officer Cruz approached appellant's passenger window, which was open. Appellant told her to get in the car. Officer Cruz again asked, "What for?" Appellant again said he was a pimp. Officer Cruz asked him, "What did that entail?" Appellant said that he would "take care of her." Appellant asked Officer Cruz how much money she had. Officer Cruz replied that she had \$400. Appellant told her that if she gave him the money that he would house and clothe her. (2RT 33.)

Officer Cruz told appellant that she did not want to get in his car because she did not feel comfortable. Appellant said that he was a "legit" businessman, pulled out a business card, and waved it in Officer Cruz's direction. Appellant continued telling Officer Cruz to get in the car. Appellant said that he would not "strongarm"² her. Appellant spoke in an aggressive tone. Officer Cruz classified appellant as a "gorilla pimp." Officer Cruz defined a gorilla pimp as a pimp who was very aggressive toward his prostitutes and used verbal threats and violence to get his way and scare prostitutes to work for him. (2RT 34-35.)

Appellant continued telling Officer Cruz to get in the vehicle. Officer Cruz declined. Officer Cruz asked appellant if she could continue working in the area. Appellant said, "Yes," and that he would take care of her. (2RT 35-36.) Officer Cruz indicated to backup officers that she had a violation. (2RT 36, 71.) She told appellant to park along the curb and she would cross the street and get in his vehicle over there. (2RT 36.)

Appellant crossed Sepulveda and Valerio and pulled to the south curb. Appellant was taken into custody. (2RT 36, 71.) Officer Paschal searched appellant's truck and found numerous cell phones, some condoms, and a business card in the center console. (2RT 71-73, 121.) According to

² "Strongarm" means to take something by force or fear. (2RT 34.)

Officer Paschal, it was common for pimps to carry condoms. "Johns," or customers of prostitutes, did not usually carry condoms, because they relied on the women to have them. Pimps also carried multiple cell phones to contact different girls. (2RT 73-74.)

A pimp typically "owns" a prostitute. (2RT 36.) Pimps normally put their prostitutes out on a street corner to perform sexual acts in exchange for money. The prostitutes give the proceeds to their pimps, who in turn give a certain portion back to them. Pimps usually put prostitutes in hotel rooms or apartments, provide them with food, get their hair and nails done, and buy them clothes. Prostitutes refuse to provide information about their pimps because they are afraid of being injured and losing income. (2RT 75, 123-124.) A prostitute should never look at another pimp if she already "belongs" to a pimp. If a prostitute makes eye contact with another pimp in the area, then the other pimp "technically owns" the prostitute. (2RT 36.)

Officer Cruz was familiar with how pimps and johns drove in the area of Valerio and Sepulveda. Typically, pimps and johns will circle the area more than one time. (2RT 41.) Sergeant Kreitzman said that johns try to obtain a sexual act for money and look for other people and police officers in the general vicinity of the females. (2RT 124-125.) Johns are typically meek and shy. (2RT 35.) On the other hand, pimps approach the females in an aggressive manner. (2RT 125.) Pimps will also park and watch a female's activities to monitor if she is "really working." Appellant's behavior was consistent with the way johns and pimps drove. (2RT 41-42.)

Between 95 and 98 percent of the pimps in the area where appellant was arrested were Black males. (2RT 75.) Sergeant Kreitzman was familiar with the pimping and pandering activities that took place in the vicinity of Valerio and Sepulveda. (1RT 121-122.) Generally, pimps try to portray themselves as legitimate businessmen when they contact people. A

pimp will give a female his business card to show that he is a legitimate businessman. (2RT 123.)

B. Defense

Barbara Zambia was appellant's mother. Appellant lived with his parents. (2RT 148-149.) He did not have any other residence. (2RT 154.) Appellant worked as a janitor for his family's janitorial service business. (2RT 149-150, 167.) He typically worked from 6:00 or 7:00 p.m. until 12:30 a.m. and came home from work every night. (2RT 151, 154, 168.) The business office was on Santa Monica Boulevard in Hollywood. (2RT 150.)

Appellant carried one cell phone. (2RT 151.) Appellant was very clumsy and dropped his cell phones. (2RT 152, 168.) Ms. Zambia recognized two Motorola cell phones recovered from appellant's truck as appellant's phones. Appellant talked to his fiancé, friends, and sisters on the cell phone. (2RT 152-153, 170.)

Celina Payano was appellant's fiancé. (2RT 166.) Appellant and Ms. Payano had a baby girl approximately three months old. (2RT 153, 167.) Appellant sometimes stayed with Payano at her house in Los Angeles. Payano said that appellant had one cell phone. When appellant broke his cell phone, he would buy another. He therefore would sometimes have two or three phones. Payano recognized the phones recovered from appellant. She said that only one of them worked "all the way." (2RT 167-170.)

Ms. Zambia and Ms. Payano did not find any hotel bills or personal items for women in appellant's possession. (2RT 154, 170-171.)

SUMMARY OF ARGUMENT

Under Penal Code section 266i, subdivision (a)(2), a person is guilty of the felony of pandering if he or she, “[b]y promises, threats, violence, or by any device or scheme, causes or induces, persuades or encourages another person to become a prostitute.”³ At issue in the present case is whether the language, “to become a prostitute,” requires that the defendant believe that the targeted person is *not already a prostitute*.

³ Penal Code section 266i, subdivision (a), defines pandering as follows:

(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:

(1) Procures another person for the purpose of prostitution.

(2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute.

(3) Procures for another person a place as an inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state.

(4) 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.

(5) 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.

(6) 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.

Consistent with the Legislature's goal in enacting the pandering statute, this Court should find that a person may commit pandering by acting as a pimp and urging a perceived prostitute to work for him. As California courts have explained, the Legislature enacted section 266i to "cover all the various ramifications of the social evil of pandering," and "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."

A would-be pimp's use of promises, threats or other pressures to induce an existing prostitute to continue in that "profession" under his or her control is certainly among the "social evils" the statute was meant to address. Accordingly, our courts have almost unanimously read "to become a prostitute" to encompass any future engagement in acts of prostitution by the targeted person regardless of whether that person has already so engaged in the past. This Court should likewise interpret the statute to further this legislative intent.

Appellant argues, to the contrary, that section 266i, subdivision (a)(2) should be read narrowly to apply only where a defendant encourages a person not already a prostitute to enter into that activity. First, comparing the language of subdivision (a)(2) to that of other subdivisions, appellant argues that a person can be guilty of "pandering" an already-existing prostitute only by procuring for the prostitute a place in a "house of prostitution" or encouraging a prostitute to remain in such a house. Unless a "house of prostitution" is involved, appellant reasons, an already existing prostitute cannot be the target of pandering. However, as will be discussed, that argument relies upon a misunderstanding of the purpose of the "house of prostitution" provisions in the other subdivisions.

Appellant next argues that an interpretation of subdivision (a)(2) of 266i that would encompass appellant's conduct would render pandering a

lesser included offense of pimping (§ 266h). But that argument is not only unpersuasive but irrelevant to the question of whether the Legislature intended section 266i, subdivision (a)(2) to apply where the targeted individual is already a prostitute.

Finally, appellant argues that even under an interpretation of section 266i, subdivision (a)(2) that includes prostitute-victims, the evidence did not demonstrate sufficiently “active” encouragement to support a conviction, and, alternatively, that he would be guilty at most of attempted pandering, because the target of his crime was an undercover police officer. Those arguments, too, are meritless, as there was ample evidence of encouragement, and as the subjective intent of the victim has no impact on pandering.

ARGUMENT

I. THIS COURT SHOULD ADOPT THE PREVAILING INTERPRETATION OF SECTION 266I, SUBDIVISION (A)(2) THAT THE VICTIM OF PANDERING MAY BE AN EXISTING PROSTITUTE

The primary question presented in this case is whether the form of pandering proscribed by section 266i, subdivision (a)(2) requires that the victim be a person who is not already an active prostitute (or is not posing as such). That question, in turn, depends upon the interpretation of the phrase, “to become a prostitute,” as used in that subdivision. The better view, consistent with longstanding authority and the purposes of the pandering statute, is that “to become a prostitute” means “engage in any future acts of prostitution,” regardless of the victim’s past or present status.⁴ This Court should adopt that view.

⁴ Subdivision (a)(2) does not require that the victim actually *perform* an act of prostitution (see *People v. Deloach* (1989) 207 Cal.App.3d 323, 333 [it is not necessary that the victim actually perform
(continued...)]

California courts have found that, in order to further the Legislature's purpose, the pandering statute prohibits various manifestations of this conduct. (*People v. Deloach, supra*, 207 Cal.App.3d at p. 333 ["As defined by this statute, pandering comprises a broad range of conduct"].) As one Court of Appeal put it:

The purpose of the anti-pandering statute (Pen. Code, § 266i) 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 combatting the evil sought to be condemned.' (*People v. Montgomery*, 47 Cal.App.2d 1, at p. 24, 117 P.2d 437, at p. 451; also see *People v. Lax*, 20 Cal.App.3d 481, 97 Cal.Rptr. 722; *People v. Charles*, 218 Cal.App.2d 812, 32 Cal.Rptr. 653.)

(*People v. Hashimoto* (1976) 54 Cal.App.3d 862, 866.)

Further, the Legislature did not narrowly draw the pandering statute to stop only the initial start-up of a prostitute's operations, but instead set out to stop any development of this kind of illegal enterprise as well:

The pandering statute and Penal Code section 266h (pimping) are both designed 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.

(*Id.* at p. 867; accord, *People v. Cason* (2009) 179 Cal.App.4th 1419, 102 Cal.Rptr.3d 560, 568.)

Under this thinking, California appellate courts have given an expansive definition to the term "to become a prostitute" as used in section 266i, subdivision (a)(2), applying it not only where the defendant pressures

(...continued)

acts of prostitution]), but only that the defendant cause, induce, persuade or encourage the victim to engage in acts of prostitution, through "promises, threats, violence," or "any device or scheme."

a novice to enter the illicit trade of prostitution for the first time, but also where a defendant induces or encourages an existing prostitute (or one whom he is lead to believe is a prostitute) to engage in further prostitution under a new arrangement. (*People v. Cason, supra*, 102 Cal.Rptr.3d at p. 572; *People v. Patton* (1976) 63 Cal.App.3d 211, 218; *People v. Hashimoto, supra*, 54 Cal.App.3d at pp. 865-866; *People v. Bradshaw* (1973) 31 Cal.App.3d 42, 425.)

In *Bradshaw*, the defendant tried to persuade an undercover police officer posing as a prostitute to work under his supervision under an arrangement where they would split fees from her customers. (*People v. Bradshaw, supra*, 31 Cal.App.3d. at p. 423.) The defendant was convicted of “procuring, causing, inducing, persuading and encouraging” the police officer to become a prostitute, in violation of section 266i. (*Ibid.*) The *Bradshaw* court held the evidence was sufficient to support that charge. The court first noted:

It is not here contended by the People that defendant had ‘caused, induced, or persuaded’ the female officer to enter a house of prostitution. The argument made to us is that he had ‘encouraged’ her so to do within the meaning of subdivision (b).

(*People v. Bradshaw, supra*, 31 Cal.App.3d at p. 424.) The court recognized, “success is not a necessary element of the offense proscribed by the word ‘encourage’ as used in subdivision (b) of section 266i.” (*Id.* at p. 425.)⁵

Most pertinent here, the court in *Bradshaw* found that section 266i, former subdivision (b), covered

⁵ Subdivision (b) of the former version of Penal Code section 266i addressed in *Bradshaw* was worded identically to subdivision (a)(2) of the current version of the statute.

cases where a defendant has solicited one whom he believes to be a former prostitute to reenter the profession and *a defendant who solicits one whom he believes presently to be a prostitute to change her business relations.*

(*Ibid.*, italics added.) Hence, the *Bradshaw* court concluded that under former section 266i, subdivision (b), it is possible to pander an already active prostitute, or a person he subjectively believes to be an active prostitute, by encouraging her to change “business relations.”

Similarly, in *People v. Hashimoto, supra*, 54 Cal.App.3d 862, the defendant, an agent for an international travel bureau, offered a business arrangement to an undercover police officer he believed to be an active prostitute. Under this offer, the defendant would supply the officer with a large volume of foreign tourists as customers. (*Id.* at p. 865.) Holding that the evidence was sufficient to support a pandering conviction under section 266i, the Court of Appeal followed the *Bradshaw* court’s interpretation of the statute as fully applicable to a defendant who induces or encourages an already existing prostitute to commit further acts of prostitution in the future under a new “business” arrangement. (*Id.* at p. 866.)

The Court of Appeal in *People v. Patton* (1976) 63 Cal.App.3d 211 also squarely rejected the argument that a defendant cannot encourage a woman to “become a prostitute” for purposes of section 266i, subdivision (b) (currently subdivision (a)(2)) if the woman was already a prostitute. The defendant in *Patton* claimed the trial court erred by excluding evidence that the victim was already a prostitute, evidence which the defendant argued would support a complete defense to pandering by encouragement in light of the “to become a prostitute” language of the statute. He also challenged a jury instruction stating that it was irrelevant whether the victim “was an innocent person or a hardened prostitute of long experience.” (*People v. Patton, supra*, 63 Cal.App.3d at pp. 215-216.) In

affirming the conviction, the court rejected the notion that the statute should not encompass situations where the victim is a prostitute:

The fallacy involved in this reasoning is the assumption that the Legislature was concerned only with actual, rather than potential, harm. It appears to us that subsection (b) of Penal Code section 266i proscribes conduct in the nature of an attempt. Thus the relevant social policy question is the potential for harm which defendant's conduct reveals. *A substantial potential for social harm is revealed even by the act of encouraging an established prostitute to alter her business relations. Such conduct indicates a present willingness to actively promote the social evil of prostitution.*

(*People v. Patton, supra*, 63 Cal.App.3d at p. 218, italics added.)

The most recent appellate decision on this point, *People v. Cason, supra*, 102 Cal.Rptr.3d 560, gives an additional justification for a less narrow interpretation of the statutory language "to become a prostitute." There, the Court of Appeal insightfully observed:

Conceptually, we see another problem with reasoning that narrowly interprets the phrase "become a prostitute" as meaning to change one's state of being. This somewhat old-fashioned notion, [footnote] seems to ignore the fact that to "be" a prostitute necessarily involves "engaging in" the prohibited criminal activity.

(*People v. Cason, supra*, 102 Cal.Rptr.3d at p. 572.) As the *Cason* court indicates, a narrow interpretation of "to become a prostitute" would target attempts to change the nature of a person, whereas the broader interpretation of "to become a prostitute" would target encouraging illegal conduct, which was what the Legislature surely aimed to prevent.

The reasoning of *Bradshaw, Hashimoto, Patton, and Cason* is persuasive, and this Court should follow it. The intent of the pandering statute is to proscribe a crime against society, public decency and morals, not merely a crime against a particular person. Hence, it is the promotion

of prostitution, not the changing of an individual's status, which is the core of the crime of pandering. The pandering statute was designed to combat prostitution by attacking one of its key sources, those who actively encourage, promote, coerce and manipulate people to engage in that vice. As the above cases recognize, section 266i was meant to encompass all of the various and complex schemes and modes of operation that panderers have adopted. The social harm created by pandering is not limited to those who encourage or coerce novices to enter prostitution for the first time. Those who "pander" existing prostitutes (including the "gorilla pimps" of whom Officer Cruz testified here) harm society not only by harassing their direct victims but by promoting the scourge of prostitution as a whole.

II. THIS COURT SHOULD REJECT APPELLANT'S NARROWER CONSTRUCTION OF SECTION 266I, SUBDIVISION (A)(2)

A. This Court Should Disapprove the Outlying Decision of the Court of Appeal in *People v Wagner*

In support of his contention that encouraging a pimping relationship for a practicing prostitute does not qualify as pandering by encouragement, appellant asks this Court to adopt the narrow construction of section 266i that the Court of Appeal, Fourth Appellate District, Division Three, recently espoused in *People v. Wagner* (2009) 170 Cal.App.4th 499, (Opening Brief on the Merits (hereinafter "OBM") at 21-23.) This Court should reject the reasoning in *Wagner*, however, because it contradicts the Legislature's intent in enacting the statute.

In *Wagner*, the defendant unsuccessfully pressured an existing prostitute on the street to accept him as her pimp. (*People v. Wagner, supra*, 170 Cal.App.4th at p. 503.) The trial court instructed the jury that the prohibition on pandering cannot apply where "a defendant solicits one whom he believes presently to be a prostitute to change her business

relations.” (*People v. Wagner, supra*, 170 Cal.App.4th at p. 504.) Expressly rejecting the *Bradshaw* and *Hashimoto* line of authority, *Wagner* held the jury instruction was erroneous.

We feel this statute is clear. The language defining the crime as occurring when a defendant induces or encourages someone else to “become a prostitute” seems fairly clear in its exclusion of efforts to importune someone currently engaged in that profession to change management. If the Legislature had wanted a more broadly applicable provision, it could have easily replaced the phrase “become a prostitute” with the phrase “engage in prostitution.” We cannot simply assume it meant the latter when it said the former.

(*People v. Wagner, supra*, 170 Cal.App.4th at p. 509.) The *Wagner* court examined section 266i and found:

This looks to us like a legislature taking pains to be precise in what it was prohibiting. In light of the otherwise quite narrow terminology employed to define the various types of pandering included within the purview of section 266i - as well as the obvious alternative language which the Legislature could have employed in subdivision (a)(2) if it had wished to create a broader crime - we simply cannot accept that the Legislature intended the language actually used in that subdivision be interpreted as loosely as the precedent relied upon by the trial court in this case. We consequently conclude that the crime defined by section 266i, subdivisions (a)(2) and (b)(1), does not occur when the person being “induce[d], persuade[d] or encourage[d]” by the defendant is *currently* a prostitute.

(*People v. Wagner, supra*, 170 Cal.App.4th at pp. 510-511.)

Wagner relies upon the faulty assumption that the Legislature intended the various, numbered subparts of section 266i, subdivision (a), to narrowly define and restrict, through specification, the acts which can constitute “pandering.” To the contrary, as several appellate courts have found, the intent of the Legislature was to cast as broad a net as possible 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 combatting the evil sought to be condemned.” (*People v. Hashimoto, supra*, 54 Cal.App.3d at p. 866; citing *People v. Montgomery* (1941) 47 Cal.App.2d 1, 24; *People v. Lax* (1971) 20 Cal.App.3d 481; *People v. Charles* (1963) 218 Cal.App.2d 812, 816; accord, *People v. Deloach, supra*, 207 Cal.App.3d at p.333 [statutory scheme of section 266i comprises a broad range of conduct].) “The subdivisions of the foregoing statute do not state different offenses but merely define the different circumstances under which the crime of pandering may be committed.” (*People v. Lax, supra*, 20 Cal.App.3d at p. 486.)

As the Court of Appeal noted in *People v. Cason*, the appellate courts interpreting the pandering statute had long “deflected attempts by panderers to weasel out of their convictions by straining at particular words or phrases within subsections of the statute.” (*People v. Cason, supra*, 102 Cal.Rptr.3d at p. 571.)

“[C]ourts are [not] always to be governed by the exact phraseology and literal meaning of every word or phrase employed. . . . [C]ourts will not blindly follow the letter of a law, when its purpose is apparent, to consequences which are inconsistent with that purpose; and this would seem to be particularly true when the results of a literal interpretation, if adopted, would be absurd”

(*Id.* at p. 572, quoting *In re Davis* (1936) 18 Cal.App.2d 291, 295-296.)

The purpose of section 266i as stated in the cases we have discussed is apparent, and to hang everything on one literal meaning of the word “become” would generate consequences inconsistent with that purpose. Thus, in our view, the Legislature does not need to change the wording of section 266i from “become a prostitute” to “engage in prostitution.” [Citation.] The latter concept is necessarily contained within the former. The statute as worded, and as interpreted by a long line of cases from California courts, is

adequate. It covers acts encouraging “even an established prostitute to alter her business relations.” [Citation.]

(Ibid.)

Moreover, the *Wagner* court failed to consider that the *Bradshaw* line of authority has been established and followed for decades. In all of this time, the Legislature has never amended the statute to “correct” any perceived misinterpretation of its intent or overly broad construction of its language. This suggests legislative acquiescence or ratification of the courts’ construction.

For all these reasons, this Court should disapprove *Wagner* and instead subscribe to the more reasonable interpretation of the pandering statute in *Bradshaw*, *Hashimoto*, *Patton*, and *Cason*.

B. The “Remain” Language in Subdivision (a)(4) Does Not Compel or Support Appellant’s Narrow Reading of Subdivision (a)(2), and the Rule of Lenity Is Not Applicable to Correct Any Perceived Ambiguity on Appellant’s Part

Appellant claims that the statutory scheme of section 266i evidences a legislative desire to limit the crime of pandering to those who target non-prostitutes “*except* in the case of brothel-workers.” (OBM at 10-12.) In support of this argument, appellant relies heavily on the language of subdivision (a)(4) of the statute, under which a person is guilty of pandering where he or she, “[b]y 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.” Appellant argues that if “encouraging someone to continue prostituting” constitutes pandering under subdivision (a)(2), then the “to remain” language in subdivision (a)(4) would be redundant. (OBM at 10-12.) Appellant

misunderstands the purpose of the “house of prostitution” provisions and therefore misreads the statute.

Subdivision (a)(4) — as well as subdivision (a)(3) proscribing the “procure[ment] for another person a place as an inmate in a house of prostitution” — was enacted to address the problem of pandering in or for brothels. As appellant recognizes (OBM at 11 and fn. 4), the “social evils” of prostitution are particularly acute in brothels where the “inmates” may be subjected to extremely coercive pressures and restrictions on liberty akin to slavery. Hence, by enacting subdivisions (a)(3) and (a)(4), the Legislature sought to punish as “pandering” the acts of procuring an “inmate” for a brothel, or pressuring or encouraging an inmate “to remain” in a brothel, *without the additional* requirement that the panderer encourage or induce the victim to *actually engage in acts of prostitution* (i.e. “to become a prostitute”) therein. Because of the coercive atmosphere inherent in a “house of prostitution,” the Legislature evidently recognized that simply delivering an inmate to such a house, or helping (by inducement or encouragement) to *keep* an inmate in such a house, is sufficiently “evil” regardless of whether the perpetrator actively encourages or pressures the victim to engage as a prostitute inside the house.

Read in that light, it is eminently clear why subdivision (a)(4) contains the phrase “to remain”, while other subdivisions including (a)(2) do not. It is likewise evident why subdivision (a)(2) contains the phrase “to become a prostitute” (i.e. to “engage in prostitution”) while subdivisions (a)(3) and (a)(4) do not. Neither phrase refers to the prior status of the victim as a prostitute or a non-prostitute. The “to remain” language in subdivision (a)(4) focuses on the intent of the panderer and bears no relation to the status of the victim. Thus, contrary to appellant’s claim, the broader interpretation of “to become a prostitute” in

subdivision (a)(2) supported by *Bradshaw*, *Hashimoto*, *Patton*, and *Cason* would not render redundant the “to remain” language in subdivision (a)(4).

Appellant also suggests that section 266i, subdivision (a)(2) is capable of two reasonable interpretations. Appellant, therefore, claims that the rule of lenity should apply to resolve any ambiguity in his favor. (OBM at 11- 14.) Respondent disagrees.

The rule favoring lenity is limited to cases of statutory interpretation where no clear legislative intent can be discerned.

By necessity, construction is required only when a statute is unclear in some respect. Thus, a court should not be straitjacketed by the rule favoring lenity to the accused where the legislature has made its intent clear. “Such overbroad reliance upon one principle of statutory construction would constitute an abdication of our responsibility” (*People v. Jones* (1988) 46 Cal.3d 585, 599-600, 250 Cal.Rptr. 635, 758 P.2d 1165.)

(*People v. Howard* (1995) 33 Cal.App.4th 1407, 1416.) Indeed, the rule of lenity is applicable only where two interpretations are equally reasonable.

As Witkin explains, “The rule [of lenity] applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.” (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53.) In *People v. Jones* (1988) 46 Cal.3d 585, 599, 250 Cal.Rptr. 635, 758 P.2d 1165, we described the rule of lenity in a way fully consistent with section 4: “The rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute’s ambiguities in a convincing manner is impracticable.”

(*People v. Avery* (2002) 27 Cal.4th 49, 58.)

Here, because the statutory language of section 266i, subdivision (a)(2) is clear and appellant’s interpretation is not equally reasonable,

the rule of lenity is inapplicable. (See *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1155.) The persuasive reasoning of the overwhelming weight of authority broadly defining the phrase “encourages another to be a prostitute” dispels any claim that the two interpretations of this phrase are in “relative equipoise.” Appellant’s effort to create an ambiguity where none exists, and to invoke the rule of lenity in support of his proposed alternative interpretation of section 266i, subdivision (a)(2), should be rejected.

C. A Question of Whether Pandering Is Necessarily Included Within Pimping Is Irrelevant to the Question on Which This Court Granted Review

Appellant claims that “pandering so construed [to include prostitutes as victims] would become a necessarily included offense of pimping” (OBM at 15.) As a threshold matter, however, whether pandering would be a lesser included offense of pimping is irrelevant to the question that this Court granted review on, namely, “Does solicitation of a person believed to be a prostitute to continue prostituting constitute pandering by encouragement?” (Pet. for Rev. at 3.) Neither is it relevant to appellant’s contention on appeal that the evidence was insufficient to support his conviction. Accordingly, this Court need not and should not address it. (Cal. Rules of Court, rule 8.516.)

In any event, appellant’s argument is without merit. In some situations, to encourage another to become a prostitute (i.e. to engage in prostitution) within the meaning of the pandering statute will require more than merely to continue to derive income from a prostitute in an existing pimp-prostitution relationship. In other words, a person can be guilty of pimping, but not pandering, during a particular time period by passively continuing to “derive support or maintenance . . . from the earnings or proceeds” of a prostitute (§ 266h [the pimping statute]) without

making any new “promises, threats, violence, . . . device or scheme” during that time period to “encourage[]” the ongoing prostitution (§ 266i(a)(2) [the pandering statute]). Thus, it appears that pandering contains at least one element not present in pimping, and that therefore a conviction of pimping does not necessarily constitute a conviction of pandering.

To the extent that appellant is also arguing that the two crimes would merge into one under the traditional interpretation of pandering (OBM at 14-15), again, that argument is irrelevant to the issue presented and outside the scope of review. Moreover, his argument clearly misses the mark, in that a conviction of pandering does not result from a conviction of pimping. For example, in this case, it appears that appellant did not commit the crime of pimping despite having committed the crime of pandering. Although he apparently wanted to, he did not actually live on or derive support from the undercover officer, solicit for business on her behalf, or receive compensation for her, elements present in the pimping statute but not in the pandering statute.

III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT APPELLANT’S CONVICTION

Appellant claims, in the alternative, that even if respondent’s construction of section 266i is correct, his conviction would nevertheless be invalid because “[t]here was no evidence that appellant could have (or did) actively encourage anyone’s prostitution.” He argues that he “offered nothing to Officer Cruz but the chance to give him her money in exchange for her to keep on as she had presumably been kept before.” (OBM at 23-24.)

This contention is meritless. Officer Cruz testified that appellant promised he would “take care of her” and provide her with clothing and housing — items of substance which would improve her ability to

conduct business as a prostitute as well as provide for her everyday needs. (2RT 33.) While appellant's promises were not identical to those in *People v. Hashimoto, supra*, 54 Cal.App.3d 862, in which the defendant offered to provide a large volume of clientele for the undercover officer-prostitute, the statute does not require as much. Appellant's actions constituted encouragement within the meaning of section 266i, subdivision (a)(2).

Still, appellant maintains that his "encouragement was of the inactive variety insofar as there was nothing but talk behind it and nothing put up front." (OBM at 23.) Resorting to stereotype, appellant notes that he "flashed no great wad of cash, sported no fine clothes or jewelry, [and] drove no fancy car with spinning wheels." (OBM at 24.) Appellant appears to be inventing new requirements of pandering not present in the statute. The evidence was sufficient to show that appellant, with the intent to encourage Officer Cruz to engage in prostitution, made express promises to "take care of" Officer Cruz and provide her with clothing and housing if she worked for him as a prostitute. Nothing more was required.⁶

Lastly, appellant suggests that his conduct would not fall within the purview of the pandering statute. Appellant argues that he could only be found guilty of attempted pandering instead of pandering. (OBM at 25-29.) Again, appellant misreads the statute.⁷

Appellant's claim is based on the faulty premise that the crime of pandering under section 266i, subdivision (a)(2) is only completed when

⁶ Moreover, appellant's "aggressive tone," consistent with that of a "gorilla pimp," further reinforced the seriousness of his intentions. (2RT 34-35.)

⁷ This Court did not grant review on this issue, nor can it said to be fairly included in the sufficiency issue that this Court did agree to hear. Thus, there is no reason for this Court to resolve it in this proceeding. (Cal. Rules of Court, rule 8.516.) In the event this Court wishes to address this issue, however, respondent addresses it on the merits.

the target actually becomes a prostitute. Citing *People v. Wagner, supra*, 170 Cal.App.4th at pp. 510-511, appellant queries, “what, if any, crime is committed when a person attempts to pander, but cannot, because the object of his attentions is not a prostitute?” (OBM at 25.)

However, by its own plain terms, section 266i, subdivision (a)(2) does not require that the victim actually “become a prostitute” (however that phrase is to be interpreted), but can instead be satisfied by “persuad[ing], or encourag[ing] another person to become a prostitute,” so long as the perpetrator utilizes means of “promises, threats, violence,” or a “device or scheme.”⁸ Hence, the offense is complete once the proscribed inducements, persuasion or encouragement occur. “[S]uccess is not a necessary element of the offense proscribed by the word ‘encourage’ as used in subdivision (b) of section 266i.” (*People v. Bradshaw, supra*, 31 Cal.App.3d at p. 425.)

Moreover, under appellant’s theory, a defendant could never be convicted of pandering when the procurer’s intended target was an undercover police officer. (See OBM 29 [“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”].) This Court should reject appellant’s theory, as have several Courts of Appeal. (See *People v. Hashimoto, supra*, 54 Cal.App.3d at p. 866 [upholding pandering conviction where victim was an undercover police officer]; *People v. Bradshaw, supra*, 31 Cal.App.3d at pp. 425-426 [same]; *People v. Frey* (1964) 228 Cal.App.2d 33, 50 [same].)

⁸ The requirement of “promises, threats, violence,” or a “device or scheme” should lay to rest appellant’s concerns that the statute might be applied to merely giving friendly words of encouragement or medical care to a prostitute. (OBM at 15.)

Appellant relies on *People v. Mitchell* (1949) 91 Cal.App.2d 214, finding the evidence sufficient to support a conviction of attempted pandering where the defendant tried without success to procure the victim as a brothel inmate. (OBM at 26-27.) That reliance is misplaced. First, because the defendant in *Mitchell* was convicted only of attempted pandering (*id* at p. 216), the appellate court had no reason to decide whether the evidence in his case could also have supported a completed pandering. (See *People v. Bradshaw, supra*, 31 Cal.App.3d at p. 424 [“the possibility of guilt under [former] subdivision (b) was not discussed” in *Mitchell*].) Moreover, the defendant in *Mitchell* was charged with pandering by “procure[ment] for another person a place as an inmate in a house of prostitution,” (former Pen. Code, § 266i(c), now codified as § 266i(a)(3)) which, unlike subdivision (a)(2), does not provide that the offense may be accomplished only by “persuad[ing]” or “encourag[ing].”

Furthermore, a requirement that the panderer succeed in persuading the victim to actually engage in prostitution would be inconsistent with the goals of the pandering statute, to “discourag[e] prostitution by prohibiting third parties from expanding an existing prostitute’s operation or expanding the supply of available prostitutes.” (*People v. Jackson* (1980) 114 Cal.App.3d 207, 210; *People v. White* (1979) 89 Cal.App.3d 143, 151-152; *People v. Hashimoto, supra*, 54 Cal.App.3d at p. 867.) To permit one who believes he is exploiting actual or potential prostitutes to escape prosecution under section 266i, subdivision (a)(2), merely because the victim does not actually wish to engage in prostitution would severely undermine efforts to combat prostitution in which the government has been found to have a legitimate and substantial interest. (See *People v. Bell* (1988) 201 Cal.App.3d 1396, 1400.) Accordingly, appellant was properly convicted of the completed crime of pandering.

CONCLUSION

Accordingly, for the foregoing reasons, respondent respectfully requests this Court to affirm the judgment of the Court of Appeal.

Dated: January 14, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
SCOTT A. TARYLE
Supervising Deputy Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General



RAMA R. MALINE
Deputy Attorney General
Attorneys for Respondent

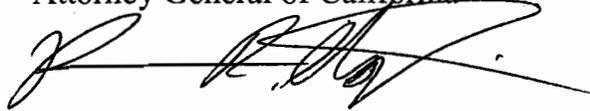
RRM:vg
LA2009507752
60513047.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13 point Times New Roman font and contains 6,969 words.

Dated: January 14, 2010

EDMUND G. BROWN JR.
Attorney General of California

A handwritten signature in black ink, appearing to read 'R. Maline', written over a horizontal line.

RAMA R. MALINE
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Jomo Adoula Zambia*

Number: S173490

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 15, 2010, I served the attached

ANSWER BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Vanessa Place
Attorney at Law
P.O. Box 18613
Los Angeles, CA 90018
Counsel for Appellant Jomo Adoula Zambia

The Honorable Dennis E. Mulcahy, Judge
Los Angeles County Superior Court
14400 Erwin Street Mall
Van Nuys, CA 91401-2705

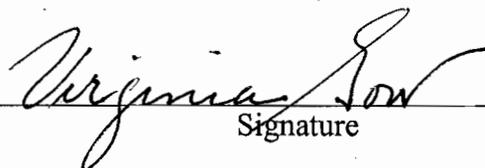
California Appellate Project (LA)
520 South Grand Avenue, 4th Floor
Los Angeles, CA 90071

Julie F. Kramer, Deputy District Attorney
Los Angeles County District Attorney's Office
7625 South Central Avenue
Los Angeles, CA 90001

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 15, 2010, at Los Angeles, California.

Virginia Gow
Declarant


Signature

RRM:vg
LA2009507752
60513047.doc

