
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 1204 **Hearing Date:** April 17, 2018
Author: Bates
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Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Pandering*

HISTORY

Source: Orange County Deputy District Attorneys Association

Prior Legislation: AB 1771 (O'Donnell), 2016, failed passage on the Senate floor
Proposition 35, 2012

Support: California District Attorneys Association; Orange County District Attorney Tony Rackauckas; Peace Officers Research Association of California (PORAC)

Opposition: American Civil Liberties Union of California; California Attorneys for Criminal Justice; California Public Defenders Association; Taxpayers for Improving Public Safety; Transgender Law Center; thousands of individuals

PURPOSE

The purpose of this bill is to eliminate existing elements for the crime of pandering and redefine the crime of pandering as: (1) arranging, causing, encouraging, inducing, persuading, or procuring another person to be a prostitute, with the intent that the other person engage in an act of prostitution or (2) receiving or giving any money or thing of value for procuring, or attempting to procure another person for the purpose of prostitution.

Existing law states that the crime of pandering occurs when a person engages in any of the following acts: (Pen. Code, § 266i, subd. (a).)

- Procures another person for the purpose of prostitution;
- By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute;
- 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;
- 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;
- 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

- 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.

Existing law provides that a person that commits any of the acts described above is guilty of pandering, a felony, and shall be punishable by imprisonment in the state prison for three, four, or six years. (Pen. Code, § 266i, subd. (a).)

Existing law specifies that any person who does any of the acts described above with another person who is a minor is guilty of pandering, a felony, and shall be punishable as follows:

- If the other person is a minor 16 years of age or older, the offense is punishable by imprisonment in the state prison for three, four, or six years; or
- If the other person is under 16 years of age, the offense is punishable by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 266i, subd. (b).)

Existing law provides that a person who deprives or violates the personal liberties of another with the intent to obtain forced labor or services is guilty of human trafficking and shall be punished by a state prison term of 5, 8, or 12 years. (Pen. Code, § 236.1, subd. (a).)

Existing law provides that any person who deprives or violates the personal liberties of another with the intent to effect or maintain a violation of specified sex offenses, is guilty of human trafficking and shall be punished by a state prison term of 8, 14, or 20 years. (Pen. Code, § 236.1, subd. (b).)

Existing law provides that any person who causes or persuades, or attempts to cause or persuade, a minor to engage in a commercial sex act, with the intent to effect a violation of specified sex offenses is guilty of human trafficking and shall be punished by a state prison term of 5, 8, or 12 years, unless the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, in which case the punishment is 15 years to life in state prison. (Pen. Code § 236.1, subd. (c).)

This bill eliminates existing elements for the crime of pandering and redefines the crime of pandering as:

- Arranging, causing, encouraging, inducing, persuading, or procuring another person to be a prostitute, with the intent that the other person engage in an act of prostitution; or
- Receiving or giving any money or thing of value for procuring, or attempting to procure another person for the purpose of prostitution.

COMMENTS

1. Need for This Bill

According to the author:

In its current form, California Penal Code section 266i provides for 6 different methods by which the offense of pandering may be committed. These methods do

not state different offenses, but merely different ways in which the same offense is committed. This confusing distinction makes charging decisions and jury instructions more complicated, and does not place the public on adequate notice about what precisely the law prohibits.

SB 1204 cleans up Penal Code, Section 266i, by utilizing existing theories of liability and incorporating language already adopted by the court of appeal and combining them into a single, easy-to-understand section. This will properly place the public on notice for what pandering is, and will simplify charging decisions and jury instructions in pandering cases, without increasing the scope of the offense or creating a new or additional crime. In addition, one of the intent theories subsumed in the human trafficking statutes (236.1(b)&(c)). As such, simplifying the pandering statute will also simplify the instructions in human trafficking cases.

SB 1204 is one more tool in the toolbox to make it easier for prosecutors to fight perpetrators pimping and pandering victims in California. Consolidating the pandering theories that are in statute will make it easier to prosecute these criminals in a more efficient manner.

2. Pimping, Pandering, and Supervising or Aiding a Prostitute

Pimping under California law means receiving compensation from the solicitation of a known prostitute. (Pen. Code, § 266h.) Pandering means procuring another person for the purpose of prostitution by persuading that person to become or continue being a prostitute. (Pen. Code, § 266i.) Traditionally, pandering has applied to individuals acting in the role of “pimp” by recruiting individuals into a life of prostitution. Under current law, pandering has required that the intended act of prostitution be with someone other than the defendant. Additionally, the Penal Code provides for the lesser crime of supervising or aiding a prostitute. Supervising or aiding a prostitute is punishable as a misdemeanor.

- **Pimping:** Pimping is a felony and may be punished by three, four, or six years in state prison (or three, six, or eight years if the prostitute was under 16). Aiding a prostitute is a misdemeanor and may be punished by six months in the county jail, a fine of no more than one thousand dollars (\$1,000), or both. Pimping is defined as either soliciting prostitution by finding a john for a prostitute and collecting a fee from the john *or* some of the prostitute's pay, or collecting some or all of a prostitute's pay even if you played no part in finding the john. To be convicted of pimping, you have to have helped find customers for a prostitute and received some money for your role in the transaction. But you can be convicted of aiding a prostitute even if you did not find the john or arrange the transaction, and even if you receive no money for your role. To be convicted of pimping because you received money from a prostitute, you have to be living off of that person's prostitution earnings. You also need to know that they are a prostitute. In contrast, you can be convicted of aiding a prostitute if you receive any money that was earned from prostitution, for any reason. You can't be convicted of pimping unless a prostitution transaction actually takes place. But you can be convicted of aiding a prostitute even if you only helped someone loiter with the intent to commit prostitution—even if they didn't find any customers.

- ***Pandering:*** Pandering is similar to pimping. A person can violate California's law against pandering when you encourage or persuade someone to engage in prostitution, and make that person available for the purpose of prostitution. Like pimping, pandering is a felony and may be punished by three, four, or six years in state prison (or three, six, or eight years if the prostitute was under 16). The crime of supervising or aiding a prostitute includes "recruiting" someone to engage in an act of prostitution or to loiter for the purpose of prostitution. But the California 6th District Court of Appeal has held that you only violate Penal Code 653.23 PC when you recruit "customers for prostitutes or prostitutes for customers," not when you recruit someone to become a prostitute. In other words, a person is guilty of supervising or otherwise aiding a prostitute only if the person who was recruited actually starts working as a prostitute or loitering for prostitution.
- ***Supervising or Aiding a Prostitute:*** A person may not direct, supervise, recruit, or otherwise aid another person in the commission of a violation of specified prostitution offenses. Additionally, a person may not collect or receive all or part of the proceeds earned from an act or acts of prostitution committed by another person. Violation of these provisions is a misdemeanor punishable by up to six months in the county jail. (Pen. Code § 653.23, subds. (a) & (b); Pen. Code § 653.26.) The types of circumstances that may be considered when evaluating if an accused offender supervised or aided a prostitute include the following, whether:
 - The offender repeatedly speaks or communicates with another person who is acting in violation of loitering for the purpose of engaging in prostitution.
 - The offender repeatedly or continuously monitors or watches another person who is acting in violation of loitering for the purpose of engaging in prostitution.
 - The offender repeatedly engages or attempts to engage in conversation with pedestrians or motorists to solicit, arrange, or facilitate an act of prostitution between the pedestrians or motorists and another person who is acting in violation of loitering for the purpose of engaging in prostitution.
 - The offender repeatedly stops or attempts to stop pedestrians or motorists to solicit, arrange, or facilitate an act of prostitution between pedestrians or motorists and another person who is acting in violation of loitering for the purpose of engaging in prostitution.
 - The offender circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists to solicit, arrange, or facilitate an act of prostitution between the pedestrians or motorists and another person who is acting in violation of loitering for the purpose of engaging in prostitution.
 - The offender receives or appears to receive money from another person who is acting in violation of loitering for the purpose of engaging in prostitution.
 - The offender engages in any of the behavior described above, inclusive, in regard to, or on behalf of two or more persons who are in violation of loitering for the purpose of engaging in prostitution.
 - The offender has been convicted of violating specified prostitution related offenses.
 - The offender has engaged, within six months prior to the arrest in any behavior described in this subdivision, or in any other behavior indicative of prostitution activity.

3. This Bill Deletes Existing Elements Currently Required in Order to Establish that an Individual has Committed the Crime of Pandering:

In order to establish that an individual has committed any crime, the prosecution must prove to a jury that the individual has committed each element of the crime. The legislature is responsible for establishing the statutory elements of each crime. By setting the elements of a crime, the Legislature defines what constitutes unlawful conduct. If elements of existing crimes are eliminated, in effort to simplify the statute or to lessen the burden on the prosecution to meet their evidentiary requirement, there is a danger that people will be exposed to prosecution and conviction for conduct that does not meet the intent of the criminal statute.

The subject matter of this bill is pandering. The statute specifies ways in which pandering can be committed and establishes the required elements necessary to prove that pandering has been committed in any of its forms. Pandering can occur based on a variety of conduct. Depending on type of conduct, different elements have to be established to prove that the crime has been committed.

This bill maintains the different ways that pandering can be committed (persuades, induces, encourages, procures) but deletes some of the elements associated with the different ways that pandering can be committed. One manner in which pandering can be committed is by “promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute.” This bill deletes the requirement (element) that inducing or encouraging another person to be accomplished by “promises, threats, violence, or by any device or scheme.” The deletion of these elements could mean that conduct which would not rise to the level of pandering under the current statute, could constitute pandering under this bill. This raises the problem that lower level conduct (such as the misdemeanor crime of “supervising or aiding a prostitute”) could be prosecuted and punished at a higher (felony) level than was intended by the statute.

4. Pandering Jury Instructions:

California has a set of model jury instructions which are intended to be given by the judge to the jury to provide the jury proper guidance on how to evaluate whether a crime has been established beyond a reasonable doubt based on evidence presented at a defendant’s trial.

CALCRIM 1151 is the model jury instruction on the crime of pandering. That jury instruction covers the different ways that pandering can be committed and the different evidentiary elements required to establish pandering, based on the conduct in question. The jury instruction provides a format by which the judge can narrowly tailor the instruction on pandering to fit the evidence that has been presented to the jury. The fact that the instruction on pandering can be narrowly tailored ensures clarity for the jury based on the evidence presented at trial. CALCRIM 1151 is presented below. The court gives one, or more, of the alternatives available in the instruction to provide appropriate guidance to the jury.

CALCRIM 1151

To prove that the defendant is guilty of pandering, the People must prove that:

- <Alternative 1A—persuaded/procured>

- The defendant successfully (persuaded/procured) <insert name> to become a prostitute(;/.)
- <Alternative 1B—promises/threats/violence used to cause person to become prostitute>
- The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) <insert name> to become a prostitute[, although the defendant’s efforts need not have been successful](;/.)
- <Alternative 1C—arranged/procured a position>
- The defendant (arranged/procured a position) for <insert name> to be a prostitute in either a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]
- <Alternative 1D—promises/threats/violence used to cause person to remain>
- The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) <insert name> to remain as a prostitute in a house of prostitution or any other place where prostitution is encouraged or allowed(;/.)]
- <Alternative 1E—used fraud>
- The defendant used fraud, trickery, or duress [or abused a position of confidence or authority] to (persuade/procure) <insert name> to (be a prostitute/enter any place where prostitution is encouraged or allowed/enter or leave California for the purpose of prostitution)(;/.)]
- <Alternative 1F—received money>
- The defendant (received/gave/agreed to receive/agreed to give) money or something of value in exchange for (persuading/attempting to persuade/procuring/attempting to procure) <insert name> to (be a prostitute/enter or leave California for the purpose of prostitution)(;/.)]

AND

- 2. The defendant intended to influence <insert name> to be a prostitute(;/.)

To the extent that this bill deletes language and elements which are currently part of the offense of pandering, it does not change the fact that there still could be multiple theories to establish pandering. Under the language of this bill, there would still need to be a distinction about whether the defendant persuaded, or arranged, or induced, or encouraged, or procured a person to be a prostitute. The current jury instruction on pandering already ensures that juries receive clear information on what is necessary to convict on the crime of pandering.

5. Concern that the Language of this Bill Could be Overbroad:

The deletion of language and elements from the current statute regarding pandering carries the potential for overbreadth which would result in criminalizing conduct beyond what has been traditionally treated as pandering. The language of this bill is broad enough that it could

potentially result in convicting individuals that solicit a prostitute with pandering. The language of this bill includes inducing and encouraging another person to engage in an act (single) of prostitution. By removing some of the existing elements, such conduct could potentially result in a pandering charge for a customer who solicits a prostitute to engage in a single act of prostitution with the customer. As mentioned earlier, pandering has applied to individuals acting in the role of “pimp” by recruiting individuals into a life of prostitution and pandering has required the intended act of prostitution be with someone other than the defendant. The broader language of this bill could pull in lower level conduct, not intended to be covered by the pandering statute.

6. Encouraging, Inducing, or Persuading

This bill seeks to separate the elements of encouraging, inducing or persuading from the additional elements of “by promises, threats, violence, or by any device or scheme.” Under existing law a perpetrator of pandering must commit an offense that combines those elements. Simply convincing or discussing whether a man or woman should engage in prostitution does not constitute pandering under existing law. Proposition 35 did separate the elements of “encouraging, inducing, or persuading” from the additional elements of “by promises, threats, violence, or by any device or scheme” for purposes of human trafficking. However, the provisions of Proposition 35 were narrowly applied to encouraging, inducing, or persuading *a minor*. The rationale of Proposition 35 is that minors were particularly susceptible to being convinced to engage in commercial sex acts by simple encouragement, absent force or threat of force. This bill seeks to apply this standard to the felony of pandering. Under this bill, a simple discussion between adults regarding whether a person should engage in prostitution could result in a felony conviction of pandering.

7. Arguments in Support

According to the California District Attorneys Association:

This bill includes all existing theories of liability and assists prosecutors by not requiring them to elect a single theory of liability or multiple theories.

According to Orange County District Attorney Tony Rackauckas:

There are currently six definitions of pandering that describe the different means by which the same offense is committed. This causes confusion for juries, which may receive jury instructions on simple definitions of the same offense. By simplifying the pandering theories used in the courtroom, prosecutors will have an additional resource to bring traffickers to justice.

8. Arguments in Opposition

According to the American Civil Liberties Union:

SB 1204, a bill that seeks to simplify California’s pandering statute, but goes beyond mere simplification and eliminates some of the elements necessary to sustain a conviction under current law. By eliminating these elements and broadening the range of activities that could be considered pandering, SB 1204

widens the net of those who may be prosecuted for the crime and may have the unintended impact of criminalizing the people the bill aims to protect.

Today, California's pandering law criminalizes those who 1) procure another person for the purpose of prostitution or procure a place for another person at a place of prostitution, 2) persuade or induce – through promises, threats, or violence – another person to become a prostitute or to remain a prostitute at a place of prostitution, 3) by fraud, duress, or abuse of a position of authority procure another person for the purpose of prostitution or to enter a place of prostitution, or to come into or leave the state for the purpose of prostitution, or 4) receive or give money or a thing of value for procuring another person for the purpose of prostitution.

While our current pandering statute is intended, in part, to target “pimps” who force young people and vulnerable communities to engage in prostitution by taking advantage of them or by using physical or emotional abuse, SB 1204 would criminalize *any* act of arranging, causing, encouraging, inducing, or persuading another person to be a prostitute – regardless of whether any of the additional requirements under existing law, such as threats, violence, or duress, are present. Thus, in attempting to synthesize the existing statute, SB 1204 actually changes the nature of the crime.

Given its breadth, SB 1204 could end up criminalizing a young person who has been a victim of human trafficking and who persuades another young person to enter the commercial sex world as a way to make money and get off the streets. The bill could likewise criminalize an adult sex worker who voluntarily engages in commercial sex and encourages a friend to do the same. Targeting sex workers and victims of human trafficking with criminal penalties is a far cry from the original intent behind our pandering statute.

We are likewise concerned that SB 1204 is vague and does not provide sufficient notice to individuals as to what types of activities could result in criminal prosecution. We fear the vagueness and overbreadth of the bill could also result in disparate and selective enforcement of the law, given the disproportionate interaction communities of color, low income communities, and LGBTQ communities have with law enforcement.

According to the California Public Defenders Association:

SB 1204 would amend Penal Code section 266i to change the definition of pandering by deleting any requirement of force, threat, fraud, promises, or payment for procuring any individual to engage in prostitution. Instead the bill would substitute “[A] person who arranges, causes, encourages, induces, persuades, or procures another person to be a prostitute, with the intent that the other person engage in an act of prostitution, is guilty of pandering, a felony...”

...Under existing law, a conviction of [pandering] is a tier 3 sex offense and requires lifetime registration...

Although a well-intentioned effort to prevent individuals from being forced into prostitution, SB 1204 has the potential to punish the victims. Our objection to SB 1204 is that it is overbroad and would further criminalize street prostitutes, many of whom are vulnerable runaways, victims of domestic violence or substance abusers.

The proposed definition of pandering is vague and ambiguous. What constitutes arranges, causes, encourages, or persuades? Under SB 1204, if a runaway minor says to another runaway, “you should consider hustling because I’m making good money,” the minor could be prosecuted for pandering...

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