IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANTONIO CHAVEZ MOSES, III, Defendant and Appellant.	No. S258143 Court of Appeal No. G055621

On Appeal from the Superior Court of Orange County
(Case No. 16NF1413)
The Honorable Julian Bailey, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Did the Court of Appeal err in reversing defendant's conviction for human trafficking of a minor (Pen. Code § 236.1, subd. (c)(1)) on the ground that defendant was communicating with an adult police officer posing as a minor rather than an actual minor?

INTRODUCTION

Penal Code section 236.1, subdivision (c), defines human trafficking of a minor to include either a completed act or an attempt. The statute defines the victim as a minor under both the completed act and the attempt prongs. "[A] person who is a minor" is the object of each verb in the statute. A defendant who attempts to persuade a fictitious person to engage in a commercial sex act has, at most, committed an attempt within the meaning of Penal Code section 21a, not a violation of section 236.1, subdivision (c). (Argument I, *post.*)

Penal Code section 236.1, subdivision (c), was passed by the voters as part of an initiative measure (Proposition 37). Neither the history of the proposition nor principles of statutory construction support an assumption the voters intended to authorize conviction of a defendant based only on the elements of the crime of attempt in Penal Code section 21a. (Argument II, *post*.)

Violation of Penal Code section 21a may not be treated as a lesser-included offense to the conduct charged in this case. Doing so would require the court to make factual findings the jury did not make. Therefore, the disposition required in this case is reversal of count one and an order remanding the case for resentencing on the stayed counts. (Argument III, *post*.)

STATEMENT OF THE CASE

A jury convicted appellant Antonio Chavez Moses, III, with human trafficking of a minor in violation of Penal Code section 236.1, subdivision (c)(1) (count one), attempted pimping of a minor in violation of Penal Code sections 664, subdivision (a), and 266h, subdivision (b)(1) (count two), and pandering by promises, threats, violence, and devices and scheme in violation of Penal Code section 266i, subdivision (a)(2) (count three). (1 CT 51; 2 CT 478-480; 4 RT 687-688.) The victim alleged in each count was police officer Detective Luis Barragan. (1 CT 185-186.) Following a bifurcated trial, the court found appellant previously suffered a prior conviction within the meaning of Penal Code sections 667, subdivisions (d) and (e)(1), and 1170.12, subdivisions (b) and (c)(1). (1 CT 53; 4 RT 703.)

The court sentenced appellant to state prison for 24 years on count one (upper term doubled), to a concurrent term of four years on count two (middle term doubled), and to a concurrent term of eight years on count three (middle term doubled). The court stayed sentence on counts two and three pursuant to Penal Code section 654. (1 CT 55-56; 2 CT 536; 4 RT 737-738.)

In a divided published opinion, the Court of Appeal, Fourth Appellant District, Division Three, reversed count one. Because the jury instructions did not require a finding appellant intended to target a minor, the Court of Appeal decided it could not reduce count one to attempt under Penal Code section 21a. (*People v. Moses* (2019) 38 Cal.App.5th 757, rev. gted. Nov. 26, 2019 (Case No. S258143) cited pursuant to Rule 8.1115(e)(2), California Rules of Court.)

Respondent, represented by the California Attorney General, did not seek review in this Court. This Court granted review on its own motion after

the District Attorney of Orange County submitted a letter asking this Court to grant review. (Letter filed Sept. 23, 2019, in Case No. S258143.)

STATEMENT OF FACTS

Santa Ana Police Detective Luis Barragan (1 RT 133-134) created an internet profile for a fictitious 21-year-old female named "Bella B" on Tagged.com, a social networking site. (1 RT 154-158; 2 RT 372, 409.) The site requires users to be age 18 or older. (1 RT 159.) Barragan agreed to the Tagged.com terms of service prohibiting users from providing any false information or information that belongs to another person and prohibiting users from pretending to be someone they are not. (2 RT 367-369.) Barragan posted a profile photograph of an unknown female he uploaded from the internet. (1 RT 160; 2 RT 369-371.)

Appellant Antonio Moses contacted Bella using the profile of "Fm Da Prince." (1 RT 171, 188.) Barragan (posing as Bella) engaged in a series of messages with Moses making it appear Bella was working as a prostitute in Vallejo. Barragan interpreted language used in the communications as a pimp recruiting a prostitute. (1 RT 189-197, 200-202, 207-210, 214-216, 218-223.) Moses sent a message including a phone number and asked Bella to call him. (1 RT 197.)

After Barragan felt the relationship had been established, he sent a message as "Bella" claiming she was age 17. "Bella" sent the message in April and told Moses she would turn 18 in November. (1 RT 224-226; 3 RT 476.) Moses continued communicating with Bella, asked her to send pictures and tried to arrange for her to travel to Los Angeles. (1 RT 227; 3 RT 476.)

After communications stopped for a few days, Barragan initiated a conversation asking if Moses was giving up on the relationship. Moses

responded that he was not giving up. The next day, he asked Bella if she was giving up on him. Bella responded that she was in San Diego and she talked about moving around with a female from Fresno. Moses said he was in Las Vegas. (1 RT 230-233.)

Moses asked Bella to call and sent the same phone number he sent previously. Bella said she did not have a phone. Moses told her "use your girl's phone." (1 RT 234.) Barragan provided Moses with an undercover phone number and offered Moses the ability to communicate by texting. Moses said he did not like to text. He told Bella when he would be in Los Angeles. (1 RT 234-235.)

Barragan arranged for a female police detective, Sonia Rojo, to assume the role of Bella's voice. (1 RT 237.) Moses and Rojo communicated by telephone. (1 RT 237-239; 3 CT 673-678.)

Moses tried to recruit Bella when they exchanged text messages. (2 RT 279-284.) Moses said he was in the San Fernando Valley. He told Bella to come to Los Angeles. (2 RT 285-287.)

Moses expressed concern about Bella being underage. He indicated he did not want to get involved while she was underage. He suggested she stay with her pimp until she turned 18 or that she might stay at Moses's mother's house until she turned 18. (1 RT 245; 2 RT 296, 422-423, 430; 3 CT 685.)

Bella told Moses she was in Reno. Bella said the guy she was with drove her there. The implication was Bella was with a pimp. Bella said he beat her and she wanted to get away from him. (2 RT 297, 387-388.)

Rojo, posing as Bella, told Moses she was back in Orange County and asked Moses if he was going to pick her up. (3 CT 689.) Moses agreed to meet her at a McDonald's restaurant in Anaheim. Bella was

supposed to wait in the bathroom to hide from her current pimp. (3 CT 697-701, 703-708.)

Moses arrived at the parking lot of the McDonald's, apparently saw Anaheim Police Officers, texted Bella he could see she is not real and said she is the police. (1 RT 121-122; 2 RT 315-319, 321, 326-327.) Moses drove out of the parking lot. Officers stopped him a short distance away and arrested him. (1 RT 122-125; 2 RT 323-324.) A phone found in the car was assigned the same telephone number Moses previously gave when communicating with Bella. (1 RT 198.)

ARGUMENT

I.

PENAL CODE SECTION 236.1, SUBDIVISION (C), REQUIRES THE EXISTENCE OF A VICTIM WHO IS A MINOR IN ORDER TO CONVICT A DEFENDANT OF AN ATTEMPT UNDER THE STATUTE

Penal Code section 236.1. subdivision (c), may be violated only if there is a victim who is under age 18. A defendant who attempts to persuade a fictitious person to engage in an act described in the statute has not committed each element defined in the statute.

A. The plain terms of Penal Code section 236.1, subdivision (c), include the required element that the victim must be a minor

Penal Code section 236.1, subdivision (c), states, in relevant part: "A person who causes, induces, or persuades, or attempts to persuade, a person who is a minor at the time of the commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of Section 266, 266h, 266i, 266j, 267, 311.1, 311.2, 311.4, 311.5, 311.6, or 518 is guilty of human trafficking." The statute includes two alternate prongs: a completed act and an attempt. The clear language of the statute defines the victim under each prong as a minor. A contrary interpretation contorts the English language. The phrase "a person who is a minor" is the object of each verb in the preceding phrase in the subdivision. Stated another way, "attempt" is a verb acting on the object, "a minor."

Therefore, an essential element of each prong of the statute is a victim who is a minor. As stated by the majority opinion of the Court of Appeal, emphasizing the definition of victim contained in the subdivision: "The plain terms of section 236.1(c) include as a required element that the victim must

be 'a person who is a minor at the time of the commission of the offense.'" (*People v. Moses* (2019) 38 Cal.App.5th 757, 758, rev. granted. Nov. 26, 2019 (Case No. S258143.)[1] "A reviewing court may not add language to a statute [citation omitted]. So too we cannot subtract language from section 236.1(c)." (*Id.*, at p. 765.)

The interpretation of subdivision (c) in the opinion below is consistent with the unanimous reasoning of Division Four of the First Appellate District in *People v. Shields* (2018) 23 Cal.5th 1242, 1244-1245, 1252-1258, holding that human trafficking of a minor, as defined by subdivision (c), requires a minor. (*People v. Moses, supra,* at pp. 761-767.) The facts and procedural history in *Shields* are similar to appellant's case. Shields accepted a request on social media to become a friend of a fictional 17-year-old prostitute. The fictional person was created by an adult police detective. Shields encouraged the fictional person to work for him in the commercial sex trade. Police arrested Shields at a place where Shields had arranged to meet the fictional person. (*People v. Shields, supra,* at pp. 1244-1247.) A jury convicted Shields of "human trafficking of a minor for a sex act, pandering, and attempted pimping of a minor over the age of 16." (*Id.*, at p. 1248.) The human trafficking count was based on the language in section 236.1, subdivision (c), criminalizing an attempt to cause, induce or persuade a person who is a minor to engage in commercial sex. (*Id.*, at pp. 1249-1250,

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[1] In a divided opinion filed by a different panel of the same Division that decided *Moses,* the Court of Appeal disagreed with the *Moses* majority and affirmed a conviction for violation of Penal Code section 236.1, subdivision (c), based on facts similar to this case. (*People v. Clark* (2019) 43 Cal.App.5th 270, rev. granted. 3-11-20, deferred pending consideration and disposition of *Moses*. (Case No. S260202; cited pursuant to Rule 8.1115(e)(2).)

1253.) The *Shields* Court held "the absence of an actual victim precludes a conviction for the completed offense of human trafficking of a minor." (*Id.*, at p. 1253.)

Respondent interprets the attempt prong of the statute by treating the "person who is a minor" language as not adding a required element. Instead, respondent relies solely on the elements required to prove an attempt under the general law governing attempts, which does not require an actual victim. (Respondent's Opening Brief on the Merits (hereinafter "OBM") 26-27.) An attempt under the general law requires two elements, specific intent to commit the target offense, and a direct but ineffectual act toward the commission. (Pen. Code § 21a.) Respondent cites examples of cases involving attempts that either did not involve an actual victim or did not identify a victim: *People v. Reed* (1996) 53 Cal.App.4th 389, rev. den. 3-12-97, and *People v. Herman* (2002) 97 Cal.App.4th 1369. (OBM 26-27.)

Respondent's reliance on *Reed* is misplaced. In *Reed*, the defendant placed an ad in a magazine seeking sexual relations a woman of any age, race or size. He included a photo of a nude male having an erection, but with the male's face blocked out. A sheriff's detective began a correspondence with the defendant. The detective represented himself as a woman looking for a man to educate her daughters, aged 12 and 9. After additional correspondence about what the defendant wanted, the detective enlisted the aid of a female deputy sheriff to pose as the mother and telephone the defendant. (*Id.*, at pp. 393-395.) After additional correspondence and telephone communications, the female deputy telephoned the defendant and arranged a meeting at a motel. The female deputy was in one room while the detective monitored the meeting from an adjoining room using surveillance equipment. The defendant came to the motel room and talked with the deputy

about what he would do with the girls. This included reference to intercourse. After the deputy asked if he brought anything with him, the defendant retrieved items from his car, including sex toys, vibrators, dildos and lubricating jelly. After the deputy asked the defendant if he was prepared to meet the girls, the defendant said that is why he came. She led him into the adjoining room where the detective arrested him and feigned the arrest of the deputy. (*Id.*, at p. 395.)

The defendant in *Reed* was convicted of attempted violation of the molestation statute (Pen Code §§ 664/288, subd. (a)). (*Id.*, at p. 393.) The Court of Appeal rejected his argument that there can be no attempt to molest a child without an actual child victim. (*Id.*, at pp. 396-397.) The Court held the defendant's acts supported conviction of attempt because the defendant harbored a specific intent to commit the crime and a fact finder could reasonably find his actions went beyond mere preparation. (*Id.*, at pp. 397-399.)

The facts and analysis in *Reed* do not apply to appellant's case. Reed was not convicted of a completed violation of the molestation statute. Unlike the defendant in *Reed*, appellant was not charged under section 664.

Respondent's reliance on *Herman* is also misplaced. The part of the *Herman* opinion dealing with attempt involved attempted lewd conduct on multiple victims. The Court of Appeal held the evidence was sufficient to convict the defendant of attempted lewd acts even without an attempt to touch the victims. The defendant made vulgar phone calls to the victims, made various sexual proposals to the victims and asked victims to meet him at a park. The jury also heard evidence the defendant molested his stepdaughters thirty years earlier. The evidence supported a finding of acts constituting steps toward execution of the defendant's criminal intent. (*Id.*, at pp. 1385-

1392.)

The facts and analysis in *Herman* do not apply to appellant's case for the same reason *Reed* does not apply. The crimes at issue were attempts to violate Penal Code section 288, not completed violations. In addition, *Herman* involves prosecution for attempts directed at actual victims. (*People v. Herman*, *supra,* at p. 1385.)

Respondent disputes the Court of Appeal majority's discussion of the plain language of the statute by arguing the court and appellant "artificially bisect the operative statutory language and read it in an unnatural manner so that the attempt language is a stand-alone requirement that does not modify the supposedly separate requirement of an actual minor." (OBM 36.) Respondent notes that, while an attempt traditionally requires criminal intent an ineffectual act toward the crime, the majority adds an element that the victim be a minor. Respondent's analysis is "attempts" is a transitive verb. The object of the verb is a minor. Therefore, respondent states the clauses must be read "as part of a single grammatical unit." (OBM 37.) From this, respondent concludes the statute does not require an attempt plus the additional element of the existence of a minor. (OBM 37-38.) Respondent gives an example of the phrase "She smells the pizza" and suggests dividing the verb from the object leaves an incorrect reading of the phrase. (OBM 37-38, fn. 5.)

Contrary to respondent's interpretation, the Court of Appeal majority's analysis is consistent with the plain wording of subdivision (c). A person who is a minor is a necessary element. An example that is more appropriate than respondent's pizza example would be a case where "she smells pizza" but there is no pizza.

Appellant is not isolating the verb from the object. On the contrary,

the language of the statute adds the element that the victim be a person who, at the time of the commission of the offense, is a minor. The operative verbs apply to each prong of the statute. (*People v. Moses, supra,* at p. 765.) The attempt prong of subdivision (c) "is distinct from the separate crime of attempt because a completed violation of the statute requires a person under the age of 18 while an attempt to violate the statute does not." (*People v. Shields, supra,* at p. 1257.)

The additional element of an actual minor was added by the electorate when it adopted the statute by initiative. (*People v. Moses, supra,* at p. 763, citing *People v. Shields, supra,* at p. 1249.) "The words chosen by the enacting body best indicate what the stature means. (*People v. Moses, supra,* at p. 765, citing *People v. Ramirez* (2010) 184 Cal.App.4th 1233, 1238, rev. den. 9-15-10.) As explained by Presiding Justice O'Leary, agreeing with the reasoning of *Shields* and the *Moses* majority in her dissenting opinion in *Clark,* the unambiguous wording of the statute requires evidence of an actual minor to sustain a conviction under either prong of the statute. (*People v. Clark, supra,* at pp. 298-300, dis. opn. of O'Leary, P.J.).) "[I]t is not the defendant's unsuccessful efforts to cause, induce, or persuade a minor to engage in a commercial sex act that prevents the crime from being completed, it is the nonexistence of a minor, a necessary element of each prong." (*People v. Clark, supra,* at p. 300, dis. opn. of O'Leary, P.J.).)

B. Penal Code section 236.1, subdivision (c), is not analogous to cases cited by respondent punishing an attempt the same as a completed act

Penal Code section 236.1, subdivision (c), does not incorporate broader principles of attempt jurisprudence. The issue in this case is one of sentence structure, not whether the statute punishes an attempt the same as a

completed crime.

Respondent relies on statutes providing for the same punishment for a completed crime and attempt to commit that crime. Respondent directs this Court to three examples: attempt to escape from custody, preventing or dissuading a witness or victim, and federal law punishing attempt to entice a minor for illegal sexual activity. (OBM 28-33.) As appellant explains herein, these cases are distinguishable.

Respondent relies on cases involving attempt to escape from custody. (OBM 29-30, citing *People v. Gallegos* (1974) 39 Cal.App.3d 512, 515-518, and *People v. Bailey* (2012) 54 Cal.4th 740, 749-751.) These cases did not hold, nor did the prosecution claim below, that escape statutes apply to someone who attempts an escape while falsely believing they are in custody in a facility listed in the statute. (2 CT 408-410.) *Gallegos* involved the intent required to violate Penal Code section 4532, subdivision (b), which proscribes escape or attempt to escape from certain penal institutions. The Court of Appeal held, while escape is a general intent crime, an attempt to escape is a specific intent crime. The court agreed with the defendant that the jury should have been instructed an attempt requires a specific intent and a direct but ineffectual act toward commission of the crime. (*People v. Gallegos, supra,* at pp. 516-517.) Respondent focuses on language rejecting the prosecution's argument that only a general intent was required because the punishment for attempted escape was specifically provided in section 4532. (OBM 29.) In *Bailey,* this Court considered Penal Code section 4530, subdivision (b), which also proscribes escape or attempt to escape from a specified institution. (*People v. Bailey, supra,* at pp. 748.) This Court agreed with *Gallegos* on the issue of specific intent. (*Id.,* at pp. 749-750.) The prosecution in *Bailey* proceeded on the theory there had been a completed

crime. The court did not instruct the jury with attempt as a lesser included offense of escape. (*Id.*, at pp. 745-746, 752.) This Court held, under the elements test, attempt to escape is not a lesser included offense because the attempt requires proof of intent. Therefore, if evidence of a completed crime is insufficient, a reviewing court could not order the judgment modified to an attempt conviction. (*Id.*, at pp. 750-751.)

Nothing in *Gallegos* or *Bailey* holds use of the word "attempt" in a statute necessarily incorporates broader attempt law jurisprudence. Section 236.1, subdivision (c), differs from section 4532 in that the intent requirement is stated in the attempt prong of human trafficking, but not for the attempt prong of escape. For that reason, the *Gallegos* Court looked beyond the statute and considered collateral authority relating to attempts in general and this Court in *Bailey* considered the attempt language in section 4530 as written in that statute. By contrast, the *Shields* Court explained the intent required to commit human trafficking of a minor is included in the statute itself, not in collateral authority. (*People v. Shields, supra,* at p. 1250.)

Respondent relies on cases interpreting Penal Code section 136.1, subdivision (a)(2), a section proscribing preventing or dissuading a witness or victim. (OBM 31-32, citing *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1519 (each attempt is a separate crime) & *People v. Foster* (2007) 155 Cal.App.4th 331, 335, rev. den. 12-19-07 (the law is intended to include threats to a witness by others on behalf of the crime perpetrator).) The statute punishes a person who attempts an act described in the statute "without regard to success or failure of the attempt." (Pen. Code § 136.1, subd. (d).) The act must be directed at a witness or victim. (Pen. Code § 136.1, subds. (a) & (b).)

These cases do not hold the statute can be violated if someone

attempts to prevent or dissuade a decoy who is not a victim or witness. Respondent compares the crime in those cases to Penal Code section 236.1, subdivision (c), because the crime of attempting to persuade a witness is complete once the defendant communicates with an intermediary, even if the communication never reaches a victim or witness. (OBM 31-32.) In the opinion below, the Court of Appeal explained how the two statutes are not analogous because section 236.1, subdivision (c), on its face, requires a victim who is a minor at the time of the crime, while section 136.1 does not require any special definition of victim. Respondent's argument has the effect of deleting "a person who is a minor at the time of the offense" from section 236.1, subdivision (c). (*People v. Moses, supra,* at p. 766.) Respondent focuses on the absence of a requirement that the communication reach an intended victim, while ignoring the definition of the victim included in the statute. As the Court of Appeal explains: "Such an interpretation here would be akin to paring from statutes designed to protect peace officers the element that the victim must be a peace officer." (*People v. Moses, supra,* at p. 766, citing Penal Code §§ 241, subd. (c), & 243, subd. (b).) *Foster* illustrates the difference. In *Foster,* the Court of Appeal explained the Legislature could have adopted a narrow definition of attempt "by requiring that the act be committed in the presence of the witness or that the commission be personally delivered by the defendant." (*People v. Foster, supra,* at p. 337.) That is what the electorate did when enacting section 236.1, subdivision (c).

Respondent relies on cases interpreting a federal statute criminalizing persuading or attempting to persuade a minor to engage in prostitution or sexual activity. (18 U.S.C. § 2422, subd. (b).) Respondent cites cases holding an actual minor is not required for an attempt conviction under that

statute. (OBM 32-33.) Instead of including the word "attempt" on the list of verbs initially directed at the object "a person who has not attained the age of 18 years," section 2422, subdivision (b), adds "attempts to do so" after the description of the completed crime.

Appellant acknowledges federal courts have not separated the prongs in section 2422, subdivision (b), as did the court below or the *Shields* Court when interpreting Penal Code section 236.1, subdivision (c). There are two reasons this Court should not apply the same approach to section 236.1, subdivision (c). First, the holding of the federal cases must be considered in light of federal jurisprudence on the law of attempt. The analysis of mens rea used by the federal courts, if applied to the conduct at issue in this case, would have supported charging appellant under Penal Code sections 21a/664. No similar option is available under federal law. Unlike state law, "[t]here is no general federal 'attempt' statute. A defendant therefore can only be found guilty of an attempt to commit a federal offense if the statute defining the offense also expressly proscribes attempt." (*United States v. Hopkins* (9th Cir. 1983) 703 F.2d 1102, 1104, cert. den. (1983) 104 S.Ct. 299; *United States v. Joe* (10th Cir. 1972) 452 F.2d 653, 654, cert. den. (1972) 92 S.Ct. 1797; see also *United States v. Sineneng-Smith* (9th Cir. 2018) 910 F.3d 461, 482; *United States v. Chi Tong Kuok* (9th Cir. 2012) 671 F.3d 931, 941.) Instead of enacting a general attempt statute, Congress has outlawed the attempt to commit some federal crimes on a selective basis. The addition of an "attempt" prong at the end of section 2422, subdivision (b), was the only method available to Congress to punish an attempt. (*United States v. Hite* (D.C. Cir. 2014) 769 F.3d 1154, 1162 (involving a conviction under18 U.S.C. § 2422, subd. (b) based on communication with an adult intermediary).)

Second, federal courts have treated a defendant's mental state as the

dispositive issue rather than the plain wording of the statute. Federal courts interpreting section 2422, subdivision (b), have focused only on the issue of mens rea. Rejecting the defense of factually impossibility, the cases on which respondent relies hold an act falls within the attempt part of the federal statute if the defendant harbors the guilty mind required by the statute and engages in conduct constituting a substantial commission of the crime. (See *United States v. Lee* (11th Cir. 2010) 603 F.3d 905, 912-913; *United States v. Cote* (7th Cir. 2007) 504 F.3d 682, 686; *United States v. Pierson* (8th Cir. 2008) 544 F.3d 933, 939; *United States v. Helder* (8th Cir. 2006) 452 F.3d 751, 753-756; *United States v. Meek* (9th Cir. 2004) 366 F.3d 705, 719-720; *United States v. Root* (11th Cir. 2002) 296 F.3d 1222, 1228; *United State v. Franer* (5th Cir. 2001) 251 F.3d 510, 513.) A defendant's mental state should not be dispositive if there is no actual victim under age 18. The federal cases, in effect, ignore the absence of an element required to violate the attempt prong of the statute. The Ninth Circuit agreed in *Meek* that "a person who has not achieved the age of 18 years" is the object of the verbs preceding that part of the statute. (*United States v. Meek, supra,* at p. 718.)

For the foregoing reasons, the other statutes on which respondent relies are not analogous to section 236.1, subdivision (c)

C. Inclusion of "mistake of fact" language in Penal Code section 236.1, subdivision (f), does not eliminate the specific requirement in subdivision (c) of an attempt directed at a person who is a minor

Subdivision (f) of section 236.1 provides: "Mistake of fact as to the age of the victim of human trafficking **who is a minor at the time of the commission of the offense** is not a defense to a criminal prosecution under this section." (Emphasis added.) Any doubt about the plain meaning of language in subdivision (c) requiring the victim to be under age 18 should be

put to rest by the clear statutory intent not to allow a mistake of fact defense when the defendant mistakenly believes the victim is an adult. Although subdivision (f) eliminates a defense, subdivision (f) does not eliminate the specific element in subdivision (c) requiring the victim to be a minor. (*People v. Moses, supra,* at p. 762; *People v. Shields, supra,* at p. 1250.) Subdivision (f) does not apply to the fact of this case.

Respondent argues the mistake of age defense applies when the victim is not a minor. (OBM 43-44.) In other words, respondent asserts factual impossibility concerning the victim's age does not apply to subdivision (c). (OBM 47-48.) Respondent states:

> "a defendant can still claim mistake of age where the minor does not exist, and is therefore not 'a minor at the time of the commission of the offense,' as in the case of a police sting operation. And this allowance makes perfect sense. In the case of an attempt to persuade a non-existent, imaginary victim, it is reasonable to require a higher level of intentionality to traffic a minor. While it may well be the case that for completed acts of sex trafficking a defendant bears the risk that the victim is actually a minor, and therefore the defendant cannot claim a mistake of age, different considerations apply in the context of a mere inchoate crime." (OBM 43.)

Respondent concludes: "Subdivision (f) applies to both completed acts of sex trafficking and attempts to sex traffic under subdivision (c)." (OBM 43.) As support, respondent repeats the analogy to escape statutes providing for general intent for completed crimes but specific attempt for attempted crimes. (OBM 43-44.)

Respondent interprets subdivision (f) as stating something it doesn't state. The subdivision is silent about the opposite mistake of fact – a defendant who thinks an adult is a minor. The language of the statute is clear that the law is intended to punish an attempt to traffic a minor the same as the substantive crime of human trafficking only if the victim or intended victim is a minor. If the intent was to include the opposite mistake of fact, that language could have been made part of the statute. Under the maxim *expressio unius est exclusio alterius*, the enumeration of things to which a statute applies is presumed to exclude things not mentioned. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852; *People v. Whitmer* (2014) 230 Cal.App.4th 906, 917-918.)

The Court of Appeal explained "the plain language of subdivision (f) establishes that the electorate intended a different meaning for 'attempts' in section 236.1(c) than for an 'attempt' under section 21(a) because the mens rea for the two crimes are different. Under subdivision (f), the perpetrator need not harbor *any* specific mental state regarding the age of his intended victim." (*People v. Moses, supra,* at p.764, italics in original.) "Under subdivision (f), the defendant's mental state regarding the victim's minority or majority is immaterial." (*Ibid.*)

Respondent argues subdivision (f) does not create a defense of impossibility that would be unavailable for the crime of attempt. Relying on the majority opinion in *People v. Clark*, respondent argues a mistake of age defense "is not co-extensive with the mens rea of specific intent." (OBM 47.) The argument is that, even if a mistake of age defense is not available, the prosecution would still have to prove the defendant intended to cause, induce or persuade a minor. (*People v. Clark, supra,* at p. 285.)

Subdivision (f) gives broader protection to potential victims by

eliminating the defense that the defendant believed a child was an adult. (*People v. Moses, supra,* at p. 764; *People v. Shields, supra,* at p. 1537.) "If a perpetrator targeted a person who was actually a minor, but the jury believed he intended to traffic an adult, and therefore his conduct did not meet section 21a's specific intent threshold, such a mistake *would be* a defense to prosecution under section 236.1(c)'s attempt prong – contrary to the electorate's express direction. By expressly foreclosing this defense, the electorate closed the door of the Attorney General's argument." *(People v. Moses, supra,* at p. 764, italics in original.)

It is not the role of a reviewing court to judge the wisdom of a distinction made by the Legislature when drafting a statute (*People v. Ward* (1998) 62 Cal.App.4th 122, 129), or the voters when enacting a statute (*People v. Superior Court (Cervantes), supra,* at p. 2014; *People v. Rizo, supra,* at p. 685). "Uncertainty as to the reason for the distinction that the Legislature drew is not the same as uncertainty as to whether a distinction was drawn at all. Our role is only to determine whether a distinction exists, not to judge the wisdom of that distinction." (*People v. Ward, supra,* at p. 129.) In *Ward* the Court of Appeal went on to explain why a reviewing court is bound by statutory language as drafted, even if the court believes the language should be changed. "By virtue of the separation of powers prescribed by the California Constitution, courts are not empowered to rewrite statutes. [Citation omitted.] We would be engaging in judicial activism were we to 'ignore the language employed by the Legislature merely because of subjective evaluation that a differently worded statute would more effectively achieve the statutory goal.'" (*Ibid.,* quoting *Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1071, fn. 20.)

II.

THERE IS NO HISTORICAL BASIS FOR ASSUMING THE ELECTORATE INTENDED TO INCORPORATE "ATTEMPT" WITHIN THE MEANING OF PENAL CODE SECTION 21A INTO PENAL CODE SECTION 236.1, SUBDIVISION (C)

The version of Penal Code section 236.1 charged in this case was added by voter initiative. (Prop. 35, § 6, Californians Against Sexual Exploitation Act (CASE) as approved by voters, Gen. Elec. (Nov. 6, 2012).) The legislative history does not support the conclusion that the voters intended the "attempt" prong in subdivision (c) to authorize conviction of a defendant based only on the elements of the crime of attempt in Penal Code section 21a.

A. Principles of statutory construction do not support finding the voters intended something not included in the plain wording of the statute

This Court should decline to assume the voters intended something not included in the language of the statute. The first goal of statutory construction "is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning." (*People v. Valladoli* (1996) 13 Cal.4th 590, 597, citing *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 763, & *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) "The plain language of the statute establishes what was intended by the Legislature." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 937, citing *People v. Ramirez* (1995) 33 Cal.App.4th 559, rev. den. 6-1-95 for the proposition that "it is unnecessary to look beyond the plain words of the statute to determine intent . . ." see also *Lungren v. Deukmejian, supra,* at p. 735 & *People v. Whitmer, supra,* at p. 917.) In other words, when the words of a statute are clear, there is no need

for courts to look behind the words to discern legislative intent and courts should not indulge in such analysis. (*People v. Overstreet* (1986) 42 Cal.3d 891, 895; *In re Lance W.* (1985) 37 Cal.3d 873, 886, rehng. den. 3-21-85.)

The same principles of statutory construction courts apply to legislation also apply when a court is asked to interpret a voter initiative. (*People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 2014, rev. den. 7-9-14; *People v. Rizo* (2000) 22 Cal.4th 681, 685.) The text enacted by the voters is the most reliable indicator of the intended purpose. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933, rehng. den. 11-1-17; *In re Mohammad Mohammad* (2019) 42 Cal. App.5th 719, 725.)

Respondent contends the electorate intended to incorporate the general law governing criminal attempts (Pen. Code § 21a) into subdivision (c), thus making the existence of an actual minor unnecessary. (OBM 25-28.) But as support for this interpretation, respondent focuses on the general goals the proponents of the proposition sought to achieve, not on evidence of an intent to incorporate the general law of attempt. Respondent observes the intent when enacting the statute was to provide greater protection for minors, combat online predators, increase penalties and to make the crime easier to prove when the victim is a minor. (OBM 21-24.)

Respondent's approach requires this Court to look beyond the plain words of the statute and incorporate a reference to Penal Code section 21a not mentioned in the statute. The electorate added "person who is a minor" as a required element. That language was not added by either the court below or the *Shields* Court. (*People v. Moses, supra,* at p. 763.)

B. The ballot description and arguments presented when Proposition 35 was on the ballot do not support finding the voters intended to incorporate Penal Code section 21a

The ballot materials accompanying Proposition 35 do not refer to any version of the word "attempt" in the summary prepared for the voters by the Attorney General, nor is the word "attempt" used in the summary prepared by the Legislative Analyst or in the ballot statements presented for and against the proposition. (*People v. Moses, supra,* at p. 763, & fn. 6, citing Voter Information Guide, Elec. (Nov. 6, 2012) initiative text and accompanying materials at <https.//vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf> [as of July 24, 2019], archived at <https://perma.cc/S87E-QZBC>.) "Had the drafters of the initiative sought to include as potential victims, persons other than minors, different wording would have been used. For example, the statute could have prohibited the same acts when directed towards a minor, *or a person who the defendant subjectively believes is a minor*. Without a minor, it is factually impossible to violate the Attempted Act Prong of the statute, because the victim's age is a necessary element of both prong prongs of the statute." (*People v. Clark, supra,* at pp. 299-300 (dis. opn. of O'Leary, P.J., italics in original).)

Respondent assumes the fact that voters intended subdivision (c) to protect minors supports an inference the voters intended the subdivision to apply in the absence of a victim who is a minor. (OBM 40-42.) Absent something in the ballot materials about attempt, the plain language of the statute supports the reasoning of the majority in the opinion below.

Respondent speculates the electorate may not have wanted to expand the statute "by opening the door to attempt offenses based on what a defendant should *reasonably* have known regarding the victim's age, as

opposed to what he *actually* believed." (OBM 39.) Respondent suggests instead the electorate included subdivision (f) (mistake of age is not a defense if the victim is a minor) removing certain defenses regarding belief in the victim's age while, according to respondent, "retaining other defenses that would apply only in the context of a sting operation involving a non-existent minor." (OBM 39.) Respondent offers a comparison to Proposition 83, which in 2006 added Penal Code section 288.3 (contact of a minor with intent to commit a sexual offense) and includes attempting to contact a person the defendant "knows or reasonably should know that the person is a minor" but does not include a mistake of age defense. (Pen. Code § 288.3, subd. (a).) Attempts under section 288.3 are punished with the reduced penalties provided in Penal Code section 664. From this, respondent assumes the voters intended to punish section 288.3 using a reasonable person standard. (OBM 39-40 & 51-52, citing *People v. Korwin* (2019) 36 Cal.App.5th 682, 690.)

That the voters enacted section 288.3 to include a defense of reasonable mistake of age has no bearing on the issue in this case. Subdivision (f) in section 236.1 does not apply to this case because subdivision (f) refers to the mistaken belief a minor is an adult. (See Arg. I-C, *post.*) The *Korwin* Court distinguished section 288.3 from section 236.1 and cited *Shields* for the proposition that the attempt prong of subdivision (c). by its plain terms, requires a victim to be a person under age 18, while the separate crime of attempt does not. (*People v. Korwin, supra,* at p. 689, citing *People v. Shields, supra,* at p. 1257.)

C. The goal of punishing defendants who attempt to persuade an adult decoy is satisfied by charging and punishing such conduct under Penal Code sections 21a/664

Respondent claims the interpretation of the statute asserted by appellant, the court below and the *Shield's* Court frustrates the voters' intent. Respondent's claim is the history and text of section 236.1 reveal an intent of punish those who attempt to sex traffic children. (OBM 21-24.)

The intent identified by respondent is satisfied by applying subdivision (c) to an attempt directed at an actual person under age 18 and by applying Penal Code sections 21a and 664 in a case where a defendant attempts to persuade an adult decoy. Both the court below and the *Shields* Court recognize conduct similar to that alleged against appellant may be charged as an attempt under Penal Code section 21a. (*People v. Moses, supra,* at p. 762; *People v. Shields, supra,* at pp. 1256-1257.)

The *Shields* Court explains the difference between the crime of attempt and a violation of section 236.1, subdivision (c), when the violation is based on the attempt prong in subdivision (c). "[T]he attempt prong of the statute is distinct from the separate crime of attempt because a completed violation of the statute requires a person under the age of 18 while an attempt to violate the statute does not." (*Id.,* at p. 1257.) "An attempt under section 21a does not require a victim." (*People v. Moses, supra,* at p. 763.) After stating "factual impossibility is not a defense to a charge of attempt" (*People v. Shields, supra,* at p. 1256, citation omitted), the Court said "this principle does not apply here, where appellant was charged with and convicted of the completed offense of human trafficking of a minor. In this context, the fact that there was no actual minor compels the conclusion that appellant did not violate section 236.1(c) because the third element of that offense cannot be

proven." (*Id.,* at pp. 1256-1257.)

Contrary to respondent's argument, this approach does not create a crime of attempt to commit an attempt. (OBM 52.) It is an attempt where the completed crime fails because there is no underage victim. As stated in *People v. Shields, supra,* "The fact that a criminal defendant's intended victim is an imaginary person or a law enforcement officer posing as a minor does not mean the defendant committed no crime. But the crime is an attempt rather than a completed offense." (*Id.,* at p. 1256.)

The prosecution's theory in appellant's trial was the attempt prong in subdivision (c) precludes a charge under the general attempt statute and thus precludes punishment in accordance with Penal Code section 664. (2 CT 406-412.) But the same prosecutor's office charged conduct similar to appellant's conduct (an adult decoy posing as a minor on the internet) as an attempted violation of Penal Code section 236.1, subdivision (c), in at least one other case. (*People v. Peterson* (Court of Appeal No. G053721; Supreme Court No. S248105); Orange County Superior Court No. 15NF1847)[2]

For the foregoing reasons, there is no historical basis to conclude the voters intended "a person who is a minor" in subdivision (c), to be anything other than an additional element not required for an attempt under section 21a, or that subdivision (c) precludes charging a defendant under section 21a if there is no victim under age 18.

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[2] Appellant is separately asking this Court to judicially notice the file in *People v. Peterson* under Evidence Code section 452, subdivision (d), for the purpose of noting what the Orange County District Attorney charged in that case. Appellant is not citing or relying on the analysis contained in the unpublished opinion filed by the Court of Appeal in that case.

III.

THE VIOLATION OF PENAL CODE SECTION 236.1, SUBDIVISION (C), MAY NOT BE TREATED AS A VIOLATION OF PENAL CODE SECTION 21A IN THIS CASE BECAUSE THE JURY INSTRUCTIONS DID NOT REQUIRE A FINDING APPELLANT SPECIFICALLY INTENDED TO TARGET A MINOR

Appellant's conviction under Penal Code section 236.1, subdivision (c), may not be modified to a conviction of a lesser included offense. Although the conduct at issue in this case could have been charged under the general criminal attempt statute (see Arg. II, *ante*), a violation of the general attempt statute may not be treated as a lesser included offense in this case. Both the *Shields* Court and the court below explains doing so would require the court to make factual findings the jury did not make. (*People v. Moses, supra,* at pp. 766-767; *People v. Shields, supra,* at pp. 1257-1258, citing *People v. Robinson* (2016) 63 Cal.4th 200, 211.)

An attempt under section 21a does not require the attempt be directed at an actual person under age 18, but violation of section 236.1, subdivision (c), does. In *Shields,* as in appellant's case, "the two distinct offenses were conflated and thus the jury was asked to decide if appellant committed a crime that it was impossible for him to commit." (*People v. Shields, supra,* at p. 1257.) The *Shields* Court noted the jury was instructed on the elements of attempt, "but the specific instruction on the count 1 charge told them that a mistake about the victim's age was not a defense to the charge. Because we cannot conclude that the jury necessarily found that appellant actually intended to traffic a minor, we cannot modify this conviction by reducing it to an attempt to violate section 236.1(c)." (*Id.,* at pp. 1257-1258.)

In appellant's case, the instruction on the law relating to section 236.1, subdivision (c), also summarized the elements of attempt. (2 CT 457-458; 3 RT 666-668; CALCRIM No.1244.) The court also read the mistake of age language to the jury. Therefore, two distinct offenses were conflated and count one must be reversed. The instructions "did not require the jury to determine whether Moses specifically intended to target a minor, as would be required if a violation of section 21a were a lesser included offense of section 236.1(c)." (*People v. Moses, supra,* at p. 767.) Count one should be reversed and appellant's case should be returned to the trial court for resentencing on the remaining counts.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be affirmed. The judgment as to count one should be reversed and the case remanded for resentencing on the remaining counts.

Respectfully submitted,

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Attorney for Appellant

WORD COUNT CERTIFICATION

I, Mark Alan Hart, am counsel for appellant. I hereby certify that the attached Appellant's Answer Brief on the Merits uses 13 point Times New Roman font and, in reliance on the word count of the computer program used to prepare this document, the word count of the body of this document, excluding tables, indices the attached appendices, and this Certification, is 9,005 words. The applicable word-count limit prescribed by Rule 8.520(c)(1) is 14,000 words. I certify under penalty of perjury that the foregoing is true and correct. Executed on March 20, 2020, at Northridge, California.

MARK ALAN HART
Attorney for Appellant

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY MAIL

RE: PEOPLE V. MOSES No. S258143

I, Mark Alan Hart, declare that I am a citizen of the United States over 18 years of age, and not a party to the subject cause; my business address is PMB 520; 9420 Reseda Boulevard, Northridge, California 91324. On March 20, 2020, I electronically served the Appellant's Answer Brief on the Merits, of which a true and correct copy is affixed, by e-serving from hart66134@gmail.com by 5:00 p.m. to:

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and I placed a copy thereof in a separate envelope for each addressee named hereafter, addressed to each addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States Mail by me at Northridge, California, on March 20, 2020. I declare under penalty of perjury that the foregoing is true and correct. Executed on March 20, 2020, at Northridge, California.

MARK ALAN HART, DECLARANT

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. MOSES**
Case Number: **S258143**
Lower Court Case Number: **G055621**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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Mark Alan Hart
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