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County of Los Angeles

OCT 13 2016

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, v. MUNIR UWAYDAH, et al. Defendants.	Case No.: BA425397 Case No.: BA435339 **PEOPLE'S OPPOSITION TO DEFENDANTS ARNOLD, FOLGAR AND GROSCOST'S MOTION TO DISMISS COUNTS 28-57; POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION**
PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, v. TATIANA ARNOLD, et al. Defendants.	Date: October 18, 2016 Time: 8:30a.m. Dept: 109

TO THE HONORABLE KATHLEEN KENNEDY, JUDGE OF THE ABOVE- ENTITLED COURT, COUNSEL FOR DEFENDANTS ARNOLD, FOLGAR AND GROSCOST, AND DEFENDANTS:

Please take notice that on October 18, 2016, or soon thereafter, in the above-mentioned court, the People will oppose the Defendants' Motion to Dismiss the money laundering and unlawful patient referral counts charged in Counts 11-27 and 28-57 of the Indictment in this case. This Opposition is based on the attached Statement of Facts, Points and Authorities, attached Declarations, and any other pleadings, records, files, documents, evidence, and argument, oral or written, that the Court may allow at the hearing of this motion.

Dated: OCTOBER 13, 2016

Respectfully submitted,
JACKIE LACEY
District Attorney of Los Angeles County

By Catherine Chon
Catherine Chon
Deputy District Attorney

I. INTRODUCTION

The defense arguments can be summarized as follows:

1. The money laundering and unlawful patient referral counts should be set aside because they were based on inadmissible hearsay: the People failed to establish a hearsay exception for the bank records that were admitted; and
2. The grand jury was improperly instructed on Labor Code section 3215.

The Court has previously ruled and the People have previously conceded, the People did not lay the proper foundation for the business records exception for the Farmers & Merchants Bank ("F &M") records introduced at the grand jury proceedings. However, the People are not introducing any of the bank records under the business records exception. The People contend that the checks and signature cards received as part of the bank records pursuant to a search warrant, are admissible as: non-hearsay operative documents to show the relationship between the defendants and evidence of payment for unlawful referral of patients (EC §1200); admissions of party (EC §1220); and as adoptive admissions (EC §1221).[1]

II. LAW AND ARGUMENT

A. The Indictment Will Not Be Set Aside If There Is Some Rational Basis That The Offense Was Committed By The Accused

A motion to dismiss under Penal Code section 995, whether directed to an indictment or an information, is governed by a single standard. Essentially, the superior court sits as a reviewing court. Thus, the court may not reweigh the evidence, or substitute its judgment as to the weight of the evidence or credibility of witnesses for that of the grand jury. Nor does the court resolve factual contentions. *People v. Pic'l* (1982) 31 Cal.3d 731,737; *Jackson v. Superior Court* (1965) 62 Cal.2d 521, 530; *Lewis v. Superior Court* (1990) 217 Cal.p.3d 379, 384. If there is *some evidence* to support the contention that an offense has been committed, the courts will

[1] The People submit as to Counts 11-27, Money Laundering, as to defendant Arnold.

not inquire into its sufficiency. *Somers v. Superior Court* (1973) 32 Cal.App.3d 961, 963; *Jackson*, supra, 62 Cal.2d at 525. (Emphasis added).

A grand jury, when deciding whether to bind a criminal defendant over to superior court, need only determine whether sufficient or probable cause exists to return an indictment. The grand jury need be convinced of merely such a state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. *Cummiskey v. Superior Court*, supra, 1026-1027.

Every legitimate inference that may be drawn from the evidence of the case must be drawn **in favor of the indictment**. *Jackson v. Superior Court*, supra, 62 Cal.2d at 530, emphasis added; *People v. Shirley* (1978) Cal.App.3d 424, 432. An indictment should not be set aside under Penal Code section 995 if there is some rational ground for assuming the possibility that an offense has been committed and that accused is guilty of it. *Bompensiero v. Superior Court* (1955) 44 Cal.2d 178, 183-184. Although there must be some showing as to the existence of each element of the charged crime, such a showing may be made by means of circumstantial evidence supportive of reasonable inferences. *Williams v. Superior Court* (1969) 71 Cal.2d 1144, 1148.

B. Evidence Of The Checks Contained In The Bank Records Are Admissible As Nonhearsay

Documents not offered for the truth of the matter asserted are, by definition, not hearsay. *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316. This includes checks, and even money orders. (See *United States v. Davis*, 596 F.3d 852, 856 ["[L]ike checks, money orders are not hearsay. They are legally operative documents with a meaning independent of the truth of the words they display…As 'verbal acts,' their significance 'lies solely in the fact that [they were] made, [so] no

issue is raised as to the truth of anything asserted.'"]) Hearsay is defined in Evidence Code Section 1200 as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." "Where 'the very fact in controversy is whether certain things were said or done and not ... whether these things were true or false, ... in these cases the words or acts are admissible not as hearsay[,] but as original evidence.' " 1 *Witkin, Cal. Evidence* (4th ed. 2000) Hearsay, § 31, p. 714, quoting *People v. Henry* (1948) 86 Cal.App.2d 785, 789. For example, documents containing operative facts, such as the words forming an agreement, are not hearsay. *People v. Jimenez* (1995) 38 Cal.App.4th 795, 802; *People v. Dell* (1991) 232 Cal.App.3d 248. The operative facts rule also applies in an action for fraud. *1 Witkin, supra*, Hearsay, § 33, p. 715 "In an action for ... deceit, the words spoken, written, or printed may be proved"; see *People v. Dell*, supra, 232 Cal.App.3d at p. 258, "words spoken by defendant to solicit prostitution are operative facts or verbal acts."

In *Jazayeri v. Mao,* appellants Mahshid Jazayeri and her husband David Rashidian, doing business as R & A Ranch, brought suit against respondents Susan Mao, her sons Dennis and Eric Mao, and their company, Mao Foods, Inc. The complaint alleged that appellants were in the business of raising chickens for sale and that they and respondents entered into an agreement under which appellants were to deliver a certain number of "live healthy" chickens weighing between five and six pounds, and respondents were to pay 50 cents per pound for the live healthy chickens delivered. According to the complaint, the overall weight of the chickens delivered was to be determined by weighing the delivery trucks and cages before and after the chickens were loaded. The complaint further alleged that the parties understood that some chickens would be dead on arrival (DOA) or otherwise unusable as food. The number of dead or unusable chickens was recorded on poultry condemnation certificates (PCCs) issued by food safety inspectors

working for the United States Department of Agriculture (USDA). Appellants alleged that the parties' contract permitted Mao Foods to deduct from the calculated weight of the delivered chickens the estimated weight of the DOA or otherwise unusable chickens. However, Mao Foods allegedly altered PCCs to show more dead or unusable chickens than were found by the USDA inspectors and, using the altered PCCs to justify their actions, deducted excessive amounts.

The Court ruled the altered PCCs given to the appellants by Susan Mao was admissible as nonhearsay. The document was not for the truth of the matter asserted—that the inscribed number of chickens were DOA or condemned by the USDA inspectors—but as direct evidence of the fraudulent statements made to appellants by respondents. "[T]his is a typical example of the nonhearsay use of an extrajudicial statement 'to prove, as relevant to a disputed fact in an action, that the ... hearer ... obtained certain information by hearing ... the statement and, believing such information to be true, acted in conformity with such belief.' [Citation.]" (*Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 947, 65 Cal.Rptr.3d 145, quoting *1 Jefferson*, Cal. Evidence Benchbook (2d ed. 1982) Hearsay & Nonhearsay, § 1.4, p. 57, italics omitted.)

Here, the checks that were written by defendants Arnold and Luke to defendants Folgar and Groscost are admissible not for the truth of what is written on the checks but to show defendants Arnold and Luke wrote a check to other defendants. The checks are admissible as non-hearsay operative documents to show the relationship between the defendants and direct evidence that defendant Arnold and Luke wrote checks to either defendants Folgar or Groscost's marketing company. The only requirement for the admissibility of the evidence is authentication.

"Authentication of a writing is required before it may be received in evidence." (EC § 1401, subd. (a); see *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525, ["Generally speaking,

documents must be authenticated in some fashion before they are admissible in evidence"].) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (EC § 1400.) "As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility." (*Jazayeri v. Mao*, 174 Cal.App.4th at 321.) See *People ex rel. Harris v. Sarpas*, (2014) 225 Cal.App.4th 1539, in which the trial court received in evidence the front and back sides of over 1,900 checks deposited into an account at Bank of America. The court received the exhibit in evidence for the limited purpose of establishing Bank of America deposited into the account of the payee defendant the amount of money that appeared on the face amount of the check. The court stated it was not receiving the checks under the business records exception to the hearsay rule but for the limited non-hearsay purpose of the above. The only question was that of authentication.

Evidence Code Section 1410 states "Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved."

Here, the checks and signature cards were provided by the banks pursuant to a search warrant. *V1: 139:10-25; V4: 527: 17-27.* The evidence was turned over to by the DAIs to SIA Ngo to analyze. *V4: 527:15-28; 528:1-9.* The checks appear to look like checks. Defendants Luke and Arnold are the authorized signers for the accounts from which the checks were written by defendants Arnold and Luke to defendants Folgar and Groscost's marketing firm.[2] The

[2] The signature cards that defendants Luke and Arnold signed for the accounts, GJ Exhibit 14, are admissible as party admissions. See below section "The Checks and Signature Cards Are Admissible as Party Admissions or Adoptive Admissions."

checks were drawn from accounts that defendants Luke and Arnold are authorized signers of and their signature is on the checks. Moreover, on the back of the checks the respective defendant who the checks were written to appear to have endorsed the check. *GJ Exhibits 14 and 16.* Defendant Groscost told investigators she was the owner of YDG marketing and had a contract with defendant Uwaydah for referrals of patients to his clinics for which she was paid. Based on the above, the checks were properly authenticated.

Moreover, Evidence Code Section 1414 states:

A writing may be authenticated by evidence that:

(a) The party against whom it is offered has at any time admitted its authenticity; or

(b) The writing has been acted upon as authentic by the party against whom it is offered."

Here, defendants Folgar and Groscost endorsed the checks written to them by defendants Arnold and Luke and acted as though the checks were authentic.

Therefore, the checks were properly authenticated. Hence, the checks are admissible as non-hearsay operative documents to show the relationship between the defendants and direct evidence that defendant Arnold and Luke wrote checks to defendants Folgar and Groscost's marketing company thereby engaging in the unlawful referral of patients.

C. The Checks And Signature Cards Are Admissible As Party Admissions Or Adoptive Admissions

Evidence Code Section 1220 states "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant…." "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." EC §1221. "Documents prepared by the opposing party are not subject to

exclusion under the hearsay rule, because they are admissions. 'Admissions of a party ...are received to prove the truth of the assertions; i.e., they constitute affirmative or substantive evidence that the jury or court may believe as against other evidence, including the party's own contrary testimony on the stand.' (*1 Witkin, Cal. Evidence*, supra, Hearsay, § 91, p. 794.) 'Express admissions may be oral or written.... Written admission are found in many types of informal and formal documents, and the fact that a writing is made pursuant to statute, e.g., an income tax return, does not preclude its use.' *(Id.*, § 92, p. 795; see, e.g., *Horton v. Remillard Brick Co.* (1915) 170 Cal. 384, 400, 149 P. 813 [defendant's financial documents, including profit and loss sheet and assets and liability account]; *StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 244, 126 Cal.Rptr.2d 754 [unaudited balance sheets presented to court and opposing party by counsel]; *Shenson v. Shenson* (1954) 124 Cal.App.2d 747, 752, 269 P.2d 170 [defendant's income tax returns]; *Sill Properties, Inc. v. CMAG, Inc.* (1963) 219 Cal.App.2d 42, 54–55, 33 Cal.Rptr. 155 [minutes of meeting of defendant's board of directors stating value of assets]; *Keith v. Electrical Engineering Co.* (1902) 136 Cal. 178, 181, 68 P. 598 [paper containing a statement of sales made by defendant and the dates of such sales "handed to plaintiff by defendant"].)" *Jazayeri v. Mao*, 174 Cal.App.4th at 325.

Here, the signing of the checks by defendants Luke and Arnold are admissions by them of the contents of the writing therefore admissible. Defendants Folgar and Groscost by endorsing the checks are adopting the "writing" therefore the evidence is admissible as adoptive admissions. When the evidence is viewed in totality the grand jurors had more than probable cause to believe the defendants were engaged in the crime of unlawful patient referrals. There was circumstantial and direct evidence that Folgar and Groscost's services were obtained for unlawful patient referrals. As shown below capping lists, large sums of money, and witnesses

testified as to such evidence. The grand jurors could logically infer that the checks written by defendants Arnold and Luke to Folgar and Groscost were for the unlawful patient referrals since there was no evidence that Folgar and Groscost worked in any other capacity for Frontline.

Defendant Arnold:

- Defendant Arnold became involved with the Uwaydah organization around 2008. *(V5: 689: 14-17).*
- Defendant Arnold was president of Controlled Health Management, an enterprise controlled by Dr. Uwaydah. The address for Controlled Health was the same location as Frontline Enterprise. *(V1: 166: 1-27; 174: 19-24).*
- Defendant Arnold was the agent for process for all Frontline Enterprise businesses. *(V1: 167: 22-25).*
- South Bay Surgical and Spine Institute ("SBSSI"), listing Munir Uwaydah as 100% owner, used defendant Arnold's law firm address as their business address. *(V1: 167-168).*
- Defendants Arnold and Luke with other charged and uncharged co-conspirators paid attorneys or middlemen ("cappers") illegal "kickbacks," or referral fees, in order to get patients to Frontline clinics. *(V1: 150: 18-28; 175: 20-28; 176: 1-15).*
- Albert Wong, an officer with the Department of Insurance, Fraud Division testified as an expert on "capping," unlawful patient referrals. He described what capping is and the factors indicative of capping: capping lists, type of business, reason for payments. (*V2: 203:1-28; 204: 1-25*).
- Grand Jury Exhibits 20, 21, 23 are indicative of defendants Groscost and Folgar engaging in capping. (*V2:205-234*).

- Defendant Arnold was the authorized signer on numerous bank accounts for Uwaydah and paid "cappers" Folgar and Groscost from those accounts. *(V4: 531: 10-23).*
- The attorneys, and/or the cappers would receive a premium (cash bonus) for the "surgery patients" from various co-conspirators. *(V1: 151: 1-9).*
- Esther Ros testified defendant Arnold worked with the various Dr. Uwaydah companies and eventually took over all the medical billing and patient referrals from 2008 to 2010. *(V2: 292: 5-27; 293: 3-27).*
- The attorneys, and/or the cappers would receive a premium (cash bonus) for the "surgery patients" from various co-conspirators. *(V1: 151: 1-9).*
- Uwaydah used cash to pay attorneys and Paul Turley would request a lot of cash for "marketing." Rosekelly took out cash from the accounts she was in charge of and gave it to Marisa Nelson, Kelly Park, Uwaydah or Paul Turley to give to lawyers. *(V5: 650: 8-28; 651: 1-12).*
- Defendant Arnold was in Uwaydah's inner circle. *(V5: 656: 15-28).*
- Rosekelly heard Uwaydah and defendant Arnold discuss and brainstorm about changing names to hide the true ownership of his companies to avoid the collection of judgments and to further the fraud that was going on. *(V5: 652: 18-270; 658: 1-9).* It wasn't the case of just Uwaydah telling defendant Arnold what to do; defendant Arnold would participate and figure out how to accomplish whatever their goal was. *(V5: 658: 1-9).*

Defendant Folgar

- Tony Folgar was Dr. Turley's friend and did marketing for Dr. Turley. "Marketing" includes bringing in patient cases from other attorneys. "Marketing" was the common way to refer to people who brought in patients from law offices. He brought in patients from

two different law offices, one of which was named Goldflam and Barth. (*V3: 311: 22-28; 312: 1-26*).

- There were more than ten "marketers" bringing in patients to Frontline during Witness Ros' tenure. Each had a specific goal to bring in a certain number of patients each month. Dr. Turley liked each to bring in accepted cases, potentially surgery candidates (*V3: 313: 4-12*).

- Tony Folgar and Yolanda Groscot were both "marketers" who brought referrals to Uwaydah clinics. (*V3: 314: 17-28; 315: 1-28; 316: 1-2*).

- Dr. Turley had a red book where he kept record of the amounts that he was providing to the attorneys or the marketers for the referrals that were coming in monthly. (*V3: 324: 10-24*).

- Capping lists, and cash in envelops with potential patient names were found at Folgar's residence. (*V3: 446-464*).

- Checks were written from Luke and Arnold to Folgar. (*V4: 584-591; Grand Jury Exhibit 14 and 22*).

Defendant Groscost

- Tony Folgar and Yolanda Groscot were both "marketers" who brought referrals to Uwaydah clinics. (*V3: 314: 17-28; 315: 1-28; 316: 1-2*).

- Groscost told Investigator Heinz she had a marketing company called YDG Marketing and that she had been in business since 2001. Her business consisted of one employee that answered phones and did data entry and herself who did field marketing to various law

offices. Her clients were medical offices that paid for her services to solicit law offices for business. (*V6: 841:4-11*).

- Groscost had a signed contract with defendant Uwaydah where he would pay her $10,000 per month in exchange for 20 to 30 patient referrals per month, and if she exceeded those numbers, then she would receive a bonus, or if the patients required surgery, then she would also receive a bonus above the $10,000. (*V6: 842:4-16*)

- Capping lists and/or cash were recovered from Groscost's home and business, and Location 13. (*V6:843 1-28; Grand Jury Exhibits 23 and 24*).

- Checks were written from Luke and Arnold to YDG, Groscost's marketing business. (*V4: 596-598; Grand Jury Exhibit 16 and 18*).

D. <u>The Grand Jury Was Properly Instructed On The Elements Of Labor Code § 3215 And Had Sufficient Probable Cause To Indict On The Charges.</u>

California Labor Code § 3215 states:

> *"Except as otherwise permitted by law, any person acting individually or through his or her employees or agents, who offers, delivers, receives, or accepts any rebate, refund, commission, preference, patronage, dividend, discount or other consideration, whether in the form of money or otherwise, as compensation or inducement for referring clients or patients to perform or obtain services or benefits pursuant to this division, is guilty of a crime." Labor Code § 3215.*

California Jury Instructions (*CALJIC & CALCRIM*) do not include jury instructions for Labor Code § 3215. Therefore, the Grand Jury Advisor instructed the jury from the language of the statute. The Instructions to the grand jury were read:

> "In order [sic] prove this crime, the People must prove that:

No. 1, the target offered, delivered, received or accepted a rebate, refund, commission, preference, patronage, dividend, discount or other consideration, whether in the form of money or otherwise;

No. 2, as compensation or inducement, for referring clients, or patients, to perform or obtain service [sic] benefits."
Grand Jury Transcript (BA435339), V6: 967:6-968:12.

Labor Code Statute § 3215 ends with the phrase, "pursuant to this division," however, this is not language that is required to be found true by the grand jury. In fact, no defense counsel has cited a single authority which mandates, or even suggests, that this language must be included as a distinct element which the jury must find to be true. The grand jurors would have no means to ascertain what "pursuant to this division" means, and certainly would have to be told that the division applies to Worker's Compensation. However, criminal statutes in California are replete with examples of legislative language that sets forth requirements for applicability of the statute, yet these same requirements are not elements of the respective jury instructions. Perhaps the best examples come from the Health and Safety Code (HS), such as HS §11377(a), commonly referred to as "Possession of Methamphetamine." That statute reads as follows:

11377. (a) Except as authorized by law and as otherwise provided in subdivision (b) or Section 11375, or in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f) of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in a county jail for a period of not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code.

As can be seen in the language of the statute, classifications, designations, and possible exclusions related to the applicability of the statute to various classes of people are explained. If one looks at the California Jury Instruction (CALJIC) for HS §11377(a) which is given to juries, one can notice a striking difference between the complexity of the statute and the simplicity of the jury instruction. CALJIC 12.00 reads, in relevant part, as follows:

> Defendant is accused in Count [ ] of having committed the crime of illegal possession of a controlled substance, a violation of section [11377] of the Health and Safety Code.
> Every person having previously been convicted of [a crime], namely [ ], who possesses methamphetamine, is guilty of a violation of Health and Safety Code section 11377(a).
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person exercised control over or the right to control an amount of [methamphetamine], a controlled substance;
> 2. That person knew of its presence;
> 3. That person knew of its nature as a controlled substance;
> 4. The substance was in an amount sufficient to be used as a controlled substance; and
> 5. That person had previously been convicted of the crime of [ ].

As can be seen, none of the qualifying language listed in the statute made its way into the jury instruction. This is because it is not the proper province of the jury to decide whether certain conduct applies to the complete legislative language of a statute, but rather to determine whether certain facts fit the appropriate elements of the crime.[3]

Assuming, arguendo, that the jury was required to be instructed that an element of the statute was that the referral must be for services or benefits within the worker's compensation system, there is no doubt that the jury would have still indicted on the charges. This is because there was no evidence that the payment for referrals were for anything but worker's

[3] According to the Use Note to CALJIC 12.00, "[I]t is not within the jury's province to determine whether or not a substance is a narcotic." (citing People v. Medina, 27 Cal.App.3d 473, 478). Notably, the instruction also leaves out other exclusionary language, and possible defenses, which are present in the statute.

compensation patients: Gordon Oard testified he is an investigator for Berkshire Hathaway, that is exclusively a Worker's Compensation insurance company. *V1:26-28.* James Fisher testified he was employed by the Adminsitrative Director of the Department of the Division of Workers'Compensation of the Department of Industrial Relations and testified about The Workers' Compensation Appeals Board. *V2: 2502-275.* Esther Ros testified she was hired by defendant Turley to be an intake coordinator for L.A. Health Partners/Frontline and provided evidence regarding capping by defendants Folgar and Groscost. *V2: 279-349.* She testified she has been working in Workers Compensation since 1999. *V2:279:12-19.* All the victims on the aggravated mayhem charges previously dismissed were all Workers Compensation patients. In other words, at best, the defense could argue that the grand jury was required to find that the payments reflected in Counts 28-57 were at least in some part reflecting a payment for a worker's compensation referral. But that is precisely what the grand jury did find.

E. The Grand Jury Instructions Need Not Be As Precise As Instructions Before A Trial Jury, And Misinstruction Will Not Give Rise To Setting Aside The Indictment Unless The Misinstruction Caused The Jury To Indict On Less Than Probable Cause.

The California Supreme Court has made it clear that "[a] grand jury need not be instructed with the same degree of precision that is required for instructing the trial jury." *Stark v. Superior Court* (2011) 52 Cal.4th 368, 407. The Defense may still base a PC §995 Motion to Dismiss on a claim of misinstruction of the grand jury, or a failure to instruct on a crucial element. *Stark v. Superior Court* (2011) 52 Cal.4th 368, 377; *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1306-1307.) However, unless the reviewing court concludes that the

misinstruction caused the grand jury to indict on something less than probable cause, the indictment will not be set aside. *Stark*, at 407; see also *Gnass*, at 1313.

In *Stark*, the defendant filed a motion to dismiss pursuant to PC §995, and argued that the prosecutor failed to instruct the grand jury on a requisite element of mental state, and that failure amounted to a "'misinstruction on the standard of proof...which effectively removed the element of mens rea from any independent assessment by grand jurors.'" *Stark* at 407. In addition, Stark claimed that the prosecutor's argument on the law "may have confused the grand jury and 'vitiated' the correct instruction" on the law. *Ibid.* at 409. Nonetheless, based on the entirety of the evidence, and the entirety of the instructions, the California Supreme Court ruled that both the failure to instruct, and any confusion caused by the prosecutor's comments on the law, was harmless and there was a sufficient record on which the grand jury could base its indictment. *Ibid.* at 407, 413. Thus, despite the court's acknowledgement that Stark could make his claims in his 995 motion, the court ruled that the arguments failed to meet the standard, i.e., the arguments failed to show that the grand jury indicted on less than probable cause.

Here, even if the Court were to find that the grand jury should have been instructed that they had to find that at least part of the payment reflected in Counts 28-57 were related to worker's compensation benefits or services, the fact is that that was the only reasonable conclusion that the jury could come to. So, like in Stark, based on the entirety of the evidence and instructions, any error in this particular instruction is harmless. This grand jury could not have indicted on less than probable cause because there was no other rational inference other that the fact that the referral payments in question were related to worker's compensation benefits and/or services.

III. CONCLUSION

For the reasons stated above, the People respectfully request that the Court deny the Defense Motion to Dismiss.

Dated: October 13, 2016

Respectfully Submitted:

Catherine Chon
Deputy District Attorney

PROOF OF SERVICE

I, Kennes Ma, declare under penalty of perjury, on October 13, 2016 a copy of this motion was emailed to the named attorneys below at their respective email addresses listed:

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