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1 moment, those who ascended to the dessert level experienced a so-called
2 “birthday” and received their payout. (RT 536.) Their payout was eight times
3 their initial gift. Therefore, if one initially purchased 1/8th of a plate for \$625, she
4 received a payout of \$5,000. If one initially purchased a full plate for \$5,000, she
5 received a payout of \$40,000. (CT Aug 25-26.) The “birthday girls” received their
6 payment directly from the women in the appetizer positions. (RT 534, 1174.)

7 Each four-level system was referred to as a “chart.” When a birthday
8 occurred, the charts split into two brand new charts and everyone moved up one
9 level. (RT 530; CT Aug 1.) In other words, of the women occupying the eight
10 appetizer plates, half then occupied the four soup and salad plates on the first new
11 chart while the other half occupied the four soup and salad plates on the second
12 new chart. (RT 529; CT Aug 25-26.) Likewise, of the women who had occupied
13 the four soup and salad plates, half occupied the two entrée plates on the first new
14 chart while the other half occupied the two entrée plates on the second new chart.
15 Finally, those previously in the entrée position on the old chart moved into the
16 dessert positions on the two new charts. (CT Aug 25-26.) At that moment, the
17 appetizer level remained vacant. (RT 530.) If or when the appetizer level filled up
18 completely, a birthday occurred on the new chart, which then split into two new
19 charts itself. (CT Aug 1.)

20 When a woman received her birthday payout, she had several options in
21 what to do with the cash. She could keep all of it. She could make a voluntary
22 donation to the charity WEAVE. (RT 1139.) She could “forfeit” a portion of the
23 cash she received onto the soup and salad level of a new chart with the hope of
24 eventually receiving a birthday payout from that investment. (RT 912.) Or she
could “sponsor” a new member by buying a spot for her with a portion of her
birthday proceeds. (RT 531.)

1 Accompanying the charts themselves were birthday tracking sheets, dinner
2 party tracking sheets, and birthday gifting sheets. Birthday tracking sheets
3 contained information pertaining to the chart, including the designated numbers for
4 the new split charts, the names of the birthday girls, the date, time, and place of the
5 birthday party, and the names and phone numbers of those expected to provide a
6 gift. (RT 328.) Dinner party tracking sheets contained the names of women who
7 had made pledges and expressed interest in attending the birthday party. (RT 282.)
8 Birthday gifting sheets were signed receipts by birthday girls indicating that they
9 had received their money. (RT 331.)

10 In addition to providing cash gifts, some women participated in WHW by
11 holding certain positions and performing certain tasks within the organization. For
12 instance, a “chart leader’s” responsibility was to coordinate her particular chart.
13 As Cheryl Bean, one of the high ranking members of WHW, testified, the chart
14 leader was essentially a “scribe.” (RT 590.) Her job was to place new members
15 into available appetizer spots and write that information down on the chart. (RT
16 590-591.) This role became more distinctly defined by the promulgation of the
17 “WHW Rules And Responsibilities” in July of 2002. (RT 589-590.) According to
18 these Rules, a chart leader’s job included keeping track of who was on the
19 particular chart, keeping those people informed of important information, and
20 faxing completed charts to the “officator.” (CT Aug 17.) There were several
21 hundred chart leaders within the WHW organization. (RT 423.)

22 The officiator was responsible for coordinating the “birthday party,” which
23 was the actual event where the new members on the appetizer level would pay the
24 birthday girl. (CT Aug 18.) As Cathy Lovely, another high ranking WHW
member, testified, the officiator “just kept track of who showed up.” (RT 430.)
Under the Rules and Responsibilities, the officiator also was responsible for
following a certain set procedure if prospective members failed to show at the

1 birthday party and for turning into the “monitor” completed birthday tracking
2 sheets, dinner party tracking sheets, and birthday gifting sheets. (CT Aug 18.)

3 The monitor oversaw the chart leaders. (CT Aug 16.) In fact, she was the
4 one to assign charts leaders for each chart. (RT 546-547; CT Aug 16.) Overseeing
5 the monitor was the “area monitor.” (CT Aug 15.) Her job was to provide chart
6 numbers to the monitors and chart leaders, to maintain master archives, and to keep
7 contact with WHW’s attorneys and ensure that the members were following the
8 organization’s guidelines. (CT Aug 15.)

9 Also involved in the execution of the dinner party were the “counter” and
10 the “hostess.” As the title suggests, the counter’s job was to actually count the
11 cash that was pledged by the new members and turn it over to the birthday girls.
12 (RT 335.) She also ensured that each birthday girl signed and dated the gifting
13 sheets. (CT Aug 19.) Often, one of the attendees at the birthday party would
14 volunteer to act as counter. (RT 429-430.) The hostess offered her home as a
15 location to hold the birthday party. (RT 430-431; CT Aug 21.)

16 Finally, “presenters” gave presentations on WHW to prospective members.
17 (CT Aug 20.) A presenter was required to have thorough knowledge of how
18 WHW was run. (RT 625.) In addition to her oral presentation, the presenter also
19 handed out a written packet, upon which she based her presentation. (RT 478,
20 1066.)

21 WHW informed prospective participants that “we do not make it mandatory
22 that you recruit a certain number of women to the dinner parties so that you are
23 able to receive your gift when it is your turn.” (CT Aug 25-26.) Several of the
24 former members of WHW– Cathy Lovely, Melody Hart, Geraldine Flanagan, and
Doris Fitzpatrick – echoed this fact by testifying that the recruitment of additional
members was not a prerequisite for receiving the prospective birthday payout. (RT
443, 1060, 1074, 1170.)

1 Petitioner first became involved in WHW in April of 2002. (CT Aug 32.)
2 The prosecution attempted to document petitioner's participation through the
3 testimony of several of its former members as well as through the presentation of
4 various documents and computer files seized during the searches of petitioner's,
5 Cathy Lovely's, and Cheryl Bean's residences. (RT 768, 771-772; CT 424-446.)
6 Among the documents seized from petitioner's residence were WHW birthday
7 gifting sheets, charts, printouts of financial summaries, sign-up and contact sheets,
8 and printouts of WHW related e-mails. (RT 681.) The computer files also included
9 various other files pertaining to WHW, including WHW's dinner party packet (CT
10 Aug 25-26), its Roles and Responsibilities (CT Aug 13-24), a master list of all
11 charts (CT Aug 1-3), a WHW overview outline (CT Aug 4-12), and e-mails
12 pertaining to WHW matters. (CT Aug 32-248.)

13 By Detective Eric White's calculations, petitioner was involved with 49
14 separate charts. (RT 851.) This included six birthdays, a seventh birthday under
15 the name "Katie D" (who Cathy Lovely suspected was petitioner's mother), and
16 spots on 19 separate plates. (RT 812, 851, 939, 1142.) According to White's
17 calculations, these seven birthdays yielded a gross payout of \$72,500. (RT 959.)
18 Of that amount, petitioner forfeited \$10,000, she sponsored someone with \$6,250,
19 and \$865 was stolen. (RT959.) The total value of petitioner's plates that did not
20 birthday was \$180,000. (RT 940.) Petitioner also made a donation to WEAVE at
21 her birthday for chart 2014. (RT 890.)

22 Other witnesses testified that petitioner herself had expressed figures similar
23 to those calculated by Detective White. Tara Spurgeon testified that petitioner
24 stated during a presentation that she had made close to \$80,000 in cash. (RT
1223.) Doris Fitzpatrick testified that petitioner told her that she had enjoyed five
to six birthdays. (RT 1160.) Cathy Lovely, who shared a birthday with petitioner
on one chart, confirmed that petitioner received \$25,000. (RT 1130.)

1 In addition to involving herself in the gifting process, petitioner also
2 participated in WHW by performing in some of the organization's official roles.
3 For instance, she served as chart leader for twelve different charts. (RT 370, 376,
4 414-15, 432, 487, 549, 612, 909; CT Aug 70-80, 85-86, 87-88, 122, 136-39, 163,
5 164, 174-77, 188, 220.) She discontinued serving as a chart leader in the
6 beginning of August 2002. (RT 1141.) Her reasons for this were partly her own
7 health and partly her frustration with several of the new rules that had been
8 implemented. (Exhibit 191.)

9 Petitioner also acted as a presenter. Many of the group's members testified at
10 trial that they recalled petitioner's presentations. (RT 1034, 1038, 1045, 1065,
11 1150, 1153, 1161-62, 1204, 1208, 1211, 1220-21, 1227.) She also acted as
12 hostess, counter, and officiator of several birthday parties. (RT 899, 902, 908,
13 1122, 1154, 1157, 1183.) According to both Lovely and Bean, neither remembered
14 petitioner ever serving as monitor. (RT 434, 573.)

14 **B. Procedural History**

15 Based on these facts, petitioner was charged with one count of operating an
16 endless chain scheme in violation of California Penal Code section 327. (CT 41.)
17 The jury found her guilty as charged. (RT 1669.) The court sentenced petitioner to
18 five years probation. (RT 1846.)

19 Petitioner appealed her conviction in the California Court of Appeal, Third
20 Appellate District raising four claims, two of which are pertinent to this petition.
21 First, she argued that her right to due process was violated when she was convicted
22 of operating an endless chain scheme without sufficient evidence showing that
23 either WHW qualified as an endless chain scheme within the meaning of section
24 327 or that she "contrived, prepared, set up, proposed or operated" such a scheme,
as required by the statute. Second, she argued that if WHW was deemed an
endless chain scheme within the meaning of the statute, then the statute was

1 unconstitutionally vague, as interpreted by the state appellate court, because the
2 language of the statute did not give sufficient notice that an organization such as
3 WHW would fall within the purview of the statute. In an unpublished opinion filed
4 on August 23, 2006, the Court of Appeal rejected petitioner's claims and affirmed
5 her conviction. (Exhibit A.) Petitioner sought review of the Court of Appeal's
6 decision in the California Supreme Court on the same two grounds. (Exhibit B.)
7 That Court denied review on November 1, 2006. (Exhibit C.)

8 Petitioner now files this petition.

9 **II. EXHAUSTION REQUIREMENT**

10 Petitioner raises two issues in this Petition: 1) whether her right to due
11 process was violated when she was convicted of operating an endless chain scheme
12 without sufficient evidence showing that either WHW was in fact an endless chain
13 scheme or that she was an "operator" of the organization, within the meaning of
14 Penal Code section 327; and 2) if WHW was an endless chain scheme under the
15 California Court of Appeal's interpretation, whether the language of the statute
16 was unconstitutionally vague such that petitioner did not receive adequate notice
17 that an organization such as WHW would be in violation.

18 These two issues were raised in petitioner's direct appeal before the
19 California Court Appeal. After the California Court of Appeal affirmed
20 petitioner's conviction on August 23, 2006, (Exhibit A), petitioner sought review
21 in the California Supreme Court on these two grounds. That court denied review
22 on November 1, 2006. (Exhibit C). Because petitioner raised these issues before
23 the state supreme court, they became exhausted for purposes of petitioning this
24 court for a writ of habeas corpus. *See Duncan v. Henry*, 513 U.S. 364, 365, 115
S.Ct. 887, 130 L.Ed.2d 865 (1995)(holding that state prisoner must exhaust state
court remedies before petitioning for writ of habeas corpus and exhaustion has
been satisfied if issue has been presented to state's highest court).

1 **III. STATUTE OF LIMITATIONS**

2 A state defendant seeking habeas corpus review in the federal courts has one
3 year from the date his conviction becomes final to file his petition. 28 U.S.C. §
4 2244(d)(1). A conviction becomes final 90 days after the state Supreme Court
5 denies review. *Bowen v Roe*, 188 F3d 1157, 1158 (9th Cir. 1999) (holding that
6 review does not conclude under 28 USC §2244(d)(1) until expiration of period
7 during which defendant could apply for writ of certiorari in United States Supreme
8 Court).

9 Following her conviction, petitioner appealed in the California Courts. She
10 sought review in the California Supreme Court, which was denied on **November 1,**
11 **2006.** She did not seek certiorari in the United States Supreme Court.

12 Accordingly, her conviction became final on **January 30, 2007**, ninety days later.
13 Under the one-year statute of limitations specified in section 2244, petitioner had
14 until **January 30, 2008** to file a federal habeas corpus petition raising the claims
15 previously raised on direct appeal. Because petitioner is filing this petition before
16 January 30, 2008, she is within the statute of limitations to file this petition.

17 **IV. CUSTODY REQUIREMENT**

18 Petitioner was sentenced to five years probation on August 26, 2004. (CT
19 933.) She is currently serving her term of probation. A person on probation is
20 considered to be in “custody” for purpose of petitioning this court for a writ of
21 habeas corpus. *Cervantes v. Walker*, 589 F.2d 424, 425 n1 (9th Cir. 1978); *Benson*
22 *v. California*, 328 F.2d 159, 162 (9th Cir. 1964); *Jackson v. Coalter*, 337 F.3d 74,
23 79 (1st Cir. 2003).

24 **V. STANDARD OF REVIEW**

Under the Antiterrorism and Effective Death Penalty Act [hereinafter
AEDPA] of 1996, a federal court should grant a writ of habeas corpus on behalf of
a person in state custody if the state court’s decision “resulted in a decision that

1 was contrary to, or involved an unreasonable application of, clearly established
2 federal law, as determined by the Supreme Court of the United States, or...resulted
3 in a decision that was based on an unreasonable determination of the facts in light
4 of the evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d); *see*
5 *also Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 1172-73, 155 L.Ed.2d 144
6 (2003). A state court decision will be an “unreasonable application of” clearly
7 established federal precedent if it “identifies the correct governing legal principle
8 from this Court’s decisions but unreasonably applies that principle to the facts of
9 the prisoner’s case.” *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146
10 L.Ed.2d 389 (2000). Under this prong, relief may not be granted unless the state
11 court decision was “objectively unreasonable,” as opposed to merely erroneous or
12 even clearly erroneous. *Lockyer v. Andrade*, 538 U.S. at 75-76. A state court
13 decision is contrary to clearly established federal law “if the state court arrives at a
14 conclusion opposite to that reached by this Court on a question of law or if the
15 state court decides a case differently than this Court has on a set of materially
16 indistinguishable facts.” *Id.*

17 The “indisputable focus” of the federal law at issue in a habeas corpus
18 petition is on United States Supreme Court decisions that were the law at the time
19 the state court rendered its decision. *Plumlee v. Del Papa*, 465 F.3d 910, 919 (9th
20 Cir. 2006); *LaJoie v. Thompson*, 217 F.3d 663, 669 (9th Cir. 2000). However,
21 circuit precedent is considered “persuasive authority for purposes of determining
22 whether a particular state court decision is an ‘unreasonable application’ of
23 Supreme Court law, and also may help ... determine what law is ‘clearly
24 established.’” *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000).

Although this is a deferential standard, it is not empty one. “[D]eference
does not imply abandonment or abdication of judicial review. Deference does not
by definition preclude relief. A federal court can disagree with a state court’s

1 credibility determination and, when guided by AEDPA, conclude the decision was
2 unreasonable or that the factual premise was incorrect by clear and convincing
3 evidence.” *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d
4 931 (2003).

5 In making this determination, this Court should look to the “the state’s last
6 reasoned decision” on the issue. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir.
7 2002). In this case, the last reasoned decision was the August 23, 2006 opinion by
8 the California Court of Appeal. The state court issuing that decision is not required
9 to cite to Supreme Court cases or even be aware of them “so long as neither the
10 reasoning nor the result of the state-court decision contradicts them.” *Early v.*
11 *Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002). If the state court,
12 however, fails to give any reasons for its denial of the defendant’s constitutional or
13 federal claim, this Court must then independently review the state record to
14 determine whether the court’s decision was objectively unreasonable. *Himes v.*
Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

15 **VI. PETITIONER’S RIGHT TO DUE PROCESS UNDER THE**
16 **FOURTEENTH AMENDMENT WAS VIOLATED BY A GUILTY**
17 **VERDICT TO THE CHARGE OF OPERATING AN ENDLESS CHAIN**
18 **SCHEME UNDER CALIFORNIA PENAL CODE SECTION 327**
19 **WITHOUT SUFFICIENT EVIDENCE THAT WOMEN HELPING**
20 **WOMEN (WHW) WAS AN ENDLESS CHAIN SCHEME OR THAT**
21 **PETITIONER WAS AN “OPERATOR” WITHIN THE MEANING OF THE**
22 **STATUTE**

23 “[T]he Due Process Clause protects the accused against conviction except
24 upon proof beyond a reasonable doubt of every fact necessary to constitute the
crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068,
25 L.Ed.2d 368 (1970). In the context of a habeas corpus proceeding, a challenge
to the sufficiency of the evidence requires the Court to determine whether “any
rational trier of fact could have found the essential elements of the crime beyond a

1 reasonable doubt.” *McMillan v. Gomez*, 19 F.3d 465, 468-69 (9th Cir.
2 1994)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d
3 560 (1979) (emphasis in original)). This Court reviews the state court’s sufficiency
4 determination by examining whether it constituted an objectively unreasonable
5 application of this standard. *Juan H. v. Allen*, 408 F.3d 1262, 1275 n.13 (9th Cir.
6 2005).

7 To establish sufficient evidence, “the prosecution need not affirmatively
8 ‘rule out every hypothesis except that of guilt.’” *Wright v. West*, 505 U.S. 277,
9 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992). Moreover, “a reviewing court
10 ‘faced with a record of historical facts that supports conflicting inferences must
11 presume--even if it does not affirmatively appear in the record--that the trier of fact
12 resolved any such conflicts in favor of the prosecution, and must defer to that
13 resolution.’” *Id.* at 296-97. At the same time, “mere suspicion or speculation” has
14 long been held to be insufficient to sustain a conviction. *United States v. Messer*,
15 197 F.3d 330, 343 (9th Cir. 1999).

16 As a general rule, this Court “must respect the province of the jury to
17 determine the credibility of witnesses....” *Jones v. Wood*, 114 F.3d 1002, 1008 (9th
18 Cir. 1997). However, if the testimony of a witness is so incredible such that no
19 rational trier of fact could have believed it, the evidence may be insufficient to
20 sustain a conviction. *United States v. Chancey*, 715 F.2d 543, 546 (11th Cir. 1983).

19 **A. The Evidence Was Insufficient To Show That WHW Was An Endless 20 Chain Scheme**

21 In this case, the evidence was insufficient to sustain petitioner’s conviction
22 for operating an endless chain scheme because WHW was not an endless chain
23 scheme within the meaning of the statute – California Penal Code section 327.
24 Section 327 makes it a crime to contrive, prepare, set up, propose or operate an
endless chain scheme. It defines an “endless chain scheme” as “any scheme for the

1 disposal or distribution of property whereby a participant pays a valuable
2 consideration for the chance to receive compensation for introducing one or more
3 additional persons into participation in the scheme or for the chance to receive
4 compensation when a person introduced by the participant introduces a new
5 participant.” Cal. Penal Code § 327.

6 As the language of the statute shows, the definition of an endless chain
7 scheme is one that requires its participants to bring in new members in order to
8 receive compensation. Under the definition, a participant has the chance of
9 receiving compensation if one of two things occurs: either 1) that participant
10 “introduc[es] one or more additional persons into participation in the scheme” or 2)
11 “a person introduced by the participant introduces a new participant.” Either way,
12 an endless chain scheme, as it is defined under section 327, is one that requires
13 each of its members to introduce new members in order to have any chance of
14 receiving compensation.

15 WHW did not meet this definition because it did not make the receipt of a
16 prospective payout contingent on the introduction of new members into the group.
17 In fact, the evidence overwhelmingly shows the opposite to be true. Several of
18 WHW’s former members testified that one was not required to recruit new
19 members into the organization in order to “birthday.” Both Cathy Lovely and
20 Cheryl Bean, two of the high-ranking members of the group, testified that
21 recruitment was not mandatory. (RT 443, 592.) Other lesser-involved members,
22 including Melody Hart, Geraldine Flanagan, and Doris Fitzpatrick, also testified
23 that there was no requirement to introduce new participants. (RT 1060, 1074,
24 1170.) Even the official literature of WHW informed prospective members that no
recruitment obligation existed. (CT Aug 8.)

Petitioner is not aware of any published California case law addressing
section 327’s applicability to an organization such as WHW. That is, there appears

1 to be no California case involving an organization where a given individual
2 member was not required to recruit additional members in order to receive her
3 payout.

4 However, the Court of Appeal – the last court to issue a reasoned decision in
5 this case –held that an organization such as WHW does indeed qualify as an
6 endless chain scheme under the statute, the lack of a recruitment requirement
7 notwithstanding. Acknowledging factually that “personal recruitment of new
8 participants was not a ‘mandatory’ requirement” in WHW, the state appellate court
9 interpreted the statute in terms of “the group” as a whole. Thus, in the court’s
10 view, because the organization *as a whole* depended upon the recruitment of new
11 members to sustain itself, WHW was an endless chain scheme. (Exhibit A at 4, 9.)
12 In reaching this conclusion, the court relied chiefly on California Penal Code
13 section 7, which provides: “[T]he singular number includes the plural, and the
14 plural the singular.” (Exhibit A at 9.) It further relied on a 1923 California
15 Supreme Court case – *Ex Parte Mathews*, 191 Cal. 35, 214 P. 981 (Cal. 1923), a
16 case involving an ordinance banning a person from keeping goats within a certain
17 distance from another’s property. The state Supreme Court in that case held that
18 the statute, although it phrased the proscribed activity in terms of a singular person,
19 applied also to goats owned by *several* individuals in common. Pointing to the rule
20 that “in the absence of an express declaration that it shall include the plural,
21 ‘person’ may or may not include ‘persons,’ according to the context,” the Court
22 held that the “ordinance involved herein would be entirely ineffectual, if not
23 discriminatory, if it made the keeping of goats lawful when done by several
24 persons and unlawful when done by one.” *Id.* at 43.

 Turning to the case *sub judice*, the Court of Appeal’s decision was an
unreasonable application of the *Jackson v. Virginia* standard to the facts of this
case. From a factual standpoint, the Court of Appeal may be correct that the

1 organization as a whole depended upon recruitment to sustain itself. But that is not
2 how the legislature chose to define endless chain schemes. Had it done so, it easily
3 could have drafted language referring to the scheme as a whole. For instance, it
4 could have defined an endless chain scheme as one which requires the recruitment
5 of new members in order to sustain itself, or words to that effect. Instead, it
6 defined it in terms of the obligations of the *individual participant*. Section 327
7 defines an endless chain scheme as that in which “a participant,” in exchange for
8 the chance to receive compensation, introduces one or more additional persons into
9 participation.

10 The Court of Appeal is also correct that California Penal Code section 7
11 addresses the interchangeability of the singular and the plural. But as the
12 *Matthews* case – the California Supreme Court case cited by the Court of Appeal –
13 holds, under California law, that interchangeability is not applied automatically.
14 Rather, the plural “may or may not” be substituted for the singular depending on
15 the context of the statute. *Matthews*, 191 Cal. at 43. In *Matthews*, it made sense
16 that the language of the ordinance, although expressed in the singular, included the
17 plural since the nuisances created by goats (i.e the smell and noise) would be felt
18 equally regardless of the number of people who owned the goats.

19 The same cannot be said of endless chain schemes. An organization that
20 makes payout contingent on the recruitment of new members is very different from
21 one that does not. In the case of the former, a participant would suffer losses if she
22 was not able to meet the recruitment requirement. Thus, under such a scheme,
23 each individual would be required to take affirmative steps to bring in new
24 members or suffer a monetary loss. On the other hand, in an organization such as
25 WHW, where recruitment is not a requirement, a participant is not compelled to
26 meet such a requirement. In WHW, a woman could receive her payout regardless
27 of whether she was adept at recruiting new members or not. Thus, on an individual

1 basis, participants in an organization such as WHW are less likely to suffer losses
2 than they would be in an organization that requires recruitment, even if the group
3 as a whole needs new members to sustain itself.

4 Therefore, Penal Code section 327 is not a statute whereby the plural should
5 be substituted for the singular as it was in the *Matthews* case. Unlike the *Matthews*
6 case, where the harm caused was the same regardless of the number of people
7 involved, the possibility of harm differs depending on whether the singular or
8 plural is used in section 327. Had the statute targeted organizations that, as a
9 whole, required new members to sustain itself, then, yes, WHW would be an
10 endless chain scheme. But because the statute targeted organizations that required
11 each participant to bring in new members, WHW was not an endless chain scheme.

12 Accordingly, the evidence was legally insufficient to sustain petitioner's
13 conviction under section 327 because WHW was not an endless chain scheme.
14 The state appellate court's holding otherwise was an unreasonable application of
15 the sufficiency of the evidence standard set forth in *Jackson v. Virginia*.

16 **B. The Evidence Was Insufficient To Show That Petitioner Was An** 17 **Operator Of WHW**

18 In addition to its burden of proving that WHW was an endless chain scheme,
19 the prosecution also was required to prove that petitioner contrived, prepared, set
20 up, proposed or operated such a scheme. Cal. Penal Code § 327. There was no
21 evidence that petitioner contrived, prepared, set up or proposed WHW. Rather, the
22 issue at trial was whether petitioner was an "operator."

23 In a previous case by one of California's intermediate appellate courts –
24 *People v. Sanchez*, 62 Cal.App.4th 460, 72 Cal.Rptr.2d 782 (Cal. App. 1998) – the
25 court defined the term "operate" for purposes of section 327 as follows:

26 "[T]o cause to function usually by direct personal effort: work (a car)
27 (operating a drill press) ... to manage and put or keep in operation whether

1 with personal effort or not (operated a grocery store).” Unlike the words
2 “contrives,” “prepares,” “sets up” or “proposes,” which envision preparatory
3 activity, the word “operates” denotes ongoing conduct which advances the
4 progress of an existing entity. This term stands apart from the others, which
describe various stages of formulation of the scheme; one who “operates” a

5 scheme may carry it along after its inception....
6 The word “operate” does not, however, as the drafters well understood,
7 encompass mere participation, as would the phrase “aids in the operation.”
8 The meaning of “operates”--to manage and to keep in operation--clearly
precludes “participation” in an endless chain scheme as a basis of guilt.

9 *Id.* at 471. The trial court in this case instructed the jury with this language. (CT
10 384.)

11 The Court of Appeal held that petitioner was an operator of WHW. Citing
12 the *Sanchez* case, the court pointed out that an operator does not need to “control []
13 the entire scheme.” (Exhibit A at 14.) In the court’s opinion, petitioner was an
operator because she “kept the scheme going and growing by her active, energetic
14 efforts.” (Exhibit A at 14.)

15 Petitioner believes the Court of Appeal’s determination that the evidence
16 was sufficient to show that she was one of WHW’s operators was unreasonable.
17 Petitioner is not suggesting that it is necessary for an individual to control the
18 entire scheme in order to be considered an operator. However, under the *Sanchez*
19 definition, that person does need to exert some form of managerial control over the
20 organization. Here, petitioner unquestionably participated in the organization in
21 several capacities -- presenter, counter, hostess, officiator, and chart leader.
However, these positions were not managerial in nature and did not necessarily
elevate one from participant to operator.

22 As a presenter, petitioner gave presentations to prospective participants,
23 providing them a general overview of the group. There was no evidence that
24 presenters managed WHW or otherwise were responsible for keeping it in

1 operation. On the contrary, presenters were nothing more than glorified
2 announcers or speakers who relied on a previously prepared packet in making their
3 presentations. (RT 478, 1066.)

4 The same is also true of petitioner's roles as counter, officiator, and hostess.
5 The counter just counted the money that was gifted at a birthday party and often
6 was an attendee at the party who volunteered her service. (RT 335, 429-430.) The
7 officiator coordinated the birthday party and, as Cathy Lovely testified, did little
8 more than "just [keep] track of who showed up." (RT 430.) The hostess merely
9 offered her home as a venue for the birthday party. (RT 430-431; Exhibit 40-Y at
p. 9.)

10 Finally, petitioner's position as "chart leader" did not make her an operator
11 of WHW. Arguably this position required a higher degree of participation than
12 those previously described. However, chart leaders still were not managers of the
13 organization. The fact that there were "several hundred" of them is a good
14 indication that they had little, if any, managerial say in the organization. (RT 423.)
15 As Cheryl Bean acknowledged, a chart leader was nothing more than a "scribe."
16 (RT 590.) Her job simply was to record the names of those on a particular chart
17 and keep track of its progress. (RT 590-591.) A chart leader had no input in
18 assigning the chart numbers or in determining how fast the positions on the chart
19 filled. Moreover, she had no role in maintaining the group's master archives or in
20 ensuring that the organization's rules were being followed. Those were the
21 responsibilities of the monitor, a position in which petitioner did not serve. (RT
22 434, 573; CT Aug 15.)

23 Therefore, even though the Court of Appeal was technically correct that one
24 does not need to "control [] the entire scheme" in order to be an operator of an
endless chain scheme, an operator still must exert some managerial control over

1 the scheme. (Exhibit A at 14.) Despite petitioner’s service in the aforementioned
2 positions, she did not manage WHW, unlike Cathy Lovely and Cheryl Bean.

3 That petitioner may have helped “[keep] the scheme going and growing by
4 her active, energetic efforts” also did not make her an operator. (Exhibit A at 14.)
5 Many individuals played a role in WHW’s maintainability, including mere
6 participants who helped it along by virtue of their mere participation. Petitioner
7 may have been particularly enthusiastic in her support of the organization than
8 perhaps others. But that does not mean she exercised the requisite managerial
9 control to make her an operator. Put differently, a person could perform many
10 different tasks within an organization without necessarily being an operator. That
11 was the case with petitioner.

12 Accordingly, the evidence was insufficient to sustain petitioner’s conviction
13 because it failed to sufficiently show that she was an operator. The Court of
14 Appeal’s determination otherwise was an unreasonable application of the *Jackson*
15 *v. Virginia* standard to the facts of this case.

16 **VII. PETITIONER’S RIGHT TO DUE PROCESS UNDER THE**
17 **FOURTEENTH AMENDMENT WAS VIOLATED WHEN THE**
18 **CALIFORNIA COURT OF APPEAL INTERPRETED PENAL CODE**
19 **SECTION 327 IN A WAY CONTRARY TO THE PLAIN LANGUAGE OF**
20 **THE STATUTE THEREBY DEPRIVING HER OF ADEQUATE NOTICE**
21 **AND FAIR WARNING THAT HER CONDUCT WAS CRIMINAL**

22 “A penal statute [must] define the criminal offense with sufficient
23 definiteness that ordinary people can understand what conduct is prohibited and in
24 a manner that does not encourage arbitrary and discriminatory enforcement.”
Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).
Indeed, “[n]o one may be required at peril of life, liberty or property to speculate as
to the meaning of penal statutes. All are entitled to be informed as to what the State
commands or forbids.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618,

1 83 L.Ed.2d 888 (1939). A statute is unconstitutional vague when it fails to give
2 people “of ordinary intelligence a reasonable opportunity to know what is
3 prohibited” or when it “encourages arbitrary or discriminatory enforcement.”
4 *Gonzales v. Carhart*, ___ U.S. ___, 127 S.Ct. 1610, 1628-1629, 167 L.Ed.2d 480
5 (2007). As the Supreme Court explained in a case involving the interpretation of
6 the term “motor vehicle” in a criminal statute:

7 Although it is not likely that a criminal will carefully consider the text of the
8 law before he murders or steals, it is reasonable that a fair warning should be
9 given to the world in language that the common world will understand, of
10 what the law intends to do if a certain line is passed. To make the warning
11 fair, so far as possible the line should be clear. When a rule of conduct is laid
12 down in words that evoke in the common mind only the picture of vehicles
moving on land, the statute should not be extended to aircraft simply
because it may seem to us that a similar policy applies, or upon the
speculation that if the legislature had thought of it, very likely broader words
would have been used.

13 *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1932).

14 The central principle underlying the vagueness doctrine is that of “fair
15 warning.” *Darnell v. Swinney*, 823 F.2d 299, 301 (9th Cir. 1987). Deprivation of
16 the right to fair warning “can result both from vague statutory language and from
17 *an unforeseeable and retroactive judicial expansion of statutory language that*
18 *appears narrow and precise on its face.”* *Rogers v. Tennessee*, 532 U.S. 451, 457,
19 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001)(emphasis added).

20 The seminal case addressing this latter situation is *Bouie v. City of*
21 *Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). In that case, two
22 African-American men were convicted of criminal trespass after they sat at a
23 restaurant reserved for whites only. They were not informed that they were
24 prohibited from being there until only *after* they had already sat down. The South
Carolina Supreme Court affirmed their convictions construing “the statute to cover

1 ... the act of remaining on the premises of another after receiving notice to leave.”
2 *Id.* at 350. Under that plain language of the statute, however, the prohibited
3 conduct was *entry* upon land of another after notice. *Remaining on the premises*
4 after receiving notice to leave was not proscribed by the statute, and the statute had
5 never been interpreted in such a way as to proscribe that conduct. The United
6 States Supreme Court reversed. While acknowledging that the evidence was
7 sufficient to sustain the defendants’ convictions under the state supreme court’s
8 new interpretation of the trespass statute, it held that their right to due process was
9 violated because they were deprived of not only fair warning, but any warning
10 whatsoever that their conduct violated the trespass statute. *Id.* at 355. It held, “If
11 the Fourteenth Amendment is violated when a person is required ‘to speculate as to
12 the meaning of penal statutes,’ ... or to ‘guess at (the statute’s) meaning and differ
13 as to its application,’ ... the violation is that much greater when, because the
14 uncertainty as to the statute’s meaning is itself not revealed until the court’s
15 decision, a person is not even afforded an opportunity to engage in such
16 speculation before committing the act in question.” *Id.* at 352. The Court pointed
17 out that there was nothing in the wording of the statute itself nor in any prior South
18 Carolina judicial decisions that gave the defendants warning that their conduct
19 would be considered criminal. On the contrary, the statute was “narrow and
20 precise.” *Id.*

21 Other decisions following *Bouie* resulted in similar outcomes. In *Douglas v.*
22 *Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973), a defendant’s probation
23 was revoked after he failed to report a traffic citation that he had received. The
24 probation condition he was alleged to have violated required him to report all
“arrests.” *Id.* at 430. The Supreme Court rejected the state’s argument that the
traffic citation should be deemed an arrest. Relying on *Bouie*, the Court noted the
absence of any prior decisions treating traffic citations as arrests. As a result, any

1 such expansive interpretation would violate the defendant’s right to due process.
2 *Id.* at 432.

3 The Supreme Court reached the same result in *Rabe v. Washington*, 405
4 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972), a case in which the operator of a
5 Drive-In movie theatre was convicted for showing a racy movie under the state’s
6 obscenity statute. The state Supreme Court acknowledged that the movie was not
7 technically obscene, but interpreted the statute in such a way that a non-obscene
8 movie could be deemed obscene by virtue of “the context of its exhibition.” *Id.* at
9 315. The state court felt that because the movie was shown at a drive-in, the
10 context of the movie’s exhibition rendered it obscene. The United States Supreme
11 Court reversed, holding that the statute “so construed, is impermissibly vague as
12 applied to petitioner because of its failure to give him fair notice that criminal
13 liability is dependent upon the place where the film is shown.” *Id.* at 315-16. The
14 Court pointed out that the statute made no reference to the context or location
15 where the movie was shown. As a result, the defendant’s “conviction was thus
16 affirmed under a statute with a meaning quite different from the one he was
17 charged with violating.” *Id.* at 315.

18 And in *Clark v. Brown*, 450 F.3d 898 (9th Cir. 2006), the Ninth Circuit
19 found the California Supreme Court had violated a capital defendant’s right to due
20 process when it re-interpreted one of its previous cases – *People v. Green* – that
21 defined the scope of the felony-murder special circumstances statute used to
22 impose the death penalty. After examining the state supreme court’s previous
23 decisions from the time of *Green* to the present, the Ninth Circuit found the state
24 court’s new interpretation to be a sea-change that “retroactively chang[ed] the
felony-murder special circumstance statute to reach [the defendant’s] conduct.” *Id.*
at 909. The state court’s new interpretation was thus unforeseeable.

1 By contrast, the Ninth Circuit rejected the defendant's due process
2 argument in *Webster v. Woodford*, 369 F.3d 1062 (9th Cir. 2004). In that case, the
3 defendant, who was convicted of robbery-murder, challenged the state supreme
4 court's interpretation of the felony-murder and lying-in-wait special-circumstance
5 statutes that made him eligible for the death penalty. Addressing the felony-
6 murder statute, the defendant first argued that because the car he stole was a
7 quarter-mile away from the location of the murder, it did not occur in the
8 "immediate presence" of his victim and no judicial construction of the phrase put
9 him on notice otherwise. *Id.* at 1070. The state supreme court, however, interpreted
10 the statute to include a quarter-mile distance within the defendant's immediate
11 presence. The Ninth Circuit rejected the defendant's argument in large part
12 because prior California Supreme Court decisions had long-held that that one could
13 be convicted of robbery, which requires "immediate presence," by taking property
14 outside the victim's sensory perception and by being in constructive, and not actual
15 possession of the property. *Id.* at 1071-72. Such decisions put the defendant on
16 notice that his actions constituted robbery. The Ninth Circuit also rejected the
17 defendant's argument that the state supreme court's determination that a jury could
18 find the special circumstance of "lying in wait" in the absence of physical
19 concealment was an unforeseen expansion of the statutory elements in violation of
20 his due process rights. As was the case with the felony-murder statute, the
21 California Supreme Court's prior decisions made it foreseeable that it would reach
22 the interpretation it did in the current case. *Id.* at 1073-74.

21 In *Knutson v. Brewer*, 619 F.2d 747 (8th Cir. 1980), the Eighth Circuit
22 reached the same result in the case of an Iowa state defendant convicted of
23 kidnapping for ransom. The statute defined "ransom" as "any money, property, or
24 thing of value." The Iowa Supreme Court held that the defendant was guilty of
kidnapping for ransom because the sexual gratification he obtained while he

1 forced the victim to sodomize him constituted a “thing of value.” The Eighth
2 Circuit distinguished the case from that of *Bouie* in that the defendant was “far
3 from innocent.” It held:

4 “[W]e think it significant that the issue of construction involved here is not
5 the drawing of a line between legal conduct and illegal conduct. What
6 Knutson did was unlawful under any interpretation of Iowa law, and he
7 makes no contention to the contrary. His position, reduced to its simplest
8 terms, is that he had a right to expect that he would be convicted for
9 kidnapping only, rather than for kidnapping for ransom. This kind of
10 reliance interest is not, in our view, entitled to a great deal of weight. When
11 a person does an act that he well knows to be a violation of some law, and
12 when a statute is later interpreted to cover his conduct in a way that does not
13 do violence to the ordinary understanding of the English language, the
14 Fourteenth Amendment is not offended.

15 *Id.* at 750.

16 Applying these principles to the instant case, petitioner’s right to due process
17 was violated by the state appellate court’s unforeseen interpretation of Penal Code
18 section 327. Like the trespass statute in *Bouie*, section 327 is “narrow and precise.”
19 *Bouie*, 378 U.S at 352. It specifically defines an illegal endless chain scheme as
20 one “whereby *a participant* pays a valuable consideration for the chance to receive
21 compensation for introducing one or more additional persons into participation in
22 the scheme or for the chance to receive compensation when a person introduced by
23 the participant introduces a new participant.” It says nothing about the group as a
24 whole and its need to recruit new members, but rather precisely delineates a
recruitment requirement for each individual participant. Just as the defendants in
Bouie had no fair warning that their act of remaining at the restaurant would be
criminal under a statute that predicated the crime of trespass on the person’s
knowledge at the time of entry, petitioner had no fair warning that her participation
in WHW would be criminal under a statute that defines an endless chain scheme as
one where each participant must recruit members in order to receive a payout.

1 Also, like in *Bouie*, *Douglas*, and *Clark*, and unlike in *Webster*, there appear
2 to be no prior California cases that addressed a scheme such as WHW, which
3 might have given petitioner fair warning that it was illegal. Indeed, petitioner is not
4 aware of any case law that would have put her on notice that WHW fell within the
5 purview of the statute despite the language defining an endless chain scheme in
6 terms of the individual participant. Moreover, unlike in *Knutson*, where the
7 defendant knew he was engaging in illegal activity, petitioner's activity was not
8 illegal under *any* criminal statute other than section 327 as interpreted by the Court
9 of Appeal. It was not as if petitioner knew she was in violation of "some law," as
10 *Knutson* himself was.

11 The Court of Appeal rejected petitioner's vagueness argument based on the
12 maxim that "[i]t is common knowledge you do not get something for nothing. An
13 eightfold return from new subscriptions manifestly cannot be sustained
14 indefinitely." (Exhibit A at 12.) This is an unreasonable application of the *Bouie*
15 vagueness doctrine to the facts of this case. Whether petitioner subscribed to this
16 principle of "common knowledge," or understood that WHW could not sustain
17 itself indefinitely is beside the point. The fact is that without any other case law
18 stating otherwise, petitioner was entitled to rely on the "narrow and precise"
19 language of the statute to determine whether her own conduct was legal. As the
20 *Bouie* court held, she should not have "to speculate as to the meaning of penal
21 statutes,' ... or to 'guess at (the statute's) meaning and differ as to its
22 application...." *Bouie*, 378 U.S at 352. As the *McBoyl* court held, a "statute should
23 not be extended ... simply because it may seem to us that a similar policy applies,
24 or upon the speculation that if the legislature had thought of it, very likely broader
words would have been used." *McBoyl*, 283 U.S. at 27. Petitioner should not be
expected to know that section 327, even though it frames the recruitment
requirement in terms of the individual participant, really refers to the group as a

1 whole because the group cannot sustain itself indefinitely. If in fact the statute does
2 mean the latter, as the Court of Appeal held, then petitioner was not given fair
3 warning of this given that the plain language of the statute does not state this and
4 was only interpreted in this way after she had already engaged in such conduct.
5 The fact that a district attorney from a neighboring county expressed his opinion
6 that WHW was a legal organization, while admittedly not dispositive of the fact
7 itself, is at least empirical evidence that the statute was vague and failed to provide
8 fair warning to its illegality. (CT 616, 625.)

9 For these reasons, the statute was vague as interpreted by the Court of
10 Appeal and petitioner's right to due process was denied. Her conviction should be
11 reversed.

12 CONCLUSION

13 WHEREFORE, Petitioner Christine Ney moves this Honorable Court to grant the
14 following relief:

- 15 a) Accept jurisdiction over this case;
- 16 b) Require the respondent to answer the allegations in this Petition and
17 Points and Authorities in Support;
- 18 c) Order the State to lodge the record on appeal with this Court;
- 19 d) Issue a Writ of Habeas Corpus freeing petitioner from his
20 unconstitutional confinement.

21 Respectfully Submitted,

22 /s/ Randy S. Kravis
23 Randy Kravis, #214100
24 Attorney for Petitioner

DATED: January 4, 2008