

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, |) | Third District Court of Appeal |
| |) | # C048122 |
| |) | |
| Plaintiff-Respondent |) | Sacramento County Superior Court |
| |) | # 02F09957 |
| vs. |) | |
| |) | |
| CHRISTINE SUZANNE NEY, |) | |
| |) | |
| Defendant-Appellant. |) | |
| _____ |) | |

Appeal from the Superior Court of Sacramento County
 The Honorable Emily Vasquez, Judge Presiding

Petition for Review After the Unpublished Decision of the
 Court of Appeal, Third Appellate District
 Affirming the Judgment of Conviction

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CHRISTINE SUZANNE NEY,)
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Appeal from the Superior Court of Sacramento County
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Petition for Review After the Unpublished Decision of the
Court of Appeal, Third Appellate District
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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF
THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 28 of the California Rules of Court, Christine Ney,
defendant/petitioner, respectfully petitions this Honorable Court for review in the
above-entitled matter after the unpublished decision by the Court of Appeal, Third
Appellate District, filed August 23, 2006, affirming the judgment of conviction. A
copy of the opinion of the Court of Appeal is attached hereto as appendix "A".

Respectfully submitted,

September 6, 2006

Randy S. Kravis,
Attorney for Petitioner

ISSUES PRESENTED FOR REVIEW

- 1) Was petitioner's right to due process violated because of her conviction for operating an endless chain scheme based on insufficient evidence showing that Women Helping Women qualified as an endless chain scheme and that petitioner was one of its "operators?"

- 2) If Women Helping Women was an endless chain scheme because the organization as a whole needed to continually recruit new members, is section 327 unconstitutionally vague because it defines endless chain schemes not in terms of the organization as a whole but one in which each individual participant must introduce new members in order to receive her chance at compensation?

NECESSITY FOR GRANTING REVIEW

Petitioner's claims are premised on federal constitutional principles. This petition for review is necessary so that petitioner may exhaust her state remedies. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 842 [119 S.Ct. 1728, 144 L.Ed.2d 1].) This petition for review is also necessary because it addresses an important and unsettled question of law. (Cal. Rules of Court, rule 28(b)(1).)

STATEMENT OF THE CASE AND FACTS

For purposes of this petition of review only, petitioner adopts the statement of the facts and case set forth by the Court of Appeal. (Slip opn., pp. 1-6.)

REASONS FOR GRANTING REVIEW

I.

REVIEW SHOULD BE GRANTED SO THAT THIS COURT CAN DETERMINE WHETHER PETITIONER’S RIGHT TO DUE PROCESS WAS VIOLATED WHEN SHE WAS CONVICTED OF OPERATING AN ENDLESS CHAIN SCHEME BASED ON HER MERE PARTICIPATION IN WOMEN HELPING WOMEN, AN ORGANIZATION THAT DOES NOT REQUIRE ITS PARTICIPANTS TO RECRUIT NEW MEMBERS IN ORDER TO RECEIVE COMPENSATION AND THUS DOES NOT QUALIFY AS AN ENDLESS CHAIN SCHEME UNDER PENAL CODE SECTION 327

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law....” (U.S. Const., 14th Amend.) This clause “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) The test to determine a claim of insufficiency of the evidence in a criminal case is whether, on the entire record, a rational trier of fact could find a defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) In making this determination, this Court must view the evidence in the light most favorable to the prosecution and presume in support of the judgment of conviction the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-93.)

However, before determining that evidence is sufficient to sustain a verdict, the appellate court must conclude that that evidence is “substantial.” (*People v. Torres* (1996) 43 Cal.App.4th 1073, 1078.) Substantial evidence is that which is reasonable, credible, and of solid value. (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1291.) Reversal of a conviction is warranted if “it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’” (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Based on these principles, “mere speculation” cannot support a conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) Consequently, “[i]mplicit in [the appellate court’s] duty to determine the legal sufficiency of evidence to sustain a verdict is [the court’s] obligation, in a proper case, to appraise the sufficiency and effect of evidence admitted or otherwise indubitably established as precluding or overcoming, as a matter of law, inconsistent inferences sought to be derived from weak or inconclusive sources.” (*People v. Reyes* (1974) 12 Cal.3d 486, 499.) Thus, the testimony of witnesses which is “inherently insubstantial”, and which is contradicted by other “solid and believable evidence”, is an inadequate foundation to support a criminal conviction. (*Ibid.*)

Petitioner was convicted of operating an endless chain scheme in violation of Penal Code section 327 based on her participation in Women Helping Women (WHW). She believes that her conviction stands in violation of *In re Winship* and her right to due process under the Fourteenth Amendment for two reasons. First,

the evidence is legally insufficient to show that WHW was an endless chain scheme as that term is defined under section 327. Second, even if WHW was an endless chain scheme, the evidence was legally insufficient to show that she was an “operator” of that organization.

A. Women Helping Women Was Not An Illegal Endless Chain Scheme Because Individual Participants Were Not Required To Introduce New Participants In Order To Receive A Chance At Receiving Compensation

Section 327 makes it a crime to contrive, prepare, set up, propose or operate an endless chain scheme. (Pen. Code § 327.) It defines an “endless chain scheme” as “any scheme for the disposal or distribution of property whereby a participant pays a valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant.” (*Ibid.*)

In her appeal, petitioner argued that WHW did not qualify as an endless chain scheme because it did not require each participant to recruit new members into the organization in order to receive her compensation, otherwise known as her “birthday” payout. The People argued that WHW was an endless chain scheme because the organization as a whole would collapse if new members were not constantly recruited. The Court of Appeal boiled down the issue to whether the term “a participant,” as it is used in section 327, should be construed in the singular or in the plural. (Slip opn., p. 9.) That is, if the People are correct and “a participant” is really a plural reference to the group as a whole, then WHW would

be an endless chain scheme because the group as a whole did in fact need to recruit new members in order to sustain itself. However, if petitioner is correct and the term “a participant” really means what it says – *a* singular participant – then WHW was not an endless chain scheme because the organization did not require its individual participants to introduce new members in order to receive a chance at compensation. The Court of Appeal concluded that the People’s interpretation was the correct one based largely on Penal Code section 7, which provides that the singular includes the plural and vice versa. (Slip opn., p. 9.)

Petitioner believes that this case is a good candidate for review by this Court because it is necessary to address an unsettled and important issue of law. (Cal. Rules of Court, rule 28(b)(1).) To this date, petitioner is unaware of any decision by this Court addressing this issue and is aware of only one Court of Appeal case that touches upon the meaning of section 327 -- *People v. Sanchez* (1998) 62 Cal.App.4th 460. In *Sanchez*, however, each individual was in fact responsible for bringing in more members. (*Id.* at p. 465.) If a member failed to meet this obligation, he or she would be expelled. (*Ibid.*) Since each participant was required to recruit new members, the *Sanchez* court never needed to reach the issue faced here.

Petitioner believes her interpretation is correct. The Court of Appeal’s interpretation of section 327 may be a reasonable one. However, petitioner’s interpretation is more congruent with the precise language used in section 327 – “a participant.” As a rule of statutory construction, “[i]f the statutory language is

clear and unambiguous, the plain meaning of the statute governs.” (*In re Carlos E.* (2005) 127 Cal.App.4th 1529, 1537 [citations omitted].) Courts should also give words their usual or ordinary meaning. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) These principles dictate that when section 327 unequivocally defines the recruitment requirement in terms of “a participant,” it should be construed as meaning “a participant.” Moreover, to the extent this phrase is ambiguous, the rule of lenity demands that the interpretation most favorable to petitioner be adopted. (*People v. Overstreet* (1986) 42 Cal.3d 891, 896.) This would mean that the statutory phrase should be interpreted in the singular and that WHW was not an endless chain scheme.

For these reasons, this Court should accept review of this issue.

B. The Evidence Was Insufficient To Show That Petitioner Was An “Operator” of Women Helping Women

In addition to its burden of proving that WHW was an endless chain scheme, the prosecution also was required to prove that petitioner contrived, prepared, set up, proposed or operated such a scheme. (Pen. Code § 327.) There was no evidence that petitioner contrived, prepared, set up or proposed WHW. Rather, the issue at trial was whether petitioner was an “opeartor.”

The Court of Appeal in *People v. Sanchez* defined the term “operate” for purposes of section 327 as follows:

“[T]o cause to function usually by direct personal effort: work (a car) (operating a drill press) ... to manage and put or keep in operation whether with personal effort or not (operated a grocery store).” Unlike the words “contrives,” “prepares,” “sets up” or “proposes,” which envision

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

(*Sanchez, supra*, 62 Cal.App.4th at p. 471.) The trial court instructed the jury with this exact language. (2CT 384.)

Under this definition, petitioner was not an operator of WHW. There is no question she *participated* in the organization. She did so in several capacities – presenter, counter, hostess, officiator, and chart leader. However, none of the duties associated with these positions required her, or for that matter authorized her, to “manage” WHW’s affairs. As a presenter, petitioner gave presentations to prospective participants, providing them a general overview of the group. There was no evidence that presenters managed WHW or otherwise were responsible for keeping it in operation. On the contrary, presenters were nothing more than glorified announcers or speakers who relied on a previously prepared packet in making their presentations. (2RT 478; 4RT 1066; CT Aug 20¹.) There also is nothing in the record to suggest that presenters had any sort of hand in drafting the packet. Therefore the mere fact that petitioner gave presentations did not make her an operator of WHW.

¹ “CT Aug” refers to the Augmented Clerk’s Transcript.

The same is also true of petitioner's roles as counter, officiator, and hostess. The counter just counted the money that was gifted at a birthday party and often was an attendee at the party who volunteered her service. (2RT 335, 429-430.) The officiator coordinated the birthday party and, as Cathy Lovely testified, did little more than "just [keep] track of who showed up." (2RT 430.) The hostess merely offered her home as a venue for the birthday party. (2RT 430-431; CT Aug 21.) One would be hard-pressed to argue that a participant rose to the level of operator solely by serving in these capacities.

Finally, petitioner's position as "chart leader" did not make her an operator of WHW. Arguably this position required a higher degree of participation than those previously described. However, chart leaders still were not managers of the organization. The fact that there were "several hundred" of them is a good indication that they had little, if any, managerial say in the organization. (2RT 423.) As Cheryl Bean acknowledged, a chart leader was nothing more than a "scribe." (2RT 590.) Her job simply was to record the names of those on a particular chart and keep track of its progress. (2RT 590-591.) A chart leader had no input in assigning the chart numbers nor in determining how fast the positions on the chart filled. Moreover, she had no role in maintaining the group's master archives or in ensuring that the organization's rules were being followed. Those were the responsibilities of the monitor, a position in which petitioner did not serve. (2RT 434, 573; CT Aug 15.)

Petitioner's lack of managerial control of WHW was highlighted in two e-mails she drafted. In those e-mails, petitioner expressed her frustration with the promulgation of new rules and procedures by those she termed the "elders." (CT Aug 214, 238.) The fact that she was being instructed "to adhere to them and to support the decision of the 'elders'" is a good indication that she was not a high-ranking official responsible for managing or keeping WHW in operation. (CT Aug 214.) Rather, she was a mere participant who aided in the group's operation, but who still was required to follow the mandates of its managers.

Therefore, the positions that petitioner occupied did not make her an operator of WHW. They may have made her a participant who aided in the organizations operation. However, as *Sanchez* held, that does not make one liable under section 327.

The same is also true of the fact that she personally received several birthday payouts. As petitioner pointed out in her Memorandum Of Points And Authorities submitted at trial, Civil Code section 1689.2 provides that a "participant" in an endless chain scheme must deduct any amounts she received from the scheme from any recovery she otherwise would be entitled to receive. (1CT 102.) Implicit in this statute is the notion that one remains a "participant" even after receiving compensation from the chain scheme. Consequently, even if one "birthdays," that does not, in and of itself, elevate her to the status of "operator."

Notwithstanding her active participation in WHW, the evidence was insufficient to show that petitioner was an “operator,” as that term is defined in *Sanchez*. Accordingly, this Court should grant review on this issue.

II.
**REVIEW SHOULD BE GRANTED SO THAT THIS COURT CAN
DETERMINE WHETHER SECTION 327 IS UNCONSTITUTIONALLY
VAGUE IN DEFINING THE TERM “ENDLESS CHAIN SCHEME”**

“The Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution, each guarantee that no person shall be deprived of life, liberty, or property without due process of law.” (*People v. Heitzman* (1994) 9 Cal.4th 189, 199.) In accordance with these provisions, criminal statutes require “a reasonable degree of certainty in legislation.” (*Ibid.*) “A penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” (*Kolender v. Lawson* (1983) 461 U.S. 352, 357 [103 S.Ct. 1855, 75 L.Ed.2d 903].) 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* (1939) 306 U.S. 451, 453 [59 S.Ct. 618, 83 L.Ed.2d 888].) “Vague laws trap the innocent by not providing fair warning.” (*Heitzman, supra*, 9 Cal.4th at p. 199.) Therefore, “[i]f a criminal statute is not sufficiently certain and definite, it is unconstitutionally vague and therefore void.” (*People v. Maciel* (2003) 113 Cal.App.4th 679, 683.)

In order to show that a statute is unconstitutionally vague, the petitioner must show “not that it affects a substantial number of others, but that the law is vague as to her or ‘impermissibly vague in *all of its applications.*’” (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116 quoting *Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 497-498 [102 S.Ct. 1186, 71 L.Ed.2d 362][Emphasis in original].) In making this determination, courts “look first to the language of the statute, then to its legislative history, and finally to the California decisions construing the statutory language.” (*Heitzman, supra*, 9 Cal.4th at p. 200.)

To be clear, petitioner believes that section 327 is unambiguous. The statute clearly defines an endless chain scheme in terms of the individual participant and requires that each participant recruit additional members in order to be able to receive compensation. Because WHW unquestionably did not impose such a requirement on its members, it did not qualify as an endless chain scheme.

The Court of Appeal has interpreted this statute differently. It has concluded that the plural really means the singular and that the recruitment requirement under section 327 is defined in terms of the organization as a whole, not the individual participant. (Slip opn., p. 9.) If the Court of Appeal is correct in this interpretation then the statute is necessarily vague. The statute defines endless chain schemes in terms of “*a participant’s*” requirement to recruit new members. If the statute really means that it is the *organization’s* need for continued recruitment that serves as the defining factor, as the Court of Appeal believes, then

one is hard-pressed to conclude that the statute gives fair warning as to what is proscribed. Stated otherwise, how can an “ordinary” person be expected to know that an organization is illegal because it, as a whole, requires recruitment of new members when the statute defines the illegal organization as one where a single participant must introduce new members in order to receive her chance at compensation?

Since this Court has yet to address the issue of the statutory definition of “endless chain scheme” as it is used in section 327, the issue of whether the Court of Appeal’s decision renders that section vague is also a question of first impression for this Court. Petitioner respectfully submits that it should grant review on this issue.

CONCLUSION

For the reasons stated herein, review should be granted and the judgment reversed.

Dated: September 6, 2006

Respectfully submitted,

/s/ Randy S. Kravis
Randy S. Kravis, Esq., #214100
Attorney for Petitioner

CERTIFICATION OF WORD COUNT IN THIS PETITION

Pursuant to California Rules of Court, Rule 28.1(e)(1), I, Randy S. Kravis, certify under penalty of perjury that, according to my word processing program, Microsoft Word 2002, there are 3,162 words in this petition for review filed on behalf of petitioner Christine Ney.

DATED: September 6, 2006

/s/ Randy S. Kravis
Randy S. Kravis

APPENDIX A

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 12930 Ventura Blvd., #903, Studio City, CA 91604.

On September 6, 2006, I served the foregoing document described as **PETITION FOR REVIEW** on the following:

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Petitioner

I placed true copies of the foregoing document in sealed envelopes addressed as stated on the attached service list. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing in a registered U.S. mailbox.

Executed on September 6, 2006 Studio City, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Randy S. Kravis
Name

/s/ Randy S. Kravis
Signature