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CENTRAL JUSTICE CENTER

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ALAN SLATER, Clerk of the Court
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. JOSEPH GERARD CAVALLO, ET AL., Defendants.	Case No.: 05ZF0118 **GLOBAL OPPOSITION TO DEFENDANT CAVALLO'S DEMURRER, TWO MOTIONS TO DISMISS, AND MOTION TO SEVER** Dept.: C-36 Date: October 13, 2006 Time: 9:00 a.m. Est.: 20 minutes

SUMMARY

Having been unsuccessful in his attempt to recuse the district attorney's office and/or obtain discovery to show that he is the target of invidious discrimination, defendant Cavallo now seeks to litigate a demurrer, two motions to dismiss, and a motion to sever his trial from that of his codefendants.

For the reasons set forth below, each of these motions should be summarily denied.

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It is pretty common knowledge that the California Bar Association has the authority to discipline attorneys and the Insurance commissioner has the authority to discipline insurance agents. I'm sure Cavallo is the only attorney in the history of California law that has every been convicted of a felony for violation of Title 10, CCR 2071. I agree he was in violation of the B&P Code. I don't think even he would deny that.

1 **ARGUMENT**

2

3 **I. The demurrer should be overruled.**

4 A. The Promulgation Issue

5 Cavallo's initial claim in his demurrer is that counts 2 and 3 do not state a valid
6 cause of action. He argues that the Insurance Commissioner illegally promulgated
7 section 2071 of title 10 of the California Code of Regulations (hereafter "rule 2071"),
8 and thus the counts in the indictment that are based on a violation of this rule (i.e.,
9 counts 2 and 3) must be set aside. (NOTE: For ease of reference, attachment 1 is a
10 listing of all current bail regulations, including section 2071. Attachment 2 is a listing
11 of all bail statutes set forth in chapter 7 of the Insurance Code.)

12 The argument is easily rejected. California law grants the Insurance
13 Commissioner authority to promulgate "reasonable rules (or regulations) necessary,
14 advisable, or convenient for the administration and enforcement" of chapter 7 of the
15 Insurance Code. (Ins. Code, § 1812.) The commissioner promulgated rule 2071
16 pursuant to this provision.

17 Rule 2071 precludes bail agents from recommending attorneys to arrestees.[1] To
18 determine whether the rule is a "reasonable" one that is "advisable" and/or
19 "convenient" to the enforcement of chapter 7, it is helpful to look at the kickback
20 scheme Cavallo himself orchestrated, where he paid his codefendants a tremendous
21 amount of consideration (including 30 percent of his retainers) in exchange for their
22 referral of dozens of arrestees to him over several years. As will be shown, this type of
23 arrangement runs afoul of numerous provisions of chapter 7, and thus Rule 2071 is a
24 reasonable effort to enforce the provisions of that chapter.

25

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27 [1] Rule 2071 provides: "No bail licensee shall in any manner, directly or indirectly, suggest the name of or
28 recommend any attorney to any arrestee or person purporting to act for or represent an arrestee.

Cyndee pointed out the example makes no sense. If the arrestee is indigent, they wouldn't have money to hire an attorney in the first place - or bail out!

1 The primary consequence of this type of arrangement is the corruption of the
2 bail agent's fiduciary obligation toward an arrestee. The potential for danger is
3 enormous when liberty is at stake. For example, an indigent arrestee may never learn
4 that he is eligible for the services of a public defender, because he has retained the bail
5 agent's chosen lawyer before arraignment. Similarly, non-indigent arrestees may feel
6 intimidated against retaining the most competent lawyer they can afford if they believe
7 the agent who secured their freedom only works with a particular lawyer. And if the
8 non-indigent defendant is unable to pay his lawyer, he may fear that will be taken back
9 into custody. Moreover, regardless of whether a client is indigent, the arrangement
10 deprives a defendant of information he is entitled to know: namely, that a major share
11 of the retainer he paid is being shared with a person who has no role in the defense of
12 the charges.

Collateral? We're lucky if we get the premium!

13 Another consequence of a Cavallo-like kickback scheme is that a bail agent may
14 become indebted to a lawyer to such an extent that it interferes with the agent's legal
15 and ethical obligations to the judiciary. For example, a lawyer may pressure an agent
16 into accepting inadequate collateral, if the client has insufficient resources to pay both
17 the bail premium and the legal retainer. And a defendant's incentive for not fleeing the
18 court's jurisdiction (i.e., the forfeiture of bail, and the bail agent's incentive to capture
19 him) may cease to exist if the arrestee and his lawyer conspire with the agent to allow
20 the arrestee to remain a fugitive in exchange for a secret reimbursement of the agent's
21 losses.

What attorney is going to "secretly" or otherwise agree to pay off a the full amount of a bail forfeiture?

22 It cannot reasonably be denied that these consequences run afoul of section
23 1804-1807 of the Insurance Code, which require bail agents to act with honesty and
24 integrity, avoid improper business practices, have an understanding of the obligations
25 and duties of bail, and maintain standards of fairness. In addition, when a agent refers
26 arrestees to a particular attorney, there is a risk that the attorney will then reciprocate
27 by soliciting bail on behalf of the agent, while hoping to receive additional client
28 referrals in return. This would violate Insurance Code section 1800, which precludes

Smith v. Downey was in a CIVIL APPELLATE COURT. He was served with an accusation alleging he had made gifts to various law enforcement employees to induce them to favor him in his bail business, he knowingly permitted jailers to solicit bail business for him and to favor him over his competitors. He was further charged with 2081, 2082, 2074, 2094, 2101, and 2102 of the California Administrative Code.

1 unlicensed individuals (including attorneys) from soliciting bail in exchange for
2 remuneration. This is the function of the Office of Admin. Law.

3 While no published case has analyzed whether rule 2071 was lawfully
4 promulgated, *Smith v. Downey* (1952) 109 Cal.App.2d 745 is instructive. The appellate
5 court in *Smith* was called upon to decide whether the Insurance Commissioner lawfully
6 promulgated rule 2081 (which was subsequently renumbered), which precluded bail
7 agents from soliciting bail in public institutions. The court explained: "we find nothing
8 unreasonable, unnecessary or oppressive in connection with [this] rule[] as related to
9 the kind of business here regulated. . . . To permit solicitation of bail bonds in county
10 jails and other public places, especially through the aid of jailers, would naturally be
11 conducive to many of the evils which [chapter 7] was designed to prevent." (*Id.*, at p.
12 750.) The procedures in the APA were followed. He filed for a writ of mandamus in the trial court.

13 As the *Smith* court further explained, "The bail bond licensing provisions were
14 adopted to meet a well-known condition which obviously called for some real
15 regulation of the business of furnishing such bail bonds. Such regulation was placed in
16 the hands of the insurance commissioner, and while some statutory regulation was
17 provided he was given a further rule-making power similar to that given to many other
18 administrative agencies, and for similar reasons. While rules so established must be
19 reasonable, it seems inconceivable that it could have been intended to leave the
20 question of their reasonableness exclusively to the criminal courts." (*Id.*, at p. 748.)

21 A similar analysis is warranted here. Just as soliciting bail in public institutions
22 may be proscribed to avoid the type of corruption that can occur when jailers become
23 involved in the process, the Insurance Commissioner can properly impose a rule that
24 precludes agents from corrupting our system of justice by engaging in the type of
25 kickback scheme that occurred here. Rule 2071 is a reasonable prophylactic measure
26 designed to avoid corrupt business arrangements between bail agents and attorneys.

27 Defendant also claims on pages 7-8 of his brief that Rule 2071 (which he
28 mislabels as Rule 1072 and 1071 in this portion of his argument) must be declared

Smith's license was only suspended for 90 days, but was stayed for three years upon the terms that he refrain from making gifts to public employees, that he cease from soliciting in any penal institution, and that he conform to all rules and regulations relative to bail transactions.

invalid, as the Insurance Commissioner did not specifically "reference" any particular statute when promulgating it. Defendant relies on Government Code section 11359 for the proposition that an express reference is necessary. But no case has ever so held. The statute referenced by defendant is a definitional provision that does not purport to dictate the conditions precedent to the valid promulgation of a regulation.

AUTHORITY-REFERENCE-CONSISTENCY CLARITY-NONDUPLICATION-NECESSITY

OAL REVIEW FOR COMPLIANCE WITH THE AUTHORITY AND REFERENCE STANDARDS

Each regulation must satisfy the Authority and Reference standards. Complying with the Authority and Reference standards involves a rulemaking agency in two activities: picking appropriate Authority and Reference citations for the note that follows each regulation section to be printed in the California Code of Regulations, and adopting a regulation that is within the scope of the rulemaking power conferred on the agency.

"Authority" means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation. Government Code Section 11349(b).

"Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation. Government Code Section 11349(e).

Each regulation section printed in the California Code of Regulations must have a citation to the specific statutory authority under which it was enacted and a citation to the specific statute or other provision of law that the regulation is implementing, interpreting, or making specific. As an example the Authority and Reference Citations for Section 55 of Title 1 of the California Code of Regulations reads as follows: "Authority cited: Sections 11342.4 and 11349.1, Government Code. Reference: Sections 11346.1, 11349.1, 11349.3 and 11349.6, Government Code."

The statutes and other provisions of law cited in Authority and Reference notes are the agency's interpretation of its power to adopt a particular regulation. A rulemaking agency initially selects Authority and Reference citations when it is drafting the proposed regulation text and may revise and refine the citations during

B. The Vagueness/Uncertainty Claims

Cavallo raises some additional arguments relating to the purported vagueness/uncertainty of the indictment. None of the arguments is fatal to the indictment.

Cavallo claims he is unable to determine whether the People have alleged in count 1 that he conspired to: (1) engage in the crime of capping, or (2) solicit another to engage in the crime of capping. (See demurrer, at pp. 10-12.) The People intend to proceed on the former theory, and we will amend the indictment if defendant so requests.

He next claims that it is "odd[]" that the overt acts alleged in count 1 and 2 are identical. (See demurrer, at p. 12.) The People are unfamiliar with any authority that allows a demurrer to be predicated on a defendant's feeling that particular pleading language is odd. To the extent defendant believes he has raised a legitimate legal challenge here, we have no idea what it is.

Cavallo also implies that he cannot be charged with a conspiracy to violate an insurance regulation that governs the conduct of bail agents, since he does not fall into that category. (Demurrer, at p. 12.) Regardless of whether he has properly raised this claim in the context of a demurrer (i.e., since the alleged defect depends on a fact that does not appear on the face of the accusatory pleading), it is easily rejected. While rule 2071 does indeed govern the conduct of bail agents, there is no authority for the notion that an attorney is immune from prosecution when he conspires with bail agents to violate that rule. In a similar context, the Court of Appeal has rejected the notion that because capping laws govern the conduct of non-lawyers, lawyers are immune from engaging in the crime of conspiracy to engage in capping. (*Hutchins v. Municipal Court* (1976) 61 Cal.App.3d 77, 84-85.)

Next, Cavallo complains that the People have not alleged in count 3 the specific act of attorney recommendation that he aided and abetted during the 22-month period

pled in the indictment. (Demurrer, at p. 12.) Defendant's argument lacks merit. The People have intentionally pled this count in that manner, to allow a felony conviction in the event the jury unanimously concludes that Cavallo is vicariously liable for *any one* of the numerous recommendations that his codefendants made during the time set forth in the indictment. The other alternative was for the People to charge Cavallo with a distinct count for each recommendation that can be attributed to him. Defendant has no legitimate due process argument here, as the grand jury transcript provides him with notice as to the various recommendations that might serve as the basis of a conviction for violating count 3. (See, e.g., *People v. Yoshimura* (1976) 62 Cal.App.3d 410, 416 [explaining that a grand jury transcript can be considered in addition to the language of the indictment to determine whether the prosecution has given adequate notice to a defendant of the acts forming the basis on a felony charge].)

Lastly, Cavallo raises the notion that Rule 2071 "threatens the right of freedom of speech as plead [sic]." (Demurrer, at pp. 17-18.) Given Cavallo's express acknowledgment that "[t]his type of commercial speech can be regulated and even criminalized under the holdings of the California Supreme Court and those of the United States Supreme Court[,]" the People are at a loss to respond to this argument. There is nothing about the manner in which we have pled the indictment that threatens the First Amendment to any greater extent than what already exists by virtue of the Insurance Commissioner's promulgation of Rule 2071. And Cavallo makes no argument that Rule 2071 is facially invalid.

II. The Penal Code section 995 motion should be denied.

Cavallo also seeks dismissal pursuant to Penal Code section 995 on three main grounds. Both should be rejected.

A. The Jury was Properly Instructed on Conspiracy Law

Cavallo claims the jury might have indicted him in the absence of probable cause because the prosecution made a statement in closing argument that implied that a

1 conspiracy may be predicated *solely* on the fact that Cavallo benefited from the
2 referrals made to him.
3 This argument borders on the frivolous. It is absurd to infer that the jury
4 believed, based on one ambiguous clause in a closing argument, that a conspiracy could
5 be predicated solely on an after-the-fact benefit. The jury was properly instructed on
6 the elements of conspiracy, and the specific intent that must be shown, and the grand
7 jury is presumed to have followed that law. (Evid. Code, § 664.) Moreover, as Cavallo
8 contends in another portion of his brief, "[i]t is . . . obvious that no bail agent would risk
9 losing his license and being prosecuted for [referring inmates to an attorney] if he or
10 she were not receiving something of value in return for soliciting business . . . ." (Penal
11 Code section 995 motion, at p. 16.) The logical extension of this argument means that
12 the grand jury would "obvious[ly]" conclude that the referrals to Cavallo only occurred
13 because a conspiracy to refer clients, in exchange for money, occurred in the first place.
14
15 B. Only One Overt Act Need Be Established to Support a Conspiracy
16 Indictment
17 While acknowledging that a *trial* jury need only find one overt act was
18 committed by a conspirator before finding all members of the conspiracy guilty, Cavallo
19 claims that a *grand* jury must find the existence of every overt act alleged. He claims
20 that unless this occurs, there is a risk that a defendant might be indicted on something
21 less than probable cause.
22 The argument is logically unsound. While the People acknowledge a defendant
23 cannot be indicted for a felony offense in the absence of a grand jury's probable cause
24 finding that each and every charged felony was committed, we are unfamiliar with any
25 rule stating that a grand jury must find probable cause to support every *overt act*
26 alleged in an indictment. Moreover, there is no need to create such a rule. A defendant
27 cannot stand trial after being indicted for the crime of conspiracy *unless* the grand jury
28 found probable cause to believe that at least one overt act was committed in

furtherance of the agreement. If the members of a grand jury make this finding, but merely disagree on which overt act or acts were committed, the defendant suffers no prejudice since there is still probable cause to believe he committed the charged conspiracy.

To the extent the prosecution failed to introduce any evidence in support of some of the overt acts, Cavallo declined to file a motion seeking to strike those acts from the indictment. The People take no position on whether he would have been entitled to this remedy had he sought it.

C. Rule 2071 Does not Preempt any More General Laws

Cavallo alleges that cannot be charged with the more general crime of conspiracy to commit capping, since a more specific provision (Rule 2071), preempts prosecution for the conspiracy pursuant to the *Swann-Gilbert* doctrine. (See *People v. Swann* (1967) 213 Cal.App.2d 447; *People v. Gilbert* (1969) 1 Cal.3d 475.)

The argument must be rejected. The *Swann-Gilbert* rule is not mandated by any statute or constitutional provision. Rather, it is merely a rule of statutory construction courts use when determining whether the Legislature *intended* that a specific statute be used – rather than a more general statute – when prosecuting conduct proscribed by both statutes. (See, e.g., *People v. Cockburn* (2003) 109 Cal.App.4th 1151, 1158-1159.) The doctrine is inapplicable here, since the Legislature did not enact Rule 2071 – the Insurance Commissioner did. Defendant cites no authority suggesting that an Insurance Commissioner may enact a regulation that can trump prosecution under a statute passed by the Legislature.

Moreover, the rule applies only when the general statute provides a penalty *more severe* than the more specific one. (*Ibid.*) Here, the penalties are identical (a 16-month, 2-, or 3-year wobbler) for both conspiracy to engage in capping (see Pen. Code, § 182, subd. (a)) and a violation of Rule 2071 (see Ins. Code, § 1814).

Lastly, defendant cites no authority for the proposition that most violation of the latter provisions *necessarily* or even commonly involve a conspiracy to engage in capping.

III. The nonstatutory motion to dismiss should be denied.

Defendant's nonstatutory motion to dismiss is mainly predicated on the contention that the Orange County District Attorney failed to advise the Grand Jury about allegedly exculpatory evidence related to the Sheriff's bias against him and the District Attorney's purportedly overzealous and unethical pursuit of Cavallo's criminal misdeeds. But the subjective motivations behind the decision to seek an indictment are irrelevant to the issue of his guilt or innocence. As to the allegation that we failed to inform the grand jury that our investigators were acting unethically, there is no evidence to support it, as shown during the hearing on his recusal motion.

As to Cavallo's claim that Baytieh committed misconduct by "arguing" the case rather than simply giving neutral legal advice to the grand jury, we are unaware of any legal authority that precludes the prosecutor from advocating that the grand jury issue an indictment based on the evidence presented. Moreover, Baytieh committed no misconduct insofar as he expressed his personal views of what the evidence established, insofar as he never implied that he was basing his statements on evidence outside the record. (See, e.g., *People v. Ghent* (1987) 43 Cal.3d 739, 772.)

IV. Severance is not required here.

Cavallo raises three reasons in support of his motion to sever his case from that of his codefendants. Each lacks merit.

First, he contends that the credibility of his attorney (John Barnett) will be hampered once he is cross-examined by his codefendants' counsel. (Barnett is a witness for the prosecution on counts 4 and 5, neither of which is charged against Cavallo) But this argument is moot. As the People agreed when opposing defendant

Castro's severance motion, we will not be calling Barnett as a witness in the event either Castro or Cruz is tried with Cavallo.

Second, Cavallo suggests he will suffer undue prejudice if the jury hears evidence on counts 4 and 5, which involve the use of jail inmates to solicit business on county property. This contention should be rejected. Joinder of multiple defendants in a single trial is proper when defendants are charged with different crime, so long as all defendants share at least one count in common, and there is a common element of substantial importance relating to all charges.[2] (Pen. Code, § 1098; see *People v. Spates* (1959) 53 Cal.3d 33, 26 [joint trial was proper on seven robbery counts, even though one defendant was charged with only two of them]; *People v. Stathos* (1971) 17 Cal.App.3d 33, 41.)

Moreover, nothing about the nature of counts 4 and 5 is so inherently prejudicial that Cavallo will suffer an unfair trial. (The People have no evidence to show that the tank workers used force or intimidation when referring fellow inmates to Xtreme.) While he contends that these counts will involve proof that Castro and Cruz "prey[ed] on vulnerable arrestees" and will "make them appear to be undesirable and slimy to the jury" (severance motion, at p. 10), the prejudicial impact will be nil, when contrasted with evidence that Cavallo – to borrow his own words – systematically "preyed upon" his own "vulnerable" clients. Cavallo's argument is the white-collar equivalent of Charles Manson complaining that a joint trial with Leslie Van Houten would be unfair, if the jury learns that she robbed a liquor store on the way to Sharon Tate's home.

Lastly, Cavallo claims that severance is appropriate since his defenses are "potentially" antagonistic to those of his codefendants. Other than Cavallo's now-moot contention that Barnett will be a prosecution witness on two of the counts, he does not articulate any reason why this might be so. Moreover, the People do not anticipate any antagonism. Undoubtedly, Cavallo will defend against counts 1-3 by arguing that he

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[2] As Cavallo impliedly concedes, all of these counts – involving unlawful bail practices – involve a common element of substantial importance.

never aided and abetted the referral of inmates to him. To be antagonistic, the defense of Castro and/or Cruz would have to involve proof that they *did* have a preexisting scheme to refer inmates to Cavallo. Given that this would be a concession of their guilt on the charged counts, the People strongly doubt this will occur.

CONCLUSION

For the foregoing reasons, the demurrer should be overruled. The remaining three motions should be denied.

Respectfully submitted this 3rd day of October, 2006.

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