*APPELLATE DIVISION DOCKET No. 2006-07537*

*Requested Argument Time: 20 minutes*
*To Be Argued By: Gerald B. Lefcourt*

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# Supreme Court of the State of New York

Appellate Division: Second Department

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THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent,*

-against-

DAIVERY TAYLOR,

*Defendant-Appellant.*

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## BRIEF ON BEHALF OF DEFENDANT-APPELLANT DAIVERY TAYLOR

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GERALD B. LEFCOURT
LAW OFFICES OF
GERALD B. LEFCOURT, P.C.
148 East 78th Street
New York, New York 10075
(212) 737-0400
Lefcourt@lefcourtlaw.com
*Attorney for Daivery Taylor*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DAIVERY TAYLOR,

Defendants-Appellants.

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STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 1706N/04.

2. The full names of the original parties were The People of the State of New York against Silverman & Taylor and Daivery Taylor. This appeal is on behalf of Daivery Taylor.

3. This action was commenced in the Supreme Court, Nassau County.

4. This action was commenced by the filing of an indictment on or about August 24, 2004.

5. This appeal is from a judgment, convicting appellant, after a bench trial, of scheme to defraud in the first degree and offering a false instrument for filing in the first degree.

6. This is an appeal from the judgment of conviction rendered on July 31, 2006.

7. The appendix method is not being used.

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## Preliminary Statement

This is an appeal from a judgment of the Supreme Court, Nassau County, rendered on July 31, 2006, convicting Mr. Taylor, after a non-jury trial, of one count of scheme to defraud in the first degree [P.L. 190.65] and four counts of offering a false instrument for filing in the first degree [P.L. §175.35], and sentencing him to 5 years' probation and a fine of $5,000.

Timely notice of appeal was filed.

Appellant's co-defendant below, the law firm of Silverman & Taylor, was convicted of one count of scheme to defraud in the first degree and four counts of offering a false instrument for filing, and on July 31, 2006 was fined $5,000.

## Questions Presented

1. Whether the court's failure to order the prosecution to provide a bill of particulars specifying the conduct encompassed by count two, prevented Mr. Taylor from adequately preparing a defense, thus depriving him of his Sixth and Fourteenth Amendment rights to due process and a fair trial.

2. Whether the evidence was legally insufficient and the verdict against the weight of the evidence where the prosecution failed to prove beyond a reasonable doubt that Mr. Taylor knowingly and intentionally participated in the Fernandez brothers' scheme to defraud insurers.

3. Whether the evidence was insufficient to establish beyond a reasonable doubt that Mr. Taylor filed false statements with the Office of Court Administration.

4. Whether critical wiretapped conversations were wrongly admitted under the co-conspirator exception to the hearsay rule where the prosecution failed a) to establish that the Fernandez brothers were unavailable to testify, and b) to make a prima facie showing of Mr. Taylor's participation in a conspiracy to defraud.

## Statement of Facts

### Introduction

Appellant Daivery Taylor, a partner of the law firm and co-defendant Silverman & Taylor ("the firm"), was charged in an indictment with enterprise corruption,[1] insurance fraud, grand larceny, scheme to defraud and offering a false instrument for filing, as part of a multi-defendant indictment against "The Fernandez Brothers Criminal Enterprise." Under Count One which charged the defendants with enterprise corruption, the indictment alleged that between 1999 and 2004, Mr. Taylor was part of an insurance fraud scheme, run by brothers John and Robert Fernandez, who paid for the names of automobile accident victims, then steered those victims to certain clinics that would order allegedly excessive testing and treatment in order to generate high payouts by insurance carriers and

[1] As discussed post at 6 and 25, this charge was dismissed before trial.

increase the potential settlements in personal injury lawsuits.[2] The accident victims were referred by the Fernandez brothers to a number of lawyers, including Mr. Taylor, who paid the brothers a fee for the referrals and other services such as driving victims to medical appointments and lawyers' offices, and brought personal injury lawsuits on behalf of the accident victims.

Count Two of the indictment, charging Mr. Taylor with scheme to defraud in the first degree [P.L. § 190.65(1)(b)], set forth no factual allegations except the defendants were engaged in the alleged scheme in Nassau County during the roughly five year period from October 1999 to about June 2004. Defense counsel requested from the prosecution a Bill of Particulars specifying the factual substance of the conduct encompassed by the charge. The prosecution responded that Mr. Taylor was not entitled to a Bill of Particulars. The court never ruled on defense counsel's subsequent motion to compel the production of a Bill of Particulars. After trial, counsel argued in a motion to set aside the verdict that the court's failure to require production of a Bill of Particulars deprived Mr. Taylor of a fair trial, as the indictment did not apprise him of the conduct that was the basis for Count Two, making it impossible to adequately prepare a defense. Despite the

[2] The law firm of Silverman & Taylor was a co-defendant at trial and was charged with the same offenses.

prosecution's concession that defense counsel had indeed moved for a Bill of Particulars, the court denied the motion on the ground that the court's file did not contain a motion to compel or any motion practice on this issue.

There was no dispute during the bench trial, that all of the accident victims represented by Mr. Taylor and Silverman & Taylor had actually been in automobile accidents and had suffered some degree of pain or injury as a result, and had sought and received medical treatment - including acupuncture, massage and other physical therapy – and/or psychiatric treatment, from licensed practitioners. Nor was it disputed that Mr. Taylor received client referrals from the Fernandez brothers, who also followed up with clients to make sure that they followed doctors' or therapists' treatment plans. What was hotly contested was whether his acceptance of the referrals and representation of these accident victims in personal injury lawsuits proved Mr. Taylor's complicity in insurance fraud or a scheme to defraud. The court, in fact, acquitted Mr. Taylor of insurance fraud, but found him guilty of scheme to defraud and offering a false instrument for filing.

Sixteen wiretapped conversations were admitted over defense objections. Four were between Robert Fernandez and Mr. Taylor, and the remainder between 1) accident victims and either people employed by the Fernandez brothers or one of the brothers themselves and; 2) the Fernandez

brothers and their employees or office staff at a medical facility or Silverman & Taylor. The prosecution contended that the recorded conversations, between the Fernandez brothers and accident victims, employees, or medical or law office staff, were admissible as co-conspirator statements. Over defense objections that 1) the Fernandez brothers were available to testify since the indictment against them had been dismissed and no new charges were pending against them and 2) the government had not made a prima facie case that Mr. Taylor was a co-conspirator in a scheme to defraud, the court ruled that the conversations were admissible as co-conspirator statements.

A. The Indictment and Motion For A Bill of Particulars

The forty-one count indictment charged the defendants - Robert Fernandez (a/k/a Robert Campbell), John Fernandez, RJF Services, Inc., New York Professional Management, Inc., Andrea Gurciullo, Andrea Gurciullo Acupuncture, P.C., Paul Ajlouny, Paul Ajlouny & Associates, P.C., Daivery Taylor, the Law Offices of Silverman & Taylor and Robert Betman - with enterprise corruption, insurance fraud, scheme to defraud and grand larceny.[3] According to the indictment, Robert and John Fernandez created and operated the "Fernandez Brothers Criminal Enterprise" "for the

[3] The indictment is part of the Supreme Court file in this case.

purpose of obtaining money by fraud in the submission of no-fault and bodily injury claims to insurance carriers," and along with their co-defendants "banded together to submit fraudulent claims to no-fault insurance carriers through the illegal solicitation of clients, to file false retainer statements with the New York State Office of Court Administration ("OCA"), and to provide medically unnecessary treatment to motor vehicle accident victims."[4]

As discussed further below (see post at 25), the indictment was dismissed against the Fernandez brothers on speedy trial grounds (40).[5] Guilty pleas were entered for defendant corporations RJF Services and New York Professional Management (91). Count One of the indictment, the enterprise corruption charge, was dismissed against Mr. Taylor (and Silverman & Taylor) after the dismissal of the entire indictment against the Fernandez brothers (94).

Count Two of the Indictment charged the defendants with Scheme to Defraud in the First Degree [P.L. § 190.65(1)(b)] and stated:

> The defendants, in the County of Nassau and elsewhere, during a period from in or about October 1999 to in or about June

[4] As explained in the "background" section of the indictment, under New York Insurance Law, a person injured in a motor vehicle accident may pursue a claim for non-basic economic damages, such as pain and suffering, only if he or she has sustained a "serious injury," as defined under section 5102(d) of that law.

[5] Numbers in parentheses refer to the pages of the trial transcript. Those preceded by "S," refer to the pages of the sentencing transcript.

> 2004, engaged in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person and to obtain property from more than one person by false and fraudulent pretenses, representations and promises, and so obtained property with a value in excess of one thousand dollars from one and more such persons.

Prior to trial, defense counsel served a "Demand for Discovery and Request for a Bill of Particulars" (dated May 18, 2005).[6] In the section entitled: "Bill Of Particulars," counsel requested that the prosecution "specify with particularity the following;"

> a. The factual substance of the defendant's conduct beyond the conclusions contained in the indictment which is encompassed by the charges and which the People intend to prove on their direct case (Id. at 8, ¶ 4).

Counsel further requested that the prosecution "Specify the principal's conduct which formed the basis, in whole or part, of the charges herein" (Id. at 9, ¶ 4(b)(ii)).

In its response, the prosecution refused Mr. Taylor's request, stating, "The facts set forth in the indictment provide all of the particulars to which the defendant is entitled" (People's Response to Defendant's Demand for a Bill of Particulars, dated June 14, 2005 at ¶17).

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[6] The demand for bill of particulars, prosecution's response, and Judge Donnino's decision, are part of the Court file.

The defense moved for an order compelling the production of a Bill of Particulars.[7] No decision, however, was ever rendered on that motion, nor was it addressed in any manner by the court (Hon. William C. Donnino). In his oral and written rulings, Judge Donnino ruled only on defense counsel's motion to inspect the Grand Jury minutes and to dismiss the indictment for a defect in the prosecution's instructions on the law to the Grand Jury. The judge stated orally:

> There is a motion to inspect and dismiss or reduce the counts based on examination of the Grand Jury minutes. I have examined the Grand Jury minutes, they are sufficient to support the Charges [sic], et cetera. The motion to dismiss, reduced [sic] or whatever is denied (Transcript of pre-trial proceeding, dated August 5, 2005 at 3).

And in a written decision dated September 6, 2005, just six days before the trial began, before a different judge, Judge Donnino issued a one-paragraph written decision essentially reiterating his oral decision:

> As previously stated on the record, the defendant's motion to inspect the Grand Jury minutes was granted. Upon inspection, the motion to dismiss the indictment or reduce a charged offense in the indictment was denied. The evidence before the Grand Jury was sufficient to support each and every count in the indictment. The defendant's application for release of the Grand Jury minutes was accordingly denied. The defendant's motion to dismiss the indictment for a defect in the District Attorney's instructions on the law to the Grand Jury was

[7] Although neither defense counsel nor the prosecution was able to locate a copy of the motion and it was not found in the Court file, the prosecution later conceded that the motion was made (See discussion of motion to set aside the verdict, post at 35).

denied. The instructions were not defective as a matter of law (Donnino Decision).

B. The Trial Evidence

The Prosecution's Case

1. Referrals

Edwin Guerrero worked for the Fernandez brothers from approximately September 2002 until his arrest in June 2003 (52, 54, 55, 110, 133-34, 143-44). Guerrero, who pleaded guilty to insurance fraud conspiracy, testified against Mr. Taylor as part of a plea agreement under which he would receive no jail time and pay no restitution (53, 203).[8] Guerrero, who claimed on direct examination he had no prior arrests, admitted on cross-examination that he had forgotten a prior arrest for petty larceny in 1992 (177, 197-98). Mr. Guerrero invoked the Fifth Amendment when asked whether he reported to the IRS or state tax authorities the cash payments he received from the Fernandez brothers (186-87).

Guererro's job for the Fernandez brothers, which he had previously done for approximately two years for an associate of the brothers named Oscar Oliden, was to drive automobile accident victims to certain clinics and

[8] Outside the courtroom, Mr. Guerrero also took it upon himself to instruct a prosecution witness, Edwin Rivas, who was speaking with a defense counsel to be silent (Guerrero 194-95; Rivas 497).

lawyers' offices, for which the Fernandez brothers paid him $500 per week (54, 57- 59, 130, 132-33). Guerrero's job with the Fernandez brothers also entailed seeking out and sending accident victims to the attorneys and clinics with which the brothers were associated, for which he earned an additional $400 (62) or $500 (58-59) from the Fernandez brothers (54, 55, 58-59, 64-65, 68, 133-34). He found such accident victims through insurance brokers, including Clifton Collins who was the owner of CMD Brokerage in Hempstead, New York, and also through auto body shops (Guerrero 55-56, 70-71, 162-65; Collins 358).

The Fernandez brothers, who worked out of various medical offices that they owned or managed, would give Guerrero the names of accident victims or insurance brokers to visit or call (110-11, 174-76). He would call the victims, find out if they were at fault in the accident and in pain and, if so, would take them to a clinic - - sometimes one located at 141 North Franklin Street in Hempstead, New York which was owned by the Fernandez brothers - - and to a lawyer designated by the Fernandez brothers (65-66, 110-12). Guerrero was instructed by the Fernandez brothers to lie and tell the victims that he was from a lawyer's office and that they should seek medical attention immediately whether or not they presently believed that they were injured, because if they did not and later developed

symptoms, they would have to pay for medical treatment out of pocket (62-63, 101-02, 162-63). He also told them that if they went to a clinic and followed the prescribed treatment, a lawyer would represent them and they would get money (62-63). Mr. Taylor was never present when Guerrero recruited or spoke to the accident victims and, in fact, Guerrero never met Mr. Taylor outside the offices of Silverman & Taylor (161, 165, 168).

Guerrero first met Mr. Taylor in September 2002, the same day he began working for the Fernandez brothers (144-45). Thereafter, Guerrero took accident victims to Silverman & Taylor on 10 to 15 occasions (142-43, 168). For patients referred to Silverman & Taylor, Mr. Taylor wrote checks, which Guerrero would pick up, payable to medical clinics owned and managed by the Fernandez brothers (157, 175). The Fernandez brothers had offices in their medical clinics (175-76). Mr. Taylor sent some of Silverman & Taylor's clients to John Fernandez for referral to a clinic for treatment (73).

Guerrero, who was born in El Salvador and whose native tongue was Spanish, required an interpreter for trial, in prior court proceedings and when meeting with lawyers for the Attorney General's office because he was sometimes confused when people spoke to him in English (49-51, 199-200).

All of Guerrero's interactions with Mr. Taylor, however, were in English (172-73).

Insurance broker Clifton Collins, who was arrested in June 2003 in connection with his involvement with the Fernandez brothers, pleaded guilty to conspiracy in the fifth degree, a misdemeanor, and agreed to cooperate with the prosecution in exchange for its recommendation of a conditional discharge and no payment of fines or restitution (357, 366). Collins referred about 15 people to Guerrero, whom he met in June 2002 (359, 362). Collins saw that some of these accident victims were limping and/or complaining of pain (368, 373-74), but otherwise had no personal knowledge of their medical conditions (368, 373-74).

Guerrero introduced Collins to Robert Fernandez (363). Collins also met Mr. Taylor through Guerrero, but only in connection with his own personal injury case that was unrelated to his dealings with Guerrero (366). On the day Collins visited Mr. Taylor's office in connection with that case, Robert Fernandez happened to be present and greeted him, but they had no further conversation (367). Collins never discussed his relationship with Guerrero with Mr. Taylor (377).

Numerous lawyers and firms, including Silverman & Taylor, paid the Fernandez brothers for accident victim referrals (59, 68, 142-43, 220-21).

Mr. Taylor paid Guerrero with checks made out to the clinics that referred the patients in the amount of $800 for each patient referred to him (60-61, 68, 157, 159-60, 175). Similarly, Guerrero paid Collins either $200 (Collins 361) or $300 to $400 (Guerrero 73) cash per victim referral. The medical clinics to which the victims were referred paid Guerrero $500 per patient (159-60).

2. The Medical Providers

Andrea Gurciullo, an acupuncturist who was charged in the instant indictment, pleaded guilty to insurance fraud and testified for the prosecution in exchange for a promise of no jail time and a fine of $50,000 (558-60). Gurciullo owned several medical facilities between 1999 and her arrest in 2003 or 2004. In April 2003, Gurciullo met John Fernandez and decided to set up practice with him (574-75, 577).[9] At her Garden City office, Gurciullo had a staff of providers that included a medical doctor, a psychologist, and a massage therapist (575). A "good percentage" of Gurciullo's patients did, in fact, appear to be in pain; Gurciullo observed

[9] Before that, between 2000 and 2003, the Fernandez brothers, through their companies, JF and New York Professional, provided management services for all of Gurciullo's other facilities, for which she paid between $18,500 and $22,500 per month (562-63). The Fernandez brothers worked with Oscar Oliden, who was responsible for marketing, and a "consultant group" called U.S. Marketing, that for $25,000 per month per office, provided patients, made sure the offices were run efficiently and "up to code," and made sure that that the billing was done (563-64, 619-20).

each patient walk and get out of a chair, tested their range of motion and checked for redness or swelling (595). No-fault patients were seen more times per week (at least 3 to 4) than other patients and Gurciullo instructed the staff to treat the no-fault patients more gently and to use needles less frequently in order to keep these patients coming back for treatment (578, 585-86). The treatment prescribed for the patients did not vary with the relative severity of the pain (580-81, 597).

To insure that any "staged" accidents were screened out, Gurciullo insisted that all patients be referred to her by someone she knew and that they had been seen by an attorney and obtained a police report regarding the accident (605). Gurciullo never met with any attorneys, including Mr. Taylor; she only had conversations with the Fernandez brothers about the patients and their attorneys (598).

3. The Accident Victims

Jose Escobar had an automobile accident on the morning of October 17, 2002 (232-33). He was able to exit his car without assistance, fill out a police report, visit his insurance broker's office and then go to work immediately after the accident (234-36). He initially had a "little" pain in his neck and back (235), but while he continued to work in the ensuing days and weeks because he wanted to keep his job, he developed constant pain in

his back, neck, head and knee (249, 272, 275). Escobar had no health insurance and was taking Advil for his pain (275).

On the evening of the accident, Escobar was contacted by a man named "Roberto" who said he had obtained Escobar's phone number from the secretary of the insurance broker's office (236-37). Roberto asked to see Escobar at his job and when he arrived, told Escobar that he should get medical treatment and see a lawyer (240-42). Roberto provided Escobar with the names and addresses of a lawyer and a clinic, and further explained that Escobar would have to continue treatment for a minimum of six to eight months (243).

Within a couple of days of the accident, Escobar went to Silverman & Taylor where he met with Mr. Taylor and told him about his accident and constant pain (265-66, 272). Mr. Taylor, with whom Escobar met 4 or 5 times, told him that he was going to help him with his case and advised him to continue treatment at the clinic for his pain, but did not say how long he should go to clinic and never told him to lie or exaggerate about his physical condition (266-67, 272-73). Mr. Taylor also never told Escobar how much money he might get from a lawsuit (273). Escobar went to a clinic on Front Street in the Town of East Meadow three times a week for the next six months and received massages, electrical stimulation and various other

treatments and tests (248, 253-63). He stopped going to the clinic after six months because the pain was less constant (267-68). Escobar received a check in the amount of $5,200 "or something like that" (270).

Carolina Gonzalez and Maria Lopez, sisters, were in an automobile accident in Lopez's car on December 25, 2002 (Gonzalez 278; Lopez 503-04). Both sisters, as well as the driver of the other car, were able to get out of their cars unassisted although Lopez's car was "completely ruined" (Gonzalez 279-80; Lopez 505-07). Lopez and Gonzalez went home after the accident, which was on a weekend, and on Monday, after receiving the police report of the accident, Lopez reported the accident to her insurer (Gonzalez 280; Lopez 509). Someone gave Lopez Mr. Taylor's name and address, and she went to his office, which was located near her insurer (511). Lopez needed a Spanish-speaking translator in order to communicate with Mr. Taylor; a "tall strong young man" who drove a black Mercedes (presumably Robert Fernandez) arrived and translated for them (512-13, 516, 519, 523). Lopez told Mr. Taylor about the accident, including her sister's presence in the car, and provided him with the police report. Mr. Taylor, through interpreter Fernandez, said that they had a good case and would get "much money" and told her to get therapy and that "the more we went to therapy the better it was for us" (512-13, 515, 522). Lopez filled out

some papers, then went with the interpreter to pick up her sister (Lopez 516; Gonzalez 282, 284).

The interpreter took the women to The Institute of Therapy (Gonzalez 283). Both Lopez and Gonzalez were suffering with back pain as a result of the accident; Lopez had shoulder pain as well (Lopez 524, 543-46; Gonzalez 286). The women were treated with heat, acupuncture (Gonzalez 288; Lopez 525, 548) and chiropractic manipulation (Lopez 548) three times a week for six months (Gonzalez 289; Lopez 528). They also had x-rays and MRIs (Gonzalez 290; Lopez 548). The treatment they received made Lopez and Gonzalez feel better (Gonzalez 291; Lopez 548). When they began to miss appointments after the first few weeks, they received calls from staff at the clinic, from Mr. Taylor's office (Lopez 528) and from the interpreter (Gonzalez 285).

Lopez, on the one hand, continued to go to the clinic although she purportedly had no pain two months after the accident- in February 2003- because Mr. Taylor had told her to continue therapy because the more she went "the better it was going to be" (531-34). Lopez did not recall, however, if she ever told Mr. Taylor that she was no longer in any pain, nor could she recall whether she told doctors as late as March 2003 that she still had back and knee pain (550-51). Lopez denied that she ever argued with

Mr. Taylor because her car had not been repaired, but she thought Mr. Taylor was not doing enough to get her car fixed. She admitted telling Mr. Taylor that she had been contacted by investigators from the Attorney General's Office, but claimed she did not tell him that as a threat (553).

Edwin Rivas was in an automobile accident on February 14, 2003. Although the car in which he was a passenger had to be towed away because of the damage, Rivas and the driver were able to leave their cars unassisted. Rivas had no immediate pain at the time of the accident, but developed back pain over the next few days (468-70, 495, 479-80, 495-96).

A few days after the accident, Rivas received a call from a man (presumably Robert Fernandez), who then came to Rivas' house and took him to a chiropractor's office (473-78).[10] Rivas was treated with warm patches and later "some kind of electric current" and exercise (482, 489, 491). He also had an x-ray and an MRI and saw a psychologist (490-92). Rivas' back pain persisted for about two months; he continued to receive treatment three times a week for about six months (485-86, 497). Rivas never saw a lawyer and did not recall ever discussing a lawsuit, but he received $2,700 from Silverman & Taylor (492-94).

[10] Rivas described the man as a tall, robust Spanish-speaking white-skinned man with black hair who drove a black Mercedes (476-78).

Felix Quezada was involved in an automobile accident on March 29, 2003. Although he was able to get out of his car unassisted and went to work the same day, he began to experience pain in his back and waist the day after the accident and could not lift anything heavy. Within two weeks it had worsened and was "very bad" and became "very intense," radiating down to his leg (404-05, 428, 431-32). Quezada's vehicle also had thousands of dollars of damages (427).

Quezada received a call from a man who identified himself as Roberto, said he was calling from "a company of lawyers" and that he "could help [Quezada] with the accident (405-06). Quezada met with Roberto at work, and the next day Roberto took him to a chiropractor's office where he saw a masseuse, acupuncturist and doctor (409-10). Afterwards, Roberto took Quezada to the offices of Silverman & Taylor where he filled out a form; at that time he saw only a secretary (415, 418).

Quezada, a diabetic, received treatment at the clinic four times a week for five or six months. He missed a week of work because of the pain that was at times was so bad that he had to sleep on the floor (422-23, 426). He also received an x-ray, MRI, some "electrical treatment" and some nerve tests (421-22). The treatment provided at the clinic worked "very well," reducing his pain level from a level nine to a level four or five (423, 432).

At some point Quezada met with Mr. Taylor regarding the bill for his automobile damage that the insurance company had not yet paid (424-25). Mr. Taylor informed Quezada that he did not need a lawyer for that but indicated he would look into it for him (425). Quezada also told Mr. Taylor about his pain, inability to lift and loss of time at work as a result of the accident (428-29). Mr. Taylor never made any promises to him about what the outcome of his lawsuit would be, never told him how long to continue his medical treatment or to exaggerate any of his injuries or pain (430-31). Quezada received $9,200 from Silverman & Taylor (425).

4. Expert Testimony

Philip Harris, M.D., a specialist in the treatment of people with impairments of function and mobility such as back injuries, ankle injuries, and spinal cord injuries, reviewed the medical records of Lopez, Gonzalez, Quezada, Rivas and Escobar (434, 457).[11] Dr. Harris did not examine or speak to any of the patients, nor did he speak to the doctors or other health care providers about the treatment they rendered (834, 836). He conceded that he was not a chiropractor and could express no opinions about chiropractic treatment received by these patients (835-36). The doctor also admitted feeling "uncomfortable" about rendering any opinion about the

[11] Harris also reviewed the medical record of Francis Romero who did not testify and whose medical record was therefore withdrawn (457, 823).

care provided by physical therapists (840). Dr. Harris did not see any certification that records he reviewed were complete and accurate, and could not say if they were the complete records of the treatment rendered (824-25, 828-29). Furthermore, the incomplete records he received were provided to him handpicked from the Attorney General's Office (824).

Dr. Harris observed a "general pattern" in all six patients' treatments; all or most saw a chiropractor, masseuse, medical doctor, acupuncturist and psychologist, all received treatment three or four times a week for about six months, all received x-rays, MRIs and/ or nerve conduction tests (457, 702, 739, 742-46, 752-68). Dr. Harris opined that there was generally excessive testing and excessive treatment not justified by the patients' injuries (457, 750-51, 776, 811, 821). With respect to Quezada, Harris opined that there was a failure to take his diabetes into account in ordering and interpreting tests and their results (776). Escobar, in Harris' opinion, did not receive excessive chiropractic or acupuncture treatment (811).

Dr. Harris acknowledged that doctors could reasonably disagree about the necessity and propriety of different types of treatment and in the interpretation of test results (841-42). He acknowledged as well that, pain being subjective, doctors often properly treated for pain when there was no objective evidence of pain (847-48).

5. The Retainer Statements

Laura Munz-Cebisch of the Office of Court Administration ("OCA") produced four retainer statements filed with the OCA stating that the subject clients were referred to the Law Office of Silverman & Taylor by Community Medical Center (387, 381-84). John Fernandez was arrested on June 13, 2003 and, in a search of his car, police recovered a briefcase containing various documents, including retainer forms of Silverman & Taylor (Investigator Angel LaPorte: 665-66, 689). Documents of other law firms were recovered as well (794).

The four retainer statements in question here, admitted as People's Exhibits 13 through 17, concerned clients Edwin Rivas, Felix Quezada, Maria Lopez, and Carolina Gonzalez. Each printed retainer statement form contained question 7, *"Name, address and relationship of person referring the client:"* followed by a space for the response. The typed response on the forms was "L.I. Community Medical Center, 88 W. Merrick Road, Freeport, NY 11520" (Id.). On all of the forms, a signature appears above the line for "Signature of Attorney" (Id.).

Certificates of incorporation indicating that neither John nor Robert Fernandez were listed as owners of Long Island Community Medical, P.C., and certificates from the NYS Professional Licensing Services stating that

neither brother was licensed to practice acupuncture, chiropractor, massage or physical therapy, were admitted into evidence (871-78; P.E.s 37-40).

6. Admission of the Wiretapped Calls

The prosecution moved to admit recordings of several of the "thousands" of calls intercepted by wiretap between February and May 2003 as part of the investigation of the Fernandez brothers' criminal enterprise (33-43, 333-35). The recordings they sought to admit fell into roughly three categories: 1) conversations between Robert Fernandez and accident victims; 2) conversations between Robert or John Fernandez and their employees or the office staff of medical facilities and law firms and; 3) four conversations between Robert or John Fernandez and Daivery Taylor (hereafter "the Taylor tapes") (see People's Exhibits 1 through 4; 335-37, 352).

Except for the Taylor tapes, the recorded conversations can be summarized as follows[12]: In general, in the calls the prosecution called "sales pitches," Robert Fernandez is talking to accident victims and trying to convince them to see a doctor. He usually claims that he is calling from an unspecified lawyer's office (but never says he is calling from Silverman & Taylor or on behalf of Mr. Taylor), tells them that any pain they are

[12] The numbered, dated recordings are on CDs and are, along with their transcripts, part of the Supreme Court file.

experiencing from the accident will get worse over the next few days and weeks or, if they are not experiencing any pain, that they will likely begin to experience pain and should see a doctor now because they might not be covered by insurance later. Fernandez also informs them that they could be entitled to money from a lawsuit if they can prove serious injury by getting treatment at least 3-times-a-week. He then usually arranges to see the accident victim in person or have a driver bring the victim to a medical facility the same day or shortly thereafter. Notably, in at least one call (recording # 1096**)** Fernandez specifically tells the accident victim that if he does not have any pain, he should not go to the medical office, and on another occasion, (recording # 2438**),** a woman insisted that she was fine and did not agree to go to a doctor.

In other conversations, usually with staff at a clinic, with a runner, or occasionally with staff at Silverman & Taylor, Robert Fernandez is asking questions or obtaining information (such as a phone number or address) about a patient. In a few conversations, John Fernandez is speaking with Andrea Gurciullo or another person about clinic or patient matters.

The prosecution argued that these recordings were all admissible under the hearsay exception for co-conspirator statements (34-39). Defense counsel opposed the admission of the tapes on the ground that they were not

subject to the exception for co-conspirator statements unless the Fernandez brothers were unavailable and there was sufficient prima facie evidence of Mr. Taylor's involvement in the fraud scheme (34-35, 43).

a. The Availability of the Fernandez Brothers

The court reserved its judgment regarding the admissibility of all of the tapes, but agreed that, as an initial matter, the prosecution would be required to establish the unavailability of the Fernandez brothers (44-45). Subsequently, Robert and John Fernandez each took the stand. Both were specifically asked some or all of the following series of questions and, having consulted with their attorneys, responded by invoking the Fifth Amendment:

- From 2000 to 2003, did you work with any attorneys?
- From 2000 to June of 2003, did you work with any medical clinics?
- From 2000 to June 2003, did you contact individuals who were involved in automobile accidents and direct them to certain facilities?
- From June 200 to June 2003, did you work with your brother . . . and with Edwin Guerrero in contacting accident victims and steering them to certain facilities?
- From June of 2000 to June of 2003 did you have contact with an individual by the name of Daivery Taylor?
- From 2000 to June of 2003, did you contact any accident victims and direct them to the law firm of Silverman and Taylor?

- From 200 to June 2003, did you contact any accident victims on the phone?

(R. Fernandez 79-83; J. Fernandez 86-89).

Defense counsel argued that the Fernandez brothers could not properly assert their Fifth Amendment privilege and, therefore, were not unavailable, because the indictment was dismissed against the Fernandez brothers on April 12, 2005, they had recently entered guilty pleas on behalf of the two corporations they owned that had also been charged in the indictment, and the period covered by the indictment - - October 1999 to June 2004 - - as to which double jeopardy had now attached was the same period about which they had been questioned and invoked the Fifth Amendment (84, 89-92, 96-97). Accordingly, counsel argued, the tapes the prosecution was seeking to introduce were inadmissible (92).

The prosecution countered that the indictment covered "a small fraction of the entire Fernandez brothers' operation," that the brothers would be testifying to "background information" that was outside the period of the indictment, and that, therefore, despite the dismissal of the indictment against them, the Fernandez brothers were within their rights to assert the Fifth Amendment privilege (92-93). When asked by the court whether there was a "possibility of an investigation that expands beyond the scope of the facts in this instant indictment," the prosecutor coyly responded:

> "I don't know. I have no information regarding a pending investigation. There is every possibility that there could be one. We will be hearing testimony from different witnesses regarding criminal conduct, by the Fernandez brothers. And, you know, there is every possibility that this [sic] they could be under investigation (93-94).

In response, counsel pointed out that the charge of enterprise corruption in the original indictment was broad and, in fact, encompassed the entire universe of the alleged behavior the People attributed to the Fernandez brothers.[13] Thus, not only was the prosecution's unsubstantiated claim of the possibility of an additional investigation of the brothers "pure speculation," the prosecution claim that the brothers had a valid basis to assert their Fifth Amendment privilege was "disingenuous" (94-95).

The prosecution did not substantiate its speculation about a possible investigation or assert that there was any ongoing or anticipated

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[13] The enterprise corruption count charged the defendants, in part, as follows:

> [I]n the County of Nassau and elsewhere, during a period form in or about October 1999 to in or about June 2004, having knowledge of the existence of a criminal enterprise, hereinafter the "Fernandez Brothers Criminal Enterprise," and the nature of its activities, and being employed and associated with that enterprise, intentionally conducted and participated in the affairs of such enterprise by participating in a pattern of criminal activity, as follows:
>
> > The Fernandez Brothers was a group of persons, including all the defendants, and other persons known and unknown to the grand jury, sharing a common purpose of engaging in criminal conduct, associated together in an ascertainable structure distinct from their pattern of criminal activity, and with a continuity of existence, structure, and criminal purpose beyond the scope of individual criminal incidents.

investigation of the Fernandez brothers regarding any matters beyond the charges of the dismissed indictment, but merely added that the Fernandez brothers had invoked the Fifth Amendment based upon legal advice and for reasons known only to them and their attorneys (97).

The Court ruled that based upon "the court proceeding with respect to Mr. Robert Fernandez and Mr. John Fernandez, that they are unavailable" (98).

b. The Prima Facie Case

After the testimony of three witnesses (Carolina Gonzalez, Jose Escobar and Edwin Guerrero), the question of the admissibility of the tapes was revisited (307-24). Counsel argued that, based on the testimony of those three witnesses, the prosecution had not established prima facie Mr. Taylor's involvement in a conspiracy to defraud as there had been no testimony or other evidence that Mr. Taylor was involved in "falsification" of accidents or the extent of injuries, or had any knowledge regarding the treatment referred patients received at the medical clinics (308-09). In fact, not only did Escobar and Gonzalez testify that they actually had some degree of pain- Escobar said that Mr. Taylor never told him to lie or exaggerate about his injuries and never made any promises to him about the lawsuit, and it was unclear whether Gonzalez met Taylor until she was well

into her treatment. (309-11). Counsel argued further that even assuming the truth of Guerrero's testimony that he received payment from Mr. Taylor or the law firm for patient referrals from the Fernandez brothers, it established not a conspiracy to defraud insurance companies, but at best a potential ethical violation (301-12, 317-18, 321-24). Responding to the prosecution's contention that Guerrero's testimony, standing alone, established a prima facie case of conspiracy and scheme to commit insurance fraud (314-16), defense counsel countered:

> The problem I have with that … is the only time you heard any reference to Mr. Taylor or Silverman and Taylor was at the very end of the argument. And the reason that that's important is because we have not questioned the fact that there were fees paid to these medical clinics… There was a dispute as to what these fees were paid for, but we have not disputed that there were checks written to those medical clinics. Now, the importance of that is that Edwin Guerrero describes a scheme to defraud where people are recruited where Daivery Taylor is not present, where people are spoken to where Daivery Taylor is not present, where people are dealt with at times when Daivery Taylor is not present. And we've heard from two of the people that they indicate were the unwitting subjects of this scheme: Mr. Escobar and Miss Gonzalez. And they don't support the position that Daivery Taylor was involved in that essence of the scheme… I'm not saying that the Fernandez brothers and Mr. Guerrero didn't have some scheme to defraud insurance companies. But the proof is wholly… and completely lacking when you look at it as to the defendant… Mr. Taylor…and that's why this shouldn't come in at this trial (317-18).

The prosecution argued that some of the tapes were not hearsay, but were part of the res gestae of the crime (312-13), others were admissions by

Mr. Taylor (313) and that, in any event, a prima facie showing of a conspiracy and scheme to commit insurance fraud had been made (314). While admitting that Mr. Taylor did not have direct contact with "all these people," the prosecution contended that he nevertheless was aware of what was going on and "shield[ed" himself "by getting the Fernandez brothers … and … Edwin Guerrero to do his dirty work" while turning a blind eye (320). Defense counsel reiterated that Mr. Taylor's contacts with the accident victims were entirely proper for an attorney representing a client, and that any scheme to defraud implicated the Fernandez brothers and Guerrero, not Mr. Taylor (321-21).

After asking and being assured by the prosecution that it would present more witnesses to establish the conspiracy, prima facie (324-35), the court, over defense counsel's objection, admitted the recordings "subject to connection" (325, 326-30).[14] Investigator Martinez identified the voices of Mr. Taylor, Robert Fernandez and John Fernandez on the Taylor tapes, which were admitted into evidence as party admissions - - call #s 560, 577, 1526, and 2709 [P.E.s 2E and 3A] (347-49). The summarized content of the Taylor tapes, the dates of which are in parentheses, is as follows:

[14] The recordings, on four CDs (People's Exhibits 1 through 4), corresponded to four different phone numbers (336-37), one of which was the telephone number to Silverman & Taylor (329, 337). They were marked into evidence, but the contents of the conversations were not admitted in evidence at this time (338).

> Call 1526 (3/28/03)- between Mr. Taylor and Robert Fernandez concerning a client who was evidently dissatisfied with treatment she had received from staff at Silverman & Taylor and had complained about it to Robert Fernandez.
>
> Call 577 (5/2/03)- between John Fernandez and Mr. Taylor, in which they discuss a client who needs transportation in order to go to a new clinic. Fernandez informs Mr. Taylor that when he went to one facility in Queens (Nassau Blvd. in Garden City), agents from the National Insurance Crime Bureau were there seizing computers and phones, and that he had heard that it happened at another facility in the Bronx. Mr. Taylor responds with little apparent concern, asking in passing if Long Island Community clinic might be next, because he had a substantial number of cases there, before returning to the original subject of the conversation.
>
> Call 2709 (4/17/2003)- between Robert Fernandez and Mr. Taylor discussing client Carolina Gonzalez. Mr. Taylor tells Fernandez that they need to drop her case because she is calling complaining about property damage to car, but she was at fault in the accident.
>
> Call 560 (3/13/03) – between Robert Fernandez and Mr. Taylor wherein Mr. Taylor instructs Fernandez to take a client to a precinct to file a police report and then send her to a medical facility.

Following the testimony of Clifton Collins, Laura Munz-Cebisch, Felix Quezada, Dr. Harris (in part), Edwin Rivas, Maria Lopez and Andrea Gurciullo, the prosecution argued that enough circumstantial evidence, including all of the witness' testimony, the Taylor tapes, and bank records of payments by the law firm to companies owned by the Fernandez brothers, had been presented to establish a prima facie case of conspiracy and scheme

to defraud against Mr. Taylor (630-31). The prosecution reasoned that, because there was an insurance fraud scheme involving the Fernandez brothers and Mr. Taylor had ongoing dealings with the Fernandez brothers regarding the clients they referred to him, Mr. Taylor must, by implication, have been aware of and a participant in the fraud scheme (630-34, 644-45).

The defense, countering that the prosecution's case was one of guilt by association that did not establish a prima facie case of Mr. Taylor's involvement in a scheme to defraud, noted that Gurciullo, who was complicit with the Fernandez brothers in the essential medical aspect of the fraud, did not implicate Mr. Taylor and, evidently never met or spoke to him. She did, notably, insist that her patients see an attorney before coming to her facility in order to make sure there were no staged accidents- "that the cases were legitimate" (635-36, 642). Moreover, counsel argued, based on the testimony of patients Rivas, Lopez and Quezada, Mr. Taylor never told them to do anything improper. On the contrary, they were, in fact, injured, they complained to Mr. Taylor that they were in pain, and Mr. Taylor advised them to get treatment. While Mr. Taylor informed these clients that the more treatment they got the better their cases would be – which was merely the truth - he never told them to get treatment for nonexistent pain or injuries or to exaggerate their injuries; nor did a single witness testify that

they understood this to be his meaning (636-39). Finally, counsel submitted that even the Taylor tapes themselves reflected no more than that Mr. Taylor knew and received client referrals from the Fernandez brothers, and that he "is trying to satisfy a person who refers him business, and not indicative of this grand scheme or conspiracy that they seek to absorb Mr. Taylor and Silverman and Taylor into" (641-43).

After, again, reserving its decision (646-49), the court, the following day, ruled that the tapes were admissible as declarations of co-conspirators during the course or furtherance of a conspiracy. The court stated, in pertinent part:

> However, whether utilized to sustain introduction of a hearsay declaration of a conspirator to prove a co-conspirator's complicity in the conspiracy or substantive crime, the evidence may be admitted only by showing that a prima facie case of conspiracy has been established. The determination of whether a prima facie case of conspiracy has been established must be made without recourse to whether [sic] statements sought to be introduced.
>
> A conspiracy consists of an agreement to commit an underlying substantive act committed by one of the conspirators in the furtherance of the conspiracy, Penal Law Section 105.20.
>
> Further, a prima facie case can be demonstrated by circumstantial evidence, Prince-Richardson on Evidence 4-513.
>
> The Court finds that the People have proven a case of conspiracy. Therefore, the statements made by the alleged conspirators are admissible.

(652-54).

C. <u>The Summations</u>

The defense argued that the prosecution's case was one of guilt by association, and that the evidence did not establish that Mr. Taylor was aware of the allegedly excessive treatment of the patients referred to him- all of whom had soft tissue injuries, suffered some level of actual pain and received beneficial treatment (892-95, 898-99). There was, further, no proof that the retainer statements, which indicated that certain medical facilities had referred the clients to him, were false, since the Fernandez brothers were associated with the medical facilities, or that Mr. Taylor signed or was the person who submitted the retainer statements to the OCA (901-02).

The prosecution contended that Mr. Taylor's association with the Fernandez brothers was for the sole purpose of making profit as part of a scheme to recruit nominally injured patients to obtain unnecessary medical treatment and file lawsuits, and that he knowingly filed false retainer statements with the OCA (960-986).

D. The Verdict

After hearing the summations, the court (Hon. Jeffrey S. Brown) asked for all of the evidence then reserved its verdict until the following day (987-98). The following day before rendering its verdict, the court asked for

a replay of the Taylor tapes (992). The court thereafter found Mr. Taylor (and Silverman & Taylor) guilty of a scheme to defraud in the first degree and four counts of offering a false instrument for filing in the first degree, and acquitted him (and the firm) of insurance fraud in the third degree and grand larceny in the third degree (992-94).

E. Motion to Set Aside the Verdict

The defense moved, pursuant to C.P.L. § 330.30(1) to set aside the verdict on the ground that Count Two of the indictment, charging the defendants with first-degree scheme to defraud, was statutorily insufficient. Counsel argued that Count Two failed to set forth factual allegations "that would apprise the defendants of the conduct that gives rise to the crimes they are charged with" and "notwithstanding a request for a bill of particulars and a refusal by the prosecution to particularize this count … the court failed to rule on this critical issue." (Moschetti Affirmation dated November 7, 2005 at ¶¶ 8, 9). In response, the prosecution argued that the motion should be denied because the defendants had failed to preserve the issue by failing to move for dismissal of the indictment on this ground in their omnibus motion (People's Memorandum in opposition, dated December 16, 2005 at 1-2).

In reply, defense counsel pointed out that the correct remedy for an indictment's factual insufficiency and failure to apprise a defendant of the

conduct comprising the charges against him is not a motion to dismiss, but a request for a bill of particulars. Counsel reiterated that a request for bill of particulars as to Count Two had been made and that the prosecution had refused to particularize the count, and further that " the defendants brought a motion to compel a bill of particulars" and "[w]ithout explanation, the court deciding the defendant's omnibus motion failed to address this issue and, thus, forced the defendants to go into trial without knowing what particular conduct they were being accused of in Count II." (Moschatti Reply Affirmation dated December 29, 2005 at 2, ¶¶ 5, 6).

The court denied the motion, finding that the defendants had only previously moved to dismiss the indictment based on insufficiency of the evidence to submitted to the Grand Jury and that it was this motion that Judge Donnino ruled upon, and that, further "review of the files does not disclose any request for a Bill of Particulars in this matter." (Court's decision dated March 30, 2006 at 2). The court concluded, "The files are devoid of any demand, refusal or motion practice in regard to the bill of particulars." (Id. at 3).

In a motion to renew, defense counsel supplied the court with the request for Bill of Particulars that had evidently been missing from the court's file, and brought to the court's attention the paragraph in which the

defendants specifically requested that the prosecution set forth the factual substance of the defendants' conduct which is encompassed by the charges (Moschetti Affirmation on Motion to Renew, dated May 22, 2006 at 2, ¶¶ 4-6). Counsel also annexed to the motion the prosecution's response to the Bill of Particulars, and specified the paragraph wherein the prosecution stated that the defendants were not entitled to a Bill of Particulars (Id. at 2, ¶¶ 5,7). Arguing that the Judge Donnino had failed to consider or decide the defendants' motion for a Bill of Particulars, counsel stated, "Finally, it appears that the County Court in deciding the defendants' [other] motions never even considered the defendant's application for a Bill of Particulars. As this Court indicated, the Court file failed to contain the defendants' Bill of Particulars and Motion to Compel the prosecution to comply with the request." (Id. at 7, ¶ 23).

In response, the prosecution conceded that the defendants had moved for a Bill of Particulars but argued that Judge Donnino had denied the motion:

> Defendants' contention is insufficient to justify reargument for two separate reasons. First, <u>while Defendants are correct that they moved for a bill of particulars, the record establishes that Judge William Donnino denied that motion in a decision issued from the bench on August 5, 2005.</u> A review of the transcript of the August 5, 2005 court appearance, attached hereto as Exhibit A, shows that Judge Donnino unequivocally denied every pre-trial motion pending before the Court as well as the

> fact that the Defendants did not raise any objections to the decision. Moreover, Judge Donnino followed up his oral decision with a written decision dated September 6, 2005, denying Defendants' pre-trial motions in their entirety. (Prosecution's June 16, 2006 letter at 1)[emphasis supplied].

The prosecution further contended that defendants' argument that Count Two provided insufficient notice was meritless because the indictment as a whole "clearly apprised" the defendants of the substance of the charges in the individual counts of the indictment and because in their opening statements, counsel "expressed no lack of understanding regarding the nature of the scheme at issue." (Id. at 2).

The court, granting the motion for reargument, nevertheless adhered to its previous decision, stating that despite the now provided copies of the demand for bill of particulars and response, "no motion practice" concerning the issue was provided and no reference to the issue it was made in Judge Donnino's decision. (See Court's decision on Reargument dated July 19, 2006at 1-2).

F. Sentence

Mr. Taylor was sentenced to five years' probation, with a condition of therapy as directed by the Probation Department, and a fine of $5,000 (S. 4).

## Argument

### Point One

## THE COURT'S FAILURE TO ORDER THE PROSECUTION TO PROVIDE A BILL OF PARTICULARS SPECIFYING THE CONDUCT ENCOMPASSED BY COUNT TWO, PREVENTED MR. TAYLOR FROM ADEQUATELY PREPARING A DEFENSE, THUS DEPRIVING HIM OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL

A defendant has a basic and fundamental right under the federal and New York State constitutions to be informed of the charges against him so that he can prepare his defense. U.S. Constitution Amends. VI, XIV; N.Y. Const. Art. I, §6; Estes v. State of Texas, 381 U.S. 532, 85 S.Ct. 1628 (1965); Cole v. State of Arkansas, 333 U.S. 196, 68 S.Ct. 514 (1948); People v. Iannone, 45 N.Y.2d 589, 412 N.Y.S.2d 110, 113-14 (1978). An indictment is, "first and foremost," "the necessary method providing the defendant with fair notice of the accusations made against him so that he will be able to prepare a defense." People v. Iannone, supra 45 N.Y.2d at 594; see People v. Morris, 61 N.Y.2d 290, 293, 473 N.Y.S.2d 769 (1984).

But while an indictment may be facially sufficient to apprise a defendant of the charges against him, it may be insufficient, standing alone, to provide sufficient notice to the defendant of the nature and character of the crimes charged and, thus, to prepare or conduct his defense. Iannone, supra, 45 N.Y.2d at 662-63. Where the court determines that an indictment is lacking in sufficient particularity to enable the defendant to prepare or

conduct his defense, it can ensure fair notice of the nature of the charges by ordering the prosecution to provide a detailed Bill of Particulars. Id. Criminal Procedure Law §200.95 provides that upon a motion to compel a Bill of Particulars, if the court is satisfied that any or all of the items of information are necessary to enable the defendant adequately to prepare or conduct his defense, it must grant the motion as to every such necessary item.

Here, the indictment alone failed to adequately apprise Mr. Taylor of what conduct comprising first-degree scheme to fraud he was alleged to have committed; accordingly, a bill of particulars was necessary in order to enable him to adequately prepare a defense. It is undisputed that the prosecution refused to provide a bill of particulars and defense counsel did, in fact, timely move to compel its production. The prosecution conceded this in response to Mr. Taylor's Motion to Renew following the court's denial of his motion to set aside the verdict (see ante at 8). The court, however, failed to address counsel's motion; in both oral and written decisions the court quite clearly addressed only the defense omnibus motion to inspect the grand jury minutes and dismiss the indictment on grounds that the evidence before the grand jury was insufficient and/or the prosecution's instructions to the grand jury (see ante at 8). Judge Donnino's decision

made absolutely no mention of Mr. Taylor's motion to compel production of a bill of particulars- a distinct issue that the court could not have intended to address by a general denial of a motion to dismiss the indictment. Nor, contrary to the prosecution's contention in its reply to Mr. Taylor's motion to renew, did the court deny all pre-trial motions. Judge Donnino stated quite plainly that he was denying Mr. Taylor's motion to dismiss the indictment, not all pretrial motions, and certainly not his motion to compel a bill of particulars.

Most importantly, whether by failure to address or denial, the lack of a bill of particulars setting forth the specifics of the conduct with which Mr. Taylor was charged, deprived him of the opportunity to adequately prepare his defense. The indictment essentially mirrored the language of the statute; the only facts it provided was that the conduct, whatever it was, took place in Nassau County "and elsewhere" between "October 1999 to in or about June 2004." Because no bill of particulars was provided, Mr. Taylor went to trial without knowing the specific conduct of which he was accused and was essentially was reduced to learning as the trial went along- certainly not in time to adequately prepare his defense. In this light, the failure to compel provision of a bill of particulars deprived Mr. Taylor of fair notice of the accusations against him in violation of the Sixth and Fourteenth

Amendments of the U.S. Constitution and Article I, Section 6 of the New York Constitution, and his conviction of scheme to defraud in the first degree should be reversed.

Point Two

THE EVIDENCE WAS LEGALLY INSUFFICIENT AND THE VERDICT AGAINST THE WEIGHT OF THE EVIDENCE WHERE THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. TAYLOR KNOWINGLY AND INTENTIONALLY PARTICIPATED IN THE FERNANDEZ BROTHERS' SCHEME TO DEFRAUD INSURERS

The gaping hole in this case was the complete lack of evidence that Mr. Taylor knew that patients the Fernandez brothers referred to him received unnecessary or excessive medical treatment in order to pad their personal injury claims. It is, thus, only by an unsupported inferential leap, that the evidence in this case could be deemed sufficient to prove, beyond a reasonable doubt, that Mr. Taylor knowingly and intentionally participated in a scheme to defraud insurance companies. The court, quite rightly, acquitted Mr. Taylor of insurance fraud, necessarily finding that there was insufficient evidence that he had committed a fraudulent insurance act. Yet, the only fraud alleged in this case was, in fact, insurance fraud; thus, if Mr. Taylor did not know that patients received unnecessary treatment, and did not commit a fraudulent insurance act, the basis of his conviction of scheme to defraud becomes amorphous, speculative, and ultimately elusive.

To convict an attorney of scheme to defraud in the first degree, the prosecution must establish that the attorney "engage[d] in a scheme constituting of a systematic ongoing course of conduct with intent to defraud more than one person ... and so obtain[ed] property with a value in excess of one thousand dollars from one or more such persons." People v. Wolf, 284 A.D.2d 102, 726 N.Y.S.2d 83, (1st Dept. 2001), lv. granted, 96 N.Y.2d 926, 732 N.Y.S.2d 644, aff'd. as modified 98 N.Y.2d 105, 745 N.Y.S.2d 766 (2002).

While intent to defraud may, and often must, be established by circumstantial evidence, People v. Sala, 258 A.D.2d 182, 695 N.Y.S.2d 169 (3d Dept. 1999), "mere vagueness and suspicion do not rise to the level of evidence." People v. Ardito, 86 A.D.2d 144, 148-49 (1st Dept. 1982). "As the Court of Appeals has warned, '[t]he danger ··· with the use of circumstantial evidence is that of logical gaps-that is, subjective inferential links based on probabilities of low grade or insufficient degree-which, if undetected, elevate coincidence and, therefore, suspicion into permissible inference' (People v. Cleague, 22 N.Y.2d 363, 367, 292 N.Y.S.2d 861, 239 N.E.2d 617)." People v. Moore, 291 A.D.2d 336, 339, 738 N.Y.S.2d 332 (1st Dept. 2002). Because of that danger, "a criminal conviction based upon circumstantial evidence is subject to strict judicial scrutiny." People v.

Kennedy, 47 N.Y.2d 196, 201, 417 N.Y.S.2d 452 (1979); People v. Karpowski, 99 A.D.2d 118, 127, 473 N.Y.S.2d 166 (1st Dept. 1984).

Even when viewed in the light most favorable to the People, the evidence established, at best, that for a fee, the Fernandez brothers referred accident victims to Mr. Taylor for legal services - - at worst an ethical breach, but which would also explain the filing of false retainer statements.[15] There was substantial direct evidence that the Fernandez brothers or their employees steered accident victims to medical facilities owned or managed by the brothers and Dr. Harris opined that the medical or other personnel at those facilities ordered excessive treatment and testing for some patients. Putting aside that Dr. Harris did not know if he had reviewed patients' complete medical records- they were not certified as such- (824-29) that he could express no opinion about their chiropractic treatment or physical therapy (835-36, 840), that he admitted doctors could disagree about the necessity and propriety of treatment for something as subjective as pain (841-42), and that all of the patients who testified indicated that the treatment they received was beneficial, even assuming arguendo, that some of the patients received unnecessary treatment, there is a complete dearth of

[15] DR 2-103(B) states, in pertinent part, that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client…" McKinney's Judiciary Law § 482; N.Y.Ct.Rules, §§ 1200.3(a)(7); See e.g. In Re Klafter, 11 A.D.3d 1, 782 N.Y.S.2d 108 (2d Dept. 2004).

evidence that Mr. Taylor was aware that patients received unnecessary treatment. On the contrary, all of the accident victims received treatment for real injuries, all who saw Mr. Taylor told him that they were in pain, and Mr. Taylor told none of them to get treatment for nonexistent pain or to lie or exaggerate about their injuries.

Evidence that Mr. Taylor did not, in fact, have any reason to believe that the accident victims were receiving unnecessary or excessive treatment came directly from the mouths of the prosecution's witnesses. Escobar, who met with Mr. Taylor four or five times, told Mr. Taylor about his "constant pain." (266). Mr. Taylor advised him to continue treatment at the clinic for his pain, but did not say how long he should go to the clinic and never told him to lie or exaggerate about his physical condition (266-67, 272-73). The treatment Escobar received at the clinic worked – lessening his pain to the point that he no longer needed treatments, but notably continued to take pills for the pain.

Quezada began to experience pain in his back and wrist the day after the accident and could not lift anything heavy. Within two weeks it had worsened and was "very bad" and became "very intense," radiating down to his leg (404-05, 428, 431-32) The treatment provided at the clinic worked "very well," reducing his pain level from a level nine to a level four or five.

Quezada too told Mr. Taylor about his pain, inability to lift and loss of time at work as a result of the accident. Mr. Taylor never made any promises to him about what the outcome of his lawsuit would be, never told him how long to continue his medical treatment or to exaggerate any of his injuries or pain. Moreover Quezada, in Dr. Harris' opinion, did not receive excessive treatment (811).

Likewise, both Lopez and Gonzalez suffered back and/or shoulder pain, and both got better as a result of the treatment received. And while Lopez asserted that she continued receiving treatment at Mr. Taylor's insistence after she no longer had pain, she did not remember ever telling Mr. Taylor that she was no longer in pain. Lopez also conveniently did not recall telling doctors at the clinic that she still had back and knee pain two months after she claimed at trial she no longer had pain. Finally, Rivas, who suffered a back injury, but said he continued receiving treatment after he no longer needed it, did not recall ever seeing an attorney, although he at some point receive a check from Silverman & Taylor in the amount of $2,700 - -a sum which hardly seems to even suggest an inflated personal injury claim. In any event, if Mr. Rivas never saw Mr. Taylor, it cannot reasonably be said that he supplied any evidence that Mr. Taylor was aware that he received unnecessary medical treatment.

Numerous intercepted calls were also part of the evidence in this case, but there is none of Mr. Taylor encouraging any accident victim to exaggerate an injury or seek unnecessary medical treatment or instructing any alleged co-conspirator to do so. Nor did these tapes support a conclusion that Taylor was aware that others were encouraging the clients to act improperly. In fact, Mr. Taylor speaks on only four of the tapes, and his conversations reveal no wrongdoing (see summary of Taylor tapes, ante at 27). These calls confirm that Fernandez referred some clients to Mr. Taylor and that they sometimes discussed clients, but there is no discussion suggesting that any client get unnecessary or excessive treatment.

Nor did the other tapes, while they were certainly damning evidence of the existence of a *Fernandez brothers* conspiracy, tend to prove that Mr. Taylor was involved in the conspiracy. The calls were mostly of Robert Fernandez's aggressive sales pitches encouraging accident victims to seek medical treatment. Fernandez held himself out to be from a "lawyer's office" in most such calls, but did not specify what lawyer's office, and since most of the individuals he called in the tapes did not testify at trial, there is no evidence any of them were referred to Mr. Taylor. Guerrero, in fact, testified that Fernandez's offices were at a medical clinic, not Silverman & Taylor.

Moreover, even if all of the accident victims in the various taped conversations were ultimately referred to Mr. Taylor, Mr. Taylor did not witness Robert Fernandez's or for that matter Guererro's so-called sales pitches - - it would be pure speculation to conclude that he was aware of any supposed wrongdoing by the Fernandez brothers in those sales pitches, and an even further leap to suppose that, based on these conversations which Mr. Taylor did not take part in or witness, he knew that the medical clinics the victims were sent to would render unnecessary treatment.

The tapes revealed only three calls (#s 1254, 1256, 1263) that Robert Fernandez made directly to Silverman & Taylor – without, notably, speaking to Mr. Taylor. In these, Fernandez spoke to a secretary about Maria Lopez and Carolina Gonzalez, apparently out of concern that they had not been getting physical therapy with sufficient frequency. At one point, the receptionist put Lopez on the phone with Fernandez, who tells Lopez to continue physical therapy three times a week, and that the more she goes to physical therapy the more money she gets (1263). It is, as an initial matter, questionable whether this conversation, in and of itself, evinces fraudulent conduct on Fernandez' part since he, essentially, told Lopez, albeit in shorthand, a legal reality – that her failure to get treatment would make it difficult to establish that her injuries were substantial. Such advice would

apply equally, whether the treatment were real or fraudulent. But irrespective of the propriety of Fernandez's statements or his motive, Mr. Taylor certainly did not take part in the conversation, and there was no evidence that he witnessed it or was even in the office when it took place.

In short, despite taping thousands of conversations, seizing numerous documents, and the testimony of patients and several alleged participants in the fraud scheme, the prosecution failed to present even a scintilla of actual evidence that Mr. Taylor was aware that the victims referred to him received unnecessary or excessive treatment, without which only by rank speculation could the court have concluded that Mr. Taylor knowingly and intentionally engaged in the brothers' scheme to defraud. This Court must, of course, view the evidence in the light most favorable to the prosecution, People v. Contes, 60 N.Y.2d 620, 467 N.Y.S.2d 349 (1983), and must determine "whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial." People v. Williams, 84 N.Y.2d 925, 926, 620 N.Y.S.2d 811 (1994). But evidence that Mr. Taylor accepted referrals from the Fernandez brothers and encouraged clients to get police reports and medical treatment, which was the only evidence offered here, did not support the inference that he was part of a scheme to defraud insurance

companies. Our system of jurisprudence does not recognize guilt by association or relationship. It is a huge and unreasonable inferential leap, on this evidence, to suppose that Mr. Taylor knew and intended that the clients referred to him would obtain excessive or unnecessary treatment for nominal or nonexistent injuries. Ardito, supra, 86 A.D.2d at 147-48 ("mere vagueness and suspicion do not rise to the level of evidence."). This is, in fact, a verdict based on guilt by association. Accordingly, Mr. Taylor's conviction of scheme to defraud was a violation of his constitutional right to due process of law, should be reversed and the indictment dismissed. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). Alternatively, this Court should "engage in its own de novo review of the evidence, sitting as a thirteenth juror," and find that the verdict was against the weight of the credible evidence and reverse the conviction. People v. Rayam, 94 N.Y.2d 557 (2000)(court citing Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211 (1982).

## Point Three

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT MR. TAYLOR FILED FALSE STATEMENTS WITH THE OFFICE OF COURT ADMINISTRATION.

The prosecution failed to establish that Mr. Taylor signed and presented the retainer statements in question to the OCA. Further, for all the

evidence that Mr. Taylor knew and accepted referrals from the Fernandez brothers, there was only inconclusive evidence that Mr. Taylor knew the four patients referred to in the retainer statements were referred to Silverman & Taylor by the Fernandez brothers rather than by the clinic named as a referral source- a clinic with which the Fernandez brothers, in any case, had a close association. Thus, the prosecution also failed to establish that the statements contained false statement and that Mr. Taylor intended to defraud the OCA.

Penal Law § 175.35 provides:

> A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any … public authority or public benefit corporation of the state, he offers or presents it to a public office, public servant, public authority or public benefit corporation with the knowledge or belief that it will be filed with … such public office, public servant, public authority or public benefit corporation.

"The essential elements of this crime are (1) the presentation to a public office of a written instrument, (2) with knowledge that such instrument contains false information which will be filed with the public office, and (3) with the intent to defraud the State or any political subdivision thereof." People v. Bentley, 106 A.D.2d 825, 484 N.Y.S.2d 222 (3d Dept. 1984) (court citing People v. Chaitin, 94 A.D.2d 705, 462

N.Y.S.2d 61, affd. 61 N.Y.2d 683, 472 N.Y.S.2d 597 (1984); People v. Asar, 136 A.D.2d 712, 523 N.Y.S.2d 910, 911 (2d Dept. 1988).

The four retainer statements in question admitted as People's Exhibits 13 through 17, concerned clients Edwin Rivas, Felix Quezada, Maria Lopez, and Carolina Gonzalez. Each printed retainer statement form contained question 7, *"Name, address and relationship of person referring the client:"* followed by a space for the response. For all of the forms except that regarding Jose Escobar, the typed response on the forms was "L.I Community Medical Center, 88 W. Merrick Road, Freeport, NY 11520" (Id). On all of the forms, a signature appears above the line "Signature of Attorney" (Id.).

As an initial matter, as pointed out by defense counsel in summation (901-02), not a single witness testified that the signature appearing on the five retainer statements was Mr. Taylor's, or that someone signed and presented them to the OCA on Mr. Taylor's authority. Bogle v. Coughlin, 162 A.D.2d 789, 557 N.Y.S.2d 699 (3d Dept. 1990)(evidence insufficient to establish accused was person who had forged document absent an attempt to compare his signature on document with any samples of his handwriting); cf. People v. Joanette, 162 A.D.2d 882, 558 N.Y.S.2d 231 (3d Dept. 1990)(evidence sufficient to establish presentation and delivery of false

instrument where defendant personally brought documents to DSS and signed them in presence of a DSS employee). Munz-Cebisch from the OCA testified only that she received them and essentially checked to see if the forms were completely filled out; she did not and could not know who signed or sent them. Absent such proof, the evidence was insufficient to establish that Mr. Taylor signed the retainer statements and presented them to the OCA.

Even assuming, arguendo, that he signed the retainer statements, there is no evidence that the information contained in them was false or that Mr. Taylor intended "to defraud the state or any political subdivision thereof." The retainer statements truthfully indicated where the patients received medical treatments; the Long Island medical facility with which the Fernandez brothers were openly associated if not officially the owners. Indeed, according to Guerrero, they maintained offices at one or more of the medical facilities (174-76). But it was not entirely clear from the evidence who referred Rodriguez, Rivas, Lopez and Quezada to Silverman & Taylor, and there was no evidence that any of the patients told Mr. Taylor who referred them to him. Rivas never met Mr. Taylor (492), Mr. Taylor was not present when Robert Fernandez brought Quezada to Silverman & Taylor from the clinic- he was seen instead by a secretary (418); Lopez testified that

someone from her insurance company recommended Taylor to her (509-11); and Gonzalez went because her sister wanted her to go- she went to her first visit with Mr. Taylor alone and her only other visit with her sister (292). On this evidence, it is impossible to state beyond a reasonable doubt that Mr. Taylor intentionally provided false information or that he did so intending to defraud the OCA or any other State body. Rather, it is more likely he named the medical clinic since it was where the patients had come from before coming to his office and it was, in fact, associated with the Fernandez brothers.

For the foregoing reasons, the court should find that the evidence was insufficient to establish Mr. Taylor's of guilt of this charge or, alternatively, that the verdict was against the weight of the evidence. Jackson v. Virginia, supra, 443 U.S. 307; People v. Rayam, supra, 94 N.Y.2d 557.

## Point Four

## CRITICAL WIRETAPPED CONVERSATIONS WERE WRONGLY ADMITTED UNDER THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE WHERE THE PROSECUTION FAILED A) TO ESTABLISH THAT THE FERNANDEZ BROTHERS WERE UNAVAILABLE TO TESTIFY, AND B) TO MAKE A PRIMA FACIE SHOWING OF MR. TAYLOR'S PARTICIPATION IN A CONSPIRACY TO DEFRAUD.

The prosecution offered into evidence, as coconspirator statements, numerous tape-recorded conversations between the Fernandez brothers and

accident victims, their employees or office staff of medical facilities and law offices. While prior statements of a non-testifying person may be admitted into evidence under the coconspirator exception to the hearsay rule if, 1) the declarant is unavailable and 2) a prima facie case of co nspiracy has been established, see People v. Bak Tran, 80 N.Y.2d 170, 179, 589 N.Y.S.2d 845 (1992); People v. Salko, 47 N.Y.2d 230, 237, 417 N.Y.S.2d 894 (1979), neither prerequisite was met here. First, the Fernandez brothers' invocation of their Fifth Amendment privilege was unjustified and the brothers therefore were not, in fact, "unavailable" to testify. Second, the prosecution had not made a prima facie showing, by evidence independent of the tapes, that Taylor was a co-conspirator. Accordingly, the trial court erred in admitting these hearsay conversations. Because the tapes added critical – in fact dispositive – weight to the prosecutor's case, the error was not harmless, and requires that a new trial be granted.

A. The Fernandez Brothers Were not Shown to be Unavailable.

For a witness to properly invoke his Fifth Amendment privilege against compulsory self-incrimination, the danger of self-incrimination must be "real and probable," not "imaginary and unsubstantial." Brown v. Walker, 161 U.S. 591, 608 (1896); Ohio v. Reiner, 532 U.S. 17, 21, 121 S.Ct. 1252 (2001) ("We have held that the privilege's protection extends

only to witnesses who have 'reasonable cause to apprehend danger from a direct answer,'" quoting Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814 (1951)); United States v. Seewald, 450 F.2d 1159 (2d Cir. 1971); People v. Ciraulo, 40 A.D.2d 834, 337 N.Y.S.2d 389 (2d Dept. 1972). A witness cannot establish that the danger is "real and probable" by a blanket assertion of the privilege because "[t]he witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself – his say-so does not of itself establish the hazard of incrimination." Hoffman, supra, 341 U.S. at 486; Ciraulo, supra, 40 A.D.2d at 834. Rather, the witness must take the stand and give "a responsive answer to the question or an explanation of why it cannot be answered" without self-incrimination. Hoffman, supra, 341 U.S. at 487. Although the witness, in the first instance, is generally the best judge of whether an answer may tend to be incriminating, the witness should be required to establish a factual predicate for an assertion of the privilege where the danger of incrimination is not readily apparent People v. Faulk, 255 A.D.2d 333, 679 N.Y.S.2d 333 (2d Dep't 1998); Ciraulo, supra, 40 A.D.2d at 834.

Even where an invocation of the privilege may once have been proper, "where there can be no further incrimination, there is no basis for the assertion of the privilege," Mitchell v. United States, 526 U.S. 314, 326, 119

S.Ct. 1307 (1999). For this reason an otherwise valid Fifth Amendment privilege may be lost by a conviction, Reina v. United States, 364 U.S. 507, 513, 81 S.Ct. 260 (1960); United States v. Romero, 249 F.2d 371, 375 (2d Cir.1957), or waived by a guilty plea, Boykin v. Alabama, 395 U.S. 238, 243 (1969), 89 S.Ct. 1709; McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166 (1969); United States v. Sanchez, 459 F.2d 100, 103 (2d Cir. 1972). This does not mean that a witnesses necessarily loses his right to assert the privilege simply because he has been convicted or charges dismissed; certainly, a witness may still assert the privilege if still subject to a realistic risk of incrimination on other charges. See United States v. Domenechi, 476 F.2d 1229, 1231 (2d Cir. 1973); United States v. Miranti, 253 F.2d 135, 138 (2d Cir.1958); Romero, supra, 249 F.2d at 375. Such would be the case, for example, where the witness, previously convicted, has been informed he is a target of a new grand jury investigation. United States v. Rodriguez, 706 F.2d 31, 36 -37 (2d Cir. 1983). But a court may not simply accept a witness's blanket assertion of the Fifth Amendment privilege in response to all questions asked of him without undertaking a "particularized inquiry" to determine whether the assertion was founded on a *reasonable* fear of prosecution as to each of the posed questions. United States v. Zappola, 646 F.2d 48 (2d Cir.1981) (plain error for trial court to

simply accept undercover witness's blanket assertion of Fifth Amendment privilege in response to questions posed of him, rather than undertaking particularized inquiry to determine whether witness had reasonable fear of prosecution with respect to each such question).

Nothing in this record reflects the requisite "particularized inquiry" to determine whether or not each Fernandez brother was validly asserting his privilege to the questions each was asked. Surely this was not an instance where the risk of incrimination was readily apparent, as where testimony is sought from someone possibly implicated in the crime under inquiry but not yet charged. People v. Arroyo, 60 A.D.2d 914, 402 N.Y.S.2d 177 (2d Dep't 1978), aff'd., 46 N.Y.2d 928, 415 N.Y.S.2d 205 (1979). Rather, in the face of the dismissal of all charges – including the broadly worded OCCA count – against each brother, it appeared the brothers were out of jeopardy. See McCall v. Pataki, 232 F.3d 321, 323 (2d Cir. 2000) ("Because Herrera had already been convicted and sentenced with respect to the crime of which he was asked to speak, he had no right to refuse to answer on the ground of self-incrimination"); Ciraulo, supra 40 A.D.2d at 834 ("since witness had pleaded guilty and had been sentenced for a crime arising out of the very transactions about which he was to be questioned, there appears to have been no valid basis for his assertion of the privilege."). Yet, rather than

substantiate the brothers' asserted fear of incrimination the prosecutor argued, simply and with no supporting evidence, that the dismissed indictment covered but "a small fraction of the entire Fernandez brothers' operation," and that the brothers would be testifying to "background information" that was outside the period of the indictment (Tr. 92-93). Neither the Fernandez brothers nor the prosecutor gave a *single* example of how truthful answers to any – let alone all – the questions posed would incriminate the brothers with respect to some other crime not covered by the dismissed counts. In fact, when asked by the court whether there was a "possibility of an investigation that expands beyond the scope of the facts in this instant indictment," the prosecutor coyly responded, "there is every possibility that… they could be under investigation" even while the prosecutor conceded, "I have no information regarding a pending investigation" (Tr. 93-94). Cf. United States v. Rodriquez, supra, 706 F.2d at 37 ("In the absence of the pending grand jury investigation of Law's activities and other potential related criminal charges, her guilty plea might well have eliminated her ability to validly assert the Fifth Amendment privilege").

Where, as here, the prosecutor seeks to admit devastating hearsay in derogation of the defendant's right to confront and cross-examine the

witnesses against him, more must be proffered before the witnesses is declared "unavailable" than the prosecutor's undifferentiated and unsubstantiated suggestion that the witness might be subjected to some undefined prosecution at an undetermined point in the future; vague and cute allusions to hypothetical – and as yet non-existent – investigations simply are not sufficient.

For these reasons the trial court erred when it held that each Fernandez brother had properly invoked his Fifth Amendment privilege and therefore was unavailable.

B. The Prosecution Failed to Present a Prima Facie Case, Through Independent Evidence, that Mr. Taylor Entered a Criminal Conspiracy with the Fernandez Brothers

The tapes were inadmissible for the additional reason that the prosecution failed to make a prima facie showing that Mr. Taylor was part of the Fernandez brothers' conspiracy to defraud insurance companies.

Certainly, "[f]raudulent intent required for first-degree scheme to defraud is usually not susceptible of proof by direct evidence and must ordinarily be inferred from circumstantial evidence, such as defendant's knowledge of misleading or deceptive nature of particular business practices employed." People v. Sala, 258 A.D.2d 182, 188-89, 695 N.Y.S.2d 169 (3d

Dept. 1999)(defendant's pervasive involvement in almost every aspect of the scheme was sufficient evidence of his knowledge of the fraudulent business practices). But "[w]here circumstantial evidence is weakly held together by 'subjective inferential links based on probabilities of low grade or insufficient degree' a prima facie case will not be deemed satisfied." Bak Tran, supra, 80 N.Y.2d 179 (court quoting People v. Cleague, 22 N.Y.2d 363, 367, 292 N.Y.S.2d 861 (1968).

In order to establish a prima facie case here, the prosecution had to make a showing, independent of the tapes themselves, that Mr. Taylor intentionally participated in a scheme to defraud insurance companies. Instead, what the prosecution established was merely that Mr. Taylor had a client referral arrangement with the Fernandez brothers. As discussed in Point One, none of the prosecution's witnesses testified that Mr. Taylor knew of any excessive or unnecessary medical treatment of any clients referred to him - - a crucial missing direct link in the inferential chain of circumstantial evidence that he intentionally engaged in a scheme to defraud. For the court to accept such evidence as sufficient, even prima facie, to prove that Mr. Taylor had the requisite intent to defraud insurance companies, was to embrace the faulty concept of guilt by association.

Notably, in a strong indication that the prosecution's case was weak, the court twice reserved decision on this issue, asking each time if the prosecution anticipated it would have additional prima facie evidence, and essentially deciding that a prima facie case had been made only after virtually all of the prosecution's evidence was in. The court was right to be guarded, though it ultimately erred, for the prosecution merely presented a strong case against the Fernandez brothers, showed a connection- the payment of fees for clients - - between Mr. Taylor and the Fernandez brothers, and allowed suspicion and conjecture to do the rest. But absent some proof that Mr. Taylor was aware of the allegedly excessive or unnecessary treatment clients received from the medical facilities to which the clients were referred, the court could not reasonably find a prima facie case was made that Mr. Taylor intended to defraud insurance companies.

Black's Law Dictionary defines a prima facie case as "a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." Black's Law Dictionary 1228 (8th ed.2004). see also Powers v. Powers, 207 A.D.2d 637, 638, 616 N.Y.S.2d 102 (3d Dept. 1994), revd. on other grounds, 86 N.Y.2d 63, 629 N.Y.S.2d 984 (1995); People v. Benitez, 167 Misc.2d 99, 101, 637 N.Y.S.2d 590 (N.Y. City Ct. 1995). Although less demanding than proof beyond a reasonable

doubt, it cannot be grounded on suspicion, conjecture or surmise, and a mere scintilla, or even some proof, is not sufficient for a prima facie case. See People v. Sclafani, 8 Misc.2d 896, 897, 168 N.Y.S.2d 713 (N.Y. Gen. Sess. 1957). The so-called evidence here was insufficient to establish a prima facie case that Mr. Taylor was part of the Fernandez brothers' scheme to defraud insurance companies, in fact the entire case was merely one of guilt by association. Accordingly, the court erred in admitting the tapes under the hearsay exception for co-conspirator statements.

C. The Error was not Harmless

Short of having Robert and John Fernandez's testimony, these tapes provided the strongest possible evidence of the existence of the Fernandez brothers' criminal enterprise, and much-needed corroboration of the testimony of the Fernandez brothers' employees, the acupuncturist and patients regarding their dealings with the brothers. Even with the tapes, the court acquitted Mr. Taylor of insurance fraud and grand larceny. Without them, it is doubtful that the court would have found sufficient evidence that a fraudulent scheme existed – let alone that Mr. Taylor was part of it. The four Taylor tapes that, interestingly, were the last things the court listened to before rendering its verdict, would, without the context provided by the

remaining tapes, have lacked significance. It cannot reasonably be maintained that the admission of the tapes, if error, was harmless.

## Point Five

## MR. TAYLOR JOINS IN THE ARGUMENTS ADVANCED BY CO-DEFENDANT SILVERMAN & TAYLOR IN ITS BRIEF ON APPEAL

We are aware that co-defendant Silverman & Taylor will be filing its brief on appeal and we join in and adopt the arguments it advances on appeal to the extent not inconsistent with the positions advanced herein.

## Conclusion

For all the foregoing reasons, the judgment of conviction against Mr. Taylor should be reversed and the indictment should be dismissed, or a new trial ordered.

Dated: New York, New York
November 8, 2007

Respectfully submitted,

LAW OFFICES OF GERALD B. LEFCOURT, P.C.
148 East 78th Street
New York, New York 10075
(212) 737-0400
*Attorney for Daivery Taylor*

On the brief:
Gerald B. Lefcourt
Richard B. Levitt
Yvonne Shivers

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