CITATION: R. v. Rosenfeld, 2009 ONCA 307
DATE: 20090415
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COURT OF APPEAL FOR ONTARIO

Doherty, Cronk and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Simon Morris Rosenfeld

Appellant

Anthony Moustacalis, for the appellant

Jason Wakely, for the respondent

Heard: March 9, 2009

On appeal from the conviction entered by Justice Tamarin M. Dunnet of the Superior Court of Justice, sitting with a jury, dated February 22, 2005, and on appeal and cross-appeal from the sentence imposed on March 30, 2005.

Doherty J.A.:

I. OVERVIEW

[1] The appellant, a lawyer, was convicted of two counts of laundering the proceeds of crime and one count of attempting to possess money obtained by crime. He received sentences totalling three years and was ordered to pay a fine of $43,230. The trial judge gave the appellant 12 months to pay the fine and imposed a 12-month sentence in default of payment. The appellant appeals the convictions and sentence. The Crown also appeals sentence.

[2] I would dismiss the conviction appeal. I would grant leave to the Crown to appeal the sentence, allow the Crown's sentence appeal and vary the sentence to five years. Obviously, I would dismiss the appellant's sentence appeal.

[3] The court did not call on the Crown on the conviction appeal. The two issues argued by counsel for the appellant on the conviction appeal do not require detailed analysis.[1] I will address the conviction appeal first. The rest of my reasons will focus on the Crown's sentence appeal.

II. FACTS

[4] Inspector William Majcher of the RCMP, posing as a front man for a large Colombian drug operation, met the appellant in Florida in March 2002. In May 2002, the appellant agreed to launder large amounts of cash that Majcher told him were the proceeds of the Colombian cartel's international cocaine trade. Majcher told the appellant that the drug cartel generated profits of $3 million a month and needed those profits laundered. Majcher offered the appellant a fee of eight per cent to provide the necessary services and the appellant accepted that offer. The appellant encouraged Majcher to do his money laundering business in Canada indicating that there was little police oversight.

[5] In June 2002, Majcher came to Toronto and gave the appellant CAD$250,000, which he said were the proceeds of the Colombian drug cartel's cocaine business. The appellant laundered these funds through a series of transactions and bank accounts in the names of shell corporations. The funds eventually found their way into the Florida bank accounts controlled by the supposed drug cartel. A few weeks later, Majcher gave the appellant USD$190,000. Once again, the appellant laundered this money through a series of different bank accounts and eventually transferred the funds into the designated Florida bank accounts.

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[1] I will not address the grounds of appeal raised in the appellant's facta, but not pursued in oral argument.

[6] The FBI decided to terminate a related American operation and it became necessary to bring the undercover operation involving the appellant to an end in early August 2002. The appellant was arrested. He had received commissions of approximately CAD$43,000 on the two transactions.

[7] The Crown had an overwhelming case against the appellant. It consisted of intercepted communications involving the appellant, videotaped meetings with the appellant and Majcher, and highly incriminating material seized from the appellant and his home at the time of his arrest. The appellant did not testify. No substantive defence was advanced at any time in the lengthy trial, including in trial counsel's closing address. Nor could counsel for the appellant, when invited to do so in this court, suggest any possible defence on the merits.

III. THE CONVICTION APPEAL

[8] The investigation of the appellant grew out of a larger investigation involving the FBI and the RCMP. Most of the evidence tendered against the appellant was gathered pursuant to a wiretap authorization issued by a justice of the Ontario Court of Justice on May 30, 2002. The affidavit filed in support of the wiretap application included reference to a telephone conversation between the appellant and Majcher on May 22, 2002. Majcher was in Florida and the appellant was apparently in Toronto. This conversation was intercepted under the auspices of the FBI and pursuant to permission granted by the senior FBI agent. Under the applicable American law, permission to intercept conversations in which one of the participants consents to the interception can be granted by a senior police officer. Unlike Canada, a judicial authorization is not required.

[9] In his first argument, counsel for the appellant submitted that the interceptions made pursuant to the Canadian wiretap authorization granted on May 30, 2002 should have been excluded. He further argued that without those conversations, the Crown could not prove the appellant's guilt. Counsel's argument proceeded along the following line:

- The interception of the May 22 conversation was subject to *Charter* scrutiny;
- On a *Charter* analysis, the interception was unreasonable and violated the appellant's s. 8 rights as it was made without prior judicial authorization: see *R. v. Duarte*, [1990] 1 S.C.R. 30;
- Because the interception of the May 22 conversation was unconstitutional, the information contained in that conversation must be excised from the affidavit used to obtain the Canadian authorization: see *R. v. Grant*, [1993] 3 S.C.R. 223;

- Absent the information contained in the May 22 conversation, there was not a sufficient evidentiary basis on which a judge, acting within the limits of the *Criminal Code* provisions, could grant an authorization to intercept private communications. The authorization should not have been granted: see *R. v. Garofoli*, [1990] 2 S.C.R. 1421;
- Because the authorization should not have been granted, the interceptions made pursuant to the authorization must be taken as having been made without a valid authorization and, therefore, in violation of s. 8; and
- The violation was sufficiently serious to merit exclusion of the evidence under s. 24(2) of the *Charter*.

[10] Crown counsel, relying on the analysis in *R. v. Hape*, [2007] 2 S.C.R. 292, submitted that the interception of the May 22, 2002 conversation did not occur in Canada, was made under the authority of the FBI, and was not subject to *Charter* scrutiny. I need not address the merits of that argument. For the purpose of my analysis, I will assume that the *Charter* does reach that interception. I will also assume that as the interception was not judicially authorized, it constituted an unreasonable search and violated the appellant's rights under s. 8 of the *Charter*.

[11] Accepting the assumptions set out above, the appellant's argument fails for two reasons. First, even if the interception of the conversation was unlawful and violated s. 8, the officer swearing the information in support of the authorization was entitled to rely on the contents of that conversation as relayed to him by Majcher, one of the participants in the conversation: see *R. v. Fliss*, [2002] 1 S.C.R. 535, at para. 43. A finding that the interception of the May 22 conversation violated the appellant's s. 8 rights would not have affected the contents of the affidavit relied on by the police in support of the application for the Canadian wiretap authorization.

[12] Second, I agree with the Crown's submission that the Canadian authorization would have been issued even if the affidavit contained no reference to the information provided in the May 22 telephone call. The affidavit sworn in support of the application for the Canadian wiretap authorization contained abundant evidence, apart from the May 22 call, that would justify an order to intercept the appellant's communications in respect of the named offences. That conversation did little more than confirm earlier negotiations and arrange a further meeting. Applying the well-known standard from *Garofoli*, the appellant has failed to show that the authorization could not have been granted had the contents of the May 22 conversation been unavailable to the police.

[13] Finally, even though I need not reach s. 24(2), I am convinced that the evidence obtained through the Canadian wiretap authorization would not be properly excluded under s. 24(2) of the *Charter* if the interceptions made pursuant to it were found to violate the appellant's rights under s. 8. I accept the trial judge's finding of good faith on

the part of the police. The evidence of the interceptions is non-conscriptive, totally reliable, powerful and central to the prosecution of very serious offences. All of these factors speak loudly in favour of admitting the evidence even if there was a breach of s. 8. The appellant's first argument cannot succeed.

[14] Counsel for the appellant's second argument alleges a failure to make full and proper disclosure. This argument, like the first, is connected to the May 22 conversation and the attempt to demonstrate that the conversation was intercepted in violation of the appellant's constitutional rights.

[15] At trial, counsel (not counsel on appeal) brought an unsuccessful omnibus disclosure application seeking all notes and materials in the possession of the FBI in any way related to the investigations that led to the appellant's arrest. On appeal, counsel for the appellant limited the claim to a submission that the trial judge should have ordered the Crown to produce, or at least make its best efforts to obtain, relevant information in the possession of the FBI agent who approved the interception of the May 22 telephone conversation. Counsel argued that this disclosure was necessary to enable the defence to make a proper challenge to the constitutionality of the interception of the May 22 conversation and, hence, to the ultimate admissibility of the evidence intercepted under the Canadian authorization.

[16] Clearly, the argument advanced on appeal is a much more focussed one than the argument put to the trial judge. Counsel for the appellant acknowledges that the trial judge's failure to order the Crown to produce the material in the possession of the FBI referable to the granting of the consent to intercept the May 22 conversation was relevant only to the issues raised on the *Garofoli* application and, more specifically, relevant only to the constitutionality of the interception of the May 22 conversation.

[17] I have assumed that the interception of the May 22 conversation was unconstitutional for the purpose of this appeal. All the disclosure in the world from the FBI pertaining to that conversation could not put the appellant in a better position than I have assumed he is in for the purpose of considering and rejecting his argument based on the unconstitutionality of the May 22 conversation. This disclosure argument is of no consequence given my approach to the first argument advanced on behalf of the appellant.

IV. THE CROWN'S SENTENCE APPEAL

[18] At trial, the Crown sought a sentence of between five and seven years. Defence counsel submitted that a two-year sentence was appropriate and asked the trial judge to consider imposing the maximum conditional sentence of two years less a day with

stringent conditions. The trial judge imposed a sentence of three years and a fine of $43,230.[2]

[19] On appeal, the Crown seeks a sentence of five years and the appellant submits that a sentence of two years should be imposed. As I would grant leave to the Crown to appeal sentence and vary the sentence to five years, I need not address the specific issues raised on the appellant's sentence appeal.

(a) The Trial Proceedings

[20] In the sentencing proceedings at trial, Crown counsel called Inspector Majcher to testify how he came to meet the appellant.[3] Majcher testified that in his undercover capacity, he was dealing with a money launderer named King in the Bahamas. King told Majcher that he knew a person who could assist in injecting large amounts of cash obtained through criminal activity into the international banking system. King went on to indicate that he had done business with this person for quite some time and that this person could handle large amounts of cash. King spoke with this person on the telephone on March 8, 2002 in Majcher's presence. A meeting was arranged for March 11. At some stage, King identified the person as Simon Rosenfeld.

[21] Majcher met with the appellant in Florida on March 11, 2002. They discussed the appellant's ability to launder large amounts of cash. The appellant was not prepared to launder money in the United States and told Majcher that he charged 12 per cent commission. Majcher told the appellant he usually paid about five per cent. During the conversation, Majcher made it clear that the money being discussed was the proceeds of international cocaine trafficking. During this first meeting, Majcher gave the appellant a one dollar bill and the appellant assured him that from that point forward their conversations were protected by the client/solicitor privilege. These initial discussions eventually led to the agreement to launder millions of dollars in drug money for a commission of eight per cent. The two transactions described earlier in these reasons were a product of that agreement.

[22] The Crown relied on this evidence, as well as many of the appellant's statements made in the intercepted communications with Majcher, to demonstrate that the appellant was a "professional" money launderer. Crown counsel submitted that:

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[2] The fine represents the amount of the commissions paid to the appellant and was imposed pursuant to s. 462.37(3). The fine is not in issue on the appeal.

[3] The trial judge had excluded this evidence at trial on the basis that its prejudicial potential outweighed its probative value. She admitted the evidence on sentencing.

> [T]his is not a lawyer who is unwilling; this is not a lawyer who is wilfully blind. This is a corrupt lawyer who is taking advantage of and this is his business. The bottom line is that this is his business. Whether it's laundering drug monies or stock fraud pump and dumps. This is his business. [Emphasis added.]

[23] Crown counsel stressed several other aggravating factors in her submissions. She contended that the appellant's belief that his actions were directly assisting those at the top of the international cocaine trade rendered his conduct at least as culpable as the conduct of persons who aided in the drug trade in other ways. Counsel submitted that those individuals, even though there are often mitigating circumstances surrounding their involvement in the drug trade, normally receive lengthy penitentiary sentences. She submitted that the appellant's punishment should be comparable.

[24] Crown counsel also submitted that the appellant's position as a lawyer was a significant aggravating factor. Relying on Majcher's evidence and documentary evidence placed before the trial judge on sentence, she argued that lawyers in Canada were particularly useful to those seeking to hide "dirty" money. Canadian lawyers, unlike other professionals and financial institutions in Canada and elsewhere, are not subject to reporting requirements with respect to large cash transactions. Lawyers also can shield their activities behind client/solicitor privilege.

[25] Crown counsel argued that the appellant's comments on the intercepted conversations indicate that he was aware of the advantages his profession gave him and that he was prepared to use those advantages to further the criminal activity in which he was involved. Counsel contended that the appellant's willingness to misuse his status as a lawyer was made all the more serious because of his obligations as a barrister and solicitor to the administration of justice. Crown counsel argued that the appellant's comments on the wiretaps revealed a disdain for the criminal justice system and a total disregard for his responsibilities as a lawyer.

[26] Crown counsel stressed the international nature of the criminal activity that the appellant believed he was assisting through his money laundering efforts. She submitted that Canada's international obligations and reputation required the imposition of a sentence that reflected Canada's commitment to stand with other countries in the international community against the threat posed by international organized crime. Crown counsel referred to comments made by the appellant to Majcher suggesting that Canada was seen as a relatively safe haven for those looking for a place to inject their criminal proceeds into legitimate financial markets.

[27] Finally, Crown counsel submitted that the appellant's personal circumstances presented little by way of mitigation. There was no evidence of remorse and greed appeared to be the only motive for the appellant's actions. Counsel observed that the appellant lived a lavish lifestyle while bragging that he structured his affairs to avoid paying his debts and his taxes. Counsel depicted the appellant as a person who, despite having the means to earn a legitimate living, chose instead to pursue a criminal path that would fund a lavish and extravagant lifestyle.

[28] The appellant did not call any evidence on sentencing.[4] The appellant was 58 years old at the time of sentencing. He was married and had three children (ages 19, 16 and 10). The appellant had no criminal record. He was a lawyer in the province of Ontario, although he apparently did not spend much of his time practising law. He was an undischarged bankrupt.

[29] Defence counsel argued that the wiretap interceptions did not demonstrate that the appellant was running a sophisticated, well-organized money laundering operation. Counsel contended that the interceptions showed that the two transactions did not go smoothly, and that the appellant seemed out of his depth. Counsel also argued that despite some of the appellant's statements during the intercepted communications, there was no hard evidence that he engaged in money laundering on any occasion other than the two transactions that were the subject matter of these charges.

[30] Defence counsel urged the trial judge not to accept the statements made by the appellant on the wiretaps at face value. Counsel submitted that the appellant was making things up so that Majcher would believe that he was a "player" in the criminal underworld. Counsel pointed out that the appellant contradicted himself several times and that some of his comments were obvious exaggerations.

[31] Defence counsel also urged the trial judge to take into consideration the appellant's bail conditions for the almost three years that it took to get the charges through the criminal justice system. Counsel submitted that the restrictions on his liberty should be taken into account and that the appellant's compliance with the bail terms demonstrated that he was a good candidate for a conditional sentence.

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[4] Trial counsel asked for an adjournment of the sentencing proceedings to allow the appellant to be assessed by a psychiatrist, Dr. Graham D. Glancy, or alternatively to allow Dr. Glancy to attend and testify on the sentencing. The trial judge refused to further adjourn the already protracted trial proceedings. While we see no error in that decision, we did allow appellate counsel to file the report of Dr. Glancy with this court. I have considered the report. Apart from providing certain additional personal information about the appellant, the report did not assist in determining the appropriate penalty.

[32] The trial judge identified general deterrence as the paramount consideration in sentencing the appellant. She accepted most of the submissions made by Crown counsel. The trial judge did not, however, make a specific finding as to the extent, if any, of the appellant's involvement in money laundering beyond these two transactions. She referred, with apparent approval, to evidence suggesting a broader involvement, but she made no specific finding of fact.

(b) The Fitness of the Sentence

[33] Mr. Wakely, for the Crown, in very able submissions, frankly acknowledged that the three-year sentence imposed by the trial judge was not inconsistent with sentences imposed on lawyers for similar offences.[5] Nor did Mr. Wakely suggest that the trial judge committed any error in principle. He argued, however, that the relatively few sentences imposed on lawyers who were involved in sophisticated, large-scale money laundering operations were far too low to adequately reflect the seriousness of the offence and adequately express society's denunciation of the conduct of lawyers whose actions aided and abetted large-scale, organized international crime. Mr. Wakely submitted that a three-year sentence is demonstrably unfit and, therefore, properly the subject of appellate variation: see *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.

[34] There is a danger in generalizing when describing the imposition of an appropriate sentence. Canadian sentencing philosophy has avoided the concept of tariff sentencing for certain kinds of offences and favoured an approach that recognizes the uniqueness of each sentencing problem. Sentencing judges in Canada must tailor the sentence to the specifics of the offence and the specifics of the offender: see *Criminal Code*, s. 718.1.

[35] Consequently, I do not adopt Crown counsel's sweeping condemnation of sentences imposed on lawyers for this kind of offence. I do, however, accept the submission that in the specific circumstances of this case, a significantly longer jail term was required to adequately reflect the seriousness of the offence and the appellant's level of culpability. Three years is demonstrably unfit.

[36] In coming to my conclusion, I have considered the submissions of counsel both here and at trial. I find myself in substantial agreement with Crown counsel's submissions. I emphasize the following features of the case:

- The appellant's belief as to the source of the money he was laundering;
- The size and sophistication of the appellant's operation;

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[5] See, for example, *R. c. Flahiff*, [1999] J.Q. No. 403 (C.Q. crim.), aff'd [2001] J.Q. No. 2319 (C.A.); *R. c. Lavoie* [1999], J.Q. No. 5595 (C.Q. crim.), aff'd [2003] J.Q. No. 1474 (C.A.).

- The appellant's motive;
- The appellant's status as a lawyer;
- The nature of the appellant's involvement in money laundering; and
- The absence of any significant mitigating factors.

[37] I begin with what the appellant believed was the source of the money he was laundering. From the appellant's perspective, the important one when assessing his culpability, this was no victimless crime. The appellant thought he was playing a crucial role in the successful operation of the international cocaine trade. That trade kills countless people and destroys the lives of even more. The appellant's conduct was designed to give the appearance of legitimacy to the profits reaped from one of the most nefarious and socially harmful of all criminal activities. His culpability is properly analogized to others who perform services to assist those who control and reap the profits of the international cocaine trade: see *R. v. Roa*, [1996] J.Q. No. 46 (C.A.). The fact that the appellant was dealing with an undercover officer and not a real representative of a drug cartel does not mitigate his conduct.[6]

[38] The appellant's money laundering operation was a significant one. He earned almost $50,000 in less than a month for the services he provided in respect of two substantial transactions. The appellant fully expected to earn much more in what he anticipated would be an ongoing and growing relationship with the drug cartel. The appellant's operation had some degree of complexity and sophistication. He set up various bank accounts in different jurisdictions in the names of corporate shells he controlled. The appellant funnelled the funds through these accounts to their ultimate destination. The appellant also used others to perform banking services for him, thereby sheltering his own identity. This operation could not have come into existence overnight.

[39] Money was the appellant's only motive. While the value to both individual and general deterrence of longer jail sentences can be questioned in many contexts,[7] I think it has value for offenders like the appellant. If any offender engages in a "risk/benefit" analysis before engaging in criminal activity, it is an offender like the appellant. The appellant had choices. He did not stumble into this criminal activity. Nor did circumstances push him into this criminal activity. The only reasonable inference is that the appellant chose criminal activity over legitimate ways of pursuing a living because the criminal activity offered the possibility of quicker, easier and larger profits. Persons

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[6] The appellant also believed that he was acting for the benefit of, and at the direction of, a criminal organization. Section 718.2(a)(iv) of the *Code* recognizes this as an aggravating factor on sentence. The appellant was, of course, despite his best efforts, not working for a criminal organization. Consequently, the section has no direct application.
[7] See *R. v. Wismayer* (1997), 33 O.R. (3d) 225, at pp. 241-46 (C.A.); Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Melbourne: Cambridge University Press, 2007), at pp. 54-63.

like the appellant who measure success by the size of their monetary gain, must understand that the potential for quick, large gains through criminal conduct comes at the risk of detection and the imposition of a long jail term.

[40] The appellant's status as a lawyer is a significant aggravating factor for two distinct reasons. First, apart from the specifics of the offences committed by the appellant, those privileged to practise law take on a public trust in exchange for that privilege and the many advantages that come with it. Lawyers are duty bound to protect the administration of justice and enhance its reputation within their community. Criminal activity by lawyers in the course of performing functions associated with the practice of law in its broadest sense, has exactly the opposite effect. Lawyers like the appellant who choose to use their skills and abuse the privileges attached to service in the law not only discredit the vast majority of the profession, but also feed public cynicism of the profession. In the long run, that cynicism must undermine public confidence in the justice system: see *R. v. Oliver*, [1977] 5 W.W.R. 344 (B.C.C.A.).

[41] The second reason the appellant's status as a lawyer is an aggravating factor relates to the specifics of this crime. Lawyers, for arguably valid reasons, are exempt from the reporting conditions applicable to other professions and financial institutions who deal in cash transactions. The communications between lawyers and their clients, also for valid reasons, are protected from disclosure by the client/solicitor privilege. This privilege attaches uniquely to lawyers and their clients. The wiretap interceptions and Majcher's evidence demonstrate that the appellant appreciated the advantage to a money laundering operation of both the solicitor's exemption from the reporting conditions and the client/solicitor privilege. He was ready and willing to abuse these specific privileges available to him because of his status as a lawyer to enhance his money laundering services. The appellant's willingness to prostitute his legal services and abuse the special privileges associated with them are significant aggravating features of his conduct.

[42] Lastly, I turn to the nature of the appellant's involvement in the money laundering world and the criminal activities associated with it. I can accept that the appellant engaged in hyperbole in his conversations with Majcher because he was doing his very best to impress someone he believed to be a major player in the drug trade. That is, however, hardly a mitigating factor. Why would the appellant want so badly to impress Majcher? The only answer must be because he very much wanted Majcher's business. The appellant was clearly an experienced money launderer when he met Majcher. That experience is evident not only from the appellant's discussions about money laundering with Majcher, but also from the manner in which the appellant initially came to Majcher's attention. Another money launderer in the Bahamas introduced the appellant to Majcher as a person who that other money launderer knew could handle large amounts of "dirty" cash. That is exactly the service that the appellant made available to Majcher.

[43] The appellant presented himself as a person wise in the ways of money laundering. He also consistently and aggressively promoted himself to Majcher as a person who could provide more and better services for the drug cartel Majcher represented. The appellant suggested that these services could go beyond money laundering to include other criminal activities, including drug dealing.

[44] The appellant was not caught in a moment of weakness. He was not in any manner of speaking a victim of circumstances. Nor was the appellant wilfully blind as what were initially legitimate legal services slid from the legal into the illegal. As Crown counsel at trial aptly put it, the appellant was in the business of laundering the proceeds of large-scale, international criminal activity. The intercepted communications demonstrate beyond peradventure that he was anxious to grow that business and branch out to other forms of criminal conduct.

[45] The mitigation side of the sentencing ledger offers precious little to offset the litany of aggravating features present in this case. I propose to refer to only one of the mitigating features put forward by counsel at trial. Pre-conviction bail conditions can be relevant on sentencing. However, in the absence of any evidence as to the effect on the appellant of his bail conditions and the absence of any explanation for the delay in proceeding through trial, I am not prepared to give the appellant any credit for his pre-conviction bail status. Given the strength of the case against him, I would think that the appellant would have been very happy had this case never gone to trial. The long delay in the prosecution of the appellant's appeal, while the appellant remained on bail, further indicates that he was only too happy to be on bail and leave the matter unresolved. I am sure he knew that incarceration was the only realistic outcome when these proceedings ultimately came to an end.

V. DISPOSITION

[46] The nature of these offences and the appellant's involvement in them required that the objectives of societal denunciation, general deterrence and specific deterrence be given priority in fixing the appropriate sentence. A substantial penitentiary term was the only sentence that could properly reflect these objectives. The five- to seven-year range suggested by the Crown at trial was not inappropriate. I would allow the appeal and vary the sentence to five years. The fine component of the sentence remains as imposed at trial. RELEASED: "DD" "APR 15 2009"

"Doherty J.A."
"I agree: E.A. Cronk J.A."
"I agree: G.J. Epstein J.A."