S216444

In the Supreme Court of the State of California

CRC 8.25(b)

THE PEOPLE,
Plaintiff and Respondent,
v.
JEFFREY HUBBARD,
Defendant and Appellant.

Case No. S_____

SUPREME COURT
FILED

FEB 11 2014

Frank A. McGuire Clerk

Deputy

Second Appellate District, Division One, Case No. B239519
Los Angeles County Superior Court, Case Nos. SA075027, BA382926
The Honorable Stephen A. Marcus, Judge

PETITION FOR REVIEW

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The People of the State of California, plaintiff and respondent in the above-entitled action, hereby petition this Honorable Court to grant review in this case, pursuant to California Rules of Court, rules 8.500 and 8.504, following an unpublished decision of the California Court of Appeal, Second Appellate District, Division One, case number B239519, filed on December 31, 2013, reversing appellant's convictions for misappropriation of public funds (Pen. Code, § 424, subd. (a)(1)). (Exh. A.)

ISSUES PRESENTED

1. Does a superintendent of a public school district (i.e., an officer of a district of this state), qualify for prosecution for misappropriation of public funds under Penal Code section 424 without a further showing that the officer is "charged with the receipt, safekeeping, transfer, or disbursement of public moneys"?

2. If Penal Code section 424 applies only when an officer is "charged with the receipt, safekeeping, transfer, or disbursement of public moneys," must the officer have final "approval authority" of the expenditure (Exh A. at pp. 6-8; *People v. Aldana* (2012) 206 Cal.App.4th 1247, 1254) rather than "some degree of control" over the disbursement of public funds (*People v. Groat* (1993) 19 Cal.App.4th 1228, 1232) for the officer to qualify for prosecution for misappropriation of public funds?

STATEMENT OF THE CASE

Appellant was the Superintendent of the Beverly Hills Unified School District ("BHUSD") from July 1, 2003, through June 6, 2006. (7RT 1550.) The district had a five-member board that held public board meetings twice a month. Appellant attended all board meetings. Prior to each board

meeting, the superintendent's office published an agenda setting forth the items to be covered during the meeting. The board held closed session meetings before the public sessions to discuss certain confidential topics such as personnel, litigation, and student matters. All increases in employee compensation, including automobile allowances and stipends, had to be approved by the board. Any board decision regarding employee compensation was discussed first in closed session, but the decision always had to be ratified in open session in order for it to take effect. In order for anything to be ratified in open session, it had to be listed on the board agenda. After every public meeting, minutes were published summarizing all of the board actions that took place during the meeting. (3RT 433-437.)

Karen Christiansen was the Director of Planning and Facilities for the BHUSD. In 2005, her employment contract with the district stated her salary was $113,000 per year and provided for a $150 per month car allowance. The contract did not provide for any additional stipends. The contract could only be amended with board approval. (3RT 440-441.)

Melody Voyles worked at the BHUSD as a Payroll Benefit Specialist at the district office. She was responsible for the payroll and benefits for district employees. If a district employee received a change in pay or benefits, Voyles would typically be notified by a report or memo from the human resources department. (3RT 359-363.) In a memo dated September 29, 2005, appellant directed Voyles to pay Christiansen a $500 per month car allowance retroactive to September 1, 2005. Appellant did not follow the established protocol for increasing Christiansen's compensation. Christiansen began receiving the increased car allowance in October 2005. (3RT 369-373.)

On February 6, 2006, appellant sent another memo to Voyles directing her to pay a $20,000 stipend to Christiansen.[1] Voyles entered the information into the payroll system and Christiansen received two $10,000 stipend payments for a total of $20,000. The first $10,000 stipend was paid on February 9, 2006, and the second was paid on February 16, 2006. (3RT 365-368, 375.)

Two BHUSD board members testified that appellant never sought board approval to give Christiansen a $500 per month car allowance or a $20,000 stipend. The board never approved the stipend or the increased car allowance. The board did not know about the payments to Christiansen until 2009 when the superintendent at the time informed the board of irregularities.[2] (3RT 432, 441-442; 4RT 608-609, 614-619; 5RT 962-975.)

Following a jury trial, appellant was found guilty of two counts of misappropriation of public funds (Pen. Code, § 424, subd. (a)(1)). (2CT 287-289.) The trial court placed appellant on three years of formal probation with various terms and conditions. (2CT 316-318.)

On appeal, appellant contended that he was not a person "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of Penal Code section 424, and he therefore could not be found guilty of violating that section.[3] Respondent countered that appellant was the superintendent of the BHUSD; thus, he was an officer of

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[1] BHUSD's Assistant Superintendent of Human Resources at the time testified that he never received or saw either of the memos regarding Christiansen's increased compensation. (4RT 717-721.)

[2] Appellant testified that he did not know whether the payments to Christiansen were ever approved by the board. (7RT 1602-1603.)

[3] Appellant raised several other claims on appeal; however, the Court of Appeal did not reach the merits of those claims.

the school district. Since appellant was a public officer, he fell within the ambit of Penal Code section 424 on that basis alone. Respondent also argued that the evidence established that appellant exercised some degree of control over public funds, therefore, he was "a person charged with the receipt, safekeeping, transfer, or disbursement or public moneys." (See *People v. Groat* (1993) 19 Cal.App.4th 1228, 1232.)

The Court of Appeal rejected respondent's arguments and held that appellant could not be criminally liable under Penal Code section 424 for the increased car allowance and stipend paid to Christiansen because the "approval authority" to make the payments rested with the BHUSD board, rather than with appellant. (Exh. A at p. 10.)

REASONS FOR GRANTING REVIEW

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE SCOPE OF THE TERM "OFFICER" UNDER PENAL CODE SECTION 424, SUBDIVISION (A), IS AN ISSUE OF STATEWIDE IMPORTANCE

This case presents an issue of broad public importance: the interpretation of the scope of Penal Code section 424, subdivision (a)(1), which states:

> Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who . . . [w]ithout authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another . . . is punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in this state.

This case involves whether a school district superintendent, who was responsible for the day-to-day business and operations of the district, can be found criminally liable for misappropriating public funds entrusted to the district, on the basis that he is an "officer."

At trial, the prosecution submitted a proposed jury instruction on the elements of the crime of misappropriation of public funds. The instruction stated that the first element that the prosecution had to prove was that appellant was "an officer of this state, or of any county, city, town, or district of this state, or was a person charged with the receipt, safekeeping, transfer, or disbursement of public moneys." Appellant's trial counsel stated that he had no objection to this portion of the instruction.[4] (7RT 1654.) The trial judge instructed the jury in accordance with the proposed instruction. (2CT 303-304; 8RT 1833-1834.) Appellant's defense at trial was that he did not have the requisite knowledge and intent to commit the crime and that the prosecution was not commenced within the statutory period. He did not argue that he was not subject to prosecution under the statute on the basis that he was not an "officer" or "a person charged with the receipt . . . of public moneys." (8RT 1862-1902.)

On appeal, respondent argued that because appellant was an officer of the BHUSD, he fell within the class of persons subject to prosecution under Penal Code section 424 on that basis alone. The Court of Appeal rejected that argument, stating that to be liable under the statute, a public officer must also be "charged with the receipt, safekeeping, transfer, and disbursement of public moneys." (Exh. A at p. 8.)

The Court of Appeal ignored the plain, commonsense construction of Penal Code section 424. The statute lists the persons subject to the statute and includes officers and "every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys." (Pen. Code, § 424, subd. (a).) The Court of Appeal reasoned that the "charged with the receipt . . ." language of the statute modified both "officer" and "every

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[4] Counsel objected to a separate portion of the instruction regarding the intent element. (7RT 1654-1664.)

other person." (Exh. A at p. 8.) However, such a construction of the statue renders the portion of the statute describing "officer" mere surplusage. (See *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274 ["[w]ell-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative"].) Under the Court of Appeal's interpretation, the entire portion of the statute preceding "every other person" is rendered meaningless. Such a narrow interpretation is counter to the legislative intent that Penal Code section 424 be "construed very broadly." (See *Stark v. Superior Court* (2011) 52 Cal.4th 368, 400.)

To give meaning to each word and phrase in the statute, Penal Code section 424 should be interpreted as listing the various people subject to the statute, i.e. "each officer of this state . . ." *or* a "person charged with the receipt . . . of public moneys." (See *People v. Groat*, *supra*, 19 Cal.App.4th at pp. 1231-1232 ["To be convicted under section 424, a defendant must be a public 'officer' or a 'person charged with the receipt, safekeeping, transfer, or disbursement of public moneys'"].) Such a construction of the statute would give the words of the statue their plain and commonsense meaning and would effectuate the legislative intent to "safeguard the public treasury and ensure public confidence in the state's use of its funds." (*Id.* at p. 1232.)

As the superintendent of the BHUSD, appellant was clearly an officer within the purview of Penal Code section 424. A school district superintendent is "the chief executive officer of the governing board of the district." (Educ. Code, § 35035, subd. (a); see *People v. Crosby* (1956) 141 Cal.App.2d 172, 175 ["There is no doubt that a public administrator is a public officer of a county"]; *People v. Schoeller* (1950) 96 Cal.App.2d 55, 57-58 [secretary of the board of directors of irrigation district was an officer of the district].) As an "officer of . . . [a] district" appellant was prohibited

from appropriating public moneys to his own use or to the use of another without authority of law. (Pen. Code, § 424, subd. (a)(1).) Thus, appellant's status as an officer of the district meant that he fell within the ambit of Penal Code section 424. No additional showing that appellant was "charged with the receipt safekeeping, transfer, or disbursement of public moneys" was required.

Review is therefore warranted in this case "to settle an important question of law" and to provide needed guidance to public officials, trial and appellate courts, and law enforcement as to the scope of the word "officer" under Penal Code section 424. (Cal. Rules of Court, rule 8.500(b)(1).)

II. REVIEW SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE COURT OF APPEAL'S OPINION AND THE DECISION IN *GROAT* OVER THE DEGREE OF CONTROL NECESSARY FOR MISAPPROPRIATION

In addition to being a public officer, appellant was also liable for misappropriation as a person "charged with the receipt, safekeeping, transfer, or disbursement of public moneys." (Pen. Code, § 424, subd. (a).) The Court of Appeal held, however, that because appellant did not have "approval authority" to expend funds, he could not as a matter of law be liable under Penal Code section 424. (Exh. A at p. 10.) This was clearly in conflict with the court's opinion in *People v. Groat*, *supra*, 19 Cal.App.4th 1228, holding that only "some degree" of control over public funds is required.

In *Groat*, the Sixth Appellate District held that a manager of a city department who had ability to authorize her own pay violated Penal Code section 424 by submitting time cards indicating time worked or sick when she was neither at work nor sick but was teaching classes for another employer. (*People v. Groat*, *supra*, 19 Cal.App.4th at pp. 1233-1235.)

Groat held that Penal Code section 424 required only "some degree of control" over public funds:

> Courts have recognized the Legislature's intent [in enacting section 424] to hold public officers specially accountable. Those "who either retain custody of public funds or are authorized to direct the expenditure of such funds bear a peculiar and very grave public responsibility, and . . . courts and legislatures, mindful of the need to protect the public treasury, have traditionally imposed stringent standards upon such officials. [Citations.]" [Citation.] [¶] Because of the essential public interest served by the statute it has been construed very broadly. The state Courts of Appeal have held that "to be charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of section 424 requires only that the defendant have *some degree of control* over public funds and that control need not be the primary function of defendant in his or her job.

(*People v. Groat*, *supra*, 19 Cal.App.4th at p. 1232, italics added.)

By contrast, the Court of Appeal here disregarded the long-established "some degree of control" standard and essentially invented a new requirement for a person to be found liable under section 424—that the defendant must have final authority for approving the expenditure. (Exh. A at pp. 9-10.) The Court of Appeal dismissed the "some degree of control" standard described in *Groat* as "dicta" (Exh. A at pp. 9-10), but that standard was clearly central to the *Groat* court's holding because the court upheld the conviction based on that standard, even if the defendant also had approval authority. Moreover, the court's adoption of an "approval authority" requirement in this case severely limits the application of Penal Code section 424 because many public officials cannot legally expend or disburse funds without authorization from another elected body, such as a school board. Thus, under the court's reasoning, persons who exercise some control over public funds—control sufficient to convert the funds to their own use or to another's use—but do not have "approval authority" to

expend public funds, could never be found liable for misappropriating public funds.

This case illustrates why the Court of Appeal's standard is too restrictive. The fact that appellant did not have authorization from the district board to make the payments to Christiansen is the basis for the misappropriation of public funds charge. In other words, if the board had authorized the payments, he necessarily would not have misappropriated public funds. The lack of board authorization did not make it impossible for the payments to Christiansen to be made. Indeed, this case demonstrates that payments could be made to employees without board approval; however, the lack of board approval meant that such payments were unauthorized and illegal.

Moreover, the Court of Appeal also disregarded the legislative intent behind section 424, which is to "hold public officers specially accountable. Those 'who either retain custody of public funds or are authorized to direct the expenditure of such funds bear a peculiar and very grave public responsibility, and . . . courts and legislatures, mindful of the need to protect the public treasury, have traditionally imposed stringent standards upon such officials.'" (*People v. Groat*, *supra*, 19 Cal.App.4th at p. 1232, quoting *Stanson v. Mott* (1976) 17 Cal.3d 206, 225.) Indeed, this Court cited the *Groat* standard with approval in discussing the legislative intent: "'Because of the essential public interest served by [section 424] it has been construed very broadly. . . .' [Section 424] applies to 'every other person' with *some control* over public funds." (*Stark v. Superior Court*, *supra*, 52 Cal.4th at p. 400, quoting *People v. Groat*, *supra*, 19 Cal.App.4th at pp. 1232, 1234, italics added.)

The Court of Appeal relied on *People v. Aldana* (2012) 206 Cal.App.4th 1247, but that decision does not support the court's holding. In *Aldana*, the court held that a physician who had submitted false

timesheets to a hospital administrator could not have violated section 424, subdivision (a)(3), because he "was not able to authorize his own pay." Thus, he was not a person "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of section 424. (Exh. A at p. 7.) The Court of Appeal here compared appellant, the superintendent of the BHUSD, to the physician in *Aldana*, stating that appellant was required to get board authorization to make the payments to Christiansen: "By sending memoranda to payroll and the human resources department (which undisputedly was the sole party responsible for creating the necessary documents for securing board approval), Hubbard was merely 'the first step in a process that results in the expenditure of public funds,' but that is not 'sufficient to establish criminal liability under section 424 absent approval authority,' which Hubbard undisputedly did not have." (Exh. A at p. 7, quoting *People v. Aldana, supra*, 206 Cal.App.4th at p. 1254.)

But the Court of Appeal's comparison of the defendant in *Aldana* to appellant is inapt. The defendant in *Aldana* was a hospital employee that merely signed a blank timesheet and submitted it to his supervisor for completion. (*People v. Aldana*, *supra*, 206 Cal.App.4th at p. 1254.)[5] Thus, in *Aldana*, there was no evidence that the defendant exercised *any* control over public funds. (*Ibid.*) Its statement regarding approval authority was dicta since the evidence did not even show that the defendant had "some control" over public funds. In any event, to the extent *People v. Aldana* can be read to require that a person have approval authority for an expenditure to establish criminal liability under Penal Code section 424 (see *id.* at p.

[5] Notably, the hours eventually filled in by the defendant's supervisor reflected *less* hours than the defendant had actually worked. (*People v. Aldana*, *supra*, 206 Cal.App.4th at p. 1257.)

1254), its reasoning is counter to the "some control" standard set forth in *Groat*. (See *Stark v. Superior Court*, *supra*, 52 Cal.4th at p. 400.)

And here, appellant was the superintendent of a school district. He was much more than "the first step in a process that results in the expenditure of public funds." (Exh. A at p. 7.) Appellant was the chief executive officer of the BHUSD and was responsible for the day-to-day business and operations of the district. As superintendent, appellant was responsible for overseeing the expenditure of BHUSD funds. He initiated district expenditures by bringing them to the board for approval. If an expenditure was approved, he was then obligated to ensure that the payment was made. The BHUSD board relied on appellant to spend district funds only on things that had been approved by the board. Thus, the evidence showed that he exercised, at the very least, *some* control over public funds. As to this case specifically, he directed subordinate staff to make payments to Christiansen, but he did not follow the standard procedure for initiating the payments and obtaining board approval. Therefore, while appellant may not have had final approval authority to expend district funds, he certainly exercised *some* control over public funds.

The Court of Appeal's narrow interpretation of Penal Code section 424 runs counter to the Legislature's intent to construe the statute broadly and effectively precludes a vast number of public officials from prosecution under the statute. Accordingly, this Court should grant review to secure uniformity of decision and to settle this important question of law. (California Rules of Court, rule 8.500(b)(1).)

CONCLUSION

For the reasons stated, respondent respectfully requests that this Court review the decision of the Court of Appeal.

Dated: February 7, 2014

Respectfully submitted,

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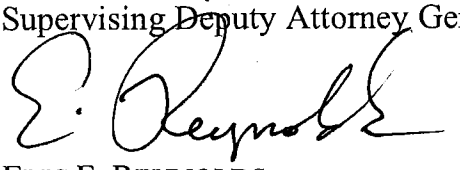

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 3,347 words.

Dated: February 7, 2014

KAMALA D. HARRIS
Attorney General of California

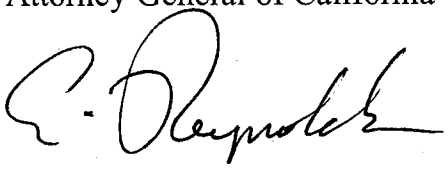

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EXHIBIT A

Filed 12/31/13

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY HUBBARD,

Defendant and Appellant.

B239519

(Los Angeles County
Super. Ct. Nos. SA075027, BA382926)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Reversed.

Hillel Chodos and Philip Kaufler for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jeffrey Hubbard of two counts of misappropriation of public funds in violation of Penal Code section 424, subdivision (a)(1).[1] On appeal, he argues that his convictions must be reversed because, as superintendent of the Beverly Hills Unified School District (the District), he was not "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of section 424. We agree and accordingly reverse his convictions and direct the superior court to dismiss the charges.

BACKGROUND

The operative consolidated information and indictment, filed on January 3, 2012, charged Hubbard with three counts of misappropriation of public funds in violation of section 424. The consolidated information and indictment further alleged, pursuant to subdivision (c) of section 803, that although the alleged crimes took place in 2005 and 2006 they were not discovered and could not reasonably have been discovered before September 2009. Hubbard pleaded not guilty and denied all special allegations.

The charges were tried to a jury, which found Hubbard guilty on two counts but not guilty on the third. As to the counts on which Hubbard was convicted, the jury also found true the allegation that the crimes were not and could not reasonably have been discovered before September 2009.

The court suspended imposition of sentence and placed Hubbard on probation for three years subject to various terms and conditions, including that he serve 60 days in jail and perform 280 hours of community service. The court also ordered Hubbard to pay various fines and fees, including $23,500 in restitution. Hubbard timely appealed.

The evidence introduced at trial showed the following facts: Hubbard was the superintendent of the District from July 1, 2003, through June 30, 2006. At that time, Karen Christiansen was employed by the District as the director of planning and

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[1] All subsequent statutory references are to the Penal Code.

facilities, under a contract providing for a base salary of $113,000 per year and a car allowance of $150 per month.[2]

In a memorandum dated September 29, 2005, Hubbard stated that effective September 1, 2005, Christiansen was to receive a $500 car allowance per month. Hubbard testified that the reason for the increase (from $150 per month under Christiansen's contract) was that the travel requirements for Christiansen's position had dramatically increased after Christiansen took on the duties of a contractor that had been managing various construction projects for the District but was terminated by the District in the fall of 2005. Hubbard's September 29 memorandum was addressed to Melody Voyles (the payroll benefit specialist) and copied to both Sal Gumina (the assistant superintendent for human resources) and Nora Roque (the human resources coordinator). Gumina testified that the entire human resources department, which he supervised, consisted of himself, Roque, and Claudia Grover, a secretary.

In a memorandum dated February 6, 2006, Hubbard stated that Christiansen was to receive a $20,000 stipend. Christiansen's contract did not provide for such a stipend. Hubbard testified that the stipend, like the increased car allowance, was meant to compensate Christiansen for the increase in her workload when she took on the duties of the contractor that had been terminated. Hubbard's February 6 memorandum was addressed to Roque and copied to Voyles.

At trial it was undisputed that both the increased car allowance and the stipend required approval by the District's board of education—Hubbard did not have the legal authority to order them unilaterally. The board held regular meetings twice each month. The board discussed personnel matters, including changes in pay, in closed session, but anything requiring board approval had to be put to a vote of the board in open session. In order for a change in pay to come before the board for an official vote, it had to be

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[2] In a previous appeal, we reversed Christiansen's convictions on four counts of conflict of interest in violation of Government Code section 1090, and we directed the superior court to dismiss all charges against her. (*People v. Christiansen* (2013) 216 Cal.App.4th 1181, 1183.) At all times relevant to the present appeal, Christiansen was an employee of the District, but she later became an independent contractor.

listed on either a certificated personnel report (for employees who hold teaching certificates) or a classified personnel report (for other employees). Those reports were prepared by the human resources department, which provided them to the superintendent, who would sign them and include them in the packet of materials that the board received before a regular meeting.

Voyles, the payroll benefit specialist, was called as a witness by the prosecution. She testified that when an employee's salary or other recurring payments (such as monthly car allowances) were changed, the change had to be entered into the computer system by the human resources department. In contrast, Voyles could process a one-time payment such as a stipend without human resources first making an entry to that effect in the computer. In either case (recurring payments or one-time payments), the District itself did not issue the checks. Rather, the District submitted payment requests that were transmitted to the County of Los Angeles (the County), which would issue the checks to the employees. The County did not "blindly pay things" requested by the District, but rather would "ask for verification," conduct "audits," and generally provide some measure of "oversight" to try to ensure that all payments were properly authorized.

Voyles testified that when she received the February 6 memorandum (concerning the stipend), she brought it to the attention of her supervisor, Cheryl Plotkin, who was then the assistant superintendent of business for the District. Voyles did not recall "any red flags that went off in [her] mind" concerning the February 6 memorandum; rather, she told Plotkin about the memorandum because that was what Voyles routinely did "for anything that [she] thought was going to affect budget." Plotkin, called as a witness by the defense, testified that when Voyles brought the February 6 memorandum to her attention, she told Voyles "[t]o make sure she had all the documentation."

Gumina (head of the human resources department), called as a witness for the prosecution, testified that upon receipt of the September 29 memorandum or the February 6 memorandum, the human resources department "normally would request backup material . . . to make sure the proper approvals [by the board] were in place," and

it "would not be correct procedure if they did not go back to the superintendent's office to make sure the necessary backup paperwork was attached."[3]

It is undisputed that Christiansen ended up receiving both the increased car allowance and the $20,000 stipend. But two board members testified that the board never discussed or approved the increased car allowance and never discussed or approved the $20,000 stipend. In addition, the District's assistant superintendent of business services (at the time of trial) testified that the District conducted a search of the minutes of the board's meetings "in and around the time of the auto allowance" and "in and around the time of the stipend," and the stipend and increased auto allowance "were not listed" on the personnel reports. The prosecution also introduced exhibits consisting of the agendas, minutes, and personnel reports from certain board meetings around the times of Hubbard's memoranda, but the exhibits did not cover all of the meetings from the relevant period,[4] and some of the personnel reports were missing.[5]

Hubbard testified that the board briefly discussed the increased car allowance and the $20,000 stipend in closed session, that there were no objections, and that he wrote the September 29 and February 6 memoranda in order to initiate the process for securing official approval by the board at a subsequent open session—the memoranda were addressed or copied to the human resources department, which undisputedly was the sole party responsible for creating the necessary personnel reports. Apart from Hubbard's

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[3] Gumina initially testified on direct examination that because the September 29 memorandum was merely copied to him, he "would not have acted on it," but he later admitted on cross-examination that "[t]he procedure should be the same" regardless of whether the memorandum was copied to him or "sent directly" to him.

[4] For example, the exhibits included the documents from the two meetings in September 2005, which preceded Hubbard's September 29 memorandum, as well as the documents from the two meetings in October 2005, which immediately followed that memorandum. But the exhibits did not include the documents from the next two meetings, in November 2005.

[5] For example, the exhibits included the agendas and minutes from the meetings of January 10 and 23, 2006, which state that classified personnel reports and certificated personnel reports were approved at those meetings, but the exhibits did not include those reports for those meetings.

own testimony that he raised both the stipend and the increased car allowance in closed session (where they were approved without objection), there is no evidence that Hubbard did anything to secure those payments to Christiansen beyond writing those two memoranda.

In addition, Hubbard subpoenaed the District to produce copies of his email exchanges with board members around the time of the memoranda, which he believed would show that he had indeed discussed both the stipend and the increased car allowance with members of the board. The board moved to quash the subpoena on the ground that compliance would be too burdensome and expensive. The superior court granted the motion, concluding that Hubbard had not carried his burden of showing good cause for enforcing the subpoena.

DISCUSSION

Under section 424, subdivision (a), "[e]ach officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys" who "[w]ithout authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another," "[i]s punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in this state."

Hubbard argues that he is not a person "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of section 424, so he cannot have violated it. We agree and accordingly reverse his convictions and direct the superior court to dismiss the charges against him.

People v. Aldana (2012) 206 Cal.App.4th 1247 (*Aldana*) is controlling. In *Aldana*, the defendants were the administrator of a public hospital and a physician whom the administrator had hired to perform various administrative functions. (*Id.* at pp. 1250-1251.) The physician was paid by the hour for his administrative work. The government program that provided the physician's compensation "required employees to report their actual hours worked during each pay period, and required supervisors to certify the hours the employees worked." (*Id.* at p. 1251.) The physician

signed blank timesheets and provided them to the administrator, who filled in the number of hours worked each day and "signed them to indicate her approval." (*Ibid.*) Both the physician and the administrator acknowledged, however, that "the timesheets did not accurately reflect the actual hours [the physician] worked on any particular day." (*Ibid.*) Indeed, the administrator "did not keep track of the actual hours [the physician] worked," but rather "estimated and averaged the number of hours she recorded on [the physician's] timesheets." (*Ibid.*)

The physician was convicted of keeping a false account under subdivision (a)(3) of section 424, but the Court of Appeal reversed. (*Aldana*, *supra*, 206 Cal.App.4th at pp. 1252-1253.) The court reasoned that because the physician "was not able to authorize his own pay," he was not a person "'charged with the receipt, safekeeping, transfer, or disbursement of public moneys'" within the meaning of section 424. (*Id.* at pp. 1253-1254.) Rather, the administrator "was the person entitled to authorize" the physician's pay, and the payments to the physician "would not have been processed without [the administrator's] signature on his timesheets." (*Id.* at p. 1254.) More broadly, the court observed that no case "has held that being only the first step in a process that results in the expenditure of public funds is sufficient to establish criminal liability under section 424 absent approval authority. . . . [I]t is the ability to control the public moneys that is key." (*Ibid.*)

Aldana applies straightforwardly to the case before us. It is undisputed that Hubbard "was not able to authorize" the stipend and increased car allowance for Christiansen. (*Aldana*, *supra*, 206 Cal.App.4th at p. 1254.) Rather, only the District's board was "entitled to authorize" those payments. (*Ibid.*) By sending memoranda to payroll and the human resources department (which undisputedly was the sole party responsible for creating the necessary documents for securing board approval), Hubbard was merely "the first step in a process that results in the expenditure of public funds," but that is not "sufficient to establish criminal liability under section 424 absent approval authority," which Hubbard undisputedly did not have. (*Ibid.*) "[I]t is the ability to

control the public moneys that is key" (*ibid.*), and Hubbard undisputedly did not have that ability. He therefore cannot be criminally liable under section 424.

Respondent presents two arguments against that reasoning, but we conclude that both lack merit. First, respondent argues that because Hubbard "was an officer" of the District, "on that basis alone" he "fell within the class of persons subject to prosecution under section 424." Thus, according to respondent, because Hubbard was an officer of the District, he can be criminally liable under section 424 even if he is *not* a person "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of that statute.

We disagree for two reasons. First, we note that no case has adopted respondent's construction of the statute—no case has held that a defendant may be criminally liable under section 424 if the defendant was a public officer but was not "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of the statute.

Second, the Supreme Court long ago explained that section 424 "has to do solely with the protection and safekeeping of public moneys . . . and with the duties of the public officer *charged with its custody or control* . . . ." (*People v. Dillon* (1926) 199 Cal. 1, 5, italics added (*Dillon*).) The Court traced the origin of the statute to a provision of the California Constitution concerning the misuse of public funds "'by any officer having the possession or control thereof'" and observed that the statutory language addresses "the single subject of the duties of an officer *charged with the receipt, safekeeping, transfer, and disbursement of public moneys*." (*Ibid.*, italics added.) Similarly, the Court stated that "the subject matter and the language of section 424 clearly indicate that the legislative mind was intently concerned with the single, specific subject of the safekeeping and protection of public moneys and the duties of public officers *in charge of the same*." (*Id.* at p. 6, italics added.) "To again state the situation more succinctly, section 424 has to do solely with the receipt, safekeeping, transfer, and disbursement of *public moneys* by official custodians." (*Id.* at p. 10.)

Dillon was decided nearly 100 years ago, but the relevant provisions of section 424 have remained unchanged. No intervening case law casts any doubt on *Dillon*'s continuing validity. We are consequently bound by the Court's construction of section 424. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Because section 424 concerns only the misuse of public funds *by the official custodians of those funds*, we must reject respondent's first argument.[6]

Respondent's second argument is that Hubbard was "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of section 424 because he had "some degree of control over the disbursement of [D]istrict funds." (Italics omitted.) Respondent's reference to "some degree of control" comes from *People v. Groat* (1993) 19 Cal.App.4th 1228, 1232 (*Groat*), which stated that section 424 "requires only that the defendant have some degree of control over public funds."

We conclude that respondent's argument lacks merit. *Aldana* helpfully summarized *Groat* as follows: "In *Groat*, the defendant prepared and signed her own timecards, and no other signature on the timecards was required for the defendant to be paid. (*Groat*, *supra*, 19 Cal.App.4th at p. 1230.) The defendant's timecards reflected she had been at work or been sick when, in fact, she was teaching at a local college. (*Id.* at pp. 1230-1231.) The court concluded the ability of a public employee to authorize his or her own pay charges that employee with the disbursement of public moneys, and therefore subjects him or her to liability under section 424. (*Groat*, *supra*, at pp. 1233-1234.)" (*Aldana*, *supra*, 206 Cal.App.4th at pp. 1253-1254.) Thus, insofar as *Groat*'s broad reference to "some degree of control over public funds" (*Groat*, *supra*,

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[6] We also note that the allegations of the operative consolidated information and indictment mirror the language of the statute in a manner that conforms to our interpretation of section 424. The charging document alleges that Hubbard was "a person described in Penal Code section 424 charged with the receipt, safekeeping, transfer, and distribution of public moneys" and that he misappropriated "the same" (i.e., the public moneys of which he was custodian). The charging document does not allege that Hubbard was an officer. Rather, it predicates his criminal liability on his status as a custodian of public funds, which he allegedly misappropriated.

19 Cal.App.4th at p. 1232) suggests that a defendant who lacks approval authority can nonetheless possess the requisite degree of control, it is dicta, because the defendant in *Groat* had approval authority. Again, as stated in *Aldana*, "[n]o case, including *Groat*, has held that being only the first step in a process that results in the expenditure of public funds is sufficient to establish criminal liability under section 424 absent approval authority. As the *Groat* court explained, it is the ability to control the public moneys that is key." (*Aldana*, *supra*, 206 Cal.App.4th at p. 1254.)

For the reasons we have already given, that key is missing here. It is undisputed that Hubbard was not able to authorize the stipend and increased car allowance for Christiansen. That approval authority rested solely with the District's board. Hubbard therefore cannot be criminally liable for those payments under section 424. Our resolution of this issue makes it unnecessary for us to address the remaining arguments raised by the parties.

DISPOSITION

Hubbard's convictions are reversed, all penalties imposed on him, including restitution, are vacated, and the superior court is directed to enter an order dismissing all charges against him.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

MILLER, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DECLARATION OF SERVICE

Case Name: *People v. Jeffrey Hubbard* Case No.: S_____
Second Appellate District Case No.: B239519

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 10, 2014, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Hillel Chodos
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1559 S. Sepulveda Blvd.
Los Angeles, CA 90025
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(Two Copies)

Max Huntsman
Deputy District Attorney
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District Attorney's Office
18000 Criminal Justice Center
210 West Temple Street, 18th Floor
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(One Copy)

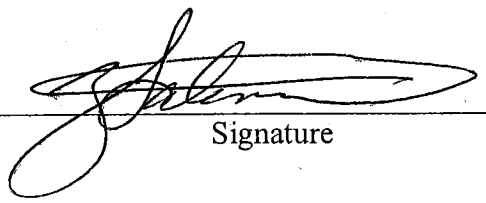
The Honorable
Stephen A. Marcus, Judge
Los Angeles County Superior Court
Clara Shortridge Foltz
Criminal Justice Center
210 West Temple Street, Department 132
Los Angeles, CA 90012-3210
(One Copy)

On February 10, 2014, I caused the original and 8 copies of the **PETITION FOR REVIEW** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **On Trac; TRACKING NUMBER B10270436268 .**

On February 10, 2014, I electronically served the attached **PETITION FOR REVIEW** with the Clerk of the Court using the Online Form provided by the California Court of Appeal, Second Appellate District.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 10, 2014, at Los Angeles, California.

Z. Salena
Declarant



Signature

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