Case No. S207250

In the

Supreme Court

of the

State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

PAUL BIANE, MARK KIRK, JAMES ERWIN, JEFFREY BURUM,

Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO
CASE NO. E054422,
SAN BERNARDINO COUNTY SUPERIOR COURT
CASE NO. FSB 1102102
HON. BRIAN MCCARVILLE, JUDGE

JEFFREY BURUM'S ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

Before this Court are four distinct issues arising out of the lower courts' rulings on defendant and respondent Jeffrey Burum's demurrer:

1. Can an alleged bribe giver be charged under Penal Code section 31 with aiding and abetting the receipt of the same bribes he is accused of giving?
2. Can an alleged bribe giver be charged with conspiracy to commit the crime of receiving the same bribes he is accused of giving?[1]
3. Can a private citizen be charged with conspiring in or aiding and abetting a public official's violation of Government Code sections 1090?
4. Is Government Code section 9054 void for vagueness and an impermissible criminalization of constitutionally-protected activities?[2]

This Court should rule in Mr. Burum's favor on all four issues. First, the People's attempt to charge Mr. Burum, the alleged bribe *giver*, with aiding and abetting the *receipt* of bribes is barred by long-standing California law. Second, California courts uniformly recognize that the bribe giver and bribe receiver cannot conspire with each other because they lack a common motive or purpose. Third, the language and legislative history of Section 1090 reveals a legislative intent to preclude aiding and abetting and conspiracy liability for private citizens. And fourth, Section 9054 is unconstitutionally vague for failing to define the phrase "improperly influence," and, under the Court of Appeal's interpretation, impermissibly criminalizes constitutionally-protected activities.

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[1] Although the People conflate these first two issues, they actually involve separate and distinct theories of derivative liability.

[2] In their Opening Brief, the People only quote the bribery and Section 1090 issues raised in their Petition for Review, improperly ignoring the Section 9054 issue raised by Mr. Burum in his Answer to Petition for Review. (Cal. Rules of Court, Rule 8.520, subd. (b)(2).)

The primary focus of the People's Opening Brief is the bribery charges against Mr. Burum. The People ask this Court to overturn over a century of precedent precluding their improper attempt to charge Mr. Burum, the alleged bribe *giver*, under derivative theories of liability for the crime of *receiving* bribes.[3] The People offer no basis for this Court to so radically change California bribery law. Moreover, even if this Court overturned this long-standing precedent, due process precludes the ex post facto application of such a new and unexpected interpretation of the law to Mr. Burum.

The People's Section 1090 arguments are equally meritless. Section 1090 targets improper conflicts of interest by public officials, and the legislative history and statutory construction of Section 1090 and Government Code section 1097 reveals a legislative intent to preclude derivative liability for private citizens such as Mr. Burum. Again, the People offer no convincing reason for this Court to find otherwise. Moreover, as with the bribery charges, due process precludes the ex post facto application of any new rule announced by this Court.

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[3] The Indictment alleges that the bribery was committed on or before November 29, 2006 (Clerk's Transcript ("CT"), 5:5-8, 13:21-16:6), and thus the statute of limitations for the crime of *giving* bribes expired no later than November 29, 2009. (Pen. Code § 801.) The crime of *receiving* bribes by a public official, however, is potentially subject to tolling under the "discovery rule." (Pen. Code §§ 801.5 and 803, subd. (c).) Attempting to capitalize on this tolling provision, the People claim that the alleged crimes were not discovered until November 1, 2008, and thus argue the Indictment was timely filed on May 9, 2011. (CT 25:11-12.) As explained in Mr. Burum's Motion filed March 6, 2013, this attempt to invoke the discovery rule is legally deficient, and the charges are time-barred on the face of the Indictment. This jurisdictional bar should be addressed as a preliminary matter, particularly in light of the Court's recent denial of review in *People v. Milstein* (2012) 211 Cal.App.4th 1158, review den. (March 27, 2013) (holding that conspiracy charges are *not* subject to the discovery rule). Mr. Burum is prepared to submit further briefing on this issue should the Court so order.

Finally, this Court should reverse the Court of Appeal's decision regarding Section 9054. The only difference between conduct criminalized by Section 9054 and garden-variety lobbying activities is that Section 9054 prohibits promises to "improperly influence" legislators. But the statute fails to define what constitutes "improperly" influencing, rendering the statute void for vagueness. The Court of Appeal disagreed, holding that "improperly influence" means "the use of personal, or any secret or sinister, influence upon legislators." This definition not only fails to cure the statute's vagueness, it criminalizes constitutionally-protected lobbying activities, which routinely involve "personal" influence. Section 9054 is thus void for vagueness and, under the Court of Appeal's ruling, an unconstitutional restraint on protected First Amendment activity.

II. BACKGROUND

A. The County's Settlement With Colonies

Mr. Burum is a developer with a managerial role in Colonies Partners, L.P. ("Colonies"). (CT 2:21.) In the early 2000s, land owned by Colonies in Upland, California, became the focal point of a dispute between Colonies and the County of San Bernardino ("County"). (CT 4:13-15.) The County claimed that it held easements on the property allowing it to redirect storm runoff onto Colonies' land, and that Colonies should construct and pay for a regional flood control facility to receive this runoff. (CT 4:13-22.) Colonies objected to the County's actions and filed a lawsuit, ultimately prevailing in two separate trials. (CT 4:22-5:2; 57:10-16.)

The second trial court issued a 50-page Statement of Intended Decision in favor of Colonies on July 31, 2006 (CT 56-105), harshly criticizing the County for, among other things:

- Having "in effect... held [Colonies'] development 'hostage' by virtue of the cloud on title" (CT 79:11-12);

- Having "unreasonably and unjustifiably interfere[ed] with [Colonies'] business" (CT 88:27-28);
- Having "coerced [Colonies] into giving [a consent] letter by stating that it would not approve the 1999 Agreement without it" (CT 89:27-90:1);
- Having "played 'hide the ball' with respect to... its interpretation of the easements" (CT 90:7-9);
- Having pursued a "deliberate course of conduct ... designed to shift to [Colonies] the obligation to build and pay for regional flood control facilities" (CT 91:28-92:2);
- Having engaged in conduct that "would have endangered the public safety" absent the mitigating efforts of Colonies and other agencies (CT 92:2-4); and
- Having "committed a massive, permanent, severe, and inseverable surcharge of the easements, in violation of California law" (CT 99:26-28).

Faced with this harsh Statement of Intended Decision – and the prospect of liability for damages in excess of $300 million, plus mounting legal fees – the County re-engaged in settlement negotiations. (CT 37:8-11.) In November, 2006, after a multi-session mediation presided over by retired California Supreme Court Justice Edward M. Panelli, the County Board of Supervisors voted 3-2 to approve a $102 million settlement of the litigation. (CT 5:13-15; 37:13-19.)

After finalizing the Settlement, the Board unanimously ratified all actions taken in respect to the Settlement. (CT 109-113). The County then filed a validation action, and a judgment of validation was entered by the Superior Court on March 29, 2007, that "binds and permanently enjoins and restrains all persons or entities, public or private," from challenging the Settlement's validity. (Motion for Judicial Notice ("MJN"), Ex. A, p.3.)

B. <u>The Indictment</u>

The Indictment alleges a conspiracy to gain approval of the Settlement through a combination of bribes and various forms of pressure

exerted on Supervisors Postmus, Biane, and Ovitt (through his Chief of Staff, Mark Kirk). (CT 5:3-12.) The alleged "bribes" were in the form of contributions, made well after the Settlement was consummated, to Political Action Committees ("PACs") purportedly controlled by Messrs. Postmus, Biane, and Kirk. (CT 5:18-6:2.) The Indictment also alleges that, by obtaining approval of the Settlement, Mr. Burum conspired with and aided and abetted Messrs. Postmus, Biane, and Kirk to violate the conflict of interest provisions of Section 1090, and to misappropriate public funds in violation of Section 424. (CT 17:3-10, 17:26-18:9.)

C. The Trial Court's Ruling

Mr. Burum demurred to all seven of the counts brought against him. (CT 29 to 54.) On August 19, 2011, relying on well-settled California law, the trial court sustained Mr. Burum's demurrer to the bribery charges (Counts 1, 4, 5, 7, and 8) and the Section 424 charges (Counts 1 and 13). (CT 253:23-26; 254:5-15, 255:20-25, 256:1-4.) The trial court overruled Mr. Burum's demurrer to the Section 1090 (Counts 1 and 11) and Section 9054 charges (Count 1). (CT 255:4-8, 26-28.)

D. The Court of Appeal's Opinion

The People appealed the trial court's ruling on the bribery and Section 424 charges, and Mr. Burum filed a petition for writ of mandate challenging the ruling on the Sections 1090 and 9054 charges. The Court of Appeal consolidated the petition with the appeal, and issued its opinion on October 31, 2012 (the "Opinion").

The Court of Appeal upheld the trial court's ruling dismissing the bribery charges, holding that Mr. Burum could not, as a matter of law, aid and abet the receipt of the alleged bribes. (Opn., pp.18-19, citing *People v. Wolden* (1967) 255 Cal.App.2d 798, 803-804 and *People v. Davis* (1930) 210 Cal. 540, 557.) The court also held that the bribe giver and receiver

cannot conspire with each other "'because the two crimes require different motives or purposes.'" (Opn., p.19, quoting *Wolden,* 255 Cal.App.2d at 804.)

The Court of Appeal also upheld the trial court's overruling of Mr. Burum's demurrer to the Section 9054 conspiracy charge, rejecting Mr. Burum's argument that the statute is unconstitutionally vague because it does not define the phrase "improperly influence." Instead, adopting a definition from a 1927 civil case, the court held that "'improperly influence' means 'the use of personal, or any secrete or sinister, influence upon legislators' either in support of or opposition to the passage of an act, as opposed to 'the open advocacy of the same before the legislature or any committee thereof in open session.'" (Opn., pp.34-35, quoting *Crawford v. Imperial Irrigation Dist.* (1927) 200 Cal. 318, 321-322.)

The Court of Appeal reversed the trial court as to both the Section 424 and Section 1090 charges. (Opn., pp.31, 38.) Regarding Section 1090, the Court of Appeal held that Mr. Burum, as a private citizen, could not be charged with aiding and abetting the alleged conflict of interest because "the Legislature intended Government Code section 1090 to exclude criminal liability on either a conspiracy or an aiding and abetting theory for anyone other than public officials and public employees with a financial interest in the underlying contract." (Opn., p.38, citing *D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861, review den. 2009 Cal. LEXIS 408 (Jan. 14, 2009).)

The People filed a Petition for Review on December 11, 2012, seeking review of the Court of Appeal's ruling as to the bribery and Section 1090 charges. On December 19, 2012, Mr. Burum filed his Answer to the Petition for Review, in which he also sought review of the constitutionality of Section 9054. The Court granted review, without any limitation of issues, on February 13, 2013.

III. ARGUMENT

Because a demurrer tests issues of law, this Court reviews the decisions below *de novo*. (*In re Richards* (2012) 55 Cal.4th 948, 960.) Here, the Court should affirm the Court of Appeal's ruling as to the bribery and Section 1090 charges, and reverse as to Section 9054.

A. The Court of Appeal Correctly Held that Mr. Burum Cannot Be Charged With Aiding and Abetting the Alleged Receipt of Bribes

It is undisputed that Mr. Burum has been charged with aiding and abetting, and conspiring in, the receipt of the same bribes he is accused of paying. (CT 3:14-22, 7:22-8:17.) As recognized by both courts below, this charging scheme is improper. Under long-standing California law, a bribe giver cannot be charged with aiding and abetting the receipt of the bribe under Section 31. Rather than accepting this rule and dismissing all bribery charges against Mr. Burum, the People ask this Court to either overturn its previous decisions, or rule that those decisions somehow do not apply here. (See Opening Brief on the Merits ("OB"), p.3.) Neither of these arguments have merit. To the contrary, judicial precedent, legislative intent, and public policy all dictate dismissal of these flawed charges.

1. An Alleged Briber Giver Cannot Be Charged Under Penal Code Section 31 for Aiding and Abetting the Separate Crime of Receiving the Bribe

Over a century ago, the Court of Appeal recognized the legislative intent to exclude aiding and abetting liability between the bribe giver and bribe receiver:

> It is very evident from an examination of the two [bribery] sections mentioned that it was the intent and purpose of the Legislature to make offering to give, or giving, a bribe an offense, whether the legislator asked for and received it or not. *And it seems quite as evident that it was never*

> *intended that persons concerned would be interchangeably guilty as accomplices, when the offer was accepted and the bribe received. In such event the giving would be the crime committed by one party, and the taking the crime of the other.*

(*People v. Bunkers* (1905) 2 Cal.App.197, 204, italics added.)

Every published case addressing this issue since *Bunkers* has agreed that bribe giving and bribe receiving are separate crimes, and that the giver and receiver are not accomplices of each other. In 1922, the Court of Appeal held that a witness who paid bribes to police officers was not an accomplice to the officers who received the bribes. (*People v. Lips* (1922) 59 Cal.App. 381, 385.) As the court recognized:

> [The witness] was in no way concerned with the officers in either asking, receiving or agreeing to receive the bribe. She was on the opposite end of the transaction."

(*Id.*) Similarly, in 1930, this Court recognized that, under the amended Penal Code section 1111, a bribe giver and bribe receiver are not accomplices of each other "inasmuch as the asking or receiving a bribe is made a separate offense from offering or giving a bribe under section 68 of the Penal Code."[4] (*Davis*, 210 Cal. at 557.)

In 1944, this Court considered these earlier cases, together with cases addressing accomplice liability in other contexts, and announced the following general rule regarding derivative liability under Section 31:

> If a statutory provision so defines a crime that the participation of two or more persons is necessary for its commission, but prescribes punishment for the acts of certain participants only, and another statutory provision prescribes punishment for the acts of participants not subject to the first provision, it is clear that the latter are

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[4] Section 1111 involves the corroboration of accomplice testimony. As discussed below, the Legislature amended Section 1111 in 1915 to define "accomplices" as only those individuals who could be charged as a principal – either directly or derivatively under Section 31 – for the identical offense charged against the defendant.

> criminally liable only under the specific provision relating to their participation in the criminal transaction. *The specific provision making the acts of participation in the transaction a separate offense supersedes the general provision in section 31 of the Penal Code that such acts subject the participant in the crime of the accused to prosecution for its commission.*

(*People v. Clapp* (1944) 24 Cal.2d 835, 838, italics added.) Applying this general rule, this Court found that a woman who submitted to an illegal abortion could not be charged as a principal for the crime of performing an abortion—and consequently could not be an accomplice under Section 1111. (*Id.* at 839.) Importantly, in explaining why it reached this conclusion, the Court noted that under the same analysis "the giver and receiver of a bribe [citation]... are no longer accomplices under section 1111." (*Id.*)

The application of the general *Clapp* rule to bribery was further developed by the Court of Appeal in *Wolden* in 1967. The court first explained that, when a crime fits the *Clapp* rule, "the definitions of accessory, aider and abettor (Pen. Code, §§ 31, 971) do not operate to subject either [of the participants] to prosecution under the section proscribing the act of the other, and that neither falls within the code definition of an accomplice as to the act of the other (*id.*)." (*Wolden*, 255 Cal.App.2d at 803-04.) The court then applied this general rule to the specific crime of bribery:

> Bribery is such a crime. The giver whose offense is specifically made a crime [citation] is not an accomplice in the separate and distinct crime [citation] of the receiver [citation]. By code definition, the giver is guilty only if he gives or offers with intent to influence the officer. The officer who asks or receives payment is guilty only if he does so with the understanding that his official action will be influenced thereby.

(*Id.* at 804.)

Clapp and *Wolden* are dispositive here. Mr. Burum is alleged in the Indictment to have given bribes to Messrs. Postmus and Biane. (CT 7:22-8:17.) As the alleged bribe giver, Mr. Burum cannot, as a matter of law, be charged as an aider and abettor in the separate and distinct crimes of receiving those very same bribes.[5] (*Wolden*, 255 Cal.App.2d at 803-04.)

2. There Is No Basis to Overturn the *Clapp* Rule

The People contend that *Clapp* should be overturned because it "has since been substantially limited and largely discredited." (OB, p.13.) While this might be a persuasive argument if true, it is not. To the contrary, the *only* criticism of *Clapp* identified by the People is Justice Schauer's dissent in *Clapp*, and then his dissent nine years later in *People v. Buffum* (1953) 40 Cal.2d 709. (OB, pp.13-15.) A single Justice's disagreement with the *Clapp* rule hardly amounts to *Clapp* being "largely discredited."

Nor has the ruling in *Clapp* ever been limited, let alone "substantially limited," by this Court's subsequent decisions. The People

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[5] The People continue to insist that, for purposes of a demurrer, merely pleading the statutory language of the bribery statutes, together with the statutory language of Section 31, is sufficient to charge Messrs. Burum and Erwin with aiding and abetted the receipt of bribes *regardless* of the additional allegations that they gave the bribes. This is not the case. Specific allegations in a charging document control the general. (See *Mandel v. Municipal Court* (1969) 276 Cal.App.2d 649, 668 [alleged facts "contradict and control" general allegations]; see also *People v. Marshall* (1957) 48 Cal.2d 394, 404 [holding that the "specific allegations of the accusatory pleading, rather than the statutory definitions of offenses charged, constitute the measuring unit for determining what offenses are included in a charge"].) Here, the Indictment alleges that Messrs. Burum and Erwin had the intent to give bribes—not to aid and abet their receipt. Thus, the Indictment fails to meet its primary purpose of giving Messrs. Burum and Erwin "fair notice" of the alleged crimes. (See *People v. Tardy* (2003) 112 Cal.App.4th 783, 786 ["Due process requires that a criminal defendant be given fair notice of the charges to provide an opportunity to prepare a defense and to avoid unfair surprise at trial."].)

cite three of this Court's cases supposedly demonstrating "conflicting" rulings (*id.* at pp.15-16), but none of them undermine the *Clapp* rule.

The People first cite *People v. Lima* (1944) 25 Cal.2d 573, in which this Court analyzed accomplice liability for the crimes of theft and receipt of stolen goods. As the People admit, however, the *Lima* decision "*acknowledged* the general rule that thieves and those who receive stolen property are not accomplices, because they are not liable to prosecution for the identical crime as the other." (OB, p.15, italics added.) The *Lima* Court's recognition of an *exception* to this general rule (see *id.*) does nothing to undermine the rule's validity.[6] In fact, the *Clapp* rule continued to apply to the crime of receiving stolen goods (Pen. Code § 496) until the Legislature amended the statute in 1992. (See MJN Ex. B [explaining that the amendment was intended to expand the scope of liability for the crime of receiving stolen property by providing "that a principal in the actual theft of the property may be convicted under these provisions, except as specified"].) No such amendment has ever been made to any of the bribery statutes at issue here.

Similarly unpersuasive is the People's reliance on *People v. Wallin* (1948) 32 Cal.2d 803. There, the issue was whether a murderer could be an accomplice to the *subsequent* crime of being an accessory after the fact under Penal Code section 32, even though the murderer was not legally capable of independently being an accessory to her own crime. (*Id.* at 806-807). As the Court explained:

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[6] The exception recognized in *Lima* applies "where the thief and the receiver of stolen property conspire together in a prearranged plan for one to steal and deliver the property to the other." (*Lima,* 25 Cal.2d at 577.) Because the bribe giver and bribe receiver cannot, as a matter of law, conspire with each other, this exception could never apply to the crime of bribery. (See *Wolden*, 255 Cal.App.2d at 804; *infra*, Section III.B.2.)

> The murder was completed as soon as the child was killed, and no subsequent acts on the part of Mrs. Paz or any other person were required to be shown in order to establish the elements of that offense. Defendant's crime of being an accessory under section 32 was separate and distinct [citation], although it, of course, depended on the previous commission of the murder. He became chargeable under section 32 when he aided Mrs. Paz to conceal her crime, and she became liable to prosecution for the identical offense by reason of section 31 when she encouraged him to assist her in avoiding arrest and punishment.

(*Id.* at 807.) This is a different issue than the *Clapp* rule, and it has no application here. Mr. Burum is being charged with aiding and abetting the alleged bribery itself, not some separate and distinct crime committed *after* the bribery was complete.

Nor does the Court's decision in *People v. Wayne* (1953) 41 Cal.2d 814, overrule or even disagree with *Clapp.* Instead, as in *Lima* and *Wallin*, the Court recognized an exception to the *Clapp* rule. In *Wayne*, the exception arose because the defendant and the witness solicited each other to offer a bribe. (*Id.* at 825.) The result of this somewhat unusual circumstance was that the witness became liable under Section 31 for the defendant's crime of solicitation by virtue of his cross-solicitation. (*Id.*) Importantly, however, both were on the same side of the bribery—*i.e.*, both wanted to solicit a bribe from a third party. Mr. Burum, on the other hand, is improperly charged with aiding and abetting the crime *on the other side* of the alleged transaction, and thus the limited exception of *Wayne* is inapplicable here.

Finally, in addition to this Court's decisions, the People cite a Michigan case addressing derivative liability under Michigan's bribery laws. (OB, pp.16-17, quoting *People v. White* (1985) 147 Mich.App.31, 39.) This case is irrelevant to the application of California's bribery laws,

as evidenced by the court's stated rationale for its ruling: "We are aware of no *Michigan authority* which would per se preclude prosecution for aiding and abetting the giving of a bribe merely because the accused is the recipient of the bribe." (*Id.* at p. 17, italics added.) In California, however, such binding authority exists, most notably *Clapp* and *Wolden.*

In short, the People's claim that *Clapp* has been criticized, called into question, and substantially limited does not hold water. Indeed, the People fail to cite a single case in which the *Clapp* rule has been disregarded or even questioned. On the other hand, numerous cases have followed the rule, recognizing that it is well settled. (See, *e.g.*, *People v. Bompensiero* (1956) 142 Cal.App.2d 693, 708 ["it is well settled that the giver and receiver of a bribe are not accomplices under section 1111"]; *People v. Bennett* (1955) 132 Cal.App.2d 569, 581 [following *Clapp*]; *People v. Grayson* (1948) 83 Cal.App.2d 516, 518-19 [applying *Clapp* and concluding that "since the act of placing a bet, without which, of course, the bet could not be received by another, was punishable as a separate offense under subdivision 6, and not specifically under subdivision 3, it was not punishable under section 31"].)

The rule is even part of the official comments to the CALCRIM jury instructions for bribery and receipt of a bribe. (MJN Ex. C [CALCRIM 2600, Related Issues, citing *Wolden* and stating that "[t]he giver and the recipient of a bribe are not accomplices of one another, nor are they coconspirators because they are guilty of distinct crimes that require different mental states"]; MJN Ex. D [CALCRIM 2603, same].) Put simply, the *Clapp* rule has been the law of this state for decades, remains good law today, and there is no reason to overturn it now.

3. The Bribe Giver Lacks the Requisite Intent to Aid and Abet the Receipt of the Bribe Under Section 31

The focus of *Clapp* and *Wolden* was on the statutory scheme, and the fact that the Legislature has seen fit to separately punish the bribe giver and the bribe receiver. But a bribe giver is not liable as an aider and abettor under Section 31 for the additional reason that the intent in giving a bribe is necessarily and fundamentally different than the intent in receiving a bribe.

Section 31 is not a strict liability statute, and instead requires "that an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Moreover:

> When the definition of the offense includes the intent to do some act or achieve some consequence beyond the *actus reus* of the crime [citation], *the aider and abettor must share the specific intent of the perpetrator.* ... [A]n aider and abettor will "share" the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement *with the intent or purpose of facilitating the perpetrator's commission of the crime.* [Citations.]

(*Id.*, italics added; see also *People v. Tewksbury* (1976) 15 Cal.3d 953, 960 ["Criminal liability as a principal attaches to those who aid in the commission of a crime only if they also share in the criminal intent [citations] or, in the language of section 31, abet the crime."].)

Bribery is a specific intent crime. (*People v. Meacham* (1967) 256 Cal.App.2d 735, 744.) Thus, an aider and abettor to bribery under Section 31 must act "with the intent or purpose" of facilitating the bribe receiver's receipt of the bribe. (*Beeman,* 35 Cal.3d at 560.) But as California courts have long recognized, the bribe giver does *not* have the same intent as the bribe receiver. (See, *e.g.*, *Lips,* 59 Cal.App.at 385 [noting that the bribe giver "was in no way concerned with the officers in either asking, receiving

or agreeing to receive the bribe," because "[s]he was on the opposite end of the transaction"]; *Wolden,* 255 Cal.App.2d at 804 [recognizing that the two crimes (bribe giving and bribe receiving) are defined in the Penal Code as requiring different intents].)

A bribe giver's intent is to receive whatever benefit is obtained by having given the bribe—*i.e.*, the quid pro quo of the bribe. The People allege that Mr. Burum's intent in offering bribes was to obtain approval of the Settlement so that *he* would benefit monetarily. (CT 5:3-4.) A bribe recipient's intent, on the other hand, is to personally benefit from the receipt of the bribe itself. The People allege that Messrs. Postmus and Biane agreed to receive bribes with the intent that *they* would benefit monetarily. (CT 8:11-17.) But it is nowhere alleged – nor could it logically be alleged – that Mr. Burum's intent or purpose in offering bribes was so that Messrs. Postmus and Biane would benefit. And because Mr. Burum's alleged intent was fundamentally different than the alleged criminal intent of Messrs. Postmus and Biane, Mr. Burum lacked the requisite intent to be charged for aiding and abetting their receipt of bribes. (*Beeman,* 35 Cal.3d at 560.)

4. The People's Attempt to Limit *Clapp* and *Wolden* to Section 1111 Ignores the Legislative History and Judicial Interpretations of Sections 31 and 1111

As an alternative to overturning *Clapp* and *Wolden*, the People argue that those cases only should be applied when analyzing accomplice status under Section 1111, and not where, as here, derivative liability under Section 31 is directly at issue. (OB, p.18.) To make this argument, the People manufacture a conflict between the two statutes—and then argue that the ruling below was improperly based on Section 1111 instead of Section 31. In reality, there is no such conflict, and the holdings of *Clapp* and *Wolden* apply equally to both statutes.

The People's basic premise is that the definition of "accomplice" in Section 1111 is "much narrower" than the definition of aiding and abetting liability in Section 31, and thus cases applying Section 1111 are irrelevant to Section 31. (OB, p.8.) The People cite this Court's ruling in *People v. Coffey* (1911) 161 Cal. 433, which they claim reflects the pre-1915 understanding that an accomplice under Section 1111 was defined by reference to "the broad definition of aiding and abetting liability from section 31." (OB, p.10.) The People then argue that the Legislature "abrogated" this broad definition and instead defined accomplice in "the limited manner rejected by *Coffey*." (OB, p.11.)

The People have it backward. It was *Coffey* that departed from Section 31, and the Legislature that then tied the definition of accomplice in Section 1111 *back* to Section 31. The Court in *Coffey* held that a bribe giver and bribe receiver were *automatically* accomplices for purposes of Section 1111, even though one cannot be charged as a principal under Section 31 for the same crime as the other. (*Coffey*, 161 Cal. at 440-441, 443-444, 448.) In other words, under *Coffey*, the definition of accomplice was *broader* than Section 31.

This expansion of the accomplice definition is what the Legislature rejected when it amended Section 1111. The Legislature instead incorporated Section 31 by reference when it defined an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code § 1111.) Thus, under the amended Section 1111 – and contrary to *Coffey* – a witness is only an accomplice *if* he or she can be charged as a principal in the crime, either directly or under Section 31.

This new definition was discussed in depth by this Court in *Clapp*. But here again, the People get it backward. The People claim that *Clapp* relied on the new, post-1915 definition of accomplice in Section 1111 "*in*

contrast to the broader language in section 31...." (OB, p.12, italics added.) But *Clapp* did not "contrast" Section 31—rather, it applied Section 31 as the statute requires:

> [T]he mere fact that the witness is punishable for his cooperation with the defendant in the illegal transaction does not make him an accomplice. *It is necessary to determine whether section 31 and 971 of the Penal Code or other provisions of the criminal law subject the witness to prosecution under the provisions that the defendant is accused of violating*, or whether the acts of the witness participating in the transaction constitute a separate and distinct offense.

(*Clapp,* 24 Cal.2d at 838, italics added.) The *Clapp* dissent reached the same conclusion:

> The definition of the word "accomplice" in section 1111 does not purport to repudiate the provisions of section 31 but is, rather, dependent upon that section for definite intelligibility.

(*Id.* at 843, Schauer, J., dissenting; see also *People v. Hoover* (1974) 12 Cal.3d 875, 879 [noting that in order to determine that Penal Code section 1111 applies, it is "necessary for the witness to be considered a principal under the provisions of Section 31"].)[7]

Thus, when this Court in *Clapp* held that a woman who submitted to an abortion was not an accomplice under Section 1111 to the defendant who performed the abortion, it was not because the Court adopted some narrower definition of "accomplice" than Section 31—rather, it was because Section 31 was applied to the crime at issue, as the amended Section 1111 requires. (*Clapp,* 24 Cal.2d at 839.) Similarly, the Court of Appeal in *Wolden* first analyzed liability under Section 31 in order to then

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[7] Even the People concede below that "determination of whether a person [is an accomplice under § 1111] *requires an analysis of whether the person meets the criteria of section 31.* [Citation.] *Penal Code section 31 applies directly to the determination of whether an individual is an accomplice.*" (Opening Br. on Appeal, pp.13-14, italics added.)

determine if a bribe giver was an accomplice for purposes of Section 1111 to the bribe receiver. (*Wolden,* 255 Cal.App.2d at 803-04.) Thus, contrary to the People's mischaracterization, the *Wolden* decision was directly based on an analysis and application of Section 31—not some "narrower" definition of accomplice taken from Section 1111.

In short, it is precisely because *Clapp* and *Wolden* first analyze liability under Section 31, before then applying Section 1111 that, under basic principles of *stare decisis*, these cases are directly relevant to the analysis of Section 31 here. And because these cases do apply to Section 31, they preclude the People's improper attempt to charge Mr. Burum with aiding and abetting the receipt of the same bribes he is accused of paying.

5. The *Clapp* and *Wolden* Rule Was Properly Applied to the Charges Against Mr. Burum

In a further attempt to avoid the *Clapp* and *Wolden* rule, the People argue that the rule was improperly applied here. (OB, p.25.) Specifically, the People argue that the Court of Appeal was wrong when it held in *Wolden* that bribery is a crime subject to the *Clapp* rule. (OB, p.27.) According to the People, bribery can theoretically be committed by only one person; for example, by a public official agreeing in his own mind to accept a bribe even though no actual agreement was reached with the bribe offerer. (*Id.*) Thus, the People argue, the crime of bribery does not "require the participation of two or more persons" because the actual participation of the other party "is not an element" of the crime of accepting or offering a bribe. (*Id.*)

But the *Clapp* rule does not require that the participation of another person be an "element" of the crime—only that "participation of two or more persons" be necessary for the commission of the crime. (*Clapp,* 24 Cal.2d at 838.) Thus, for example, *Clapp* would not apply to burglary because that crime can be committed by one person acting completely

alone. Bribery, on the other hand, *always* requires at least a second person. The cases cited by the People merely hold that the second person does not necessarily have to be criminally liable himself in order for a crime to occur. Thus, in *Diedrich*, this Court held that an actual "bilateral agreement" between the bribe giver and bribe receiver is unnecessary—it is enough if the bribe receiver agrees in his own mind to receive the bribe. (*People v. Diedrich* (1982) 31 Cal.3d 263, 273-274.)

But *Diedrich* does *not* hold – nor does any other case – that such an "agreement" in the bribe receiver's mind can occur without even the existence of a potential bribe giver. A public official does not commit the crime of bribery if he sits at his desk and imagines how great it would be if he was offered a bribe—even if he "agrees" in his own mind that he will accept that imaginary bribe if it is offered. Instead, there has to be at least a second person to make the bribe transaction possible, just as there was in *Diedrich*. (*Id.*) The fact that the party on one side of the transaction can commit bribery regardless of whether the party on the other side also has the requisite criminal intent for bribery – and regardless of whether the transaction is ever consummated – does not change the fact that at least some type of participation by the other party is necessary for the commission of the crime. Thus, even under the People's hypothetical scenario, *Clapp* and *Wolden* apply.

Furthermore, the People ignore the fact that *Wolden* was not the first, nor the last, court to conclude that *Clapp* does, in fact, apply to bribery. (See *supra*, Sections III.A.1. and III.A.2, and cases cited therein.) Indeed, *Clapp* itself notes that the rule applies to bribery. (*Clapp,* 24 Cal.2d at 839.) Nevertheless, the People ask this Court to ignore or overturn more than a century of precedent and find that the *Clapp* rule does not apply to bribery. The Court should decline to do so.

The People also argue that, at the very least, *Clapp* and *Wolden* do not apply to Count 4, which charges Mr. Burum with aiding and abetting an agreement to receive bribes by a county supervisor in violation of Penal Code section 165. (OB, p.27.) The People point out that Section 165 addresses both the crime of giving and the crime of receiving a bribe, whereas elsewhere the Legislature addressed these separate crimes in completely separate statutes (*e.g.*, Penal Code sections 68 & 69, and 85 & 86).

This argument rests on an inaccurate and unduly narrow interpretation of the *Clapp* rule. *Clapp* explains that "[i]f a statutory *provision* so defines a crime that the participation of two or more persons is necessary for its commission, but prescribes punishment for the acts of certain participants only, and another statutory *provision* prescribes punishment for the acts of participants not subject to the first provision...." (*Clapp*, 24 Cal.2d at 838, italics added.) Nothing in *Clapp*, or elsewhere, precludes the "provisions" at issue from being contained within the same section of the code. Thus, for example, the Court of Appeal in *Grayson* applied the *Clapp* rule and found that the person placing an illegal bet could not be charged under Section 31 for aiding and abetting the acceptance of the bet, even though both offenses were included in the same statute, Penal Code section 337a. (*Grayson,* 83 Cal.App.2d at 518-19.)

Similarly here, the fact that the Legislature chose, for whatever reason, to place both the crime of giving a bribe and the crime of accepting a bribe by a county or city official in the same section of the code does not change the fact that they are separate crimes. Indeed, other than being combined in one section of the code, there is no substantive difference in how these crimes are described in Section 165 compared to other bribery statutes, such as Sections 67 and 69—the difference is purely organizational. Moreover, even if this organizational decision were to be

interpreted as overriding the rationale relied on by *Clapp* and *Wolden*, the bribe giver and bribe receiver would still have fundamentally different intents, such that they could not be charged under Section 31 with aiding and abetting each other. (*Beeman,* 35 Cal.3d at 560; see *supra*, Section III.A.3.) In short, the inclusion of both bribe giving and bribe receiving in Section 165 does not remove this statute from the scope of *Clapp* and *Wolden*, and thus Count 4 was properly dismissed together with the other bribery charges against Mr. Burum.

6. The Alleged Threats and Extortion Are Irrelevant to the Bribery Charges

In a final attempt to sidestep the *Clapp* and *Wolden* rule, the People argue that the Indictment's allegations of threats and extortion provide an independent basis for liability under Section 31. (OB, pp.28-29.) The Court of Appeal rejected this legally and logically flawed argument, and this Court should do the same.

As an initial matter, most of what the People claim are "threats" and "extortion" are constitutionally-protected exercises of free speech—*e.g.*, campaigning against Measure P and creating various political mailers regarding Messrs. Postmus and Biane, both of whom were running for office. (CT 6:26-7:21.) But "[c]itizens... have every right to try to influence their public officers – through petition and protest, promises of political support, and threats of political reprisal." (*Agan v. Vaughn* (11th Cir. 1997) 119 F.3d 1538, 1544, citation omitted.) Indeed, limitations on political expression are subject to "exacting scrutiny" by the courts. (*Meyer v. Grant* (1988) 486 U.S. 414, 420.) In particular, "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." (*Thornhill v. Alabama* (1940) 310 U.S. 88, 101-02.) And "no rule can escape First

Amendment scrutiny by bearing an innocuous label." (*Castro v. Superior Court* (1970) 9 Cal.App. 675, 684.) If a state law does not show "the necessary sensitivity to freedom of expression . . . it must fall." (*Id.* at 691 [citations omitted].) Likewise, the First Amendment forbids government officials from retaliating against an individual for "speaking out," for fear of "chilling" or "silencing" that individual's future protected First Amendment activities. (See *Lacey v. Maricopa County* (9th Cir. 2012) 693 F.3d 896, 916-17.) As such, the People's attempt to base a conspiracy charge on Messrs. Burum and Erwin's participation in the political process is improper.[8]

Even setting aside the constitutional protection afforded to this alleged conduct, the People's tortured attempt to tie the alleged extortion and threats to the crime of bribery is illogical, legally unsupported, and contrary to the Indictment. As it stands, the Indictment simply does not charge Mr. Burum with using threats, menace, commands, or coercion to compel Messrs. Postmus, Biane, and Kirk to commit the crime of *receiving bribes*—which, of course, is the underlying crime for which the prosecution seeks to charge Mr. Burum as an aider and abettor in Counts 4, 5, 7, and 8.

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[8] For that matter, the underlying charges of bribery are constitutionally suspect. Mr. Burum is not accused of slipping envelopes of cash under the table—he is accused of making political donations through fully documented, duly recorded, and publically reported PAC contributions. Such activity is constitutionally protected. (See *United States v. Siegelman* (11th Cir. 2011) 640 F.3d 1159, 1169-70 ["In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda" it is a "particularly dangerous legal error... to instruct a jury that they may convict a [bribery] defendant for his exercise of either of these constitutionally protected activities"]; *McCormick v. United States* (1991) 500 U.S. 257, 272 [to find that legislators commit extortion based on their receipt or solicitation of campaign contributions "would open to prosecution... conduct that has long been thought to be well within the law."].) Criminalizing this protected activity poses a far graver threat to law and liberty than anything alleged by the People.

(CT 13:21-16:5.) Rather, the supposed threats and coercion are alleged to have occurred *in conjunction with* the bribes for the purpose of securing the Board's approval of the Settlement. (CT 5:3-7.)

In other words, there is a fatal disconnect between the intent alleged in the Indictment and the intent necessary to sustain a charge under Section 31. The Indictment alleges that the supposed extortion was committed with the intent to secure votes in favor of the Settlement—*not* with the intent to have Messrs. Postmus and Biane receive monetary benefits through their acceptance of bribes, as required to charge Mr. Burum with aiding and abetting the receipt of bribes under Section 31. (See *Beeman,* 35 Cal.3d at 560.)

Recognizing this disconnect, the People claim in their Opening Brief that "[t]he indictment sets forth the use of threats, extortion and other tactics by Burum and Erwin to wear down Postmus and Biane's resistance and compel them to accept the bribes and pressure each other to accept as well." (OB, p.2.) This is inconsistent with the Indictment and all previous briefing by the People. Until their Opening Brief, the People have been clear that the supposed threats are alleged to have been used *in conjunction with* the bribes to obtain the Settlement vote. For example, the Indictment alleges that Mr. Burum "corruptly influenced members of the Board of Supervisors *through a combination of* threats, extortion, inducements, and bribery *in order to secure their vote* in favor of a settlement." (CT 5:5-7, italics added.) Similarly, in accusing Mr. Burum of various acts of extortion, the Indictment alleges that Mr. Burum "conducted a campaign against Measure P... *in order to obtain a settlement* in the Colonies lawsuit against the County," and that he "hired private investigators to go through Postmus' trash" so he could pressure Mr. Postmus to convince Mr. Biane "*to vote in favor of a settlement* in the Colonies lawsuit against the County." (CT 6:28-7:7, italics added.)

As can be seen, the People's attempt to sidestep *Clapp* and *Wolden* based on the allegations of threats and extortion is directly contradicted by the allegations in the Indictment. Even accepting these allegations as true for purposes of demurrer, there simply are no allegations that Mr. Burum threatened, coerced, or extorted anyone *to accept a bribe*. As such, the requisite intent for Section 31 liability is completely missing, and dismissal of the legally-flawed bribery charges against Mr. Burum remains proper.

7. Holding that Bribe Givers and Bribe Receivers Can Aid and Abet Each Other Would Undermine the Legislative Intent in Amending Section 1111, and Could Thwart Future Bribery Prosecutions

The People raise two policy-related arguments against the application of *Clapp* and *Wolden*. Neither has any merit.

First, the People claim that application of the *Clapp* rule to bribery would violate public policy "by giving the bribe offeror a free pass to engage in coercive and threatening conduct to compel the recipient to accept his offer." (OB, p.17.) The People later revisit this "free pass" argument in their strained kingpin/mule analogy. (*Id.* at pp.34-35.) This argument is fundamentally misleading. Under no circumstances would a bribe offeror be given a "free pass" by application of *Clapp* and *Wolden*. Indeed, the very reason for the *Wolden* rule is that the bribe giver/offeror is *separately liable* for the crime of giving/offering the bribe. Thus, quite contrary to receiving a "free pass," the bribe offeror normally will face felony charges for the crime he committed—namely, offering a bribe.

Of course, this is not a normal Indictment. Rather, the People's novel charging scheme against Mr. Burum is the result of a unique confluence of factors, most notably the failure to charge Mr. Burum with giving or offering bribes before the expiration of the statute of limitations. (See *supra*, fn.3.) Instead, the People failed to bring timely charges against

Mr. Burum, and the trial court and Court of Appeal properly rejected the People's attempt to plead around the statute of limitations by using an impermissible charging scheme. All future prosecutors need do to avoid this result is to bring legally competent charges in a timely manner. The People's failures here are not a "public policy concern" justifying abrogation of the long-standing and well-reasoned general rule of *Clapp* and *Wolden*.

The People's second "policy" argument is that application of *Clapp* and *Wolden* would undermine the legislative intent behind Section 1111, which the People argue "was to prevent convictions based solely upon the self-serving and inherently suspect statements of accomplices." (OB, pp.17-18.) The People cite to the dissent in *Clapp* for the proposition that any "exemptions" to Section 1111 should come from the Legislature, and not the courts. (*Id.* at p.18.) But the *Clapp* and *Wolden* rule *does* come from the Legislature. As the People admit, the 1915 amendment to Section 1111 was "for the express purpose of abrogating the rule of *People v. Coffey*." (*Id.* at p.9.) And what the Legislature abrogated was *Coffey's* holding that a bribe giver and bribe receiver were accomplices for purposes of Section 1111 regardless of the fact that they were not aiders and abettors of each other under Section 31. (*Coffey,* 161 Cal. at 440-441.) By abrogating this holding, the Legislature made its intent clear that bribe givers and bribe receivers are *not* accomplices of one another—which is precisely what *Clapp* and *Wolden* recognized.

Finally, it is important to recognize the actual public policy impact of the People's proposed rejection of *Clapp* and *Wolden*. Under current law, a bribe receiver can be prosecuted and convicted based solely on the uncorroborated testimony of the bribe giver (or vice versa). This is critical. After all, most bribery transactions are conducted in secret, making corroboration difficult, if not impossible. *Clapp* and *Wolden* – and the

amended Section 1111 – therefore provide an invaluable tool to prosecutors seeking to curb public corruption.

But if the People prevail in this appeal, corrupt public officials will more easily escape punishment. Under the People's theory, a bribe giver can be charged under Section 31 as an aider and abettor of the bribe receiver. Consequently, under Section 1111, the giver is an accomplice of the receiver, and his testimony must be corroborated. Lacking any other witnesses, and assuming the corrupt official concealed his receipt of the bribe, the prosecution will be unable to corroborate the businessman's testimony, and the corrupt official will escape liability. The People's zeal to prosecute Mr. Burum simply does not justify jeopardizing the ability of future prosecutors to effectively combat actual corruption going forward.

B. The Court of Appeal Correctly Held that Mr. Burum Cannot Be Charged With Conspiring to Commit the Crime of Receiving the Alleged Bribes

In addition to its holding on aiding and abetting liability, the Court of Appeal in *Wolden* held that:

> Nor are the giver and receiver guilty of a conspiracy, because the two crimes require different motives or purposes.

(*Wolden,* 255 Cal.App.2d at 804, citing *People v. Keyes* (1930) 284 P. 1105[9] and *Calhoun v. Superior Court In and For San Diego County* (1955) 46 Cal.2d 18, 41-42.) Recognizing this additional holding, the courts below dismissed the target crimes of bribery in Count 1. (Opn., p.19.) The People fail to provide any reason to reverse this result.

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[9] In *Keyes*, this Court denied review, but felt strongly enough about the Court of Appeal's improper ruling on conspiracy that it issued a per curium opinion explaining that a bribe giver and briber receiver cannot conspire with each other. (*Keyes*, 284 P. 1105.)

1. Wharton's Rule Is Irrelevant

As they did in their Petition for Review, the People grasp at a single reference by the Court of Appeal to Wharton's Rule—and then try to transform this dicta into the sole basis for the Court of Appeal's ruling. (OB, p.31.) Having erected this straw man argument, the People proceed to tear it down by demonstrating that Wharton's Rule has no application to the crime of bribery.

The People are right: Wharton's Rule is irrelevant. But it is more irrelevant than the People will admit. Contrary to the People's mischaracterization, the Court of Appeal did *not* rely on Wharton's Rule when ruling that the bribery conspiracy charge must be dismissed; rather, it relied on the principles set forth in *Wolden*. (Opn., p.19.) Indeed, the Court of Appeal's single-paragraph passing reference to Wharton's Rule is nothing more than dicta, and is not even contained in the section of the Opinion addressing the conspiracy charge. (Opn., p.17 [mentioning Wharton's Rule] and p.19 [addressing conspiracy].)

This is no surprise given that Wharton's Rule is fundamentally different than the rule in *Wolden*. As recognized by *Wolden* – and by this Court in *Keyes* and *Calhoun* – the giver and the receiver of a bribe cannot conspire with one another because they have "*different motives or purposes*." (*Wolden*, 255 Cal.App.2d at 804; see also *People v. Swain* (1996) 12 Cal.4th 593, 600 [conspiracy requires a showing "'not only that the conspirators intended to agree *but also that they intended to commit the elements of that offense*.'" [Citation.] Italics in original.].)

Wharton's Rule, on the other hand, recognizes that the participants in certain crimes that require two or more persons cannot be convicted of conspiracy because the Legislature has signaled that any conspiracy should be merged with the substantive offense, even though all participants have the *same intent*. (See *People v. Mayers* (1980) 110 Cal.App.3d 809, 815.)

In other words, while Wharton's Rule is an *exception* to general conspiracy law, *Wolden* is consistent with, and indeed grounded in, one of the basic elements of a criminal conspiracy—namely, the requirement of common intent. (See *Swain*, 12 Cal.4th at 600.) Understandably, then, the Court of Appeal did not base its opinion on Wharton's Rule, and this entire portion of the People's Opening Brief is irrelevant.

2. The Court of Appeal Properly Relied on *Wolden*

Setting the People's Wharton's Rule diversion aside, the focus can now be turned to the actual basis for the Court of Appeal's ruling on the conspiracy charge:

> Moreover, *Wolden* also holds that the bribe giver and the bribe receiver cannot be "guilty of a conspiracy, because the two crimes require different motives or purposes." [Citations.] Thus, we conclude the trial court also correctly sustained defendant Burum's demurrer to target crimes 1 and 2 of the conspiracy charged in count 1.

(Opn., p.19.)

This ruling is fully consistent with this Court's prior rulings on this issue. As explained in *Keyes*:

> It is true that a set of defendants may conspire to give, or a set of defendants may conspire to receive or accept, a bribe, but bribery requires for its consummation the unlawful concert of one or more persons acting with one or more other persons having a different motive or purpose. That being true, *there is in such a case no room for the operation of a charge of conspiracy.*

(*Keyes*, 284 P. 1105, italics added.)

Twenty-five years later, the same conclusion was reached in *Calhoun*:

> There are a number of crimes which two parties can *agree* to commit, but which they cannot *conspire* to commit, since they enter the agreement with different objectives. Bribery, adultery, bigamy and subornation of perjury are

> crimes of this class. [Citation.] Two parties may conspire to give a bribe [citation]; they may conspire to accept a bribe [citation]; they may *commit* bribery, one giving and one accepting [citation]; but they cannot *conspire* to commit bribery, one to give and one to accept. [Citation.]

(*Calhoun*, 46 Cal.2d at 41-42, italics in original.)

This is the rationale – not Wharton's Rule – underlying the holding in *Wolden* that the giver and receiver of a bribe cannot conspire with each other. (*Wolden,* 255 Cal.App.2d at 804.) And this, in turn, was the rationale properly relied on by the Court of Appeal to affirm the dismissal of the bribery conspiracy charges against Mr. Burum. (Opn., p.19.) As with the improper aiding and abetting charges, the People have failed to provide any reason why this Court should overturn nearly a century of precedent to hold otherwise here.

C. If This Court Overturns *Clapp* and *Wolden*, Due Process Prohibits Retroactively Applying the New Rule of Law to Mr. Burum

Even if this Court overturns *Clapp* and *Wolden*, Mr. Burum cannot be prosecuted under the expansion of liability sought by the People without violating fundamental tenets of due process.

1. Due Process Precludes the Ex Post Facto Application of Laws and Judicial Decisions

"An ex post facto law is 'any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed ....' [Citation.]" (*In re Baert* (1988) 205 Cal.App.3d 514, 517.) The United States Constitution forbids ex post facto laws for several reasons. First, it protects liberty by

invalidating statutes with "manifestly unjust and oppressive" retroactive effects. (*Calder v. Bull* (1798) 3 U.S. 386, 391.) Second, it preserves a defendant's right to "fair warning" of the charges against him, allowing him to preserve exculpatory evidence and mount a defense. (*Stogner v. California* (2003) 539 U.S. 607, 611.) Third, it protects defendants from unwise laws passed "out of the feelings of the moment." (*Fletcher v. Peck* (1810) 10 U.S. 87, 137-38.)

This principle has been extended to judicial decisions through the Due Process Clause. (*People v. King* (1993) 5 Cal.4th 59, 79-80.) "'[A] state Supreme Court, no less than a state Legislature, is barred from making conduct criminal which was innocent when it occurred, through the process of judicial interpretation.'" (*People v. Morante* (1999) 20 Cal.4th 403, 431.) Indeed, both this Court and the United States Supreme Court have recognized that "a judicial enlargement of a criminal statute that is not foreseeable, 'applied retroactively, operates in the same manner as an ex post facto law.' [Citation.]" (*Id.*; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353 [same].) Thus, a judicial decision cannot be retroactively applied if it is "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" (*King*, 5 Cal.4th at 80, quoting *Bouie*, 378 U.S. at 354; *Rathert v. Galaza* (9th Cir. 2006) 203 Fed. Appx. 97, 99 [reversing denial of habeas petition where "the California Supreme Court retroactively abrogated a specific intent requirement established by a decade old, uncontradicted, and controlling appellate court case"].)

2. Because Overturning *Clapp* and *Wolden* Would Constitute an Ex Post Facto Judicial Decision, It Could Not Be Applied to Mr. Burum

It has long been the law in California that a bribe giver cannot conspire with, or aid and abet, a bribe receiver. Indeed, this Court has

spoken at least four times on the subject, and the Court of Appeal several more times:

- *Keyes*, 284 P. 1105 (the bribe giver and bribe receiver cannot conspire with each other);
- *Calhoun*, 46 Cal.2d at 41-42 (same);
- *Davis*, 210 Cal. at 557 ("the giver and receiver of a bribe are no longer accomplices one to another");
- *Clapp*, 24 Cal.2d at 839 (same);
- *Bunkers*, 2 Cal.App. at 204 (the Legislature "never intended that [the bribe giver and bribe receiver] would be interchangeably guilty as accomplices");
- *Lips*, 59 Cal.App. at 385 (bribe giver "was in no way concerned with the officers in either asking, receiving or agreeing to receive the bribe," because "[s]he was on the opposite end of the transaction");
- *People v. Martin* (1931) 114 Cal.App. 392, 395 (the bribe receiver is not an accomplice of the bribe giver);
- *Bennett*, 132 Cal.App.2d at 581 (analyzing bribery statutes to demonstrate that, where persons are not liable for prosecution for identical offenses, they cannot be accomplices);
- *People v. MacKenzie* (1956) 144 Cal.App.2d 100, 106 ("Those who pay a bribe are not accomplices of those who conspire to ask and receive the bribe.");
- *Wolden*, 255 Cal.App.2d at 804 ("Bribery is such a crime. The giver whose offense is specifically made a crime [citation] is not an accomplice in the separate and distinct crime [citation] of the receiver [citations]. ... Nor are the giver and receiver guilty of a conspiracy, because the two crimes require different motives or purposes [citations].").

Just as telling is the complete lack of any cases holding to the contrary. Indeed, the California courts have spoken with one voice for more than a century: A bribe giver simply cannot be charged with aiding and abetting, or conspiring with, the bribe receiver.

This rule is also reflected in California's model jury instructions on bribery. California's standard CALCRIM jury instructions on bribery, numbers 2600 and 2603, both cite *Wolden* for the premise that a bribe-giver cannot be the accomplice of a bribe-receiver. (MJN Exs. C & D.) Because of the "existence and wide publication of this standard instruction, it was foreseeable that it would be applied" here. (*Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 915 ["To evaluate foreseeability, we may also look to the CALJIC instruction in place at the time of trial."].) And, just as in *Clark*, there was "no indication whatsoever" that the same rule would not apply to Mr. Burum and the other defendants in the Indictment. (*Id.*)

Even the People have now recognized, at least implicitly, that this rule against derivative liability is both long-standing and unchallenged, as evidenced by their request that this Court *overturn* the established rule and instead apply a new, broader rule allowing them to charge Mr. Burum as the aider and abetter, and conspirator, of the bribe receivers. (OB, p.13.) But, as discussed above, the only case the People cite in which such a charging scheme is approved is a Michigan case applying Michigan bribery laws. (See *supra*, Section III.A.2.) As the United States Supreme Court has explained, "[i]t would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said." (*Bouie*, 378 U.S. at 359-360.)

Thus, even if this Court overturns *Clapp* and *Wolden* now, Mr. Burum cannot be prosecuted under the new rule because doing so would violate due process. (*Moss v. Superior Court* (1998) 17 Cal.4th 396, 429 ["Like retroactive application of an 'unforeseeable and retroactive judicial expansion of' a statute [citation], retroactive application of a decision disapproving prior authority on which a person may reasonably rely in determining what conduct will subject the person to penalties, denies due

process."); *Devine v. New Mexico Dept. of Corr.* (10th Cir. 1989) 866 F.2d 339, 346 [finding that state supreme court decision was unforeseeable in light of published sources of state law].)

Importantly, it is irrelevant whether this Court agrees with the People that all of the prior published court decisions were in error. A due process violation can occur where "lower appellate courts [] consistently, but erroneously" apply a statute the same way. (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1706.) Nor does it matter that the Indictment alleges, but does not charge, that Mr. Burum gave a bribe. Whether the alleged wrongdoer's actions were innocent or "societally unacceptable," that distinction "is one of degree and does not alter [this Court's] fundamental inquiry" into due process concerns. (*Baert*, 205 Cal.App.3d at 521-522; *People v. James* (1998) 62 Cal.App.4th 244, 275-276 [rejecting government's argument that there was no due process violation because defendant's conduct was not "completely innocent when committed"].)

Finally, permitting the People to pursue the bribery charges against Mr. Burum would impermissibly resurrect time-barred charges. As already discussed, Mr. Burum was not charged with agreeing to *give* bribes because such charges were barred by the statute of limitations and not subject to the discovery rule of Penal Code section 803. (See *supra*, fn. 3.) The Indictment alleges that the supposed agreement to give bribes was reached on or before November 29, 2006. (CT 5:5-8, 13:21-16:6.) The statute of limitations for the crime of agreeing to give bribes thus expired no later than November 29, 2009—almost a year-and-a-half before the Indictment was filed on May 9, 2011. By charging Mr. Burum with aiding and abetting the *receipt* of bribes, the People hoped to resurrect this already time-barred prosecution by invoking the discovery rule of Section 803. This too violates due process. (*Stogner*, 539 U.S. at 609 [finding that "a criminal prosecution after expiration of the time periods set forth in

previously applicable statutes of limitations" violates the ex post facto clause].)

In summary, even if this Court were to overturn the bright-line rule set forth in *Clapp, Wolden*, and the numerous other cases that have recognized that a bribe giver cannot be charged under derivative theories of liability for the crime of receiving a bribe, such a new and unforeseeable interpretation of the bribery statutes cannot be applied to Mr. Burum. Prosecuting Mr. Burum under these circumstances would deprive him of fair notice in violation of due process.

D. The Court of Appeal Correctly Held that Mr. Burum Cannot Be Charged With Aiding and Abetting or Conspiring in the Alleged Violation of Government Code Section 1090

Mr. Burum is charged in Counts 1 and 11 with conspiring and aiding and abetting in a violation of Government Code Sections 1090 and 1097. (CT 3:14-22, 17:1-10.) The Court of Appeal properly found that Mr. Burum's demurrer to these charges should have been sustained. The People's only argument otherwise is that the Court of Appeal "misread" the decision in *D'Amato*, and that *D'Amato's* holding is limited to cases implicating the separation of powers doctrine. (OB, p.39.) Not so.

The pertinent holding in *D'Amato* is quite straightforward. *After* addressing the separation of powers doctrine – which is not implicated here – the *D'Amato* court held that, "[m]oreover, the Legislature's wording of section 1090 evinces the intent to exclude aider and abetter liability." (*D'Amato,* 167 Cal.App.4th at 873.) This holding is directly applicable to the charges brought here, as explained by the Court of Appeal:

> We share our colleagues' view that the Legislature intended Government Code section 1090 to exclude criminal liability on either a conspiracy or an aiding and abetting theory for anyone other than public officials and public employees with a financial interest in the

> underlying contract. Neither defendant Burum nor defendant Erwin was a public official at the time alleged in the indictment. Therefore, the trial court should have sustained their demurrers to count 11, and to target crime 5 of count 1.

(Opn., p.38.) Not only is this conclusion legally correct, it is completely uncontradicted by any other California decision—and there simply is no reason for this Court to reverse this conclusion here.

1. Government Code Sections 1090 and 1097 Do Not Apply to Private Citizens

As an initial matter, it is important to keep in mind that Mr. Burum, as a private citizen, falls outside the scope of Sections 1090 and 1097. By its plain language, Section 1090 only applies to "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees." Similarly, criminal liability under Section 1097 is limited to "[e]very officer or person prohibited by the laws of this state from making or being interested in contracts...." This limited scope is confirmed by the statutes' legislative history. (See MJN Ex. E [noting that this legislation "relat[es] to the organization and operation of State government and the general qualifications *of public officers*." (Italics added.)]; MJN Ex. F [describing Section 1090 as a provision "prohibiting *enumerated public officers* to have anything to do in a personal capacity with transactions with which they were concerned in their official capacities." (Italics added.)].)

Not surprisingly then, judicial opinions construing Sections 1090 and 1097 uniformly have recognized that these statutes are targeted *solely* at public officials and employees. (See, *e.g., D'Amato,* 167 Cal.App.4th at 868 [the object of Section 1090 "is to insure absolute loyalty and undivided allegiance" from public officials]; *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn.5 ["The purpose of the prohibition is to prevent a situation where a public official would stand to gain or lose something with respect

to the making of a contract over which in his official capacity he could exercise some influence."].)

Here, Mr. Burum is a private businessman whose company happened to enter into a contract with the County. (CT 2:21.) He was not a public official or employee – nor an independent contractor or some other agent for the County – and thus he does not fit within the categories of persons subject to Sections 1090 and 1097.

2. The Court of Appeal Properly Based Its Ruling on the Legislative Intent to Exclude Aiding and Abetting Liability

The People's attempt to use derivative theories of liability to expand the scope of Sections 1090 and 1097 fails under the following rule of statutory interpretation:

> "[W]here the Legislature has dealt with crimes which *necessarily involve the joint action of two or more persons*, and where *no punishment at all is provided for the conduct, or misconduct, of one of the participants*, the party whose participation is not denounced by statute cannot be charged with criminal conduct on either a conspiracy or aiding and abetting theory. So, although generally a defendant may be liable to prosecution for conspiracy as an aider and abettor to commit a crime even though he or she is incapable of committing the crime itself, the rule does not apply where the statute defining the substantive offense *discloses an affirmative legislative policy the conduct of one of the parties shall go unpunished.* [Citation.]"

(*D'Amato*, 167 Cal.App.4th at 873, italics added, quoting *In re Meagan R.* (1996) 42 Cal.App.4th 17, 24.)

As the *D'Amato* court recognized, Sections 1090 and 1097 disclose just such a legislative policy. (*Id.*) Had the Legislature intended to criminalize the participation of the non-public party to a contract violating Section 1090, it could have done so. Instead, the Legislature narrowed the

scope of criminal liability to apply *only* to public officials, and provided a *separate civil remedy* against the private contracting party. (See *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1336 [noting that Government Code section 1092 is "the most effective way to give section 1090 all the teeth that it needs" vis-à-vis the private party to the contract].) Thus, where an alleged violation of Section 1090 involves a contract between public entity and a private citizen – such as here – under *D'Amato* and *Meagan*, the private citizen cannot be charged with aiding and abetting or conspiring to violate Section 1090 because:

(1) The private citizen is a *necessary participant* in the alleged transaction; and

(2) The Legislature has chosen *not to punish* private citizens under Sections 1090 and 1097.

(See *D'Amato*, 167 Cal.App.4th at 873.)

Such a result should come as no surprise. After all, in the long history of Section 1090, there is not a *single* published case in which a private party has been criminally charged with conspiring, or aiding and abetting, a violation of the statute—despite numerous cases where it is clear that the private party knew about the public official's conflict of interest, but entered into the contract anyway. (See, *e.g.*, *People v. Wong* (2010) 186 Cal.App.4th 1433; *People v. Honig* (1996) 48 Cal.App.4th 289; *Webb v. Superior Court* (1988) 202 Cal.App.3d 872; *People v. Watson* (1971) 15 Cal.App.3d 28.) Instead, prosecutors have uniformly recognized – at least until this case – that the plain language and legislative intent of Sections 1090 and 1097 preclude criminal liability for private citizens.[10]

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[10] To the extent there is any uncertainty regarding the scope of these statutes, under the rule of lenity a criminal statute is to be construed "as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the

3. The People's Attempts to Distinguish *D'Amato* Fail

The People's principal attack on *D'Amato* is to mischaracterize it as only a separation of powers case. (OB, pp.37-39.) *D'Amato* is not so limited. After discussing the separation of powers doctrine, the court transitioned into an *additional* basis for its holding: "Moreover, the Legislature's wording of section 1090 evinces the intent to exclude aider and abetter liability." (*D'Amato,* 167 Cal.App.4th at 873.) It is this rationale – and not the separation of powers doctrine – with which the Court of Appeal agreed when holding that Mr. Burum's demurrer to the Section 1090 charges should have been sustained. (Opn., pp.37-38.)

The People also attempt to distinguish *D'Amato* based on its discussion of *People ex rel. State of California v. Drinkhouse* (1970) 4 Cal.App.3d 931. (OB, pp. 39-40.) As an initial matter, *Drinkhouse* was not a criminal case—it was a civil quiet title action involving real property conveyed by one public official (a tax collector) to another public official in violation of Section 1090. (*Drinkhouse*, 4 Cal.App.3d at 934-935.) More importantly, the court in *D'Amato* did not "expressly distinguish[] and reaffirm[]" *Drinkhouse* as the People claim. (OB, p.39.) Rather, the court merely noted that the rejection of derivative liability for violations of Sections 1090 and 1097 would not have changed the *result* in the *Drinkhouse* criminal case because the aider and abettor was also a public official, and thus was independently guilty of violating Section 1090. (*D'Amato,* 167 Cal.App.4th at 875.) Mr. Burum, on the other hand, *was not* a public official with a financial interest in the transaction. Therefore, he cannot be charged directly or derivatively under Section 1097, and nothing in *Drinkhouse* or the *D'Amato* court's discussion of *Drinkhouse* changes this conclusion.

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construction of a statute." (*People v. Overstreet* (1986) 42 Cal.3d 891, 896.)

4. Strong Public Policy Concerns Would Be Implicated by Expanding Liability Under Sections 1090 and 1097 to Include Private Parties to a Public Contract.

The *D'Amato* court also noted that permitting derivative liability under Section 1090 "could have dire consequences affecting the ability of a local legislative body to operate in an independent manner." (*D'Amato*, 167 Cal.App.4th at 874.) The ramifications of permitting the prosecution of private citizens on derivative theories of liability would be no less dire. Indeed, it would have a devastating chilling effect on the willingness of private citizens to enter into contracts with public entities.

The People glibly dismiss this concern by claiming that "the rule deters only intentional unlawful conduct, and therefore poses no risk of having a chilling effect on the willingness of private citizens to enter legitimate and lawful contracts with government agencies." (OB, p.41.) But the fact that a contract is legitimate and lawful will not always protect a private citizen from an overzealous and politically-motivated prosecution. And while the private citizen may ultimately be vindicated, the social and monetary costs of such prosecution are devastating—costs that private citizens most certainly would take into account when negotiating contracts with public entities. (*Cf. Robinson Helicopter Co. v. Dana Co.* (2004) 34 Cal.4th 979, 996 [noting "the value commercial parties place on predictable potential costs and the chilling effect tort exposure in routine breach cases would have on commercial enterprise"].)

This result, particularly in the face of clear legislative intent that Sections 1090 and 1097 are *not* directed at non-governmental parties, is unjustifiable and should be rejected. (*D'Amato*, 167 Cal.App.4th at 874 ["'To the extent that uncertainty remains in interpreting statutory language, 'consideration should be given to the consequences that will flow from a particular interpretation.'" (Citations.)].)

5. Due Process Prohibits Retroactively Applying Any Expansion of Liability Under Sections 1090 and 1097

As discussed *supra*, Section III.C, due process concerns prohibit the ex post facto application of a new and unforeseen judicial interpretation of a statute. (*Moss*, 17 Cal.4th at 429.) Thus, if this Court finds for the first time – contrary to all previous judicial interpretations of the statutes – that private citizens *are* subject to aiding and abetting liability under Sections 1090 and 1097, such a ruling should not retroactively be applied here.

E. The Court of Appeal Erred In Finding that Government Code Section 9054 Was Constitutionally Sound

Mr. Burum has been charged in Count 1 with conspiring to violate Government Code section 9054, which states in relevant part:

> Every person who obtains, or seeks to obtain, money or other thing of value from another person upon a pretense, claim, or representation that he can or will improperly influence in any manner the action of any member of a legislative body in regard to any vote or legislative matter, is guilty of a felony.

This statute is unconstitutionally vague because it fails to define what constitutes "improperly" influencing, as opposed to constitutionally-protected lobbying activities. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.) The Court of Appeal's failure to recognize that Section 9054 is void for vagueness should be reversed.

1. Section 9054 is Unconstitutionally Vague

To pass constitutional muster, a penal statute must provide notice as to what specific conduct is being criminalized—and it must do so "with sufficient definiteness that ordinary people can understand what conduct it prohibits." (*United States v. Poindexter* (D.C. Cir. 1991) 951 F.2d 369,

378.) Just as important, a statute must "establish minimal guidelines to govern law enforcement." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357-58.) Without such guidelines, a criminal statute would permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." (*Id.*)

When a criminal statute impacts First Amendment rights, even "greater precision should be required to survive a void-for-vagueness challenge." (*People v. Mirmirani* (1981) 30 Cal.3d 375, 383; see also *Smith v. California* (1959) 361 U.S. 147, 150-51 [warning against "threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution"]. Indeed, the United States Supreme Court repeatedly has struck down legislation "on its face" for precisely this reason. (*Secretary of State of Md. v. Joseph H. Munson Co., Inc.* (1984) 467 U.S. 947, 965, fn. 13 [collecting cases where statutes were struck down for facially infringing on protected First Amendment activity].)

Poindexter illustrates the fundamental requirement that a statute adequately define the criminal conduct. Poindexter was convicted of violating 18 U.S.C. section 1505 for having "corruptly influenced" a congressional investigation. (*Poindexter,* 951 F.2d at 377.) The Supreme Court reversed the conviction, recognizing that, "on its face, the word 'corruptly' is vague; that is, in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'" (*Id.* at 378.) Notably, the court rejected various dictionary definitions of the adjective "corrupt" – *including the term "improper"* – because they were "no more specific—indeed they may be less specific—than 'corrupt.'" (*Id.* at 378-379.) The court concluded that "the term 'corruptly' is too vague to provide constitutionally adequate notice" of the prohibited conduct. (*Id.*)

This Court should reach the same conclusion regarding Section 9054. The "criminal" nature of the conduct addressed by Section 9054 depends *entirely* on the phrase "*improperly* influence." Everything else described in the statute is perfectly legal, routine lobbying. (Gov. Code § 82039, subd. (a)(1) [defining "Lobbyist" as an individual who is paid "to communicate directly or through his or her agents with any elective state official, agency official, or legislative official *for the purpose of influencing legislative or administrative action*" (italics added)].)

Not only is lobbying authorized under California law, it is constitutionally protected under the First Amendment. (*F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 405 (1984) Rehnquist, J., dissenting [the "right to lobby is constitutionally protected"]; *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 45-46 [lobbying involves fundamental rights protected under the First Amendment].) Section 9054 thus purports to criminalize constitutionally-protected activity based solely on the term "improper"—but without providing *any* guidance as to what type of conduct is proper, and what is improper.

Faced with similar attempts to regulate "improper" conduct, courts have consistently recognized that the term is unconstitutionally vague. As one District Court explained, "the purpose of a prohibitory rule is to inform those affected what is improper not merely that the 'improper' is prohibited." (*Marin v. Univ. of Puerto Rico* (D. P.R. 1973) 377 F. Supp.613, 627 [invalidating regulations barring "improper or disrespectful conduct in the classroom or campus"]; see also *J.L. Spoons, Inc. v. City of Brunswick* (N.D. Ohio 1998) 181 F.R.D. 354, 357-358 [finding a rule "overbroad on its face" because it "employs several extraordinarily vague terms, including 'improper'..."]; *Poindexter*, 951 F.2d at 378-379 [noting that "improper" may actually be "less specific" than the unconstitutionally vague term "corruptly"].)

The People argued below that "improper influence" is not vague because Congress used the word "improper" when it enacted 18 U.S.C. section 1515(b) in response to *Poindexter*. (Return at 25-26.) But while the word "improper" was included in the new definition of the term "corruptly," Section 1515(b) now goes on to define what is meant by "corruptly" and "with an improper purpose":

> As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

Section 9054 contains no such definition or examples, nor does the Government Code contain a separate section – like 18 U.S.C. section 1515(b) – providing a definition of the term "improperly." Section 9054 is therefore unconstitutionally vague on its face.

2. Under the Court of Appeal's Interpretation, Section 9054 Not Only Remains Vague, But Also Impermissibly Criminalizes Free Speech

The Court of Appeal upheld the validity of Section 9054 despite the weight of authority holding that the term "improper" is unconstitutionally vague. To do so, the Court of Appeal relied on a 1927 civil case which defined "improper influence" as "the use of personal, or any secret or sinister, influence upon legislators" in support of passage of an act, as opposed to "the open advocacy of the same before the legislature or any committee thereof in open session." (Opn., pp.34-35, quoting *Crawford*, 200 Cal. at 321-322.)

But this definition does not cure the statute's vagueness. For example, because a prosecutor could charge a defendant under any of the alternative grounds listed in the *Crawford* definition, a lobbyist might be charged for representing that he or she will use "sinister" influence. But the

statute fails to provide any guidance as to what influence is "sinister." The Court of Appeal also claimed that Section 9054 criminalizes "influence peddling." (Opn., p.35.) But again, no guidance is provided to differentiate illegal "influence peddling" from constitutionally-protected lobbying.

More importantly, the Court of Appeal's interpretation directly criminalizes modern lobbying by prohibiting the use of "personal influence." For example, a former legislator would run afoul of Section 9054 if she was hired based on a representation that she would meet with her former colleagues in the Legislature and use her "personal influence" to lobby for particular legislation. But this is an every-day occurrence in Sacramento, where paid lobbyists routinely use their "personal influence" to influence votes. And this does not occur on the floor of the legislature, or in open committee meetings; it occurs at dinners and fund-raisers, through personal phone calls and private meetings, all of which could be deemed "secret" – and thus illegal – under the Court of Appeal's definition. (Opn., pp.34-35.)

In short, what *Crawford* and the Court of Appeal call "improper influence" is simply another name for perfectly legal, and constitutionally-protected, lobbying. (See *Fair Political Practices Com.*, 25 Cal.3d at 45-46.) The Court of Appeal's interpretation of Section 9054 thus confirms that the statute is a facially unconstitutional restriction on the exercise of free speech.

F. The People Do Not Have Unfettered Authority to Prosecute Mr. Burum Using Legally Deficient Charges

As they did below, the People claim that dismissing any of the counts brought against Mr. Burum interferes with prosecutorial discretion. (OB, pp.41-42.) This argument should be summarily rejected. Once a charge has been filed and "the prosecutorial die [is] cast, the case is

"'before the court' for disposition, and disposition is a function of the judicial power no matter what the outcome." (*People v. Superior Court (On Tai Ho)* (1974) 11 Cal.3d 59, 65.)

Of course, the proper exercise of this judicial power includes dismissing charges where "the facts stated [in the indictment] do not constitute a public offense." (Pen. Code § 1004, subd. (4); *Mandel*, 276 Cal.App.2d at 674-675 [demurrer should have been sustained because "the facts stated in the complaint do not constitute a public offense"].) This is precisely the case here. The allegations of the Indictment simply do not constitute violations of the bribery statutes or Sections 1090 and 9054, and therefore those counts should be dismissed on demurrer.

IV. CONCLUSION

For all of the foregoing reasons, Mr. Burum respectfully requests that this Court uphold the Court of Appeal's rulings as to all bribery and Section 1090 charges against Mr. Burum, and reverse the Court of Appeal's ruling as to the alleged conspiracy to violate Section 9054.

Respectfully submitted,

Dated: April 15, 2013

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CERTIFICATE OF COMPLIANCE

[Cal. Rule of Court 8.520(c)]

This brief consists of 14,000 words as counted by the word processing program used to generate the brief.

Dated: April 15, 2013

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People v. Biane, et al.
California Supreme Court Case No. S207250

PROOF OF SERVICE

I am a citizen of the United States. My business address is ARENT FOX LLP, 555 West Fifth Street, 48th Floor, Los Angeles, CA 90013. I am employed in the county of Los Angeles where this service occurs. I am over the age of 18 years, and not a party to the within cause.

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

Executed on April 15, 2013, at Los Angeles, California.

Kimberly Bardales

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