S216444
2d Criminal No. B239519
LASC No. SA075027, BA382926

SUPREME COURT COPY

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JEFFREY HUBBARD,

Defendant and Appellant.

APPELLANT HUBBARD'S BRIEF ON REVIEW

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TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE ABOVE-ENTITLED COURT:

Appellant Jeffrey Hubbard, formerly the Superintendent of the Beverly Hills Unified School District, was improperly prosecuted and convicted of violating Penal Code §424(a)(1), by requesting a $500 per month car allowance and a $20,000 bonus or stipend which were paid to a BHUSD employee, Karen Christiansen. The gist of the criminal charge was that such payments could only lawfully be made with Board approval, and Board approval was supposedly not obtained.

Hubbard's conviction was correctly reversed by the Court of Appeal because the record demonstrated that Hubbard was not a person "charged with the receipt, safekeeping, transfer, or disbursement of public moneys," as required

by §424, since he did not have the power to authorize such payments, and only the Board could authorize such payments. Indeed, as the Opinion of the Court of Appeal notes, the criminal charges were predicated entirely on the proposition that he supposedly authorized and directed the payments to be made to Christiansen even though he did not have the power or authority to do so.

The People argue that a public officer can be charged and convicted of violating §424 even if he or she is not a person "charged with the receipt, safekeeping, transfer, or disbursement of public moneys," at least so long as he or she has "some degree of control" over public funds and initiates the first step in the process of disbursing those funds.

But the People's arguments are founded on a misconstruction of the plain language of §424, and a mischaracterization of the record and the applicable case law. For the reasons set forth in the unpublished Opinion of the Court of Appeal, and for the reasons set forth below, the analysis and conclusions of the Court of Appeal as to the meaning and construction of §424, and the reversal of Hubbard's unjust conviction, should be adopted and approved by this Court.

The conviction was predicated on the premise, without evidence, that Hubbard had the power and authority unilaterally to cause public funds to be disbursed. He had no such power or authority. There were several safeguards and rigorous protocols that were in place to prevent the Superintendent from disbursing funds solely on his instruction. First, there is a Human Resources department that must follow specific rules before anyone can receive a raise, a stipend or any other compensation that is not provided for in a Board approved contract. The Human Resources department cannot process a request for additional compensation without obtaining formal Board approval. Second, even following Board approval, checks or drafts cannot be issued by the school district without the County of Los Angeles verifying that Board approval was first ob-

tained. Third, within the Beverly Hills Unified School District there are several checks and balances that protect and prevent public monies from being improperly disbursed. Such requests go to the Human Resources department and the Assistant Superintendent of Schools.

Hubbard followed these procedures in a completely transparent way. In accordance with established protocols Hubbard initiated the process of requesting a stipend and car allowance when he wrote a memo to the Human Resources department and the Assistant Superintendent to process the request through the Board. This is exactly what he was supposed to when he recommended and requested additional compensation for an employee. There are hundreds of transactions that are presented and processed by Human Resources as well as other departments, that are routed from the department and then submitted to the Board for approval. The Superintendent who oversees all aspects of the school district does not, and it is of course not practical for him to personally shepherd each item through obtaining Board approval. That is the responsibility of each department, through their respective staffs. In the case of the issuance of a stipend or car allowance for an employee, the department responsible for dotting the i's and crossing the t's is Human Resources. Hubbard had every right to assume that Human Resources followed established protocol in processing his requests.

The important legal aspect here, as it pertains to §424, is that Hubbard did not have the authority or the power, on his instruction alone, to get monies to an employee. Hubbard could not simply sign a check or draft in favor of an employee. Human Resources and the County would be required to seek and obtain a Board resolution approving payment before the payment could be made.

Furthermore, because the Court of Appeal correctly accepted Hubbard's argument that he did not fall within the ambit of §424, it did not reach or address

his other arguments for reversal. However, as Hubbard explained in his Opening and Reply Briefs in the Court of Appeal, and as is explained briefly below, there are several additional reasons why his conviction cannot be upheld and was properly reversed.

STATEMENT OF THE CASE

Hubbard was the Superintendent of the Beverly Hills Unified School District (BHUSD) in 2005 and the first part of 2006. At that time Karen Anne Christiansen was employed by the BHUSD as Director of Planning and Facilities. In Counts 1 and 2 of a complaint filed by the People on December 9, 2010, Hubbard was charged with violating Penal Code §424(a)(1) by supposedly causing the BHUSD to pay Christiansen a $500 per month car allowance in September of 2005 and a one-time "stipend" or bonus of $20,000 in February of 2006, without the approval of the BHUSD Board.

The extra car allowance and the stipend were requested for Christiansen by Hubbard because the BHUSD terminated the services of a large construction firm, and Christiansen was required, in addition to her regular duties, to take over that firm's tasks and to travel extensively.

Christiansen was originally named as a co-defendant with Hubbard in Counts 1 and 2, but the People later dismissed those counts as to her, leaving Hubbard the only defendant. Christiansen was charged separately in Counts 3, 4, 5 and 6 of that complaint with four felonies for supposedly violating Government Code §§1097 and 1090 in unrelated transactions in 2007 and 2008 not involving Hubbard; however, the charges against Christiansen were severed from those against Hubbard, and tried separately. Christiansen was improperly convicted, but her conviction was reversed (*People v. Christiansen* (2013) 216 Cal. App. 4th 1181), and review was denied by this Court.

As the Opinion of the Court of Appeal notes, the evidence supporting the accusation that the Board did not approve Christiansen's $500 per month car allowance and $20,000 stipend was extremely flimsy.

First of all, the evidence was clear – and the People insisted -- that Board approval was necessary. The People have never explained – either in the trial court or the Court of Appeal, or to this Court – how it was even possible for the payments to have been made to Christiansen without Board approval. Not only were there numerous officials and staff members responsible for obtaining Board approval and seeing to it that all such payment were in fact approved by the Board before they were made; the checks themselves were issued by the County, not the BHUSD. As the Opinion notes, 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.

Secondly, it was undisputed that Hubbard's memos to his staff were merely the first step in the process of obtaining the car allowance and stipend for Christiansen, and that it was the responsibility of Sal Gumina, the BHUSD's assistant superintendent for human resources, not Hubbard, to prepare the necessary documentation, and to submit the request to the Board and to make sure the necessary Board approval was obtained.

Only two Board members (Lurie and Demeter) testified that there was no Board approval, but essentially their testimony was only that they had no recollection in 2011 and 2012 when the criminal action was first prosecuted, that the Board had approved the request in 2005 and 2006. Other Board members from 2005 and 2006 did not testify. Alex Cherniss, a BHUSD official, testified only that he had looked for but supposedly had been unable to find any record of Board approval; but the records he produced were incomplete, and did not include minutes or

classified personnel reports and certificated personnel reports of some Board meetings in the pertinent time period.

There was no evidence of any kind that Hubbard ever said or did anything to conceal his request from the Board or to circumvent the requirement of Board approval; nor was there any evidence that he ever knew, or even should have known -- if in fact it was the case -- that the requisite Board approval had not been obtained by the persons responsible for obtaining it, or that the County had somehow issued the checks to Christiansen without the requisite Board approval.

Hubbard attempted to subpoena the BHUSD 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.

Finally, it is significant that in October of 2011, the People obtained an indictment and added a third count against Hubbard, charging him with violating Penal Code §424 by supposedly causing the BHUSD to pay a $108 per month raise to another BHUSD employee, Nora Roque, again supposedly without Board approval. However, the jury acquitted Hubbard on that count, as the evidence at trial demonstrated that in fact the Board approved Roque's raise.

ARGUMENT

I. HUBBARD'S CONDUCT WAS NOT WITHIN THE AMBIT OF PENAL CODE §424, BECAUSE HE DID NOT HAVE CUSTODY, POSSESSION OR CONTROL OVER THE DISBURSEMENT OF THE PUBLIC FUNDS USED TO PAY CHRISTIANSEN.

Penal Code §424(a)(1) says that:

> **(a)** 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 either:
>
> **1.** Without 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.

The gist of the charges was that Hubbard caused the payments to Christiansen to be made without the approval of the BHUSD Board required by law. But Hubbard, though admittedly an officer of the BHUSD, was not "charged [i.e., entrusted by law] with the receipt, safekeeping, transfer, or disbursement" of the funds used to pay Christiansen her car allowance and stipend; and while he could request or recommend that the payments should be made to her, he did not have the authority, the power, or the control over those funds necessary to make the disbursements. They could only be made by the BHUSD and paid by the County if formally approved by the Board. Thus he cannot be guilty of the offenses with which he was charged and of which he was convicted.

As noted above, The People argue that a public officer can be charged and convicted of violating §424 even if he or she is not a person "charged with the

receipt, safekeeping, transfer, or disbursement of public moneys," if he initiates a request for the disbursement of such funds to himself or another.

But the language of the statute will not bear that construction.

First of all, the People's construction of the statute makes no sense. Unless a public officer has possession, custody or control of public moneys, and is therefore "charged with the receipt, safekeeping, transfer, or disbursement of [those] public moneys," that officer will simply not have the power, and will not be able "without authority of law, [to] appropriate the same, or any portion thereof, to his or her own use, or to the use of another."

Besides, if the Legislature had intended to make public officers criminally liable even though they were not charged with the receipt, safekeeping, transfer, or disbursement of public moneys, the statute would have identified "Each officer of this state, or of any county, city, town, or district of this state, **or any person** charged with the receipt, safekeeping, transfer, or disbursement of public moneys" as being subject to criminal charges. But the statute says, instead, that "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," is subject to criminal prosecution. Clearly, in order to be subject to the criminal proscriptions of §424, the defendant must either be a public officer charged with the receipt, safekeeping, transfer, or disbursement of public moneys, or some other person, even though not a public officer, who is charged with the receipt, safekeeping, transfer, or disbursement of public moneys.

Penal Code §424 was enacted in 1872. As the Court of Appeal correctly observed, no case in the last 140 years has adopted the People's construction of the statute; that is, 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.

On the contrary, this Court expressly held nearly a century ago in *People v. Dillon* (1926) 199 Cal. 1, that §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* . . . ." and that the statute was enacted to implement 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*." 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*." "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."

And as the Court of Appeal also noted, in *People v. Aldana* (2012) 206 Cal.App.4th 1247, the Court held that the defendant physician, who signed blank timesheets later completed by an administrator, and who received pay for hours he did not actually work, was wrongly convicted, and could not have violated §424, because since 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.

The People argue to this Court that the pertinent case law does not require a public officer to have possession, custody or control of public moneys, or to be charged with the receipt, safekeeping, transfer, or disbursement of public moneys, in order to be subject to criminal prosecution under §424. They make a perfunctory attempt to distinguish *People v. Dillon* and *People v. Aldana, supra,* or to render them inapposite to the issues framed by the petition for review in this case; but it is apparent that their attempt to do so is grounded on a mischaracterization of what those cases actually said and what they actually held. Indeed, it was not only *People v. Dillon* and *People v. Aldana* that held that a public officer must be charged with the receipt, safekeeping, transfer, or disbursement of public moneys, in order to be subject to criminal prosecution under §424; all of the other cases cited by the People in their brief before this Court where public officers were convicted of violating §424 similarly make it clear that the officers involved actually had possession, custody or control of public moneys, or were charged with the receipt, safekeeping, transfer, or disbursement of public moneys, and therefore had the power, by themselves, to disburse the public moneys they were prosecuted for misappropriating.

Finally, the People seek to circumvent the language of the statute and the uniform holdings of the pertinent judicial decisions by wrenching a phrase out of context from *People v. Groat* (1993) 19 Cal.App.4th 1228, 1232, which stated that section 424 "requires only that the defendant have some degree of control over public funds." But as the Court of Appeal explained, that phrase was merely *dictum,* because 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's timecards reflected she had been at work or been sick when, in fact, she was teaching at a local college. The court in *Groat* 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.

Finally, it should be **noted** that the People's proposed construction of §424 has serious negative implications for the administration of public agencies. It is one thing to criminalize the misappropriation of public funds by public officers or employees who actually have, and who actually misuse, the power to make disbursement of public moneys. It is quite another thing to subject public officers to criminal prosecution for the improper disbursement of public moneys by others, merely because they were officers with "some degree of control" over those moneys.

Looking only at the facts of this case, it is highly doubtful that the evidence would even support an argument that Hubbard had "some degree of control" over the disbursements to Christiansen. All he could do, and all he did, was request that such payments be made. He did so by sending memos to his staff, which were clearly intended only to prompt them to prepare the necessary submissions to **the** Board, and to obtain Board approval. As the Court of Appeal observed, all Hubbard did was take "the first step" in the process, which was to be controlled entirely by others, that ultimately resulted in the disbursement

At least two other officers of the BHUSD were more responsible **than** Hubbard for the payments to Christiansen being made without Board approval, if in fact that actually happened: Sal Gumina, the assistant superintendent for

human resources, was responsible for submitting a request to the Board, obtaining Board approval, and seeing to it that no payments were made without Board approval. Cheryl Plotkin, the assistant **superintendent** of business affairs, was **responsible for** providing assurance to the County, in connection with the request for the issuance of County checks, that the requisite approvals had been obtained. Both had "some degree of control" over the disbursement of BHUSD funds, and more control than Hubbard; but **is** - apparent that it would have been unfair to prosecute them, and in fact they were not prosecuted.

Thus, the Court of Appeal correctly held that neither Hubbard, nor any other public officer, could be subject to criminal prosecution for violating §424 by misappropriating public moneys, unless he or she had possession, custody or control of public moneys, and was therefore "charged with the receipt, safekeeping, transfer, or disbursement of [those] public moneys," and actually had the power "without authority of law, [to] appropriate the same, or any portion thereof, to his or her own use, or to the use of another." This Court should therefore reject the People's argument that public officers can be criminally liable merely because they are officers, or merely because they have "some degree of control" over public moneys. but which they do not have the power actually to disburse or misappropriate.

II. THERE ARE OTHER REASONS WHY HUBBARD'S CONVICITON MUST BE REVERSED.

Because the Court of Appeal concluded Hubbard was not subject to prosecution under §424, it found it unnecessary to address his other arguments for reversal, and did not do so. Those arguments are set forth at length in the Opening and reply Briefs filed by Hubbard in the Court of Appeal. Thus, even if this Court

were to accept the People's construction of §424, his conviction is subject to reversal for at least the following additional reasons:

A. Hubbard was improperly deprived of his constitutional right to compel the attendance of witnesses on his behalf.

Hubbard served a subpoena *duces tecum* on the BHUSD to produce his emails with Board members and BHUSD supervisory employees, which he said would confirm his testimony that he had discussed the car allowance and the stipend with them informally. The BHUSD, through its civil attorneys, moved to quash the subpoena on the ground that it would cost the BHUSD between $5,000 and $15,000 to search its computer records, and take about four weeks. [RT A1-32, B1-16]

The trial court granted the motion to quash, concluding that it was required to engage in a "balancing" process, which required it to weigh Hubbard's claim that the subpoenaed documents and testimony would be helpful to his defense against the claims of the BHUSD that compliance would be too expensive and too difficult. The trial court further concluded that the burden lay on Hubbard to demonstrate the likelihood that the subpoenaed documents and testimony would actually be helpful to his defense. The trial court cited, and said it relied on, *Hallissy v. Superior Court* (1988) 200 Cal. App. 3d 1038, *People v. Warrick* (2005) 35 Cal. 4th 1011, and *Garcia v. Superior Court* (2007) 42 Cal. 4th 63, as supporting these conclusions. [RT B6-7] But these cases are completely inapposite, and lend no support whatever to the trial court's analysis.

The Sixth Amendment to the Constitution of the United States guarantees to every criminal defendant the right "to have compulsory process for obtaining witnesses in his favor." Article I, §15 of the California Constitution similarly guaran-

tees to every criminal defendant the right "to compel attendance of witnesses on [his] behalf." In *People v. Treadway* (2010) 182 Cal. App. 4th 562, 567, the Court said:

> A defendant's right to present a defense, including, most importantly, the right to " 'offer the testimony of witnesses, and to compel their attendance, if necessary,' " is at the very heart of our criminal justice system. (*In re Martin (1987) 44 Cal.3d 1, 29 [241 Cal.Rptr. 263, 744 P.2d 374].*) The right to compulsory process is enshrined in the *Sixth Amendment to the United States Constitution*, guaranteed in state prosecutions by virtue of the *Fourteenth Amendment to the United States Constitution*, and expressly protected by *article I, section 15 of the California Constitution.*
>
> It goes without saying, therefore, that the government cannot block or hinder a criminal defendant's access to witnesses whose testimony would be material and favorable to the defense.

All of the cases cited by the trial court dealt with situations where the testimony and documents sought by the criminal defendant were protected from disclosure by privileges of one kind or another. Even in those situations, the defendant's right to compel disclosure would override the witness' right to avoid disclosure, if the criminal defendant established a reasonable possibility that the evidence to be discovered might result in his exoneration.

Thus, in *Hallissy v. Superior Court, supra*, the defendant sought to subpoena a reporter's unpublished notes of an interview with defendant. The unpublished notes were privileged from disclosure under the reporter's shield law, Evidence Code §1070, California Constitution, Article I, §2, subd. (b). The Court said [*Id.*, at 1045]:

> "[in] cases involving a conflict between the criminal defendant's constitutional right to a fair trial and a newsperson's protection under the First Amendment and *section 1070*, the criminal defendant's constitu-

tionally derived protection has resulted in the rule that 'where a criminal defendant has demonstrated a *reasonable possibility* that evidence sought to be discovered might result in his exoneration, he is entitled to its discovery.'"

In *People v. Warrick, supra,* the criminal defendant sought to subpoena the personnel records of the arresting officers. The Supreme Court explained how its holding in *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531 had been codified by the Legislature in Penal Code §§ 832.7 and 832.8, and Evidence Code §1043, making such personnel records privileged, but nevertheless subject to *in camera* review and ultimate disclosure, if the criminal defendant establishes "a logical link between the defense proposed and the pending charge," and also "articulate[s] how the discovery being sought would support such a defense or how it would impeach the officer's version of events." [*Warrick, supra,* 35 Cal. 4th at 1021] The Supreme Court went on to conclude. [*Id.* at 1026]. "What standard must a moving party meet to show a 'plausible' factual foundation for the *Pitchess* discovery requested? We conclude that a plausible scenario of officer misconduct is one that might or could have occurred."

In *Garcia v. Superior Court, supra,* the Supreme Court held that a criminal defendant seeking privileged information about the police officers, and making a *Pitchess* motion, could file his motion under seal if he was required to include information covered by his own privileges in order to make the required "plausible" showing.

None of these cases has anything whatever to do with Hubbard's subpoena *duces tecum.* There is nothing privileged, or claimed to be privileged, about Hubbard's emails with BHUSD Board members and supervisory employees about Christiansen's car allowance and stipend. There are no competing constitutional

or statutory policies that have to be "balanced." Hubbard's constitutional right to compulsory process simply cannot be limited on the basis of the witness' claim of expense or inconvenience.

In *People v. Hammon* (1997) 15 Cal. 4th 1117, the Supreme Court made it crystal clear that the requirement of a plausible showing, and the balancing process, applicable where the subpoenaed information was covered by a privilege, had no application where the information sought was not privileged. The Court held that a criminal defendant charged with molestation of his foster daughter, a child under 14, had failed to make the showing necessary to obtain information before trial from psychologists who had treated the victim, which was covered by the psychotherapist privilege. But the Court finally concluded with the following observation:

> For the reasons stated, therefore, we decline to extend the defendant's Sixth Amendment rights of confrontation and cross-examination to authorize pretrial disclosure of privileged information. Of course, nothing we say here is intended to address the application *at trial* of the principles articulated in *Davis, supra, 415 U.S. 308.* Nor do we have an occasion in this case to revisit the question of whether a defendant may generally obtain pretrial discovery of unprivileged information in the hands of private parties. That the defense may issue subpoenas duces tecum to private persons is implicit in statutory law (*Pen. Code, §§1326, 1327*) and has been clearly recognized by the courts for at least two decades. (*Millaud v. Superior Court (1986) 182 Cal. App. 3d 471, 475-476; Pacific Lighting Leasing Co. v. Superior Court (1976) 60 Cal. App. 3d 552, 559-566.*). [*Id.*, at 1128; emphasis added]

Furthermore, the trial court's order quashing Hubbard's subpoena was especially inappropriate in light of the facts. The BHUSD had prompted the

institution of the criminal case against Hubbard and Christiansen as a tactic in its civil litigation with Christiansen. The BHUSD had had no trouble or hesitation in collecting and providing to the District Attorney the 2005 and 2006 emails between Hubbard and Christiansen that it thought would help to incriminate him. The claimed expense of $5,000 to $15,000 was trivial by comparison to the $1,500,000 (which sum included several hundred thousand dollars simply for monitoring the criminal trials) it claimed to have spent on the civil litigation.

Hubbard's testimony in support of the subpoena was that he recalled email exchanges with Board members and supervisory employees discussing Christiansen's car allowance and stipend. The BHUSD made no attempt to contradict this claim, relying only on the claimed expense and difficulty as the reasons for not complying. Even if a "plausible" showing was required – which it was not, since the requested information was not privileged – Hubbard satisfied any requirement for a showing that the subpoenaed emails would or might establish that the Board had indeed approved the car allowance and stipend, thus proving his innocence. This information was especially necessary in view of the extraordinarily flimsy and doubtful showing made by the People and the BHUSD in support of the claim that the Board did not approve the payments. The improper denial of Hubbard's constitutional right to compulsory process constitutes reversible error as a matter of law.

B. The evidence failed to establish that Hubbard had the requisite *mens rea*; that is, that he knew, or was criminally negligent in failing to know, that the payments to Christiansen were made without Board approval.

In *Stark v. Superior Court, supra* (2011) 52 Cal. 4th 368, this Court held that a defendant charged with violating Penal Code §424 could not be guilty unless he knew, or was criminally negligent in failing to know, the facts that made his alleged conduct criminal.

Stark was a case involving charges of violating various subsections of *Penal Code §424*. The prosecution argued that the crimes described were "general intent" crimes, and that all that it was required to show was that the defendant committed the acts. The Supreme Court acknowledged [*Id.*, at 390] that:

> Applying long-standing principles of criminal intent, we reaffirm that the violations of *section 424* at issue are general intent crimes. Further, settled authority teaches that even general intent crimes often require some kind of knowledge. We first resolve whether the applicable provisions of *section 424* require any additional mental state beyond a general intent to do the act.

And later [*Id.*, at 395-396]:

> As the statutory language provides, it is not simply appropriation of public money, or the failure to transfer or disburse public funds, that is criminalized. Criminal liability attaches when those particular actions or omissions are contrary to laws governing the handling of public money. Unlike many statutory provisions, these provisions make the presence or absence of legal authority part of the definition of the offense. The People must prove that legal authority was present or absent.
>
> Without a mental state as to legal authorization, a defendant could be convicted of violating the *section 424* provisions by simply acting or failing to act, even if he was unaware of the facts, as defined by statute, that made his intent wrongful. Such an interpretation is inconsistent with *Vogel, supra, 46 Cal.2d 798*, and the common law upon which *Vogel* relied. *Section 424* has never been construed as a strict liability offense. The purpose of *section 424* is punishment, rather than regulation. The penalties for its violation are

severe, including a prison sentence and the disqualification from public office.

The plain language of the statute and our own recent jurisprudence compel the conclusion that *section 424(a)* 1, 6, and 7 must be construed to include a mental element as to the presence or absence of legal authorization or obligation.

And further [*Id.*, at 396-398]:

A defendant must know the facts that affect the material nature of his conduct, that is, the facts that must be proven to show his act is the kind of conduct proscribed by the statute. He need not know that his behavior in light of those facts is regulated by a statute. . . .

Section 424, however, is an unusual statute, in which the definition of some of the offenses incorporates a legal element derived from other *noncriminal* legal provisions. Each of the three provisions at issue refers to "law" or "legal duty." These references are "shorthand," used to encompass the wide variety of requirements relating to the official's duties.

The "law" applicable to the acts and omissions in these provisions of *section 424* is the *authorizing* law, which is extraneous to the penal statute. Liability under *section 424* arises when the officer or custodian, bound by these authorizing laws, acts without authority (*§424(a)* 1) or fails to act as required. (*§424(a)* 6, 7.) For the sake of clarity, we will refer to these authorizing laws as "nonpenal laws," to distinguish them from the crimes defined in *section 424*. In Stark's circumstances, for example, the nonpenal law relied on by the People includes the Government Code and the Board resolutions.

As we have explained, presence or absence of legal authorization is an essential element of each of the offenses at issue. It is also a "fact" about which the defendant must have knowledge in order to act with wrongful intent. Thus, the People must prove, as a matter of fact, *both* that legal authority was present or absent, *and* that the defendant knew of its presence or absence. (emphasis added)

In this case, there was and is no dispute about what the non-penal law provided; nor is there any dispute that Hubbard knew that the increased car allowance and the stipend could not be paid to Christiansen by the BHUSD without Board approval. Assuming *arguendo* that Hubbard was entrusted with the control over public funds required to make him subject to §424 (although he was not); and assuming further *arguendo* that there was sufficient evidence to establish beyond a reasonable doubt that in fact the payments actually were made without Board approval (although there was not); the only *Stark* issue was whether there was sufficient evidence to prove beyond a reasonable doubt that Hubbard knew, or was criminally negligent in failing to know, that in fact the payments were made without Board approval.

As noted above, Hubbard made no attempt to keep his conclusions about the car allowance and the stipend secret; they were openly disclosed in memos to the staff. No witness testified or even suggested that Hubbard ever told anyone to keep his suggestions secret from the Board, or to refrain from preparing and presenting the requisite formal submissions to the Board in the usual way. No witness testified or even suggested that Hubbard was ever informed in 2005 or 2006 (or at any time until the criminal complaint was filed on December 9, 2010) that no formal submission had been prepared or given to the Board, and that the Board had supposedly not approved the car allowance or the stipend.

But what is most important, no witness testified or even suggested that Hubbard actually ever knew, or suspected, or had reason to suspect, that either the car allowance or the stipend was paid to Christiansen without Board approval.

It was the responsibility of the Human Resources department and the Business Affairs department to prepare the required submissions to the Board, to place

the submissions on the Board agenda, and to seek and obtain the requisite formal approval by the Board of the car allowance and the stipend. It was not part of Hubbard's job as Superintendent, either as a matter of law or as a matter of common sense, to double check and confirm that all of his subordinates had in fact done each and every thing that they were supposed to do.

The question, therefore, is whether the evidence supports a conclusion that Hubbard was criminally negligent in failing to know (if indeed it was the case) that despite the controlling statutes which prohibited such payments and which were known to everyone at the BHUSD, and despite the elaborate checks and balances, and despite the frequent audits by the BHUSD, the payments were somehow made without Board approval.

The issue is even more complicated as a result of the instructions which the trial court gave to the jury on this issue. On the issue of whether Hubbard should have known the (alleged or supposed) facts (that is, that the payments were actually made without Board approval) the trial court instructed the jury as follows [RT 1830-1831];

> Defendant is not guilty of misappropriation of public funds if he did not have the intent or mental state required to commit the crime because he reasonably did not know a fact or reasonably mistakenly believed a fact. If the Defendant's conduct would have been lawful under the facts as he reasonably believed them to be, he did not commit the crime of misappropriation of public funds.
>
> If you find that the defendant believed that he had the proper Beverly Hills School Board approvals and if you find that belief was reasonable, he did not have the mental state required for the charged crimes of misappropriation of public funds.

If you have a reasonable doubt about whether Defendant had the mental state required for misappropriation of public funds, you must find him not guilty of those crimes as charged in counts 1, 2, and 3.

Thus, in connection with the issue of Hubbard's knowledge of the facts, the trial court made no reference to whether Hubbard knew the fact that payment would be made, or had been made, without Board approval. Furthermore, the trial court made no reference to whether Hubbard was "criminally negligent," but instead spoke only of "reasonable" care. It thus improperly allowed the jury to find Hubbard guilty if his failure to know the facts was merely "unreasonable," even though that failure may not have been "criminally negligent."

The trial court's instructions on "criminally negligent" were provided only some time later, in connection with its instruction on whether Hubbard should have known the law. On that subject, the trial court told the jury [RT 1835-1836]:

> In order to prove this crime, each of the following elements must be proved:
>
> A person 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 monies;
>
> That person, without authority of law, appropriated public monies to his or her own use or to the use of another;
>
> The person knew or was criminally negligent in failing to know that his actions and omissions were without lawful authority or contrary to legal requirements.
>
> "Criminal negligence," as used in these instructions, involves more than ordinary carelessness or reasonable good faith mistakes made by public officers regarding their legal responsibilities. The negligence must be aggravated, culpable, gross, or reckless.
>
> Criminal negligence is measured by what is objectively reasonable for the particular person in the Defendant's position. Even in

complex situations, public officials are obligated to act in strict compliance with the law and must take reasonable necessary steps to determine the appropriateness of their conduct. Those who willfully accept the responsibility to manage or handle public money cannot remain recklessly ignorant of the laws regulating their actions.

It is sufficient that the defendant knew generally that non-penal laws required or prohibited his conduct.

And I'm going to be defining the non-penal laws. Okay? That's the separate one you have.

Let me start again.

It is sufficient that the Defendant knew generally that non-penal laws required or prohibited his conduct. The People do not have to prove that the Defendant knew his conduct was a crime. The non-penal laws in this case include state education codes and the School Board policies of the Beverly Hills School District.

If you find the Defendant subjectively believed that his actions or omissions were authorized by law and that this belief was objectively reasonable for a person in the Defendant's position and not the result of criminal negligence, then you cannot find the Defendant guilty of misappropriation of Public Funds.

But there was never any contention by Hubbard that he did not know what the law provided, let alone that he was less than "criminally negligent" in failing to know the law. The only issue was whether he was "criminally negligent" in failing to know that the payments to Christiansen had somehow been made without Board approval. On that subject, there simply was and is no evidence in the record to support the conclusion that he knew, or was criminally negligent in failing to know, that everyone else at the BHUSD involved in the payment process – the Board members, the Human Resources Department, the payroll department, and the County, had all separately and collectively managed to make the payments in violation of the law.

C. The evidence established that the criminal complaint against Hubbard was barred by limitations.

The statute of imitations applicable to the crimes with which Hubbard was charged, as they relate to the payments to Christiansen, is four years from the "discovery" of the crime. It would normally be three years, see Penal Code §801, but it is extended to four years from discovery because Hubbard was admittedly a public officer. Penal Code §§801.5, 803(c).

The conduct on which the charges are based occurred in September of 2005 and February of 2006. In June of 2006, Hubbard left the BHUSD, and Christiansen formally terminated her employment and became an independent outside consultant. [Ex. 8] The criminal complaint against Hubbard was not filed until December 9, 2010, more than four years after the alleged crimes were committed, and thus was plainly barred by limitations unless the People were able to prove late discovery.

The statute of limitations in criminal cases is jurisdictional. *People v. McGee* (1934) 1 Cal. 2d 611, 613-614. "In civil actions the statute is a privilege which may be waived by the party. In criminal cases, the state, through its legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter. . . . It follows that where the pleading of the state shows that the period of the statute of limitations has run, and nothing is alleged to take the case out of the statute, for example that the defendant has been absent from the state, the power to proceed in the case is gone."

To be sure, the statute may be tolled for late discovery. As the Court said in *People v. Lopez* (1997) 52 Cal. App. 4th 233, 248, "It is settled that at trial the prose-

cution bears the burden of proving that the charged offense was committed within the applicable period of limitations. (*People v. Crosby, supra, 58 Cal. 2d at p. 725.*) The burden of proof on this issue is proof by a preponderance of the evidence. (*People v. Zamora, supra, 18 Cal. 3d at p. 565, fn. 27.*)."

The "discovery" required to start the period of limitations running is discovery by the victim or by a law enforcement officer. Where, as here, the "victim" is a government agency, "a victim for purposes of the discovery provisions of *Penal Code section 803, subdivision (c)*, is a public employee occupying a supervisorial position who has the responsibility to oversee the fiscal affairs of the governmental entity and thus has a legal duty to report a suspected crime to law enforcement authorities." *People v. Lopez, supra,* 52 Cal. App. 4th at 247-248.

Furthermore, the "discovery" is deemed to have been made when the "victim" learns of the facts. *People v. Lopez, supra,* 52 Cal. App. 4th at 246:

> "Although the statute refers to 'discovery of an offense,' the courts have read a requirement of diligence into the limitations statutes. (1 Witkin & Epstein, Cal. Criminal Law, *supra,* Defenses, ß 375, p. 430.) 'On its face the 1969 amendment [to *Penal Code section 800*] appears to set the limitation period running from the actual "discovery" of a theft. The new provision has nevertheless been interpreted to include the same requirement of "reasonable diligence" in discovering the facts of a theft that the courts have read into the "discovery" provision of statute of limitations for tort actions based on fraud as set forth in *Code of Civil Procedure section 338, subdivision 4.* [Citation.] In that context we have held that the word "discovery" is not synonymous with actual knowledge. [Citation.] 'The statute commences to run . . . after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. . . ." (*People v. Zamora, supra, 18 Cal. 3d at pp. 561-562,* fn. omitted.)"

In other words, the People had the burden of proving to the jury at trial by a preponderance of the evidence that no "public employee [of the BHUSD] occupying a supervisorial position who had the responsibility to oversee the fiscal affairs of the governmental entity" was aware of the facts on which the charges against Hubbard were based until less than four years before the complaint was filed in December of 2010.

It must be emphasized that the "discovery" occurred when the supervisorial employee or employees learned of the facts. It is immaterial whether those employees considered the facts to constitute a crime. If any "public employee [of the BHUSD] occupying a supervisorial position who had the responsibility to oversee the fiscal affairs of the governmental entity" was aware in 2005 and 2006 of the facts which were now construed by the People as having constituted a crime, then the statute began to run when those facts were known.

In this connection, it may well be that the jury was led to reject Hubbard's defense of limitations by an erroneous instruction from the trial court. In explaining the defense of limitations, the trial court accepted the People's argument [RT D1-44] that the supervisorial employee not only had to know the facts, but also had to understand and believe that those facts constituted a crime. The trial court told the jury [RT 1832] that:

> "Discovered" means an awareness that there has been misconduct and that it was caused by criminal means. . . .
>
> The victim has the requisite actual notice when he has knowledge to facts sufficient to make a reasonably prudent person suspicious of criminal activity.

As noted above, the evidence established without dispute that Hubbard's recommendation of Christiansen's car allowance and stipend were known to

BHUSD supervisory employees in 2005 and 2006 (Assistant Superintendent for Human Resources Sal Gumina and Assistant Superintendent for Business Affairs Cheryl Plotkin), as well as at least Melody Voyles and Nora Roque; and that both Gumina and Plotkin (and everyone else) were aware that formal submissions to the Board and formal approval by the Board were necessary, and admonished Voyles accordingly. Furthermore, Gumina admitted that it was not only the responsibility of the Human Resources department to prepare the submissions required to obtain formal Board approval, he also admitted that the Human Resources department together with the Business Affairs department, is responsible for making certain that people get the money they are legally entitled to and not getting money they are not legally entitled to. [RT 730-735] Whether or not they knew or believed that Hubbard was guilty of violating §424 or of some other crime (and indeed, for the reasons set forth above, he was not), they were aware, or reasonably should have been aware, of all the pertinent facts; that Hubbard had recommended the car allowance and the stipend; that no formal Board approval had been sought or obtained (if in fact that was the case); and that payments to Christiansen had been made without formal Board approval (if in fact that was the case).

No one proffered any explanation as to why Hubbard was supposedly "criminally negligent" in failing to know that the payments were made to Christiansen without formal Board approval (if indeed they were), but that Gumina and Plotkin were not similarly negligent in failing to know or suspect the same facts, or why the statute of limitations did not begin to run before February or March of 2006, or why it had not expired before December 9, 2010.

CONCLUSION

For all of the foregoing reasons, this Court should reject the People's argument that public officers can be criminally liable merely because they are officers, or merely because they have "some degree of control" over public moneys, but which they do not have the power actually to disburse or misappropriate; and it should approve and adopt the analysis and conclusions of the Court of Appeal as set forth in its unpublished Opinion in this case, At the very minimum, the judgment should be reversed for a new trial, with directions to allow and enforce Hubbard's subpoena *duces tecum*, and to instruct the jury properly on the requisite *mens rea* as set forth in *Stark v. Superior Court*, and on the statute of limitations.

Dated: September 3, 2014

Respectfully submitted,

HILLEL CHODOS
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By: Hillel Chodos
Hillel Chodos
Attorneys for Appellant
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CERTIFICATION PURSUANT TO

CALIFORNIA RULES OF COURT, RULES 8.204(c)(1) and 8.490(b)(6)

As attorney for Appellant, I hereby certify that Appellant Hubbard's Brief on Review, excluding this certificate and the tables of contents and authorities, but including footnotes, contains 8,141 words, based on the word count program in Microsoft Word.

Date: September 3, 2014

HILLEL CHODOS

PROOF OF SERVICE - 1013a and 2015.5 C.C.P.
By Mail

State of California)
)
County of Los Angeles)

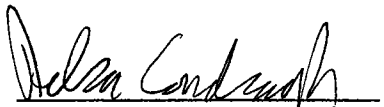
I, the undersigned, am a resident of the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; my business address is 1559 South Sepulveda Boulevard, Los Angeles, CA 90025.

On September 3, 2014, I caused a true and correct copy of the within document entitled APPELLANT HUBBARD'S BRIEF ON REVIEW to be served by mail, by placing said document in a sealed envelope with postage thereon fully prepaid, and deposited in the United States mail. The envelope is addressed as listed below:

SERVICE LIST

Kamala Harris Attorney General of California Eric Reynolds Deputy Attorney General 300 South Spring Street, Suite 1702 Los Angeles, CA 90013	Max Huntsman, Esq. Deputy District Attorneys Los Angeles County District Attorney's Office 18000 Foltz Criminal Justice Center 210 West Temple Street, 18th Floor Los Angeles, CA 90012
Presiding Judge, Hon. Stephen Marcus, J Clara Shortridge Foltz Criminal Justice Center 210 West Temple Street Los Angeles, CA 90012 *(1 copy by Hand Delivery)*	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of September, 2014 at Los Angeles, California.



Debra Condragh