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LIU, J.

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In the Supreme Court of the State of California

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SUPREME COURT
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Deputy

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Appellant,** **v.** **PAUL BIANE, et al.,** **Defendant and Respondent.**

Case No. S_____

Appellate District Division Two, Case No. E054422
San Bernardino County Superior Court, Case No. FSB1102102
The Honorable Brian McCarville, Judge

PETITION FOR REVIEW

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
MELISSA MANDEL
Supervising Deputy Attorney General
State Bar No. 159141
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2211
Fax: (619) 645-2044
Email: Melissa.Mandel@doj.ca.gov
Attorneys for Plaintiff and Appellant

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

Appellant, the People of the State of California, respectfully petitions this Court to grant review in this matter pursuant to rule 8.500 of the California Rules of Court. The unpublished opinion of the Court of Appeal, Fourth Appellate District, Division Two, authored by Justice Art W. McKinster, filed on October 31, 2012, is attached to this petition as Exhibit A.

ISSUES PRESENTED

1. Can a bribe offerer be charged with conspiracy to commit bribery, and aiding and abetting the receipt of a bribe, where his conduct satisfies the elements of those crimes?

2. Can a private person be charged with aiding and abetting a criminal conflict of interest violation?

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Jeffrey Burum, a wealthy developer and managing partner of Colonies Partners, offered bribes to San Bernardino County public officials to settle a lawsuit on terms dictated by Burum. For his criminal plan to succeed, Burum needed three San Bernardino County supervisors to vote in favor of the lawsuit, so in addition to offering bribes to certain individuals, Burum enlisted the assistance of defendant James Erwin to obtain their collective cooperation in the bribery scheme. Burum and Erwin used a combination of threats, extortion, and inducements to wear down their resistance and secure the votes of Supervisors Bill Postmus and Paul Biane, and to get Chief of Staff Mark Kirk to influence Supervisor Gary Ovitt to vote in favor of the settlement. Each of those supervisors voted to settle the case for $102 million, against the advice of all county attorneys and all private attorneys hired to represent the county. (CT 1-28.)

Between March and July 2007, Burum began paying the bribes by giving $100,000 each to Postmus, Erwin, Biane and Kirk through phony political action committees. He also took Erwin on an extravagant jet trip and provided him with expensive gifts, which Erwin failed to disclose on his FPPC form 700. Erwin, Biane and Kirk did not disclose the $100,000 bribes on their FPPC form 700's or on their income tax returns, all of which were filed under penalty of perjury. (CT 1-28.)

For these actions, on May 9, 2011, a special grand jury indicted Burum, Erwin, Biane and Kirk on 29 criminal charges.[1] As pertinent here, defendants Burum and Erwin were indicted in counts charging them together with conspiracy (count 1, Pen. Code, § 182); bribery (counts 4 and 5; Pen. Code, § 165); asking for/receiving a bribe (counts 7 and 8; Pen. Code, § 86); and conflict of interest (count 11; Gov. Code, § 1090).

On August 19, 2011, the trial court partially sustained the defendants' demurrers. As pertinent here, the court sustained Burum's demurrer to counts 4, 5, 7 and 8 (and count 1, to the extent it was predicated on those crimes), on the grounds that as a matter of law, a person who offers a bribe cannot be charged with aiding and abetting the receipt of a bribe. It overruled Erwin's demurrer on the same charges, finding that as the intermediary rather than the bribe offerer, there was no legal impediment to charging Erwin with aiding and abetting the receipt of a bribe. The trial court overruled both demurrers as to count 11, holding that private persons can be charged with aiding and abetting a conflict of interest. (CT 261-281.)

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[1] For his role in these events, Bill Postmus pleaded guilty to all charges in a previously filed case and agreed to cooperate with the prosecution.

The People appealed the trial court's ruling granting Burum's demurrer in part. Burum and Erwin filed petitions for writ of mandate/ prohibition, wherein Erwin challenged the court's denial of his demurrer on the bribery charges, and both challenged the court's denial of their demurrers on the conflict of interest charge. The matters were consolidated. Applying a narrow doctrine of federal common law, Wharton's Rule, the Court of Appeal affirmed the trial court's ruling granting Burum's demurrer as to counts 4, 5, 7 and 8; reversed the trial court's order denying Erwin's demurrer as to counts 5 and 8; and reversed the trial court's ruling denying the demurrers as to count 11. The Court of Appeal also granted the demurrer as to count 1 to the extent it relied on charges for which demurrers had been granted. (Exh. A.) The issues raised in this Petition were presented to the Court of Appeal, so no Petition for Rehearing was filed. The People respectfully request this Court grant review.

ARGUMENT

I. CALIFORNIA'S OUTDATED BRIBERY JURISPRUDENCE CONFLICTS WITH UNITED STATES SUPREME COURT AUTHORITY AND IS INTERNALLY CONTRADICTORY, RESULTING IN CONFUSION WHICH PREVENTS THE EFFECTIVE PROSECUTION OF CRIMES AGAINST THE PUBLIC TRUST

California's bribery law has failed to develop alongside evolving national legal standards. Specifically, California's application of Wharton's Rule to invalidate bribery and conspiracy charges conflicts with United States Supreme Court authority and every federal circuit court that has considered the issue. Further, conflicts within this Court's own jurisprudence create confusion as to whether a person who offers a bribe is immune from liability for aiding and abetting the receipt of a bribe, even where his conduct would support such charges.

This is the right case for this Court to offer guidance on these important issues, and it comes at the right time. Although unpublished, this high-profile public corruption case is being closely watched, and will be used as a benchmark to inform the conduct of both public officials and those seeking to influence them as to what acts they can commit without subjecting themselves to prosecution. It is an important case to the citizens of California, involving the theft of $102 million of public funds under circumstances which substantially undermine confidence in local government. And because the Court of Appeal's holding specifically limits the manner in which prosecutors can charge bribery crimes, it will have a chilling effect on public corruption prosecutions and cause the issue to evade review. Finally, the public policy concerns foreshadowed by this Court's prior holdings become a reality here, where the mastermind of a massive bribery scheme was given a free pass by the Court of Appeal, while his underling continues to face criminal liability for the identical conduct.

California's bribery law has not been meaningfully considered in more than half a century, and another half century may pass before the opportunity to do so arises again. In these hard economic times, where local governments are going bankrupt and individuals are struggling to stay afloat financially, California citizens are entitled to local prosecutors fully equipped with all available charging tools to fight against the theft of their tax dollars.

A. California's Application of Wharton's Rule to Aiding And Abetting Bribery Charges Conflicts With United States Supreme Court Authority And Every Federal Circuit Court That Has Considered the Issue

Count One charges Burum, Erwin and others with conspiracy to commit bribery, and counts four, five, seven and eight charge Burum and Erwin with aiding and abetting the receipt of a bribe, based on allegations

that, in addition to offering and paying bribes, "On or between January 1, 2005, and November 29, 2006, 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.) It further alleges that "ERWIN joined the conspiracy, and conveyed various threats and/or inducements from BURUM to Postmus, BIANE and KIRK. ERWIN agreed to accept money in exchange for influencing the votes of POSTMUS and Biane." (CT 5.) Overt acts 5-14 set forth specific threatening and coercive acts Erwin and Burum committed in their efforts to overcome the resistance of Postmus and Biane, coerce them into accepting the bribes, and accomplish a settlement on the terms demanded by Burum. (CT 5-8.)

The Court of Appeal applied Wharton's Rule to invalidate the charges against Burum. Wharton's Rule is a doctrine of federal common law which provides, "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission. (*Ianelli v. United States* (1975) 420 U.S. 770, 775 [95 S.Ct. 1284, 43 L.Ed.2d 616].) (Exh. A, pp. 16-17.)

California's application of Wharton's Rule to bribery charges conflicts with United States Supreme Court authority. The Supreme Court has made it clear that Wharton's Rule has current vitality only as a judicial presumption, which applies only in the absence of a legislative intent to the contrary. Classic Wharton's Rule offenses such as adultery, incest, bigamy and dueling are characterized by a congruence between the agreement and the substantive offense. The parties to the agreement are the only persons involved in the substantive offense, the immediate consequences of the crime rest on the parties themselves and not on society at large, and the substantive offense is not likely to pose the kind of threat to society the law

of conspiracy seeks to avert. (*Ianelli v. United States, supra*, 420 U.S. at pp. 782-783.)

Citing *People v. Wolden* (1967) 255 Cal.App.2d 798, 803-804, the Court of Appeal applied Wharton's Rule in a manner inconsistent with the limited presumption authorized by the United States Supreme Court. (See Exh. A, p. 19.) This is not a case where the immediate consequences of the crime rest on the parties themselves, or where the agreement does not appear likely to pose the distinct kinds of threats to society that the law seeks to avert. (*Ianelli v. United States, supra*, 420 U.S. at pp. 782-783.) This $102 million theft of taxpayer funds affected every taxpayer in San Bernardino. Moreover, even Burum's successful commission of each bribery charge would not have been enough to accomplish the goal of the conspiracy, as the agreement included an effort by all conspirators to influence Supervisor Gary Ovitt to vote in favor of the settlement to secure a total of at least three votes, but Ovitt is not alleged to have received a bribe.

Moreover, while the United States Supreme Court has stated that Wharton's Rule "has current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary," (*Ianelli v. United States, supra*, 420 U.S. at pp. 782-783), the California Legislature has indicated a clear intent to hold bribe offerers criminally liable to the same extent as those who receive bribes. (See, e.g., Pen. Code, § 165, [including both the offerer and receiver under a single statute], and Pen. Code, §§ 67, 68, 85, 86, [providing for punishment of two, three or four years for both the offerer and receiver of a bribe].) The indictment here alleges the bribe offerer used his enormous political power and financial resources to coerce the public officials into accepting his bribes. The statutory scheme offers no support for the court's decision to treat him more favorably than those who gave in to his pressure.

Additionally, Wharton's Rule does not apply where the conspiracy involves more persons than the substantive offense (*Ianelli v. United States, supra*, 420 U.S. at p. 782, fn. 15.) Here, the conspiracy charged four defendants and additional unnamed coconspirators. (See count 1, CT 3.)

While each bribery charge named the specific individual Burum aided and abetted in receiving the bribe, the alleged conspiracy was far broader than any individual bribery charge, as it named multiple parties not alleged to be bribe recipients, and involved a more complex goal than any individual bribery count. In other words, while the bribery charges involved Burum's efforts to coerce each specific board member, the conspiracy charge involved Burum's agreement with Erwin, Postmus, Biane and Kirk to obtain a favorable lawsuit settlement by securing the acceptance of his bribes by three or more voting members of the board.

California's application of Wharton's Rule to bribery charges conflicts with every federal circuit court that has considered the issue, which unanimously conclude Wharton's Rule does not apply to bribery (See, e.g., *United States v. McNair* (11th Cir. 2010) 605 F.3d 1152, 1215; *United States v. Bornman* (3rd Cir. 2009) 559 F.3d 150, 156; *United States v. Hines* (8th Cir. 2008) 541 F.3d 833, 838; *United States v. Morris* (7th Cir. 1992) 957 F.2d 1391, 1403.) California's application of Wharton's Rule to aiding and abetting charges conflicts with the Ninth Circuit's holding that Wharton's Rule does not apply to aiding and abetting (*United States v. Castro* (9th Cir. 1989) 887 F.2d 988, 996; *United States v. Huber* (9th Cir. 1985) 772 F.2d 585, 591-592.)

Finally, while the United States Supreme Court has said Wharton's Rule applies only where it is impossible under any circumstances to commit the substantive offense without cooperative action (*Ianelli v. United States, supra*, 420 U.S. at pp. 782-783), the Court of Appeal applied the rule to charges of receiving a bribe, although this Court has made it

clear that crime does not require cooperative action. (*People v. Diedrich* (1982) 31 Cal.3d 263, 273-274.)

Finally, under no circumstances does Wharton's Rule authorize a court to grant a demurrer as to both the conspiracy and bribery charges. Wharton's Rule is a merger doctrine which would prevent Burum's conviction for *both* the conspiracy and the underlying substantive charge, an election which could be made by the prosecutor or by appropriate jury instructions. (See *Ianelli, supra*, 420 U.S. at p. 775.)

B. There is a Conflict In California Law With Respect to Whether a Person Who Offers a Bribe Can Be Charged With Aiding And Abetting the Receipt of a Bribe

Relying on *Wolden, supra*, the Court of Appeal held that even though Burum was alleged to have used threats, menace, command or coercion to compel others to accept a bribe, he could not be charged with aiding and abetting the receipt of a bribe because he was the bribe offerer. (Exh. A, p. 19.) Support for that proposition was found in cases from this Court dating back more than half a century. Those cases cannot be reconciled with subsequent developments in the law, and their continuing validity should be reexamined.

The court's holding turned on the following language from *Wolden*:

> When one statute defines a crime which necessarily requires the participation of two or more persons, but fixes punishment for only one of them, and another statute separately provides that the other participant is guilty of a distinct crime, each is guilty of a criminal offense, but the offense of which each is guilty is separate and distinct from that of the other. It follows that the definitions of accessory, aider and abettor ([]§§31, 971) do not operate to subject either to prosecution under the section proscribing the act of the other, and neither falls within the code definition of an accomplice as to the act of the other. (*Id.*). Bribery is such a crime. The giver whose offense is specifically made a crime ([] § 67) is not an accomplice in the separate and distinct crime of the receiver [citations].

That language comes from *People v. Clapp* (1944) 24 Cal.2d 835, 838. Subsequent decisions have gone to great lengths to distinguish *Clapp* or simply refuse to apply it, such that the case is of questionable validity. (See *People v. Buffum* (1953) 40 Cal.2d 709, 728 (Opinion of J. Schauer, concurring and dissenting), overruled on other grounds as stated in *People v. Morante* (1999) 20 Cal.4th 403.) *Clapp* conflicts with this Court's decision in *People v. Diedrich, supra*, 31 Cal.3d at pages 273-274, because *Clapp* says the crime of bribery requires two or more persons, while *Diedrich* says it does not.[2]

Wolden also relied on *People v. Keyes* (1930) 103 Cal.App. 624 (per curiam denial of review) and *People v. Davis* (1930) 210 Cal. 540, to conclude that the giver of a bribe cannot be charged with aiding and abetting the receipt of a bribe, irrespective of the facts. (Exh. A, pp. 18-19.) In *Keyes*, this Court stated, without citation, that the giver and receiver of bribes are not guilty of a conspiracy because the two crimes require different motives. In *Davis*, this Court held that the giver and receiver of a bribe are not accomplices of one another, but an intermediary may be the accomplice of both. (*Davis,* at pp. 557-558.)

Wolden acknowledged the difficulty in reconciling those rules, and in this case, principles of equity and fairness weigh heavily in favor of reexamining the aforementioned cases. While the Court of Appeal found Burum's conduct in offering the bribe excused him from liability for his role in aiding and abetting the receipt of the bribes, it found no legal impediment to such liability for Erwin, an intermediary, whose acts were committed at Burum's direction and on his behalf. Thus, the mastermind

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[2] *Diedrich* involved Penal Code section 165 as charged in counts 4 and 5. The same reasoning applies equally to counts 7 and 8 which charge violations of Penal Code section 86. (See *People v. Gaio* (2000) 81 Cal.App.4th 919, 928-929.)

was set free while his underling continues to face criminal charges. (cf. *People v. Athar* (2005) 36 Cal.4th 396, 403 [disfavoring an irreconcilable disparity in punishment for individuals committing similar offenses].)

The aforementioned cases also conflict with other decisions from this Court. This Court has made it clear that even where the law specifies separate crimes for participants in a criminal transaction, that separate treatment does not preclude aiding and abetting liability where the facts support it. (*People v. Lima* (1944) 25 Cal.2d 573, 579 [aiding and abetting liability appropriate for those involved in a conspiracy to steal and receive stolen property]; *People v. Wayne* (1953) 41 Cal.2d 814 [a person who solicits may, by his subsequent conduct, encourage, aid and abet another's solicitation and become a principal in the crime under Penal Code section 31].)

In *People v. Wallin* (1948) 32 Cal.2d 803, this Court found that a murderer was an accomplice to an individual charged with being an accessory after the fact to the murder. While her commission of the murder alone would not subject her to liability as an accessory after the fact, it did not follow that she could not become liable if she encouraged another to aid her to avoid arrest and punishment. (*Id.* at p. 806.) Here, similarly, even if Burum's conduct offering the bribe would not subject him to accomplice liability for aiding and abetting the receipt of a bribe, it does not follow that he could not become liable based on his subsequent charged conduct of using threats and coercion to compel the recipients to accept the bribe.

In *People v. Hutchins* (1976) 61 Cal.App.3d 77, the Court of Appeal questioned the existence of a "rule" proposed by the defendant that, "where a statute defines an offense which necessarily involves joint action, but provides no punishment for the conduct of one of the participants, that participant cannot be charged as principal, coconspirator, or aider and abettor in the substantive offense committed by the other party." (*Id.* at p.

83.) The court found "no persuasive analogy" between situations where courts had exempted from punishment parties who were generally considered by society to be less morally blameworthy than the other party, and the facts of the case before it, which involved an attorney employing runners to solicit business for him. In the latter case, "the attorney is likely to be the instigator or manager of the scheme and is the person who profits financially from it." (*Ibid.*) That is exactly the case with Burum here.

This Court should grant review to clarify that whether a bribe offerer can be charged with aiding and abetting the receipt of a bribe depends on the facts of the case. *People v. Lee* (2006) 136 Cal.App.4th 522, demonstrates that the issue involves a factual determination, even where a provision of law generally precludes accomplice liability.

In *Lee,* the defendant, a prison inmate, was convicted of conspiracy to furnish a controlled substance to a prison inmate based on evidence that the defendant, his wife and a prison employee had worked together to bring drugs into the facility. (*Lee, supra*, 136 Cal.App.4th at pp. 526-527.) The defendant claimed that as a prison inmate, he could not be charged with conspiracy to furnish controlled substances to a prison inmate. Specifically, he claimed the statutory language of the substantive offense expressly applied to non-inmates and therefore excluded him. Other statutes provided for lesser punishment for prison inmates, so applying the law of conspiracy to an inmate, he claimed, would run contrary to the express legislative intent. (*Lee, supra*, 136 Cal.App.4th at p. 529.)

The defendant relied on "narrowly drawn, interconnected exceptions" to the general rules regarding coconspirator liability to argue that he was not properly charged. (*Lee, supra*, 136 Cal.App.4th at p. 530.) One of those alleged exceptions derived from cases holding that "where the Legislature has dealt with crimes which necessarily involved the joint action of two or more persons and where no punishment is provided for the

conduct of one of the parties, that person cannot be charged as a principal, coconspirator, or aider and abettor if (1) a different and more lenient criminal statute is found to be controlling as to such person, or (2) there is an affirmative legislative intent that such participant go unpunished." (*Id.* at p. 531.)[3]

In analyzing the defendant's liability in *Lee*, the court surveyed the jurisprudence from which the rule had developed, and noted that particular features of joint participation were present when the rule was applied to preclude prosecution against one party. The court held the overriding consideration in cases applying the rule was that the Legislature had indicated an intent that one party escape punishment, or be punished less severely, for participation in the conduct at issue. (*Lee, supra*, 136 Cal.App.4th at p. 536.)

The Legislature has revealed no intent that bribe offerers escape punishment, or are punished less severely, than those who receive bribes. As set forth above, the two are subject to the same punishment. As in *Lee*, to hold otherwise would lead to the absurd result that a "kingpin" developer (Burum), using "mules" (Erwin) to accomplish the crimes of both giving and receiving bribes, would escape the very same liability that the "mules," who operate at his direction, are subject to, simply because the developer is also the person who paid the bribes. (*Lee, supra,* 136 Cal.App.4th at p. 538.)

Penal Code section 31's expansive language provides that "all persons" who participate in the commission of a crime are principals. There is no bribery exception to aiding and abetting liability. The Court of Appeal created a new rule of law which operates as a judicial grant of

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[3] Whether such a rule exists at all is questionable. (*Hutchins, supra,* 61 Cal.App.3d at p. 83.)

immunity to bribe offerers, limits prosecutorial discretion to select the appropriate charges, and presents a significant obstacle for prosecutors fighting public corruption crimes.

II. PRIVATE PARTIES CAN AID AND ABET CRIMINAL VIOLATIONS OF GOVERNMENT CODE SECTION 1090[4]

"All persons" involved in the commission of a crime are accomplices, except in those cases where the rule is altered by a special statute. (Pen. Code, § 31, *People v. Shaw* (1941) 17 Cal.2d 778, 800.) No such statute (or any other provision of law) limits the liability of Burum and Erwin for aiding and abetting San Bernardino public officials in violating Government Code section 1090.

The conflict of interest charges against Burum and Erwin are premised upon their efforts to coerce, compel and threaten San Bernardino public officials into entering a $102 million settlement contract, under circumstances where everyone involved had a financial interest in the contract, and everyone knew of the public officials' financial interest in the contract. Count 1, in pertinent part, charges Burum and Erwin with conspiring with Postmus, Biane and Kirk to commit a violation of Government Code section 1090, and Count 11 charges Burum and Erwin with aiding and abetting Postmus, Biane and Kirk in violating Government Code section 1090. (CT 17.) The indictment alleges that Postmus and Biane voted on the Colonies lawsuit settlement knowing they had a

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[4] Government Code section 1090 provides, in pertinent part, "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity." The penalties for violating section 1090 are set forth in Government Code section 1097.

financial interest in the outcome (CT 5) and that Burum and Erwin used threats, inducements and bribes to secure their votes, knowing they had a financial interest in the outcome. (CT 5.)

Since no special statute alters the application of Penal Code section 31 in this context, Burum and Erwin were properly charged with aiding and abetting violations of Government Code section 1090. (See *People v. Shaw, supra*, 17 Cal.2d at p. 800.) Case law and public policy support imposing criminal liability on private persons with a financial interest in a contract who use threats, menace or coercion, or advise and encourage public officials to enter a contract in which the public official has a conflict of interest in violation of Government Code section 1090.

No case directly addresses the issue raised here, but case law on related issues provides support for the People's position that private parties with a financial interest in a contract can be charged with aiding and abetting a violation of Government Code section 1090. For example, in *D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861, the court impliedly endorsed accomplice liability under Government Code section 1090 by setting forth the elements that must be proved in support of such a charge. (*Id.* at p. 870.) And, the *D'Amato* court expressly distinguished and reaffirmed the decision in *People ex rel State of California v. Drinkhouse* (1970) 4 Cal.App.3d 931, wherein one defendant was convicted of violating Government Code section 1090 on an aiding and abetting theory. (*Id.* at p. 935.) Further support for the proposition that private parties can be accomplices to 1090 violations can be found in *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124, wherein the court held that persons in an advisory position to a city may fall within Government Code section 1090, and that independent contractors with potential to exert considerable influence over a city's contracting decisions may be principals under Government Code section

1090. (*Id.* at pp. 1124-1125.) Moreover, there is no meaningful basis on which to distinguish aiding and abetting liability under Government Code section 1090 from other situations in which private parties have been held liable for aiding and abetting public officials in committing crimes, such as bribery (Pen. Code, § 68, *People v. Anderson* (1925) 75 Cal.App. 365, 374 (overruled on other grounds as stated in *In re Wright* (1967) 65 Cal.2d 650, 654 (superseded by statute as stated in *People v. Burns* (1984) 157 Cal.App.3d 185) and misappropriation of public funds (Pen. Code, § 424, *People v. Little* (1940) 41 Cal.App.2d 797, 805.)

The Court of Appeal discussed none of these issues, but instead misread a single statement in *D'Amato* as creating a wholesale exception to aiding and abetting liability under Government Code section 1090. (Exh. A, p. 37.) *D'Amato* created no such exception. In *D'Amato*, the defendant was a city administrator who supervised his codefendant, the city's director of public works. In order to obtain federal funding for a project, the defendant recommended the formation of a joint powers committee, and then as a member of that committee, voted to contract with his codefendant's consulting firm to serve as the project manager. (*D'Amato, supra,* 167 Cal.App.4th at p. 866.) The codefendant was indicted for violating Government Code section 1090, and the defendant public official was indicted for aiding and abetting the codefendant by forming the joint powers agreement and contracting with the codefendant's consulting firm. (*Id.* at p. 867-868.) The court found that principles of legislative immunity prevented charging a public official with aiding and abetting a violation of Government Code section 1090, because the specific intent required for aiding and abetting liability would require inquiry into the defendant's state of mind, which violates the separation of powers doctrine when the defendant is a public official engaged in protected legislative activity. Thus, the court held, "the separation of powers doctrine bars criminal

prosecution of a public official for aiding and abetting another's section 1090 violation based on that official's legislative activities where the official does not hold a personal financial interest in the contract at issue." (*Id.* at p. 876.) That holding has no bearing on the liability of private parties. The separation of powers doctrine prohibits prosecutors from using a generally applicable criminal statute to oversee legislators in the performance of their legislative duties, thereby impinging on their ability to function independently. (*D'Amato, supra*, at p. 872; *Tenney v. Brandhove* (1951) 341 U.S. 367, 377 [71 S.Ct. 783, 95 L.Ed.2d 1019].) Concerns about maintaining the integrity of government functions are not implicated by inquiry into the motivations of private parties who are not involved in legislative activity.

Thus, while the Court of Appeal correctly quoted *D'Amato's* statement that "[T]he Legislature's wording of section 1090 evinces the intent to exclude aider and abettor liability[]," it read that statement far too broadly to prohibit accomplice liability altogether. Rather, the remainder of the quoted paragraph gives meaning to the quoted statement, concluding "[t]hus, the language of section 1090 is consistent with a legislative intent to exclude from punishment members of a legislative body who do not have a financial interest in the contract at issue." (*D'Amato, supra*, 167 Cal.App.4th at pp. 508-509.)

Public policy weighs in favor of the People's position, and against extending legislative immunity to protect private citizens not performing legislative activity. The purpose of Government Code section 1090 is to remove or limit the possibility that any personal influence might directly or indirectly bear on a public official's decisions, and to void contracts obtained through fraud or dishonesty. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Imposing criminal liability on private persons, like Burum and Erwin here, who advise, encourage, threaten, command or coerce public officials

into entering contracts in which the official has a financial interest will further that policy by deterring such individuals from pressuring officials into entering unlawful contracts. The Legislature has given no indication of an intent to exclude such persons from criminal liability, and they fall squarely within the definition of accomplices under Penal Code section 31.

The power to define crimes and fix penalties is vested exclusively in the legislative branch, and prosecuting authorities, exercising executive functions, have sole discretion to choose, for each particular case, the actual charges from among those potentially available based upon "'the complex considerations necessary for the effective and efficient administration of law enforcement.'" (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552.) The Court of Appeal violated these principles by imposing judicial limitations on the Legislature's broad definition of accomplice liability which includes "all persons concerned in the commission of a crime." Moreover, by applying these new rules in demurrer proceedings, the court infringed on the prosecutor's right to choose from among all potentially applicable charges, and present evidence establishing the elements of accomplice liability. (*Ibid.*)

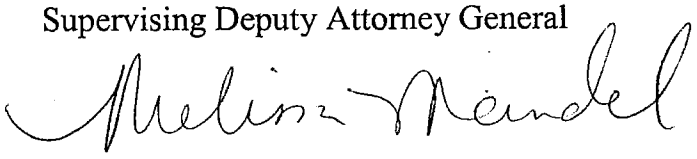
CONCLUSION

For the reasons set forth above, review should be granted.

Dated: December 10, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General



MELISSA MANDEL
Supervising Deputy Attorney General
Attorneys for Plaintiff and Appellant

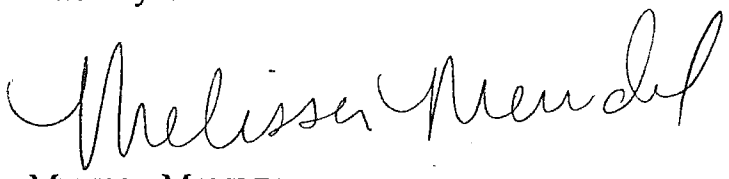
MM:bp
SD2011801249
70655837.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 5,265 words.

Dated: December 10, 2012

KAMALA D. HARRIS
Attorney General of California



MELISSA MANDEL
Supervising Deputy Attorney General
Attorneys for Plaintiff and Appellant

ATTACHMENT A

Filed 10/31/12 P. v. Biane CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. PAUL ANTOINE BIANE et al., Defendants and Respondents.	E054422 (Super.Ct.No. FSB1102102) OPINION
MARK KIRK, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	E054735
JAMES ERWIN, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent;	E054737

THE PEOPLE, Real Party in Interest.	
JEFFREY BURUM, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	E054738

APPEAL AND PETITIONS FOR WRIT OF MANDATE from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Appeal affirmed in part and reversed in part. Petition for writ of mandate denied as to Mark Kirk. Petition for writ of mandate granted in part and denied in part as to James Erwin. Petition for writ of mandate granted in part and denied in part as to Jeffrey Burum.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton, and Melissa Mandel, Deputy Attorneys General, for Plaintiff, Appellant and Real Party in Interest The People.

David M. Goldstein for Defendant and Respondent Paul Biane.

Law Office of Grech & Firetag, Paul Grech, Jr. and Chad W. Firetag for Defendant, Respondent and Petitioner Mark Kirk.

Law Office of Rajan Maline, Rajan Maline; Law Office of Harmon & Harmon and Steven L. Harmon for Defendant, Respondent and Petitioner James Erwin.

Arent Fox, Stephen G. Larson and Mary Carter Andrues for Defendant, Respondent and Petitioner Jeffrey Burum.

The People of the State of California appeal from the trial court's order sustaining, in part, the defendants' demurrers to various counts of the grand jury indictment in this action. (Pen. Code, § 1238, subd. (a).) The indictment alleges in pertinent part that defendants Mark Kirk, James Erwin and Jeffery Burum (hereafter referred to collectively as defendants or individually by last name) committed various crimes including aiding and abetting William Postmus and defendant Paul Biane, both of whom are elected members of the San Bernardino County Board of Supervisors (the Board), to accept a bribe and/or ask for or receive a bribe; and with conspiracy to commit those crimes as well as other crimes that involve the alleged unlawful acts of several elected members of the Board. The alleged object of the conspiracy was to obtain the Board's approval of a $102 million settlement in favor of Colonies Partners, L.P., of which defendant Burum is a general partner, in its lawsuit against the County of San Bernardino.

In addition to the People's appeal, defendants Burum, Kirk and Erwin filed petitions for writ of mandate challenging the trial court's order overruling parts of their respective demurrers. We consolidated defendants' writ petitions with the People's appeal in order to address and resolve in a single opinion all issues related to the demurrers.

For reasons we explain below, we agree with the People's assertion in their appeal that the trial court erred in sustaining defendants' demurrers to the counts that allege they misappropriated public funds in violation of Penal Code section 424. We also agree with the assertion of defendants Erwin and Burum in their writ petitions that the trial court should have sustained their demurrers to the counts that allege they had a conflict of interest in violation of Government Code section 1090. In addition, we agree with defendant Erwin's claim that the trial court should have sustained his demurrer to counts 5 and 8, which allege he aided and abetted defendant Biane in committing the crimes of bribery in violation of Penal Code section 165, and asking for and/or receiving a bribe in violation of Penal Code section 86, respectively. We reject the claim defendant Kirk alleges in his writ petition and will deny the writ. Therefore, we will affirm in part and reverse in part, and issue a writ of mandate directing the trial court to sustain defendants' demurrers in the manner just indicated.

I.

PROCEDURAL BACKGROUND

A. The Indictment

On May 9, 2011, a special grand jury in San Bernardino County issued a 29-count indictment naming Paul Biane, Mark Kirk, James Erwin, and Jeffrey Burum as defendants. The indictment alleged that at all relevant times defendant Biane was an elected member of the Board; defendant Kirk was chief of staff for Gary Ovitt, an elected member of the Board; and defendant Erwin, among other things, was the agent of

defendant Burum. The indictment further alleged that between January 1, 2005 and July 12, 2007, defendants Biane, Kirk, Erwin and Burum, one of two general partners in Colonies Partners, L.P. (Colonies), conspired with each other and with unindicted coconspirators including William Postmus, an elected member of the Board, to commit the crimes of bribery in violation of Penal Code section 165 (referred to in the trial court and hereafter as target crime 1), asking for and/or receiving a bribe in violation of Penal Code section 86 (target crime 2), appropriation of public funds by a public officer without authority of law in violation of Penal Code section 424 (target crime 3), improper influence of a legislative action in violation of Government Code section 9054 (target crime 4), and conflict of interest in violation of Government Code section 1090 (target crime 5).

According to the indictment, "[t]he object of the conspiracy was to illegally obtain $102,000,000 from the County." As alleged in the indictment, the means for accomplishing the conspiracy were that Colonies purchased certain real property in Upland for the purpose of residential and commercial development; the property included a 67-acre flood control basin; San Bernardino County asserted easement rights over the flood control basin; in March 2002, Colonies sued the county in order to challenge its easement claim; that litigation confirmed the county's easement rights, but in July 2005 only part of those rights were affirmed on appeal; some unknown time after Colonies filed its lawsuit, defendant Burum "concocted a scheme to obtain a monetary settlement . . . from the County"; between January 1, 2005 and November 29, 2006, defendant

Burum allegedly corruptly influenced members of the Board through "threats, extortion, inducements, and bribery in order to secure their vote in favor of a settlement"; and defendant Erwin allegedly joined the conspiracy by conveying threats and/or inducements from defendant Burum to Postmus, defendant Biane, and defendant Kirk. In addition, defendant Erwin allegedly agreed to accept money from defendant Burum in exchange for influencing the votes of Supervisor Postmus and defendant Biane; defendant Kirk allegedly agreed to accept money from defendant Burum in return for influencing the vote of Supervisor Ovitt. Postmus and defendant Biane allegedly joined the conspiracy by agreeing to accept a bribe in return for their votes to approve the Colonies settlement.

The indictment alleges that on November 28, 2006, Postmus, Ovitt, and defendant Biane voted to approve a settlement of $102 million in Colonies's lawsuit against the county. Postmus and defendant Biane allegedly "voted [in favor of the settlement] knowing that they had a financial interest in the outcome, a bribe from [defendant] Burum." The indictment also alleges, "After Colonies received substantial sums of money from the settlement with the County, [defendant] Burum distributed from Colonies the agreed upon bribes and payments to Postmus, [and defendants] Biane, Kirk, and Erwin" by giving $100,000 to political action committees created and controlled by them.

The indictment alleges numerous overt acts defendants and the unnamed coconspirators committed. We recount the details of those allegations below as pertinent to our resolution of the issues raised on appeal.

In addition to the conspiracy charged in count 1, which includes the five identified target crimes, the indictment also separately charged defendants with committing the following additional crimes, some of which are the crimes alleged as target crimes in the conspiracy count:

Defendant Biane—bribery in violation of Penal Code section 165 (count 2); asking for and/or receiving a bribe in violation of Penal Code section 86 (count 6); conflict of interest in violation of Government Code section 1090 (count 10); appropriation of public funds by a public officer without authority of law in violation of Penal Code section 424 (count 12, entitled "public officer crime"); willfully filing a false tax return in violation of Revenue and Taxation Code section 19705, subdivision (a)(1) (count 15); perjury by declaration in violation of Penal Code section 118 (count 19); and filing a false instrument in violation of Penal Code section 115, subdivision (a) (count 20).

Defendant Kirk—bribery in violation of Penal Code section 68 (count 3); obtaining money on the representation that he would improperly influence Gary Ovitt in regard to an official matter or vote, in violation of Government Code section 9054 (count 9); conflict of interest in violation of Government Code section 1090 (count 10); appropriation of public funds by a public officer without authority of law in violation of

Penal Code section 424 (count 13); filing a false tax return in violation of Revenue and Taxation Code section 19706 (count 16); perjury by declaration in violation of section 118 (count 21); and filing a false instrument in violation of Penal Code section 115, subdivision (a) (count 22).

Defendant Erwin—bribery in violation of Penal Code section 165 (counts 4 & 5); asking for and/or receiving a bribe in violation of Penal Code section 86 (counts 7 & 8); conflict of interest in violation of Government Code section 1090 (count 11); appropriation of public funds by a public officer without authority of law in violation of Penal Code section 424 (count 13); forgery in violation of Penal Code section 470, subdivision (a) (count 14); willful failure to file a tax return in violation of Revenue and Taxation Code section 19706 (count 17); filing a false tax return in violation of Revenue and Taxation Code section 19706 (count 18); perjury by declaration in violation of Penal Code section 118 (counts 23, 25, 26 & 28); and filing a false instrument in violation of Penal Code section 115, subdivision (a) (counts 24, 27 & 29).

Defendant Burum—bribery in violation of Penal Code section 165 (counts 4 & 5); asking for and/or receiving a bribe in violation of Penal Code section 86 (counts 7 & 8); conflict of interest in violation of Government Code section 1090 (count 11); and appropriation of public funds by a public officer without authority of law in violation of Penal Code section 424 (count 13).

B. The Demurrers

Defendants each demurred to the indictment on the grounds that the facts alleged did not state public offenses and, even if true, that the alleged facts would constitute a legal justification or excuse or other legal bar to prosecution. (Pen. Code, § 1004.)[1] In particular, all defendants demurred to the conspiracy charge alleged in count 1.[2] In addition, each defendant demurred to some or all of the counts in which he was charged with aiding and abetting in the commission, or actually committing, the crime alleged as a target crime in the conspiracy count. In other words, defendant Burum, joined by defendant Erwin, his alleged agent, demurred to counts 4 and 5, which alleged bribery in violation of Penal Code section 165; counts 7 and 8, which alleged violations of Penal Code section 86 based on asking for or receiving a bribe; count 11, which alleged a conflict of interest in violation of Government Code section 1090; and count 13, which alleged misappropriation of public funds in violation of Penal Code section 424. Defendant Biane demurred to counts 2 (bribery), 6 (asking for and/or receiving a bribe), 10 (conflict of interest), and 12 (misappropriation of public funds), and defendant Kirk, in

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[1] Penal Code section 1004 states, in pertinent part, that, "The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either: [¶] . . . [¶] 4. That the facts stated do not constitute a public offense; [¶] 5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution."

[2] Defendants Erwin and Biane joined in defendant Burum's arguments, and also asserted arguments of their own. Defendant Kirk separately demurred.

addition to demurring to count 1, demurred to count 9 (improper lobbying in violation of Government Code section 9054) and count 13 (misappropriation of public funds).

C. The Trial Court's Ruling

The trial court sustained defendants' demurrers in part and overruled them in part. We will recount the details of the trial court's ruling, below, as pertinent to our discussion of the issues raised by the parties.

II.

DISCUSSION

A. Standard of Review

1. *The People's Appeal*

"'[A] demurrer raises an issue of law as to the sufficiency of the accusatory pleading, and it tests only those defects appearing on the face of that pleading.' [Citation.]" (*People v. Manfredi* (2008) 169 Cal.App.4th 622, 626; see also *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1090 ["A demurrer to a criminal complaint lies only to challenge the sufficiency of the pleading and raises only issues of law."].) On appeal "We review an order sustaining a demurrer without leave to amend de novo, exercising our independent judgment as to whether, as a matter of law, the complaint . . . states a cause of action on any available legal theory. [Citation.] In doing so we assume the truth of all material factual allegations, and we are required to accept them as such, together with those matters subject to judicial notice. [Citation.]" (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 524, fn. omitted.)

2. ***Defendants' Writ Petitions***

"The Code of Civil Procedure provides that mandate 'may be issued . . . to compel the performance of an act which the law specially enjoins' [citation] where 'there is not a plain, speedy, and adequate remedy, in the ordinary course of law.' [Citation.] Although it is well established that mandamus cannot be issued to control a court's discretion, in unusual circumstances the writ will lie where, under the facts, that discretion can be exercised in only one way. [Citation.]" (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 850-851.) If defendants' writ petitions demonstrate the trial court had no discretion to overrule their demurrers, i.e., that as a matter of law the indictment failed to a state public offense, then defendants would lack an adequate remedy at law without first incurring the time and expense of a trial.

B. Judicial Notice Requests

Defendant Burum, in connection with his petition for writ of mandate, requests this court take judicial notice of the judgment of validation in San Bernardino Superior Court case No. SCVSS146272, dated March 29, 2007, attached as Exhibit A to his judicial notice request. The judgment of validation is not relevant to any issue defendant Burum raises in his writ petition, and he only mentions the document in the "factual background" section of that petition. Therefore, the request for judicial notice is denied.

Defendants Burum, Erwin and Kirk also request in connection with their writ petitions that we take judicial notice of the record in the related appeal. Defendants Burum and Erwin also request we take judicial notice of various documents, attached as

exhibits to their judicial notice requests, that purportedly pertain to the legislative histories of Government Code sections 1090 and 9054. The appeal and writ petitions have been consolidated, as previously noted, and as a result the record in the appeal is properly before us. The documents purportedly related to the legislative histories of the noted Government Code sections are irrelevant because, as we discuss below, neither statute is ambiguous; therefore, we need not determine the Legislature's intent. Accordingly, the judicial notice requests are denied.

C. Motion to Dismiss Writ Petitions

The People move to dismiss the writ petitions filed by defendants Erwin and Kirk because the petitions are verified by their respective attorneys but do not include the affidavit required under Code of Civil Procedure section 446 explaining why the verifications were not made by the defendant parties. The People acknowledge that defendant Erwin's attorney states in his verification that he, rather than defendant Erwin, verified the petition because he has "superior knowledge than Petitioner of the facts therein." The People contend the attorney must explain why he has superior knowledge, and that failure to do so renders the verification inadequate.

The People do not cite authority for that contention, and therefore we are not persuaded. Code of Civil Procedure section 446 offers three reasons for the attorney rather than the party to verify a pleading—the party is absent from the county where the attorney has his or her office, "from some cause" the party is unable to verify the pleading, and the facts are within the knowledge of his or her attorney. (Code Civ. Proc.,

§ 446.) Defendant Erwin's attorney stated that he has superior knowledge of the facts, and that statement comports with the statutory requirement.

Defendant Kirk's attorney states in his verification that "[t]he matters stated in the attached declaration [*sic*] are true of our knowledge." The statement arguably does not comport with Code of Civil Procedure section 446, but we nevertheless decline to dismiss the writ petition. One of the reasons for requiring that a writ of mandate petition be verified by the beneficially interested party is so that facts alleged in the petition can be used as evidence. (See *People v. Superior Court (Alvarado)* (1989) 207 Cal.App.3d 464, 470.) The issues raised in defendants' writ petitions are all ones of law. For this reason, we view the verifications as adequate compliance with the requirement that writ petitions be verified. (See Code Civ. Proc., § 1086; Cal. Rules of Court, rule 8.486(a)(4).)

D. Analysis

1. *Bribery in Violation of Penal Code Sections 165 and 86 (Alleged in Count 1 As Target Crimes 1 and 2, and in Counts 2, 4, 5, 6, 7 and 8 Against Defendants Burum, Biane and Erwin)*

As set out above, the indictment alleges in count 1 that defendants conspired to commit five target crimes. Alleged target crime 1 is bribery in violation of Penal Code section 165.[3] The indictment alleges in count 2 that defendant Biane violated section 165, in count 4 that defendants Burum and Erwin aided and abetted Postmus in violating

[3] All further statutory references will be to the Penal Code unless otherwise indicated.

section 165, and in count 5 that defendants Burum and Erwin aided and abetted defendant Biane in violating section 165.

Alleged target crime 2 of the conspiracy charged in count 1, is a violation of section 86, the crime of being a supervisor who asks for and/or receives a bribe. Count 6 of the indictment alleges that defendant Biane violated section 86 by being a county supervisor who received a bribe, count 7 alleges that defendants Burum and Erwin aided and abetted Supervisor Postmus in receiving a bribe, and count 8 alleges that defendants Burum and Erwin aided and abetted defendant Biane, also a county supervisor, in receiving a bribe.

Defendant Burum, joined by defendants Biane and Erwin, asserted in his demurrer he was the person who offered the bribes, and as a matter of law he could not aid and abet Postmus and defendant Biane in the crimes of receiving the bribe, nor could he conspire with any of the other defendants to commit that crime. Therefore, defendants Burum, Biane and Erwin all argued that the facts alleged in the indictment could not establish conspiracy based on target crimes 1 (bribery) and 2 (asking for and/or receiving a bribe) nor could they establish counts 2, 4, 5, 6, 7 and 8, which allege bribery in violation of section 165 and asking for and/or receiving a bribe in violation of section 86, either as a direct perpetrator (Biane) or as an aider and abettor (Burum and Erwin).

The trial court sustained defendant Burum's demurrer to target crimes 1 and 2, and counts 4, 5, 7 and 8, but overruled the demurrers of defendants Erwin and Biane.[4] Defendant Erwin challenges that ruling in his petition for writ of mandate.

a. *The People's Appeal*

The People contend the trial court erred in sustaining defendant Burum's demurrer to target crimes 1 and 2 alleged in count 1, and counts 4, 5, 7 and 8, the related bribery counts, because the question of whether the person who gave the bribe also aided and abetted the receipt of the bribe is one of fact for a jury to determine. While that ordinarily is true, when the charging document alleges facts that either do not constitute a public offense (§ 1004, par. 4) or that establish a complete defense to the crime (§ 1004, par. 5), the factual issue can be resolved as a matter of law. Defendant Burum made both of those claims in his demurrer.

In particular, defendant Burum relied on *People v. Wolden* (1967) 255 Cal.App.2d 798 (*Wolden*), which holds that "when one statute defines a crime which necessarily requires the participation of two or more persons, but fixes punishment for only one of them, and another statute separately provides that the other participant is guilty of a distinct crime, each is guilty of a criminal offense, but the offense of which each is guilty is separate and distinct from that of the other. It follows that the definitions of accessory,

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[4] The trial court did not specify in its order whether it was granting leave to amend. However, because the defect in the indictment involves a question of law, namely whether defendant Burum is legally capable of committing the charged crimes, we construe the order as denying leave to amend the indictment.

aider and abettor ([] §§ 31, 971) do not operate to subject either to prosecution under the section proscribing the act of the other, and neither falls within the code definition of an accomplice as to the act of the other (*id.*). Bribery is such a crime. The giver whose offense is specifically made a crime ([] § 67) is not an accomplice in the separate and distinct crime ([] § 68) of the receiver [citations]." (*Id.* at pp. 803-804.)

The indictment in this case alleges that defendant Burum was the person who offered the alleged bribe to the other defendants. Therefore, under *Wolden* he could not as a matter of law aid and abet any other defendant in receipt of the bribe as alleged in target crimes 1 and 2, and in counts 4, 5, 7 and 8. On that basis, the trial court sustained defendant Burum's demurrer to those counts.

The People contend *Wolden* is inapplicable because it was concerned only with the issue of whether any of the witnesses were accomplices within the meaning of section 1111, which protects a defendant from conviction based solely upon the uncorroborated testimony of an accomplice. It also defines 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." (§ 1111.)

Wolden is not limited to section 1111, and instead involves application of the principle that "[w]here the cooperation of two or more persons is necessary to the commission of the substantive crime, and there is no ingredient of an alleged conspiracy that is not present in the substantive crime, then the persons necessarily involved cannot be charged with conspiracy to commit the substantive offense and also with the

substantive crime itself. [Citations.] This is the 'concert of action rule' or Wharton's Rule. (1 Anderson, Wharton's Criminal Law and Procedure (1957) p. 191.) The classic Wharton's Rule has been applied to crimes characterized by a general congruence of the agreement and the completed offenses. The rule is considered in modern legal thinking as an aid in construction of statutes, a presumption that the Legislature intended the general conspiracy section be merged with the more specific substantive offense. [Citation.]" (*People v. Mayers* (1980) 110 Cal.App.3d 809, 815, citing among other cases, *Iannelli v. United States* (1975) 420 U.S. 770, 785-786.) Because we reject the People's argument that *Wolden* was limited to the issue of corroboration, we will not address the People's arguments regarding principles pertinent to corroboration of accomplice testimony.

Our conclusion that *Wolden* is not limited to section 1111 also requires us to reject the People's assertion that the previously quoted principal is obiter dictum. Specifically, the People contend the principle that the bribe giver cannot aid and abet the bribe receiver is obiter dictum because the issue in *Wolden* was whether the trial court correctly instructed the jury that the bribe giver and the bribe receiver were not accomplices of each other, and therefore corroboration of the receiver's testimony is not required.

We addressed the distinction between ratio decidendi and obiter dictum in *Krupnick v. Hartford Accident & Indemnity Co.* (1994) 28 Cal.App.4th 185 (Fourth Dist., Div. Two), in which we quoted Witkin for the proposition that "'[t]he *ratio decidendi* [holding of case] is the principle or rule which constitutes the ground of the decision, and

it is this principle or rule which has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a) which statements of law were necessary to the decision, and therefore binding precedents, and (b) which were arguments and general observations, unnecessary to the decision, i.e., dicta, with no force as precedents.'" (*Id.* at p. 199, quoting 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 783, p. 753; see also *Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1005-1006.)

The issue in *Wolden* was whether, in a prosecution of a tax collector for receiving bribes from property owners, the testimony of the bribe giver had to be corroborated as required by section 1111. Whether a bribe giver and a bribe receiver are accomplices of each other was the issue the *Wolden* court had to decide in order to resolve the corroboration question. Therefore, its resolution of that issue is not obiter dictum.

Even if we were to agree with the People's obiter dictum claim, we nevertheless would confirm the underlying legal principle because it was discussed and applied in *People v. Davis* (1930) 210 Cal. 540, which held, "It is likewise true that since 1915, under the amendment of that year to section 1111 of the Penal Code providing that an accomplice is one who is liable to the prosecution for the identical offense charged against the defendant on trial, the giver and receiver of a bribe are no longer accomplices one to the other (although that was formerly the law of this state, *People v. Coffey*, 161 Cal. 433 [39 L. R. A. (N. S.) 704, 119 Pac. 901]), 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." (*Id.* at p. 557.)

Application of the principle set out in *Wolden*—namely that the person who gives or offers a bribe cannot, as a matter of law, aid and abet the person who receives the bribe—requires us to affirm the trial court's order sustaining defendant Burum's demurrer to counts 4, 5, 7 and 8. 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." (*Wolden, supra,* 255 Cal.App.2d at p. 804, citing *People v. Keyes* (1930) 103 Cal.App. 624 [opinion of Supreme Court denying hearing].) 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. The trial court purported to overrule defendant Burum's demurrer to target crimes 1 and 2 with respect to the allegation that he conspired with persons unknown to commit the two crimes in question, but we dismiss those allegations as well. The identity of the person with whom defendant Burum conspired cannot save the allegations of the indictment because the crimes defendant Burum allegedly conspired to commit are ones the law states he cannot commit. Therefore, the trial court should have dismissed counts 4, 5, 7 and 8, and the related target crimes, as to defendant Burum.

b. ***Defendant Erwin's Petition for Writ of Mandate***

Although defendant Erwin joined in defendant Burum's demurrer, the trial court overruled his demurrer to target crimes 1 and 2, and counts 4, 5, 7 and 8, because it found

the indictment alleged he was an agent of both the bribe giver (defendant Burum) and the bribe receivers (defendants Biane and Kirk and unindicted coconspirator Postmus). Defendant Erwin contends the trial court erred. We disagree.

The trial court relied on *People v. Davis*, *supra*, which holds "when the bribe is accomplished through the medium of an agent, or go-between, or intermediary, the mere fact that the evidence is conclusive that such emissary is the agent or accomplice of one of the parties does not necessarily determine that such emissary is not likewise the agent or accomplice of the other party to the transaction. We can see no impossibility, legal or otherwise, in a person acting as the agent or accomplice of both the bribe giver and the bribe receiver. Each case, of course, must turn on its own facts and circumstances, and if there is any doubt as to the proper status of the emissary, the question is one, under proper instructions, for the jury. [Citation.]" (*People v. Davis*, *supra*, 210 Cal. at pp. 557-558.)

Relying on *People v. Davis*, the trial court found that the indictment alleged defendant Erwin "is accused of being an intermediary in Burum's bribery of Postmus, Biane, and Kirk [who are] not the payor of the bribes. Erwin's involvement in those transactions was not necessary to the commission of the crimes. Under *Wolden*[,] Erwin cannot be prosecuted for conspiring with Burum to bribe Erwin but he can be prosecuted for conspiring with Burum to bribe Postmus, Biane and Kirk." Therefore, the trial court overruled defendant Erwin's demurrer to target crimes 1 and 2 alleged in count 1, and counts 4, 5, 7 and 8.

The trial court's analysis is wrong, but the conclusion is correct under *People v. Davis*—defendant Erwin, as an alleged intermediary, can be the agent of both the bribe giver and the bribe receiver, and as an agent of the receiver can be found to have aided and abetted and conspired to receive a bribe. However, the *Wolden* court discussed and distinguished *People v. Davis* after first acknowledging "some difficulty in reconciling the rule that giver and receiver do not have the same motive with the view that a single intermediary can simultaneously entertain both motives." (*Wolden, supra*, 255 Cal.App.2d at p. 804.) The *Wolden* court recognized it was bound by the holding under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, and then distinguished *People v. Davis* on its facts, noting that the intermediary in that case "gave no money of his own and received no benefit from the action induced by payment. Thus he could be an accomplice of the bribe receiver." (*Wolden*, at p. 804.)

In this case, defendant Erwin contends the factual allegations of the indictment establish that he acted only as an agent of defendant Burum, the bribe giver. Under *Wolden*, such facts would constitute a complete defense to the aiding and abetting bribery charges because defendant Erwin, as an agent only of defendant Burum, the bribe giver, would stand in defendant Burum's shoes.

The facts in *Wolden* that the court relied on to conclude the intermediaries in that case were agents only of the bribe givers, were that they each paid money of their own and benefitted from the action induced by the bribe. (*Wolden, supra*, 255 Cal.App.2d at pp. 804-805.) There are no similar factual allegations in the indictment in this case.

However, we do not view the facts cited in *Wolden* as exclusive. The indictment in this case alleges specific facts that connect defendant Erwin with defendant Burum, and also with Postmus, one of the bribe receivers.

More particularly, in addition to the previously noted allegation that in 2006 defendant Erwin was the agent of defendant Burum, the information alleges that defendant Erwin joined the conspiracy and conveyed various threats and/or inducements from defendant Burum to Postmus, defendant Biane, and defendant Kirk; defendant Burum offered to pay defendant Erwin if he helped obtain a settlement favorable to Burum in the Colonies case; defendant Burum paid defendant Erwin $100,000 after defendant Burum received a substantial portion of the Colonies settlement from the county; defendant Erwin claimed to have created political mailers, which disclosed Postmus was addicted to drugs, in order to persuade Postmus to convince defendant Biane to vote in favor of settling the Colonies lawsuit; defendant Erwin reputedly said the mailers would not go out if the lawsuit was settled on terms defendant Burum found favorable; defendant Erwin created political mailers that depicted defendant Biane unfavorably, and those mailers were to be used to influence defendant Biane to vote in favor of a settlement in the Colonies lawsuit; after the Board approved the Colonies settlement, defendant Burum hosted defendant Erwin on a private jet trip to New York and Washington, D.C., where he provided meals, refreshments, lodging, watches, entertainment, spending money, and prostitutes as gifts for defendant Erwin's assistance in obtaining the Colonies settlement from the county.

With respect to Postmus, an alleged bribe receiver, the indictment includes the factual allegations that in January 2007 he appointed defendant Erwin to the position of assistant assessor for the County of San Bernardino, and that "[o]n or between October 1, 2006, and November 28, 2006, Postmus and [defendant] Burum engaged in negotiations concerning the settlement amount of the Colonies lawsuit at the Doubletree Hotel in Ontario with [defendant] Erwin and [Patrick] O'Reilly [an alleged media consultant for defendant Burum and an unindicted coconspirator] acting as intermediaries."

For purposes of pleading a public offense, the noted allegations are sufficient to align defendant Erwin with Postmus, and thus make him an alleged agent of a bribe receiver. In other words, we are unable to say as a matter of law that the allegations are insufficient to state a theory of liability for conspiracy to commit bribery and/or receiving a bribe, as well as aiding and abetting Postmus in committing those crimes. Therefore, the allegations in count 4 and count 7 that defendant Erwin aided and abetted Postmus in receiving a bribe are sufficient to state a public offense against defendant Erwin such that the trial court correctly overruled his demurrer to those counts, and to the conspiracy allegation in count 1 based on target crimes 1 and 2. We cannot say the same about the allegations in counts 5 and 8 with respect to defendant Erwin aiding and abetting defendant Biane.

The indictment specifically alleges that defendant Erwin was the agent of defendant Burum and that defendant Erwin agreed to and did accept money from defendant Burum in return for influencing the votes of Postmus and defendant Biane.

Unlike the allegations discussed above that defendant Erwin acted as the intermediary for defendant Burum and Postmus in settling the Colonies case, and that afterward Postmus appointed defendant Erwin to assistant county assessor, there are no factual allegations that suggest defendant Erwin acted on behalf of defendant Biane. As a result, we must conclude the indictment is insufficient as a matter of law to state a public offense against defendant Erwin on counts 5 and 8 because it appears on the face of the pleading that he acted only as an agent of the bribe giver, defendant Burum, in persuading defendant Biane to accept a bribe. Consequently, the indictment does not allege facts that establish a public offense, namely that defendant Erwin aided and abetted defendant Biane in receiving a bribe. Therefore, the trial court should have sustained defendant Erwin's demurrer to counts 5 and 8.

2. ***Misappropriation of Public Funds in Violation of Section 424 (Alleged in Count 1 As Target Crime 3, and in Counts 12 and 13 Against All Four Defendants)***

The indictment alleges in count 1 that all defendants conspired to commit the crime of misappropriation of public funds in violation of section 424 (target crime 3, also referred to in the indictment as "public officer crime"). In count 12, the indictment alleges that defendant Biane on November 28, 2006, committed the crime of public officer crime, in violation of section 424, by being an officer and a person described in section 424 "charged with the receipt, safekeeping, transfer, and distribution of public moneys" and that he did "in a manner not incidental and minimal without authority of law, appropriate the same, and a portion thereof, to personal use and the use of another

and loaned the same or any portion thereof and made a profit out of and used the same for any purpose not authorized by law and fraudulently altered, falsified, concealed, destroyed, and obliterated any account." Count 13 alleges that defendants Kirk, Burum and Erwin aided and abetted Postmus and defendant Biane in violating section 424.

All four defendants demurred to the target crime 3 allegation in count 1 that they conspired to violate section 424, and to the charges alleged in counts 12 and 13 on the ground that the statute applies only to the unauthorized acts of public officials. Because county supervisors are authorized by law to settle lawsuits, defendants asserted they could not be liable either as conspirators or aiders and abettors for violating section 424. In particular, defendant Burum (joined by defendants Erwin and Kirk) and defendant Biane argued among other things that section 424 according to its express language applies to embezzlement of public funds, or the manipulation of accounts and other acts not authorized by law. Members of a county board of supervisors are authorized by law to settle lawsuits. Therefore, defendants argued section 424 does not apply to the alleged payment of a settlement in return for an alleged bribe. Alternatively, defendant Burum argued that any other interpretation of the statute would require inquiry into the subjective motives of the supervisors in question and that inquiry would violate the separation of powers doctrine as discussed in *D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861 (*D'Amato*).

The trial court agreed, relying in part on *D'Amato*, and sustained defendants' demurrers to target crime 3 of the conspiracy charged in count 1, and to counts 12 and 13. Although not expressly stated, that ruling necessarily was without leave to amend.

a. *The People's Appeal*

The People contend the trial court erred in sustaining defendants' demurrers to the section 424 allegations, first because the trial court "improperly blended two different concepts," and next because the concepts individually either do not apply or the trial court applied them incorrectly. We agree.

The first issue we must resolve is whether the alleged act of approving a settlement in return for a bribe, or a kickback, violates section 424, which provides, "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; or [¶] 2. Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law . . . [¶] Is punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in this states. [¶] (b) As used in this section, 'public moneys' includes the proceeds derived from the sale of bonds or other evidence or indebtedness authorized by the legislative body of any city, county, district, or public agency. [¶] (c) This section does not apply to the incidental and minimal use of public resources authorized by Section 8314 of the Government Code."

Defendants argued in the trial court, as they do in this appeal, that section 424 only applies when the public official's action, which in this case is approving a settlement, is "without authority of law." Because county supervisors have legal authority to approve the settlement of lawsuits, defendants contend section 424 does not apply. Defendants' interpretation of the statutory language is incorrect.

According to section 424, the action that must be "without authority of law" is the public official's act of appropriating public funds "or any portion thereof, to his or her own use, or to the use of another." (See *Stark v. Superior Court* (2011) 52 Cal.4th 368, 390 ["Section 424(a)1 applies to a defendant who appropriates public money to his own use or use of another without authority of law."].) In this case, the indictment can reasonably be construed to allege that the identified county supervisors conspired to appropriate and did appropriate public funds unlawfully by authorizing the county to pay $102 million to Colonies in settlement of its lawsuit knowing that they would receive payments from defendant Burum, the beneficiary of that settlement, in the form of bribes or kickbacks. The allegations can reasonably be construed to allege the county supervisors knew the bribes or kickbacks would be paid out of the money they had appropriated for the settlement. As a result of their alleged knowledge that part of that appropriation would be to the supervisor's own use, and consequently "without authority of law," the indictment alleges a violation of section 424.

In sustaining defendants' demurrers to the section 424 violations alleged in the indictment, the trial court incorrectly focused on the purportedly lawful act of settling the

lawsuit and ignored the additional allegation that the identified supervisors appropriated a portion of the settlement money to their own use without authority of law by obtaining a kickback or bribe. The alleged act of approving a settlement knowing it includes an appropriation of money, a portion of which would go to their own use, is the act alleged to be without authority of law.

The supervisors' alleged act of approving a settlement they know includes an unlawful appropriation of money to their own use does not require an inquiry into the motives of the supervisors and therefore does not violate the separation of powers doctrine. Consequently, the trial court also incorrectly relied on *D'Amato* to sustain defendants' demurrers to target crime 3 of the conspiracy charge, and counts 12 and 13.

In *D'Amato*, the defendant city administrator recommended formation of a joint powers committee in order to obtain funding for a city project, and then the defendant approved a contract with his codefendant's consulting firm to act as the project manager. The codefendant, who was also the city's director of public works, was indicted for having a conflict of interest in violation of Government Code section 1090, and the defendant city administrator was charged with aiding and abetting the codefendant in committing that violation.

The court in *D'Amato* held the separation of powers doctrine precluded prosecution of the defendant city administrator for aiding and abetting the codefendant in violating Government Code section 1090 because, absent a financial interest on the part of the city administrator (and thus presumably his own conflict of interest), the

prosecution was based on the city administrator's legally protected legislative acts. In particular, the court first observed that the object of Government Code "'section 1090 of prohibiting individuals "from being financially interested in any contract made by them in their official capacity or by the body or board of which they are members is to insure absolute loyalty and undivided allegiance to the best interest of the [government agency] they serve and to remove all direct and indirect influence of an interested officer as well as to discourage deliberate dishonesty. [Citations.]" [Citation.]' [Citation.]" (*D'Amato*, *supra*, 167 Cal.App.4th at p. 868.) "'The evil to be thwarted by section 1090 is easily identified: If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality.' [Citation.] Thus, where a public official holds a personal interest, criminal liability may accrue even in the absence of 'actual fraud, dishonesty, unfairness or loss to the governmental entity, and . . . without regard to whether the contract in question is fair or oppressive.' [Citation.]" (*D'Amato*, at pp. 868-869.) "By creating a conclusive presumption of divided loyalty where a public official holds a personal financial interest, the Legislature avoided the prospect of executive and judicial officers delving into the subjective motivations of public officials performing their legislative duties. This respect for the deliberative processes of local governmental agencies derives from the separation of powers doctrine, embodied in the California Constitution, article III, section 3: 'The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise

either of the others except as permitted by this Constitution.'" (*Id.* at p. 869.) "When the Legislature confers legislative power on a municipal body, a judicial or executive body may not interfere with that legislative power, except as the Legislature authorizes. [Citation.] [¶] 'An . . . important corollary of the separation of powers doctrine is courts cannot inquire into the impetus or motive behind legislative action.' [Citation.] '[T]he rule barring judicial probing of lawmakers' motivations applies to local legislators as well as to members of the state Legislature or of Congress.' [Citation.]" (*D'Amato*, at pp. 869-870.)

Unlike *D'Amato*, the indictment at issue here alleges the identified supervisors had a financial interest in the money they appropriated for the settlement and therefore violated section 424 by appropriating funds to their own use without lawful authority. No inquiry into their subjective motives is necessary.

The indictment alleges that defendant Biane was a county supervisor and therefore subject to liability under section 424. There are no similar allegations in the indictment with respect to the remaining defendants. The next issue we must resolve is whether the other named defendants, none of whom are alleged to be officers of the county, or persons charged with the receipt, safekeeping, transfer, or disbursement of public moneys, can be held criminally responsible on a theory of aiding and abetting or conspiracy to violate section 424.

Long ago, in *People v. Little* (1940) 41 Cal.App.2d 797 (*Little*) this court resolved that issue: "If authority be needed to support the conclusion that a person who is not an

official may be guilty, as a principal, in the crime of misuse of public funds, it may be found in the case of *People v. West* [(1935)] 3 Cal.App.2d 568 . . . ." (*Id.* at p. 805.) In *People v. West*, a deputy county treasurer loaned county funds to the defendant in return for the defendant's check which was worthless because it was drawn on the defendant's closed bank account. The defendant was charged with and convicted of violating section 424 on the theory of aiding and abetting, i.e., being the recipient of the embezzled money. The conviction was affirmed on appeal. Similarly, in *Little*, the defendant was charged with and found guilty of violating section 424 by embezzling public funds based on his conduct of receiving and spending money his girlfriend embezzled from her job as a bookkeeper with the city water department. That conviction was affirmed on appeal.

In this case, defendant Burum's alleged act of offering and/or giving kickbacks or bribes to the county supervisors in return for their alleged act of approving the $102 million settlement is the conduct that renders the settlement an appropriation "not authorized by law," and as such, a violation of section 424. Defendants Erwin and Kirk are alleged to have acted as the agents of defendant Burum in offering the bribe or kickback that in turn caused the county supervisors to have an interest in the settlement. The allegations adequately allege a public offense, namely a violation of section 424.

For the noted reasons, we conclude the trial court should have overruled defendants' demurrers to counts 12 and 13, and to target crime 3 of the conspiracy charge. We will reverse the order sustaining the demurrers to those allegations and counts.

3. *Improper Lobbying in Violation of Government Code Section 9054 (Alleged in Count 1 as Target Crime 4, and in Count 9 Against Defendant Kirk)*

The indictment alleges as target crime 4, that defendant Kirk violated Government Code section 9054 by conspiring with defendant Burum and his alleged agent defendant Erwin, to improperly influence San Bernardino County Supervisor Gary Ovitt to vote in favor of the Colonies settlement. The indictment charged defendant Kirk in count 9 with improper lobbying in violation of Government Code section 9054. Defendant Kirk demurred to the allegations on the ground that Government Code section 9054 only applies to the State Legislature. The trial court overruled his demurrer. Defendant Kirk challenges that ruling in his petition for writ of mandate. Defendants Burum and Erwin also contend in their writ petitions that Government Code section 9054 applies only to members of the State Legislature, and therefore the trial court should have sustained their demurrers to target crime 4 of the conspiracy charge. We disagree and conclude the trial court correctly overruled their demurrers.

Government Code section 9054 states, in pertinent part, that, "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."

Defendants contend in their writ petitions that the phrase "a legislative body" is not defined in Government Code section 9054, and when viewed in context, refers only

to the State Legislature and not a county board of supervisors. We do not share their view.

"Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them 'their usual and ordinary meaning.' [Citation.] 'The statute's plain meaning controls the court's interpretation unless its words are ambiguous.' [Citations.] 'If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' [Citation.]" (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387-388.)

We do not share defendants' view that the phrase "a legislative body" as used in Government Code section 9054 is ambiguous, but even if we were to agree, we nevertheless would not agree with their claim that the Legislature intended the phrase to mean the California State Legislature and not other legislative bodies such as a county board of supervisors. Defendants base their claim in part on legislative history, including margin notes contained in the chaptered bill, and also on the fact that section 9054 is located in a part of the Government Code that purportedly pertains only to state government, namely "Title 2, (Government of the State of California), Division 2, (Legislative Department), Part 1, (Legislature), Chapter 1.5, (General), Article 3, (Crimes against the Legislative Power)."

Despite its placement in the code, it is apparent from other provisions in Article 3—all adopted in 1943 as part of the codification of the Government Code (see Stats. 1943, ch. 134, p. 809)—that the California Legislature distinguished between the "California Legislature" and "a legislative body." The Government Code refers to the "California Legislature," sometimes also accompanied by a reference to "either of the houses composing it" when it means the California State Legislature. (See, e.g., Gov. Code, §§ 9050, 9051, 9052, 9053, 9053.5.) In using the phrase "a legislative body" in Government Code section 9054, the Legislature did not intend, as defendants claim, to limit that section only to the California Legislature. To put it bluntly, if the Legislature had meant to limit the statute in the manner defendants contend, the Legislature would have said so.

We also do not share defendants' view that the phrase "improperly influence" used in Government Code section 9054 is unconstitutionally vague and/or overly broad.

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations.]" (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

The phrase "improperly influence" means "'the use of personal, or any secret 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.'" (*Crawford v. Imperial Irrigation Dist.* (1927) 200 Cal. 318, 321-322.) Government Code section 9054 makes it a felony for a person to ask for or obtain money (or other thing of value) upon the pretense, representation, or claim that the person can or will use personal, secret or sinister influence on a member of a legislative body in regard to a vote or legislative matter.

In arguing the statute is vague, defendant Erwin cites examples of conduct that could constitute "improper influence," such as one legislator offering to vote for another legislator's bill if that legislator were to return the favor. That conduct does not violate Government Code section 9054 because there is no solicitation of money or a thing of value by the first legislator. Contrary to defendant Erwin's claim, the statute does not criminalize legitimate advocacy; it makes it unlawful for a person to claim in return for money or some item of value that one can "improperly influence in any manner the action of any member of a legislative body in regard to any vote or legislative matter." The statute does not criminalize protected speech, as defendants contend; it criminalizes influence peddling, i.e., claiming in return for any form of compensation that one can and/or will improperly influence a member of any legislative body in regard to a vote or other matter. In short, and contrary to defendants' assertions, Government Code section 9054 does not make it unlawful for a person to simply say he or she can improperly influence a member of a legislative body.

For each of the reasons discussed, we reject defendants' various challenges to the constitutionality of Government Code section 9054 and conclude the trial court properly

overruled their demurrers to target crime 4 in the conspiracy charge, and defendant Kirk's demurrer to count 9.

4. ***Conflict of Interest in Violation of Government Code Section 1090 (Alleged in Count 1 as Target Crime 5, and in Count 11 Against Defendants Burum and Erwin, for Aiding and Abetting Defendant Biane, Defendant Kirk and Postmus)***

Count 11 of the indictment charges defendants Burum and Erwin with violating Government Code section 1090 by aiding and abetting defendants Kirk and Biane, and Supervisor Postmus, to commit a conflict of interest. The conspiracy alleged in count 1 of the indictment identifies Government Code section 1090 as target crime 5. Defendants Burum, Erwin and Kirk demurred to count 11 and the conspiracy allegation in count 1 based on target crime 5 on the ground that, as a matter of law, the statute does not apply to the acts of a private citizen. The trial court disagreed and overruled their demurrers.

Defendants Burum and Erwin contend in their writ petitions that the trial court erred and that Government Code section 1090 only applies to government officials and government employees, but not to private citizens. Therefore, as a matter of law, they cannot violate that statute and the trial court should have sustained their demurrers. We agree.

Government Code section 1090 states, "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or

employees be purchasers at any sale or vendors at any purchase made by them in their official capacity." The penalty for being a public officer or other person precluded by law from making a contract in which the person has an interest is set out in Government Code section 1097.[5]

As previously discussed in *D'Amato*, *supra*, 167 Cal.App.4th 861, our colleagues in Division Three of this court observed that "the Legislature's wording of [Government Code] section 1090 evinces the intent to exclude aider and abettor liability. Specifically, 'where 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. [Citation.] 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.]' [Citation.]" (*Id.* at p. 873; see also *In re Meagan R.* (1996) 42 Cal.App.4th 17, 24.)

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[5] Government Code section 1097 states, "Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any member of the governing board of a school district, who willfully violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state."

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.

III.

CONCLUSION

The trial court correctly sustained the demurrer of defendant Burum to target crimes 1 and 2 of the conspiracy alleged in count 1, and to the crimes charged in counts 4, 5, 7 and 8. We will affirm that ruling and will further direct the trial court to strike target crimes 1 and 2 in their entirety as to defendant Burum.

The trial court correctly overruled defendant Erwin's demurrer to target crimes 1 and 2, and to counts 4 and 7, which allege, respectively, that he conspired with defendant Burum and with William Postmus, a member of the San Bernardino County Board of Supervisors, to ask for and/or receive a bribe, and aided and abetted Postmus in committing those crimes. The trial court, however, erred in overruling defendant Erwin's demurrer to counts 5 and 8 that allege he aided and abetted in committing those same crimes with respect to defendant Biane as the recipient of the bribe. Therefore, we will issue a writ of mandate directing the trial court to sustain defendant Erwin's demurrer to counts 5 and 8 and dismiss those counts as to him.

The trial court erred in sustaining defendants' demurrers to the conspiracy alleged in count 1 based on target crime 3, the crime of misappropriating public funds in violation of section 424, as well as to count 12, which alleged defendant Biane violated that section, and count 13, which alleged defendants Kirk, Burum and Erwin aided and abetted defendant Biane and William Postmus in violating that section. Therefore, we will reverse the trial court's ruling in that regard.

The trial court also erred in overruling the demurrers of defendants Erwin and Burum to target crime 5, which alleges they conspired with Postmus, defendant Biane and defendant Kirk to commit the crime of having a conflict of interest in violation of Government Code section 1090. The trial court also erred in overruling the demurrers of defendants Erwin and Burum to count 11, which charged them with aiding and abetting Postmus, defendant Biane and defendant Kirk in violating Government Code section 1090. Therefore, we will direct a writ of mandate issue commanding the trial court to sustain the demurrers of defendants Burum and Erwin to count 11, and target crime 5 of the conspiracy alleged in count 1.

We also will deny defendant Kirk's petition for writ of mandate because the trial court did not err in overruling his demurrer to count 9, the charge that he misappropriated funds in violation of Government Code section 9054, and target crime 4 of the conspiracy charged in count 1, which alleged defendant Kirk conspired with defendant Burum to commit that crime.

Finally, we reject defendant Burum's contention in his writ petition that we must dismiss the conspiracy charged in count 1, because we conclude it adequately alleges two viable target crimes—target crime 3, which alleges he conspired with defendants Erwin, Kirk and Biane and with Postmus to misappropriate public funds in violation of Penal Code section 424, and target crime 4, which alleges he conspired with Kirk to improperly lobby Supervisor Ovitt in violation of Government Code section 9054. The indictment, although lengthy and perhaps imprecise, adequately alleges conspiracy to commit the two noted crimes.

IV.

DISPOSITION

The trial court's ruling sustaining defendants' demurrers to counts 12 and 13, and the related predicate crimes alleged in the conspiracy charged in count 1, is reversed. The trial court is further directed to sustain in its entirety defendant Burum's demurrer to the conspiracy alleged in count 1 based on the predicate crimes in Penal Code section 165 and Penal Code section 86 and to strike those allegations as to defendant Burum.

A writ shall issue directing the Superior Court of San Bernardino County to:

(1.) Sustain the demurrer of defendants Burum and Erwin to count 11, and the related predicate crime alleged in the conspiracy charged in count 1;

(2.) Sustain the demurrer of defendant Erwin to counts 5 and 8, and the related predicate crime alleged in count 1, and dismiss counts 5 and 8.

Petitioners are DIRECTED to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

The trial court's ruling is otherwise affirmed, and the matter is remanded to the trial court.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Paul Biane, et al.** No.: **E054422**

I declare:

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

On December 10, 2012, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Stephen G. Larson (2 copies)
Attorney at Law
Arent Fox LLP
555 West Fifth Street, 48th Floor
Los Angeles, CA 90013

Mary Carter Andrues (2 copies)
Attorney at Law
Arent Fox LLP
555 West Fifth Street, 48th Floor
Los Angeles, CA 90013

David M. Goldstein (2 copies)
Attorney at Law
10535 Foothill Blvd., Suite 300
Rancho Cucamonga, CA 91730

Rajan R. Maline (2 copies)
The Law Offices of Rajan R. Maline
3750 University Avenue, #680
Riverside, CA 92501

Steven L. Harmon
Law Offices of Grech & Firetag
7095 Indiana Avenue, Suite 200
Riverside, CA 92506

Paul Grech, Jr. (2 copies)
Law Offices of Grech & Firetag
7095 Indiana Avenue, Suite 200
Riverside, CA 92506

Chad W. Firetag (2 copies)
Law Offices of Grech & Firetag
7095 Indiana Avenue, Suite 200
Riverside, CA 92506

R. Lewis Cope
Deputy District Attorney
San Bernardino District Attorney's Office
Public Integrity Unit
303 W. 3rd Street, 5th Floor
San Bernardino, CA 92415

Clerk of the Court
Attn: Honorable Brian McCarville
San Bernardino County Superior Court
401 N. Arrowhead Avenue
San Bernardino, CA 92415-0063

Clerk of the Court
California Court of Appeal
Fourth Appellate District, Div. 2
3389 12th Street
Riverside, CA 92501

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **December 10, 2012** to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 10, 2012, at San Diego, California.

Bonnie Peak
Declarant

Bonnie Peak
Signature

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