In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

PAUL BIANE, et al.,

Defendants and Respondents.

Case No. S207250

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

REPLY BRIEF ON THE MERITS

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Burum offers no answers to the most troubling questions raised by the opinion below. Why should a person who conspires to and does aid and abet the receipt of bribes through threats, extortion and coercion escape liability for those crimes for the sole reason he committed the additional act of offering bribes? Why should an underling in a bribery scheme face greater criminal liability than the mastermind who directed his conduct? Why should principles of legislative immunity protect the government's adversaries from judicial inquiry into their criminal state of mind when making deals with corrupt public officials?

The Court of Appeal carved out two exceptions to the expansive definition of aiding and abetting liability in Penal Code section 31, holding that bribe offerors cannot aid and abet the receipt of bribes, and Government Code section 1090 is not subject to aiding and abetting liability. No legal authority compelled these holdings, and the court altogether failed to recognize the disastrous public policy implications of the new rules it created. Burum's Answer Brief on the Merits fails to satisfactorily defend either of these two holdings.[1]

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[1] Burum's brief contains the demonstrably false assertion that "[h]ere, the Indictment alleges that Messrs. Burum and Erwin had the intent to give bribes-not to aid and abet their receipt. Thus, the Indictment fails to meet its primary purpose of giving Messrs. Burum and Erwin "fair notice" of the alleged crimes." (Answer Brief on the Merits, p. 10, fn. 5; see also p. 22.) But the indictment is crystal clear in charging Burum and Erwin with aiding and abetting the receipt of bribes. (CT 13-15, counts 4, 5, 7 and 8 [charging Burum and Erwin with aiding and abetting the receipt of bribes by Supervisors Postmus and Biane].)

Also, Burum improperly argues his use of threats and extortion constituted constitutionally protected speech and therefore he believes the prosecution is "constitutionally suspect." (Answer Brief on the Merits, p. 21, 22, fn. 8.) This claim has no place in Burum's Answer Brief on the Merits. Burum never challenged the constitutionality of the charges in the

(continued...)

I. THE MESSAGE BETWEEN THE LINES OF ERWIN'S JOINDER

Erwin's joinder in Burum's arguments on the conspiracy and bribery charges does not help his position. First, Burum's arguments turn on his status as the bribe offeror and therefore do not apply to Erwin, who is alleged to be an intermediary. Second, Erwin expressly declines to challenge the Court of Appeal's holding that he was properly charged with aiding and abetting the receipt of bribes by Postmus. (Joinder, p. 2, fn. 1.) This position undermines the Court of Appeal's holding that Erwin was improperly charged with aiding and abetting the receipt of bribes by Biane, because the analysis of those issues should be identical. (See Opening Brief on the Merits, pp. 19-21.) Erwin's decision not to challenge the two bribery charges which remain intact against him allows him to avoid an uncomfortable truth - - that the opinion below provides an incentive to intermediaries to throw in a bribe of their own (e.g., a few extra dollars, tickets to a ball game) so that they, too, can claim entitlement to the bribe-offeror exemption to aiding and abetting liability created by the Court of Appeal.

Neither Erwin nor Burum has refuted the most problematic corollary of the Court of Appeal's holding - - if Erwin had personally offered Postmus a bribe, he would not be facing bribery charges. That is not and should not be the law.

(...continued)
trial court, and the issue was not litigated in the Court of Appeal. Burum's Answer to the Petition for Review did not ask this Court to grant review on that issue. It should not be considered.

II. NEITHER LAW NOR PUBLIC POLICY SUPPORTS THE COURT OF APPEAL'S NARROWING OF AIDING AND ABETTING LIABILITY IN THE PUBLIC CORRUPTION CONTEXT

No California case has heretofore exempted bribe offerors from liability for conduct that would otherwise support charges of conspiracy and aiding and abetting the receipt or bribes, but the Court of Appeal ruled that bribe offerors are immune from liability for actions they take to compel the recipients to accept their offer. Also, Burum cites to no provision of criminal law which has heretofore been held to fall completely outside the reach of Penal Code section 31, but the Court of Appeal created an exception to aiding and abetting liability for Government Code section 1090. Neither holding has a rational basis in law or public policy. All charges against respondents should be reinstated.

A. Burum's Attempt to Resuscitate the *Clapp* Rule Fails, As Does His Attempt to Defend the Court of Appeal's Application of Accomplice Testimony Principles to Limit a Bribe Offeror's Criminal Liability

In their Opening Brief on the Merits, the People explained all the reasons this Court should overrule *People v. Clapp* (1944) 24 Cal.2d 835 (*Clapp*), or limit its application to the accomplice testimony context, or find that based on its express language, it does not apply to this case. (Opening Brief on the Merits, pp. 7-29.) Burum's efforts to revive *Clapp* and apply it here are not persuasive.

Burum characterizes Justice Schauer's dissent in *Clapp*, and his subsequent dissent nine years later in *People v. Buffum* (1953) 40 Cal.2d 709 (*Buffum*), as "[a] single Justice's disagreement" with the rule. (Answer Brief on the Merits, p. 10.) But cases cited in the latter dissent reveal that Justice Schauer's concerns were well founded, as discussed in the Opening Brief on the Merits. (*Buffum, supra*, 40 Cal.3d 709, citing *People v. Lima*

(1944) 25 Cal.2d 573, 579 (*Lima*); *People v. Harper* (1945) 25 Cal.2d 862, 877 (*Harper*), and *People v. Wallin* (1948) 32 Cal.2d 803, 808 (*Wallin*).)

Lima supports the People's position, because it considered the facts to determine that a "well established exception" to the common law rule that a thief was not an accomplice of a person who received stolen property applied, where there was a conspiracy or a prearranged agreement between the thief and receiver. (*People v. Lima, supra*, 25 Cal.2d at p. 578, citing *People v. Shaw* (1941) 17 Cal.2d 778, 798, 799.) *Lima* arose in the theft context, where a longstanding common law rule prevented a person from being convicted of receiving stolen property if there was evidence implicating him in the theft. (*People v. Allen* (1999) 21 Cal.4th 846, 853.) Even the common law rule was subject to certain exceptions, depending on the facts. (*Id.* at pp. 874-875.) And, as Burum points out, the 1992 amendment to Penal Code section 496 eliminated the limitation on aiding and abetting liability which had existed at common law. Since no similar common law rule exists in the bribery context, no special legislation is needed, and the general provisions of Penal Code section 31 apply. *Lima* illustrates that whether a person is an accomplice is a question of fact.

Burum attempts to distinguish *People v. Wallin, supra*, 32 Cal.2d at page 808, and *People v. Wayne* (1953) 41 Cal.2d 814, based on alleged factual differences between those cases and this case. His analysis proves the People's point that the determination of whether a person is an accomplice depends on the facts. Here, the People were denied the opportunity to establish the facts. (Answer Brief on the Merits, pp. 12-13.)

Burum cites *People v. Bompensiero* (1956) 142 Cal.App.2d 693, 708, as one of several cases he claims "followed the [*Clapp*] rule, recognizing that it is well settled." (Answer Brief on the Merits, p. 13.) But the rule Burum cites from Bompansiero is not the "*Clapp* rule" (See, Answer Brief on the Merits, p. 13 [erroneously suggesting the statement from

Bompensiero "it is well settled that the giver and receiver of a bribe are not accomplices under section 1111" is the "*Clapp* rule"]. In fact, *Bompensiero* did not cite *Clapp* at all. Further, the statement is qualified, referring to "accomplices under section 1111", which bolsters the People's position that the definition of accomplice in that section applies only when the issue arises under that section. While Burum is correct that *People v. Bennett* (1955) 132 Cal.App.2d 569, 581, applied the *Clapp* rule, Bennett is completely inapplicable here, because it held that the victims of bribery were not accomplices whose testimony required corroboration. (*Ibid.*) Burum is no victim. Finally, in *People v. Grayson* (1948) 83 Cal.App.2d 516, 518-19, another section 1111 case, the court applied *Clapp* to find that a person who places a bet is not an accomplice of the person who receives the bet because the crime requires two or more persons for its commission. (*Ibid.*) That is not the case with agreeing to receive a bribe. (*People v. Diedrich* (1982) 31 Cal.3d 263, 273-274.)

Burum correctly points out that *People v. Wolden* (1967) 255 Cal.App.2d 798 (*Wolden*), is referenced in the bench notes to CALCRIM 2600 and 2603. (Answer Brief on the Merits, P. 13.) But this simply explains the origin of the confusion upon which Burum capitalized to make his novel claim that *Wolden* decided an issue of substantive bribery law. *Wolden* decided an issue of accomplice testimony under Penal Code section 1111. Its misplacement in the bench notes for substantive bribery law does not alter its significance. "Cases are not authority for propositions not considered." (*People v. Johnson* (2012) 53 Cal.4th 519, 528.)

People v. Thompson (1954) 122 Cal.App.2d 567, the only case considering the application of *Clapp* to an issue of aiding and abetting liability, held that *Clapp* did not apply. There, defendants were jointly charged with nine counts of violating Government Code section 6200 and nine counts of violating Government Code section 6201, which prohibited

the theft, destruction or mutilation of a public record or paper. Section 6200 applied to public officers and was a felony; section 6201 applied to individuals who were not public officers and was a wobbler. Defendant Thompson was a deputy clerk of the court. Defendant Lazarus was the owner of a parking lot. Lazarus would issue traffic citations, collect the fines, and give the citations to Thompson, who would dispose of the matters and split the money with Lazarus. (*Id.* at p. 572.) Each count alleged that Thompson was a civil service employee and Lazarus aided and abetted the offense. Defendants were convicted of eight counts of violating section 6200, and acquitted of the charges under 6201. (*Id.* at p. 569.)

Relying on the *Clapp* rule, defendant Lazarus, whose guilt was premised on aiding and abetting a public officer, argued that since another statute (section 6201) specifically applied to his conduct as a non-public official, section 6201 created an exception to the broad provisions of aiding and abetting liability under section 31. The Court of Appeal disagreed. (*Thompson, supra*, 122 Cal.App.2d at p. 569.)

The court held that *Clapp* is limited to cases where two or more persons necessarily participate, and that exceptions to liability under 31 exist only where the legislation affirmatively indicates the section was not intended to apply. The court explained that since 6201 did not require the participation of two persons and could be committed by an officer alone, there was no occasion for the Legislature to proscribe punishment for a non-officer who might be a participant in the crime, and therefore there was no significance to the omission by the Legislature of a non-officer who participates in the act. (*Thompson, supra*, 122 Cal.App.2d at p. 570.)

> Inasmuch as the *Clapp* and *Buffum* cases are not in point we think there is no authority for the proposition that one who aids and abets another in the commission of a crime may not be prosecuted as a principal if, perchance, he would have been subject to prosecution for a lesser offense if he, alone, had

> committed the forbidden act. If it does not affirmatively appear from the legislation that the law which prescribes punishment for the lesser offense was intended to exclude prosecution for the greater, such an intention cannot be read into it by way of interpretation. So far as the offenses of the defendants are concerned we cannot discover in the scheme of sections 6200 and 6201 an implied intention of the Legislature to excuse a nonofficer who aids and abets an officer in a violation of section 6200 from any of the consequences which would fall upon the latter. The officer's crime involves a breach of trust and for that reason is made a more serious offense than a like act of a nonofficer. When the latter aids and abets in a violation of section 6200, in the eyes of the law he places himself in the category of an officer and becomes a principal in the greater crime by virtue of section 31. We conclude that Lazarus was properly convicted as a principal in the violations of section 6200.

(*Thompson, supra*, 122 Cal.App.2d at p. 571.)

The same reasoning applies here. Burum points to nothing in the statutory scheme or legislative history that reveals an intent to exclude bribe offerors from liability for aiding and abetting the receipt of a bribe.

Respondents' argument can be summarized as follows: Penal Code section 1111 defines an accomplice as "one liable to prosecution for the identical offense charged against the defendant on trial." The crimes of offering bribes and receiving bribes require different criminal intents. Therefore, offerors and receivers of bribes are not liable to prosecution for the identical offense and are not accomplices of one another.

That reasoning is flawed. While it may be true that the statutory definition of each crime makes it possible to commit one without committing the other, it does not follow that they are mutually exclusive, or that it is impossible for one person to commit both crimes. No case has held that to be so.

Respondents' failure to appreciate this distinction is clear from their reliance on *People v. Bunkers* (1905) 2 Cal.App. 197, 204, *People v. Lips*

(1922) 59 Cal.App. 381, and *People v. Davis* (1930) 210 Cal. 540, 557. Those cases support the People's position that whether a person is an accomplice depends on the facts.

In *Bunkers*, the court confined its inquiry to whether there was sufficient evidence before the jury to conclude that testifying witnesses were not accomplices, so that their uncorroborated testimony supported the defendant's conviction. (*Bunkers, supra*, 2 Cal.App. at p. 203.) Similarly, in *Lips*, the court reviewed the evidence presented at trial to conclude that a witness was in no way concerned with the officers in asking for, receiving or agreeing to receive a bribe, and based on that evidence she was not an accomplice whose testimony required corroboration. (*Lips, supra*, 59 Cal.App. at p. 385.) Finally, in *Davis*, the analysis makes it clear that the determination of whether a person is an accomplice depends on his role in the transaction as determined by the evidence at trial. (*Davis, supra*, 210 Cal. at p. 557.) Thus, each of those cases recognized the question of whether a person is an accomplice depends on the facts. The holding below sustaining the demurrers prevented the People from proving the allegations in the indictment which would show that unlike the witness in *Lips*, Burum was very involved with the "opposite end of the transaction." (See *Lips, supra*, at p. 385.)

Burum seems to suggest the People elevate form over substance in arguing that *Clapp* is expressly inapplicable to charges under Penal Code section 165 because that single provision prohibits both the offer and acceptance of a bribe. He argues the organizational structure of the statute should not override the rationale of *Clapp* and *Wolden*. (Answer Brief on the Merits, p. 21.) But the "rationale" of *Clapp* and *Wolden* is based entirely on the organizational structure of the statute. The *Clapp* rule specifically states that where "a statutory provision so defines a crime that the participation of two or more persons is necessary for its commission,

but prescribes punishment for the acts of certain participants only, and another statutory provision proscribes punishment for the acts of participants not subject to the first provision, it is clear that the latter are criminally liable only under the specific provision relating to their participation in the criminal transaction." (*Clapp, supra*, 24 Cal.2d at p. 838, emphasis added, citations omitted.) No justification other than the statutory organization is offered anywhere in the case law to explain the *Clapp* rule.

Burum argues, "The Bribe Giver Lacks the Requisite Intent to Aid and Abet the Receipt of a Bribe." (Answer Brief on the Merits, p. 14.) Not this bribe giver. While the People have acknowledged the mere act of offering a bribe may not be sufficient in itself to establish the intent to aid and abet the receipt of the bribe, Burum did much more than simply offer a bribe and the indictment so alleges, stating that Burum used threats, extortion and coercion to compel the recipients to accept the bribes.

Burum states that California courts have long recognized that the bribe giver does not have the same intent as the bribe receiver. (Answer Brief on the Merits, p. 14.) While true, this observation has no legal significance. It goes without saying that one defendant can simultaneously entertain the intent to commit multiple crimes, and generally he can be charged with all the crimes he commits. (See *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268; Pen. Code, § 954.) Here, the indictment makes it clear that Burum simultaneously entertained the intent to offer a bribe, and the intent to compel the recipients to accept the offer using threats, coercion and extortion. And in any event, Burum's point is unclear since he was not charged with offering a bribe.

Burum confuses the concepts of intent and motivation, claiming "it is nowhere alleged – nor could it logically be alleged – that Mr. Burum's intent or purpose in offering bribes was so that Messrs. Postmus and Biane

would benefit." (Answer Brief on the Merits, p. 15.) No such allegation is required. The crime of aiding and abetting the acceptance of a bribe does not require that the aider and abettor specifically intend to enrich the acceptor, just that he specifically intend the recipient to accept or agree to accept the bribe, for whatever reason. Here, Burum's *intent* to coerce the recipients into accepting the bribe was *motivated* by his own prospects for financial gain if they did.

Burum spins words to maintain his position that the crime of accepting a bribe requires the participation of two or more persons notwithstanding this Court's contrary holding in *People v. Diedrich, supra*, 31 Cal.3d at pages 273-274. (Answer Brief on the Merits, p. 18.) He seems to argue there is a distinction between crimes which require the participation of two persons as an element of the crime, and crimes for which participation is necessary but not an element, that the crime of accepting a bribe falls within the latter category, and the *Clapp* rule applies to that category of cases. (Answer Brief on the Merits, p. 18.) Burum's argument is confusing and without legal support.

The example Burum offers illustrates this confusion. Burum claims, "[t]hus, for example, *Clapp* would not apply to burglary because that crime can be committed by one person acting completely alone. Bribery, on the other hand, always requires at least a second person. The cases cited by the People merely hold that the second person does not necessarily have to be criminally liable himself in order for a crime to occur." (Answer Brief on the Merits, p. 19.) However, like bribery, burglary always requires the involvement of a second person, even if that person is not criminally liable. A person cannot unlawfully enter his own property, so every burglary involves a person whose home or business was burglarized. Burum's effort to distinguish *Diedrich* fails.

The People's Opening Brief on the Merits explained that basic rules of statutory interpretation compel the result that the definition of accomplice in Penal Code section 1111 applies only to determinations of whether a witness's testimony requires corroboration within the meaning of that provision. (Opening Brief on the Merits, pp. 18-25.) The Court of Appeal improperly relied on that definition to limit the scope of aiding and abetting liability.

The Court of Appeal's application of Penal Code section 1111 jurisprudence to questions arising under Penal Code section 31 subverts the legislative purpose of section 1111. Section 1111 was enacted to prevent convictions based solely on the inherently unreliable self-serving statements of accomplices. (*People v. Belton* (1979) 23 Cal.3d 516.) Yet, by concluding that bribe offerors and acceptors can never be accomplices of one another no matter what the facts, the opinion allows bribery convictions in every case to be based on the uncorroborated testimony of another party to the bribe. In this case, for example, Biane, Kirk and Erwin will have no basis to complain if circumstances develop so that the prosecution obtains convictions at trial based solely on Burum's inherently suspicious, uncorroborated testimony.

Burum does not address the irony that applying section 1111 in this context directly undermines its purpose, but instead, he turns the argument around, claiming "if the People prevail in this appeal, corrupt public officials will more easily escape punishment," because "under Section 1111, the giver is an accomplice of the receiver, and his testimony must be corroborated." (Answer Brief on the Merits, pp. 25-26.) Burum misunderstands the People's position, and this mischaracterization pervades his brief. The People do not claim, as Burum suggests, that the offeror and acceptor of bribes are accomplices of one another, no matter what. Rather, the People's position is that in the bribery context, as in every other area of

law, the question of whether a person is an accomplice (whether that question arises under section 1111 or section 31) is a question of fact. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103). If the evidence establishes that a bribe offeror's conduct meets the definition of aiding and abetting the acceptance of a bribe, Penal Code section 31 makes it clear he is a principal in that crime and no other provision of law limits his liability therefor.

Burum also surmises that the prosecution charged him with aiding and abetting the receipt of bribes in order to "resurrect time-barred charges" of offering a bribe, and that the People used an improper charging scheme to plead around the statute of limitations, claiming "[a]ll future prosecutors need to do to avoid this result is to bring legally competent charges in a timely manner." (Answer Brief on the Merits, pp. 24-25, 33.) Burum is wrong.

In the first place, his argument unfairly shifts responsibility for the length of the investigation from himself to the prosecution team. The indictment alleges conduct by Burum that spanned more than four years, and involved an enormous, complex and intricate conspiracy with acts that occurred on two continents and included the bribery of two public officials and a public employee, months of efforts to compel them to accept the bribes, and additional acts to cover up his payment of those bribes. The length of the investigation was a direct result of Burum's elaborate scheme to conceal his crimes, which necessitated a lengthy, painstaking and methodical investigation. Through their diligence, investigators ultimately discovered evidence of a multitude of crimes committed by a number of individuals. Only those that are not time-barred were charged.

Second, even if the prosecutor's charging motivations were relevant, which Burum fails to establish, the indictment reveals the flaw in Burum's assumption that the charges were motivated solely by the expiration of the

statute of limitations for the crime of offering a bribe. This is clearly erroneous because Erwin, who is not alleged to have offered any bribes, was charged in the same counts with the same crimes. As to both defendants, and as set forth in detail in the Petition for Review, the charges are based on their conduct which was intended to and did compel the recipients to accept the bribes, including threats, coercion and extortion. While Burum's myopic view of the indictment focuses entirely on his offer of bribes, the indictment itself reveals a far broader factual basis supporting the charges. Like Erwin, Burum is criminally liable for that conduct whether or not he offered any bribes, and there is no support for his assumption that he would not have been charged with these crimes if the crime of offering bribes remained viable

Burum relies on *Stogner v. California* (2003) 539 U.S. 607, 609 [123 S.Ct. 2446, 156 L.Ed.2d 544], for the proposition that the People violated due process by using the discovery provision in Penal Code section 803, subdivision (c) to resurrect a time-barred prosecution. (Answer Brief on the Merits, p. 33.) His statute of limitations claims were not litigated in the trial court or decided by the Court of Appeal, and are improperly presented here. In any event, this is not a time-barred prosecution. In *Stogner*, the charged crime was time-barred. Here, the charged crime is not.

Here, Respondents were charged with aiding and abetting the receipt of bribes based on conduct that occurred during the period of limitations for that crime. A defendant's commission of uncharged, time-barred offenses is not a defense to his prosecution and conviction for other crimes which are not time-barred. (Cf. *Spaziano v. Florida* (1984) 468 U.S. 447, 456 [104 S.Ct. 3154, 82 L.Ed.2d 340] *People v. Diedrich, supra*, 31 Cal.3d at p. 283; *People v. Whitfield* (1993) 19 Cal.App.4th 1652, 1658, holding that defendants have no right to jury instructions on time-barred lesser offenses.) There is no support in law or public policy to hold otherwise.

In sum, a bribe offeror can be charged with aiding and abetting the receipt of bribes. Accordingly, the bribery charges should be reinstated, including charges that Erwin aided and accepted the receipt of bribes by Biane, for the reasons set forth in the Opening Brief on the Merits. Since the bribery charges are proper, so, too, is the conspiracy to commit bribery. Burum's argument that the conspiracy is invalid is unconvincing.

With respect to the conspiracy, the Court of Appeal cited *Wolden*, which cited *People v. Keyes* (1930) 103 Cal.App. 624, 646 [Opinion on Denial of Rehearing] (*Keyes*), for the proposition that the giver and receiver of a bribe are not guilty of a conspiracy because the two crimes require different motives. To the extent *Keyes* is read to stand for that proposition, its underpinnings have been discredited and it should be overruled. Alternatively, it can be harmonized with existing legal authority by recognizing that it applies only in the rare case where the conspiracy is no broader than the bribery, so the crimes merge. In other words, *Keyes* applies only in the very narrow circumstances where *Wharton's* Rule applies, and Burum acknowledges *Wharton's* Rule does not apply here. (Answer Brief on the Merits, p. 28.)

This Court's brief decision on denying rehearing in *Keyes* cites no legal authority. But its underpinnings are determined by reference to the Court of Appeal opinion it disapproved. That opinion held that the giver and receiver of a bribe could be charged with conspiracy to bribe. In so holding, the court recognized federal case law to the contrary as stated in *United States v. Dietrich* (Neb. 1904) 126 F. 664, *United States v. New York C. and Hr.R.R. Co.* (N.Y. 1906) 146 F. 298, and *Thomas v. United States* (8th Cir. 1907) 156 F. 897. The Court of Appeal distinguished these cases finding they were based on federal laws that did not apply in California, but this Court issued an opinion stating:

> [W]e withhold our approval of so much of the opinion rendered as holds that in California, contrary to rulings elsewhere, an unlawful agreement between two parties, the one to give and the other to receive a bribe, may constitute a criminal conspiracy. It is true that a set of defendants may conspire to give or a set of defendants may conspire to receive or accept a bribe, but bribery requires for its consummation the unlawful concert of one or more persons acting with one or more other persons having a different motive or purpose. That being true, there is in such a case no room for the operation of a charge of conspiracy.

(*Keyes, supra*, 103 Cal.App. at p. 646.)

That holding appears to be based on the reasoning of the aforementioned cases distinguished by the Court of Appeal. As explained in *Thomas, supra*, those cases applied Wharton's Rule. (*Thomas, supra*, 156 F. at p. 904.) As explained in the Opening Brief on the Merits, Wharton's Rule is a very narrow principle of federal common law which does not apply here. (Opening Brief on the Merits, pp. 30-35.) Since *Keyes* relied on Wharton's Rule cases, its reasoning is limited to the very narrow category of cases where Wharton's Rule would apply. As Burum concedes, it does not apply here.

The charged conspiracy was far broader than any individual bribery charge. Not only did the conspiracy include additional parties not charged in the bribery counts, but the complex scheme involved a unique commonality of motive and intent between all parties. Burum needed the votes of three supervisors. Therefore, the goal of the conspiracy was to collectively obtain the acceptance of everyone who was needed to make that happen, including two voting members of the board of supervisors and the Chief of Staff who would exert influence over a third voting member of the board. The acceptance of a bribe by any one conspirator was not sufficient to accomplish the goal of the conspiracy. Everyone had to do

their part. In that regard, Burum shared a common intent and motive with all other members of the conspiracy, including the bribe receivers.

Burum claims support for his position by providing a direct quote from *People v. Calhoun* (1955) 46 Cal.2d 18, 41-42, without stating that it was taken from a dissenting opinion. He references the quote as if it has the authority of law, claiming "Twenty-five years later, the same conclusion [as in *Keyes*] was reached in *Calhoun*." (Answer Brief on the Merits, p. 28.) But the majority in *Calhoun* distinguished *Keyes* because it involved an "elaborate" conspiracy, using reasoning which applies with even greater force here.

Neither *Keyes* nor *Calhoun* involved the unique and egregious facts alleged here, where the bribe offeror committed additional acts beyond the offer of a bribe to coerce a global acceptance of his bribe offer and thereby committed a conspiracy that went far beyond the mere agreement to offer and accept a bribe. Like the determination of whether a bribe offeror has aided and abetted the receipt of a bribe, whether he has conspired to do so depends on the facts.

B. Respondents Have Failed to Offer Any Reason to Extend Legislative Immunity to Private Parties Or to Treat Conflict of Interest Violations Different from Other Provisions of Law Which Hold Private Persons Criminally Liable For Aiding And Abetting Crimes Committed by Public Officials

The People's Opening Brief on the Merits explains that while *D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861 (*D'Amato*) was correctly decided, it was read far too broadly by the Court of Appeal and improperly applied in this case. *D'Amato* applied principles of legislative immunity to preclude aiding and abetting liability against public officials under Government Code section 1090, to avoid judicial inquiry into their state of mind while conducting legislative activity.

The goal of protecting government secrets is not furthered - - indeed, it is substantially undermined - - by the Court of Appeal's extension of legislative immunity to private parties engaged in adversarial proceedings with corrupt government officials. As charged in the indictment, Burum, a private party, was a plaintiff in a lawsuit against San Bernardino County, but he was secretly working with county officials to obtain a massive settlement through unlawful means, and Erwin was working on his behalf. Neither Burum nor Erwin was involved in legislative activity, as required by *D'Amato*. As alleged in the indictment, all parties had a financial interest in the transaction here, which was the critical missing factor in *D'Amato*. Unlike *D'Amato*,the defendants here are private parties, so no provision of law protects judicial inquiry into their intent. Yet the Court of Appeal failed to discuss any of these factors and read a single statement from *D'Amato* ["the Legislature's wording of section 1090 evinces the intent to exclude aider and abettor liability"] as a wholesale exclusion on aiding and abetting liability under Government Code section 1090 rather than an intent to exclude aider and abettor liability under the relevant circumstances discussed therein.

Burum has failed to point to any other provision of law which is entirely exempt from aiding and abetting liability. Other public official crimes are subject to aiding and abetting liability, as set forth in the Opening Brief on the Merits, page 40. Burum fails to offer any persuasive argument in support of a different rule under Government Code section 1090.

Any doubt that private parties can be liable for aiding and abetting crimes by public officials is resolved by *People v. Thompson, supra*, 122 Cal.App.2d 567. There, a deputy clerk was charged with destroying tickets in violation of section 6200, which made the crime a felony if committed by a public officer, and section 6201, which made the crime a misdemeanor

if committed by a non-officer. A private party codefendant was charged with aiding and abetting the commission of each crime. The jury found both defendants guilty of the greater charges involving public officials, and the private party complained that he could only be guilty of the lesser. The court disagreed and found the existence of a specific statute defining liability of a non-officer did not preclude liability for aiding and abetting an officer. (*Id.* at p. 571.)

Aside from the limited exception set forth in *D'Amato*, neither Government Code section 1090 nor Penal Code section 31 nor any other provision of law reveals a legislative intent to categorically exclude Government Code section 1090 from the reach of section 31. Clearly, Burum and Erwin are not entitled to legislative immunity which was the narrow basis of the *D'Amato* holding. The conflict of interest charge (and conspiracy, to the extent it was predicated on a conflict of interest) should be reinstated.

C. Principles of Ex Post Facto Do Not Apply

Burum argues that due process precludes the ex post facto application of the "expansion of liability" sought by the People, explaining that an ex post facto law is any statute or judicial decision which punishes as a crime an act that was innocent when done. (Answer Brief on the Merits, pp. 29-30.) Burum's conduct was never innocent, or reasonably mistaken as innocent. No expansion of liability is sought. Penal Code section 31 provided clear notice to Burum that "all persons" involved in the commission crimes are principals in the crimes so committed.

The People have asked this Court to overrule *Clapp* in order to put an end to further efforts by defendants to capitalize on its flawed reasoning to escape criminal liability. But overruling *Clapp* is not necessary to find in favor of the People, because *Clapp* did not hold that a bribe offeror cannot be liable for aiding and abetting the receipt of a bribe. Similarly, the People

ask this Court to overrule *People v. Keyes, supra*, 103 Cal.App. 624 [Opinion of Supreme Court on Denial of Rehearing], if it reads that opinion as holding that a bribe giver and bribe receiver can never commit a criminal conspiracy. But overruling *Keyes* is not necessary to find in favor of the People, because as explained above, its reasoning is inapplicable in cases like this one where the conspiracy is much broader than the bribery. Finally, as set forth above, *D'Amato v. Superior Court, supra*, is properly decided but inapplicable here. No case has ever held that Government Code section 1090 is categorically exempt from aiding and abetting liability.

Accordingly, this Court need not overrule a single case in order to reinstate all charges against Respondents. The People have demonstrated Burum's position has never had any support in the law.

Burum explains an ex post facto law is any statute or judicial decision which punishes as a crime an act that was innocent when done. (Answer Brief on the Merits, p. 29.) Burum's conduct was never innocent. As set forth above, none of the cases cited on page 31 of the Answer Brief on the Merits held that a person who offers a bribe cannot be liable for aiding and abetting the receipt of a bribe. None of those cases addressed issues of accomplice liability at all; rather, they dealt with the need for corroboration of accomplice testimony. Further, to the extent language in *Keyes* is construed as holding that a bribe offeror and receiver cannot commit a criminal conspiracy, the limited scope of that rule was made clear more than a century ago in *Thomas v. United States, supra*, 156 F. at pages 903-904, to apply only where the agreement which forms the basis of the conspiracy is no greater than the agreement which forms the basis of the bribery charge.

III. REVIEW SHOULD NOT BE GRANTED ON THE ADDITIONAL ISSUE RAISED IN RESPONDENTS' ANSWER TO PETITION FOR REVIEW, BUT IF IT IS, THE CLAIM SHOULD BE DENIED ON THE MERITS

In his Answer to the Petition for Review, Burum asked this Court to review an additional issue involving the constitutionality of Government Code section 9054. Although this Court has the authority to consider any issue raised in the Answer (Cal. Rules of Court, rule 8.516(b)(1)), it did not indicate an intention to do so in the order, which stated, "Petition for Review Granted." For the reasons set forth the in People's Reply to Answer to Petition for Review, the People oppose a grant of review on that issue. If the Court grants review on this issue, it should be denied on the merits.

Respondents argue the Court of Appeal incorrectly upheld Government Code section 9054 against a vagueness challenge, and that the court's interpretation of the statute criminalizes free speech. (Answer Brief on the Merits, pp. 40-44.) The court properly held the phrase "improperly influence" was not unconstitutionally vague, and the court's interpretation does not infringe on the right to free speech.

Government Code section 9054 provides, in pertinent part,

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

Respondents mischaracterize the prohibited conduct. They claim the criminal nature of the conduct under 9054 depends entirely on the phrase "improperly influence," which is vague and purports to criminalize conduct that is protected under the First Amendment without providing any guidance as to what conduct is proper or improper. (Answer Brief on the Merits, p. 42.) But it is the representation that one will use improper means

to influence a legislative matter that is prohibited by statute. Whether a person acts upon that representation is irrelevant. What is required is that the defendant makes a misrepresentation or claim that he will exert improper influence. The statute clearly prohibits a defendant's effort to obtain a personal benefit by representing that he will improperly influence a legislative matter, which is similar to, and entitled to no greater constitutional protection than the solicitation of a bribe.

But even under Respondents' interpretation, the statute is not unconstitutionally vague.

> Due process requires that a statute be sufficiently definite to provide a standard of conduct for those whose activities are proscribed and a standard by which the law may be enforced and guilt ascertained. [Citation.] This requires that a violation be described with reasonable certainty so that ordinary people can understand what is proscribed and so that the innocent are not trapped without fair warning. [Citation.]

(*People v. Honig* (1996) 48 Cal.App.4th 289, 339-340.)

A criminal provision must be definite enough to provide a standard of conduct for those whose activities are proscribed, and it must provide definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. In determining whether the challenged statute provides constitutionally fair notice, "'we look first to the language of the statute, then to its legislative history, and finally to the California decisions construing the statutory language. [Citation.]'" (*Honig, supra*, at pp. 339-340.)

Far from being a term that renders the statute vague, the word "improperly" narrows the statute's meaning, so that it clearly does not apply to constitutionally protected activity or other, "proper" methods of influence. In fact, the term was used by Congress to remedy a constitutionally vague federal statute as explained in *United States v. Safavian* (2006) 451 F.Supp.2d 232, 246 (*Safavian*).

Safavian explained that 18 U.S.C. section 1515(b) was enacted in response to *United States v. Poindexter* (D.C. Cir. 1991) 951 F.2d 369, 378. In *Poindexter*, the court reversed the defendant's conviction for violating 18 U.S.C. section 1505, which provided: "Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress . . ." shall be subject to criminal penalties. Poindexter held that the term "corruptly" as used in the section was too vague to provide constitutionally adequate notice that it prohibits lying to Congress.

In response to *Poindexter*, Congress enacted 18 U.S.C. section 1515(b), which provides that corruptly, as used in section 1505, means, "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." (*Safavian, supra*, 451 F.Supp.2d at p. 246, emphasis added.) Thus, Congress used the term "improperly" to remedy a vagueness problem, which substantially undermines Respondents' claim that the term itself is vague.

CONCLUSION

The People respectfully request this Court reinstate all charges against defendants.

Dated: May 6, 2013

Respectfully submitted,

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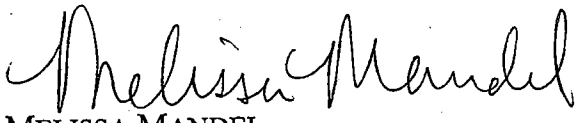

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 7,058 words.

Dated: May 6, 2013

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Paul Biane, et al.** No.: **S207250**

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; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On May 6, 2013, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

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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 May 6, 2013, at San Diego, California.

Bonnie Peak
Declarant

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Signature

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