LIU, J.

Case No. S207250

In the

Supreme Court

of the

State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

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

Defendants and Respondents.

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

RESPONDENT JEFFREY BURUM'S ANSWER TO PETITION FOR REVIEW

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JEFFREY BURUM

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I. INTRODUCTION

In seeking review of the Court of Appeal's unpublished decision in this matter, the People notably never state the grounds upon which they base their Petition. While the People attempt to create the impression that this case presents critical issues requiring this Court's review, they fail to plainly state why review is "necessary to secure uniformity of decision or to settle an important question of law" as required under Rule 8.500, subd. (b)(1).) (See Cal. Rules of Court, rule 8.500, subd. (b)(1).) Whether intentional or not, this omission is telling because the Court of Appeal's decision is entirely consistent with every published case addressing these already well-settled issues. Thus, there is no need for this Court to grant review, only to reconfirm what previous courts already have recognized.

The first issue for which the People seek review is the Court of Appeal's ruling affirming the dismissal of the improperly charged bribery counts brought against Mr. Burum. Lacking any legitimate basis for review of this decision, the People manufacture two reasons to support their request for review. Neither of the People's proffered reasons can survive scrutiny.

First, the People claim that California's bribery jurisprudence is "outdated" and inconsistent with "national legal standards" because it applies Wharton's Rule "to invalidate bribery and conspiracy charges." (Pet. at p. 3.) The People's claim is belied by the Court of Appeal's well-reasoned opinion. While the Court of Appeal mentioned Wharton's Rule in passing in its opinion below, the basis for its decision was not Wharton's Rule. Rather, the Court of Appeal relied on *People v. Wolden* (1967) 255 Cal.App.2d 798, a case that does not apply, or even mention, Wharton's Rule. In fact, *no* published California decision has *ever* held that Wharton's Rule applies to bribery. Wharton's Rule is irrelevant to the

decision reached by the Court of Appeal, irrelevant to California bribery law, and provides no basis for this Court to grant review.

The People's second reason for seeking review of the dismissed bribery counts is equally meritless. The People argue that there is a "conflict in California law" regarding whether the alleged giver of a bribe can be charged with aiding and abetting the receipt of the same bribe. (Pet. at p. 8.) However, the People fail to cite a single case to support their position that there is a conflict in California law. Indeed, the *only* cases that have addressed this question (including the Court of Appeal below) have squarely held that a bribe giver *cannot* be charged with aiding and abetting the alleged receiver of bribes. The People fail to cite to *any* California case holding otherwise. Instead, the People cite to a number of cases addressing aiding and abetting liability for crimes *other than* bribery. When it comes to aiding and abetting the receipt of bribes by the bribe giver, there already is a "uniformity of decision," rendering review by this Court wholly unnecessary.

Turning to the second issue raised by this Petition, the People seek review of the Court of Appeal's ruling that Mr. Burum cannot be charged with conspiring or aiding and abetting a violation of Government Code section 1090. Here, the best argument that the People can muster is that the Court of Appeal purportedly reached the wrong decision. Contrary to the People's argument, however, the Court of Appeal applied well-settled law in reaching its opinion. Following the plain holding of *D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861, the Court of Appeal correctly held that Section 1090 is not subject to aiding and abetting liability. No other published decision has ever held otherwise, and thus there is no reason for this Court to grant review.

Finally, an underlying theme to the People's Petition is the notion that this Court of Appeal decision will somehow affect future public

corruption cases by depriving prosecutors of their discretion to choose what charges to bring against a defendant. The People go so far as to accuse the Court of Appeal of creating "a judicial grant of immunity to bribe offerers." (Pet., pp. 12-13.) This argument fails for two reasons: First, and most obviously, this *unpublished* opinion is limited to this case, and the unique factual background on which this case and the charges brought by the People were based. The opinion will have absolutely no precedential impact on future cases, nor will it affect the charging discretion of other prosecutors in other cases.

Second, the Court of Appeal did not grant any "immunity" to Mr. Burum, or to anyone else. To the contrary, Mr. Burum still faces two felony counts relating to the same underlying conduct on which the dismissed bribery and conflict of interest counts were based. Moreover, the People used a legally flawed charging scheme to avoid the statute of limitations for bribery – which had lapsed at the time the People sought an indictment – by charging the alleged bribe giver with aiding and abetting the alleged bribe receiver. The Court of Appeal, like the trial court before it, properly rejected this improper charging scheme, and there is no reason for this Court to review that decision.

In short, neither of the issues raised by this Petition meets the standard for Supreme Court review.

Finally, the Indictment here was returned on May 9, 2011, nearly four and a half years after the alleged date of the offenses. Under the California constitution and by statute, Mr. Burum is entitled to a speedy trial. (Cal. Const., art. I, § 15; Cal. Penal Code § 1342.) The case has been essentially stayed since the People appealed the trial court's decision regarding the demurrers over 16 months ago, and the time has come to present this case to a jury so that Mr. Burum can defend himself against the

charges levied by the People and vindicate his good name and reputation. Mr. Burum respectfully requests that the Petition for Review be denied.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Because the decision below is based on a demurrer, the factual background of this case is largely irrelevant. Nevertheless, it is worth noting that the People's unsupported recitation of the facts at this stage of the case mischaracterizes the record and demonstrates their lack of prosecutorial objectivity. As this Court has previously noted, "[t]he duty of the district attorney is not merely that of an advocate. His [and her] duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial." (*Johnson v. Superior Court* (1975) 15 Cal.3d 248, 255, quoting *In re Ferguson* (1971) 5 Cal.3d 525, 531.) Here, a reader of the People's version of the facts would understandably assume that Mr. Burum already has been tried and convicted. This could not be further from the truth.

What the People fail to mention is that the $102 million settlement that Mr. Burum supposedly obtained through bribes actually involved the taking of over 60 acres of prime real estate by the County of San Bernardino from Mr. Burum's company, Colonies Partners, L.P., for the construction of a regional flood-control facility—and thus Colonies was constitutionally-entitled to just compensation. (Burum Demurrer, pp. 2-3) The People also omit the fact that the County's expert witnesses and attorneys have since taken the position that the settlement was objectively reasonable, and that the County faced the very real prospect of nearly $300 million in damages had it not settled the litigation for $102 million. (Burum Opp. to People's App., p. 5.) While the People note that one of the County Supervisors, Bill Postmus, has pleaded guilty to all charges, they neglect to mention that Mr. Postmus *consistently* has denied any *quid pro quo* with regard to his approval of the Colonies settlement. And, finally,

the People gloss over the fact that the alleged "bribes" were in fact lawfully reported – and constitutionally-protected – political contributions made months after the settlement was approved. (Burum Demurrer, p. 5, fn. 4; Burum Reply in Support of Demurrer, p. 9.)

The People's version of the procedural background also is incomplete. While the People note that Mr. Burum was indicted on several counts of "bribery," they fail to explain that they faced a serious hurdle before the grand jury was even convened: Because the alleged conduct occurred well outside the three-year statute of limitations for giving or offering bribes, and because the tolling provisions of Penal Code sections 801.5 and 803(c) do *not* apply to the crimes of giving or offering bribes, any potential charges against Mr. Burum were time-barred. (*Id.*, p. 2.) It is for this reason only – and not some alleged "prosecutorial discretion" – that the People charged Mr. Burum with aiding and abetting the *receipt* of bribes. (*Id.*) By utilizing accomplice theories of liability, the People hoped to tie Mr. Burum to crimes that were potentially subject to tolling under Sections 801.5 and 803(c)—thereby avoiding the time-bar posed by the statute of limitation. (Demurrer, p. 8.)

Finally, and most importantly for purposes of this Petition, the People blatantly misstate the Court of Appeal's holding below. The People characterized the Court of Appeal's ruling as follows:

> 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.

(Pet., p. 3.) This is a complete mischaracterization of the court's opinion. The Court of Appeal's *only* reference to Wharton's Rule is in a single paragraph of dicta dropped into the middle of the court's lengthy discussion of the bribery charges. (Pet., Ex. A at pp. 16-17.) The actual basis for the Court of Appeal's ruling is found on page 19 of the opinion:

> 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." [Citation.] 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.

(Pet., Ex. A at p. 19.) As will be seen below, this fundamental misstatement of the Court of Appeal's ruling is the cornerstone upon which the People have based their Petition for Review.

III. ANALYSIS

Pursuant to the California Rules of Court, the California Supreme Court may order review of a Court of Appeal decision when "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500, subd. (1)(b).) The People fail to demonstrate that either of the issues raised in their Petition involve any split amongst the Courts of Appeal, or any important and unsettled question of law. As such, review is not appropriate and the Petition should be denied.

A. Neither The Court of Appeal Below, Nor Any California Court Before It, Has Ever Applied Wharton's Rule to Bribery

The central theme of the People's Petition is that the Court of Appeal below, and California courts generally, are out of step with federal law and modern bribery jurisprudence in applying Wharton's Rule to bribery. (See Pet., pp. 3-8.) The People contend that this Court should step in to override the California Legislature's carefully-crafted statutory scheme for punishing bribery, and more than 50 years of bribery jurisprudence, all in the name of modernizing California's supposedly

"outdated" bribery laws.[1] This argument can be disposed of summarily based on one simple fact: Wharton's Rule is irrelevant, both to the decision in this case and to California bribery jurisprudence generally.

In affirming the trial court's dismissal of all bribery charges against Mr. Burum, the Court of Appeal did *not* rely on Wharton's Rule, but rather on the principle set forth in *Wolden*. (See Pet., Ex. A at p. 19.) Indeed, the Court of Appeal's single-paragraph passing reference to Wharton's Rule is nothing more than dicta.[2] (See *id.*, pp. 16-17.) And, to be clear, Wharton's Rule and the principle in *Wolden* are *not* the same. To the contrary, there are at least two fundamental differences between these two principles that further demonstrate why Wharton's Rule was not the basis of the Court of Appeal's unpublished ruling, and why review here is unnecessary.

First, Wharton's Rule *only* applies to conspiracy—it is inapplicable to aiding and abetting liability. As such, on a very basic level, Wharton's Rule literally could not have been the basis for the Court of Appeal's ruling, given that four of the five bribery counts dismissed were aiding and abetting charges. *Wolden*, on the other hand, focuses primarily on aiding and abetting—and, not surprisingly, it is *Wolden's* discussion of aiding and abetting liability that was adopted by the Court of Appeal. (Pet., Ex. A at pp. 15-19.) In essence, *Wolden* recognizes the legal principle that, for certain crimes necessarily involving two or more persons, the legislature intended that the participants only be found guilty of the "separate and distinct" act each personally committed—*i.e.*, one participant cannot "aid

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[1] See *People v. Moreland* (1978) 81 Cal.App.3d 11, 17 ["[I]t is clear the courts cannot go so far as to create an offense by enlarging a statute, by inserting or deleting words, or by giving the terms used false or unusual meanings," quoting *People v. Baker* (1968) 69 Cal.2d 44, 50].

[2] *Wolden* never mentions Wharton's Rule. Nor did Mr. Burum suggest that Wharton's Rule applies to bribery, either in his appellate briefing or in his demurrer briefing in the trial court.

and abet" the other participant. (*Wolden*, 255 Cal.App.2d at 803-804.) The *Wolden* court held that "bribery is such a crime. The giver whose offense is specifically made a crime is not an accomplice in the separate and distinct crime of the receiver." (*Id.* at 804.) This plainly is *not* Wharton's Rule, and thus the People's claim that both *Wolden* and the Court of Appeal below applied Wharton's Rule is incorrect.

The *Wolden* court also addressed conspiracy liability, which leads to the second fundamental difference between these two rules. As recognized by *Wolden* – and by this Court in *People v. Keyes* (1930) 284 P. 1105, and *Calhoun v. Superior Court In and For San Diego County* (1955) 46 Cal.2d 18, 41-42 – the giver and the receiver of a bribe cannot conspire with one another because they have ***different intents***. (*Wolden*, 255 Cal.App.2d at 804.) Wharton's Rule, on the other hand, recognizes that the participants in certain crimes that require two persons – e.g., abortion, bigamy – cannot be convicted of conspiracy because the Legislature has signaled that any conspiracy should be merged with the substantive offense, even though both participants have the ***same intent***. (See *People v. Mayers* (1980) 110 Cal.App.3d 809, 815.) In other words, while Wharton's Rule is an *exception* to general conspiracy law, *Wolden* is consistent with, and indeed grounded in, one of the basic elements of a criminal conspiracy—namely, the requirement of common intent. Thus, the Court of Appeal below simply recognized – as this Court did in *Keyes* and *Calhoun* – that the basic elements of conspiracy preclude a conspiracy between the bribe giver and the bribe receiver.

These two fundamental differences also expose the fallacy behind the People's more general claim that California bribery law is somehow outdated, and that this Court's review is needed to remedy the problem. The People's argument is based entirely on the premise that California courts have applied Wharton's Rule to bribery. But, none of the bribery

cases cited by the Court of Appeal even *mention* Wharton's Rule. Rather, as discussed above, *Wolden*, *Keyes*, and *Calhoun* all involve a principle that is fundamentally different than that of Wharton's Rule. Moreover, there is not a *single* reported California case that has *ever* applied Wharton's Rule to bribery. Thus, far from being "outdated," California bribery law has been ahead of the curve in recognizing that Wharton's Rule is irrelevant to bribery.

In short, the People's entire argument is unsupported by the record and prevailing case law. Both this case specifically, and California bribery jurisprudence generally, are entirely consistent with modern conspiracy law and the federal precedent cited by the People—and thus review is unnecessary.

B. There Is No "Conflict in California Law" Regarding Accomplice Liability Between the Bribe Giver and Bribe Receiver

The People's second argument in support of review also fails to survive scrutiny. The People claim that there is a "conflict in California law" regarding whether the alleged giver of a bribe can be charged with aiding and abetting the receipt of the same bribe. (See Pet., p. 8.) Again, however, the People fail to identify a *single* case that has permitted – even implicitly – an alleged bribe giver to be charged with aiding and abetting, or conspiring with, the bribe receiver. The People fail to identify such a case because none exists.

Lacking any real "conflict" in the case law addressing this issue, the People instead cite to a number of cases addressing aiding and abetting liability for crimes other than bribery. (See Pet., pp. 10-12 [citing five cases not involving bribery].) The fact that courts have found other crimes to be subject to accomplice liability, however, does not create any conflict with the well-settled principle – recognized by this Court – that the bribe

giver and bribe receiver cannot aid and abet, or conspire with, each other. Rather, on this particular issue, there is a "uniformity of decision" amongst California courts. Indeed, the long-established rule set forth in *Wolden* is currently cited in authoritative legal texts such as the Judicial Council's criminal jury instructions for bribery and receipt of a bribe. (See Judicial Council of Cal. Criminal Jury Instructions (2010) CALCRIM No. 2600, Related Issues; see also Witkin & Epstein, Calif. Criminal Law (3d Ed.), ch. VIII, sec. 32 [explaining that bribe giver and bribe receiver are "distinct crimes"].) Further review by this Court, therefore, is unnecessary.

C. The People Fail to Identify Any Grounds for Review of the Court of Appeal's Correct Application of *D'Amato*

The second issue raised by this Petition involves the Court of Appeal's unpublished ruling that Mr. Burum cannot be charged with conspiring or aiding and abetting a violation of Government Code section 1090. According to the People, the Court of Appeal "misread" the decision in *D'Amato* and incorrectly held that Section 1090 is not subject to aiding and abetting liability. Contrary to the People's argument, the Court of Appeal did not misinterpret the holding in *D'Amato*. Rather, as reflected the opinion below, the court properly recognized – and agreed with – the holding in *D'Amato*.

Although it is difficult to recognize in the People's summary of the case, the pertinent holding in *D'Amato* is quite straightforward. After addressing the doctrine of separation of powers, the court held that "the Legislature's wording of section 1090 evinces the intent to exclude aider and abetter liability." (*D'Amato*, 167 Cal.App.4th at 873.) While the court went on to apply this holding to the specific facts in *D'Amato* (which involved an attempt to charge a fellow legislator with aiding and abetting a Section 1090 violation), the holding is equally applicable to the charges brought here, as the Court of Appeal explained below. After quoting

extensively from *D'Amato* (not just a single sentence, as the People imply), the Court of Appeal held:

> 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.

(Pet., Ex. A at p. 37.) Not only is this conclusion legally correct, it is completely uncontradicted—no other California decision has ever held otherwise. As such, there simply is no reason for this Court to grant review.

D. This Unpublished Decision Will Have No Impact on Any Pending or Future Public Corruption Cases

As a final effort to salvage their Petition, the People contend that review is needed because the decision below will somehow hamper effective prosecution of future public corruption cases. This argument is meritless. This is an *unpublished* decision and, as such, it has no precedential impact whatsoever. Thus, the People's fears that prosecutorial discretion will be impacted are unfounded.

Moreover, it is important to recognize the unique nature of the charges being dismissed by this decision. Mr. Burum's counsel has combed California case law for *any* post-*Wolden* case in which a bribe giver was charged with aiding and abetting or conspiring with the bribe receiver. No such cases have been found. Nor have *any* cases been found in which a private citizen was charged with aiding and abetting or conspiring with a public official to violate Government Code section 1090. Mr. Burum assumes that the People similarly have been unable to find any

such cases, as they most certainly would have cited these cases in their Petition in order to establish a split in authority.

The simple fact is that the People's charging scheme against Mr. Burum is the result of a unique confluence of factors, most notably the People's failure to charge Mr. Burum before the expiration of the statute of limitations for the crimes of giving or offering bribes. Thus, all that future prosecutors need do to avoid the result reached by the Court of Appeal here, like every other prosecutor post-*Wolden*, is to bring timely charges under the appropriate statute. While such charges against Mr. Burum would have been factually meritless, they at least might have survived demurrer. Instead, the People failed to bring timely charges against Mr. Burum, and the trial court and Court of Appeal properly rejected the People's attempt to plead around the statute of limitations by using an impermissible charging scheme.

IV. ADDITIONAL ISSUE FOR REVIEW

As set forth above, Mr. Burum does not believe that review of the Court of Appeal's opinion is necessary or appropriate. If the Court nevertheless grants review, Mr. Burum respectfully submits the following additional issue for review pursuant to rule 8.500(a)(2) of the California Rules of Court.

A. Issue Presented

1. Is Government Code section 9054 unconstitutional, either as void for vagueness or as an impermissible prior restraint on free speech?

B. Why Review Should Be Granted

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

> Every person who obtains, or seeks to obtain, money or other thing of value from another person upon a pretense, claim, or representation that he can or will improperly

> influence in any manner the action of any member of a legislative body in regard to any vote or legislative matter, is guilty of a felony.

As Mr. Burum has argued before both the trial court and the Court of Appeal, this statute – which does not appear to have *ever* been used in a published criminal case – is unconstitutionally vague. (See *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 ["It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."].) In particular, Section 9054 fails to provide any notice of what would constitute "improperly" influencing—as opposed to garden-variety lobbying, an activity that has long received constitutional protection under the First Amendment.[3] The Court of Appeal below disagreed, holding that "improperly influence" was not vague because it means "the use of personal, or any secret or sinister, influence upon legislators" as opposed to "the open advocacy of the same before the legislature or any committee thereof in open session." (Pet., Ex. A at pp. 34-35 [citing *Crawford v. Imperial Irrigation Dist.* (1927) 200 Cal. 318, 321-322].) This definition of "improperly influence" not only fails to cure the unconstitutionality of Section 9054, it creates further confusion regarding what conduct is prohibited under Section 9054.

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[3] See, *e.g.*, *F.C.C. v. League of Women Voters of Cal.* (1984) 468 U.S. 364, 405 [recognizing that the "right to lobby is constitutionally protected," citing *Regan v. Taxation with Representation of Wash.* (1983) 461 U.S. 540] [Rehnquist, J., dissenting]; *Marin v. Univ. of Puerto Rico* (D. P.R. 1973) 377 F. Supp. 613, 627 [invalidating as vague university regulations barring "improper or disrespectful conduct in the classroom"]; *J.L. Spoons, Inc. v. City of Brunswick* (N.D. Ohio 1998) 181 F.R.D. 354, 357-58 [finding a rule "overbroad on its face" because it "employs several extraordinarily vague terms, including 'improper'..."]; *United States v. Poindexter* (D.C. Cir. 1991) 951 F.2d 369, 378-79 [noting that the term "improper" may actually be "less specific" than the unconstitutionally vague term "corruptly"].

Under the Court of Appeal's interpretation, the statute remains unconstitutionally vague in that no guidance is provided as to what would constitute "secret" or "sinister" influence. More importantly, the Court of Appeal's interpretation directly criminalizes modern lobbying. For example, a former legislator would run afoul of Section 9054 if he was hired based on a representation that he would meet personally with his former colleagues in the Legislature – *e.g*, at a dinner or through a private meeting at their offices – to lobby for particular legislation. As such, should this Court grant the People's Petition, it also should grant review of this important constitutional issue to confirm that Section 9054 cannot be used to criminalize a broad range of constitutionally-protected activities.

V. CONCLUSION

As set forth above, the People fail to identify any legitimate or legally cognizable reasons why this Court should grant review of the Court of Appeal's entirely correct decision. Instead, the People misrepresent the Court of Appeal's holdings, as well as California case law generally, in an attempt to manufacture a basis for reviewing the Court of Appeal's opinion. The Court should reject this unsupported and meritless Petition for Review.

Respectfully submitted,

Dated: December 18, 2012

ARENT FOX LLP

By: _____

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JEFFREY BURUM

CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, rule 8.504(d)(1)]

This brief consists of 4,347 words as counted by the word processing program used to generate the brief.

Dated: December 18, 2012

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PROOF OF SERVICE

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I declare that at the time of service I was at least 18 years of age and not a party to this case. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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