IN THE SUPREME COURT

STATE OF CALIFORNIA

ROBERT E. STARK,
Petitioner,
vs.
SUPERIOR COURT OF SUTTER COUNTY
Respondent,
THE PEOPLE,
Real Party in Interest.

Case No. S145337

Transfer From Supreme Court No. S139413

Court of Appeal Nos. C051073 and C051074
Sutter County Nos. CRMS051001 and CRMS051031

RONDA G. PUTMAN,
Petitioner,
vs.
SUPERIOR COURT OF SUTTER COUNTY
Respondent,
THE PEOPLE,
Real Party in Interest.

Court of Appeal No. C051075
Sutter County No. CRMS051030
[Consolidated Cases]

PETITION FOR REVIEW

By Petitioner Robert E. Stark
To Review a Published Opinion of the Court of Appeal, Third Appellate District,
After Transfer from Supreme Court

NO STAY REQUESTED

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE, RONALD M. GEORGE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner, Robert E. Stark, Auditor-Controller of the County of Sutter, petitions this Court for review following the decision of the Court of Appeal, Third Appellate District, by published opinion filed on June 15, 2006, denying in part and granting in part consolidated petitions for a writ of prohibition or mandate after this Court previously granted review and transferred the petitions to the Court of Appeal. The consolidated petitions sought relief from trial court orders which denied motions to set aside an indictment and an accusation under Government

Code section 3060 filed against Robert E. Stark arising out of, in the words of the Court of Appeal, ". . . a turf battle between some of the elected officials in Sutter County . . . over accounting matters." (Court of Appeal Opinion, hereafter "Opinion," at p. 2; A copy of the opinion is attached to this petition as Exhibit "A.") Mr. Stark's petition for rehearing was denied by the Court of Appeal on July 13, 2006.

QUESTIONS PRESENTED

1. May a defendant move to set aside an indictment under Penal Code section 995(a)(1)(B) upon the ground that grand jurors were misinstructed on the scienter required to establish an element of the charged offense?

2. May a public official be removed from office pursuant to Government Code section 3060 in the absence of proof of a purposeful refusal to follow the law in carrying out the duties of his or her office?

3. Where a defendant moves to set aside an indictment or accusation upon the basis that the district attorney's participation in the grand jury proceedings created a potential for bias or the appearance of a conflict of interest, must the defendant satisfy the requirements for disqualification set forth in Penal Code section 1424?

NECESSITY FOR REVIEW

Misinstruction of the Grand Jury Upon the Scienter Required to Establish An Element of the Offense

Review is again necessary in this case to settle important questions of law and to secure uniformity of decision.

The first question presented in Mr. Stark's prior petitions for review was:

> May a violation of Penal Code[1] section 424 (false accounts or misappropriation of public funds by public officer or employee) be established without proof of scienter in the form of an intentional or purposeful violation of a known legal duty?

(Petition for Review, p. 2, *Robert E. Stark v. Superior Court of Sutter County*, (Consolidated) Supreme Court No. S139412.)

This Court granted review and transferred the consolidated petitions to the Court of Appeal with directions to vacate its order denying petitions for mandate and prohibition and to issue an order to show cause. The Court of Appeal thereafter correctly resolved this important issue, holding, for example, that:

> . . . [T]o be convicted of violating section 424(a)(1), the public official must have known that he was acting without authority of law in appropriating the money and thereby *intended* to act without legal authority.

(Opinion at p. 22; emphasis in original.)

Mr. Stark was indicted and accused of misconduct in office based upon a number of complex financial transactions in which his professional judgment differed from that of the Sutter County Administrative Officer (CAO) and other officials and bureaucrats in the county. No money is alleged to be missing from the Sutter County Treasury. Mr. Stark is not alleged to have personally benefited from any of the accounting transactions at issue. The grand jury record is replete with testimony and documentary evidence confirming Mr. Stark's explanations of why he acted or refused to act, including his references to specific legal authority. Mr. Stark also submitted voluminous exculpatory written materials to grand jurors

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

as authorized by sections 939.7 and 939.71 and *Johnson v. Superior Court* (1975) 15 Cal.3d 248.

Grand jurors were instructed, however, that Mr. Stark's belief that he acted in accordance with the requirements of the law was irrelevant:

> What we have are general intent crimes. You don't have to intend to break the law. You don't have to intend to do anything that is illegal. All you have to do is the act that the law says is a crime. You've heard the phrase ignorance of the law is no excuse. That's what you're dealing with [with] a general intent crime, especially misappropriation of public money.

(Opinion at p. 56; Tab M, p. 1090.)[2]

Mr. Stark argued in his petitions for a writ of prohibition or mandate that the indictment must be set aside for this instructional error. Notwithstanding the Court of Appeal's finding that a public official must *intend* to act contrary to the requirements of law, that Court rejected Mr. Stark's claim of instructional error, holding that it was not a proper ground to set aside an indictment under section 995. (Opinion at p. 37.) On this point, the opinion cannot be reconciled with this Court's prior decisions, and a conflict now exists among the Courts of Appeal.

In *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1022, footnote 1, this Court held that "[p]etitioner's chief assertion - - that the grand jury was misinstructed on the minimum standard of proof required to indict - - is manifestly tantamount to a claim that, as instructed, the jury may have indicted her on less than reasonable or probable cause. As such, the indictment was plainly subject to a motion to set it aside on that ground under section 995, subdivision (a)(1)(B)."

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[2] Citations to the record herein are to tabs and pages in the 11 volume Appendix submitted to the Court of Appeal, cited as "Tab ___, p. ___." Page references are to consecutive pagination.

In *People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App. 4th 403, the Court of Appeal addressed the right of an indicted defendant to obtain discovery of non-testimonial grand jury proceedings for the purpose of preparing a section 995 motion to dismiss on grounds of lack of probable cause. The Court of Appeal concluded:

> Our Supreme Court has recognized that the grand jury's ability to consider the evidence impartially and independently may be prejudiced by the manner in which the prosecutor conducts the grand jury proceedings, including advice, instructions and argument (*People v. Backus* (1979) 23 Cal.3d 360, 393 [152 Cal.Rptr. 710, 590 P.2d 837]; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1022, fn. 1 [13 Cal.Rptr. 2d 551, 839 P. 2d 1059].) In light of this recognition by the Supreme Court it follows that a defendant may review these communications by a prosecutor and the grand jury in order to prepare a motion to set aside an indictment on grounds of lack of probable cause under section 995.

(*Mouchaourab, supra*, at p. 407.)

In *People v. Gnass* (2002) 101 Cal.App.4th 1271, the Court of Appeal relied upon *Cummiskey* and *Mouchaourab* in resolving the precise issue presented by this petition: May a defendant move to set aside an indictment under section 995 upon the ground that the prosecutor misinstructed grand jurors on the mens rea element of the charged offense? The Court of Appeal held:

> Although a prosecutor does not have the same duty to instruct a grand jury as a trial judge does a petit jury (e.g., there is no duty to instruct on lesser included offenses), an indictment may be set aside under Penal Code section 995, subdivision (a)(1)(B) "based upon the nature and extent of the evidence and the manner in which the proceedings were conducted by the district attorney" (*Mouchaourab, supra*, 78 Cal.App.4th at pp. 424-425), including instructional error likely to have caused the grand jury to return an indictment on

> less than reasonable or probable cause (*Cummiskey, supra*, 3 Cal.4th at p. 1022, fn. 1.)

(*Gnass, supra,* 101 Cal.App.4th at p. 1313.)

While acknowledging that it was bound by this Court's decision in *Cummiskey*, the Court of Appeal opinion here asserts that resolution of the above issue was unnecessary in *Cummiskey,* further stating that ". . . there is some reason to question the reasoning of the majority in *Cummiskey* that instructional error can be raised as a basis for setting aside an indictment under subdivision (a)(1)(B) of section 995." (Opinion at p. 33.) The Court of Appeal opinion holds that *Cummiskey* is limited to a challenge to instructional error on the minimum standard of proof required to indict and that any other instructional claim may only be reviewed under a claim of violation of the constitutional right to due process. (*Id.* at p. 36.) The opinion acknowledges that the decisions in *People v. Superior Court (Mouchaourab), supra,* and *People v. Gnass, supra,* held otherwise, stating that "we believe the courts in *Mouchaourab* and *Gnass* misconstrued *Cummiskey* . . ." (*Ibid.)* Review is therefore necessary to settle this conflict in the published decisions of the Courts of Appeal.

The conflict created among the Courts of Appeal by the opinion below requires resolution in order to provide needed guidance to district attorneys, criminal practitioners and trial courts in an era when use of grand juries has become increasingly common, after the abolition of post-indictment preliminary hearings in 1991. (*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 43; Cal. Const., art. I, § 14.1.) This issue cannot be effectively resolved on appeal after conviction, as a defendant is required to demonstrate on appeal that a claimed irregularity in

grand jury proceedings deprived him of a fair trial or otherwise resulted in actual prejudice relating to his conviction. (*People v. Towler* (1982) 31 Cal.3d 105, 123.)

Scienter Required to Support an Accusation Under Government Code Section 3060

The Court should also grant review to clarify the *scienter* required to support an accusation under Government Code section 3060. This Court's decision in *People v. Coffey* (1905) 147 Cal. 525 contains ambiguous language upon the necessary *scienter*. In *Coffey*, the Sacramento Chief of Police knew illegal gambling was being conducted in the City of Sacramento yet refused to prosecute the owners of the buildings openly used for such illegal purposes. In one passage the Court suggested that mere neglect of duty was sufficient, stating that misconduct in office . . . "does not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or an official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or malicious motive." (*Coffey* at p. 529.) In upholding the sufficiency of the accusation, however, this Court suggested that more than mere neglect of duty was required:

> It was not a mere neglect of duty. It was a failure to discharge his duty with knowledge of the facts calling for official action; a failure which was willful, and which evidenced a fixed purpose not to do what actual knowledge and the requirements of the law declare he shall do.

(*Id.* at p. 530.) The *Coffey* opinion did not resolve this ambiguity.

The Court of Appeal opinion here only serves to further confuse the issue. After reviewing *Coffey* and *Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, the Court of Appeal opinion states:

> . . .[W]e reject the argument that a knowing or purposeful violation of the law is required to establish willful misconduct under Government Code section 3060. There must be willful behavior, and that behavior must amount to misconduct - - that is " `misbehavior', `misdemeanor', `delinquency', [or] `offense' " (*Coffey v. Superior Court, supra*, 147 Cal. at p. 529.) If those two elements are established, nothing more is required.

(Opinion at p. 89.)

What the opinion fails to address, however, is whether Mr. Stark may be said to have acted "willfully" where he did not knowingly act contrary to the requirements of the law. In explaining the mens rea for a violation of section 424, the Court of Appeal observed that ". . . a person cannot intend to act without authority of law unless the person *knows* his or her action is unauthorized." (Opinion at p. 22; emphasis in original.) However, the Court of Appeal opinion leaves unanswered whether, for purposes of an accusation under Government Code section 3060, a public official can "willfully misbehave" where the official is unaware that their action or inaction is contrary to the requirements of law, a critical issue in a matter which, as here, involves complex public finance law and accounting.

For example, in addressing the evidence of Mr. Stark's claim of lawful authority for the conduct alleged in counts five and six of the accusation, the opinion asserts that whether Mr. Stark engaged in "deliberate misbehavior" is for a trial jury to resolve (Opinion at p. 95), providing no guidance whether such a

finding would require a jury to conclude that Mr. Stark acted contrary to a known legal duty. Elsewhere, however, the opinion states that the accusation against Assistant Auditor-Controller Ronda Putman cannot be upheld in the absence of evidence that she ". . . knew she was not supposed to transfer funds from [the] general reserve but decided to do so anyway." (Opinion at p. 100.)

Thus, with no CALCRIM nor CALJIC instructions addressing the issue, the standard required to remove a public official from office pursuant to Government Code section 3060 remains an open question.

The Court should grant review to settle this important issue.

Standard for a Motion to Set Aside An Indictment or Accusation for Prosecutorial Bias or Conflict of Interest

This petition presents for review the issue recognized but not decided by this Court in *People v. Eubanks* (1996) 14 Cal.4th 580:

> One should note, in this connection, the distinction between a motion to recuse the district attorney under [Penal Code] section 1424, and a motion to set aside the information or indictment, under [Penal Code] section 995. In *Greer* [*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255] we suggested that "if the trial court determines that a district attorney's participation in the filing of a criminal complaint or the preliminary hearing on that complaint created a potential for bias or the appearance of a conflict of interest, it may conclude that the defendant was not 'legally committed' within the meaning of Penal Code section 995, and the information should be set aside. (*Greer, supra,* 19 Cal.3d at p. 263, fn. 5.) We expressly reserve the question whether availability of a remedy under section 995 was affected by the addition of section 1424 and express no opinion here concerning which standard would govern motions brought under section 995.

(*Id.* at p. 592, fn. 4.)

Penal Code section 1424 was added by the legislature in 1980. Twenty-five years later, and nearly a decade after the decision in *Eubanks,* trial courts, prosecutors and defense counsel are still without guidance concerning this important issue. The Court of Appeal opinion avoids resolution of the issue by asserting that this Court's decision in *Greer never* authorized a motion to set aside an indictment for a conflict of interest, but only an information. (Opinion at p. 45.) This narrow reading of *Greer* is incorrect, and leaves the important issue recognized by the Court in *Eubanks* undecided.

The Court should grant review to settle this important question of law.

STATEMENT OF THE CASE AND FACTS

The facts and procedural history are correctly stated in the opinion of the Court of Appeal insofar as necessary for this Court's consideration of Mr. Stark's petition for review.[3]

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[3] Mr. Stark filed a petition for rehearing in the Court of Appeal upon the grounds that the opinion omitted material facts and relied upon evidence which violates section 939.6. Mr. Stark pointed out therein that the Court of Appeal expressly noted that it had summarized the evidence in the light most favorable to the indictment. (Opinion at p. 3.) Mr. Stark argued that an assessment of whether he had been prejudiced by instructional errors required consideration of additional evidence in the record which was cited and relied upon by Mr. Stark but omitted from the Court of Appeal opinion. The petition for rehearing was denied.

In the event that this Court grants review, Mr. Stark will identify in his brief upon the merits the evidence in the record which establishes that he was prejudiced by the prosecutors' misdirection of the grand jury - - testimony and writings which establish that Mr. Stark in almost every instance publicly explained his rationale, professional opinion and authority for the acts and omissions set out in the indictment and accusation.

LEGAL DISCUSSION

I. A DEFENDANT MAY CHALLENGE AN INDICTMENT PURSUANT TO PENAL CODE SECTION 995(a)(1)(B) BASED UPON A CLAIM THAT GRAND JURORS WERE MISDIRECTED AS TO THE MENS REA ELEMENT OF THE CHARGED OFFENSE

This Court held in *Cummiskey, supra,* that a claim that the grand jury was misinstructed on the minimum standard of proof required to indict is manifestly tantamount to a claim that the grand jury indicted on less than reasonable or probable cause, and that therefore, the indictment may be subjected to challenge on that basis pursuant to section 995(a)(1)(B). (*Cummiskey, supra*, 3 Cal. 4th at p. 1022, fn 1.)

In *Cummiskey,* the petitioner had challenged the instruction given to grand jurors on the minimum standard of proof necessary to return an indictment, claiming jurors should have been instructed in the language set out in section 939.8, which authorizes an indictment where the evidence, if unexplained or uncontradicted, would warrant a conviction by a trial jury. (*Id.* at p. 1025.) This Court held that the grand jury had been adequately instructed that it must find the equivalent of "probable cause" to indict. (*Id.* at p. 1029.)

Here, the Court of Appeal seizes upon the specific instruction at issue in *Cummiskey* and concludes that the Court there ". . . noted a narrow exception" to the rule that an indictment cannot be attacked under section 995 for instructional error. (Opinion at p. 32.) This characterization is not supported by the Court's clear pronouncement in *Cummiskey* that instructional errors which may have led to an indictment on less than probable cause may be raised by way of section 995.

Mr. Stark's understanding is supported by two Court of Appeal decisions which have since construed *Cummiskey* (*People v. Superior Court* (*Mouchaourab*), *supra*, 78 Cal.App.4th 403, at p. 407) (defendant is entitled to discovery of non-testimonial grand jury proceedings in order to assess whether the grand jury's ability to independently determine whether probable cause exists was prejudiced by advice, instructions, and argument of prosecutor) and *People v. Gnass, supra*, 101 Cal.App.4th at 1306 (trial court dismissal pursuant to section 995 upheld because, among other reasons, misleading instructions on mens rea of charged offense made it possible if not likely that grand jury indicted on something less than reasonable or probable cause).)

The Court of Appeal opinion here asserts that:

> Regardless of whatever erroneous instructions the grand jury may have been given, a defendant has been indicted with probable cause if the Court, in reviewing the evidence before the grand jury on the defendant's motion to set aside the indictment under subdivision (a)(1)(B) of section 995, determines that there is some rational ground for assuming the possibility that an offense has been committed and the defendant is guilty of it.

(Opinion at p. 33.) This assertion flies in the face of the plain language of section 995, the words of this Court in *Cummiskey,* and the fundamental and historical purpose of a grand jury.

This Court explained the protective role of the grand jury in *Johnson v. Superior Court* (1975) 15 Cal.3d 248, 253-254:

> Under the ancient English system . . . . the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to

> determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will. (*Hale v. Henkel* (1906) 201 U.S. 43, 59 [50 L.Ed. 652, 659, 26 S.Ct. 370], quoted in *Hoffman v. United States* (1951) 341 U.S. 479, 485 [95 L.Ed. 1118, 1123, 71 S.Ct. 814].)
>
> * * * * *
>
> The grand jury's "historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor" (*United States v. Dionisio, supra,* at p. 17 [35 L.Ed.2d at p. 81]) is as well-established in California as it is in the federal system.

Mr. Stark was entitled to have a grand jury stand between him and the prosecutor and to the grand jurors' independent evaluation of whether probable cause existed. The availability of post-indictment judicial review cannot serve as a substitute for a defendant's right to an independent assessment of probable cause by grand jurors prior to any indictment. (See, e.g., *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, at p. 591.)

The record is replete with evidence, including exculpatory evidence submitted by Mr. Stark, that he believed in good faith that his acts or omissions were authorized or required by law, but the instructions given the grand jury prevented their full and fair consideration of that evidence. For example, count 3 of the indictment alleges that Mr. Stark unlawfully transferred $336,485 from the Sutter County General Fund to Waterworks District No. 1. Relying upon authorities cited by prosecutors and testimony that Mr. Stark was not authorized to make this transfer, the Court of Appeal concludes:

> From the fact that Stark had been the County's auditor-controller for nearly 20 years and the other evidence before them, the grand jurors could reasonably entertain a strong suspicion that Stark was conversant in law governing his position and knew he did not

> have legal authority to transfer money from the county's general fund to the Waterworks District.

(Opinion at p. 30.)

However, grand jurors did not need to resort to inference and speculation, because extensive evidence in the record explained Mr. Stark's rationale and authority for the transfer:

- The proposed budget prepared by the CAO and adopted by the Board specifically recommended a transfer in to the Waterworks District to balance this budget (Tab N, pp. 2221-2223.)

- Mr. Stark submitted voluminous exculpatory evidence to the grand jury, all of which was received as Exhibit 50. Included therein were copies of publications from the California State Controller's Office with citations to relevant sections which supported Mr. Stark's opinion that the Waterworks District fund must be balanced. (Tab N, pp. 2227-2233.)

- Mr. Stark had appeared before the grand jury for an "interview" prior to the commencement of the investigation and had explained his justification and perceived authority for the transfer. (Tab N, pp. 2639-2640.)

The grand jurors, however, were misled concerning the mens rea required to establish a violation of Penal Code section 424:

> What we have here are general intent crimes. You don't have to intend to break the law. You don't have to intend to do anything that's illegal . . . You've heard the phrase ignorance of the law is no excuse. That's what you're dealing with [with] a general intent crime, especially misappropriation of public money.

(Opinion at p. 56; Tab M, p. 1090.)

Prosecutors have a duty to call to grand jurors' attention exculpatory evidence. (*Johnson v. Superior Court, supra,* 15 Cal.3d 248.) Mr. Stark supplied such evidence which was admitted into the record and the record is replete with

other such evidence. The above instruction was tantamount to a direction to ignore this highly relevant evidence. Under the rule announced by the Court of Appeal here, a prosecutor could easily render section 939.7 and this Court's decision in *Johnson* meaningless by presenting the grand jury with exculpatory evidence and then instructing them that it should not be considered.

A claim, as here, that grand jurors were misdirected on the element of mens rea is, in the words of this Court, tantamount to a claim that the defendant was indicted without reasonable or probable cause. This Court should grant review and confirm that such a claim may be raised pursuant to section 995(a)(1)(B).

II. GOVERNMENT CODE SECTION 3060 REQUIRES PROOF OF AN INTENTIONAL VIOLATION OF A KNOWN LEGAL DUTY OR A PURPOSEFUL VIOLATION OF LAW

Government Code section 3060 provides in relevant part:

> An accusation in writing against any officer of a district, county or city . . ., for *willful or corrupt misconduct* in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed.

(Emphasis added.) Contrary to the opinion below, recent Court of Appeal authority holds that knowledge of what the law requires and purposeful violation thereof must be proven to support an accusation under section 3060.

In *Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, the District Attorney of Orange County filed accusations under section 3060, seeking to unseat two county supervisors for failing to adequately supervise the county treasurer, who had made speculative, high-stakes financial investments which

ultimately led to the county's bankruptcy. The Court of Appeal ordered the accusations dismissed. Undertaking a thorough review of the history of reported prosecutions under section 3060, the court concluded:

> Taken as a whole, these cases affirm that something more than neglect is necessary to constitute willful conduct. Virtually all of them involve conduct that was otherwise criminal, conduct which was corrupt and malum in se. And, in contrast to Steiner's and Stanton's cases, none of them involved a failure to act where the duty is premised on something the official *should have known*. But that is what the district attorney has charged here. He alleges Steiner and Stanton failed to realize Citron's investment decisions could bring financial ruin to the county because they did not pay close enough attention to his activities.

(*Steiner,* 50 Cal.App.4th at p. 1781, emphasis in original.)

The *Steiner* court held that the district attorney is not a performance monitor of elected officials, and that, "[t]he [accusation] procedure must be reserved for serious misconduct . . . that involves criminal behavior or, at least, a *purposeful* failure to carry out *mandatory* duties of office." (*Steiner, supra*, at p. 1782, emphasis in original.) In *Steiner*, as here, the conduct of the officials in question amounted at most to negligence. The Court of Appeal held that to allow a section 3060 accusation to proceed on the basis of negligence would have "ominous public policy implications," effectively allowing the district attorney to subject officials to the expense and rigors of accusation and trial and seek "to oust them for getting a C minus on their report cards." (*Ibid.*)

This Court should approve the standard announced in *Steiner*.

III. THE APPEARANCE OF A CONFLICT OF INTEREST BY THE DISTRICT ATTORNEY'S OFFICE REQUIRES DISMISSAL OF THE INDICTMENT AND ACCUSATION

In People v. Superior Court (Greer) (1977) 19 Cal.3d 255, 269, this Court set forth the standard to be applied to a motion to recuse a prosecutor's office on the basis of a conflict of interest:

> [A] trial judge may exercise his power to disqualify a district attorney from participating in the prosecution of a criminal charge when a judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, *or appear to affect,* his ability to impartially perform the discretionary functions of his office.

(Emphasis added.) The *Greer* Court stated a conflict of interest which disqualifies a prosecutor from participating in a criminal case similarly provides a ground for concluding that a defendant was not "legally committed" within the meaning of section 995, and that an information (and, by implication, an indictment or accusation) must be set aside when obtained by a prosecutor with such a conflict. (*Id* at p. 263, fn. 5.)

Thereafter, in 1980, the Legislature enacted Penal Code section 1424, providing that a motion to recuse shall not be granted "unless it is shown by the evidence that a conflict of interest exists *such as would render it unlikely that the defendant would receive a fair trial*" (emphasis added), thus creating a different standard than that set forth for recusal in *Greer* (*See People v. Eubanks, supra,* 14 Cal.4th 580, 592 (to require disqualification under section 1424, conflict may

be actual or only apparent, but potential for prejudice must rise to level of likelihood of unfairness in trial proceedings, as opposed to appearance of impropriety as is sufficient under *Greer*).)

By its plain terms, however, section 1424 has no application to a motion to set aside an indictment or accusation. Section 1424 is directed at ". . . a motion to disqualify a district attorney from performing an authorized duty." It manifestly does not apply to a motion brought under section 995 or Government Code section 3066, which is not directed at recusal, but at setting aside an indictment or accusation.

Impartiality in exercise of the district attorney's discretionary function in charging a defendant is particularly crucial. The prosecutor is vested with considerable power to decide what crimes will be charged and how they will be prosecuted. Because he or she enjoys such broad discretion, the public and those he accuses may justifiably demand that he act with "the highest degree of integrity and impartiality, and with the appearance thereof." (*Greer, supra*, 19 Cal.3d at pp. 266-267.) The charging process is "the phase of a criminal proceeding when the prosecution's discretion is most apparent"; the district attorney's screening process is a major safeguard against frivolous prosecutions, and "an essential aspect of this safeguard must be the prosecutor's freedom from any personal or emotional involvement in a controversy which might bias his objective exercise of judgment." (*Id.*, at p. 267, fn. 8.) A grand jury chamber,

where the district attorney advises a grand jury in secrecy, without the presence of a representative of the accused, is the *locus classicus* that should not be tainted with even the appearance of impropriety.

In *Eubanks*, this Court specifically left open the effect of the enactment of section 1424 upon a motion brought under section 995 seeking to set aside an accusatory pleading due to participation in the charging process by a district attorney with an alleged conflict of interest. (*Eubanks, supra*, 14 Cal.4th at p. 592, fn. 4.)

The Court of Appeal here expressly declined to resolve the issue left open in *Eubanks*, asserting that this Court's decision in *Greer* did not authorize a motion to dismiss an indictment for a conflict of interest:

> In our view, however, a mere appearance of a conflict of interest on the part of the prosecutor was never a valid basis for setting aside a grand jury indictment. In *Greer*, the court suggested that if a district attorney's participation in filing a complaint against a defendant or participation in a preliminary hearing on that complaint created the appearance of a conflict of interest, the court could set aside the resulting information under section 995 on the ground the defendant was not "legally committed" within the meaning of the statute. (*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 263, fn. 5.) This was a reference to section 995, subdivision (a)(2)(A) of the statute, which provides that an information must be set aside upon a finding "[t]hat before the filing thereof the defendant had not been legally committed by a magistrate." The subdivision does not apply here, because Stark was charged by a grand jury *indictment*, not by an information. As we have previously explained, a motion to set aside an indictment under section 995 falls under subdivision (a)(1) of the statute, and that subdivision does not contain a provision comparable to subdivision (a)(2) requiring set-aside if

> the defendant was not "legally committed." Without such a provision, subdivision (a)(1) of section 995 provides no basis for setting aside an indictment because of an appearance of a conflict of interest on the part of the prosecutor who presents the case to the grand jury.
>
> What that leaves us with is the conclusion that an indictment can be set aside based on a conflict of interest only if the defendant shows that the conflict of interest violated his constitutional right to due process.

(Opinion at pp. 45-46.)

Once again, the Court of Appeal's rationale for such a narrow interpretation of a decision of this Court is not persuasive. To begin, it would be anomalous indeed to suggest that a defendant charged by indictment was required to meet a different legal standard to challenge a claimed conflict of interest than a defendant charged by information. Such a dual standard would be difficult to reconcile with the right to equal protection guaranteed by the California Constitution (*Hawkins v. Superior Court, supra.*) Of course, a construction of a statute which would call into question its constitutional validity is to be avoided wherever possible (See *People v. Romero* (1996) 13 Cal.4th 497, 509.).

In support of its narrow construction of *Greer*, the Court of Appeal focuses upon the second sentence in footnote 5, where this Court referred by way of example to the more common practice of proceeding by way of information. However, the first sentence of footnote 5 reads:

> We do not mean to deny that the same conflict of interest which disqualifies a prosecutor from participating in the trial of a criminal case may not also taint the procedure by which the defendant was charged, if the same district attorney participated

> therein (See discussion at fn 8, *post*; see also *Corbin v. Broadman* (1967) *supra*, 6 Ariz.App. 436 [433 P.2d 289]; *State v. Jones* (1924) 306 Mo. 437 [268 S.W. 83]; Annot., 31 A.L.R.3d 953, 984-986.)

(*Greer, supra*, at p. 263, fn. 5.) Not only is there no suggestion that the *Greer* Court's reference to "the procedure by which the defendant is charged" was limited only to an information, the cases cited by the Court include examples of the setting aside of both an indictment and an information. (*Corbin, supra*, 433 P.2d 289 (order quashing grand jury indictment is affirmed due to prosecutor's conflict of interest and participation in grand jury proceedings) and *State v. Jones, supra,* 268 S.W. 83 (court should have quashed information on its own motion upon learning that prosecutor had a conflict of interest).)

The district attorney's critical and prominent discretionary function prior to the filing of an indictment or accusation merits continuing the standard set forth in *Greer* as the basis for a motion under section 995 to set aside an accusatory pleading - - that is, a reviewing court need not find that Mr. Stark was unlikely to receive a fair trial, but only that there was an appearance of impropriety created by the district attorney's conflict, whether deemed an actual or apparent conflict. Under this correct standard, the trial court's unexplained, and seemingly inexplicable, conclusion that "the District Attorney's involvement did not create a potential for bias or the appearance of a conflict of interest" (Tab D, p. 83) unquestionably constituted an abuse of discretion.

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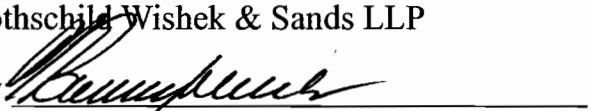
CONCLUSION

The petition for review should be granted to secure uniformity of law and to settle important issues of statewide concern.

Dated: July 25, 2006

Respectfully submitted,

Rothschild Wishek & Sands LLP

By 

M. BRADLEY WISHEK
Attorneys for Petitioner, Robert E. Stark

CERTIFICATION OF WORD COUNT

I am counsel for Robert E. Stark. I hereby certify that the foregoing petition, exclusive of tables, the Court of Appeal Opinion and this certificate under Rule 28.1(d)(1) is 5,727 words. In making this certification, I am relying upon the word count of the computer program used to prepare the document.

DATED: July 25, 2006

BY: 
M. BRADLEY WISHEK

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

ROBERT E. STARK, Petitioner, v. SUPERIOR COURT OF SUTTER COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	C051073 (Super. Ct. No. CRMS051001)
ROBERT E. STARK, Petitioner, v. SUPERIOR COURT OF SUTTER COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	C051074 (Super. Ct. No. CRMS051031)

RONDA G. PUTNAM,

Petitioner,

v.

SUPERIOR COURT OF SUTTER COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

C051075

(Super. Ct. No. CRMS051030)

ORIGINAL PROCEEDINGS in mandate. Ted H. Hansen, Judge. Peremptory writ issued.

Rothschild, Wishek, Chastaine & Sands, M. Bradley Wishek; Marilyn Fisher, for Petitioner Robert E. Stark.

Blackmon & Associates, Clyde M. Blackmon, Melinda J. Nye; Marilyn Fisher, for Petitioner Ronda Putman.

No appearance for Respondent.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Manuel M. Medeiros, State Solicitor, Mary Jo Graves, Senior Assistant Attorney General, Michael A. Canzoneri and Janet Neeley, Supervising Deputies Attorney General, Clifford E. Zall, Deputy Attorney General, for Real Party in Interest.

This writ proceeding arises out of a turf battle between some of the elected officials in Sutter County (the County) over accounting matters. That battle has resulted in a 13-count criminal indictment against the auditor-controller of the County, Robert E. Stark, as well as accusations under Government Code section 3060 against both Stark and his assistant, Ronda G. Putman, seeking to remove them from office for willful misconduct.

Stark and Putman moved to set aside the grand jury's indictment and accusations on various grounds. For the most part, the superior court denied those motions. As will be shown, we conclude the superior court erred when it refused to set aside some of the criminal charges against Stark and the accusation against Putman. Otherwise, however, the superior court was correct. We will issue a peremptory writ of mandate to correct the court's errors and otherwise allow the matter to proceed against Stark.

FACTUAL AND PROCEDURAL BACKGROUND

What follows is a general overview of the factual and procedural background of this writ proceeding. Further detail of the underlying facts is set forth below in the discussion section.[1] Stark has been the auditor-controller of the County since 1985.

In the fall of 2004, Larry Combs, the county administrative officer (who is appointed by the board of supervisors to manage the County), became aware that Stark was "making arbitrary changes to policies, making some accounting decisions that did not make sense and interfering with the operations of the county." As a result, Combs prepared a report to the board entitled, "Analysis of Performance of Auditor-Controller & Recommendation for Action," which he presented to the board on

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[1] Because this proceeding seeks to challenge the legal sufficiency of the indictment and the accusations, we set forth the facts in the light most favorable to the grand jury's decision to indict and accuse Stark and Putman.

September 7, 2004. That report alleged that "serious problems exist with respect to [Stark's] job performance." Among those problems were the following: (1) Stark filed the final budget for fiscal year 2003-2004 in June 2004, six and one-half months late; (2) Stark believed he had the authority to unilaterally amend the County budget, when state law limits that authority to the board of supervisors; (3) Stark was asserting the authority to approve the rates some County departments, such as the information technology (IT) department, were charging other County departments to recover the cost of services provided; (4) in January 2003, Stark withheld overtime pay from the County's firefighters based on an erroneous interpretation of the County's memorandum of understanding (MOU) with them; and (5) in the final budget for 2003-2004, which Stark belatedly filed in June 2004, Stark unilaterally transferred money from the County's general fund reserve to the Sutter County Waterworks District #1.

As a result of Combs's report, the board of supervisors took various actions with respect to Stark. One such action related to the setting of rates for the IT department. The IT department gets a small amount of its revenue by providing services for outside agencies, but gets the majority from services provided to other county departments, for which the department is paid through inter-fund charges (transfers from one County fund to another). Before September 2004, the billing rate that the IT department charged to other county departments for its services was set through "an informal process between

the department, [Stark,] and [the county administrative officer's] office." Then, Stark began asserting the authority to disapprove the billing rate. As a result, at Combs's request, the board delegated to Combs the power to set the IT department's billing rate.

On March 3, 2005, the grand jury began an investigation into Stark's conduct. The investigation continued through early May. On May 4, the grand jury returned a 13-count criminal indictment against Stark (case No. CRF051001). The grand jury also returned a 15-count accusation against Stark (case No. CRMS051031) and a two-count accusation against Putman (case No. CRMS051030) under Government Code section 3060 for willful misconduct in office. The charges in the indictment and information related to some of the incidents raised in Combs's report to the board of supervisors in September 2004, as well as other incidents (all of which will be further detailed below).

In July 2005, Stark and Putman filed motions to set aside the indictment and the accusations. In a consolidated memorandum of points and authorities, they argued, among other things, that the evidence presented to the grand jury was insufficient as a matter of law to support the indictment and the accusations because there was no evidence they purposefully refused to follow the law.

Following a hearing in October 2005, the superior court set aside the first count of the indictment and counts two and thirteen of the accusation against Stark, but let the remaining charges stand. Stark and Putman sought review in this court by

filing virtually identical petitions for writs of mandate or prohibition. (Stark filed two petitions: one relating to the criminal indictment and one relating to the accusation against him.) On November 23, 2005, this court summarily denied all three petitions.

Stark and Putman petitioned for review in the Supreme Court. On February 22, 2006, the court granted their petitions, consolidated the three cases, and transferred the matter back to this court "with directions to vacate its order denying petitions for mandate and prohibition and to issue an order directing real party in interest to show cause before that court why the relief sought in the petition should not be granted."

This court issued the orders to show cause as directed on March 8, 2006. By stipulation, on March 21 we consolidated the three petitions and agreed to decide "[t]he matters raised in the petitions . . . upon the briefs previously filed in the superior court and the record of those proceedings." Accordingly, we now turn to the issues raised in Stark's and Putman's motions to set aside the indictment and the accusation.

DISCUSSION

I

The Indictment

We begin by addressing Stark's arguments challenging the criminal indictment against him.[2]

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[2] As will be seen, because Stark and Putman direct most of their arguments to the indictment against Stark *and* the

A

Standard Of Review

On a criminal defendant's motion, the trial court must set aside an indictment when "the defendant has been indicted without reasonable or probable cause." (Pen. Code, § 995, subd. (a)(1)(B).) "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. [Citation.] An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it." (*Bompensiero v. Superior Court* (1955) 44 Cal.2d 178, 183-184.) "'Reasonable and probable cause' may exist although there may be some room for doubt." (*People v. Nagle* (1944) 25 Cal.2d 216, 222.)

On a motion to set aside an indictment, "'the question of the guilt or innocence of the defendant is not before the court, nor does the issue concern the quantum of evidence necessary to sustain a judgment of conviction. The court is only to determine whether the [grand jury] could conscientiously entertain a reasonable suspicion that a public offense had been committed in which the defendant had participated.'" (*People v. Hall* (1971) 3 Cal.3d 992, 996, quoting *People v. Jablon* (1957) 153 Cal.App.2d 456, 459.)

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accusations against both of them, the resolution of those arguments in relation to the indictment also disposes of those same challenges with relation to the accusations.

"A reviewing court may not substitute its judgment for that of the grand jury or magistrate in determining the sufficiency of the evidence and must draw all reasonable inferences in support of the indictment or information." (*People v. Backus* (1979) 23 Cal.3d 360, 391.)

B

Penal Code Section 424

The 13-count indictment alleges that Stark violated five of seven subdivisions of Penal Code[3] section 424, subdivision (a). Those provisions are as follows:

"(a) Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:

"1. Without authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another; 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; or,

"3. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,

"[¶] . . . [¶]

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[3] All further statutory references are to the Penal Code unless otherwise indicated. Hereafter, we will refer to the various subdivisions of Penal Code section 424 in the following form: section 424(a)(1), section 424(a)(2), etc.

"6. Willfully omits to transfer the same, when transfer is required by law; or,

"7. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him or her under any duty imposed by law so to pay over the same; —

"Is punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in this state."[4]

With these provisions in mind, we turn to the specific charges against Stark.[5]

C

Second Count

Transfers From General Reserve

The second count of the indictment alleges that Stark violated section 424(a)(3) by "wilfully and unlawfully mak[ing] seven unauthorized transfers totaling $380,334.00 from the General Fund's General Reserve." The facts underlying this charge were as follows:[6]

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[4] Neither Stark nor Putman was charged with violating section 424(a)(4) or section 424(a)(5), and therefore we do not address those provisions.

[5] Some of Stark's arguments pertain to all of the counts in the indictment, while others are limited to particular counts. Under these circumstances, we believe the best way to approach Stark's various arguments is count by count.

[6] We discuss these facts in somewhat greater detail than necessary for resolution of the argument that follows because

The County maintains two types of reserves in its general fund, both of which appear in the county budget: special reserves for specific purposes, such as capital improvements, and a general reserve, which can be used only in case of a declared emergency. The board of supervisors has set the amount of the general fund's general reserve at $1,088,000.

In August 2003, the County's election department sought to amend the budget for 2003-2004 to allow the purchase of an upgrade for its vote card reader system. To fund the purchase of the upgrade, the election department requested "cancellation of prior year reserves" in the amount of $6,327. Apparently, "cancellation of prior year reserves" refers to the use of money held in a reserve at the end of the prior fiscal year and requires a budget amendment transferring that money from the reserve into an account from which the purchase can be made (in this case, the "controlled equipment" account).

Ranjit Johal, an employee of the auditor-controller's office who worked under Putman, processed the transfer voucher necessary to accomplish the budget amendment. The transfer voucher did not specify from which reserve account the money was to come. Putman approved the transfer voucher, which was then submitted to the board of supervisors for its approval. The board of supervisors approved the budget amendment on September 2, 2003. When the approved transfer voucher came back from the

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the facts are relevant to the accusation against Putman, which we discuss later in the opinion.

board, Johal prepared a journal entry. The journal entry, which was initialed by Putman, debited the general reserve of the County's general fund in the amount of $6,327. According to Johal, either Stark or Putman told her to use the general reserve account No. 37300 on the journal entry.

Between September 2003 and February 2004, Johal made a total of seven transfers under similar circumstances, debiting a total of $380,334 from the general fund's general reserve. In addition, she made one transfer in December 2003 that credited $115,000 to the general reserve.

Marilee Smith, a certified public accountant, conducted an outside audit of the County's books for the 2003-2004 fiscal year. In auditing the County's general fund, she noted that the general fund's general reserve had been decreased seven times and increased one time during the year. Because there was no legally declared emergency, she believed the changes to the general reserve were improper.

As of March 3, 2005, when the grand jury began its investigation of Stark, the general reserve had not yet been restored to its authorized level of $1,088,000. Instead, the balance stood at $822,431.

With these facts in mind, we turn to Stark's arguments. In challenging the second count of the indictment, Stark contends that "no evidence exists to support the proposition that any *false* entries were made in the books of Sutter County. At most, . . . there are entries in the county books which are in *error*." The People, on the other hand, contend "[t]he balance of the

general reserve of $822,431.00 is a false entry in the budget of Sutter County, as the Board took no action to approve this amount. The Board of Supervisors has set the general reserve at [$]1,088,000.00, and only the Board, not the Auditor, can take action to change its balance." Or, in the words of the prosecutor in the trial court, "The transfer of the money itself creates a false record as to what the County's financial status is. It inaccurately depicts the current situation of the County's finances and falsely represents what the County's status is."

Under the law, a county's budget "may contain reserves, including a general reserve, and designations in such amounts as the board deems sufficient." (Gov. Code, § 29085.) "Except in cases of a legally declared emergency, as defined in Section 29127, the general reserve may only be established, canceled, increased or decreased at the time of adopting the budget as provided in Section 29088." (*Id.*, § 29086.) Only the board of supervisors has the authority to declare an emergency and authorize emergency expenditures from the general reserve. (*Id.*, § 29127.)

Based on the foregoing provisions, it is undisputed that Stark did not have the authority to decrease the County's general reserve without a declaration of emergency from the board of supervisors. The question is whether an unauthorized entry in an accounting record showing a decrease in the County's general reserve is a "false" entry within the meaning of section 424(a)(3).

To support their position, the People rely on *People v. Groat* (1993) 19 Cal.App.4th 1228. In *Groat*, an employee of the City of Sunnyvale admitted that "on at least 16 days during 1990 and 1991 she submitted time cards indicating time worked or sick when she was neither at work nor at home sick but in fact teaching classes at Los Medanos College in Pittsburg." (*Id.* at pp. 1230, 1234.) On appeal from her conviction for violating section 424, she argued "that her conduct did not violate any of the subdivisions of section 424." (*Groat*, at p. 1231.) The appellate court disagreed, stating, "When appellant filled out her time card, she took the first step in the process which led to the disbursement of public funds in the form of her paycheck. There is certainly no authority of law for the payment of public funds as salaries for work never performed." (*Id.* at p. 1235.)

Groat does not support the People's position. The defendant in *Groat* plainly made "false" entries on her time sheet when she reported to the city that she was either working for the city or sick at particular times, when in fact she was working at a different job at those times. The entries on her time sheets were false because they did not reflect the true facts.

The same cannot be said of the transfers from the County's general reserve here. Certainly Stark did not have the authority to decrease the general reserve without the approval of the board of supervisors. But that only makes the journal entries that decreased the reserve *unauthorized;* it does not make them false. Nor is the resulting entry in the County's

budget showing a general reserve balance of $822,431 a "false" entry. That figure accurately reflects the amount that remains in the general reserve after the unauthorized transfers were made. Again, Stark may not have had the authority to decrease the general reserve, but the figure shown on the budget reflects the true facts -- only $822,431 remained in the general reserve after the unauthorized transfers.

An accounting entry that accurately reflects the results of an unauthorized transaction is nonetheless true. Accordingly, no reasonable or probable cause existed to suspect Stark had violated section 424(a)(3) by making seven unauthorized transfers from the County's general reserve, and thus the trial court erred in denying Stark's motion to dismiss the second count of the indictment.

D

Third and Fourth Counts

Transfer To The Waterworks District

The third count of the indictment alleges that Stark violated section 424(a)(1) by "wilfully and unlawfully transfer[ing] $336,485.00 from the Sutter County General Fund to WaterWorks District No. 1." The fourth count alleges that this transfer also violated section 424(a)(3). The evidence underlying these charges was as follows:

The County's annual budget, which is essentially a spending plan for the year, generally includes all of the operating departments of the County, as well as special districts over which the board of supervisors serves as the governing body.

One of those special districts is Waterworks District No. 1, also known as the Robbins Water District (the Waterworks District). The Waterworks District is an enterprise fund that provides sewer and water services to the community of Robbins.

In 2003-2004, Stark felt the Waterworks District's fund was significantly out of balance and felt that it had to be balanced or otherwise the entire county budget would be out of balance. The office of the county administrative officer disagreed, because in its opinion enterprise funds do not have to be included in the county budget in the first place; they are included merely for informational purposes. Thus, if an enterprise fund is out of balance, it has no effect on the overall county budget.

In May 2004, Stark transferred $336,485 from the County's general fund to the Waterworks District to balance the enterprise fund. The office of the county administrative officer did not learn of this transaction until one of its staff members discovered it while examining the final budget for the 2003-2004 fiscal year.

1. *False Entry*

We begin with the fourth count, which we can resolve on the same basis that we resolved the second count. As noted, Stark contends that "no evidence exists to support the proposition that any *false* entries were made in the books of Sutter County. At most, . . . there are entries in the county books which are in *error.*" The People, on the other hand, contend that "Penal Code section 424(a)(3) was violated in that the budget reflects

a transfer not authorized by the board, and thus, is a false entry."

As we explained above, an accounting entry that accurately reflects the results of an unauthorized transaction is nonetheless true. Thus, even if Stark did not have the authority to transfer money from the County's general fund to the Waterworks District, his doing so did not result in a false entry in the County's books. Rather, it resulted in a true entry reflecting an unauthorized act. For this reason, the trial court erred in denying Stark's motion to dismiss the fourth count of the indictment.

2. *Use Of Public Money*

The third count is a different matter, however, because that charge relies on a different provision of section 424. Section 424(a)(1) makes it a felony for a public official to appropriate public money "to his or her own use, or to the use of another" "[w]ithout authority of law." The People's theory on this count is that by transferring money from the County's general fund to the Waterworks District, Stark appropriated that money to the use of the Waterworks District without authority of law, thereby violating section 424(a)(1).

Stark argues that the evidence before the grand jury did not establish any "use" of the money transferred from the County's general fund to the Waterworks District and therefore did not establish a violation of section 424(a)(1). As will be shown, the evidence before the grand jury justified the third

count of the indictment irrespective of whether the money was "used."

Stark rests his "use" argument on *People v. Crosby* (1956) 141 Cal.App.2d 172. In *Crosby*, the public administrator of San Mateo County was convicted of violating section 424(a)(1) based on various withdrawals he made from bank accounts in which he kept money belonging to estates he was administering. (*Crosby*, at p. 173.) Under the law, the defendant was "required to keep the moneys of estates . . . on deposit with the county treasurer or '[on] deposit . . . with one or more banks authorized to do business in his county.'" (*Ibid.*) At trial, the defendant admitted "keeping a large amount of cash belonging to [the] estates in his safe deposit box or elsewhere" but "flatly and consistently denied that he at any time used any of these moneys." (*Id.* at pp. 173-174.)

On appeal, the defendant contended the trial court erred in instructing the jury that if he "'knowingly and willfully placed monies belonging to estates under his administration in a safe deposit box, instead of depositing with the County Treasurer or with a bank, you may find that such use of monies was without authorization and contrary to law.'" (*People v. Crosby*, *supra*, 141 Cal.App.2d at pp. 175-176.) The appellate court agreed the instruction was erroneous, stating: "'To use,' in the sense in which the word 'use' is employed in this section is: 'To make use of . . . to convert to one's service; to avail oneself of; to employ; as to *use* a plow, a chair, a book . . .' (Webster's New Internat. Dict., 2d ed.) To keep money in a safe deposit

box or elsewhere is not 'to use' it in any common acceptation of that word." (*Crosby*, at p. 176.)

Relying on *Crosby*, Stark contends there was no evidence of "use" of public money here because "no funds left the Sutter County Treasury" and "[t]he challenged conduct consists of no more than entries in the books of Sutter County." As we shall explain, however, it is not necessary to actually "use" public money to violate section 424(a)(1).

To understand section 424(a)(1), it is necessary to contrast that provision with section 424(a)(2). The latter provision makes it a crime to *use* public money for any purpose not authorized by law.[7] The former provision, on the other hand, makes it a crime to *appropriate* public money to one's own use or the use of another without authority of law.

To "appropriate" means "to take exclusive possession of," "to set apart for or assign to a particular purpose or use" or, "to take or make use of without authority or right." (Webster's Collegiate Dict. (10th ed. 2000) p. 57, col. 2.) Applying these definitions, a public official can violate section 424(a)(1) without actually using public money; it is enough if the official simply takes the money or sets it aside without authority. Under this construction of the statutes, section 424(a)(1) and section 424(a)(2) criminalize different acts, and neither is superfluous. (See *People v. Ramirez* (2003) 109

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[7] Section 424(a)(2) also makes it a crime to loan or make any profit out of public money.

Cal.App.4th 992, 1001 [courts must "'give effect and meaning to all parts of a law if possible and avoid interpretations which render statutory language superfluous'"].) The unauthorized *use* of public money is a violation of section 424(a)(2). The unauthorized *appropriation* of public money is a violation of section 424(a)(1), regardless of whether the money is ever actually used.

It is true that the court in *Crosby* stated, "It is the gist of the offense proscribed by section 424, subdivisions 1 and 2, Penal Code, that the defendant *use* the moneys of the estate in some fashion." (*People v. Crosby, supra*, 141 Cal.App.2d at p. 176.) That assertion is flawed for the reasons set forth above. Section 424(a)(1) does not require that the public official actually use the public money for an unauthorized purpose -- that is the gist of section 424(a)(2). Section 424(a)(1) requires only that the public official appropriate the public money to his own use or the use of another.

Here, by transferring money in the County's budget from the County's general fund to the Waterworks District without lawful authority, Stark was taking or setting aside that public money for the use of someone other than the County as a whole -- the Waterworks District. That the Waterworks District may not have used that money makes no difference for purposes of section 424(a)(1). Thus, this challenge to the third count of the indictment fails.

3. *Intent To Violate The Law*

Stark next argues that section 424(a)(1) requires proof of a knowing and intentional violation of the law, and no such proof was presented to the grand jury. Stated another way, Stark contends that public officials charged with violating section 424 must have acted "contrary to what they knew and believed the law to require," and there was no such evidence that he did so here.

To the extent Stark means it must be shown that he intended to commit a crime, we disagree. As will be shown, however, we do agree that section 424(a)(1) includes an implicit mens rea requirement -- specifically, the intentional appropriation of public money to the use of oneself or another *without authority of law*. A person cannot intend to appropriate something without authority of law unless the person *knows* he or she is acting without legal authority. Thus, evidence before the grand jury had to support a finding of probable cause to believe that Stark *knew* he was acting without authority of law -- i.e., that he knew he did not have the legal authority to transfer money from the County's general fund to the Waterworks District. We conclude the evidence was sufficient on that point.

Unlike subdivisions (a)(3) through (a)(6) of section 424, section 424(a)(1) does not contain the word "knowingly," "fraudulently," "willfully," or any other word expressing the mental state that must accompany the appropriation of public money which subdivision (a)(1) criminalizes. As our Supreme Court has explained, however, "That the statute contains no

reference to knowledge or other language of mens rea is not itself dispositive. . . . [T]he requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure expressly to state it. 'Generally, "'[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' . . ." [Citation.] In other words, there must be a union of act and wrongful intent, or criminal negligence. [Citations.] "So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication." [Citation.]'" (*In re Jorge M.* (2000) 23 Cal.4th 866, 872.)

The People contend "that misappropriation of public funds is a general intent crime," which means that the perpetrator intended to do the proscribed act. (See *People v. Atkins* (2001) 25 Cal.4th 76, 82.) Thus, in the People's view, it is enough that the public official intended to appropriate the public money to his use or the use of another; it need not be shown that the official knew he was doing so without authority of law.

Stark contends the People's argument "results, in effect, in a strict liability offense." Stark is mistaken. "Strict liability offenses eliminate the 'requirement of *mens rea* . . . .'" (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331.) Here, the People do not interpret section 424(a)(1) as having *no*

mens rea requirement; they simply advocate a limited mens rea requirement that does not include the intent to act without authority, but only the intent to appropriate the public money to the use of oneself or another.

Stark, on the other hand, contends the mens rea required to violate section 424(a)(1) is not limited to the intention to appropriate public money to the use of oneself or another. Rather, according to Stark, "Penal Code section 424 requires proof that a public official purposefully refused to follow the requirements of law."

Properly limited, Stark's position is a reasonable one. If the intent generally required for criminal liability is the intent to do the proscribed act, and the act proscribed by section 424(a)(1) is the appropriation of public money to the use of oneself or another *without authority of law*, then it is reasonable to conclude that the intent required to violate section 424(a)(1) is the intent to appropriate public money to the use of oneself or another *without authority of law*. Of course, a person cannot intend to act without authority of law unless the person *knows* his or her action is unauthorized. Thus, to be convicted of violating section 424(a)(1), the public official must have known he was acting without authority of law in appropriating the money and thereby *intended* to act without legal authority. This is not to say that the public official must know he is violating section 424(a)(1) by his action; only that he must know he has no legal authority to appropriate the money for himself or another.

Jorge M., a decision of our Supreme Court that Stark heavily relies on to support his position, provides some guidance in determining what mens rea is required to violate section 424(a)(1). There, the court considered the mens rea required to violate section 12280, subdivision (b), which prohibits the possession of an unregistered assault weapon. (*In re Jorge M.*, *supra*, 23 Cal.4th at pp. 870-871.) Specifically, the court considered "whether knowledge of the characteristics bringing a firearm within the AWCA [Assault Weapons Control Act] is an element of section 12280(b)'s bar on possession." (*Jorge M.*, at p. 871.)

The People in *Jorge M.* argued that "if section 12280(b) is construed to require some mens rea, it should be 'knowledge simply of possession' of the firearm." (*In re Jorge M.*, *supra*, 23 Cal.4th at p. 885.) The court agreed that "section 12280(b), like criminal possession laws generally, requires knowledge of the object's existence and of one's control over it," but the court also "believe[d] the Legislature intended section 12280(b) to require, as well, a degree of scienter regarding the *character* of the firearm" because "without such a scienter element, the possibility of severely punishing innocent possession is too great." (*Ibid.*)

"A group of amici curiae argue[d] for a required mens rea even greater than knowledge of the weapon's characteristics: 'actual knowledge by defendants that a firearm they possessed is one that is covered by the Act.'" (*In re Jorge M.*, *supra*, 23 Cal.4th at p. 886.) The Supreme Court rejected this argument,

concluding that "to require knowledge of the law . . . would seriously impede effective enforcement of the AWCA, contrary to the legislative intent. Nothing in the language or history of the AWCA suggests the Legislature intended to create, in section 12280, an exception to the fundamental principle that all persons are obligated to learn of and comply with applicable laws."[8] (*Ibid.*)

These two aspects of the decision in *Jorge M.* tend to support a mens rea requirement in section 424(a)(1) that requires more than simply the intent to appropriate public money to one's own use or the use of another. As in *Jorge M.*, without a further scienter requirement, there is a possibility of severely punishing innocent persons. In our case, those persons are public officials who appropriate public money for their own use or, more likely, for the use of another reasonably believing they are acting within the scope of their lawful authority, when in fact they are not. Requiring as part of the mens rea of the crime the public official's knowledge of his lack of authority avoids this harsh result.

At the same time, requiring such knowledge is not the same as the unsuccessful position advanced by amici curiae in *Jorge M.*, which would have required knowledge of the law being violated. A public official who knows he is acting outside the

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[8] Ultimately, the Supreme Court settled on "[a] scienter requirement satisfied by proof the defendant *should* have known the characteristics of the weapon bringing it within the AWCA." (*In re Jorge M.*, *supra*, 23 Cal.4th at p. 885.)

scope of his lawful authority in appropriating public money for his own use or the use of another does not necessarily know he is committing a felony in violation of section 424(a)(1). Moreover, unlike in *Jorge M.*, here there is a basis in the language of the statute for the additional scienter requirement. As we have explained, the act section 424(a)(1) proscribes is the appropriation of public money without lawful authority, and thus the intent to do the proscribed act is logically the intent to appropriate public money to the use of oneself or another without that authority. Such intent cannot be shown unless the person knew he lacked authority to make the appropriation in question.

Requiring knowledge that there was no legal authority for the action is not inconsistent with *People v. Dillon* (1926) 199 Cal. 1, a case on which the People rely heavily to support their position. *Dillon* involved the prosecution under section 424(a)(1) and (a)(2) of the commissioner of finance for the City of Fresno, who used public money to purchase, at a discount available to the city, automobile tires and automobile accessories for the private use and benefit of various individuals. (*People v. Dillon*, *supra*, 199 Cal. at pp. 3-4.) Apparently because the city was reimbursed for almost all of the expenditures, the defendant in *Dillon* attempted to avoid liability by arguing that he should have been prosecuted for embezzlement under section 504, which would have required a showing of intent to defraud. (*People v. Dillon*, *supra*, 199 Cal. at pp. 4-7.) In rejecting this assertion and concluding

the Legislature had the power "to provide that embezzlement of public moneys is committed by a public officer when he uses public funds in a manner forbidden by law even though he may have no fraudulent intent when he does so," the court made the following observations: "To render a person guilty of crime it is not essential to a conviction that the proof should show such person to have entertained any intent to violate law. [Citations.] It is sufficient that he intentionally committed the forbidden act. Statutes which come clearly within the exercise of the police power of the state, of which section 424 is a striking example, fully illustrate the rule. [Citation.] Section 20 of the Penal Code is too clear to require juridical support. It provides: 'In every crime or public offense there must exist a union or joint operation of *act* and *intent*, or criminal negligence.' (Italics supplied.) The only construction that may be placed upon the above quoted section is that there must be an intent to do the forbidden thing or commit the interdicted act. It furnishes no basis for the claim that there must exist in the mind of the transgressor a specific purpose or intent to violate law. If it were so, innumerable statutes would be rendered ineffectual." (*People v. Dillon*, *supra*, 199 Cal. at p. 7.)

The *Dillon* court went on to address the defendant's assertion that the trial court prejudicially erred in refusing to give "certain instructions requested by the defendant" which "were based upon the theory that to justify the conviction of the defendant it was incumbent upon the prosecution to establish

the existence in the mind of said defendant of an intent to appropriate said public moneys to a use not authorized by law." (*People v. Dillon, supra,* 199 Cal. at p. 14.) In rejecting that argument, the court wrote:

"In our view of the law such instructions were properly refused.

"Appellant has earnestly called to our attention unusual and exceptional instances in which the law, if interpreted as we construe it, would bring about a hard situation. He uses to illustrate his argument the case of a public officer who, in obedience to an invalid statute which he believes to be valid, in good faith, disburses money as therein directed and thereafter said statute is declared to be invalid. In such a case, it is argued, the public officer would be unjustly punished as a felon. Our answer to this argument is that no such case is before us. The officer in the instant case did not act in obedience to a law presumably valid but he acted in disobedience and contrary to the statute as written. Besides, it is not necessary to here declare what the decision of this court might be in case an officer acted in good faith under color of the authority of law.

"It is not for us to consider the wisdom of the statute. It cannot be said to be invalid on the ground that it is unreasonable or harsh. An officer accepts his office with a knowledge of his duties, and in the instant case there was little excuse for the defendant to have been misled into the error he committed. Certainly there was no provision of law or

rule of moral right that could have justified him in making the uses of public moneys which the evidence shows he made. The wisdom of the legislature in requiring custodians of public moneys to hold them inviolate is both a protection to the public and to the officer as it tends to remove from him the temptations that beset those who have large sums of money in their possession free from immediate demands." (*People v. Dillon*, *supra*, 199 Cal. at pp. 14-15.)

In the end, then, the *Dillon* court did not decide whether, to violate section 424(a)(1), it must be shown that the defendant knew he was appropriating public money without authority of law, because in that case there could be no question that the defendant had such knowledge. Indeed, the court specifically left open the question of how section 424(a)(1) would apply if "an officer acted in good faith under color of the authority of law." (*People v. Dillon*, *supra*, 199 Cal. at p. 15.)

For the reasons set forth above, we conclude today that to violate section 424(a)(1), it must be shown that the defendant intended to appropriate public money to his own use or the use of another with knowledge that he was acting without authority of law. To prove this mental state, it must be shown that the defendant actually knew that the law did not authorize his appropriation of the money. If a public official knows he does not have authority to appropriate public money in a particular way, but does so any way, then and only then can it be said that the official has acted with the intent to commit the act section

424(a)(1) prohibits. If, on the other hand, the public official believed in good faith that his actions were authorized, then the official cannot be said to have acted with the requisite mental state.

The question that remains is whether the People presented sufficient evidence to the grand jury for a reasonably prudent person to conscientiously entertain a strong suspicion that Stark violated section 424(a)(1) because he knew he did not have legal authority to transfer money from the County's general fund to the Waterworks District. We conclude they did.

Government Code section 29080 et seq. sets forth the laws governing a county's annual adoption of its final budget. Under those laws, the board of supervisors is required to hold a public meeting on the proposed budget. (Gov. Code, § 29080.) The county auditor, or his designated deputy, is required to attend the meeting. (*Id.*, § 29083.) By a certain date following the conclusion of the hearing, the board is required to adopt a final budget "after making any revisions of, deductions from, or increases or additions to, the proposed budget it deems advisable during or after the public hearing." (*Id.*, § 29088.) "Increases or additions shall not be made after the public hearing, unless the items were proposed in writing and filed with the clerk of the board before the close of the public hearing or unless approved by the board by four-fifths vote." (*Ibid.*) As for transfers and revisions, those "may be made with respect to the appropriations as specified in the resolution of adoption of the budget, except with respect to

transfers from the appropriations for contingencies, by an action formally adopted by the board at a regular or special meeting and entered in its minutes. The board may designate a county official to approve transfers and revisions of appropriations within a budget unit." (*Id.*, § 29125.)

There was testimony before the grand jury that "[t]here was nothing in the final budget resolution for fiscal year 2003-04 that authorized" Stark "to transfer money out of the general fund reserve" into the Waterworks District and that "[t]here was no specific action taken by the Board of Supervisors that asked [Stark] to do that or directed him to or authorized him to." There was also testimony that to authorize the transfer from the County's general fund to the Waterworks District, "[i]t would have taken . . . a four-fifths vote of the Board of Supervisors" and "special findings of general public benefit," but the board did not do either of those things.

From the fact that Stark had been the County's auditor-controller for nearly 20 years, and the other evidence before them, the grand jurors could reasonably entertain a strong suspicion that Stark was conversant in the law governing his position and therefore knew he did not have legal authority to transfer money from the County's general fund to the Waterworks District. Accordingly, this challenge to the third count of the indictment fails.

4. *Instructional Error*

Stark claims various errors and omissions in the instructions to the grand jury require dismissal of the

indictment. For the reasons that follow, we conclude that Stark's claims of instructional error are cognizable only to the extent they constitute potential violations of his right to due process in grand jury proceedings.

In *People v. Gordon* (1975) 47 Cal.App.3d 465, the defendant offered a contention similar to Stark's that "the trial court erred in refusing to quash the indictment pursuant to Penal Code section 995" because, among other things, the deputy district attorney "fail[ed] to properly advise the grand jury on certain principles of law." (*Id.* at pp. 474-475.) The appellate court pointed out that "Penal Code section 995 provides only two grounds upon which an indictment may be set aside. They are: '1. Where it is not found, endorsed, and presented as prescribed in this code. 2. That the defendant has been indicted without reasonable or probable cause.'" (*Id.* at p. 475.) With respect to the latter ground, the court concluded "there was abundant evidence to satisfy the reasonable or probable cause requirement for a valid indictment." (*Ibid.*) With respect to the former ground, the court explained that this provision "'has been interpreted as applying only to those sections in part 2, title 5, chapter 1, of the Penal Code beginning with section 940.'" (*Id.* at pp. 475-476, quoting *People v. Jefferson* (1956) 47 Cal.2d 438, 442.) The court then concluded: "An indictment cannot be attacked . . . under Penal Code section 995 . . . on the grounds that the grand jury was given insufficient or even inaccurate legal advice before returning an indictment. [¶] The legal sufficiency of the evidence which underpins an

indictment is reviewed by a judge of the superior court at the time of the hearing on a motion under section 995 of the Penal Code. It is this check on the grand jury's power to indict that serves to protect a defendant against unmeritorious or legally incorrect indictments." (*Gordon*, at p. 476.)

In *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, the Supreme Court noted a narrow exception to the rule that an indictment cannot be attacked under section 995 based on instructional error. In *Cummiskey*, a prosecution for murder, the defendant moved to set aside the indictment on the grounds (among others) that the prosecution misinstructed the grand jury on the standard of proof necessary to return an indictment and erred in failing to instruct the grand jury on lesser included offenses. (*Cummiskey*, at pp. 1018, 1022.) On review of the trial court's denial of that motion, Justice Kennard, in a concurring and dissenting opinion joined by Justice Mosk, agreed with the *Gordon* court that a "challenge [to] the propriety of legal advice and instructions that the grand jury received" "is [not] cognizable under section 1995." (*Cummiskey*, at pp. 1039-1040.)

In a footnote, however, the majority disagreed, stating as follows: "[The defendant's] chief assertion -- that the grand jury was misinstructed on the minimum standard of proof required to indict -- is manifestly tantamount to a claim that, as instructed, the jury may have indicted her on less than reasonable or probable cause. As such, the indictment was plainly subject to a motion to set it aside on that ground under

section 995, subdivision (a)(1)(B). Moreover, [the defendant's] remaining claims are, in essence, grounded on the premise that the manner in which the prosecutor conducted the grand jury proceedings ran afoul of her due process rights under the relevant statutory and common law principles governing indictment by grand juries. Clearly, the Court of Appeal acted within its jurisdiction in entertaining [the defendant's] mandamus proceeding seeking relief from the trial court's denial of her motion to set aside the indictment under section 995." (*Cummiskey v. Superior Court, supra*, 3 Cal.4th at p. 1022, fn. 1.)

There is some reason to question the reasoning of the majority in *Cummiskey* that instructional error can be raised as a basis for setting aside an indictment under subdivision (a)(1)(B) of section 995. That statute does not allow a court to set aside an indictment merely because the grand jury "*may have* indicted [the defendant] on less than reasonable or probable cause." (*Cummiskey v. Superior Court, supra*, 3 Cal.4th at p. 1022, fn. 1, italics added.) On the contrary, the statute allows a court to set aside the indictment only if "the defendant *has been* indicted without reasonable or probable cause." (§ 995, subd. (a)(1)(B), italics added.) Regardless of whatever erroneous instructions the grand jury may have been given, a defendant has been indicted with probable cause if the court, in reviewing the evidence before the grand jury on the defendant's motion to set aside the indictment under subdivision (a)(1)(B) of section 995, determines that there is some rational

ground for assuming the possibility that an offense has been committed and the defendant is guilty of it. Obviously, in making this determination, the court is required to employ the correct law, regardless of the instructions to the grand jury. As the *Gordon* court explained, it is this judicial determination of probable cause that serves as a "check on the grand jury's power to indict" based on incorrect instructions.[9] (*People v. Gordon, supra*, 47 Cal.App.3d at p. 476.)

Nevertheless, we are bound by the decision of the majority of the Supreme Court in *Cummiskey*. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We are not bound, however, to interpret that decision broadly, as at least two other appellate courts have done, and conclude that *all* alleged instructional errors are cognizable under section 995.

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[9] We note that the majority's conclusion in *Cummiskey* that a claim of instructional error regarding the standard of proof can be raised under subdivision (a)(1)(B) of section 995 was unnecessary. Although the defendant moved to set aside the indictment under section 995, her argument regarding the standard of proof appeared to be premised on her constitutional right to due process, rather than on the statute, because she argued that "she was denied *fundamental fairness* in the indictment proceedings because the grand jury was misled into believing that it could return an indictment if it found 'sufficient cause' to do so." (*Cummiskey v. Superior Court, supra*, 3 Cal.4th at p. 1022, italics added; see *People v. Ramos* (1984) 37 Cal.3d 136, 153 [in essence, due process guarantees fundamental fairness in the decision-making process].) Thus, the Supreme Court could have addressed the standard of proof issue, along with all of the defendant's other arguments, under the rubric of due process -- that is, "grounded on the premise that the manner in which the prosecutor conducted the grand jury proceedings ran afoul of her due process rights . . . ." (*Cummiskey*, at p. 1022, fn. 1.)

In *People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, 424-425, the appellate court summarized its understanding of *Cummiskey* as follows: "In *Cummiskey* the court found that claims of instructional and other error regarding 'the manner in which the prosecutor conducted the grand jury proceedings' are cognizable in a section 995 motion to dismiss the indictment to the extent that such asserted error may have affected the grand jury's ability to determine probable cause to indict. Such claims implicate defendant's 'due process rights under the relevant statutory and common law principles governing indictment by grand juries.' [Citation.] [¶] In sum, California law provides that a defendant has a due process right not to be indicted in the absence of a determination of probable cause by a grand jury acting independently and impartially in its protective role. [Citations.] An indicted defendant is entitled to enforce this right through means of a challenge under section 995 to the probable cause determination underlying the indictment, based on the nature and extent of the evidence and the manner in which the proceedings were conducted by the district attorney."

In *People v. Gnass* (2002) 101 Cal.App.4th 1271, the appellate court followed *Mouchaourab* in expressing a similar understanding of *Cummiskey*. In *Gnass*, one of the questions before the appellate court was whether the prosecution correctly instructed the grand jury on the mens rea element of the crime with which the defendant was charged. (*People v. Gnass*, *supra*, 101 Cal.App.4th at pp. 1305-1316.) The *Gnass* court decided that

that question could be raised on a motion under section 995 because "a claim of instructional error is a cognizable basis for a motion to set aside an indictment under Penal Code section 995, subdivision (a)(1)(B), in that it is 'manifestly tantamount' to a claim the grand jury, as instructed, may have indicted the defendant on less than reasonable or probable cause." (*People v. Gnass*, *supra*, 101 Cal.App.4th at pp. 1306-1307, citing *Cummiskey v. Superior Court*, *supra*, 3 Cal.4th at p. 1022, fn. 1.)

We believe the courts in *Mouchaourab* and *Gnass* misconstrued *Cummiskey*, because the majority in *Cummiskey* did *not* hold that *every* error in instructing the grand jury is cognizable under section 995. Rather, the majority limited its holding to an alleged instructional error on "the minimum standard of proof required to indict." (*Cummiskey v. Superior Court*, *supra*, 3 Cal.4th at p. 1022, fn. 1.) According to the *Cummiskey* majority, it was *this* misinstruction -- and this misinstruction alone -- that was "manifestly tantamount to a claim that, as instructed, the jury may have indicted her on less than reasonable or probable cause," which the majority concluded "was plainly subject to a motion . . . under section 995, subdivision (a)(1)(B)." (*Ibid.*) The other claims of instructional error made in *Cummiskey* were also cognizable, but only to the extent they were "grounded on the premise that the manner in which the prosecutor conducted the grand jury proceedings ran afoul of [the defendant's] due process rights." (*Ibid.*)

Thus, under *Cummiskey*, when a defendant seeks to set aside an indictment on the ground the grand jury was misinstructed on the standard of proof necessary to return an indictment, that claim can be brought under section 995, subdivision (a)(1)(B), because (according to the *Cummiskey* majority) misinstruction on the standard of proof is the equivalent of a claim that the grand jury indicted the defendant on less than probable cause. Any other claim of instructional error, however, must be brought under the rubric of due process, which, as we shall see, requires more to succeed than a determination that the grand jury was given an erroneous instruction.

Because Stark does not contend the grand jury was misinstructed on the standard of proof, all of his claims of instructional error are cognizable only as potential violations of his right to due process in the grand jury proceeding. Accordingly, we will examine his claims of instructional error in that context, along with various other claims he makes that the grand jury proceedings violated his right to due process.

5. *Due Process*

As the foregoing discussion suggests, in addition to the statutory grounds under section 995, "a court may set aside an indictment on the ground that the proceedings [before the grand jury] have failed to comport with the demands of the due process clause of the federal or state Constitution." (*Cummiskey v. Superior Court*, *supra*, 3 Cal.4th at p. 1039, conc. & dis. opn. of Kennard, J.) Here, Stark offers several arguments aimed at showing the grand jury proceedings violated his right to due

process, as well as various claims of instructional error that we have determined are cognizable only as potential violations of his right to due process. Before considering Stark's specific arguments, however, we must consider more generally the demands due process places on grand jury proceedings.

In *People v. Backus, supra,* 23 Cal.3d at page 360, two defendants contended the indictment against them "should be dismissed because the extent of the inadmissible evidence before the grand jury was so great that the indictment was handed down in violation of their right to due process of law." (*Id.* at pp. 391-392.) The Supreme Court noted that neither it "nor the United States Supreme Court has yet addressed the question of a defendant's right to due process during grand jury proceedings . . . ." (*Id.* at p. 392.) The court went on to conclude, however, that a right to due process in grand jury proceedings does exist. As the court explained, "In his opinion for the Court of Appeal, vacated by our grant of a hearing in *Johnson v. Superior Court* (1975) 15 Cal.3d 248 [124 Cal.Rptr. 32, 539 P.2d 792], . . . Justice Friedman held that the obligation of the prosecutor to assure independence, procedural regularity, and fairness in grand jury proceedings is compelled by due process: 'The grand jury's ability to safeguard accused persons against felony charges which it believes unfounded is an attribute of due process of law inherent in the grand jury proceeding; this attribute exists for the protection of persons accused of crime before the grand jury, which is to say that it is a "constitutional right;" any prosecutorial manipulation

which substantially impairs the grand jury's ability to reject charges which it may believe unfounded is an invasion of the defendant's constitutional right. Although self-restraint and fairness may be the rule, unrestraint and unfairness the exception, the inner core of due process must be effectively recognized when the exception occurs. When the prosecutor manipulates the array of evidence to the point of depriving the grand jury of independence and impartiality, the courts should not hesitate to vindicate the demands of due process.'

"In *Johnson*, this court found it unnecessary again to reach the due process issue since we determined that the prosecutor is compelled under state law to reveal to the grand jury existence of exculpatory evidence in order that the grand jury may exercise its power under Penal Code section 939.7 to obtain that evidence. We recognized, however, that the Fifth Amendment guarantee that a defendant not be held to answer in a federal prosecution for capital and otherwise infamous crimes 'unless on a presentment or indictment of a Grand Jury' presupposed a grand jury acting independently of the prosecutor or judge, and that the function of the federal grand jury 'as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor' (*United States v. Dionisio* (1973) 410 U.S. 1, 17 [35 L.Ed.2d 67, 81, 93 S.Ct. 764]), was equally that of a state grand jury. (*Johnson v. Superior Court, supra*, 15 Cal.3d 248, 253-254.) If the grand jury cannot fulfill its obligation to act independently and to protect citizens from unfounded obligations (*In re Tyler* (1884) 64 Cal. 434, 437 [1 P. 884])

when not advised of relevant exculpatory evidence, neither can it do so if it is invited to indict on the basis of incompetent and irrelevant evidence. It follows therefore that when the extent of incompetent and irrelevant evidence before the grand jury is such that, under the instructions and advice given by the prosecutor, it is unreasonable to expect that the grand jury could limit its consideration to the admissible, relevant evidence (see *People v. Aranda* (1965) 63 Cal.2d 518, 528-529 [47 Cal.Rptr. 353, 407 P.2d 265]), the defendants have been denied due process and the indictment must be dismissed . . . ." (*People v. Backus, supra*, 23 Cal.3d at pp. 392-393.)

The court in *Backus* went on to explain that the defendants' right to due process was not violated, despite "the presentation of incompetent and irrelevant evidence to the grand jury," because "[t]he nature and extent of the inadmissible evidence was not such that it may have compromised the independence of the grand jury and contributed to the decision to indict" and therefore the "defendants were not prejudiced." (*People v. Backus, supra*, 23 Cal.3d at p. 393.)

Thus, under *Backus*, a defendant's right to due process may be violated "if the grand jury proceedings are conducted in such a way as to compromise the grand jury's ability to act independently and impartially." (*People v. Thorbourn* (2004) 121 Cal.App.4th 1083, 1089.) Obviously, not every error will rise to this level. Only if the error rendered the grand jury proceeding fundamentally unfair, by substantially impairing the grand jury's ability to act independently and impartially and to

reject charges which it may have believed unfounded, will a due process violation be shown.

With that understanding of the law, we turn to Stark's specific due process arguments.

a. *Conflict Of Interest*

A few days before Stark filed his motions to set aside the indictment and accusation against him, he and Putman filed a motion to disqualify the Sutter County District Attorney's Office from further prosecuting the cases against them on the ground that "a conflict of interest exists that would render it likely that Mr. Stark and Ms. Putman will not receive a fair hearing or trial."[10] (See Pen. Code, § 1424.) Stark asserts this alleged conflict of interest as the first basis for his due process challenge to the indictment. Stark contends that to set aside the indictment, "[t]he mere appearance of a conflict of interest is sufficient," and "the Court need not find that it was unlikely that Mr. Stark and Ms. Putman would receive a fair trial."

Stark's claim of a conflict of interest was based on "the following facts: (1) Mr. Stark is the Sutter County Auditor-Controller and will continue to make decisions which affect the daily operations of the Sutter County District Attorney's Office; (2) The Sutter County District Attorney's Office is directly financially impacted by the alleged misconduct of

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[10] The trial court ultimately concluded that no conflict of interest existed.

Robert E. Stark and the Auditor-Controller's office; and (3) Sutter County District Attorney Carl V. Adams was personally involved in events which relate to the grand jury investigation."

In rejecting this argument as a basis for setting aside the indictment, the trial court expressly found "that the District Attorney's involvement did not create a potential for bias or the appearance of a conflict of interest." As will be seen, we conclude that even if there was an appearance of a conflict of interest, that is not enough to justify setting aside the indictment. To justify a set-aside on conflict of interest grounds, Stark must show that the conflict made the grand jury proceeding fundamentally unfair to him. He has not made that showing.

In arguing that a motion to set aside an indictment must be granted on a showing of even an appearance of a conflict of interest, regardless of whether it is likely the defendant will receive a fair trial, Stark purports to answer a question left open in *People v. Eubanks* (1996) 14 Cal.4th 580. As we will explain, Stark's answer to that question is wrong.

In *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, the Supreme Court held that "a trial judge may exercise his power to disqualify a district attorney from participating in the prosecution of a criminal charge when the judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the

discretionary functions of his office." (*Id.* at p. 269.) In the course of reaching that conclusion, the court noted that "the same conflict of interest which disqualifies a prosecutor from participating in the trial of a criminal case may . . . also taint the procedure by which the defendant was charged, if the same district attorney participated therein." (*Id.* at p. 263, fn. 5.) According to the court, "if the trial court determines that a district attorney's participation in the filing of a criminal complaint or the preliminary hearing on that complaint created a potential for bias or the appearance of a conflict of interest, it may conclude that the defendant was not 'legally committed' within the meaning of Penal Code section 995, and the information should be set aside." (*Ibid.*)

In 1980, the Legislature enacted section 1424. (Stats. 1980, ch. 780, § 1.) That statute provides that "a motion to disqualify a district attorney from performing an authorized duty" "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (§ 1424.)

In *People v. Conner* (1983) 34 Cal.3d 141, the Supreme Court determined that "a 'conflict,' within the meaning of section 1424, exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is 'actual,' or only gives an 'appearance' of conflict." (*Id.* at p. 148.) This is so because "the additional statutory requirement (that a

conflict exist such as would render it unlikely that the defendant would receive a fair trial) renders the distinction between 'actual' and 'appearance' of conflict less crucial." (*Id.* at p. 147.)

In *People v. Eubanks*, *supra*, 14 Cal.4th at page 580, the Supreme Court revisited the standards for prosecutorial recusal under section 1424. In doing so, the court explained as follows: "*Conner* establishes that, whether the prosecutor's conflict is characterized as actual or only apparent, the potential for prejudice to the defendant--the likelihood that the defendant will not receive a fair trial--must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness. Thus section 1424, unlike the *Greer* standard, does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system." (*Eubanks*, at p. 592.)

In a footnote that followed that explanation, the court offered the following aside: "One should note, in this connection, the distinction between a motion to recuse the district attorney, under section 1424, and a motion to set aside the information or indictment, under section 995. In *Greer* we suggested that 'if the trial court determines that a district attorney's participation in the filing of a criminal complaint or the preliminary hearing on that complaint created a potential for bias or the appearance of a conflict of interest, it may

conclude that the defendant was not "legally committed" within the meaning of Penal Code section 995, and the information should be set aside.' (*People v. Superior Court (Greer)*, *supra*, 19 Cal.3d at p. 263, fn. 5.) We expressly reserve the question whether availability of a remedy under section 995 was affected by the addition of section 1424 and thus express no opinion here regarding what standard would govern motions brought under section 995." (*People v. Eubanks*, *supra*, 14 Cal.4th at p. 592, fn. 4.)

It is this question that Stark purports to answer here, arguing that "[b]y its plain terms, Penal Code [section] 1424 has no application to a motion to set aside an indictment or accusation." From this, Stark draws the conclusion that the *Greer* standard -- a mere appearance of a conflict of interest, with no showing of a likelihood of unfairness -- remains a viable basis for setting aside an indictment.

In our view, however, a mere appearance of a conflict of interest on the part of the prosecutor was *never* a valid basis for setting aside a grand jury indictment. In *Greer*, the court suggested that if a district attorney's participation in filing a complaint against a defendant or participation in a preliminary hearing on that complaint created the appearance of a conflict of interest, the court could set aside the resulting information under section 995 on the ground the defendant was not "legally committed" within the meaning of that statute. (*People v. Superior Court (Greer)*, *supra*, 19 Cal.3d at p. 263, fn. 5.) This was a reference to section 995, subdivision

(a)(2)(A) of the statute, which provides that an *information* must be set aside upon a finding "[t]hat before the filing thereof the defendant had not been legally committed by a magistrate." That subdivision does not apply here, because Stark was charged by a grand jury *indictment*, not by an information. As we have previously explained, a motion to set aside an indictment under section 995 falls under subdivision (a)(1) of that statute, and that subdivision does not contain a provision comparable to subdivision (a)(2) requiring set-aside if the defendant was not "legally committed." Without such a provision, subdivision (a)(1) of section 995 provides no basis for setting aside an indictment because of an appearance of a conflict of interest on the part of the prosecutor who presents the case to the grand jury.

What that leaves us with is the conclusion that an indictment can be set aside based on a conflict of interest only if the defendant shows that the conflict of interest violated his constitutional right to due process. As we have explained, an indictment is subject to set-aside on due process grounds only if the claimed violation rendered the grand jury proceeding fundamentally unfair. That means that to succeed on a motion to set aside an indictment based on a conflict of interest on the part of the prosecutor, the defendant must show that the prosecutor's conflict of interest substantially impaired the independence and impartiality of the grand jury.

In essence, then, Stark has it backwards. He contends that a motion to set aside an indictment on conflict of interest

grounds "requires a substantially lesser showing than that required under Penal Code [section] 1424." We conclude, however, that a motion to set aside an indictment on conflict of interest grounds requires a *greater* showing than a recusal motion under section 1424. While a recusal motion requires the defendant to show a *likelihood* of unfairness in the trial to come, a motion to set aside an indictment for violation of the right to due process requires a showing that the grand jury proceeding that has already occurred *was, in fact,* fundamentally unfair because the prosecutor's conflict of interest substantially impaired the independence and impartiality of the grand jury.

Stark has made no such showing here. Instead, he relies on the contention that a "mere appearance of a conflict of interest is sufficient" to set aside the indictment. We have shown that is not so.

The Supreme Court observed in *People v. Eubanks*, *supra*, 14 Cal.4th at page 592, that a prosecutor may not be disqualified on conflict of interest grounds simply because his or her "further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system." That observation applies even more strongly to a motion to set aside an indictment. A grand jury's indictment cannot be set aside simply because the prosecutor had a conflict of interest that rendered his or her participation in the grand jury proceedings unseemly, made that participation appear

improper, or tended to reduce public confidence in the impartiality and integrity of the criminal justice system. Rather, it must be shown that the prosecutor's participation rendered the grand jury proceedings fundamentally unfair to the defendant. Absent such a showing, Stark's first due process argument fails.[11]

b. *Penal Code Section 935*

Stark next contends his right to due process was violated because the district attorney's appearance before the grand jury violated section 935. Again, he is mistaken.

Section 935 provides in relevant part as follows: "When a charge against or involving the district attorney, or assistant district attorney, or deputy district attorney, or anyone employed by or connected with the office of the district attorney, is being investigated by the grand jury, such district attorney, or assistant district attorney, or deputy district attorney, or all or anyone or more of them, shall not be allowed to be present before such grand jury when such charge is being investigated, in an official capacity but only as a witness, and he shall only be present while a witness and after his appearance as such witness shall leave the place where the grand jury is holding its session."

Stark contends this statute applied here because he is "'connected' with the office of the District Attorney" because,

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[11] This conclusion applies to all of the remaining counts in the indictment and all of the counts in both accusations.

as the County's auditor-controller, he is "'in a position to make decisions which affect the operations of the Office of the District Attorney.'" He also contends the statute applies because the district attorney was involved in some of the incidents underlying the indictment and therefore at least some of the charges can be characterized as "'involving the district attorney.'"

The trial court concluded section 935 did not apply here because Stark was "just . . . another county official" and therefore not "connected" with the district attorney's office within the meaning of the statute. We need not determine the validity of that conclusion because even if we assume, for the sake of argument, that section 935 applied here, Stark has not shown a valid basis for setting aside the indictment. Because this argument is cognizable only as a potential violation of the right to due process, an appearance before the grand jury in violation of this statute would justify setting aside the indictment only if the appearance rendered the proceeding fundamentally unfair to the defendant by substantially impairing the ability of the grand jury to act independent and impartially. Here, Stark has not shown that the district attorney's participation in the grand jury proceedings rendered those proceedings fundamentally unfair to him. Thus, even if

section 935 could support a due process challenge in some hypothetical case, it does not support such a challenge here.[12]

c. *Penal Code Section 939.6*

Subdivision (a) of section 939.6 provides that, subject to a qualification not applicable here, "the grand jury shall receive no other evidence than what is: [¶] (1) Given by witnesses produced and sworn before the grand jury; [¶] (2) Furnished by writings, material objects, or other things presented to the senses; or [¶] (3) Contained in a deposition that is admissible under subdivision 3 of Section 686."

Stark contends this statute was violated when several of the grand jurors attended a joint audit committee meeting on May 4, 2005, in the midst of the investigation that led to the indictment against him. According to Stark, the transcript of that meeting shows that those grand jurors "heard information, including opinions expressed by CPA Marilee Smith, on two of the very issues" they were investigating.

In addressing this argument, the trial court pointed out that before the meeting, the prosecutor admonished the grand jurors who were on the audit committee that whatever happened at that meeting was not evidence in the grand jury's investigation and therefore could not be used in determining whether to indict Stark. Among other things, the prosecutor told the grand jurors, "'Go to the meeting or not, that's your decision. But

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[12] This conclusion applies to all of the remaining counts in the indictment and to all of the counts in both accusations.

if you do go, just remember that the grand jurors are not all present, and it's not a formal investigation, and nobody is under oath, and whatever happens can't be used in this investigation.'"

Based on the prosecutor's admonitions, the trial court found that "the issues raised under 939.6 of the Penal Code are not applicable here and did not in any way taint the functions of the grand jury in this case."

In our view, the trial court was well justified in concluding that given the prosecutor's admonitions, the grand jurors who attended the audit committee meeting did not "receive . . . other evidence" in violation of Penal Code section 939.6, subdivision (a). Again, however, even if we were to assume some of the grand jurors *did* receive evidence that was not presented to them in accordance with section 939.6, that alone would not justify setting aside the indictment. A violation of the statute would also constitute a violation of Stark's right to due process only if the receipt of the improper evidence rendered the grand jury proceeding fundamentally unfair to him. Stark, however, has made no such showing. Accordingly, like his other due process arguments, this argument fails.[13]

d. *Self-Incrimination*

Stark next contends the prosecutor impermissibly commented on his invocation of his Fifth Amendment privilege against self-

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[13] This conclusion applies to all of the remaining counts in the indictment and to all of the counts in both accusations.

incrimination. This contention is based on a letter Stark's attorney sent to the prosecutor. In that letter, Stark's attorney acknowledged receipt of a subpoena for Stark to appear before the grand jury. The letter asserted that Stark had "a statutory obligation to appear before the grand jury concerning this investigation," and that "but for [that] statutory obligation . . . , he would assert his privilege against self-incrimination under the state and federal [C]onstitutions."

After receiving that letter, the prosecutor read it to the grand jurors and discussed it with them. By that time, the grand jurors had apparently advised the prosecutor that although they wanted to hear from Stark and Putman, they did not want him to serve subpoenas on them. Accordingly, the prosecutor told the grand jury that "[i]f Mr. Stark testifies, it won't be under compulsion; it will be because the grand jury wants to hear and he wants to tell them something." The prosecutor then reminded the grand jury that Stark and Putman "have a Constitutional right not to testify, and . . . if they elect not to testify, the grand jury cannot in any way hold that against them or consider it as evidence of anything when we get around to closing this and the grand jury starts the deliberation process."

Following the withdrawal of the subpoena, Stark apparently decided not to appear before the grand jury. Based on this fact, and the statement in the letter from his attorney about his intent not to testify if he did not have to, Stark contends the "[g]rand jurors could only have concluded that he followed

the advice of his counsel and invoked his privilege against self-incrimination." Thus, he contends, the end result was that the prosecutor impermissibly commented on his assertion of the privilege against self-incrimination.

The trial court rejected this argument, concluding "the District Attorney did no such thing."

In support of his argument, Stark cites *Johnson v. Superior Court*, *supra*, 15 Cal.3d at page 248. In *Johnson*, the defendant sought a writ of prohibition to stop a criminal prosecution against him based on an indictment because the prosecutor had failed to bring to the grand jury's attention certain exculpatory evidence -- namely, the defendant's "testimony at a preliminary hearing [which] led the magistrate to dismiss a complaint charging him with the same offenses." (*Id.* at p. 250.) The Supreme Court concluded that "[w]hen a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated under [Penal Code] section 939.7 to inform the grand jury of its nature and existence." (*Id.* at p. 251.) In the course of reaching that conclusion, the Supreme Court observed as follows: "The People have chosen a poor vehicle for arguing that the district attorney is not obligated to present exculpatory evidence to the grand jury unless the jury calls for it. Not only did the district attorney fail to inform the grand jury of petitioner's preliminary hearing testimony, but he also created the false impression that petitioner would refuse to testify if called. At the conclusion of the grand jury hearing, after three other

witnesses had testified in the interim, the district attorney recalled the arresting officer and elicited his testimony that, following arrest and advisement of his *Miranda* rights, petitioner had refused to make a statement upon the advice of counsel. Reference to petitioner's invocation of the privilege against self-incrimination was clear misconduct, as the Attorney General concedes. [Citations.] But more importantly, the grand jury's power to order the production of evidence which may 'explain away' the charges under consideration was thereby thwarted." (*Id.* at p. 253.)

Stark contends that what happened here is equivalent to the impermissible reference to the defendant's invocation of the privilege against self-incrimination in *Johnson*. Like the trial court, we do not agree. But even if it were to agree, that would be of no avail to Stark. The Supreme Court did not issue a writ of prohibition in *Johnson* because the prosecutor impermissibly elicited testimony that the defendant had invoked his privilege against self-incrimination. The court issued the writ because the prosecutor violated a statutory duty to inform the grand jury of the existence of exculpatory evidence. The reference to the defendant's assertion of the privilege only added insult to injury, because it "created the false impression that [the defendant] would refuse to testify if called," when, in fact, he had already testified at a preliminary hearing. (*Johnson v. Superior Court*, *supra*, 15 Cal.3d at p. 253.)

In other words, *Johnson* does not stand for the proposition that an impermissible reference to a defendant's invocation of

the privilege against self-incrimination in front of a grand jury requires that any resulting indictment be set aside. Nor has Stark offered any other authority supporting that proposition. Of course, by including this argument under the heading of due process, Stark may be understood to contend that an impermissible reference to a defendant's invocation of the privilege against self-incrimination justifies setting aside the indictment because it constitutes a due process violation. That argument fails, however, because Stark has not shown that what happened here compromised the independence of the grand jury and contributed to the decision to indict him. Accordingly, Stark has failed to show that this incident resulted in a grand jury proceeding that was fundamentally unfair to him, and thus this argument fails also.[14]

e. *Instructional Error*

That leaves us with Stark's claims of various instructional errors and omissions, which we consider to determine if Stark has shown any violation of his right to due process relating to the third count of the indictment.

i. *Mens Rea*

Stark first argues that the prosecution misdirected grand jurors on the mens rea required to violate section 424(a)(1). We agree the prosecution's comments to the grand jury on the mens rea element might have been confusing. We further

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[14] This conclusion applies to all of the remaining counts in the indictment and to all of the counts in both accusations.

conclude, however, that Stark has not shown a violation of his right to due process.

As Stark points out, the prosecutor instructed the grand jury on section 424 as follows:

"In the crimes charged in the . . . indictment, there must exist a union or a joint operation of act or conduct and general criminal intent.

"General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he or she is acting with general criminal intent, even though he or she may not know that his or her act or conduct is unlawful."

The prosecutor then defined the terms "knowingly" and "willfully" and read section 424 verbatim.

Later, the prosecutor told the grand jury: "What we have here are general intent crimes. You don't have to intend to break the law. You don't have to intend to do anything that's illegal. All you have to do is the act that the law says is a crime. You've heard the phrase ignorance of the law is no excuse. That's what you're dealing with a general intent crime, especially misappropriation of public money."

Stark contends these instructions and comments were erroneous because they did not require "proof that a person knowingly and purposefully handled funds contrary to law." As we have explained already, to find a public official guilty under section 424(a)(1), it must be shown the official knew the

law did not authorize his appropriation of public money to his own use or the use of another.

The prosecutor's instructions and comments to the grand jury were not entirely clear on this point. The prosecutor did tell the grand jury that a person is guilty of a general intent crime if he "intentionally does that which the law declares to be a crime." From this instruction, combined with the terms of section 424(a)(1) itself, the grand jury could have understood that an intent to appropriate public money with knowledge that the appropriation was without authority of law was required. Some of the prosecutor's other comments, however, potentially confused the issue. For example, the prosecutor's comment that "[y]ou don't have to intend to do anything that's illegal" could have been understood in two ways. The grand jury might have understood this as an assertion that a defendant charged with violating section 424(a)(1) does not have to know he is committing a crime to be guilty of violating that statute -- a true statement. On the other hand, the grand jury might have understood this as an assertion that such a defendant does not have to intend to appropriate public money with knowledge that he lacked authority of law to do so -- a false statement.

In the end, regardless of the potential for confusion, Stark's challenge to the third count of the indictment on this ground fails because he has not shown that the prosecutor's instructions and comments to the grand jury on the mens rea element of section 424(a)(1) resulted in a grand jury proceeding that was fundamentally unfair to him. Stark argues that the

indictment must be set aside "because [the] grand jurors never evaluated the sufficiency of the evidence under the correct legal standard." However, because this claim of instructional error is cognizable only as a potential violation of his right to due process, Stark can prevail only if he shows that the potentially confusing instructions and comments "compromised the independence of the grand jury and contributed to the decision to indict" and therefore that he was "prejudiced" by those instructions and comments. (*People v. Backus*, *supra*, 23 Cal.3d at p. 393.) Stark has failed to make that showing because he simply argues the error itself, and nothing more. Accordingly, this argument fails.[15]

ii. *Instruction Regarding Stark's Authority*

An underlying theme to Stark's motion to dismiss the indictment was that the law requires a county auditor-controller to "refuse to pay claims which he believes to be unauthorized and unlawful." He contends the grand jurors should have been instructed on this point but instead were "misdirected" by the prosecution.

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[15] Although, as will be seen, the element of mens rea for the various offenses defined in section 424 varies slightly from subdivision to subdivision (e.g., "knowingly" versus "willfully"), this conclusion applies to all of the remaining counts in the indictment, and to all of the counts in both accusations, because, regardless of the variation, Stark and Putman have failed to show that the grand jury proceeding was fundamentally unfair to them because of the potentially confusing instructions and comments to the grand jury on the element of mens rea.

This argument has no bearing on the third count of the indictment because that count did not involve any refusal by Stark to pay a claim against the County. Accordingly, we need not consider this argument further (at least at this point).

iii. *Instruction On Mistake Of Fact*

Stark next contends the evidence before the grand jury required the prosecution to instruct on the defense of mistake of fact. Essentially, as applied to the third count of the indictment, Stark's claim appears to be that there was evidence he made a reasonable mistake as to his authority to transfer money from the County's general fund to the Waterworks District.

What Stark is really arguing for is a mistake of *law* defense, not a mistake of *fact* defense, because the question of whether he had authority to make the transfer is a question of law. Be that as it may, Stark identifies no authority that requires the prosecutor to instruct the grand jury on defenses sua sponte. Indeed, the law is to the contrary.

In *People v. Fisk* (1975) 50 Cal.App.3d 364, this court held that "[a] prosecutor need not volunteer possible defense and mitigating alternatives, such as diminished capacity, to the grand jury. Nevertheless, when members of the grand jury ask questions, he owes them the duty of correct advice." (*Id.* at p. 369.) The Supreme Court cited *Fisk* with approval in *Cummiskey v. Superior Court*, *supra*, 3 Cal.4th at pages 1034-1035, and concluded its opinion with this definitive assertion: "Finally, we believe the prosecutor has *no* duty to instruct the grand jury sua sponte on lesser included offenses *or various defenses*."

(*Cummiskey*, at p. 1037, italic added.) That assertion governs here. Accordingly, this argument fails.[16]

6. *Conclusion*

For all of the reasons set forth above, we conclude the trial court did not err in denying Stark's motion to set aside the third count of the indictment, but did err in denying the motion as to the fourth count because Stark's unauthorized transfer of money from the County's general fund to the Waterworks District cannot be characterized as a false entry in the County's books.

E

Fifth and Sixth Counts

Amendment Of The Budget

The fifth count of the indictment alleges that Stark violated section 424(a)(3) by "wilfully, unlawfully, and unilaterally amend[ing] the Sutter County Final Budget for fiscal year 2004-2005, without a 4/5ths vote of approval of the Sutter County Board of Supervisors." The sixth count alleges that this conduct also violated section 424(a)(2). The facts underlying these charges were as follows:

By June 30 of each year, the county administrative officer has to submit a proposed budget to the board of supervisors. The board then approves the proposed budget and holds budget hearings that must be completed by August 30. The board has to

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[16] This conclusion applies to all of the remaining counts in the indictment and to all of the counts in both accusations.

adopt the final budget by October 2 through a final budget resolution. The auditor-controller then has until December 2 to publish the final budget and file it with the clerk of the board.

When the board of supervisors adopts the final budget, it is balanced to the best of the board's ability. However, if the County's books from the previous fiscal year have not been closed by that time, the actual fund balances available when the auditor-controller closes the books may be different than those used in the final budget adopted by the board. The final budget resolution authorizes the auditor-controller to deal with the resulting imbalance. In 2004 in particular, the final budget resolution authorized the auditor-controller to adjust the appropriation for contingencies in each fund, as necessary, to balance the fund and the budget, and, if necessary, to balance any fund and reduce such fund's general reserves, subject to review and approval of the county administrative officer. Under this resolution, Stark could not simply make changes to the budget on his own, as he could before. The reason for this change was that Stark had made unauthorized changes to the budget in the past, and the board of supervisors did not want him to do it anymore. This change was a result of the county administrative officer's report to the board in September 2004.

In reviewing the final budget for 2004-2005, the office of the county administrative officer noted several unauthorized amendments. In one case, the board of supervisors had directed that certain money be budgeted in a contingency, but Stark

simply left it in a reserve. In another case, the board approved an amendment to the budget, but Stark did not include the amendment. In a third case, Stark put money in a reserve without authorization.

1. *False Entry*

With respect to the fifth count, Stark once again contends that "no evidence exists to support the proposition that any *false* entries were made in the books of Sutter County. At most, . . . there are entries in the county books which are in *error*." The People, on the other hand, contend that "the changes made by the Auditor, and his failure to publish a financial document as approved by the Board, constitute[] violations of Penal Code section 424(a) . . . (3)." In essence, the People contend that by refusing to incorporate changes to the final budget that the board of supervisors had approved, Stark made "unauthorized amendments" to the budget, resulting in false entries.

Because we have concluded that an accounting entry which accurately reflects the results of an unauthorized transaction is nonetheless true, the fifth count of the indictment cannot stand. Although Stark did not have the authority to amend the budget the board of supervisors had approved, his unauthorized, de facto amendment of the budget by refusing to incorporate the board's changes did not result in any *false* entry in the County's books. For this reason, the trial court erred in denying Stark's motion to dismiss the fifth count of the indictment.

2. *Use Of Public Money*

With respect to the sixth count of the indictment, Stark argues that the evidence before the grand jury of the unauthorized amendments to the budget did not establish any "use" of the County's money and therefore did not establish a violation of section 424(a)(2). We agree.

Unlike section 424(a)(1) (discussed above), section 424(a)(2) is violated only if the public official "*uses* [public money] for any purpose not authorized by law."[17] (§ 424(a)(2), italics added.) Under the definition of "use" from *People v. Crosby*, *supra*, 141 Cal.App.2d at pages 175-176, Stark in no way *used* the County's money when he failed to incorporate changes the board of supervisors mandated to the 2004-2005 final budget. If one does not "use" money by placing cash in a safety deposit box, then certainly one does not "use" money by simply changing (or refusing to change) the figures on a budget.[18]

None of the cases the People cite on the issue of "use" addresses that issue; those cases deal with issues of possession and control. (See, e.g., *People v. Knott* (1940) 15 Cal.2d 628, 631.) Thus, the cases are inapposite.

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[17] Section 424(a)(2) also makes it a crime to loan or make any profit out of public money, but the People do not rely on these other aspects of the statute.

[18] Of course, as we have concluded already, a person can *appropriate* public money for the use of another, in violation of section 424(a)(1), by changing the figures on a budget to allocate more money to a different public entity than the entity to which the money rightfully belongs.

Because Stark's unauthorized amendment of the County's budget did not constitute unauthorized use of the County's money, the trial court erred in denying Stark's motion to dismiss the sixth count of the indictment.

F

Seventh and Eighth Counts

Unauthorized Creation Of Reserves

The seventh count of the indictment alleges that Stark violated section 424(a)(3) by "creat[ing] unauthorized reserve accounts in the Sutter County Final Budget for fiscal year 2004-2005, without a 4/5ths vote of approval of the Sutter County Board of Supervisors." The eighth count alleges that this conduct also violated section 424(a)(2). These charges were based on the fact that in the final budget for 2004-2005, Stark placed excess fund balances of three different funds into reserves, rather than into appropriations for contingencies as the board of supervisors had directed him to do.

1. *False Entry*

The seventh count of the indictment is properly resolved on the same basis as the second, fourth and fifth counts. Even if Stark did not have the authority to create reserves on his own, his doing so did not result in any false entry in the County's books. Rather, it resulted in true entries reflecting unauthorized acts. For this reason, the trial court erred in denying Stark's motion to dismiss the seventh count of the indictment.

2. *Use Of Public Money*

The eighth count of the indictment fails for the same reason that the sixth count failed. By simply creating reserves without authority from the board of supervisors, Stark did not "use" any public money in violation of section 424(a)(2). Accordingly, the trial court erred in denying Stark's motion to dismiss the eighth count of the indictment.

G

Ninth Count

Refusal To Post IT Journal Entries

The ninth count of the indictment alleges that Stark violated section 424(a)(6) by "wilfully omit[ting] to transfer [public moneys], when transfer was required by law, to wit: . . . post[ing] journal entries reflecting payment due and income earned by the Sutter County Department of Information Technology Services." The facts underlying this charge were as follows:

At the beginning of the 2004-2005 fiscal year, the IT department had approximately $400,000 to $500,000 carried over from the previous year because the department's revenue had exceeded its expenses. The IT department operated on that money until the beginning of November 2004, and then began operating in the red. This was not uncommon for the department.

The process for setting the IT department's billing rate for the year did not begin until December 2004. Once the rate was set, the IT department submitted journal entries to bill the various departments to which it had provided services, but Stark

refused to process those journal entries, asserting that he needed more information to review the billing rate, even though the board of supervisors had recently delegated to the county administrative officer the power to set the IT department's billing rate. Then, in the beginning of February 2005, Stark refused to pay claims the IT department submitted for payment to various vendors because the IT department was in a negative cash position.

As of early March, the IT department was $600,000 in the red and about $185,000 in bills to the IT department had not yet been paid. At the same time, Stark was refusing to process journal entries totaling more than $1 million.

At a meeting on March 1, 2005, the board of supervisors directed Stark to make the journal entries for the IT department's first and second quarter charges (through December 2004). The next day, Stark told the county treasurer that he was refusing to process the journal entries because he disagreed with the billing rate. At a board meeting on March 8, he told the board of supervisors he would not comply with its direction to process the journal entries.

As of March 23, 2005, Stark had paid the IT department's outstanding bills, but he still had not posted the journal entries. This simply caused the department to go further into the red.

1. *Intent To Violate The Law*

In challenging the ninth count of the indictment, Stark argues that section 424(a)(6) requires proof of a knowing and

intentional violation of the law, and no such proof was presented to the grand jury. He is mistaken.

Section 424(a)(6) makes it a felony for a public official to "willfully" omit to transfer public moneys when the transfer is required by law. The word "willfully" is defined in section 7 as follows: "1. The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

"'[T]he terms "willful" or "willfully," when applied in a penal statute, require only that the illegal act or omission occur "intentionally," without regard to motive or ignorance of the act's prohibited character.' [Citation.] 'Willfully implies no evil intent; "'it implies that the person knows what he is doing, intends to do what he is doing and is a free agent.' [Citation.]"' [Citations.] The use of the word 'willfully' in a penal statute usually defines a general criminal intent, absent other statutory language that requires 'an intent to do a further act or achieve a future consequence.'" (*People v. Atkins* (2001) 25 Cal.4th 76, 85.)

The act that section 424(a)(6) forbids is the omission to transfer public money *when the transfer is required by law.* A person "willfully" commits that act if he intentionally omits to make a transfer that is required by law. In our view, such an intent can exist only if the person knows the transfer is required. If a person omits to make a transfer of public money

not knowing the transfer is required by law, then the person has not acted with the intent to commit the act that the statute makes a crime. Of course, the person does not have to know that his omission to make the transfer constitutes a crime; he does, however, have to know that the law requires the transfer. Otherwise, he has not "willfully" committed the act the statute prohibits.

The question that remains is whether the People presented sufficient evidence to the grand jury for a reasonably prudent person to conscientiously entertain a strong suspicion that Stark violated section 424(a)(6) because he knew he was required by law to post the journal entries for the IT department. We conclude they did.

The evidence showed that Stark appeared at a board of supervisors meeting on March 1, 2005, and explained that he "didn't approve of the internal service rates for processing the journal entries." Nevertheless, the board unanimously directed him to process the journal entries and pay the pending claims. At a board meeting the following week, Stark made it clear that he did not intend to comply with the board's direction to him.

Government Code section 25303 provides that "[t]he board of supervisors shall supervise the official conduct of all county officers, . . . and particularly insofar as the functions and duties of such county officers . . . relate to the assessing, collecting, safekeeping, management, or disbursement of public funds. It shall see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary,

require them to renew their official bond, make reports and present their books and accounts for inspection." Government Code section 29803 provides that (with an exception not applicable here) "the auditor shall issue warrants on the treasurer in favor of the persons entitled thereto in payment of all claims chargeable against the county which have been legally examined, allowed, and ordered paid by the board of supervisors."

Under the evidence here, the grand jurors were justified in entertaining a strong suspicion that Stark knew he was required by law to follow the board's direction to process the journal entries for the IT department so that he could pay the pending claims against the department and that he intentionally refused to do so.

Stark contends that "[i]f an auditor-controller believes that a board order directing payments from the county treasury is unlawful, the auditor-controller must refuse to follow the board's direction or order." Indeed, it has long been the law in California that "[i]f illegal claims are allowed by the Board against the county, it will be the duty of the Auditor to refuse to draw warrants therefor." (*Linden v. Case* (1873) 46 Cal. 172, 175.) Stark suggests that under this rule, he cannot be found guilty of violating section 424(a)(6) because the evidence showed that he "believed the law required him to proceed as he did." This argument fails because, by the very terms of the indictment, the "transfers" that were the subject of the ninth count of the indictment were not the claims that were being made

on the IT department, but the journal entries that were needed to transfer funds internally on the County's books so that those claims could be paid. Thus, regardless of whether Stark thought it would be illegal for the County to pay claims made against an account in the County's budget that was "in the red,"[19] Stark has not shown that the journal entries the board required him to make in order to get the IT department's account out of the red can be characterized as "illegal claims . . . against the county" subject to the foregoing rule. Thus, the rule provides no basis for Stark to argue that the journal entries, which he refused to make, were somehow not "required by law" but were, in fact, illegal. Accordingly, this challenge to the ninth count of the indictment fails.

2. *Instructional Error*

a. *Instruction Regarding Stark's Authority*

As we have explained, an underlying theme to Stark's motion to dismiss the indictment was that the law requires a county auditor-controller to "refuse to pay claims which he believes to be unauthorized and unlawful." He contends the grand jurors should have been instructed on this point but instead were "misdirected" by the prosecution.

Even if we assume the prosecutor's instructions and comments to the grand jury failed to adequately inform the jury

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[19] On this point, we note that Stark eventually paid the IT department's bills, even though he had not yet processed the journal entries, which only made the department go further into the red.

that Stark had a duty to refuse to pay illegal claims against the County, that would be irrelevant to the ninth count of the indictment because, as we have explained already, Stark has not shown that the journal entries the board required him to make to move money on the County's books can be characterized as "illegal claims . . . against the county" subject to that duty.

Moreover, even assuming Stark's duty not to pay illegal claims was relevant to this charge, Stark has not shown that any inadequacy in the instructions on this point resulted in a grand jury proceeding that was fundamentally unfair to him. It is not enough for Stark to show that the grand jury received "inaccurate" "statements on the law" from the prosecutor. To prove a due process violation, he must also show that the inaccurate instructions "compromised the independence of the grand jury and contributed to the decision to indict" and therefore that he was "prejudiced" by the error. (*People v. Backus, supra*, 23 Cal.3d at p. 393.) He has not made that showing here.[20]

b. *Instruction On Potential County Liability*

Stark contends that: (1) he was "required to certify the cost plan which is then relied upon by the State Controller's Office and the federal government as a prerequisite to reimbursement to Sutter County for federal and state programs"; (2) the County could have been held liable under the Federal

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[20] This conclusion also applies to all remaining counts in the indictment and the accusation against Stark.

False Claims Act (FCA) for submitting false statements to obtain federal grant funds if the cost plan were certified with incorrect IT rates; and (3) his refusal to "journal IT charges" was "due to the requirement that he certify the costs." From this, he asserts that the grand jurors "should have been advised of the law which provided for liability and substantial penalties under the FCA," because if they had been, "they might have viewed Mr. Stark's demand for additional information to assess whether the rates were cost-based in an entirely different light."

This argument need not detain us long. Stark fails to explain how the speculative possibility that the County *could* have faced liability under the False Claims Act, *if* he certified the cost plan, and *if* it turned out that certification was in error because of the IT billing rate, has anything to do with whether he knew he was legally required to make the journal entries the board had ordered him to make. Stark fails to explain why he could not simply have complied with the board's direction to make the journal entries, then refused to certify the cost plan -- either because he did not believe the billing rate was correct or because he had not been provided with enough information to determine if it was correct.

In any event, Stark's argument on this point is far too cursory to carry his burden of showing the grand jury proceeding was fundamentally unfair to him, in violation of his right to due process. His assertion that the grand jurors "might" have viewed things "in an entirely different light" if they had

received instructions about potential liability under the Federal False Claims Act Stark falls far short of the required showing that the alleged error "compromised the independence of the grand jury and contributed to the decision to indict" and therefore that he was "prejudiced" by the error. (*People v. Backus*, *supra*, 23 Cal.3d at p. 393.) Accordingly, this challenge to the ninth count of the indictment fails as well.[21]

Because we have rejected all of Stark's challenges to this count, it follows that the trial court did not err in denying Stark's motion to set aside the ninth count of the indictment.

H

Tenth Count

Attempt To Withhold IT Wages

The tenth count of the indictment alleges that Stark violated section 646 and section 424(a)(7) by "wilfully and unlawfully attempt[ing] to withhold payment of wages to employees of the Sutter County Department of Information Technology Services." The facts underlying this charge were as follows:

On March 8, 2005, at the time that Stark was refusing to process the journal entries for the IT department, Stark told an accountant in his office who was responsible for processing payroll that he was going to have to stop direct payroll

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[21] This conclusion also applies to the other counts in the indictment and the accusation against Stark to which he directs this argument.

deposits for the IT department. Later that day, Stark went to the treasurer's office and asked the treasurer to issue registered warrants for the IT department's payroll. A registered warrant looks like a check, but it is not immediately payable; instead, it is a promissory note that bears interest. The treasurer told Stark he had no intention of processing registered warrants until advised by county counsel, and Stark said, "Okay, I guess IT won't get paid then."

Later that day, the district attorney visited Stark's office to "make him familiar with the law when it comes to failure to pay employees." Stark said, "It doesn't matter. They're going to get paid anyway."

After that meeting, however, Stark sent an e-mail to the IT department employees informing them that if the board did not make funds available, they would receive registered warrants. He also sent an e-mail to the treasurer asserting that the treasurer's refusal to register the warrants "has prevented these payments to employees."

At the board meeting that night, the board voted to refer the matter to the State Labor Commissioner if Stark refused to pay the IT department employees on March 11, 2005. Ultimately, Stark backed down and the IT department employees received their paychecks.

In challenging the tenth count of the indictment, Stark argues that section 424(a)(7) requires proof of a knowing and intentional violation of the law, and no such proof was presented to the grand jury. Again, he is mistaken.

Section 424(a)(7) makes it a felony for a public official to "willfully" omit or refuse "to pay over to any officer or person authorized by law to receive the same, any money received by him or her under any duty imposed by law so to pay over the same." As we have explained, the word "willfully" "implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." (§ 7.)

Consistent with our analysis of section 424(a)(6), which also uses the word "willfully," we conclude that to prove a violation of section 424(a)(7), it must be shown that the defendant had the purpose or willingness to refuse to pay any money the defendant was under a duty of law to pay another. In other words, it must be shown that the defendant purposefully refused to fulfill a legal duty to pay money to someone else. It cannot be shown that the defendant acted with the requisite purpose unless it is shown that he *knew* of the legal duty that he was under. Of course, the defendant does not have to know that his refusal to comply with his legal duty to pay over public money to someone else constitutes a crime; he does, however, have to know that he is under a legal duty to make the payment; otherwise, he has not "willfully" committed the act the statute prohibits.

"An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) It follows that when a public official is charged with attempting

to violate section 424(a)(7), it must be shown that he intended to refuse to comply with a legal duty to pay over public money to someone else. The question here is whether the People presented sufficient evidence to the grand jury for a reasonably prudent person to conscientiously entertain a strong suspicion that Stark attempted to violate section 424(a)(7) because he intended to refuse to comply with a legal duty to make payroll payments to the employees of the IT department. We conclude they did.

Stark's argument on this point rests, once again, on his assertion that the law requires a county auditor-controller to "refuse to pay claims which he believes to be unauthorized and unlawful." His contention here appears to be that because the IT department was in the red, it would have been unlawful for him to make payroll payments from the department's account, and therefore he could not have intended to refuse to comply with a legal duty to make those payments because he had no such duty under the circumstances.

The evidence showed, however, that the only reason the IT department was in the red was because Stark was refusing to process the journal entries that the board of supervisors had ordered him to process. We have concluded already that the grand jury was justified in indicting Stark for violating section 424(a)(6) in connection with his refusal to process the journal entries. If the grand jurors could reasonably suspect that Stark knew he was legally required to process the journal entries that would have given the IT department enough money to

pay the department's payroll, then they could also reasonably suspect that Stark knew he had a legal duty to pay the IT department's payroll because he was legally required (by virtue of the direction from the board of supervisors) to make funds available for that purpose. Under these circumstances, Stark's challenge to the sufficiency of the evidence underlying the tenth count of the indictment fails.

Because we have already resolved all of the other arguments Stark directed against this count, it follows that the trial court did not err in denying Stark's motion to set aside the tenth count of the indictment.

I

Eleventh Count - False Books And Records

The eleventh count of the indictment alleges that Stark violated section 424(a)(3) by knowingly keeping a false account or making a false entry or erasure in the "financial books and records for the County of Sutter for fiscal year 2003-2004." The facts underlying this charge were as follows:

As noted above in connection with the first count, Marilee Smith conducted an outside audit of the County's books for the 2003-2004 fiscal year. Smith also did the audit for the previous fiscal year. In connection with that audit, Smith gave Stark a list of adjusting journal entries, which are corrections that need to be made to the County's books based on errors discovered during the audit. After the audit was complete, Stark did not express any disagreement with the recommended adjusting journal entries.

In conducting the audit for the 2003-2004 fiscal year, however, Smith discovered that Stark had not posted all of the adjusting journal entries from the previous year's audit. A "fair number" of the adjusting journal entries did not get posted, which came as a surprise to Smith.

1. *False Entry*

With respect to the eleventh count of the indictment, Stark again argues that "no evidence exists to support the proposition that any *false* entries were made in the books of Sutter County." We have previously concluded that the second, fourth, fifth, and seventh counts of the indictment must be set aside on this basis because all of those counts are based on unauthorized actions Stark took with regard to the County's budget, and a true record of an unauthorized transaction does not constitute a false entry in an account. The eleventh count requires a different analysis, however, because it is not based on Stark's taking actions that were unauthorized. Instead, the eleventh count is based on Stark's failure to make the adjusting journal entries recommended by the outside auditor in the audit of the County's books for the 2002-2003 fiscal year for errors the auditor found in the books. Under the prosecutor's theory, because Stark failed to make these adjusting entries, the County's books for the 2003-2004 fiscal year "were false, within the meaning of Penal Code section 424[(a)](3) as the Auditor knew of the errors and willfully failed to fix them in spite of representations to the independent auditor that he would."

We agree with the People that, in this circumstance, the evidence was sufficient to give the grand jury probable cause to believe Stark kept a false account. To the extent the County's books contained uncorrected figures, the books were false. Accordingly, this challenge to the eleventh count of the indictment fails.

2. *Intent To Violate The Law*

Stark next argues that the evidence supporting the eleventh count of the indictment is insufficient because section 424 requires proof of a knowing and intentional violation of the law, and no such proof was presented to the grand jury. We disagree.

Section 424(a)(3) makes it a felony to "knowingly" keep a false account or make a false entry or erasure in an account. The word "knowingly" is defined in section 7 as follows: "5. The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission."

"The word 'knowingly,' when used in any section of the Penal Code, must be construed to import only a knowledge of facts. It has no reference to a knowledge of the law." (*People v. Burns* (1888) 75 Cal. 627, 630-631.)

Under this definition, a person violates section 424(a)(3) if the person keeps an account with knowledge that the account is false. Likewise, a person violates this provision if the person makes a false entry or erasure in an account with

knowledge that the entry or erasure is false. Contrary to Stark's argument, section 424(a)(3) does not require proof that the public official knew he was acting contrary to the requirements of the law. It is enough if the official knew he was keeping a false account or knew he was making a false entry or erasure in an account.

The evidence before the grand jury was sufficient to establish probable cause to believe Stark *knew* he was keeping a false account because it showed Stark had been made aware of the adjusting journal entries that would have corrected the incorrect figures, but he failed to make them. Accordingly, this challenge to the eleventh count of the indictment fails.

Because we have already resolved all of the other arguments Stark directed against this count, it follows that the trial court did not err in denying Stark's motion to set the eleventh count of the indictment.

J

Twelfth Count

Withholding Of Wages To Fire Department Employees

The twelfth count of the indictment alleges that Stark violated section 424(a)(7) by "wilfully and unlawfully withhold[ing] wages earned by employees of the Sutter County Fire Safety Unit." The facts underlying this charge were as follows:

The County and the union representing the County's firefighters entered into a memorandum of understanding (MOU) in 1985, providing for eligible employees to earn overtime for all

authorized work in excess of 212 hours in a 28-day work period. A later MOU, entered into in 1990, provided for the establishment of an overtime account, to be used at the discretion of the fire chief to pay firefighters for any voluntary overtime worked.

No changes were made to these provision in the subsequent MOU's that were in effect through 2005.

Because the firefighters regularly work 240 hours in a 28-day work period, they automatically work 28 hours of overtime every work period. During the negotiation of the 1985 MOU, it was agreed that if a firefighter took sick leave or vacation in a given work period, that leave would be deducted from the appropriate leave balance, and the employee would still be paid overtime.

In December 2002, Richard Martin, a shift lieutenant with the County's fire department, noticed that there was no overtime on his paycheck for a work period in which he had taken leave, and his leave balance had not been reduced. Martin called Stark's office and was told that was "the way it was going to be from here on out." After he called the County's personnel director, the matter was cleared up that same day, and he received his overtime pay.

The following month, in January 2003, another issue arose when Martin learned that Stark intended to stop paying the firefighters for overtime in cash and intended instead to give them compensatory time off. According to Martin, the firefighters had been paid cash for overtime since the overtime

account was established in 1990. This change would have affected all 12 employees in the fire department.

During the two pay periods in January 2003, the fire department employees were not paid for their overtime, but received compensatory time off. Following two meetings with Stark on January 29 and 31, however, at Stark's direction the firefighters received supplemental checks paying them their overtime for the month. During the January 31 meeting, county counsel apparently advised Stark that county rules, as well as past practice, required the payment of overtime in cash.[22]

With respect to the twelfth count of the indictment, Stark again argues that section 424(a)(7) requires proof of a knowing and intentional violation of the law, and no such proof was presented to the grand jury. Again, he is mistaken.

The evidence showed that for years preceding December 2002 and January 2003, the fire department employees were paid for their overtime in cash. Then, in January 2003, Stark suddenly decided they should receive compensatory time off instead. On these facts, the grand jury could reasonably suspect that Stark knew he had a legal duty to pay the fire department employees overtime pay but intentionally refused to do so. Accordingly, this challenge to the twelfth count of the indictment fails.

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[22] The pertinent rule specifies that "[a]uthorized overtime shall be *paid* except for authorized overtime that exceeds two hundred and forty (240) hours in a twenty-eight (28) day work period," which under another rule is compensated with compensatory time off. (Italics added.)

Because we have already resolved all of the other arguments Stark directed against this count, it follows that the trial court did not err in denying Stark's motion to set aside the twelfth count of the indictment.

K

Thirteenth Count

Withholding Of Wages To Retiring Employees

The thirteenth count (the final count) of the indictment alleges that Stark violated section 424(a)(7) by "wilfully and unlawfully withhold[ing] wages in the cumulative amount of $1,969.51 earned by retiring employees of the County of Sutter." The evidence underlying this charge was as follows:

County rules provide (and have provided for more than 20 years) that when a county employee retires on a day preceding a holiday, the employee will be paid for the holiday. Ten county employees retired on December 30, 2004, which entitled them to be paid for the following day, which was the New Year's Day holiday for the County. Stark took the position that the retiring employees should not be paid for the holiday. The County's personnel director, Joann Dobelbower, requested an opinion from county counsel on the matter, and county counsel agreed the employees were entitled to be paid for the holiday. A copy of county counsel's legal opinion was provided to Stark, but as of May 3, 2005 (when Dobelbower testified to the grand jury) the retired employees had still not received their holiday pay.

As he did in connection with the tenth count, Stark argues that section 424(a)(7) requires proof of a knowing and intentional violation of the law, and no such proof was presented to the grand jury with respect to this count of the indictment. Again, he is mistaken.

We have concluded already that to prove a violation of section 424(a)(7), it must be shown that the defendant purposefully refused to fulfill a legal duty to pay money to someone else, and to make this showing, it must be shown that the defendant knew of the legal duty he was under. Here, the evidence showed that for more than 20 years, it had been a rule in Sutter County that if an employee retired the day before a holiday, the employee was to be paid for the holiday. The evidence also showed that Stark refused to follow this rule for 10 employees who retired on December 30, 2004, even after he was provided with an opinion from county counsel advising him that the employees should be paid for the holiday. Under these circumstances, the grand jurors were justified in entertaining a strong suspicion that Stark knew he had a legal duty to pay the employees for the holiday and that he intentionally refused to do so. Thus, this challenge to the thirteenth count of the indictment fails.

Because we have already resolved all of the other arguments Stark directed against this count, it follows that the trial court did not err in denying Stark's motion to set aside the thirteenth count of the indictment.

L

Conclusion

The trial court erred in denying Stark's motion to set aside the second, fourth, fifth, sixth, seventh, and eighth counts of the indictment. We will direct the issuance of a peremptory writ of mandate to correct these errors. The trial court did *not* err, however, in denying Stark's motion to set aside the third, ninth, tenth, eleventh, twelfth, and thirteenth counts of the indictment, and the case may proceed against Stark on those counts.

II

The Accusations

Government Code section 3060 et seq. provides for the removal from office of "any officer of a district, county, or city" "for willful or corrupt misconduct in office." (Gov. Code, § 3060; see also *id.*, § 3072.) Such a proceeding is initiated by the grand jury's presentation of an accusation against the official charged with misconduct. (Gov. Code, § 3060.)

We have already rejected many of the arguments that Stark and Putman directed at the accusations against them, because Stark directed those same arguments at the indictment. What remains are two related arguments: (1) The evidence was insufficient to support the accusations because there was no evidence Stark or Putman purposefully or knowingly violated the law; and (2) the grand jury was misdirected on the mens rea required to support an accusation under Government Code section

3060. Before turning to those arguments, we pause to examine the statute under which the accusations were brought -- to determine if purposeful or knowing violation of the law is required under that statute -- and then we set forth the standard of review that applies to a challenge to the sufficiency of the evidence underlying an accusation of misconduct against a public official.

A

Government Code Section 3060

As noted above, Government Code section 3060 provides for the removal of a county official from office for "willful or corrupt misconduct in office."

There is no dispute that "if an official commits a crime in connection with the operation of his office," the crime constitutes "wilful or corrupt misconduct" within the meaning of Government Code section 3060 for which the official "may be removed from his office as the result of an accusation." (*People v. Hale* (1965) 232 Cal.App.2d 112, 119.) What is at issue here is what mental element is required to show willful misconduct when a crime has not been committed. More specifically, to show willful misconduct when no crime has occurred, must it be shown that the official knowingly or purposefully violated the law?

Stark and Putman contend the answer to that question is "yes," based on *Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771. In *Steiner*, the Orange County District Attorney obtained accusations from the grand jury to remove two county supervisors

from office after the county treasurer "made speculative high-stakes financial investments, which suffered a precipitous downturn and plummeted the county into bankruptcy." (*Id.* at pp. 1774-1775.) "In a nutshell, the accusations assert[ed] [the supervisors] did a shoddy job of minding the store while [the treasurer] committed acts which plunged the county into bankruptcy." (*Id.* at p. 1776.)

Based on a thorough examination of the case law, the appellate court concluded "that something more than neglect is necessary to constitute willful conduct." (*Steiner v. Superior Court*, *supra*, 50 Cal.App.4th at p. 1781.) The court stated, "Virtually all of [the cases] involved conduct that was otherwise criminal, conduct which was corrupt and malum in se. And, in contrast to [this case], none of them involved a failure to act where the duty to act is premised on something the official *should have known.* But that is what the district attorney has charged here. He alleges [the supervisors] failed to realize [the treasurer's] investment decisions could bring financial ruin to the county because they did not pay close enough attention to his activities." (*Ibid.*) The court concluded that the removal procedure in Government Code section 3060 et seq. "must be reserved for serious misconduct, . . . misconduct that involves criminal behavior or, at least, a *purposeful* failure to carry out *mandatory* duties of office." (*Steiner*, at p. 1782.)

Steiner stands for the proposition that mere negligence is not enough to constitute willful misconduct. We agree with that

proposition. As we have explained, under the Penal Code, "willfully" "implies . . . a purpose or willingness to commit the act, or make the omission referred to." (§ 7.) The same meaning has been applied to the term "willful" in Government Code section 3060. For example, in *Coffey v. Superior Court* (1905) 147 Cal. 525, a police chief of Sacramento was charged with willful misconduct because he knew of illegal gambling in his city but refused to prosecute the offenders. (*Id.* at p. 527.) The Supreme Court concluded the case should go forward because "[t]his failure and refusal to [prosecute], if true . . . constituted a willful misconduct in office. It was not a mere neglect of duty. It was a failure to discharge his duty with knowledge of the facts calling for official action; a failure which was willful, and which evidenced a fixed purpose not to do what actual knowledge and the requirements of the law declare he shall do." (*Id.* at p. 530.)

Thus, a mere neglect of duty, without knowledge of the facts giving rise to the duty, is not willful misconduct. It does not follow, however, that willful misconduct requires a knowing or purposeful *violation of the law*, as Stark and Putman would have it. As the court explained in *People v. Hale*, *supra*, 232 Cal.App.2d at page 119, "if an official commits a crime in connection with the operation of his office, or willfully or corruptly fails or refuses to carry out a duty prescribed by the law or by the charter, if any, under which he holds his position, or if his conduct as such officer is below the standard of decency rightfully expected of a public official

such as drunkenness during work hours, or a gross and repeated failure to carry out his official routine in a timely and appropriate matter, he may be removed from his office as the result of an accusation. Such misconduct in office may be corrupt or merely wilful [citation]." Obviously, not all of these actions involve a knowing or purposeful violation of the law, and yet each is sufficient to constitute willful or corrupt misconduct. Thus, we reject the argument that a knowing or purposeful violation of the law is required to establish willful misconduct under Government Code section 3060. There must be willful behavior, and that behavior must amount to misconduct -- that is, "'misbehavior,' 'misdemeanor,' 'delinquency,' [or] 'offense.'" (*Coffey v. Superior Court*, *supra*, 147 Cal. at p. 529.) If those two elements are established, nothing more is required.

B

Standard Of Review

We now turn to the standard of review. Government Code section 3066 provides that "[i]f [the official] objects to the legal sufficiency of the accusation, the objection shall be in writing. The objection need not be in any specific form. It is sufficient if it presents intelligibly the grounds of the objection." It is this provision under which Stark and Putman moved to set aside the accusations against them based on the alleged insufficiency of the evidence.

In *People v. Hale*, *supra*, 232 Cal.App.2d at page 120, the appellate court rejected the People's argument that section 3066

"does not authorize a motion to dismiss on the ground of the insufficiency of the evidence before the grand jury." The court explained that "[i]t would constitute a violation of basic right to hold that a trial judge could not sustain an objection to an accusation if there was no evidence whatsoever before the accusatory body which would justify the bringing of such a charge. To place a public officer under the necessity of defending an accusation in such circumstances would outrage the American sense of justice. Of course, a trial judge cannot substitute himself for the jury in such circumstances and pass upon conflicting testimony or weigh the effect of differing evidence; the trial jury must pass upon the factual matters involved, if there is an issue of fact unresolved. But if there is no evidence whatsoever in the record to justify the accusation, the trial judge, as the executor of our laws, should so rule." (*People v. Hale*, *supra*, 232 Cal.App.2d at p. 121.)

Accordingly, like the trial court, we will review the record to determine whether there is any evidence to justify the accusations against Stark and Putman.

C

The Stark Accusation

1. *Sufficiency Of The Evidence*

a. *Counts Three, Six, Seven, Eight, Ten, Eleven, Twelve, Fourteen, And Fifteen*

Because commission of a crime constitutes "misconduct" within the meaning of Government Code section 3060, where a charge of misconduct in the accusation against Stark is based on

the same conduct underlying one of the criminal charges that we have concluded the trial court properly refused to set aside, that charge of misconduct is necessarily justified by the evidence before the grand jury. This is so because if the evidence is sufficient for Stark to be prosecuted for a felony based on that conduct, it is necessarily sufficient for Stark to be charged with willful misconduct based on the conduct.

The following is a list of those counts in the accusation against Stark that are based on the same facts as counts in the indictment that we have concluded are supported by sufficient evidence:

1) Count three of the accusation against Stark is based on the same conduct as the third count of the indictment: namely, Stark's unauthorized transfer of money from the County's general fund to the Waterworks District;

2) Count six of the accusation against Stark is based on the same conduct as the ninth count of the indictment: namely, Stark's refusal to post the journal entries for the IT department;

3) Counts seven and eight of the accusation against Stark are based on the same conduct as the tenth count of the indictment: namely, Stark's attempt to withhold wages from employees of the IT department;[23]

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[23] Count eight of the accusation alleges that Stark's attempt to withhold the wages was an attempted violation of section 424(a)(7); count seven alleges it was an attempted violation of Labor Code section 222, which makes it "unlawful, in case of any wage agreement arrived at through collective bargaining, either

4) Count ten of the accusation against Stark is based on the same conduct as the eleventh count of the indictment: namely, Stark's failure to post the adjusting journal entries from 2002-2003, which made the County's books for 2003-2004 incorrect;

5) Counts eleven and twelve of the accusation against Stark are based on the same conduct as the twelfth count of the indictment: namely, Stark's refusal to pay overtime to the fire department employees in January 2005;[24] and

6) Counts fourteen and fifteen of the accusation against Stark are based on the same conduct as the thirteenth count of the indictment: namely, Stark's withholding of wages from the retiring employees.[25]

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wilfully or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon." We have discussed the application of section 424(a)(7) to the evidence already. As for Labor Code section 222, plainly there was sufficient evidence to justify the accusation that Stark committed misconduct by attempting to willfully withhold agreed-upon wages from the IT employees.

[24] Count twelve of the accusation alleges that Stark's withholding of the wages was a violation of section 424(a)(7); count eleven alleges it was a violation of Labor Code section 222. We have discussed the application of section 424(a)(7) to the evidence already. As for Labor Code section 222, the evidence justified the accusation that Stark committed misconduct by willfully withholding agreed-upon wages from the fire department employees.

[25] Count fifteen of the accusation alleges that Stark's withholding of the wages was a violation of section 424(a)(7); count fourteen alleges it was a violation of Labor Code section 222 and Sutter County Rule 13.10. We have discussed the

That leaves us with four counts in the accusation against Stark that must be addressed in more detail to determine whether they are supported by sufficient evidence.

b. *Count One*

Count one of the accusation against Stark alleges that he "knowingly and willfully fail[ed] to meet the deadline of December 1, for filing the final budget with the State Controller and the Clerk of the Board of Supervisors as mandated by Government Code sections 29093(a) and (c), and Sutter County Resolution No. 92-112" because he "did not file the Final Budget for fiscal year 2003-2004 until on or about June 18, 2004."

Stark does not dispute that he was required by law to file the final budget by December 1, 2003, that he knew of the deadline, and that he missed it by over six months. His sole argument on the sufficiency of the evidence is that "[t]he budget was published late not because [he] purposefully refused to follow the law, but because he was diligently trying to comply with a fundamental legal requirement -- publication of a balanced budget." In effect, Stark contends his attempt to comply with one legal requirement -- publication of a balanced budget -- excuses his failure to comply with another legal requirement -- publication of the final budget by December 1. He is mistaken.

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application of section 424(a)(7) to the evidence already. As for the laws on which count fourteen is based, the evidence justified the accusation that Stark committed misconduct by willfully withholding agreed-upon wages from the retiring employees.

There is no question that Stark's failure to publish the budget by the date required by law was a willful failure to carry out a duty prescribed by the law. That is to say, his failure to file the budget by December 1 was not an accident; he intentionally decided *not* to publish the budget on time, ostensibly because he was still trying to balance it. Thus, Stark's argument that he did not purposefully refuse to follow the law fails.

The question Stark's argument really raises is whether his purposeful refusal to follow the law relating to when the final budget must be published can be characterized as "misconduct," given his excuse for not publishing the budget on time -- that he was trying to comply with another legal requirement. In other words, was Stark *misbehaving* (see *Coffey v. Superior Court*, *supra*, 147 Cal. at p. 530), or was he behaving appropriately under the circumstances? That is a question that must be resolved by a trial jury. At this point, it is sufficient to conclude that the charge of willful misconduct was not completely unjustified by the evidence before the grand jury. Stark himself contends that "[t]he most difficult issue delaying timely publication of the final budget concerned [his] efforts to balance the budget for the Robbins Water District." It is for a trial jury to decide whether Stark legitimately delayed filing the budget because of his reasonable attempts to accomplish a required balancing of the budget, or whether he did so illegitimately, as part of his running "battle" with the county administrative officer and the board of supervisors.

c. *Counts Four And Five*

Count four of the accusation against Stark is based on the same conduct as the fifth and sixth counts of the indictment: namely, Stark's unauthorized amendments to the 2004-2005 budget. Count five of the accusation against Stark is based on the same conduct as the seventh and eighth counts of the indictment -- namely, Stark's unauthorized creation of reserve accounts. We have concluded that the conduct underlying these counts does not support criminal charges of violating section 424(a)(2) -- because Stark did not "use" any public money -- or section 424(a)(3) -- because a true entry of an unauthorized transaction is not false. This does not mean, however, that Stark's conduct will not support charges of willful misconduct under Government Code section 3060. To the extent Stark contends "generally accepted accounting principles and Government Code provisions required him to publish the budget in the manner now criticized by the CAO's Office," the question of why Stark did what he did is a matter for a trial jury to resolve. For our purposes, it is sufficient to conclude that there was evidence before the grand jury that, if construed in the light most favorable to the People, could justify a finding that Stark engaged in willful misconduct -- that is, deliberate misbehavior -- by amending the 2004-2005 budget and creating reserve accounts without the legal authority to do so. The tenor of the evidence was that Stark was in something of a pitched battle with the county administrative officer and the board of supervisors over the scope of his authority. Based on this evidence, it is not

unreasonable to conclude that Stark did what he did, not so much out of legitimate concern for accounting principles, but because he wanted to assert the authority he claimed in spite of limitations the board had placed on him. Under the circumstances, such actions could reasonably be characterized as willful misconduct.

d. *Count Nine*

Count nine of the accusation against Stark alleges that he "misuse[d] his official position to remove employees of the Sutter County Department of Information Technology Services from receipt of wages by direct deposit, after said employees had previously requested and received electronic payment of wages." We have already discussed the facts relating to this count in connection with the tenth count of the indictment, and we have concluded that Stark's attempt to withhold payroll from the IT department employees can be prosecuted as a violation of section 424(a)(7) and therefore can be charged as willful misconduct under Government Code section 3060. Stark's cancellation of the payroll deposits was part and parcel of this course of conduct. Even Stark does not deny that he acted willfully -- that is, that he *meant* to cancel the payroll deposits. The question is whether the cancellation amounted to "misconduct" under the circumstances. As with counts one, four, and five of the accusation against Stark, discussed above, that is a matter for a trial jury to resolve. Viewing the evidence in the light most favorable to the People, we cannot say that there is no evidence to support a finding that Stark's cancellation of the IT

department payroll deposits was misconduct. If a jury concludes that Stark engaged in willful misconduct because he improperly refused to process the IT journal entries that would have given the IT department sufficient funds to cover its payroll, then the jury could conclude that his cancellation of the payroll deposits was willful misconduct as well.

2. *Instructional Error*

Stark's final argument is that the grand jury was misdirected on the mens rea required to support an accusation under Government Code section 3060.

As an initial matter, we note that Stark has not identified any authority that allows him to raise instructional error as a basis for challenging an accusation under Government Code section 3060. Government Code section 3066 allows an official who is the subject of an accusation to object to its "legal sufficiency." Stark, however, offers no argument -- let alone any supporting authority -- that instructional error can render an accusation legally insufficient within the meaning of this statute.

We would be justified in rejecting Stark's argument on this basis alone. To demonstrate error, the appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16; *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672-673, fn. 3.) When a point is asserted without argument and authority for the proposition, "it is

deemed to be without foundation and requires no discussion by the reviewing court." (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647; accord, *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1117 ["failure of appellant to advance any pertinent or intelligible legal argument . . . constitute[s] an abandonment of the [claim of error"]].)

Even if we consider the question on its merits, however, we conclude that Government Code section 3066 does not provide a basis for challenging an accusation based on allegedly erroneous instructions to the grand jury. If an accusation properly alleges willful or corrupt misconduct by a public official, and there was some evidence before the grand jury to justify the charge, and a sufficient number of grand jurors concurred in the accusation,[26] then it is legally sufficient, and any error in the instructions to the grand jury is irrelevant to its sufficiency.

Even if we assume for the sake of argument that a public official facing an accusation under Government Code section 3060 can bring a nonstatutory motion to set aside the accusation based on an alleged violation of his right to due process in the grand jury proceeding, and that such a motion can be premised on allegedly erroneous instructions to the grand jury, this is still of no avail to Stark. Stark's argument is premised on the purported showing that the prosecutor's instructions and

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[26] "An accusation may not be presented without the concurrence of at least 12 grand jurors, or at least eight grand jurors in a county in which the required number of members of the grand jury is 11." (Gov. Code, § 3060.)

comments to the jury on the mental element of willful or corrupt misconduct were conflicting and confusing. But even if we were to concede this, Stark cannot prevail because he has failed to demonstrate that the erroneous instructions and comments compromised the independence of the grand jury and contributed to the decision to accuse him and therefore he was prejudiced by the error. Absent such a showing, there is no basis to set aside the accusation on due process grounds.

For all of the reasons stated above, we conclude the trial court did not err in denying Stark's motion to set aside counts one and three through fifteen of the accusation against him.

D

The Putman Accusation

Both counts of the accusation against Putman are based on the facts that also underlie the second count of the indictment against Stark: namely, the unauthorized transfers from the general reserve of the County's general fund in the 2003-2004 fiscal year. Count one alleges that Putman made those transfers; count two alleges that she aided and abetted making those transfers.[27]

For our purposes, however, the question is the same with regard to both counts: Was there evidence before the grand jury that justified charging Putman with willful misconduct for her

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[27] The count in the accusation against Stark based on the unauthorized transfers -- count two -- was set aside by the trial court.

involvement in the unauthorized transfers from the general fund's general reserve? We conclude the answer to that question is "no."

It is true that Putman approved the transfers by initialing the journal entries Johal prepared. Johal's testimony also supports the conclusion that Putman was the person who gave her the account number for the general fund's general reserve to put on the journal entries. The critical question, however, is whether there was any evidence that Putman *knew* she was not supposed to transfer funds from this general reserve but decided to do so anyway.

On this point, it is crucial to note that the district attorney who presented the charges of misconduct to the grand jury initially concluded the evidence was insufficient to charge Putman. A deputy district attorney who assisted him (now herself a superior court judge) argued to the grand jury that as to Putman, "[i]t just seems that the evidence is not there. She did assist in the transfers out of the general fund general reserve, but there is no reason to think that someone of her status in that office, we can't prove that she knew essentially what was going on if you're somebody who can't pass the CPA test. I don't think you should be held to the same level of competency as the CPA, the Auditor-Controller, the guy who really knows -- he really knows the Government Code." The district attorney later agreed that his recommendation was "not to file" charges against Putman. Thus, the initial position of the prosecution in this matter was that there was no evidence

Putman knew the transfers from the general fund's general reserve were improper.

After the grand jury returned the accusation against Putman, the prosecution did oppose Putman's set-aside motion. In arguing the sufficiency of the evidence to support the charges of misconduct against Putman, however, the prosecution did not point to any evidence that Putman *knew* funds could not lawfully be transferred from the general fund's general reserve without a declaration of emergency by the board of supervisors. Instead, the prosecution relied only on the testimony of the outside auditor, Marilee Smith, that she "thought" a person in Putman's position -- assistant auditor -- *should* know better than to transfer money from the general fund's general reserve without authorization from the board.

Before this court, the People have not offered any further insight on the evidence before the grand jury on this point. The People chose not to file any additional papers, and when pressed at oral argument to identify evidence showing Putman's knowledge of the restriction on use of the general fund's general reserve, the People relied almost entirely on the fact that she was Stark's assistant.[28]

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[28] The People also claimed there was evidence in the record that the board of supervisors had advised Stark and Putman not to make transfers from the general fund's general reserve, but the People could not provide any specific citation to such evidence, and we have not found any such evidence ourselves.

Thus, the People's position appears to be that the mere fact that Putman was the assistant auditor is sufficient to support a rational conclusion that she actually knew about, but intentionally disregarded, the restriction on the use of the general fund's general reserve. We cannot agree with this conclusion. At best, Smith testified that someone in the position of assistant auditor -- not Putman in particular -- *should have known* funds could not lawfully be transferred from the general fund's general reserve without a declaration of emergency by the board of supervisors. This is to say nothing more than it was *negligence* for an assistant auditor to do what Putman did. But negligence is not willful misconduct.

Moreover, construed together with the other evidence before the grand jury, Smith's testimony that an assistant auditor *should* know about the restriction on the use of the general fund's general reserve does not support a rational inference that Putman herself *actually* knew of that restriction. The People have not pointed to any evidence of how long Putman had been the assistant auditor, or what her experience and training were. There was some evidence that Putman had been employed by the County for three and one-half years; however, the evidence did not reveal what portion of that time she spent as assistant auditor.

Under these circumstances, we conclude the record is devoid of any evidence that reasonably supports the accusation that Putman engaged in willful misconduct by transferring funds from

the general fund's general reserve. Accordingly, the trial court erred in denying her motion to set aside the accusation.

E

Conclusion

The trial court did not err in denying Stark's motion to set aside counts one, three, four, five, six, seven, eight, nine, ten, eleven, twelve, fourteen, and fifteen of the accusation against him. The court *did* err, however, in denying Putman's motion to set aside the accusation against her.

DISPOSITION

The petitions are granted in part and denied in part. Let a peremptory writ of mandate issue directing the respondent court to: (1) vacate its order in case No. CRF-05-1001 to the extent that order denied Stark's motion to set aside t[redacted] fourth, fifth, sixth, seventh, and eighth counts of th[redacted] indictment, and enter a new order granting the motion [redacted] those counts; and (2) vacate its order in case No. CRM[redacted] denying Putman's motion to set aside the accusation ag[redacted] and enter a new order granting that motion.

Stark and the People shall bear their own costs in this proceeding, but Putman is entitled to recover her costs. (Cal. Rules of Court, rule 56(l)(2).)

ROBIE, J.

We concur:

SCOTLAND, P.J.

CANTIL-SAKAUYE, J.

PROOF OF SERVICE

I am a citizen of the United States and a resident of Sacramento County. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is Rothschild Wishek & Sands LLP, 901 F Street, Sacramento, California 95814. On the below named date, I served the within:

PETITION FOR REVIEW

on the parties in said action as follows:

_X_ (By REGULAR MAIL) by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento, California, addressed as follows:

___ (By U.P.S.) by placing a true copy thereof enclosed in a sealed envelope, prepaid, deposited with the U.P.S. carrier/box at Sacramento, California, addressed as follows:

____(By PERSONAL SERVICE) delivering by hand and leaving a true copy with the person and address shown below.

____(By FACSIMILE) by placing a true copy thereof into a facsimile machine addressed to the person and address shown below:

Carl V. Adams
District Attorney of Sutter County
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Attorneys for Real Party in Interest

Office of the Attorney General
Cliff Zall, Deputy Attorney General
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Sutter County Superior Court
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MARILYN FISHER
P.O. Box 2509
Mendocino, CA 95460
Attorney for Robert E. Stark and
Ronda Putman

Robert Stark
1587 Holly Tree Drive
Yuba City, CA 95993
Petitioner

I, David E. Droege, declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of July, 2006 at Sacramento, California.

David Droege
David E. Droege

PROOF OF SERVICE

I am a citizen of the United States and a resident of Sacramento County. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is Rothschild Wishek & Sands LLP, 901 F Street, Sacramento, California 95814. On the below named date, I served the within:

PETITION FOR REVIEW

on the parties in said action as follows:

___ (By REGULAR MAIL) by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento, California, addressed as follows:

___ (By U.P.S.) by placing a true copy thereof enclosed in a sealed envelope, prepaid, deposited with the U.P.S. carrier/box at Sacramento, California, addressed as follows:

X____(By PERSONAL SERVICE) delivering by hand and leaving a true copy with the person and address shown below.

____(By FACSIMILE) by placing a true copy thereof into a facsimile machine addressed to the person and address shown below:

Clerk of the Court
Court of Appeal
Third Appellate District
914 Capitol Mall
Sacramento, CA 95814

I, David E. Droege, declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of July, 2006 at Sacramento, California.

David Droege

David E. Droege