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IN THE SUPREME COURT

STATE OF CALIFORNIA

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| ROBERT E. STARK,<br>Petitioner,<br>vs.<br>SUPERIOR COURT OF SUTTER COUNTY<br>Respondent, | Case No. S145337 |
| THE PEOPLE,<br>Real Party in Interest.<br>and Companion Case. | Court of Appeal Nos. C051073 and C051074<br>Sutter County Nos. CRMS051001 and CRMS051031 |
| ~~RONDA G. PUTMAN,~~<br>~~Petitioner,~~<br>~~vs.~~<br>~~SUPERIOR COURT OF SUTTER COUNTY~~<br>~~Respondent,~~<br>~~THE PEOPLE,~~<br>~~Real Party in Interest.~~ | Court of Appeal No. C051075<br>Sutter County No. CRMS051030<br>[Consolidated Cases] |

**PETITIONER'S OPENING BRIEF ON THE MERITS**

M. BRADLEY WISHEK, SBN 121875
QUIN A. DENVIR, SBN 49374
ROTHSCHILD WISHEK & SANDS LLP
901 F Street, Suite 200
Sacramento, California 95814
Phone: (916) 444-9845
Facsimile: (916) 444-2768
Attorneys for Petitioner
Robert E. Stark

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Phone: (916) 444-9845
Facsimile: (916) 444-2768
Attorneys for Petitioner
Robert E. Stark

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## STATEMENT OF ISSUES

1. Does violation of Penal Code section 424 (falsification of accounts or misappropriation of public funds by a public officer or employee) require intentional violation of a known legal duty or is it a general intent crime?[1]

[1] By order of the Court en banc on October 11, 2006, the parties were directed to brief this issue in addition to the issues set forth in the petition for review. Issues two through four were set forth in the petition for review. (Petition for Review, p. 2.)

2. 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?

3. 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?

4. Where a defendant moves to set aside an indictment or accusation upon the grounds 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?

## INTRODUCTION

Sutter County Auditor-Controller Robert E. 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. By way of example, Mr. Stark refused to follow a Board of Supervisors order to transfer public funds to the Sutter County Information Technology (IT) Department internal service fund. Mr. Stark repeatedly explained that this refusal was premised upon a concern that the rates charged by the IT Department to other

departments were unauthorized by law and might result in excess reimbursements to Sutter County from state and federally funded programs.

Mr. Stark was required to independently evaluate the lawfulness of the Board's order. (See *Linden v. Case* (1873) 46 Cal. 171, 174. ("If illegal claims are allowed by the Board against the county, it will be the duty of the auditor to refuse to draw warrants therefor. . .").) If the prosecution's view of the law were correct, Mr. Stark was faced with a decision which posed no less a Catch 22 than that confronted by Yossarian in Joseph Heller's 1961 novel. If Mr. Stark transferred county funds to the IT Department notwithstanding his belief that the order was unlawful, he would be liable to felony prosecution and removal from office unless he were fortunate enough to have a court later determine that his belief was mistaken. Conversely, if he defied the Board's order believing it to be unlawful and a court later disagreed, he would be liable to felony prosecution and removal from office notwithstanding his good faith professional opinion. Whether a court clerk or an elected public official, no public employee should fear criminal prosecution and removal from office where reasonable minds disagree concerning whether an act or omission is authorized or required by law. In the case of an elected auditor-controller, charged with the responsibility to evaluate the lawfulness of a Board order or public expenditure, the statutorily prescribed independence of that office is gravely threatened by a prosecution such as this.

The prosecution of Mr. Stark should not proceed. Notwithstanding extensive evidence that Mr. Stark acted or refused to act only as he thought the law

required, grand jurors were misadvised as to the mens rea required to establish a violation of Penal Code section 424 and to support an accusation under Government Code section 3060. Mr. Stark seeks to have this Court confirm that a motion to set aside an indictment or accusation may be premised upon such prejudicial instructional error. A grand jury cannot serve its historic role as a protective bulwark between citizens and politically motivated or overzealous prosecutors if a defendant is without a remedy when a prosecutor misleads grand jurors concerning the proof required to establish a crime under investigation, or to support an accusation.

In addition, the prosecutor here has a patent conflict of interest arising out of, in part, his personal involvement in controversies between Mr. Stark and the CAO and Board. Mr. Stark seeks to have this Court confirm that such a conflict should be evaluated under the standard set forth in *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 263 at fn 5, and not under the later enacted provisions of Penal Code section 1424, which by its plain language has no application to a motion to set aside an indictment or accusation.

**STATEMENT OF THE CASE AND FACTS**

On October 28, 2005, Mr. Stark filed petitions for a writ of prohibition or mandate in the Court of Appeal, Third Appellate District. On November 23, 2005, the petitions were summarily denied. Mr. Stark filed petitions for review in this Court on December 5, 2005. On February 22, 2006, the Court granted the petitions, consolidated Mr. Stark's petitions and a related petition filed by the

Assistant Auditor-Controller, and transferred the matter to the Court of Appeal with directions to issue an order to show cause.

On June 15, 2006, the Court of Appeal issued its opinion which granted in part and denied in part the consolidated petitions. (Petition for Review, Exhibit "A".) On July 25, 2006, Mr. Stark filed a petition for review. On September 13, 2006, the Court granted the petition.

The facts and procedural history of the case are correctly stated in the opinion of the Court of Appeal.[2]

## ARGUMENT

### I.

### A VIOLATION OF PENAL CODE SECTION 424 REQUIRES PROOF OF AN INTENTIONAL VIOLATION OF A KNOWN LEGAL DUTY

Five different paragraphs within section 424(a) are charged in the indictment and accusation. The charged provisions read:

> (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 monies, who either:

---

2 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.

Mr. Stark has identified, *infra,* the evidence in the record which establishes that he was prejudiced by the prosecutors' misdirection of the grand jury, i.e., 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.

> 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,
>
> * * * * *
>
> 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 any 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 the state. (Emphasis added.)

The Court of Appeal opinion correctly held that section 424(a) requires proof that a public official must know he is acting without authority of law.

Mr. Stark has found no case squarely addressing the issue,[3] presumably

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[3] The prosecution, in arguing for a general intent mens rea in this statute, has relied upon dicta in this Court's decision in *People v. Dillon* (1905) 199 Cal. 1. The *Dillon* Court, however, expressly declined to decide whether a public official's good faith belief that he was acting in accordance with the law would foreclose prosecution for violations of section 424 under paragraphs 1 and 2 (now 424(a), paragraphs 1 and 2). In *Dillon*, the defendant commissioner of finance withdrew public funds and permitted them to be used in the purchase of property for others at discounted prices, uses which the Court held could "certainly" not have been justified by any "provision of law or rule of moral right." (199 Cal. at p. 15.) Thus, the *Dillon* Court found it was not necessary to determine "what the decision of this court might be in case an officer acted in good faith under color of the authority of law." (*Ibid.*) The issue posed here was not decided.

because a public official has never been prosecuted in circumstances where his conduct, as in this case, has been motivated by his best professional judgment. In contrast, in every case where the issue has been raised, the conviction was upheld upon evidence of an intentional or knowing disregard of what the law required, as in *People v. Dillon, supra.*[4]

The modern trend is to require proof of a guilty mind in every criminal offense absent evidence of a legislative intent to dispense with mens rea entirely. So basic is the requirement of mens rea to principles of Anglo-American criminal jurisprudence that it is an element of every crime unless excluded expressly or by necessary implication. (*In re Jorge M.* (2000) 23 Cal.4th 866, 872 (holding prosecution must prove a defendant knew or should have known characteristics of firearm bringing it within assault weapons provision to obtain conviction).)

> That the statute contains no reference to knowledge or other language of mens rea is not itself dispositive. As we recently explained, the 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*

[4] See, e.g., *People v. Sperl* (1976) 54 Cal.App.3d 640 (marshal afforded officials and their families transport in county vehicles and ordered documentation thereof removed; also allowed his employees to make telephone calls for a campaign candidate; no reasonable man could conclude conduct was other than without authority of law); *People v. Varon* (1987) 189 Cal.App.3d 1163 (defendant camouflaged misappropriation of money through written documents); *People v. Marquis* (1957) 153 Cal.App.2d 553 (assessor conceded making of false entries); *People v. Johnson* (1936) 14 Cal.App.2d 373 (assessor intentionally and knowingly disobeyed law by keeping funds which should have been paid to treasurer for purpose of paying someone he thought had just claim); *People v. Moulton* (1931) 116 Cal.App. 552 (assessor prepared false records of use of tax monies to cover shortages due treasury).

> *rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." . . .' (*People v. Simon*[, *supra*,] 9 Cal.4th 493, 519 . . . ., citations omitted.) In other words, there must be a union of act and wrongful intent, or criminal negligence. (Pen.Code, § 20, *People v. Vogel* (1956) 46 Cal. 2d 798, 801 [299 P.2d 850].)

(*Ibid.*)

However, under certain types of penal laws, often referred to as public welfare offenses, the Legislature does not intend that proof of scienter or wrongful intent be required for conviction. These offenses are generally based upon regulatory statutes protecting public health and safety, such as traffic and food and drug regulations, and usually involve light penalties and no moral obloquy. (*Jorge M., supra*, 23 Cal.4th at p. 872.) Penal Code section 424 is not a public welfare offense. A violation of section 424 is a felony punishable by up to four years in state prison and by disqualification to hold any office in this state.

The statute's history and context strongly support a requirement of mens rea. (See, e.g., *Jorge M, supra,* 23 Cal.4th at p. 873.) The statute's obvious purpose is to set a high standard for public officials. Thus, no proof of fraudulent intent or intent to deceive is required in most of the subdivisions. However, there is no indication that the Legislature intended to enact an essentially strict liability statute and punish as a felony either innocent mistakes or professional differences of opinion.

That conclusion is supported by consideration of the overall legal framework in which an auditor-controller functions. The law requires an auditor

to refuse to pay a warrant or expenditure believed to be unauthorized or unlawful, even if ordered to do so by a board of supervisors, and imposes personal liability for allowing a disbursement for an illegal claim. (Gov. Code, § 24054; see, e.g., *Walton v. McPhetridge* (1898) 120 Cal. 440, 443-444; *Merriam v. Board of Supervisors of Yuba County* (1887) 72 Cal. 517, 519; *Linden v. Case, supra,* 46 Cal. 171, 174; *City of El Cajon v. Lonergan* (1978) 83 Cal.App.3d 672, 676-677.) So strong is the preference for an independent evaluation of the lawfulness of claims upon the public treasury that the auditor and treasurer of a county are entitled to necessary expenses in the defense or prosecution of an action brought by or against them to test the validity of a board order, including for the payment of county funds. (Gov. Code, § 29611.)

The law also allows a public official who doubts the validity of an order, contract or public expenditure to refuse to pay over public funds absent a civil court order, with no indication that the official's mistaken interpretation of the law might expose him to felony prosecution under section 424 if he is wrong. (See, e.g., *White v. Hayden* (1899) 126 Cal. 621; *Babcock v. Goodrich* (1874) 47 Cal. 488; *Social Welfare Board v. Johnson* (1940) 38 Cal.App.2d 717.) The decision in *Uhler v. Superior Court* (1953) 117 Cal.App.2d 147, adds to the legal context in which section 424 operates. The Court of Appeal there found that the proper method to test the validity of a claim the auditor had refused to pay on advice of counsel was by a civil proceeding in mandate, not by a contempt proceeding. (*Id.* at p. 156 (this remedy "should rarely if ever be used for the purpose of settling

differences of opinion between conscientious officials with respect to close questions of civil law.").)

Additionally, this Court has determined that public officials may be held civilly liable for unauthorized expenditures only upon proof that an official acted *without due care*. (*Stanson v. Mott* (1976) 17 Cal.3d 206, 223-226 (overruling prior decision imposing strict liability and noting that limits of authorized public expenditures are not always clearly ascertainable). If section 424 were construed to require only a volitional act (or omission) without regard to mens rea, the following anomalous and absurd consequences would result in the case of a public official acting in accordance with his good faith professional judgment as to what the law requires:

- In any civil action contesting the legality of the expenditure, the attorney fees of the public official would be a charge upon the county even if it were determined that the challenged expenditure was illegal or unauthorized. (Gov. Code, § 29611.)

- The public official would have no civil liability to personally repay the unauthorized expenditure unless the court first found that the official had acted without due care, and contrary to the clear requirements of the law. (*Stanson v. Mott, supra*.)

- This same public official, however, without any civil liability and having been indemnified for his attorney fees, could be indicted, convicted of a felony, removed

from office, and imprisoned for violation of section 424 for the very same conduct.

In construing a statute, a court "must attempt to avoid a construction that will lead to unreasonable or arbitrary results." (*People v. Simon, supra*, 9 Cal.4th 493, 517 (Legislature could not have intended to require knowledge of falsity or materiality before recovery in civil action available, while permitting imposition of substantial criminal penalties regardless of such knowledge or criminal negligence in failing to obtain and relate accurate information).) "If two constructions are possible, that which leads to the more reasonable result should be adopted." (*Ibid.*, citing *People ex rel Riles v. Windsor University, Inc.* (1977) 71 Cal.App.3d 326, 332.)

This Court has also imposed a mens rea requirement of actual knowledge of wrongdoing in various contexts where it is required that an act be done "willfully," because the definition in Penal Code section 7 of that word implies "simply a purpose or willingness to commit the act, or make the omission referred to" "*unless otherwise apparent from the context.*" In those cases, like here, the context mandated imposition of a requirement of consciousness of wrongdoing. (See, e.g., *People v. Garcia* (2001) 25 Cal.4th 744, 754 (requiring *actual* knowledge of registration requirement in prosecution for willfully failing to register as sex offender); *People v. Hagen* (1998) 19 Cal.4th 652, 666 (requiring

proof of intentional violation of *known* legal duty in prosecution for making false tax return).)

This Court in both *Garcia* and in *Hagen* acknowledged that there are circumstances in which the principle that "ignorance of the law is no excuse" is inapplicable. In *Garcia*, 25 Cal.4th at p. 754, the Court noted that due process places limits on the exercise of the "no excuse" principle, citing *Hagen*, 19 Cal.4th at p. 660, and *Lambert v. California* (1957) 355 U.S. 225, 228 (conviction for failure to register as felon without proof of knowledge, or probability of knowledge, of registration requirement violated due process). *Hagen* explained that there are a number of statutory contexts requiring a mental state such as that the act be committed knowingly, fraudulently, corruptly, maliciously or willfully, in which there can be no violation of a *penal* statute if this element is lacking through a mistake of *nonpenal* law. (*Hagen*, 19 Cal.4th at p. 660, fn. 4. (taxpayer who had mistaken belief certain deductions were proper under tax laws would not be guilty of willfully making false return).) This is precisely the situation here -- Mr. Stark acted while believing in the exercise of his professional judgment that his acts were authorized or required under *nonpenal* law. He should not be prosecuted under the *penal* law for these acts or omissions.

An interpretation of section 424 which allowed a conviction absent proof of scienter would raise serious due process concerns. (See *People v. Simon, supra*, 9 Cal.4$^{th}$ 493, 520-522.) This Court should make clear that section 424(a),

paragraphs 1, 2, 3, 6 and 7, require proof that Mr. Stark knew that the authority of law prohibited his acts or omissions.

## II.

## GOVERNMENT CODE SECTION 3060 REQUIRES PROOF OF A KNOWING AND PURPOSEFUL REFUSAL TO FOLLOW THE 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.)

Although previously overlooked by the parties and not cited or referred to in the Court of Appeal decision, this Court *has* previously held that a public official could not be removed from office for willful misconduct absent evidence that "he knew what he did to be unlawful or wrong." (*People v. Ward* (1890) 85 Cal. 585, 591.) In *Ward*, a justice of the peace in the township of Vacaville was prosecuted under former Penal Code section 758 (now section 3060)[5] for willful or corrupt misconduct in office. The prosecutor there, while a jury was deliberating, had stated his intention to prosecute a defendant before a justice of the peace in Suisun if the jury could not agree. The jury did not agree, and the prosecutor moved to dismiss. The Vacaville justice of the peace refused to dismiss the case.

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[5] Judicial officers are now subject to impeachment under Government Code section 3020 which was added to the Code at the same time that Penal Code sections 758 et seq. were repealed and replaced with Government Code sections 3060 et seq. Of course, judicial officers may also be removed by order of the Supreme Court (*McComb v. Commission on Judicial Performance* (1977) 19 Cal.3d Spec. Trib. Supp. 1, 8.)

A procedural and jurisdictional struggle then followed as the prosecutor attempted to prosecute the case in Suisun. Ultimately, the Vacaville justice of the peace was convicted of willful misconduct for failing to dismiss the charge and was removed from office. This Court reversed:

> . . . [The accusation] is drawn under section 758, Penal Code, which provides for an accusation by the grand jury against any "district, county, township, or municipal officer," for willful or corrupt misconduct in office. Assuming that it will lie against a judicial officer, still, when, as in the case at bar, it is against such an officer, it must contain averments showing judicial misconduct.
>
> To remove a judicial officer for misconduct in office is a grave proceeding; and to do so without proper averments and proofs is to strike a blow at the independence of that important department of the government. The act charged must have been done in the discharge of judicial functions, and must be charged to have been done with corrupt, partial, malicious, or other improper motives, *and with knowledge that it was wrong.*

(*Ward, supra*, at pp. 786-787; emphasis added.) The Court found that the superior court should have sustained a demurrer to the accusation for failure to allege that the justice of the peace acted from corrupt, malicious, or partial motives, or that he knew his acts to be unlawful. (*Id.*, at 787.)

Fifteen years later, the Court's decision in *People v. Coffey* (1905) 147 Cal. 525, also construing then Penal Code section 758, described the required scienter in ambiguous terms. 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, the 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.) *Coffey* does not discuss or refer to the Court's earlier decision in *Ward*, and in *Coffey* there was no question that the chief of police knew and understood what the law required.

More recently, the scienter necessary to support an accusation was addressed by the Court of Appeal in *Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771. There, 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.*) Although echoing this Court's earlier concerns in *Ward, Steiner* does not discuss nor refer to the *Ward* decision.

Although the Court of Appeal in *Steiner* was faced with an accusation premised upon allegations of negligence in failing to supervise, the court's rationale is equally applicable to a mistaken belief as to the requirements of law.

Government Code section 3060 requires *willful* or corrupt misconduct. A public official cannot be said to have acted willfully where their conduct is premised upon a mistaken but good faith belief that the law requires the charged act or omission. (See, e.g., *People v. Hagen, supra*, 19 Cal.4th at 661, fn 4 (noncompliance with tax law is not willful if taxpayer, in good faith, misunderstands or is ignorant of non-penal provision of law).)

Complex budget and public finance law has led to legal disputes and controversies between public officials throughout the history of this state. (See authorities cited, *supra*, at p. 9.) The legislative scheme which encourages the independence of the office of a county auditor-controller and requires a challenge to a board order or public expenditure believed to be unlawful would be patently ineffective if that same public official may thereafter be removed from office anytime a court determines he was mistaken. Such controversies are best resolved by a civil action, not an accusation. This Court should confirm that its decision in *Ward* remains good law.

## III.

## A DEFENDANT MAY MOVE TO SET ASIDE AN INDICTMENT OR OBJECT TO AN ACCUSATION ON THE GROUND THAT THE GRAND JURY WAS MISINSTRUCTED ON THE REQUIRED MENTAL STATE

### A. Penal Code Section 995(a)(1)(B) Authorizes a Challenge to an Indictment for Instructional Error Concerning the Required Mental State.

In *Cummiskey v. Superior Court* (1992) 3 Cal.4$^{th}$ 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 that 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)."

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 here. 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.) The Court of Appeal upheld the trial court's ruling granting a motion to set aside the indictment, finding that:

> . . . the district attorney's failure to instruct the grand jury on the mental state necessary for a criminal conflict of interest . . . requires the indictment against Gnass be set aside. Given the nature of the error, along with the other factors we have discussed, it is possible, if not likely, the grand jury indicted Gnass on something less than reasonable or probable cause.

(*Gnass, supra,* at 1315.)

The Court of Appeal decision in *Gnass* correctly applied *Cummiskey.* 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.

A citizen is entitled to have a grand jury stand between him and the prosecutor and to the grand jurors' independent evaluation of whether probable cause exists. The availability of post-indictment review by a judge cannot serve as a substitute for a citizen'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, 591; *State v. Ulibarri* (N.M.Ct.App. 1999) 994 P.2d 1164, 1168-1169 (grand jury is independent body - - advising grand jury of the elements of crimes prior to its deliberations goes to the heart of the grand jury's function and responsibility); *Commonwealth v. Kelcourse* (Mass. 1989) 535 N.E. 2d 1272, 1273 (Prosecutor in presenting law must scrupulously refrain from words or conduct that will invade province of grand jury); *Crimmins v. Superior Court* (Ariz. 1983) 668 P.2d 882, 884, 886 (Arizona courts recognize historical independence of grand jury and duty of fair play on those who attend and serve meant to ensure determinations by grand jury are informed, objective and just - - inaccurate facts and inadequate instructions on law required that indictment be set aside); *State v. Inthavong* (Minn. 1987) 402 N.W. 2d 799, 802-803 (Trial court misdirection on probable cause standard is fundamental error compromising integrity of indictment process); *Ajabu v. Indiana* (Ind.Ct.App. 1997) 677 N.E. 2d 1035, 1039 (Instruction that invades province of grand jury to determine whether facts establish probable cause is erroneous).)

Under Penal Code section 939.7 prosecutors have a duty to call to grand jurors' attention exculpatory evidence. (*Johnson v. Superior Court, supra*, 15 Cal.3d 248.) It has become commonplace for persons under investigation to submit exculpatory evidence directly to the grand jury during an investigation. If a defendant may not challenge a grand jury indictment for instructional error concerning the required mens rea of a charged offense, 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 such they will disregard the evidence as legally irrelevant. (See, e.g., *State v. Hogan* (Ind. 2001) 764 A.2d 1012, 1024 (Prosecutor is obliged to instruct grand jury on defenses which might foreclose otherwise unfounded prosecution as corollary to responsibility to present exculpatory evidence ).)

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 confirm that such a claim may be raised pursuant to section 995(a)(1)(B).

### B. A Defendant May Object to an Accusation for Instructional Error Concerning the Required Mental State Pursuant to Government Code Section 3066.

Government Code section 3066 provides:

> If he 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 objection.

In *People v. Hale* (1965) 232 Cal.App. 2d 112, 121, the Court of Appeal held that an objection under section 3066 may include an objection upon the grounds that the accusation was returned without probable cause. The Court reached this conclusion notwithstanding that the statute does not explicitly authorize such a challenge. The statutory right to challenge an indictment for lack of probable cause was not added to Penal Code section 995 until 1949 (Stats. 1949, c. 1311, p. 2298). However, prior to that time, the right to challenge an indictment for lack of probable cause had been authorized on due process grounds, as confirmed by this Court in *Greenberg v. Superior Court* (1942) 19 Cal.2d 319, 321-322. The Court of Appeal in *Hale* found that the constitutional underpinnings for the decision in *Greenberg* with regard to an indictment applied equally to an accusation:

> The same enlightened viewpoint is applicable to an accusation. It 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.

(*Hale, supra*, at pp. 121-122.)

There is no reason in logic or the law to allow a defendant to challenge an indictment for instructional error on the element of mens rea but to foreclose such a challenge to a defendant prosecuted by accusation. Perhaps mindful of the potential for political abuse, the Legislature has not authorized a district attorney

to initiate proceedings to remove a public official from office except upon a grand jury's presentment of an accusation. By its choice to require a grand jury to initiate proceedings to remove a public officer by accusation, the legislature surely envisioned that body functioning independently and in its historic, protective role. "We believe the grand jury's independent authority to investigate official misconduct and find accusations is equivalent to its independent authority to investigate public offenses and indict." (*Bradley v. Lacy* (1997) 53 Cal.App.4th 883, 893.)

Government Code section 3070 provides that the trial of an accusation shall be by jury and shall be conducted in the same manner as the trial of an indictment. Thus, although a defendant facing an accusation may not be fined or imprisoned like a criminal defendant he is afforded by legislative direction substantially the same procedural protections as a defendant facing a criminal indictment.

This Court's decision in *Cummiskey, supra*, applies with equal if not greater force to an accusation. Mr. Stark's claim that the accusation should be set aside for instructional error on the required mental state to support an accusation is tantamount to a claim that, as instructed, the grand jury may have returned the accusation on less than reasonable or probable cause and is subject to judicial review.

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### C. The Grand Jurors were Misinstructed on the Required Mental State to Prove a Violation of Penal Code Section 424.

Grand jurors were instructed as follows:

> In the crimes charged in the accusation and indictment, there must exist a union or 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 conduct is unlawful.
>
> The word "knowingly" means with knowledge of the existence of the facts in question.
>
> Knowledge of the unlawfulness of an act or omission is not required.
>
> The word "willfully" when applied to the intent with which an act is done or omitted, means with a purpose or willingness to commit the act or make the omission in question.
>
> The word "willfully" does not require any intent to violate the law or to injure another or to acquire any advantage.

(Tab M, pp. 1076-1077.)[6] The prosecutors then read section 424 verbatim. (Id., at pp. 1077-1078.)

The prosecutors took full advantage of this statement of the law in their argument to the grand jurors as to whether an indictment or accusation should be returned:

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[6] 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.

> 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 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.

(Tab M, p. 1090.)

For the reasons set out above, section 424 requires proof that a person knowingly and purposefully handled funds contrary to law. Thus, the prosecution misdirected grand jurors on the standard which is applicable to prove a violation of section 424.

### D. Grand Jurors Were Misinstructed on the Required Mental State to Return An Accusation Under Government Code Section 3060.

Although prosecutors first correctly stated the law as it applied to Government Code section 3060, grand jurors were later misdirected by statements which vitiated the correct instruction. Prosecutors initially directed the grand jurors upon this issue as follows:

> Misconduct in office includes any knowing and willful malfeasance, misfeasance, or nonfeasance.
>
> Malfeasance is the knowing and willful doing of an act that is unlawful.
>
> Misfeasance is the knowing and willful failure to perform a duty in the manner the law requires.
>
> Nonfeasance is the knowing and willful failure to act when the law requires an act.

> Mere negligence or mistake in judgment in the performance or nonperformance of a public officer's duty does not constitute willful misconduct in office.
>
> It must be proved that the public officer knew the act he or she was performing or failing to perform was required or prohibited by law, and, having said knowledge, willfully failed to act, in whole or in part, in conformity with such law.

(Tab M, p. 1067.)

A short time later, however, prosecutors stated:

> Misconduct in office involves any willful misfeasance, malfeasance or nonfeasance, and "willfully" means done purposefully. *It doesn't mean that you have intended to break the law.* You just have to commit the act that the law says is either a violation of statute or a criminal act also.
>
> Malfeasance is the commission of an illegal act that should not be done at all. It includes acts as would amount to "a breach of good faith that you expect public officials to keep." Performing an act in violation of a statute would be a good example. And, again, it does not have to be a violation of criminal law to return an accusation for malfeasance.

(Tab M, p. 1081, emphasis added.)

In a Power Point presentation to grand jurors which accompanied the argument by the prosecutors, the grand jurors were correctly told that "mere negligence or mistake in judgment" is not misconduct (Tab J, p. 315), and although the prosecutor likewise noted that nonfeasance required "knowing and willful failure to act when the law requires an act" (*Id.*, at p. 314), other Power Point slides suggested the exact opposite and are contrary to the law as set forth in *Ward, supra,* and *Steiner*, *supra*. Grand jurors were told:

> Misconduct in office "does not require an intent to violate the law."
>
> Malfeasance includes ". . . such acts that amount to a breach of good faith and right actions that are impliedly required of all public officers."
>
> Nonfeasance includes "neglect of the duties of office" and "failure to act where the duty to act is premised on something the official "should have known."

(Tab J, pp. 311, 312, 314.)

Grand jurors could only have been hopelessly confused. Within a single Power Point slide grand jurors were directed that they could return an accusation for failure to act premised upon something Mr. Stark "should have known," language which clearly is consistent with no more than ordinary negligence, and also advised that "something more than oversight or neglect is required to constitute willful conduct." (*Id.*, p. 314.)

This misdirection on the law was prejudicial to Mr. Stark in that grand jurors may have returned the accusation on less than probable cause - - they were misled into believing that the extensive evidence in the record which confirmed that Mr. Stark had acted as he believed the law required was irrelevant to their decision.

### E. The Misinstruction was Prejudicial and Requires that the Remaining Counts in the Indictment and Accusation be Set Aside.

The misdirection of grand jurors on the mens rea required to support a violation of section 424 or an accusation under section 3060 was prejudicial and

requires that the remaining counts in the indictment and accusation be set aside.[7] The Court need not determine in this proceeding whether instructional error upon the mental elements required to prove a violation of a criminal statute or to support an accusation is presumed to be prejudicial prior to trial, or instead requires proof of actual prejudice. (Compare, e.g., *Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1325 (failure to transcribe prosecutor's remarks to grand jury in capital case where all proceedings must be transcribed entitles defendant to pretrial relief without any showing of prejudice), with *People v. Towler* (1982) 31 Cal.3d 105, 123 (challenge to irregularities in grand jury proceedings after conviction and on appeal requires showing of actual prejudice); *People v. Jablonski* (2006) 37 Cal.4th 774, 800 (same).) On the record in this case, the instructional errors on mens rea were clearly prejudicial.

The grand jury had before it extensive evidence and testimony which established that Mr. Stark had acted or refused to act in virtually every instance as he believed the law required. The grand jury proceedings spanned eight days and the exhibits and *Johnson* material consists of thousands of pages. The remaining allegations in the indictment and accusation involve seven separate legal and

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[7] The trial court dismissed count 1 of the indictment and counts 2 and 13 of the accusation for insufficient evidence (Opinion, p. 5.) The Court of Appeal ordered the dismissal of counts 2 and 4 through 8 of the indictment (Opinion, p. 103.) These counts were dismissed for insufficient evidence and not upon account of any legal issue presented for resolution in this Court. Accordingly, the analysis of prejudice is confined to those counts which remain in the indictment and accusation, namely counts 3 and 9 through 13 of the indictment, and counts 1, 3 through 12, and 14 and 15 of the accusation.

accounting disputes. Because the Court of Appeal summarized the facts in the light most favorable to the People (Opinion at p. 3, fn 1), an analysis of the prejudice caused to Mr. Stark by the misdirection of grand jurors requires resort to other evidence relied upon by Mr. Stark in the Court of Appeal but omitted from its opinion. In addition to the summary analysis which follows, Mr. Stark invites the Court to review the more complete summary of the evidence set forth in his petition for rehearing filed in the Court of Appeal on June 26, 2006.

***1. Late Publication of Sutter County Final Budget [Accusation, Count 1; Summarized in Petition for Rehearing, pp. 12-15].***

The accusation alleges that Mr. Stark failed to publish the Sutter County final budget for fiscal year 2003-2004 by the deadline of December 1, 2003. The evidence in the record before the grand jury established that Mr. Stark believed he was unable to timely publish the budget because he was required to first balance the budget in compliance with statute. Mr. Stark's *Johnson* material confirmed:

- The County departments were still making revisions to fund balances *after* the December 1, 2003 deadline to publish the final budget. (See, e.g., Tab N, p. 2208.)

- As of December 5, 2003, numerous funds remained out of balance and the Auditor-Controller was still working with the CAO's office to balance funds. (Tab N, p. 2211.)

- The budget was delayed by a continuing professional disagreement concerning whether the Robbins Water

District fund was required to be balanced. Mr. Stark was trying to resolve with the CAO's office and the public works department a $336,485.00 deficit in fund 4400. (Tab N, pp. 2214-2215.)

- From September 30, 2003, until the time the budget was published, a dialogue continued between the auditor's office and the CAO's office concerning this imbalance in the budget. (Tab N, p. 2641.)

As instructed, grand jurors were told that Mr. Stark was properly subject to an accusation if he failed to publish the budget on time. Grand jurors would not have understood that Mr. Stark's continuing efforts to comply with the statutory requirement that he publish a balanced budget could be considered by them in assessing whether he willfully published the budget after the statutory deadline. Count 1 of the accusation should therefore be set aside.

2. ***Robbins Water District [Indictment, Count 3; Accusation, Count 3; Summarized in Petition for Rehearing, pp. 19 – 24.]***

Count 3 in both the Indictment and Accusation alleges that Mr. Stark unlawfully transferred $336,485.00 from the Sutter County General Fund to Water Works District No. 1 without approval by the Board. Extensive evidence in the record explained Mr. Stark's rationale and claimed legal 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.)

- Included with Mr. Stark's *Johnson* material 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.)

Mr. Stark was entitled to have grand jurors assess probable cause in the light of his explanations that he acted in accordance with what he believed the law required. The patent misinstruction of grand jurors would have caused them to reject this evidence as irrelevant as they were told Mr. Stark need not know the requirements of law. Count 3 of the indictment and accusation should be set aside.

***3. Allegations that Auditor-Controller Amended the Final Budget and Created Unauthorized Reserves [Accusation, Counts 4 and 5; Summarized in Petition for Rehearing, pp. 24 – 27.]***

Counts 4 and 5 of the accusation allege that Mr. Stark amended the Sutter County final budget for fiscal year 2004-2005 without approval of the Board, and that he created unauthorized reserve accounts in the Sutter County budget for fiscal year 2004-2005, respectively.

Grand jury exhibit 25 is a memorandum dated March 4, 2005, wherein Mr. Stark explains in detail the reasons why generally accepted accounting principles and Government Code provisions required him to publish the budget precisely as he did. (Tab N, pp. 1253 et seq.) Each of the specific funds at issue are addressed by Mr. Stark in detail with supporting exhibits. (*Id.*, pp. 1255 et seq.)

Again, Mr. Stark was entitled to have grand jurors assess his explanation. As instructed, grand jurors could only have understood Mr. Stark's explanations of why he was required to proceed in the way that he did to be irrelevant. Counts 4 and 5 of the accusation should be set aside.

***4. Allegations Surrounding Information Technology Department Journal Entries and Payment of Claims and Wages [Indictment, Counts 9 and 10; Accusation, Counts 6 through 9; Summarized in Petition for Rehearing, pp. 27 – 36.]***

Count 9 of the indictment alleges that Mr. Stark refused to post journal entries reflecting payments due and income earned by the Sutter County Department of Information Technology (IT) Services between March 1, 2005, and May 4, 2005. Count 10 alleges that Mr. Stark attempted to violate Penal Code section 424(a)(7) by unlawfully attempting to withhold payment of wages to employees of IT Services between March 8, 2005 and March 11, 2005. Count 6 of the accusation alleges that Mr. Stark refused to post the same journal entries which form the basis of Count 9 of the indictment. Count 7 of the accusation alleges that Mr. Stark attempted to withhold payment of wages to IT department employees, allegedly in attempted violation of Labor Code section 222. Count 8 sets forth the

same factual allegation alleged to have been in attempted violation of Penal Code section 424(a)(7). Count 9 of the accusation alleges that Mr. Stark misused his official position to remove employees of IT Services from receipt of wages by direct deposit between March 8, 2005, and March 11, 2005.

Again, extensive evidence in the record confirmed that Mr. Stark had repeatedly and publicly explained why he felt compelled by law to act or refuse to act with regard to each of the foregoing allegations.

- Mr. Stark refused to post the IT department's proposed journal entries because the IT department and the CAO's office failed to provide him with adequate documentation to assess whether or not the proposed charges were cost-based and calculated in accordance with generally accepted accounting principles. (Tab N, pp. 1183-1184; 2268.) As the chief accounting officer for the County of Sutter, Mr. Stark is required to certify the County's cost plan, including that all costs are allowable in accordance with the requirements of OMB Circular A-87. (Tab N, pp. 2234, 2237.)

- Mr. Stark provided grand jurors with copies of publications from the State Controller setting forth applicable rules for internal service funds such as the IT department, including that such departments must charge on a "cost-reimbursement" basis. (Tab N, pp. 2225, 2228, 2229, 2231-2234.)

- Because Mr. Stark refused to transfer the funds from other county departments without evidence that they were in fact cost-based, the IT internal service fund was in a deficit. This impacted the ability of Mr. Stark to pay IT vendor invoices and wages to employees. (Tab M, pp. 536-537 and 669-670.)

- Mr. Stark relied upon advice of legal counsel in directing payroll accountant Sylvia Oakley to stop direct deposit for employees of the IT department. He directed Ms. Oakley to instead create payroll checks with the expectation that by payday "we will have money that we can pay them." (Tab M, pp. 669-670.)

- In order to timely pay IT department employees, Mr. Stark requested that the Board authorize a general fund loan to the IT department. The Board refused. Mr. Stark then delivered warrants for registration to the treasurer. The treasurer refused to register the warrants. (Tab N, pp. 1251-1252.) The deficit cash policy which Mr. Stark relied upon in following this course of action was included in the evidence. (Tab N, pp. 2038-2040.)

- When Mr. Stark was unable to obtain a general fund loan from the Board to the IT department and in light of the treasurer's refusal to register the warrants, Mr. Stark paid employees and vendor invoices for the IT department and restored employees to direct deposit. (Tab M, pp. 783, 796.)

Mr. Stark was entitled to have grand jurors assess whether probable cause existed to indict him and to support an accusation after consideration of the legal authority upon which he relied in taking all of the foregoing actions and in refusing to journal the IT transfers of funds. Instead, grand jurors were told that Mr. Stark's belief as to the requirements of law was irrelevant. The prejudicial misdirection of grand jurors on the required mental intent requires that counts 9 and 10 of the indictment and counts 6 through 9 of the accusation be set aside.

***5. Failure to Maintain Financial Books and Records of Sutter County [Indictment, Count 11; Accusation, Count 10; Summarized in Petition for Rehearing, pp. 36-39.]***

Count 11 of the indictment alleges that Mr. Stark kept false accounts in the financial books and records for the County of Sutter for fiscal year 2003-2004. Count 10 of the accusation alleges that Mr. Stark failed to maintain financial books and records for the County of Sutter for the same fiscal year.

The Court of Appeal found sufficient evidence supported the indictment and accusation based upon a theory that Mr. Stark failed to make adjusting journal entries recommended by the outside auditor after an audit of the County's books for the 2002-2003 fiscal year. (Opinion, pp. 78, 92.)

There are no *Johnson* materials submitted relevant to these counts as counsel was not made aware of any specifics concerning these allegations. Still, the evidence is insufficient to support the challenged counts. Referring to the adjusting entries for the prior fiscal year's audit, the County's outside auditor testified that the auditor-controller's office posted ". . . some, but not all of them."

(Tab M, p. 854.) The outside auditor further testified that certain proposed adjusting journal entries are not material and that she would not require that they be posted if the auditor declined, based upon, for example, an adjustment of less than $1,000.00. (Tab M, pp. 863-865.) With regard to the proposed journal entries for the fiscal year the outside auditor was reviewing at the time of her testimony, her firm issued *draft* financial statements and management comments and proposed audit adjusting journal entries. (Tab M, p. 854.) She testified that she had recently spoken with Mr. Stark and that they had a meeting set up for the Monday following her testimony and that ". . . I'm assuming at that point he would agree to record the journal entries as we have reviewed them." (Tab M, p. 869.)

As instructed, grand jurors might have found probable cause simply based upon the failure to make the adjusting journal entries. However, no evidence whatsoever was presented concerning why the adjusting journal entries had not been made - - whether, for example, some of the entries which had not been made were immaterial, or whether Mr. Stark had delegated the preparation of the adjusting entries to someone within his office. In short, there was no evidence presented that Mr. Stark was aware that the adjusting journal entries had not been made, that he was aware that they were material, and that he willfully refused to make the adjustments or delegate the task to someone within his office.

Mr. Stark was entitled to have grand jurors assess whether there was probable cause based upon a grand jury correctly instructed upon the mental state

required to support an indictment and accusation. Had the grand jury been so instructed, they might well have found that there was no evidence that Mr. Stark purposefully refused or failed to make or delegate the making of the proposed adjusting journal entries.

### *6. Allegedly Unlawful Refusal to Pay Fire Fighter Wages and Unlawful Withholding of Wages [Indictment, Count 12; Accusation, Counts 11 and 12; Summarized in Petition for Rehearing, pp. 36 - 39.]*

Count 12 of the indictment alleges that Mr. Stark refused to pay wages and unlawfully withheld wages earned by employees of the Sutter County Fire Safety Unit between January 10, 2003 and January 31, 2003. Count 11 of the accusation alleges that Mr. Stark during the same time period unlawfully withheld wages earned by employees of the Sutter County Fire Safety Unit. Count 12 of the accusation alleges that Mr. Stark during the same time period unlawfully refused to pay wages earned by employees of the Sutter County Fire Safety Unit.

The allegations concerning the above-described counts all centered upon a professional disagreement regarding the proper calculation and payment of overtime pay for fire fighters. The evidence before the grand jury established that:

- Mr. Stark sent a memorandum to Personnel Director Joann Dobelbower dated December 23, 2002, which was received at the Personnel Department on December 27, 2002. Ms. Dobelbower reportedly responded to the memorandum on December 30, 2002. Thereafter, a meeting was held to discuss the disagreement on January 13, 2002. The meeting was

attended by Community Services Director Richard Hall, Ms. Dobelbower, Mr. Stark, Assistant CAO Curt Coad, Assistant Auditor-Controller Ronda Putman, and Auditor-Controller Payroll Accountant Sylvia Oakley. They endeavored to resolve the issue of overtime pay as raised by Mr. Stark. (Tab M, pp. 1005-1010.)

- Mr. Stark paid fire fighters during January, 2003, in accordance with his interpretation of the memorandum of understanding (MOU) between Sutter County and the fire fighters. Grand Jury Exhibit 68 consists of a detailed e-mail memorandum dated January 27, 2003, which sets out Mr. Stark's interpretation of the MOU, with citations from two relevant MOUs in reference to past practice. Mr. Stark also invited fire safety unit employees to provide any additional information which would shed light on the issue. (Tab N, p. 2355.)

- Additional meetings were held in late January in an attempt to resolve the disagreement, including a meeting attended by County Counsel Darryl Larson. (Tab M, pp. 1013 and 1017.) After a meeting on January 31, 2003, Mr. Stark agreed to pay fire fighters overtime pay in accordance with the fire fighter's interpretation of the MOU. (Tab M, pp. 1017-1018.)

- Mr. Stark explained in a detailed writing why he agreed to pay fire fighters notwithstanding that his interpretation of the MOU was contrary to their position. A copy of his explanation was included

before grand jurors in Mr. Stark's *Johnson* material.
(Tab N, p. 2624.)

Mr. Stark was entitled to have grand jurors assess, with correct instructions upon the law, whether he knew the law required him to act otherwise when he had refused to pay fire fighters. As instructed, grand jurors could find probable cause to support the indictment and accusation if Mr. Stark, in their opinion, had simply misinterpreted the MOU. As instructed, grand jurors would have believed that Mr. Stark's explanations of authority and why he temporarily changed his practice of paying fire fighters over time pay was irrelevant. Count 12 of the indictment and Counts 11 and 12 of the accusation should therefore be set aside for prejudicial instructional error.

### 7. *Alleged Unlawful Withholding of Wages of Retiring Employees [Indictment, Count 13; Accusation, Counts 14 and 15; Summarized in Petition for Rehearing, pp. 41-42.]*

Count 13 of the indictment alleges that Mr. Stark refused to pay wages due to retiring employees of the County of Sutter in an aggregate amount of $1,969.51 on or between the 30th day of December, 2004, and the 14th day of January, 2005. Count 14 of the accusation alleges that on the same dates Mr. Stark unlawfully withheld the wages earned by retiring employees in violation of Sutter County Rules and the California Labor Code. Count 15 sets forth the same factual allegations as a violation of Penal Code section 424(a)(7).

Personnel Director Joann Dobelbower testified that several employees retired effective December 30, 2004. Ms. Dobelbower asserted, without citation to

any County Rule or other writing, that "the rules provide that someone that leaves our employment pursuant to retirement on the day preceding a holiday, they will be paid for that holiday." (Tab M, p. 1043.) She said that some employees were not paid in accordance with this rule and that the total pay not received for those employees was $1,959.51. (Tab M, pp. 1045-1047.)

Dobelbower testified that the issue arose when someone in the probation department called her assistant asking whether a retiring employee would be paid for a holiday. The assistant called the Auditor-Controller's office to discuss the matter. Ms. Dobelbower learned that there was a disagreement between the person processing payroll in the Auditor's office and Dobelbower's assistant. Dobelbower then called Mr. Stark who felt, although Ms. Dobelbower did not share with the grand jury the basis for his opinion, that County employees should not be paid if they retired prior to a holiday. Ms. Dobelbower asserted that it was "my opinion that they should." (Tab M, p. 1047.)

Ms. Dobelbower indicated she wrote a letter to the County Counsel referring to an unspecified rule and asking a series of questions regarding the rule and the circumstances about which she disagreed with Mr. Stark. (Tab M, p. 1047.) She further testified, without foundation, that County Counsel sent a copy of an opinion to Mr. Stark. (Tab M, pp. 1047-1048.) Although the opinion was not produced, and County Counsel was not called as a witness on this issue, Ms. Dobelbower claimed that the opinion stated that Mr. Stark was required to pay employees for a holiday after the effective date of their retirement. (Tab M, pp.

1047-1048.) Her description of the opinion of County Counsel was inadmissible hearsay, as was her assertion that Mr. Stark received a copy of the opinion. (Pen.Code, § 939.6(b).) This evidence should not be considered in assessing whether the misinstruction of grand jurors was prejudicial upon the challenged counts. (*Id.*)

The admissible evidence before grand jurors was that Ms. Dobelbower believed the employees should have been paid and that Mr. Stark was of the opinion they should not. As instructed, grand jurors would have believed that Mr. Stark's belief the employees should not be paid was irrelevant. Mr. Stark was entitled to have grand jurors assess whether probable cause existed by giving due consideration to his opinion as the elected Auditor-Controller. Count 13 of the indictment and Counts 14 and 15 of the accusation must be set aside.

## IV.

## PENAL CODE SECTION 1424 IS INAPPLICABLE TO A MOTION 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

### A. Penal Code Section 1424 Has No Application to a Motion to Set Aside an Indictment Under Section 995.

*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* (1996) 14 Cal.4th 580, 592 (to require disqualification under section 1424, a 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 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 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.4$^{th}$ 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, pp. 45-46.)

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, but 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).)

Given the district attorney's critical and prominent discretionary function prior to the filing of an indictment, the standard set forth in *Greer* should remain 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.

### B. The Court Should Extend its Holding in *Greer* To Grand Jury Proceedings Which Lead to An Accusation.

Mr. Stark has located no reported decision which purports to address whether a defendant may challenge an accusation under Government Code section 3066 based upon a prosecutor's conflict of interest.

The decision in *Greer* is grounded in due process. (*Greer*, *supra*, 19 Cal.3d at 266.) It is axiomatic that a defendant is entitled to due process of law in a grand jury investigation which results in an accusation. (See, e.g., *Hale, supra,* 232 Cal.App.2d 112, 120-121 (Defendant may move to set aside accusation for lack of sufficient evidence); *People v. Superior Court (Hanson)* (1980) 110 Cal.App.3d 396 (Court recognized right to due process in proceedings initiated by accusation but found no right to post-accusation preliminary hearing after balancing interests of public official with state's interests).) The logic and rationale of this Court's

decision in *Greer* applies with equal force to grand jury proceedings which result in an accusation.

### C. The Trial Court Erred in Finding No Appearance of a Conflict of Interest.

Prior to moving to set aside the indictment and accusation, Mr. Stark filed a motion to recuse the Sutter County District Attorney's Office (Tab O, pp. 2793 et seq.) The motion was brought pursuant to section 1424 and Mr. Stark argued that the evidence demonstrated that (1) as Auditor-Controller Mr. Stark would continue to make decisions which affect the daily operation of the District Attorney's Office; (2) the Sutter County District Attorney's Office is directly financially impacted by the alleged misconduct of Mr. Stark; and (3) Sutter County District Attorney Carl Adams was personally involved in events which relate to the grand jury investigation. (*Id.*, at p. 2795.) Mr. Stark relied primarily upon the Court of Appeal decision in *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277 (entire Orange County District Attorney's Office recused from prosecuting Auditor-Controller due to conflict of interest). (*Id.*, at pp. 2795-2796.)

Extensive evidence was presented by the parties by way of exhibits and declarations. This evidence included:

- Only months before the grand jury investigation, District Attorney Carl Adams led department heads in opposition to a Board request by Mr. Stark for prior review by the Auditor-Controller of all matters before the Board which resulted in an impact on his office. (Tab O, pp. 2797, 2819.) Adams sent an e-mail to the

Board opposing Mr. Stark's request on behalf of most department heads (*Id.*, pp. 2849-2850.) On November 2, 2004, Mr. Adams spoke before the Board in opposition to Mr. Stark's proposal. Mr. Adams was critical of Mr. Stark. He accused Mr. Stark of sending out a press release upon the issue but not consulting other department heads. He also claimed Mr. Stark "has not been collegial with other department heads making it easy for us to work with him." (*Id.*, at pp. 2856 et seq.)

- During the grand jury proceedings, Mr. Adams appeared in Mr. Stark's office with his chief investigator. He provided Mr. Stark and Assistant Auditor-Controller Ronda Putman with photocopies of several different Labor and Penal Code provisions pertaining to non-payment of wages and other claims. Mr. Adams informed Mr. Stark the code provisions pertained to the refusal to pay county claims. (*Id.*, pp. 2798-2799, 2821-2822, 2841-2848.) On the following day, his investigator was called to testify before grand jurors concerning the contact Adams had with Mr. Stark. (Tab M, pp. 638-641.) The reasonable inference arising from this conduct is that Mr. Adams wanted to influence Mr. Stark's official conduct on a pending controversy by threat of criminal charges.

- Mr. Stark's office continued to provide accounting and other services for Mr. Adams's office. The cost-based

reimbursement by the district attorney's office to the Auditor-Controller's Office was approximately $14,000.00 in fiscal year 2003-2004. (Tab O, p. 2818.)

- Mr. Stark was called upon to audit and pay professional fees and witness travel claims pertaining to his prosecution. He referred one of those claims to the Board when a dispute arose about whether it was proper. (Tab CC, pp. 3072-3073.)

- Mr. Stark's refusal to post IT journal entries could adversely impact reimbursable programs and grants affecting the budget of district attorney's office. (Tab O, p. 2821.) The prosecution attempted to minimize this impact by a declaration from CAO Larry Combs asserting that it was speculative that district attorney funds would be lost and that the impact would be minimal or offset by other funding sources. (Tab S, pp. 3030 et seq.) However, a petition for extraordinary relief asserted without equivocation that failure to post the journal entries "would result in the loss of federal and state monies of more than $600,000." (Tab O, p. 2895.) Mr. Stark's declaration explained that most of the revenue for Mr. Adam's $244,000.00 budget for investigation and prosecution of welfare fraud was from federal and state sources which were jeopardized by the IT dispute. (Tab CC, p. 3071.)

The trial court denied the recusal motion, stating in part, however: "I do acknowledge and recognize that some may perceive an apparent conflict . . ." (Tab EE, p. 3136.)

In his points and authorities in support of the motion to set aside the indictment and accusation, Mr. Stark argued that section 1424 was inapplicable and that the standard was as set forth in *Greer*. Mr. Stark incorporated the prior evidence and pleadings from the motion to recuse. (Tab J, p. 216.)[8]

In ruling on the motion to set aside the indictment and accusation, the court inexplicably contradicted its earlier statement acknowledging that some might see an apparent conflict. The court ruled 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.)

Based upon the evidence in the record, and applying the standard set forth in *Greer*, this Court should find that the participation of Mr. Adams in the grand jury proceedings created the potential for bias or the appearance of a conflict of interest. (*Greer, supra*, 19 Cal.3d at 263, fn 5.) The indictment and accusation should therefore be set aside.

---

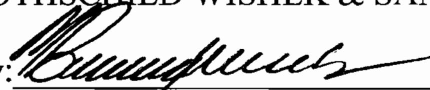
[8] Mr. Stark did not take advantage of the prosecutor's conflict by waiting to see if the grand jury returned an indictment or accusation. Counsel for Mr. Stark directed correspondence to Mr. Adams during the proceedings setting out the basis for the conflict and requesting that Mr. Adams refer the matter to the Attorney's General's Office. (Tab O, p. 2865.) When Mr. Adams declined, Mr. Stark filed a motion during the grand jury proceedings to recuse Mr. Adams's office. (Tab O, pp. 2870 et seq.). Sutter County Presiding Judge Robert Damron declined to reach the merits, ruling instead that Mr. Stark had no standing to bring the motion because there was no case before the Court. (Tab O, p. 2799.)

## CONCLUSION

For all of the foregoing reasons, Mr. Stark respectfully requests that this Court direct the Court of Appeal to issue a peremptory writ of mandate or prohibition directing the Sutter County Superior Court to set aside the remaining counts in the indictment and accusation.

Dated: November 13, 2006

ROTHSCHILD WISHEK & SANDS LLP



By: ____________________

M. Bradley Wishek

**CERTIFICATION OF WORD COUNT**

I am counsel for Robert E. Stark. I hereby certify that the foregoing petition, exclusive of tables and this certificate under Rule 28.1(d)(1), is 12,490 words. In making this certification, I am relying upon the word count of the computer program used to prepare the document.

DATED: November 13, 2006

By
M. BRADLEY WISHEK

## 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:

**PETITIONER'S OPENING BRIEF ON MERITS**

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
446 Second Street
Yuba City, CA 95991
Attorneys for Real Party in Interest

Clerk of the Court
Sutter County Superior Court
446 2nd Street
Yuba City, CA 95991

Clyde M. Blackmon
Blackmon & Associates
813 Sixth Street, Suite 450
Sacramento, CA 95814
Attorneys for Ronda Putman

The Law Office of
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 13th day of November, 2006 at Sacramento, California.

___________________________________
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:

**PETITIONER'S OPENING BRIEF ON MERITS**

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:

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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

Office of the Attorney General
Cliff Zall, Deputy Attorney General
1300 I Street, Suite 124
P.O. Box 944255
Sacramento, CA 94244-2550
Attorneys for Real Party in Interest

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

Executed this 13th day of November, 2006 at Sacramento, California.

______________________________

David E. Droege