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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT E. STARK,
Petitioner,
v.
SUPERIOR COURT OF SUTTER COUNTY,
Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

RONDA G. PUTNAM,
Petitioner,
v.
SUPERIOR COURT OF SUTTER COUNTY,
Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

Case No. S145337

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

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

ANSWER BRIEF ON THE MERITS

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ROBERT E. STARK, Petitioner, v. **SUPERIOR COURT OF SUTTER COUNTY,** Respondent, **THE PEOPLE OF THE STATE OF CALIFORNIA,** Real Party in Interest	S145337
RONDA G. PUTNAM, Petitioner, v. **SUPERIOR COURT OF SUTTER COUNTY,** Respondent, **THE PEOPLE OF THE STATE OF CALIFORNIA,** Real Party in Interest.	

ISSUES PRESENTED

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]
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?

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1. By order of this 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.

argued that he was unaware of the order. Rather, he has asserted that his refusal to follow the Board's order was premised upon a concern that the rates charged by the IT Department to other county departments were otherwise unauthorized by law because they might result in excess reimbursements to Sutter County from state and federally funded programs. Stark in essence argues that, despite the Board's order, he believed in good faith that the law required him to act as he did; and that, if he was mistaken in his judgment, he cannot be said to have acted with knowledge that his actions were unauthorized.

The validity of Stark's argument depends upon the relevance, under Penal Code section 424 and Government Code section 3060, of any proffered evidence that he did not know his actions were unauthorized. This Court has granted review to resolve this question, and other questions, raised in this proceeding.

STATEMENT OF THE CASE

After an informal investigation culminating in petitioner Stark's personal appearance, the Sutter County Grand Jury in 2005 conducted formal hearings into Stark's conduct as county auditor-controller. The transcript of the testimony before the grand jury exceeds 600 pages. The grand jury received 84 exhibits and also considered defense evidence amounting to over 2,500 pages of documents.

In May 2005, the grand jury returned an indictment and accusation against petitioner Stark.[2] The indictment charged Stark with thirteen felony counts of misuse of public funds and falsification of records—and one count of attempt—under section 424. These counts were based on allegations that Stark made seven unauthorized transfers totaling $380,334 from the Sutter County

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2. The grand jury also returned an accusation against Assistant Auditor. Ronda Putnam. The accusation against her was dismissed by the Court of Appeal. The People do not challenge that dismissal.

this action. The trial court let the remaining counts in the indictment and accusation stand finding that they were supported by sufficient evidence.

Stark filed a petition for writ of mandate or prohibition to review the trial court's order denying his motion to set aside the indictment and accusation. The Court of Appeal summarily denied the petition. Stark then filed a petition for review in this Court. In February 2006, this Court granted the petition and transferred the matter back to the Court of Appeal with directions to issue an order to show cause. Thereafter, the Court of Appeal ordered briefing on the issues raised in the petition.

In the Court of Appeal, Stark again argued that both Penal Code section 424 and Government Code section 3060 require proof that the official knew his conduct violated the law. Because the grand jury was not told of this alleged requirement, he further argued, the indictment and accusation against him could not stand. Finally, with respect to his conflict-of-interest claim, Stark argued that the strict standard for recusal of the prosecutor under Penal Code section 1424 should not apply to a motion under section 995 to dismiss an indictment or accusation.

The Court of Appeal issued an opinion that granted the petition in part and denied it in part. (*Stark* v. *Superior Court* (2006) 44 Cal.Rptr. 575.) The court held that certain Penal Code section 424 subdivisions under which Stark had been indicted required proof that the defendant knew his actions were unauthorized (*id.* at pp. 589, 618-619); but it concluded that there indeed was probable cause to believe that Stark had that requisite knowledge.[3] (*Stark*, 44 Cal.Rptr 575) As to Government Code section 3060, the court held that a "knowing and purposeful violation of the law" was not a required element of

3. The Court of Appeal also dismissed counts 2, 4, 5, 6, 7 and 8 of the indictment on technical grounds not relevant here. The People do not challenge this action.

omissions are factual elements of the offense—albeit facts with a legal dimension—about which the defendant must have some culpable mental state. This is not to say that the defendant must know that section 424 criminalizes his conduct rather that he must have some knowledge that he lacked the authority to act as he did. Just because guilty knowledge of the facts making Stark's conduct criminal (including the fact that he lacked authority to act as he did) is required does not mean that actual knowledge of those facts is the appropriate standard.

Strong public policy reasons militate against any requirement that the People invariably prove the defendant's actual knowledge of the facts making the public official's conduct unlawful under section 424. It would be contrary to the public interest to allow a public official charged with safekeeping public monies to avoid liability under section 424 simply by being willfully ignorant of the facts establishing the unlawfulness of his or her actions. Rather, it is sufficient under section 424 if he had a culpable mental state in the form of either actual knowledge or criminal negligence about his lack of authority to act as he did. (See *People v. Simon* (1995) 9 Cal.4th 493, 522.)

2. Nor does Government Code section 3060 require proof of an official's purposeful refusal to follow the law. When a public official commits a crime connected to his office, it constitutes "willful or corrupt misconduct" under section 3060 irrespective of his or her precise intent. Where the acts or omissions fall short of criminal conduct, but are alleged to be without authority of law, section 3060 requires proof that the defendant intentionally did the act or made the omission with knowledge that the act or omission was beyond his or her authority or was reckless in not knowing that such act or omission was beyond his authority. Mere inadvertence or an honest and reasonable mistake in such a context does not constitute "willful or corrupt misconduct."

ARGUMENT

I.

PENAL CODE SECTION 424 SETS OUT A GENERAL INTENT CRIME AND DOES NOT REQUIRE THE PROSECUTION TO PROVE THE DEFENDANT INTENTIONALLY VIOLATED A KNOWN LEGAL DUTY

Both the accusations and the indictment allege violations of Penal Code section 424, subdivision (a), which may be violated as specified in any of seven separate paragraphs set out in the statute. Five of these paragraphs are the bases for the charges in this case. 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:
>
> 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 decided that the plain language of these provisions, along with recent decisions of this Court, support the view that section 424

Regardless, as this Court has held, classification of an offense as a general intent crime does not answer the question as to whether the relevant statute requires proof of guilty knowledge of the facts making ones conduct criminal, i.e., a culpable mental state with respect to those facts. (*People v. Salas*, *supra,* 37 Cal.4th at p. 975.). General intent crimes ordinarily require guilty knowledge of the facts making one's conduct criminal. (*People v. Simon*, *supra*, 9 Cal.4th at p. 519.) But criminal liability may be imposed despite a lack of guilty knowledge "where the purpose is to protect public health and safety and the penalties are relatively light." (*Simon*, *supra*, 9 Cal.4th at p. 521.)

Section 424 could conceivably be seen as a public welfare offense, in that it is designed to help safeguard the public monies. "The safekeeping of public monies has, from the first, been safeguarded and hedged in by legislation most strict and severe in its exactitudes. It has continuously been the policy of the law that the custodians of public moneys or funds should hold them inviolate and use or disburse them only in strict compliance with the law." (*People v. Dillon*, *supra*, 199 Cal at p. 12.) Nonetheless, punishment under section 424 is substantial: a violation of section 424 is a felony; and it is punishable by up to four years in the state prison. As this Court made clear in *Salas, supra,* it is only as to those offenses that involve public health or welfare *and* impose relatively light penalties that it may be assumed the Legislature intended to eliminate any requirement of guilty knowledge. (*Salas*, *supra*, 37 Cal.4th at p. 978.) The *Salas* principle suggests that the Legislature intended that a violation of section 424 requires proof of some species of guilty knowledge of the facts that made the official's alleged conduct otherwise unlawful. (*Salas*, *supra*, 37 Cal.4th at p. 978; *In re Jorge M.* (2000) 23 Cal.4th 866, 872; *Simon*, *supra*, 9 Cal.4th at p. 521.)

Moreover, a contrary interpretation could allow the imposition of liability where the defendant acted with no intent other than to faithfully carry out his

(a)(2), (a)(7)) The People clearly are required to prove some species of guilty knowledge on the part of the defendant as to these facts. (See *Salas*, *supra*, 37 Cal.4th at p. 978.) For example, to prove the (a)(6) violation, the prosecution must establish that the defendant "had a purpose or willingness to . . . make the omission." (Pen. Code, § 7.)

The harder question is whether the Legislature intended, by the references to the "law" in each of these subdivisions, to create a "legal fact" or element about which proof of a certain kind of guilty knowledge is also required. (*See People v. Garcia*, *supra*, 25 Cal.4th at p. 752; see also *In re Wagner* (1981) 119 Cal.App.3d 90, 103-104 [holding that to prove crime of unlawful assembly, People must prove that defendant knew that the assembly was unlawful]). This question must be resolved with due consideration for the standard maxim that knowledge of the unlawfulness of one's acts normally is not required to establish criminal liability. (See *People v. Noori* (2006) 136 Cal.App.4th 964, 975-978.) Here, the plain language of the statute and the significant penalties imposed for its violation indicate that the Legislature intended that the statutory references to whether the act of omission was otherwise unauthorized by "law" in section 424 comprise "legal facts" about which proof of guilty knowledge is required in order to impose criminal liability.

Section 424 does not criminalize the appropriation or disbursement of public monies but only disbursement or failure to disburse when the law requires otherwise. The offense is not complete without proof that the law required other than what the defendant did with the public funds. Thus, under the plain language of the statute, proof that the transfer or failure to transfer or disburse was without legal authority is an essential element of the crime. It is a "fact" that brings the act or omission within the proscription of the statute. Accordingly, it is a "fact" as to which the People must prove some degree of guilty knowledge on the part of the defendant. This remains true even though,

parts for the private use and benefit of various persons. (*People v. Dillon*, *supra*, 199 Cal. at pp. 3-4.) *Dillon* claimed that section 424 required proof of fraudulent intent. In rejecting this claim the *Dillon* Court observed, "To render a person guilty of a 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...." (*People v. Dillon*, *supra*, 199 Cal. at p. 7.)

This language in *Dillon* is not inconsistent with the People's position that there is no need under section 424 to prove a specific intent to violate section 424. Section 424 is a general intent crime. However, as explained above , under this Court's recent jurisprudence proof of guilty knowledge of the facts that make section 424 a crime is required. Because of the unusual wording in section 424, one of those facts about which guilty knowledge is required is the lawfulness of one's actions. Again this view is not inconsistent with *Dillon*, which acknowledged that the defendant must intend to commit the proscribed act. One cannot intend to appropriate money without authority to do so unless one has some knowledge of what that authority is. Thus, although not fully explained, the *Dillon* Court's construction of section 424 would require some knowledge of the law's requirements concerning the use of the public funds.

Moreover, the *Dillon* Court did not directly decide the question of whether a defendant must know he was acting without authority of law in order to violate section 424 since it found that there was no question that Dillon had such knowledge. *Dillon* explicitly left open the question of how section 424 would apply if the defendant acted in good faith and merely made a mistake in judgement about his authority. (*Dillon*, *supra*, 199 Cal. at p. 15.)[7]

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7. To the extent that the language in *Dillon* could be seen to support the view that section 424 does not require any knowledge of the fact that one is acting beyond one's authority it is inconsistent with this Court's recent jurisprudence and should be disapproved.

the public welfare is entrusted. They are supposed to be experts on their duties and the requirements of their office. Permitting willful ignorance to protect a public official from liability under section 424 would undermine this principle and encourage malfeasance rather than vigilance.

Stark cites to two recent opinions of this Court, *People v. Garcia, supra* 25 Cal.4th 744 and *People v. Hagen, supra* 19 Cal.4th 652, in support of his argument for an actual knowledge standard. (AOB 11-12.) However neither case supports the use of such a standard in the case of a public official charged with misusing public funds. In *Hagen*, this Court held that willfulness as an element of felony tax evasion required the prosecution to prove that the false statement required by the statute was made in voluntary, intentional violation of a known legal duty. (*Id.* at p. 666.) This Court's holding was based upon a number of factors. First, and most significantly, this Court noted that similar federal law had previously been interpreted by the United States Supreme Court to require proof of knowledge of the law by the defendant. (*Id.* at pp. 659-661, citing *United States v. Bishop* (1973) 412 U.S. 346, 356-361, *United States v. Pomponio* (1976) 429 U.S. 10, 11-12, and *Cheek v. United States* (1991) 498 U.S. 192, 199-202.). Independently, this Court also noted that due to the complexities of the tax law it would be unfair to expect taxpayers, upon whom the filing of a tax return is required by law, to know the intricacies of all of the myriad of regulations. For these reasons this Court determined that the legislature likely did not intend to impose felony criminal liability on a taxpayer who misstated information because of legal ignorance or good faith mistake as to the law's requirements. (*People v. Hagen*, *supra,* 19 Cal.4th at p. 662.)

Hagen did not discuss whether a standard of criminal negligence in not knowing of the tax law's requirements could be sufficient to establish liability presumably because neither party argued for such an interpretation. Thus, *Hagen* is not authority for the proposition that actual knowledge as opposed to

required in *Garcia*. But the public official seeks out his role and rightly is expected to know his duties. Any law that encourages ignorance as opposed to vigilance on the part of public official does not serve the public.

Moreover, a bare claim of ignorance that an actual knowledge standard would encourage would be difficult to disprove. A defendant's direct testimony that he or she was confused as to the requirements of the law will in many instances be sufficient to create reasonable doubt as to their actual knowledge of the unauthorized nature of their use of the public funds. (See *In re Jorge M.*, supra, 23 Cal.4th at pp. 884-885.)

As this Court stated almost 70 years ago, "The safekeeping of public moneys has, from the first, been safeguarded and hedged in by legislation most strict and severe in its exactitudes. It has continuously been the policy of the law that the custodians of public moneys or funds should hold and keep them inviolate and use or disburse them only in strict compliance with the law." (*People v. Dillon*, *supra*, 199 Cal. at p. 12.) Recognition of at least a criminal negligence standard of proof, as opposed simply to an actual knowledge rule, would promote this policy. The criminal-negligence standard, consistent with the Legislature's desire to hold those who handle the public monies to high standards, would properly put the onus on the public official to whom much is entrusted to make a proper effort to determine what the law requires before disbursing or refusing to disburse public funds. To the extent that the official fails to take ordinary actions to determine the appropriateness of his use of the public monies, or seeks to shield himself from the information bearing on the legal authority for his handling of the funds, he would rightly be criminally liable under section 424 if his actions indeed were unauthorized. However, if the official was not criminally negligent in failing to determine whether his actions were authorized, he would not face the prison term prescribed by section 424. A criminal-negligence standard would rule out section 424

II.

"WILLFUL MISCONDUCT" IN GOVERNMENT CODE SECTION 3060 DOES NOT DENOTE ONLY A KNOWING AND PURPOSEFUL REFUSAL TO FOLLOW THE LAW

Government Code section 3060 provides for the removal from office of a public officer of a district, city, or county for "willful or corrupt misconduct in office." (Gov. Code, § 3060.) Petitioner Stark alleges, as he did below, that the grand jury's section 3060 accusation failed for want of sufficient proof of a knowing and purposeful refusal to follow the law. (AOB 13-17.) The Court of Appeal disagreed with Stark, holding that proof of purposeful behavior that amounts to misconduct is all that is required. (*Stark, supra,* 44 Cal.Rptr.3d at p. 619.)

Stark's view is wrong, however; and the Court of Appeals' view is not entirely correct. Here—at least where the official has not committed a crime—actions or omissions taken in an official capacity that were undertaken without authority of law may establish willful misconduct within the meaning of section 3060 where the defendant took such actions knowing that they were unauthorized or was reckless in not determining that such actions were unauthorized.

Here, the grand jury returned a section 3060 accusation of 15 instances of willful misconduct in office. Some of the counts in the accusation are based upon parallel allegations, in the indictment, that Stark had violated Penal Code section 424. There does not appear to be any dispute that, to the extent the allegations in the accusation are based upon a crime committed in petitioner's official capacity, as is alleged in the counts based upon the section 424 charges, they make out a case of "willful or corrupt misconduct in office" within the meaning of section 3060. (*See Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1782; *People v. Hale* (1965) 232 Cal.App.2d 112, 119; see also 2 Witkin

of willful or corrupt misconduct in office. Thus, at issue here the meaning of "willful misconduct," as that term is used in section 3060, when the conduct of which the defendant is accused is connected to his official duties but falls short of an enumerated crime.[12]

In *Steiner v. Superior Court, supra,* 50 Cal.App.4th 1771, the Court of Appeal gave a partial answer to this question. In *Steiner,* two county supervisors were accused by accusation of "willful misconduct" under section 3060 based upon their negligence in failing to realize that the Orange County Treasurer's decisions were plunging the county into bankruptcy. (*Id.* at pp. 1774-1776.) The *Steiner* court thoroughly examined the case law and concluded that "something more than neglect is necessary to constitute willful misconduct" under section 3060 when the defendant is not alleged to have committed a crime. (*Id.* at p. 1781.)

The *Steiner* court noted that, in *Coffey v. Superior Court* (1905) 147 Cal. 525, this Court had engrafted a knowledge element on the mental state required to commit "willful misconduct." In *Coffey,* the local police chief was charged with "willful misconduct" because he was aware of illegal gambling occurring in his jurisdiction yet declined to take any action against the lawbreakers. (*Id.* at p. 527.) This Court held that the case should go forward because "[t]his failure and refusal to [take action], 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 [emphasis added].) The *Steiner* court concluded that none of the cases since *Coffey* had

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12. This case does not present the question of whether and under what circumstances actions unconnected to a public official's office that do not allege a criminal violation may nevertheless constitute "willful or corrupt misconduct in office" under section 3060.

Here, even as to those counts in the accusation that do not properly allege a violation of section 424, Stark nevertheless is alleged to have acted in a manner inconsistent with his duties. In order for Stark to have knowledge of the facts constituting the misconduct he must know that he acted in a manner inconsistent with his duties. In other words he must have some knowledge of what he was supposed to do. Thus, due to the special nature of the non-criminal allegations constituting the misconduct in this case, proof of willful misconduct requires a showing that Stark had some species of knowledge that his actions or omissions were inconsistent with his lawful duties. Although the Court of Appeal was correct in concluding from *Steiner* that willful misconduct under section 3060 generally does not require proof of a knowing or purposeful violation of the law; the peculiar nature of the willful-misconduct allegations in this case requires proof that Stark had a culpable mental state with respect to his knowledge of the legal requirements bearing on his official duties.[13]

What was true about the mental state required in a Penal Code section 424 violation (see arg. I, *ante*) is true here: just because the law requires proof of some such knowledge-related culpable mental state does not mean that actual knowledge is the appropriate standard. *Steiner* does not hold otherwise. *Steiner* did not consider whether recklessness could suffice to demonstrate "willful misconduct" only that mere negligence was not sufficient. (*Steiner v. Superior Court*, *supra*, 50 Cal.App.at p. 1781.)

When considering the term "willful misconduct" in related contexts, this Court has recognized that recklessness in not knowing the pertinent fact is

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13. This is similar to the position espoused in ARG. I, *ante*, that due to its unique wording section 424 requires proof of guilty knowledge of fact that ones actions or omissions were unauthorized. So to in section 3060 if the allegations of "willful misconduct" relate to the failure to do something the law requires then knowledge of that duty is a required element of the People's proof.

disregard of the probability of injury. (See *Reuther v. Viall* (1965) 62 Cal.2d 470, 475.) Similarly, "willful misconduct" in section 3060 requires an intentional act undertaken with reckless disregard, not of imminent peril, but of the authorization for the act or omission.[14]

In sum, when an accusation under section 3060 does not allege a violation of a crime connected to the accused's office, proof of "willful misconduct" requires a showing that the public official either had actual knowledge of the facts constituting the misconduct or was reckless in not knowing the facts that constituted the misconduct. Depending on the case this may, but need not, include a requirement of proof of some degree of knowledge of the lawfulness of one's actions.

Here, due to the nature of the allegations the facts of the misconduct include a legal component. Thus, as to these allegations in order to commit willful misconduct it must be shown that Stark knew or was reckless in not knowing that his actions were without authority of law.

Given the above discussion it follows that probable cause exists to permit the charges in the accusation to go forward. To the extent the charges are based upon violations of section 424, as discussed *ante*, there is little dispute that this constitutes willful or corrupt misconduct in office. Evidence sufficient to prove the section 424 allegations in the indictment are thus sufficient to sustain the parallel changes in the accusation. To the extent the section 3060 allegations

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14. Stark cites an 1890 opinion of this Court in support of his view that section 3060 requires proof that the defendant had actual knowledge that what he did was wrong. However, that case—*People v. Ward* (1890) 85 Cal. 585—predates this Court's explicit discussion in *Coffey* of the predecessor of section 3060. In addition, *Ward* dealt with judicial discipline; and, on that score, it has been overtaken by this Court's modern Commission of Judicial Performance cases. As explained above, this Court's judicial-performance cases on "willful misconduct" support respondent's view that recklessness in not determining that one's actions are wrongful is sufficient to establish willful misconduct.

III.

A DEFENDANT MAY NOT MOVE TO SET ASIDE AN INDICTMENT UNDER SECTION 995 ON THE GROUND THAT THE GRAND JURORS WERE MISINSTRUCTED ON THE MENTAL ELEMENT OF THE CHARGED OFFENSE

Penal Code Section 995 provides that an indictment may be set aside upon two grounds: (1) "where it is not found, endorsed, and presented as prescribed in this code" or (2) "that the defendant has been indicted without reasonable or probable cause." (Section 995, subdivision (a)(1)(A and B).)

Stark argues, based largely upon the recent opinions of the Court of Appeal in *People v. Superior Court* (*Mouchaourab*) (2000) 78 Cal.App.4th 403 and *People v. Gnass* (2002) 101 Cal.App.4th 1271, that this Court's statement in a footnote in *Cummiskey v. Superior Court*, *supra*, 3 Cal.4th 1018 authorized challenges under section 995 based upon the manner in which the proceedings were conducted, including *any* instructional error likely to have caused the grand jury to indict on less than probable cause. Under Stark's view his claim that the grand jury was misinstructed on the mental elements of the charges in the indictment is thus cognizable under section 995. (AOB 18-19.) The Court of Appeal below disagreed, holding that this Court's statement in *Cummiskey* authorized challenges under section 995 based upon instructional error *only* where the grand jury was misinstructed on the standard required to indict. (*Stark v. Superior Court*, *supra*, 44 Cal.Rptr.3d at pp. 595-596.) The Court of Appeal determined that other errors in the grand jury proceeding, including other kinds of instructional errors, were cognizable only to the extent that they constituted violations of the right to due process in grand jury proceedings. (*Ibid.*) For the reasons explained below, the People submit that the Court of Appeal's interpretation of Section 995 is correct.

ability to act independently and impartially." (*Stark*, *supra*, 44 Cal.Rptr.3d at p. 597) Thus, following *Backus*, there exist, two independent grounds to challenge a grand jury indictment. First, the defendant may challenge the indictment under section 995 based upon the alleged insufficiency of the evidence.[15] (*Gordon*, *supra*, 47 Cal.App.3d at pp. 475-476.) Second, the defendant may challenge the indictment on the constitutional grounds that the manner of the grand jury proceedings failed to comport with due process. (*Backus*, *supra*, 23 Cal.3d at pp. 392-393.)

Nothing in *Backus* suggests, however, that a challenge to an indictment on due process grounds must be effectuated through the use of section 995. Rather, these were two very different and independent ways to challenge an indictment. (See *Cummiskey*, *supra*, 3 Cal.4th at p. 1039, conc. and dis. opn. of Kennard J.)

In *Cummiskey v. Superior Court*, *supra*, 3 Cal.4th 1018, the defendant sought to set aside the indictment based upon (among other things) the fact that the prosecutor allegedly misinstructed the grand jury on the standard of proof required to indict (*Id.* at p. 1022.) Justice Kennard, in a concurring and dissenting opinion, agreed with the court in *Gordon* that a "challenge [to] the propriety of legal advice and instructions that the grand jury received is not cognizable under section 995." (*Cummiskey*, supra at pp. 1039-1040.) In a footnote, however, the majority stated: "[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

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15. Of course section 995 then as now also allowed a defendant to challenge an indictment on technical grounds not relevant here. (Section 995, subdivision (a)(1)(A).)

a basis to set aside an indictment under section 995. Or it might have stated that any misinstruction of the grand jury at all was tantamount to a claim that the defendant had been indicted without probable cause. That the Court chose not to say this and instead confined its footnoted statement to one particular type of instructional error strongly suggests that its statement was a narrow one. Additionally, it is unlikely that, if this Court intended in *Cummiskey* to open the door to challenges under section 995 for every misinstruction of a grand jury, it would have done so in such an indirect and unclear manner. Finally, there is no discussion in the majority opinion in *Cummiskey* of *Backus*. If this Court intended in *Cummiskey* to allow section 995 to be used for all kinds of challenges to the manner in which the grand jury proceedings were conducted, it would effectively be saying that the due process challenge it permitted in *Backus* must be vindicated through the use of section 995. But *Cummiskey* clearly did not say that. Indeed *Backus* is conspicuous by its absence from the majority opinion. A far more reasonable conclusion is that this Court meant what it said in *Cummiskey* that is that a misinstruction on the standard of proof required to indict is cognizable under section 995. All other claims of instructional error like other claims regarding the manner in which the proceedings are conducted must be brought under the rubric of due process. (See *Stark v. Superior Court*, *supra*, 44 Cal.Rptr.3d at p. 596)

In arguing for a broad interpretation of the *Cummiskey* footnote, petitioner cites to two opinions of the Court of Appeal, *People v. Superior Court* (*Mouchaourab*), *supra*, 78 Cal.App.4th 403 and *People v. Gnass*, *supra*, 101 Cal.App.4th 1271. However, both *Mouchaoura*b and *Gnass* base their holdings upon an improper conflation of an indicted defendant's due process rights and his rights under section 995.

In *Mouchaourab*, the indicted defendants requested disclosure of records and transcripts of the grand jury proceedings. In ruling that the defendants were

section 995 to challenge the legal sufficiency of the evidence are plainly different.

Moreover, *Mouchaourab's* overbroad reading of *Cummiskey* arguably would make cognizable under section 995 any significant error in the manner of the proceeding. This conclusion seems to be an awful lot to read from the majority's footnote in *Cummiskey,* which was limited to misinstruction on the standard of proof required to indict.

Likewise, *Gnass* inappropriately combines the right to due process with statutory rights under section 995. *Gnass* held, as Stark asks this Court to hold, that a claim of an instructional error in a grand jury proceeding on an element of the offense is cognizable under section 995. (*People v. Gnass*, *supra*, 101 Cal.App.4th at pp. 1306-1307.) However, the court's holding in Gnass was based upon the same conflation of the due process and statutory grounds that occurred in *Mouchourab.* (*Ibid.*) Section 995 is not a statutory vehicle to vindicate a defendants right to fundamental fairness in a grand jury proceeding. Rather it is a statute designed to ensure that there is sufficient evidence to believe that the indicted defendant has committed the charged offense. That this Court in one narrow instance found that a particularly egregious error in the manner of the proceeding is tantamount to a claim under section 995 does not mean that all claims concerning the manner of the proceeding are now cognizable under section 995. Because the *Gnass* and *Mouchourab* courts misread this Court's precedent and combined these two separate doctrines in reaching their conclusions concerning the reach of *Cummiskey*, this Court should not accord significant weight to their conclusions.

Stark also argues that, if he does not prevail on this issue, a prosecutor could render meaningless section 939.7, which requires the prosecutor to call exculpatory evidence to the grand jury's attention. Stark posits that the prosecutor could present such evidence and then instruct the grand jury to

directly challenge the Court of Appeal's conclusions that the remaining counts in the indictment and those in the accusation are supported by sufficient evidence nor the conclusion that the proceedings were not fundamentally unfair so as to deprive him of due process. Rather, he argues only that the misinstructions on the mental elements of the charges was prejudicial in that the grand jury may have returned the accusation and the indictment on less than probable cause. (AOB 27.) As explained in detail above, that claim is not cognizable. As such, Stark's claims that the indictment and accusation must be set aside due to instructional errors in the grand jury proceeding must fail.

Even assuming these questions were preserved for review for the reasons stated in the opinion of the Court of Appeal below, Stark has not demonstrated that any errors in the instructions to the grand jury on the mental elements required to prove a violation of Penal Code section 424 or Government Code section 3060 rose to the level of a due process violation. (*Stark ,supra*, 44 Cal.Rptr.3d at pp. 605, fn. 15, 611-612, 623.) None of these errors concerning the mens rea required to prove these charges compromised the independence of the grand jury so as to render the proceedings fundamentally unfair. Thus, there is no basis to set aside the accusation or indictment on due process grounds. (See *Backus*, *supra*, 23 Cal.3d at pp. 392-393.)

Finally, for the reasons set forth in the opinion of the Court of Appeal below, and as explained in ARG's I and II, ante, there was legally sufficient evidence presented to support the remaining charges in the indictment and the accusation.

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applies to the proceedings by which the accusation was returned. (See *Stark*, *supra*, 44 Cal.Rptr.3d at p. 623.) Nonetheless because in the instant case the proceeding was one and the same The People will assume that Stark's right to due process in the proceeding would encompass that part of the proceeding wherein the accusation was returned thus allowing him to contest the manner in which the accusation was returned on due process grounds.

standard for recusal that this Court adopted in *Greer*. (*People* v. *Eubanks* (1996) 14 Cal.4th at pp. 591-592.)

Petitioner relies on a footnote in *Eubanks*. The footnote "left open" the question of the whether the section 1424 change in the recusal standard also governs a motion to set aside an accusatory pleading due to bias on the part of the district attorney. (*People* v. *Eubanks*, *supra*, 14 Cal.4th at p. 592, fn. 4.) Just because the question was "left open," however, does not mean that the enactment of section 1424 had no effect on the type of bias required to set aside an indictment or accusation.

There are sound reasons why the standard required to set aside an accusatory pleading for prosecutorial bias must at a minimum satisfy that required for recusal. The use of the lesser standard advocated by Stark would undermine section 1424 and lead to absurd results. Following dismissal of the pleading in Stark's world, presumably, the district attorney would then re-file the same pleading, as it would not have been found substantively deficient except for the fact that the district attorney had sought it. Then, presumably, the defense would again assert that the pleading should be dismissed. The process then would either repeat itself, or end with a result more drastic than any recusal under section 1424 would have accomplished under a more demanding standard. No sensible defense attorney would need to remove the district attorney if he could more easily obtain a dismissal of the accusatory pleading and frustrate the prosecution of the case anyway. Surely the Legislature did not intend, nor would this Court authorize, such a merry-go-round. Nor may section 1424 be rendered a nullity. (See *People v. Simon*, *supra*, 9 Cal.4th at p. 517) [statutes must be interpreted to avoid absurd results].) When the Legislature rejected *Greer's* standard for recusal in section 1424, then, it also rejected the same *Greer* standard for setting aside the

CONCLUSION

Accordingly, The People request that this Court modify the legal holdings of the Court of Appeal as stated herein, but in all other respects affirm the judgment and permit the accusation and indictment to proceed against petitioner.

Dated: February 8, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 12,846 words.

Dated: February 8, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Stark v. Superior Court of Sutter Co., The People, RPI* No.:S145337

I declare:

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

On February 9, 2007, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 9, 2007, at Sacramento, California.

____

Declarant