

S216444
2d Criminal No. B239519
LASC No. SA075027, BA382926

IN THE
SUPREME COURT
OF THE
STATE OF CALIFORNIA

PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JEFFREY HUBBARD,

Defendant and Appellant.

Superior Court of Los Angeles County
Hon. Stephen A. Marcus, J.

APPELLANT HUBBARD'S ANSWER TO PETITION FOR REVIEW

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SUPREME COURT
FILED

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TABLE OF CONTENTS

APPELLANT HUBBARD’S ANSWER TO PETITION FOR REVIEW	1
STATEMENT OF THE CASE	2
ARGUMENT	5
I. HUBBARD WAS NOT COVERED BY PENAL CODE §424(a)(1), AND THEREFORE COULD NOT HAVE VIOLATED IT.	5
II. HUBBARD CANNOT BE CRIMINALLY LIABLE MERELY BECAUSE HE SUPPOSEDLY HAD “SOME DEGREE OF CONTROL” OVER PUBLIC MONEYS.	7
III. CONCLUSION.	8
CERTIFICATION OF WORD COUNT	9

TABLE OF AUTHORITIES

Cases

<i>People v. Aldana</i> (2012) 206 Cal. App. 4th 1247	5
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Statutes

Government Code §1090	3
Government Code §1097	3
Penal Code §424	3, passim

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TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE ABOVE-
ENTITLED COURT:

The People's petition for review should be denied because the issues identified by the People were correctly analyzed, and because Appellant's conviction was correctly reversed, by the Court of Appeal in its unpublished Opinion; and because the case does not present any unsettled issues requiring review by this Court.

STATEMENT OF THE CASE

In 2005 and early 2006, Appellant Jeffrey Hubbard was the Superintendent of the Beverly Hills Unified School District. When the duties and travel requirements of the BHUSD's Director of Facilities, Karen Christiansen, increased dramatically because of the departure of a major contractor, Hubbard recommended that she should have an increased car allowance from \$150 to \$500 per month, and a stipend or bonus of \$20,000. He made his recommendation by way of memo to the Human Resources Department and a copy to the Assistant Superintendent of Business for the BHUSD to process those requests. The BHUSD ultimately increased the car allowance and paid the one-time stipend of \$20,000. Hubbard left the BHUSD to become Superintendent for Newport Mesa in June of 2006.

Five years later, in December of 2010, after Christiansen had terminated her employment and become an independent contractor for the BHUSD, and the BHUSD had become involved in multi-million-dollar civil litigation with Christiansen that was about to go to trial, the BHUSD persuaded the People to institute inappropriate criminal proceedings against Christiansen and Hubbard.¹ Christian-

¹ The criminal prosecution was prompted and instigated by the civil lawyers for the Beverly Hills Unified School District (the supposed "victim") as a tactic in the civil litigation which has been pending between the BHUSD and Karen Christiansen and Strategic Concepts since August of 2009. The Court should understand that this is not speculation on the part of Hubbard; it is shown by documents and information supplied by the District Attorney at the joint preliminary hearing on the charges against Hubbard and Christiansen [Exs. II and JJ], and by documents filed in the civil action. Christiansen was and is suing the BHUSD for about \$7,000,000 for breach of contract. The accusations against Christiansen in her criminal proceeding, that she supposedly violated Government Code §1090, were substantially identical to the claims being asserted by the BHUSD by way of defense in the civil action. After the BHUSD's elaborate motion for summary judgment in the civil action was emphatically denied by the Court, and two days before the civil action was scheduled to proceed to trial, and in order to obtain the continuance they desperately wanted, the BHUSD and its lawyers

sen's conviction for supposed violation of Government Code §§1090 and 1097 was later reversed with directions to dismiss, on the ground that on the undisputed facts she was not a Board member, officer or employee of the BHUSD, and therefore did not and could not have committed the crimes of which she was charged [*People v. Christiansen* (2013) 216 Cal.App.4th 1181]

Hubbard was separately charged with, and tried for, supposed violation of Penal Code §424. The basis for the charges was solely, and entirely, that those payments could not lawfully have been made without Board approval, but that Hubbard had requested the car allowance and the stipend for Christiansen, and supposedly had caused those amounts to be paid by the BHUSD without Board approval.

The People did not claim, and do not claim, that the extra car allowance and the stipend were unwarranted by the extra duties imposed on Christiansen as the BHUSD's Director of Facilities when the contractor departed. They did not claim, and do not claim, that Hubbard made any attempt to keep his conclusions about the car allowance and the stipend secret; they were openly disclosed in memos to the staff. No witness testified or even suggested that Hubbard ever told anyone to

persuaded the District Attorney to file the criminal complaint against Christiansen and Hubbard. Hubbard was targeted for the criminal action along with Christiansen, partly because of the car allowance and stipend, but also because he had provided a declaration and a deposition to Christiansen in the civil action supporting her position and contradicting various claims made by the BHUSD in the civil action.

Secondly, the criminal complaint originally alleged eight counts against Christiansen. However, on January 13, 2011, the District Attorney unilaterally amended the complaint to delete four of the eight counts against Christiansen. Among other things, Counts 1 and 2 originally named both Christiansen and Hubbard; however, the District Attorney dismissed Counts 1 and 2 as against Christiansen. Thus, Hubbard became the only remaining defendant in Counts 1 and 2 of the information.

keep his suggestions secret from the Board, or to refrain from preparing and presenting the requisite formal submissions to the Board in the usual way.

Furthermore, the People did not really prove that the car allowance and the stipend were actually paid to Christiansen without the requisite Board approval, and never offered any explanation of how that could have happened, given the number of people involved, the oversight by the Citizens' Oversight Committee, and the review and audit procedures of the County of Los Angeles that wrote the checks. Two former Board members, Lurie and Demeter, testified only that they did not remember, in 2011, any approval by the Board in closed session in 2005 and 2006. Alex Cherniss, a BHUSD Assistant Superintendent, testified that he had been unable to locate any record of approval by the Board, but as the Opinion of the Court of Appeal reflects, he admitted that he had been unable to locate the records of the critical closed session meetings when the car allowance and stipend would have to have been considered. (In this connection, it is important to note that Hubbard was also charged in a later indictment with causing a \$108 salary increase to be paid by the BHUSD to another employee, Nora Roque, without Board approval, because the record of Board approval supposedly could not be located; but he was acquitted of that charge by the jury when the supposedly missing records were located shortly before trial, and showed that in fact Roque's increase was actually approved by the Board.)

Hubbard appealed, arguing that he was not covered by Penal Code §424; that the evidence failed to establish that the payments to Christiansen were actually made without Board approval; that the evidence failed to show he had the necessary *mens rea* – that is, that he knew, or was criminally negligent in failing to know, that the payments were made without Board approval; that he was impro-

perly deprived of his constitutional right to compel the attendance of witnesses on his behalf; and that the evidence showed that his prosecution was barred by limitations.

His conviction was reversed by the Court of Appeal in its unpublished Opinion, because the undisputed evidence demonstrated that he was not a person “charged with the receipt, safekeeping, transfer, or disbursement of public moneys” within the meaning of Penal Code § 424, and therefore could not have violated it. The Court of Appeal concluded that, in the light of this dispositive holding, it was unnecessary to address Hubbard’s other claims of prejudicial error.

ARGUMENT

I. HUBBARD WAS NOT COVERED BY PENAL CODE §424(a)(1), AND THEREFORE COULD NOT HAVE VIOLATED IT.

As the Opinion explains [at page 7], “Under section 424, subdivision (a), ‘[e]ach officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys’ who ‘[w]ithout authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another,’ ‘[i]s punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in this state.’” The Opinion then goes on to say correctly, after citing and quoting from *People v. Aldana* (2012) 206 Cal. App. 4th 1247, that:

“*Aldana* applies straightforwardly to the case before us. It is undisputed that Hubbard ‘was not able to authorize’ the stipend and increased car allowance for Christiansen. (*Aldana, supra*, 206 Cal.App.4th at p. 1254.) Rather, only the District’s board was ‘entitled to authorize’ those payments. (*Ibid.*) By sending memoranda to payroll and the human

resources department (which undisputedly was the sole party responsible for creating the necessary documents for securing board approval), Hubbard was merely “the first step in a process that results in the expenditure of public funds,” but that is not “sufficient to establish criminal liability under section 424 absent approval authority,” which Hubbard undisputedly did not have. (*Ibid.*) “[I]t is the ability to control the public moneys that is key” (*ibid.*), and Hubbard undisputedly did not have that ability. He therefore cannot be criminally liable under section 424.

The People now seek review from this Court, arguing that because Hubbard was admittedly an “officer” of the BHUSD, that was sufficient to establish his criminal liability under §424, and they were not also required to show that he was a “person charged with the receipt, safekeeping, transfer, or disbursement of public moneys.”

But first of all, the language of the statute will not bear that construction. It subjects officers – and other persons – to criminal liability for appropriating public money to themselves or to others, only if the officer or other person is “charged with the receipt, safekeeping, transfer, or disbursement of public moneys.” Indeed, the People did not charge any of the other “officers” who were involved in processing or making the payments to Christiansen, merely because they were “officers.” Besides, as the Opinion reflects [at fn. 6, page 10]:

“We also note that the allegations of the operative consolidated information and indictment mirror the language of the statute in a manner that conforms to our interpretation of section 424. The charging document alleges that Hubbard was “a person described in Penal Code section 424 charged with the receipt, safekeeping, transfer, and distribution of public moneys” and that he misappropriated “the same” (i.e., the public moneys of which he was custodian). The charging document does not allege that Hubbard was an officer. Rather, it predicates his criminal liability on his status as a custodian of public funds, which he allegedly misappropriated.”

Furthermore, the People's entire case at trial was predicated solely on the idea that Hubbard was guilty of violating §424, not simply because he was an officer, but only because he supposedly somehow caused the money to be paid to Christiansen without Board approval, when Board approval was a necessary prerequisite.

In short, the People cannot have it both ways. If they insist that Hubbard committed a crime only because Board approval was required and the money was (supposedly) paid out to Christiansen without Board approval, they cannot argue at the same time that he was a "person charged with the receipt, safekeeping, transfer, or disbursement of public moneys."

II. HUBBARD CANNOT BE CRIMINALLY LIABLE MERELY BECAUSE HE SUPPOSEDLY HAD "SOME DEGREE OF CONTROL" OVER PUBLIC MONEYS.

The People also argue that review should be granted to determine whether a person can be criminally liable under §424, even if he or she is not a "person charged with the receipt, safekeeping, transfer, or disbursement of public moneys," so long as he or she has "some degree of control" over public moneys. But the Opinion [at pages 10-11] correctly rejects and disposes of this argument:

"Respondent's second argument is that Hubbard was "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" within the meaning of section 424 because he had "some degree of control over the disbursement of [D]istrict funds." (Italics omitted.) Respondent's reference to "some degree of control" comes from *People v. Groat* (1993) 19 Cal. App. 4th 1228, 1232 (*Groat*), which stated that section 424 "requires only that the defendant have some degree of control over public funds."

We conclude that respondent's argument lacks merit. *Aldana* helpfully summarized *Groat* as follows: 'In *Groat*, the defendant prepared

and signed her own timecards, and no other signature on the timecards was required for the defendant to be paid. (*Groat, supra*, 19 Cal.App.4th at p. 1230.) The defendant's timecards reflected she had been at work or been sick when, in fact, she was teaching at a local college. (*Id.* at pp. 1230-1231.) The court concluded the ability of a public employee to authorize his or her own pay charges that employee with the disbursement of public moneys, and therefore subjects him or her to liability under section 424. (*Groat, supra*, at pp. 1233-1234.)' (*Aldana, supra*, 206 Cal.App.4th at pp. 1253-1254.) Thus, insofar as *Groat's* broad reference to 'some degree of control over public funds' (*Groat, supra*, 19 Cal.App.4th at p. 1232) suggests that a defendant who lacks approval authority can nonetheless possess the requisite degree of control, it is dicta, because the defendant in *Groat* had approval authority. Again, as stated in *Aldana*, '[n]o case, including *Groat*, has held that being only the first step in a process that results in the expenditure of public funds is sufficient to establish criminal liability under section 424 absent approval authority. As the *Groat* court explained, it is the ability to control the public moneys that is key.' (*Aldana, supra*, 206 Cal.App.4th at p. 1254.)"

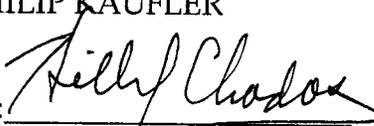
III. CONCLUSION.

For all of the foregoing reasons, the People's petition for review should be denied.

Dated: February 18, 2014

Respectfully submitted,

HILLEL CHODOS
PHILIP KAUFLE

By: 

Hillel Chodos

Attorneys for Appellant
Hubbard

CERTIFICATION PURSUANT TO
CALIFORNIA RULES OF COURT, RULES 8.204(c)(1) and 8.490(b)(6)

As attorney for Appellant, I hereby certify that Appellant's Answer to Petition for Review, excluding this certificate and the tables of contents and authorities, but including footnotes, contains 2,208 words, based on the word count program in Microsoft Word.

Dated: February 18, 2014


HILLEL CHODOS

PROOF OF SERVICE - 1013a and 2015.5 C.C.P.
By Mail

State of California)
)
County of Los Angeles)

I, the undersigned, am a resident of the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; my business address is 1559 South Sepulveda Boulevard, Los Angeles, CA 90025.

On February 18, 2014, I caused a true and correct copy of the within document entitled APPELANT HUBBARD'S ANSWER TO PETITION FOR REVIEW to be served by mail, by placing said document in a sealed envelope with postage thereon fully prepaid, and deposited in the United States mail. The envelope is addressed as listed below:

SERVICE LIST

Eric Reynolds Deputy Attorney General 300 South Spring Street, Suite 1702 Los Angeles, CA 90013	Max Huntsman, Esq. Deputy District Attorneys Public Integrity Division 320 West Temple Street, Room 766 Los Angeles, CA 90012
Presiding Judge, Hon. Stephen Marcus, J Clara Shortridge Foltz Criminal Justice Center 210 West Temple Street Los Angeles, CA 90012 (1 copy by Hand Delivery)	Clerk, Court of Appeal 300 South Spring Street, Los Angeles, CA 90013 <i>hand delivery</i>

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 18th day of February, 2014 at Los Angeles, California.


Debra Condragh