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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. EUGENE SELIVANOV AND TATYANA BERKOVICH, Defendants.	CASE NO. BA 372244 **DEFENDANT EUGENE SELIVANOV'S NOTICE OF MOTION AND MOTION FOR A NEW TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES** Date: October 4, 2013 Time: 9:00 a.m. Place: Department 102

TO: DISTRICT ATTORNEY JACKIE LACEY AND DEPUTY DISTRICT ATTORNEYS SANDI ROTH AND DANA ARATANI:

PLEASE TAKE NOTICE that on October 4, 2013, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Stephen A. Marcus, Department 102, defendant Eugene Selivanov, by and through his counsel of record, will move this Court for a new trial on all counts.

This motion is based on the statutory grounds enumerated in Penal Code §§ 1181 and 1182 and on Mr. Selivanov's constitutional guarantee of a fair trial. This motion is supported by this Notice, the attached Memorandum of Points and Authorities, the complete files and records of this action, and by such other matters and arguments as may come before the Court.[1]

DATED: September 4, 2013

Respectfully submitted,

CROWELL & MORING LLP

By: _____
Jeffrey H. Rutherford
Attorneys for Defendant
Eugene Selivanov

[1] Mr. Selivanov joins in the motion for a new trial filed by co-defendant Tatyana Berkovich. Mr. Selivanov incorporates by reference Ms. Berkovich's motion and memorandum of points and authorities to the extent they are not inconsistent with Mr. Selivanov's motion, argument or evidence.

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I. INTRODUCTION

Eugene Selivanov moves for a new trial pursuant to Penal Code §§ 1181 and 1182. Mr. Selivanov seeks a new trial on the following counts for the following reasons:

Counts 1, 3, 5-6, 12, and 25:

- The Court misdirected the jury on the definition and application of Penal Code § 424. *See* Penal Code § 1181(5).
- The Court misdirected the jury on the Penal Code § 424 negligence standard established by *Stark v. Superior Court*, 52 Cal. 4th 368 (2011). *See* Penal Code § 1181(5).
- The Court misdirected the jury on the applicable non-penal laws pursuant to Penal Code § 424. *See* Penal Code § 1181(5).

Counts 2, 4, 7, 10, 13, and 26:

- The Court misdirected the jury on the definition and application of Penal Code § 504. *See* Penal Code § 1181(5).

Count 2:

- The Court failed to direct the jury on the requisite unanimity needed for Penal Code § 504. *See* Penal Code § 1181(5).

Count 5:

- The jury's verdict is contrary to applicable law and to the evidence presented at trial. *See* Penal Code §§ 1181(6), (7).

Counts 15-24:

- The jury's verdicts concerning Mr. Selivanov's tax filings are contrary to applicable law and to the evidence presented at trial. *See* Penal Code §§ 1181(6), (7).

In determining whether to grant Mr. Selivanov's Motion for a New Trial, this Court is not limited to the statutory grounds listed in Penal Code § 1181, as outlined above. Mr. Selivanov's motion may also be granted if the Court concludes that any non-statutory grounds denied Mr. Selivanov a fair and impartial trial. *See, e.g., People v. Fosselman*, 33 Cal. 3d 572, 582 (1983);

People v. Sherrod, 59 Cal. App. 4th 1168, 1174 (1997). This power derives from the trial court's constitutional obligation to ensure a criminal defendant a fair trial. *See, e.g., People v. Davis*, 31 Cal. App. 3d 106, 110 (1973).

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II. THE COURT MISDIRECTED THE JURY ON THE DEFINITION AND APPLICATION OF PENAL CODE § 424 (COUNTS 1, 3, 5, 6, 9, 12, 25)

A. Introduction

As part of its instructions on Counts 1, 3, 5, 6, 9, 12. and 25 (Penal Code § 424(a)(1)-(3) violations), the Court defined for the jury three of § 424's central elements. The Court stated that for purposes of this case:

- "Public moneys," included "all monies and evidences of indebtedness received or held by Ivy Academia Charter public school or its officers in their official capacity";
- "District" included "a charter school"; and
- "Officer" included "a charter school operator, administrator, executive director and President."

See Jury Instructions 7.26.1, 7.26.2, 7.26.3.

By doing so, the Court erred in two ways.

First, the Court wrongly relieved the prosecution of its burden of proving, beyond a reasonable doubt, a central element of the § 424 offenses; namely, that Penal Code § 424 applies

to Mr. Selivanov, as the Executive Director of Ivy Academia Charter School. That is because Penal Code § 424, by its express terms, applies only to two groups of people: (1) officers of the state of California, or of any county, city, town, or district thereof (public officers); (2) every other person charged with the receipt, safekeeping, transfer, or disbursement of "public moneys," whether a public officer or not. Cal. Penal Code § 424(a). "Public moneys," in turn, are specifically defined in Penal Code § 426 as "all bonds and evidence of indebtedness, and all moneys *belonging* to the state, or any city, county, town, district, or public agency therein, and all moneys, bonds, and evidences of indebtedness *received* or *held by* state, county, district, city, town, or public agency officers in their official capacity." (emphasis added). Therefore, by defining the statutory terms "public moneys," "district," and "officer" in the manner it did, the Court relieved the prosecution of the burden of proving, beyond a reasonable doubt, that Mr. Selivanov was indeed a public officer, or that he was in charge of public moneys.

Second, the Court provided the jury with the wrong definitions for the statutory terms "public moneys," "district," and "officer." Independent charter schools, operated by non-profit organizations, are not counties, cities, towns or districts of the state of California, and therefore officers of independent charter schools cannot be considered public officers under Penal Code § 424, as the Court instructed the jury. Equally, independent charter school funds are not moneys belonging to a county, city, town, district or public agency therein, or held by an officer of those governmental entities, and therefore are not "public moneys" under Penal Code § 426, as the Court instructed the jury. It follows that those handling independent charter school funds cannot be liable under Penal Code § 424. Nothing in Penal Code §§ 424 and 426 suggests the statutory language can accommodate such a broad interpretation; a conclusion further supported by a number of cases directly on point. Had the prosecution been required to prove Mr. Selivanov was either a public officer, or a person in charge of "public moneys," it would have necessarily failed that task as a matter of law.

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B. Relieving the Prosecution of its Burden to Prove Mr. Selivanov Was a "Public Officer" Or a Person In Charge of "Public Moneys" Was Prejudicial Error In Violation of Mr. Selivanov's Constitutional Rights

By defining the statutory terms "public moneys," "officer," and "district" as it did, the Court relieved the prosecution of the burden of proving, beyond a reasonable doubt, an element of the § 424 offenses; that Mr. Selivanov was indeed a public officer, or that he was a person in charge of public moneys.

A jury instruction "relieving the prosecution of the burden of proving, beyond a reasonable doubt, each element of the charged offense violates the defendant's rights under both the United States and California constitutions." *People v. Flood*, 18 Cal. 4th 470, 479–480 (1998). Such an instruction constitutes error even when the evidence of that element is undisputed. *People v. Figueroa*, 41 Cal. 3d 714, 724 (1986). Thus, in a prosecution for evading a "peace officer," it was error to instruct the jury that the person the defendant evaded was, in fact, a "peace officer." *Flood*, 18 Cal. 4th at 482 & n.8. Similarly, in a prosecution for the sale of unqualified "securities," it was error to instruct the jury that the documents in question were "securities"; instead, the jury should have been instructed on the statutory definition of a "security," so the jury could make the determination with respect to the documents at issue. *People v. Figueroa*, *supra*, 41 Cal. 3d at 734, 740.

Similar error has occurred in Mr. Selivanov's case. Under the jury instructions as given, the jury was told that "all moneys and evidence of indebtedness received or held by Ivy Academia Charter public school or its officers in their official capacity" were, in fact, "public moneys." As a result, the jury did not have to determine whether the prosecution had proven beyond a reasonable doubt the first element of the Penal Code § 424 counts—that Mr. Selivanov was a "person charged with the receipt, safekeeping, transfer, or disbursement of *public moneys*." *See* Jury Instruction 7.26.1 (emphasis added). Accepting as true that all of Ivy Academia's funds were "public moneys," the jury was not required to determine whether the funds held by Mr. Selivanov in his capacity as an officer of the school were in fact "public moneys." The first element of the offense was thus deemed to be "proven." Similarly, by

instructing the jury that the term "district," as used in Penal Code § 424, also means "charter school," and the term "officer" also means a charter school executive director (Mr. Selivanov's position) the jury was excused from determining whether Mr. Selivanov was in fact an "officer of the state of California, or of any county, city, town, or *district* thereof." *See* Penal Code § 424 (emphasis added). The first element of the offense was again "proven."

As held in *Figueroa,* the Court should have left the statutory definition of "public moneys" unaltered, and required the jury to decide whether Ivy Academia's funds fall under that definition. The Court should have also refrained from narrowly defining the terms "district," and "officer," effectively relieving the prosecution from proving that charter schools, such as Ivy Academia, are indeed "districts," and executive directors, such as Mr. Selivanov, are indeed "officers," as used in Penal Code § 424.

C. The Court Misdirected the Jury on the Statutory Terms "Public Moneys," "District," and "Officer" Resulting in a Verdict Contrary to Law and the Evidence Produced at Trial

The Court's failure to require the prosecution to prove the "public officer" and "public moneys" element of the § 424 offenses has critical significance in Mr. Selivanov's case. Had the prosecution been required to prove Mr. Selivanov was either a public officer, or a person in charge of "public moneys," the prosecution would have necessarily failed that task as a matter of law. *First*, independent charter schools that are operated by non-profit corporations are not "districts" or "public agencies," as these terms are used in Penal Code §§ 424 and 426.[2] As a result, the jury could not have found Mr. Selivanov guilty of an offense attributable only to an "officer of this state, or of any county, city, town, or district of this state." *Second*, funds of independent charter schools operated by non-profit corporations are not "public moneys" as the term is defined in Penal Code § 426. As a result, the jury could not have found Mr. Selivanov guilty of an offense attributable only to a person in charge of "public moneys."

[2] In the interest of brevity, Mr. Selivanov focuses his argument here on the definition of "district" and "public agencies" under Penal Code §§ 424 and 426. The terms state, county, city, or town are on their face inapposite.

1. Independent Charter Schools Operated by Non-profit Corporations Are Not "Districts" or "Public Agencies"

In *People v. Christiansen*, 216 Cal. App. 4th 1181 (2013), *review denied*, the Court of Appeal emphasized the critical role statutory interpretation plays in criminal cases. Considering the term "employee" in Government Code § 1090, the *Christiansen* court held that the term may not be expanded beyond its common-law meaning unless the legislature has allowed it—"clearly and unequivocally." *Id.* at 1188. Similarly, given that the legislature has not allowed for any expansion of the terms "district" and "public agencies" in Penal Code §§ 424 and 426, these statutory provisions should not be interpreted beyond their regular meaning to include independent charter schools.

People v. Holtzendorff, 177 Cal. App. 2d 788, 795 (1960)—a case directly on point—further supports this conclusion. There, when interpreting Penal Code §§ 424 and 426, the Court of Appeal reiterated the well-known principle that "when language which is reasonably susceptible of two constructions is used in a penal law, ordinarily that construction which is more favorable to the offender will be adopted…The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language in a statute." (citing cases). This interpretative guideline, known as the "rule of lenity," prohibits judicial attempts to expand on the meaning of a given criminal statute in the name of a claimed public policy. *See Crandon v. United States*, 494 U.S. 152 (1990). It "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Id.* at 158.

Applying this principle, the *Holtzendorff* court held that the Housing Authority of the City of Los Angeles—*a public corporation*—cannot be considered a county, city, town or district, such that one of its officers can be prosecuted under Penal Code § 424. *Id.* at 797. The court reasoned that in adopting the definition that it did, the legislature could have included public corporations, as well; but it did not. *Id.* The *Holtzenforff* court further decided that the Housing Authority's moneys cannot be considered "public moneys" under Penal Code § 426, given the court's determination that the Housing Authority was not a county, city, town, or

district. As a result, the Housing Authority's officers may not be charged under Penal Code § 424. *See Holtzendorff*, 177 Cal. App. 2d at 797. [3]

Much like Government Code § 1090, which was at issue in *Christiansen*, the prohibition of Penal Code § 424 "is one of those 'somewhat unusual' statutory duties in that its application is expressly restricted to the public officials enumerated in that statute." *Klistoff v. Superior Court*, 157 Cal. App. 4th 469, 480 n.2 (2007). Given the clear pronouncements made in *Christiansen* and *Hozennforff,* the term "district" and "public agency," as used in Penal Code §§ 424 and 426, should therefore not include independent charter schools, such as Ivy Academia, that are operated by private non-profit entities, independent of any school district or other public agency.[4] Other California and federal cases support this result.

In *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164 (2006), the California Supreme Court considered whether school districts (on the one hand) and independent charter schools (on the other hand) can be sued under the California False Claims Act ("CFCA") and the California Unfair Competition Law ("UCL"). The court also considered whether plaintiffs needed to "present" their claims against independent charter schools pursuant to the Tort Claims Act, as though they were public agencies. *Wells*, 39 Cal. 4th at 1178-79, 1213-14.

The *Wells* court concluded that school districts and independent charter schools are not one and the same. Whereas schools districts—or any agency of state or local government—cannot be sued under the CFCA and UCL, independent charter schools (and their operators) could be sued under both statutes. *Wells*, 39 Cal. 4th at 1179. The court's analysis shows why independent charter schools cannot be considered districts or public agencies. *First*, as the *Wells*

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[3] In 1987, perhaps as a response to *Holtzendorff,* the legislature exercised its unique prerogative to determine the boundaries of criminal liability and amended Penal Code § 426's definition of "public moneys," *clearly and unequivocally*, to include moneys belonging to "public agencies" as well. *See* 1987 Cal. Legis. Serv. 828, § 29 (West).

[4] Notably, the legislature had an opportunity to amend Penal Code §§ 424 and 426 in 1992 when first allowing for the creation of charter schools pursuant to the Charter Schools Act. Equally, Penal Code §§ 424 and 426 could have been amended to encompass charter schools, when the Charter Schools Act went through a significant overhaul in 1998. In both occasions, the legislature remained silent.

court explains, the Charter Schools Act considers charter schools to be school districts only for a limited set of purposes. Outside those limited scenarios, independent charter schools are not districts. *Id.* at 1200-01. *Second,* the charter schools in question (like Ivy Academia) were "*operated*, not by the public school system, but by distinct outside entities—which the parties characterize as non-profit corporations." *Id.* at 1201.[5] These distinct outside entities "are given substantial freedom to achieve academic results free of interference by the public educational bureaucracy." *Id.* *Third*, "the autonomy, and independent responsibility, of charter school operators extend, in considerable degree, to financial matters. Thus, where a charter school is operated by a nonprofit public benefit corporation, the chartering authority is not liable for the school's debts and obligations." *Id.*; Cal Ed. Code § 47604(c). In other words, the charter school and the school district are two separate legal entities. *Last,* unlike school districts, the Charter Schools Act assigns no sovereign significance to charter schools or their operators. *Wells*, 39 Cal.4th at 1201.

The *Wells* court reached similar conclusions on the issue of presentment under the Tort Claims Act. Under the Tort Claims Act, the court reasoned, claims must be presented to "the state," or "local public entities," which include (much like Penal Code §§ 424 and 426) "a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state." *Id.* at 1214. Independent charter schools, the *Wells* court held, "do not fit comfortably within any of the categories defined, for purposes of the [Tort Claims Act], as 'local public entities'." *Id.*

The *Wells* analysis was affirmed a year later in *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708 (2007). There, the court was again confronted with charter school presentment issues under the Tort Claims Act and filing requirements in the Roster of Public Agencies. The *Knapp* court explained that "initially, charter schools were viewed as

[5] It is undisputed that Ivy Academia was operated by Alternative Schools, Inc., a nonprofit public benefit corporation. *See* Ex. 6 (Alternative Schools, Inc. Articles of Incorporation). All references to numerical exhibits are to trial exhibits.

operationally but not legally separate from their chartering authorities." *Id.* at 715 (citing cases). The legal ties were severed, however, in 1999, when "Education Code section 47604 provided that charter schools may also elect to operate as, or be operated by, a nonprofit public benefit corporation, formed and organized pursuant to the Nonprofit Public Benefit Corporation Law." *Id.* Like the charter schools in *Wells*, therefore, the Palisades Charter High School, which was organized as a California nonprofit corporation, was an independent legal entity from its chartering authority—the Los Angeles Unified School District. *Id.* at 717. And as a result, no presentment was necessary. *Id.* Similarly, as the Palisades Charter High School was not a "district, public authority, public agency, or any other political subdivision or public corporation in the state," it was not a "public agency" required to register in the Roster of Public Agencies. *Id* at 718.

Federal courts have reached similar results. For example, in examining the question of whether charter schools are state actors for purposes of a § 1983 analysis, the United States Court of Appeals for the Ninth Circuit defined a charter school (much like the California Supreme Court did in *Wells*) as a "private entity that contracted with the state to provide students with educational services that are funded by the state." *See Caviness v. Horizon Cmty Learning Ctr., Inc.*, 590 F.3d 806, 815 (9th Cir. 2010).[6] As a result, the Ninth Circuit held that a charter school is merely a private entity performing a function that serves the public (providing public education) and not a state actor. Similarly, the Ninth Circuit held that authority to regulate a charter school is not sufficient to make the school's actions those of the state. "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the state." *Id.* at 816; citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999).

[6] In *Knapp,* the California Court of Appeal also highlighted the contractual relationship between an independent charter school and its authorizer, stating, "[t]he charter establishing a charter school is a *contract* detailing the school's educational programs, goals, students served, measurable pupil outcomes and measurement methods, and the school's governance structure." *Knapp v. Palisades Charter High School*, 146 Cal.App.4th 708, 714 (2007) (emphasis added).

The combined message of these courts is clear—while independent charter schools fulfill a public function, are funded by the state, and are regulated by a public agency, they remain a private entity separate and independent from the school districts and other public agencies with which they interact. They are, therefore, not to be considered as districts or any other public agency. Any interpretation of the terms "district" and "public agency" under Penal Code §§ 424 and 426 should conform to these judicial pronouncements. Charter schools should not be counted as a "district" or as a "public agency" under these sections of the Penal Code and the Court's instruction to the contrary was in error.

2. Funds of Independent Charter Schools Operated by Non-profit Corporations Are Not "Public Moneys"

Penal Code § 426's definition of "public moneys" fashions a critical link between the entity owning or holding the funds and the resulting nature of the funds. Only when funds *belong* to or are *held* by "the state, or any city, county, town, district, or public agency therein," can the funds be considered "public moneys" for purposes of Penal Code § 424. As a result, funds that belong to or that are held by independent charter schools—which as shown above are not "districts" or "public agencies"—cannot be considered "public moneys" for purposes of Penal Code § 424.

That remains the rule even when the funds were originally the property of the government. *See Holtzendorff*, 177 Cal. App. 2d at 796-797 (public funds transferred to the Housing Authority of Los Angeles County—*a public corporation*—no longer public monies under Penal Code § 426 as they no longer belong to any state subdivisions listed in § 426).[7]

[7] The only reported exception to this rule pertains to a situation in which the state retains an extremely high degree of interest in and control over all of the funds received by the private entity – unlike the funds here. In *People v. Johnson*, 209 Cal. App. 4th 800 (2012), *as modified* (Oct. 4, 2012), *review denied*, the court held that public funds can only retain their public status when the state "retain[s] an interest in, and extensive control over, all of the funding provided to the [non-public entity]..." *Johnson*, 209 Cal. App. 4th at 814. There, the entity at issue—a group home child care facility—received only restricted funds via multiple monthly checks—each issued with a field identifying the name of a single child the funds were meant for. In the event these restricted funds were not spent on the designated child as instructed, the group home was under an obligation to return the funds to the California Department of Social Services ("DDS") which actively pursued their collection. *Id*. at 814-5. By contrast, Ivy Academia's funds— (continued…)

III. THE COURT SHOULD HAVE INSTRUCTED THE JURY ON THE UNIQUE PENAL CODE § 424 NEGLIGENCE STANDARD ESTABLISHED BY *STARK* (COUNTS 1, 3, 6, 9, 12, 25)

A. Introduction

During argument over the final jury instructions on Penal Code §§ 424(a)(1) and (a)(2), counsel for Mr. Selivanov requested that the Court instruct the jury on the negligence standard espoused in *Stark v. Superior Court*, 52 Cal. 4th 368 (2011), as the correct scienter needed for Penal Code § 424 offenses. *See* Reporter's Tr. of March 25, 2013 Proceedings at 92-93. The Court, over defense counsel's objection, decided to limit the instruction to the general language found in CALJIC 7.26.1, which merely outlines the difference between criminal negligence and ordinary negligence.[8] The standard outlined in *Stark*, however, is much more exacting, and has particular significance in this case given Mr. Selivanov's defense and the evidence produced at trial.

B. Under *Stark*, Reasonable, Good Faith Mistakes and Ordinary Negligence Are Not Criminal

Stark holds: "Public officers and others should not be criminally liable for a reasonable, good faith mistake regarding their legal responsibilities. Nor is section 424 intended to criminalize ordinary negligence or good faith errors in judgment." *Stark,* 52 Cal. 4th at 400. "If public officials and others entrusted with control of public funds subjectively believe their actions or omissions are authorized by law, they are protected from criminal liability unless that belief is objectively unreasonable, *i.e.*, is the product of criminal negligence in ascertaining legal obligations." *Id.*

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particularly its unrestricted funds such as general purpose and categorical block grants—are discretionary by design. *See* Ed. Code §§ 47633(c), 47634.1(h); *see also* Trial Tr. at 1639:19-23 (Eairleywine Testimony); 1689:23-1690:4 (Smith Testimony); 3470:10-14 (De Los Santos Testimony); 4659 (Young Testimony); 5353:15-5354:4 (Moser Testimony).

[8] Both CALJIC 7.26.1 and the jury instruction given in Mr. Selivanov's case state: "Criminal negligence refers to a higher degree of negligence than is involved in ordinary negligence. Ordinary negligence is the failure to exercise ordinary or reasonable care. Criminal negligence must be aggravated, gross, or reckless."

During trial, it was Mr. Selivanov's position that the decisions made regarding Ivy Academia's funds that were challenged by the prosecution, were made in good faith under the strong belief they were all authorized actions. In support of that position, a number of witnesses testified that Mr. Selivanov's actions were common among charter school operators, in particular when it came to expenditure of school funds on business meals and teacher appreciation events, and the fact that charter school operators enter into sublease arrangements with their schools. *See* Trial Tr. at 4659:16-4662:8, 4664:6-12, 4664:26-4665:10 (Young Testimony); 4697:11-24, 4698:11-20 (Premack Testimony)). This evidence substantiated Mr. Selivanov's scienter argument; unfortunately, the jury did not receive the correct instruction under *Stark* against which it could assess the evidence and determine Mr. Selivanov's guilt beyond reasonable doubt. Instead, the jury was merely told that ordinary negligence is the failure to exercise ordinary or reasonable care, and that a conviction in Mr. Selivanov's case required proof of criminal negligence, which refers to a higher degree of negligence than is involved in ordinary negligence. *See* Jury Instructions 7.26.1, 7.26.2. A new trial on all Penal Code §§ 424(a)(1) and 424(a)(2) charges (Counts 1, 3, 6, 9, 12, 25) should be granted to remedy this error.

IV. THE COURT MISDIRECTED THE JURY ON THE APPLICABLE NON-PENAL LAWS PURSUANT TO PENAL CODE § 424 (COUNTS 1, 3, 6, 9, 12, 25)

A. Introduction

The issue of which non-penal laws could be used under *Stark* for the purposes of proving the prosecution's Penal Code § 424 charges was extensively litigated throughout the trial and pre-trial phases. Up to the eve of trial, the prosecution had taken the position that it need not (and indeed could not) provide a non-penal law that was tailored to the actual misappropriation allegations in Mr. Selivanov's case. *See* People's Response to the Court's Order to Identify Law or Regulation Violated for Prosecution of Penal Code Section 424 at 2-3. The prosecution took this position, even in the face of this Court's § 995 ruling, which specifically discussed *Stark*, dismissing several counts based on *Stark's* holding. *See* 995 Tr. at 150:21-152:21.[9]

[9] With regard to original Counts 3 and 4 (which the Court dismissed), this Court stated: "*Stark* is an objective standard, and I do not find that the statute given by the people [Ed. Code § (continued…)

Nevertheless, by order of this Court, the prosecution eventually relented and offered a smorgasbord of purported provisions it maintained should suffice under *Stark*.[10] After extensive argument, the Court narrowed the list to five "non-penal laws." *See* Nonpenal Laws for Selivanov Jury Instructions 7.26.1, 7.26.2.[11]

Mr. Selivanov maintains that the Court misdirected the jury on the applicable non-penal laws under Penal Code § 424 and *Stark*; for a number of reasons. *First*, the descriptions of the non-penal "laws" given to the jury differed from the provisions actually found in the relevant source documents. As a result, the jury did not have the opportunity to consider whether Mr. Selivanov violated any of the provisions actually in place, and Mr. Selivanov's guilt was not adjudicated based on the purported proscriptions in the actual non-penal "laws." *Second*, the non-penal "laws" chosen by the Court are unconstitutionally vague; they did not inform Mr. Selivanov of what he could or could not do (no warning), and they did not give the jury a standard that could be uniformly applied to persons similarly accused (no guide to adjudication).[12] The non-penal "laws" were vague also because they were presented to the jury devoid of any context or definition. In particular, general concepts such as "misuse of school funds," "fiscal mismanagement," and "fiduciary responsibility," were presented to the jury

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47604.5] provides the necessary non-penal obligation that Selivanov did not obey, and without a showing of a non-penal obligation that Selivanov violated or otherwise failed to follow the prosecution argument fails…." *See* 995 Tr. at 150:6-11.

[10] In this submission, the prosecution offered nineteen different non-penal "laws" purporting to support all or some of their Penal Code § 424 allegations (the prosecution did not specify which non-penal "laws" applied to which count). This list included the Charter Schools Act provisions on expenditures of general purpose and categorical block grants, and the Corporations Code provisions on self dealing. *See* People's List of Non-Penal Statutes.

[11] The final list of nonpenal laws did not include the Charter Schools Act's spending provisions (Ed. Code §§ 47633(c) and 47634.1(h)), over Mr. Selivanov's counsel's objection. *See* Reporter's Tr. of March 25, 2013 Proceedings at 89:12-90:8.

[12] For example, referring to Education Code § 47605.4, which was on the list of "relevant nonpenal laws" that was presented to the jury, this Court has stated: "I simply am unable to discern from this Education Code any clue as to what position Selivanov was supposed to have violated." *See* Superior Court 995 Ruling at 151:23-28.

without the necessary definitions provided by the Charter Schools Act, the California Corporations Code, and general corporation law. The Court erred when it refused to supply these critical legal frameworks as requested by Mr. Selivanov.[13] *Third*, the non-penal "laws" that were presented to the jury in connection with the Penal Code § 424 counts are inappropriate under *Stark* as they do not constitute the "legal requirements that governed the act or omission" in question. *Stark*, 52 Cal. 4th at 377.

Each of these points is addressed in turn.

B. The Non-Penal Laws Provided to the Jury Did Not Track the Actual Non-Penal Laws Governing Mr. Selivanov's Actions

As *Stark* makes clear, "it is not simply appropriation of public money, or the failure to transfer or disburse public funds, that is criminalized [in Penal Code § 424]. Criminal liability attaches when those particular actions or omissions are contrary to laws governing the handling of public money." *Stark*, 52 Cal. 4th at 395-6. In addition, for criminal liability to attach, the prosecution must prove that a defendant knew or should have known he was acting without authority; that is to say, that a defendant knew or should have known he was violating certain laws governing his handling of public money. *See id.* at 398.

To comply with *Stark*, the jury in Mr. Selivanov's case was supplied with a list of five "Nonpenal Laws." For guilt to attach to each of the § 424 counts (excluding Count 5), the jury had to find (and unanimously agree) that Mr. Selivanov violated at least one of these non-penal "laws," and that he knew or should have known he had done so. However, the jury was not provided with the actual non-penal "laws" at issue. Instead, the jury was provided either an incomplete version of some of these "laws," or a version not supported by the actual source document. The following comparison is instructive:

[13] Even the prosecution, as indicated in its proposed jury instructions, requested that the Court provide a definition of "fiduciary duty" to the jury. *See* People's Proposed Instruction 7.26.1, dated 3/14/2013 at 2. The term remained undefined in the final instructions given to the jury.

Jury Instructions Given	Actual Nonpenal "Law"
The Ivy Academia Charter Petition provides: 1. Theft and misuse of school property or funds are prohibited	Section D—Staff Hiring and Relations—states: "The following violations are considered misconduct and may result in disciplinary action up to, and including termination of employment: 4. Theft… 10. Misuse of school property or funds. *See* Ex. 1 (Ivy Academia's Charter Petition) at 60.
The Ivy Academia Charter Petition provides: 2. Engaging in fiscal mismanagement is prohibited	The Ivy Academia Charter Petition does not contain a prohibition against fiscal mismanagement for school officials. The Charter Petition only refers to the Charter Schools Act's revocation provision—Ed. Code § 47607(c)(1)—which allows the school's authorizer to initiate charter revocation proceedings, but only after a notice to cure has been issued, and only after a finding, through showing of substantial evidence, that the charter school has engaged in fiscal mismanagement. *See* Ex. 1 (Original Charter Petition) at 83.
The Bylaws of Alternative Schools, Inc's provide: corporation's assets could not inure to the benefit of any private person or individual, or to any director of officer of the	The Bylaws of Alternative Schools, Inc's permit profit-bearing contracts with the school's officers and directors. *See* Exhibit 13 (Board Minutes attaching Bylaws of Alternative Schools, Inc.) at 31, at Article IX—a section omitted

corporation.	from the list of non-penal "laws" given to the jury.[14]
Education Code § 47604.5: this code section prohibits the operators of a charter school from engaging in illegal or substantially improper use of public funds for personal benefit of any officer, director, or fiduciary of the charter school.	Education Code § 47604.5 contains no such prohibition. • It only allows the State Board of Education, after receiving the recommendation of the Superintendent of Public Instruction, to take appropriate action, including, but not limited to, revocation of the school's charter. • It does not institute any prohibitions against operators of a charter school. • Action is only permitted against a charter school based on certain factual findings, one of which relates to illegal or substantially improper use of charter school funds.[15] *See* Ed. Code § 47604.5.

Allowing the jury to determine Mr. Selivanov's guilt based on nonexistent or partial versions of non-penal "laws" was an error. Without seeing the unaltered and complete non-penal "laws," *as they exist in the source documents*, the jury could not have adequately considered whether the actual non-penal "laws" were in fact violated by Mr. Selivanov, or whether Mr. Selivanov knew or should have known of their existence, or that they prohibited his conduct. Those are essential elements of the Penal Code § 424 offenses (excluding Count 5), which the prosecution, as a result, could not have proven beyond reasonable doubt.

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[14] Had the jury been instructed with the full and complete text of Article IX as part of the non-penal "law" instruction, the jury would have been able to determine that the transaction at issue—mainly, the lease/loan transaction (Counts 3 and 25)—was in fact entered into by Ivy Academia's board of directors in compliance with Article IX, thus eliminating any would-be violation of the non-penal "law" allegedly embedded in Article V of the Bylaws.

[15] While Education Code § 47604.5 concerns the use of "*charter school funds,"* the jury instructions refer, incorrectly, to the use of *"public funds*." *See* Nonpenal Laws for Jury Instructions 7.26.1, 7.26.2. As Mr. Selivanov has argued above, charter school funds are not public funds. *See infra* Section II.C.2.

C. The Non-Penal Laws Included in the Selivanov Jury Instructions Are Unconstitutionally Vague

But even as given, the jury should not have been allowed to consider the five non-penal "laws"—made part of the offense under *Stark*—as they are all unconstitutionally vague. As phrased, the non-penal "laws" that were presented to the jury in the jury instructions provide no notice to Mr. Selivanov of what is prohibited, nor are they clear enough to allow the jury to determine Mr. Selivanov's guilt beyond reasonable doubt.

A law must define the criminal offense with sufficient definiteness; otherwise it violates a defendant's constitutional due process guarantee. *See People v. Heitzman,* 9 Cal. 4th 189, 199 (1994). In order to satisfy the demands of due process, two requirements must be met. *First*, the law must provide fair warning. The prohibition must be definite enough to provide a clear standard of conduct for those expected to follow the law. *Id.* "Because we assume that individuals are free to choose between lawful and unlawful conduct, 'we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly. Vague laws trap the innocent by not providing fair warning.'" *Id.* *Second*, the law must be a clear guide to adjudication. The prohibition must be clear enough so that it does not "impermissibly delegate[] basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *People v. Rubalcava,* 23 Cal. 4th 322, 332 (2000). Notably, a law may escape vagueness if its terms may be made reasonably certain by reference to other definable sources. *People v. Gamez,* 235 Cal. App .3d 957, 971 (1991), *disapproved on other grounds in People v. Gardeley*, 14 Cal. 4th 605 (1996). As explained below, the Court could have curbed some of the vagueness through reference to other definable sources. No such reference, however, was made.

The following portions of the non-penal "laws" provided to the jury are unconstitutionally vague:

- *"Misuse of school property/substantially improper use of funds."* Left undefined, these phrases provided no notice to Mr. Selivanov or adequate standard of

adjudication for the jury. The jury was given no guidance as to which uses of school property or funds are proper, and which are prohibited, even in general terms, anywhere in the instructions. The answer was not supplied even though it was readily available. Over the course of the trial, the defense requested that the Court instruct the jury on the authorizing law applicable to charter schools—the Charter Schools Act. *See, e.g.,* Reporter's Tr. of March 25, 2013 Proceedings at 89:12-90:8.[16] The defense asked that, at a minimum, the jury receive the Charter School Act's spending provisions, which outline clearly the permitted uses of school funds at issue in this case. *See* Ed. Code §§ 47633(c) and 47634.1(h). The Court refused. Without more, the terms "misuse" and "improper use" are unconstitutionally vague.

- *"Fiscal mismanagement."* This phrase provided no notice to Mr. Selivanov or adequate standard of adjudication for the jury. By using this term, the Court requested that the jury determine whether Mr. Selivanov's management of Ivy Academia's fiscal affairs was criminal. However, the jury was not provided with any yardstick by which to measure the quality of Mr. Selivanov's fiscal management, or guidance as to what conduct could constitute "mismanagement." The provision stating that "engaging in fiscal management is prohibited," was therefore unconstitutionally vague. *See Wheeler v. State Bd. of Forestry*, 144 Cal. App. 3d 522, 528 (1983) (judgment stating appellant was "grossly incompetent" held unconstitutionally vague without proscribing a standard by which to measure appellant's competency).
- *"Fiduciary responsibility for the well being of the organization."* By using the term "fiduciary responsibility," the Court chose to import a concept of corporate law "fiduciary") without also supplying its legal significance as it applies to the actions

[16] Similarly, Mr. Selivanov requested that the Court take judicial notice of portions of the Charter Schools Act, pursuant to Cal. Evid. Code 451(a). *See* Reporter's Tr. of March 25, 2013 Proceedings at 17:7-20. The Court declined to do this.

and decisions of corporate officers and directors under California law.[17] Without an adequate definition, such as one supplied by the California Code of Corporations, *see* Cal. Corp. Code § 7231, and relevant case-law, the jury was in no position to determine whether, in fact, Mr. Selivanov breached his "fiduciary responsibility" as an officer and director of Ivy Academia.[18]

D. The Non-Penal Laws Drafted by a Private Entity Are Inappropriate under Penal Code § 424 and *Stark*

Finally, provisions promulgated by a *private* entity cannot be used as the "authorizing" non-penal "laws" required by *Stark* as an element of a Penal Code § 424 prosecution. Only rules promulgated by a governmental entity can fill this "authorizing," non-penal law rubric.

Under *Stark*, "the 'law' applicable to the acts and omissions in [Penal Code § 424] is the *authorizing* law,…" *Stark*, 52 Cal. 4th at 397 (emphasis in original). "Liability under section 424 arises when the officer or custodian, bound by these authorizing laws, acts without authority or fails to act as required." *Id.* Rules and policies devised by a *private* entity, by definition, cannot stand for these "authorizing" laws, as they have no power to authorize an individual to handle public moneys in a certain manner. Only rules devised by a public entity have the power to authorize such handling of public moneys.

In Mr. Selivanov's case, four out of the five "authorizing" non-penal "laws" were provisions created by Ivy Academia—a charter school operated by a non-profit private corporation—either in its Charter Petition or in its bylaws. *See* Non-Penal Laws for Selivanov Jury Instructions 7.26.1, 7.26.2. Only the fifth non-penal law given to the jury refers to a law promulgated by a public entity, albeit one that is inapplicable. *See supra* Section IV.B-C.

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[17] It is telling that the prosecution itself left a space for a definition of the term "fiduciary duty" in its proposed jury instructions. *See* People's Proposed Instruction 7.26.1, dated 3/14/2013 at 2. The term remained undefined in the final instructions given to the jury.

[18] In reality, given that this accepted standard was not at play in trial, no evidence was produced showing that Mr. Selivanov, in fact, breached his corporate fiduciary duties, as established under California corporate law.

Case law supports the proposition that provisions instituted by private entities cannot serve as the "authorizing" non-penal laws required under *Stark*. While preparing this motion, counsel for Mr. Selivanov reviewed *all* available Penal Code § 424 cases (not just those decided after *Stark*). None of those cases involves provisions created by a private entity as a basis for § 424 liability.

Lastly, it is worth repeating that the prosecution in this case had a genuine "authorizing" non-penal law upon which to rely. The spending provisions in the Charter Schools Act—Ed. Code § 47633(c) and Ed. Code § 47634.1(h)[19]—clearly state how charter schools may spend their general purpose and categorical block grants, which are the funds at issue in this case. Arguably, any use of funds outside the bounds charted by these provisions would be in violation of an "authorizing" law and thus an appropriate basis for Penal Code § 424 liability. The jury, however, was not provided with these Charter Schools Act provisions when determining Mr. Selivanov's § 424's liability. This error should be remedied with the grant of a new trial.

E. New Trial Should be Ordered Even if Only One of The Suggested Non-penal "Laws" Was given in Error

Even if the Court determines that only one of the five non-penal "laws" was given to the jury in error, the Court should still grant a new trial on Counts 1, 3, 6, 9, 12, and 25 (all Penal Code § 424 charges apart from Count 5). That is because there is no way of knowing upon which non-penal "law" the jury actually agreed. The jury was instructed to unanimously agree on which non-penal "law" Mr. Selivanov actually violated, but were told there was no need to state which non-penal "law" they selected in their verdict. *See* Selivanov Jury Instructions 7.26.1 and 7.26.2.

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[19] As a reminder, Education Code § 47633(c) provides: "General-purpose entitlement funding may be used for any public school purpose determined by the governing body of the charter school." Education Code § 47634.1(h) provides: "Categorical block grant funding may be used for any purpose determined by the governing body of the charter school."

V. THE COURT MISDIRECTED THE JURY ON THE DEFINITION AND APPLICATION OF PENAL CODE § 504 (COUNTS 2, 4, 7, 10, 13, 26)

A. Introduction

Mr. Selivanov was charged with embezzlement by a public or private officer, in violation of Penal Code § 504, in Counts 2, 4, 7, 10, 13, and 26. Under Penal Code § 504, a public or private officer, who "fraudulently appropriates to any use or purpose not in the due and lawful execution of that person's trust, any property in his or her possession or under his or her control by virtue of that trust, or secretes it with a fraudulent intent to appropriate it to that use or purpose, is guilty of embezzlement." Cal. Penal Code § 504. The Court misdirected the jury in its § 504 instructions in two ways. *First*, the Court provided the jury with Penal Code § 503 instructions, even though Mr. Selivanov was charged with a violation of § 504—a separate and distinct criminal offense. *Second*, the embezzlement instructions were deficient because they failed adequately to instruct the jury on the "claim of right" defense pursuant to Penal Code § 511 and *People v. Stewart,* 16 Cal. 3d 133 (1976).

B. The Court Used Penal Code § 503 Instructions For Penal Code § 504 Charges

Although Mr. Selivanov was charged with multiple violations of Penal Code § *504*, the jury received instructions pertaining to Penal Code § *503*—a statute proscribing a substantially different embezzlement offence. As a result, the jury was not instructed on an element unique to the § 504 offense—that the appropriation of property be "to any use or purpose *not in the due and lawful* execution of [defendant's] trust." Cal. Penal Code § 504 (emphasis added). The Court should allow a new jury to consider whether the facts produced by the prosecution support a finding of guilt under the correct standard.[20]

The omission of this "*due and lawful*" element from the jury instruction is particularly significant in Mr. Selivanov's case because much of the testimony at trial concerned the "due

[20] Mr. Selivanov attaches as Exhibits A and B hereto examples of jury instructions from two California Superior Court cases where appropriate Penal Code § 504 instructions were given: *People v. Earl Hobbs*, C. No. NA0710 (Oct. 30, 2006); *People v. Velia Rosales,* C. No. BA232225 (Oct. 8, 2003).

and lawful" nature of Mr. Selivanov's actions. In particular, when addressing Mr. Selivanov's challenged American Express expenses, the defense showed that the types of expenditures challenged by the prosecution were common for charter school operators and that Arthur Sarkisian, the treasurer of Ivy Academia's board of directors, approved the expenditures. *See* Trial Tr. at 1853:12-25 (Pilyavskaya Testimony). Likewise, when addressing the lease/loan transaction (Counts 4 and 26) and the alleged improper 2007 money transfers (Counts 7, 10, and 13), the defense showed that Mr. Selivanov received the requisite approval of the board of directors, and/or was authorized under the school's bylaws to make the challenged transfers as the school's executive director. *See* Ex. 13 at 45-51 (Lease/Loan transaction—Board approval); Trial Tr. at 5350:15-26 (Moser Testimony). Given the way the jury was instructed, however, none of this important defense evidence mattered, as the jury was not asked to determine whether or not Mr. Selivanov's challenged actions were "due and lawful." This omission was further compounded when the Court did not instruct the jury on the applicable spending provisions of the Charter Schools Act and on the applicable provisions of the California Corporations Code[21]—provisions that underscore the *due and lawful* nature of Mr. Selivanov's alleged takings.

Without determining that Mr. Selivanov's challenged American Express expenditures (Count 2), "lease" payments (Count 4), continuous loan payments (Count 26), and 2007 fund transfers (Counts 7, 10, and 13) were in fact for "any use or purpose not in the due and lawful execution of Mr. Selivanov's trust," there can be no embezzlement. A new trial should therefore be granted to allow the jury to determine whether this essential element of Penal Code § 504 offense could be proven.

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[21] *See, e.g.,* Cal. Corp. Code §§ 5141, 5231, 5234, 5233. Corporations Code § 5233 (self dealing) was part of the list of nineteen non-penal laws the prosecution submitted by order of this Court on the eve of trial. *See* People's List of Non-Penal Statutes.

C. The "Claim of Right" Defense Instruction Was Inadequate

The embezzlement instructions given to the jury were also lacking because they failed adequately to instruct the jury on the "claim of right" defense pursuant to Penal Code § 511 and *People v. Stewart,* 16 Cal. 3d 133 (1976).

Penal Code § 511's "claim of right" defense (also outlined in CALCRIM 1863) includes three elements: (1) an open and avowed appropriation of property; (2) under a claim of title; (3) preferred in good faith, even though such claim is untenable. Cal. Penal Code § 511; *People v. Threestar*, 167 Cal. App. 3d 747, 755 (1985).

The embezzlement instructions given to the jury did not follow the suggested language outlined in CALCRIM 1863, and misconstrued § 511's "claim of right" defense. *First*, instead of instructing the jury that Mr. Selivanov's *claim of title* could constitute a defense to embezzlement, the Court only told the jury that acting with *authorization* could serve as a defense.[22] *See* Selivanov Jury Instruction 1806. *Second*, and more important, the first element of § 511, that the appropriation was "open and avowed," was entirely missing from the instruction given. This omission was significant. As the Court noted during argument on the jury instructions, defendants "acted like they had a right to that property or a right to spend it the way they were spending. They did do this transparently, openly, they didn't try to hide anything." Reporter's Tr. of March 25, 2013 Proceedings at 119:25-120:2. The Court also added "and I guess the other argument is that typically in embezzlement matters, people hide when they embezzle."[23] *Id.* at 120:3-5.

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[22] As the Court is aware, Mr. Selivanov was charged with a number of embezzlement Counts. While Mr. Selivanov agrees that the authorization was the central issue with regard to his "questionable" American Express expenditures, the issue of *title* was central to Mr. Selivanov's defense to the lease/loan transaction (Counts 4 and 26), and to the 2007 money transfers (Counts 7, 10, and 13).

[23] As an example, all of Mr. Selivanov's American Express expenses that were challenged as embezzlement under Count 2 were provided to and reviewed by Arthur Sarkisian, Ivy Academia's board treasurer, and Ivy Academia's independent auditors. The expenses were captured by detailed expense reimbursement forms with backup vendor receipts attached. *See* Trial Tr. at 1852:11-28, 1853:1-25, 1855:22-28, 1856:1 (Pilyavskaya Testimony); Ex. 19 (Ivy Academia expense reports and receipts). In addition, the LAUSD's OIG received copies of these later "questioned" expense reports and receipts *two years* before search warrants in this case (continued…)

The Court should have instructed the jury *sua sponte* on a complete and accurate "claim of right" defense. Not doing so was prejudicial error. *See Stewart,* 16 Cal. 3d at 140 (trial court erred in failing to give, *sua sponte*, a properly worded instruction on the "claim of right" defense where there was evidence that defendant was relying on that defense); *Threestar*, 167 Cal. App. 3d at 755-757 (failure to properly instruct the jury on a § 511 defense by altering "claim of right" language and omitting "open and avowed appropriation" element was prejudicial error).[24] Moreover, "such error cannot be cured by weighing the evidence and finding it not reasonably probable that a correctly instructed jury would not have convicted the defendant." *Stewart*, 16 Cal. 3d at 141; *see also People v. Alvarado,* 133 Cal. App. 3d 1003, 1020 & n.6 (1982). The Court should grant a new trial on the embezzlement charges to remedy this error.

VI. THE COURT FAILED TO INSTRUCT THE JURY ON THE REQUISITE UNANIMITY NEEDED FOR PENAL CODE § 504 (COUNT 2)

A. Introduction

When a defendant is charged in a single count with several unlawful acts, and the evidence purports to show that the defendant committed more than one of those unlawful acts, the jurors must be instructed with CALJIC No. 17.01's unanimity instruction. *People v. Diedrich*, 31 Cal.3d 263, 280-82 (1982); *People v. Ferguson*, 129 Cal. App. 3d 1014, 1020-21 (1982). *People v. Laport,* 189 Cal. App. 3d 281, 283 (1987). This general rule applies with equal force to multiple acts of embezzlement charged under a single count. *See Laport*, 189 Cal. App. 3d at 283-284.

(continued)
were executed. Similarly, the lease/loan transaction had been fully disclosed to Ivy Academia's board of directors, and Ivy Academia's auditors and was included in the audited financial statement sent to the LAUSD and State Controller's Office. *See* Ex. 13 at 45-50 (Ivy Academia board of directors minutes); Exs. 249-251 (Ivy Academia's Audited Financial Statements for 2008-2010).

[24] While the Court had a *sua sponte* duty to provide a complete and accurate "claim of right" defense instruction, the defense had specifically asked for a CALCRIM 1863 instruction during argument on the jury instructions. *See* Reporter's Tr. of March 25, 2013 Proceedings at 117:26-27; 118:19-20.

Despite this clear rule, the jury was only instructed on unanimity for the counts charging Mr. Selivanov with misappropriation of public funds (Counts 1,3,5,6,9,12, and 25). The jurors were not instructed that they must reach a unanimous verdict for the multiple embezzlement acts charged under Count 2.[25]

B. The Numerous Embezzlement Acts Charged under Count 2 Merited A Unanimity Instruction

Mr. Selivanov was charged with 122 separate acts of purported theft under Count 2. *See* Ex. 17 (Ivy Charter School American Express Charges).[26] In general, the challenged acts fall under a number of broad categories such as business meals, teacher appreciation events, and teacher appreciation gifts. *Id.* Given that no unanimity instruction was given as to Count 2, it is impossible to know whether the jury unanimously agreed that Mr. Selivanov was guilty, beyond reasonable doubt, of any of these acts of embezzlement. *See, e.g., Laport*, 189 Cal. App. 3d at 283-84; *see also People v. Hefner*, 127 Cal. App. 3d 88, 97 (1981) ("[w]e have no way to gauge the effect of this error. Since we cannot assume the jurors unanimously agreed on the act constituting the offense charged, we are unable to say a miscarriage of justice did not occur").

Unanimity was particularly needed to determine whether Mr. Selivanov was guilty of the crime of grand or petty theft under Jury Instruction 1801. Only those acts of embezzlement agreed-upon by the jury may be counted towards the $950 threshold that constitutes a grand theft offense.

The lack of a unanimity instruction should be remedied by granting a new trial as to the charges of embezzlement under Count 2.

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[25] During the argument on jury instructions, the Court indicated that "unanimity is going to be given." *See* Reporter's Tr. of March 25, 2013 Proceedings at 35:3. At that point in time, the Court was not sure whether it would actually list the counts the unanimity instruction is going to apply to. *Id.* at 35:3-5. The final jury instructions suggest a choice was made to list only those counts related to the misappropriation of public funds charges. *See* Jury Instruction 17.01.

[26] The prosecution indicated which acts constituted alleged embezzlement by highlighting the line-items it considered unlawful. *See* Ex. 17 (Ivy Charter School American Express Charges).

VII. COUNT 5 VERDICT IS CONTRARY TO APPLICABLE LAW AND TO THE EVIDENCE PRESENTED AT TRIAL

A. Introduction

A new trial is appropriate when the evidence collected at trial is not sufficient to support the jury's guilty verdict. *See People v. Lagunas*, 8 Cal. 4th 1030, 1038 & n.6 (1994); *People v. Robarge*, 41 Cal. 2d 628, 633-34 (1953). The evidence may be deemed insufficient to support a guilty verdict as a matter of law, or, alternatively, the Court, sitting as a "thirteenth juror," can independently assess the available evidence and decide it does not warrant a finding of guilt beyond a reasonable doubt. *See Lagunas*, 8 Cal. 4th at 1038 & n.6; *People v. Oliver*, 46 Cal. App. 3d 747, 752 (1975); *Robarge*, 41 Cal. 2d at 633-634. The evidence offered by the prosecution in support of its false accounting charges under Penal Code § 424(a)(3) fails the sufficiency test under both scenarios.

Penal Code § 424(a)(3), which forms the basis for the false accounting charges against Mr. Selivanov (Count 5), criminalizes the keeping of a false account of or relating to public moneys. Cal. Penal Code § 424(a)(3). It further criminalizes the making of knowingly false entries or erasures in such an account. *Id.* Mr. Selivanov's conviction on Count 5 was based on two alleged categories of false accounting:

- "Inaccurate" representation of the initial and repayment start-up loan amounts (later referred to as the "Due to Academy" IOU), reported by Ivy Academia's auditors in Note 8 ("Loans Payable") of Ivy Academia's Audited Financial Statements for its first year in operation (ending June 30, 2005). *See* Ex. 73 at 17 (Ivy Academia 2005 Audited Financial Statements);
- Misclassifications of meals and teacher appreciation expenses in Ivy Academia's QuickBooks in the first two years of operations.[27]

[27] These two alleged categories of false accounting were what remained from the prosecution's lengthy list of false accounting instances disclosed to Mr. Selivanov at the eve of trial following this Court's order.

Evidence presented at trial did not sufficiently support Mr. Selivanov's conviction related to either of these false accounting allegations for a number of reasons.

B. Argument

1. Mr. Selivanov Did Not "Keep" or "Make" Note 8 of Ivy Academia's 2005 Audited Financial Statement

The prosecution failed to present evidence at trial that Mr. Selivanov "kept" Note 8 or that he made the challenged entry in Note 8 as mandated under § 424(a)(3). Quite the contrary, Connie De Los Santos—an auditor from LAUSD's Office of the Inspector General (OIG), who reviewed Ivy Academia's books, reviewed the independent auditors' work papers, and interviewed the auditors several times—testified that she was aware it was the auditors who drafted Note 8; not Mr. Selivanov. *See* Trial Tr. at 3458:6-8 (De Los Santos Testimony).

2. Note 8 of Ivy Academia's 2005 Audited Financial Statement was Not False

Neither did the prosecution present sufficient evidence that the note entry in question was, in fact, wrong. Pursuant to Note 8, the balance on the "Due to Academy" account, reported under the title "additions," was $250,000. It was the prosecution's position that that amount was incorrect because during that year, the loan amount grew to $397,000.[28] Evidence produced by the prosecution at trial, however, demonstrated that the initial loan amount was indeed $250,000, as approved by Ivy Academia's board of directors on August 24, 2004. *See* Ex. 13 at 14-15 (Board Minutes Attaching Unsecured Promissory Note). What the prosecution is challenging as an instance of false accounting, then, is not the accuracy or falsity of the initial loan balance figure reported in Note 8, but rather the *auditors*' decision to include the initial loan balance and not the balance at its highest point. Such a decision, whether reasonable or not, could not form the basis for a charge against Mr. Selivanov related to *his* knowing falsification of accounts. Oddly enough, even though the prosecution was challenging the auditors' judgment on this important point, they chose not to call any of the auditors to testify at trial and explain why they

[28] There is no dispute that the end balance of the loan as of June 30, 2005 was accurately reported in Note 8. *See* Trial Tr. at 3343:23-24, 3456:0-12 (De Los Santos Testimony).

chose to include the initial loan balance under Note 8, and not the loan balance at its highest point. Moreover, Ms. De Los Santos and other investigators from LAUSD's OIG met with members of Ivy Academia's independent audit firm a number of times. As Ms. De Los Santos testified at trial, she never asked the auditors about their election to report the loan's initial balance, rather than the loan's balance at its highest point. *See* Trial Tr. at 3459:4-25 (De Los Santos Testimony).

3. Note 8 of Ivy Academia's 2005 Audited Financial Statement is not an "Account"

Note 8 was contained in an audited financial statement detailing the outstanding balance of a loan that Mr. Selivanov provided to Ivy Academia. A note regarding a private loan cannot be considered an "account of or relating to" *public moneys* for purposes of Penal Code § 424(a)(3). Case law suggests that only records related to the *disbursement* of public moneys can be considered "accounts" for purposes of Penal Code § 424(a)(3). *See People v. Groat*, 19 Cal. App. 4th 1228, 1233–1234 (1993); *People v. Sperl*, 54 Cal. App. 3d 640, 656 (1976) ("unquestionably, the [deputies'] time records 'related' to the disbursement of public moneys"); *People v. Battin,* 77 Cal. App. 3d 635, 650 (1978) ("Defendant's certification on the staff time sheets was, indeed, a 'disbursement' of public moneys within the meaning of section 424").[29]

4. Misclassifications of Meals and Teacher Appreciation Expenses in Ivy Academia's QuickBooks

In order to prove that Mr. Selivanov was guilty of false accounting as it relates to the misclassifications of meals and teacher appreciation expenses in Ivy Academia's QuickBooks in the first two years of operations, the prosecution needed to show that it was in fact Mr. Selivanov who knowingly misclassified the expenses. Testimony provided by Ivy Academia's bookkeeper—Marina Pilyavskaya—however, showed that Mr. Selivanov was not involved in that process. Rather, it was Ms. Pilyavskaya that took the receipts submitted by Mr. Selivanov

[29] Notably, given that the operative term—"account"—is offered undefined in the statute, no expansion beyond its common-law meaning is allowed. *See People v. Christiansen*, 216 Cal. App. 4th 1181, 1188-89 (2013), *review denied*.

and generated the expense reports along with the corresponding expense codes. It was also Ms. Pilyavskaya who classified the expenses, by code, in Ivy Academia's QuickBooks. *See* Trial Tr. at 1937:26-1938:1 (Pilyavskaya Testimony). Any errors made in that coding process could not, therefore, be attributed to Mr. Selivanov.

5. New Trial Should be Ordered Even if One of The False Accounting Theories Can Support A Guilty Verdict

Given the evidence offered at trial, neither of the prosecution's two false accounting theories can support a guilty verdict. That said, even if the Court determines that one of the false accounting theories is nevertheless supported by evidence, the Court should still grant a new trial on Count 5. That is because there is no way of telling which false accounting theory the jury actually agreed on. The jury was instructed to agree on which false accounting act Mr. Selivanov actually committed, but was told there was no need to state which act it selected in its verdict. *See* Jury Instruction 17.01.

VIII. THE VERDICTS CONCERNING MR. SELIVANOV'S TAX FILINGS ARE CONTRARY TO APPLICABLE LAW AND THE EVIDENCE PRESENTED AT TRIAL (COUNTS 15-24)

A. Introduction

The jury convicted Mr. Selivanov of felony violations of Revenue and Taxation Code § 19705(a) for willfully subscribing to and filing a false individual income tax return for each of the tax years 2004-2008 (Counts 15-19), and for unlawfully subscribing to and filing a false corporate income tax return for AJFK/eGeneration for each of the tax years 2004-2008 (Counts 20-24). While the charges targeting Mr. Selivanov's personal tax returns were follow-on charges that were wholly dependant on liability for the substantive charges, *see* Trial Tr. at 4243-4244 (Salazar Testimony) and Ex. 78,[30] the charges targeting Mr. Selivanov's corporate tax returns

[30] Above, Mr. Selivanov has requested a new trial for Counts 1-2, 6-7, 9-10, and 12-13, which are the substantive Counts underlying Mr. Selivanov's alleged personal tax violations. A new trial on these underlying substantive counts must result in a new trial on the individual tax violations regardless of the merit of Mr. Selivanov's specific argument as to his convictions for willfully subscribing to and filing a false individual income tax return for each of the tax years 2004-2008 (Counts 15-19).

were based on reported misclassifications in the deductions taken by eGeneration in the relevant years. *See* Trial Tr. at 4263-4264 (Salazar Testimony).

The evidence presented by the prosecution in support of these charges does not support a finding of guilt beyond a reasonable doubt because the prosecution did not prove Mr. Selivanov submitted the incorrect personal and corporate tax returns "in voluntary, intentional violation of a known legal duty." *People v. Hagen*, 19 Cal. 4th 652, 666 (1998).

B. The Prosecution Presented No Evidence That Mr. Selivanov Voluntarily And Intentionally Violated a Known Legal Duty

The prosecution's failure to present adequate evidence as to Mr. Selivanov's willful conduct, stems in part from the unique nature of the tax violations he was charged with. Willfulness, as an element of Revenue and Taxation Code § 19705(a), requires the prosecution to prove:

(1) that the law imposed a duty on the defendant;

(2) that the defendant knew of this duty; and

(3) that defendant voluntarily and intentionally violated that duty.

People v. Hagen, 19 Cal. 4th 652, 660 (1998) *citing Cheek v. United States,* 498 U.S. 192, 201 (1991). "Carrying this burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." *Id.* In Mr. Selivanov's case, the prosecution did not even attempt to prove these elements.

Concerning Mr. Selivanov's personal tax returns, the prosecution relied solely on the fact that Mr. Selivanov failed to report *as income* the amounts allegedly misappropriated as a result of the questioned American Express charges and the 2007 money transfers. *See* Trial Tr. 4243-4244 (Salazar Testimony). As stated by Mr. Salazar on cross-examination, but for the prosecution's characterization of these amounts as "stolen," these unreported amounts did not belong in the tax returns. *Id.* at 4244:1-3.

In other words, in order to sustain a felony conviction on Counts 15-19, the prosecution needed to present evidence that Mr. Selivanov both (1) knowingly misappropriated and

embezzled certain funds and (2) knowingly failed to report these misappropriated and embezzled funds on his personal tax returns. The prosecution failed to do this. At most, the evidence could be interpreted to show that Mr. Selivanov *should have known* he was not allowed to appropriate the funds in question – with no evidence (circumstantial or otherwise) regarding Mr. Selivanov's knowledge of his tax reporting obligation. As such, the evidence falls short of the exacting "willfulness" standard under *Hagen* for a felony conviction.[31]

Similarly, concerning eGeneration's corporate tax returns, the prosecution concentrated its efforts on showing that the 2004-2008 eGeneration tax returns were false due to the misclassified expenses claimed on the returns. Trial Tr. at 4047-4050 (Salazar Testimony), 6266-6268 (Prosecution's Closing Argument); Ex. 94. But nowhere did the prosecution attempt to show that Mr. Selivanov knew about the purported misclassifications. No evidence was presented suggesting that Mr. Selivanov created the eGeneration QuickBooks which supported Mr. Salazar's entire analysis, *see, e.g.,* Trial Tr. 4042:2-4043:13 (Salazar Testimony), and no attempt was made to show whether Mr. Selivanov provided inaccurate information to his Certified Public Accountant, who prepared the returns. In fact, Mr. Selivanov's accountant—Frank Roth—was not even called to testify.

Given the evidence presented at trial and the prosecution's failure to show that Mr. Selivanov (1) knew of his tax duties, and (2) voluntarily and intentionally violated those duties, the verdicts concerning Mr. Selivanov personal and corporate tax filings for the years 2004-2008 should be set aside, and a new trial ordered.[32]

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[31] Notably, the jury found co-defendant Ms. Berkovich guilty of misdemeanor tax violations for the same personal tax returns. The prosecution's evidence at trial did not distinguish between Mr. Selivanov and Ms. Berkovich.

[32] Theoretically, pursuant to Penal Code § 1181(6), the Court can modify these tax-related verdicts and convert Mr. Selivanov's felony convictions to misdemeanor ones. *See Hagen,* 19 Cal. 4th at 662 (espousing a misdemeanor violation where willfulness has not been proven). However, given that the prosecution has not attempted to show the $15,000 tax delinquency required for a misdemeanor conviction, that option is not available. *See* Defendant Berkovich's Notice of Motion and Motion for a New Trial at Section III.

IX. MR. SELIVANOV JOINS IN ALL ISSUES RAISED BY MS. BERKOVICH THAT MAY INURE TO HIS BENEFIT

Mr. Selivanov specifically joins in the issues raised in his co-defendant's motion for a new trial and any briefs filed on her behalf to the extent that they may benefit him. *See generally* Cal. Rules of Court, Rule 8.200(a)(5); *People v. Castillo,* 233 Cal. App. 3d 36, 51 (1991); *People v. Stone*, 117 Cal. App. 3d 15, 19 n.5 (1981); *People v. Smith,* 4 Cal. App. 3d 41, 44 (1970).

X. CONCLUSION

In conclusion, the defense requests that the Court grant a new trial on the counts set forth above.

Respectfully submitted,

DATED: September 4, 2013

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