IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **YEVGENY SELIVANOV, et al.,** Defendants and Appellants.	Case No. B252894

Los Angeles County Superior Court, Case No. BA372244
The Honorable Stephen A. Marcus, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In a 40-count information, the Los Angeles County District Attorney charged appellants Yevgeny Selivanov and Tatyana Berkovich in counts 1, 3, 5, 7, and 39 with misappropriation of public funds, in violation of Penal Code[1] section 424, subdivision (a), in counts 2, 4, 6, 8, and 40 with embezzlement by public or private officer, in violation of section 504, and in counts 27 through 31 with filing a false tax return, in violation of Revenue and Taxation Code section 19705, subdivision (a). Against appellant Selivanov, the information also charged him in counts 9, 11, 18, 21, and 24 with misappropriation of public funds, in violation of section 424, subdivision (a), in counts 10, 19, 22, and 25 with embezzlement by public or private officer, in violation of section 504, in counts 20, 23, and 26 with money laundering, in violation of section 186.10, subdivision (a), and in counts 32 through 36 with filing a false tax return, in violation of Revenue and Taxation Code section 19705, subdivision (a). Against appellant Berkovich, the information further charged her in count 38 with conflict of interest, in violation of Government Code sections 87100 and 91000. On counts 1 through 8, 18 through 26, and 39 through 40, the charging document alleged that appellants, with the intent to do so, took, damaged, and destroyed property of a value exceeding $65,000, within the meaning of section 12022.6, subdivision (a)(1). On counts 2, 4, 6, 8, 10, 19, and 40, the charging document alleged that the embezzlement consisted of public funds within the meaning of section 514. Counts 12 through 17 and 37 were abandoned at the preliminary hearing and excluded from the information. Counts 3 through 6, 9 through 10, and 38 were dismissed under section 995. (16CT 2691-2709; 18RT 3229; 22CT 4222-4224, 4247-

[1] Unless indicated otherwise, all further statutory references are to the Penal Code.

4248.) Appellants pled not guilty to the remaining charges and denied all of the special allegations. (16CT 2726-2729.)

After a jury trial, the jury convicted appellant Selivanov on counts 1, 2, 7, 8, 11, 18, 19, 21 through 36, 39, and 40. As to appellant Berkovich, the jury convicted her on counts 1, 2, and 7. As to counts 27 through 31, the jury convicted her of lesser-included offense of filing a false tax return, in violation of Revenue and Taxation Code section 19701, subdivision (a). These counts were ultimately dismissed. The jury also found true the related special allegations as to both appellants. (24CT 4584-4627, 4690-4715.)

Appellants filed motions for new trial. (24CT 4756-4804; 25CT 4805-4884.) The People opposed the motions. (26CT 5105-5167.) The court granted the motions for new trial as to counts 1, 7, 11, 18, 21, 24 and 39, and otherwise denied them.

The court sentenced appellant Selivanov to four years and eight months in state prison, calculated as the upper term of three years as to count 8, an additional one-year for the enhancement on count 8, and one-third the middle term or eight months as to count 26. The court imposed concurrent terms as to all other counts on which the jury convicted him. As to appellant Berkovich, the court sentenced her on count 2 and ordered her placed on formal probation on the condition that she serve 45 days in county jail with credit for time served. (27CT 5412-5429.)

The court ordered appellant Selivanov to make restitution in the amount of $277,895.15, $22,396.60 of which the court found appellant Berkovich was jointly and severally liable. (27CT 5433-5436.) An additional $43,899 in restitution was imposed against appellant Selivanov. (1ACT 214.)

Appellants filed notices of appeal. (27CT 5437-5438.) The People filed a notice of appeal regarding the portions of the new trial motions that the court granted. (1SCT 1.)

STATEMENT OF FACTS

A. The Prosecution Evidence

1. Appellants found the Ivy Academia Charter School

On May 14, 2000, appellants filed the limited liability company documents for an entity called Academy Just for Kids ("AJFK"). About five years later, they filed a certificate of amendment and changed the company's name to E-generation ("EGEN"). (6RT 2198-2199, 2203.) Appellant Selivanov was listed as AJFK's agent, and appellant Berkovich as its manager. Later, they would be listed as the principals of EGEN. (6RT 2206-2207.) AJFK and EGEN were the private businesses of appellants. (6RT 2214.)

On May 11, 2004, appellants filed the articles of incorporation for Alternative Schools, Inc. ("Alternative"). This entity was the parent for Ivy Preschool. (6RT 2213.) It was also the parent for the charter school that appellants decided they wanted to found. (4RT 1423; 6RT 2207-2208.) Appellants filed articles of incorporation for Alternative Schools Foundation, which did business as Ivy Support fund and Ivy Academia Support Fund. (6RT 2210, 2213.)

To start a charter school, an individual was required to file a charter petition setting forth, among other items, a description of the proposed instructional program and governance system, as well as a budget for fiscal preparations. (4RT 1422.) Once a charter petition received approval, the petition essentially became a contract between the school's founders and the approving board of education. (4RT 1437.) The charter school was

then permitted to receive public funds from the state, calculated based on the school's average daily attendance. In addition, the operators of the school were permitted to apply for additional grants and seek funding from private sources. (4RT 1424-1425.) Because it took some period of time to receive initial public funds, it was not uncommon for a school's founders to provide a start-up loan to the school, for which they were entitled to reimbursement. (4RT 1435.)

Aaron Eairleywine, the Central Business Advisor for the Charter School Division of the Los Angeles Unified School District, explained that under certain circumstances, a charter school could spend public funds on meals for staff and faculty if those meals were related to an educational purpose. (4RT 1421, 1548.) These circumstances were quite rare, but included when a meeting occurred during a lunch hour. (4RT 1548.) In general, the charter school was required to show that the use of the funds served an educational need or educational necessity, not just for meals, but for all expenditures. (4RT 1549.) No training was provided on these requirements. (4RT 1579, 1639-1640.) Eairleywine, however, testified that public funds could not be used for social activities, like bowling, sporting events, birthday celebrations, and Christmas parties, off-campus, outside-of-work hours meals with faculty and staff, or charitable donations. (4RT 1550, 1556.) In addition, some public funds came with specific restrictions on their use, and a charter school had to demonstrate that the funds were used for the restricted purpose. (4RT 1575.)

Patricia Smith, Executive Director of the Los Angeles County Office of Education and former Controller, added that public funds must be used for the overall operation and purpose of the charter school. They could not be used to benefit any individual. (4RT 1671, 1679.) She concurred with Eairleywine's description of restrictions on the funds and elaborated that public funds could not be used to take a teacher out to lunch or dinner.

(4RT 1679-1682, 1684.) Smith further testified that costs paid for by public funds must be reasonable, necessary, allowable, and allocable. She defined reasonable as a cost a reasonable person would pay for an item under the circumstances. She defined necessary as a cost necessary to the effective and efficient operation of the school. Smith explained that the term allowable referred to if any restrictions were put on the funds. And allocable referred to the existence of a direct correlation between the cost and a benefit to the school's programs. (4RT 1682.) Smith stressed that one could not simply look at the label given to the type of fund usage, but had to look beyond the label to determine the real purpose for the expenditure. (4RT 1706.) She believed that public funds could never be used to purchase alcohol or clothes and gifts for staff and faculty. (4RT 1683.)

Appellants followed the above procedure and filed the Ivy Academia Charter School ("Ivy Academia") petition in October 2003. (4RT 1423.) The petition, like other charter school petitions, stated that Ivy Academia's board members had a legal fiduciary responsibility to the school. This responsibility included a duty to maintain the school in an appropriate and legal manner, a duty to act in good faith, and a duty of loyalty. In sum, the board members could never put any other interests before that of the school. (4RT 1523-1524.) Otherwise, a charter could be revoked, for example for failing to meet generally accepted accounting principles, violating a provision of the law, and engaging in fiscal mismanagement. (4RT 1525.)

According to the Ivy Academia petition, which was approved, appellant Selivanov was the executive director of the school. Appellant Berkovich was its president. (4RT 1531.) Appellants filed a renewal petition in 2007, which was also approved. (4RT 1530, 1586.)

On June 15, 2004, AJFK entered into a sublease of property located on De Soto Avenue in Woodland Hills (the "De Soto Property") with Amoroso Development Company, Inc. ("Amoroso"). (6RT 2219; 8RT 2856-2858.) A portion of the property was to be used for the charter school campus. Amoroso leased the property from AJ Levine in 1984, and agreed to sublease it to AJFK for a monthly rent of $18,390, beginning July 1, 2004. (6RT 2217-2218, 2220.) The agreement did not expire until June 13, 2014, and appellants acted as the personal guarantors on the sublease. (6RT 2220, 2227; 8RT 2857.)

Before Ivy Academia received any public funds, appellants provided the charter school with a start-up loan from their personal funds. This loan was initially represented in the amount of $250,000, but appellant Selivanov later claimed that the amount was actually $464,000, which he then adjusted to $397,007.58 with interest at the rate of nine percent. The amount was never accurately reflected on any audited financial statement. Under the terms of the start-up loan, Ivy Academia owed this sum to AJFK and then EGEN following the name change. (7RT 2435-2437, 2486; 8RT 2803; 9RT 3036, 3100; 10RT 3343.) On October 19, 2004, Ivy Academia made an online transfer of $300,000 to AJFK. (7RT 2438-2439; 9RT 3039.) No repayments of the loan were correctly stated on any audited financial statement. (10RT 3343.)

In September 2004, Ivy Academia began receiving public funds from the state. Ivy Academia applied for a $250,000 loan from the state to start the school, and received the loan on September 9, 2004. Ivy Academia was required to pay this amount back to the state, and the loan only had an interest rate of two percent. (4RT 1539-1541, 1545; 9RT 3035.) From September 2004 through 2010, Ivy Academia also received a total of $25 million in public funds. (4RT 1545; 9RT 3033.) The school never received a performance rating lower than proficient. (4RT 1632.)

2. The Operation of Ivy Academia[2]

As president, appellant Berkovich was in charge of the school's educational programs, public relations, and fundraising. She was not responsible for the school's finances. (5RT 1955-1958.) She helped create the school's curriculum and worked with the teachers on their development. (6RT 2123.) She also purchased supplies for the classrooms. (6RT 2124.)

Marina Pilyavskaya[3] was the bookkeeper at Ivy Academia since September 1, 2004. (5RT 1814.) Pilyavskaya reported to appellant Selivanov, and used a software program called QuickBooks to aid her with the bookkeeping. (5RT 1818-1820.) The labels for the different accounts on QuickBooks were already set up when she started, and every school computer had access to the server on which QuickBooks was maintained. (5RT 1845-1849.) Appellant Selivanov had access to QuickBooks. And QuickBooks was then turned over to accountants for tax and audit purposes. (5RT 1848-1850.)

Appellants each had an American Express ("AMEX") credit card in the name of Ivy Academia. (5RT 1851-1852.) Pilyavskaya would request the receipts relating to charges on the credit cards from appellants. She then would attach the receipts to expense reports and turn them over to the school's board for approval. (5RT 1853.) Sometimes appellant Berkovich would write "mine" or "personal" on a receipt to indicate that a purchase was not for business purposes. (5RT 1969-1971.)

In the first year of Ivy Academia's operation, appellants did not take a salary because the school did not have enough money to pay them. (5RT 1943.) An account entitled, "Due to Management," was used to track the

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[2] Ivy Academia's board members exercised their right not to incriminate themselves and did not testify under the Fifth Amendment. (6RT 2102-2117.)

[3] Pilyavskaya received immunity from prosecution. (5RT 1815.)

deferred compensation, including interest. (5RT 1945.) Initially, $180,000 were owed to appellant. This amount increased to $230,000 based on bonuses and interest, and was approved by the board members. (7RT 2484-2486; 9RT 3034, 3334-3336.) Appellants were also paid salaries in 2006 and 2007, and requested salary increases, which the board approved. (9RT 3040-3043.) By 2011, appellants received the amount in full. (7RT 2488-2493; 9RT 3045.) Also in the early years of Ivy Academia, appellants both loaned money to the school and personally guaranteed loans and leases. (5RT 1917-1918.)

Appellants asked their friend, Alex Kauffman,[4] to serve as the president of Alternative's board, which was the same as the board for Ivy Academia. (13RT 4276, 4278.) He was never an officer of AJFK or EGEN and did not know any details about the Ivy Support Fund or EGEN. (13RT 4299-4300.) Kauffman testified that he never reviewed any of Ivy Academia's accounting records or the tax returns for Alternative. (13RT 4313-4314, 4352.) He, along with the rest of the board members, nevertheless, approved appellants' compensation. (13RT 4321-4324.)

3. The improper AMEX charges

As of December 22, 2006, the categories Pilyavskaya had available to her on QuickBooks for business expenses were "teacher appreciation" and "business meetings." The following month, an auditor assisted Ivy Academia with putting more detailed categories in QuickBooks and providing a different process for the approval of AMEX charges, after the auditor raised concerns about previously approved charges.[5] (5RT 1925-1926.) Appellant Selivanov attempted to remove a written statement of the

[4] The prior testimony of Kauffman from the preliminary hearing in 2011, was read into the record. (13RT 4273.)

[5] The audit was done by an accounting firm, which appellants paid $80,000 of public funds for its services. (9RT 3091.)

concerns from a 2006 audited financial report. His efforts proved unsuccessful, and the report indicated that some of the charges lacked an adequate explanation, were missing supporting invoices, were not authorized, and appeared to be of a personal nature. (8RT 2780.)

Connie Delos Santos, a forensic accountant, analyzed the AMEX charges when she worked as a financial analyst for the Los Angeles Unified School District.[6] (9RT 3022.) Delos Santos testified that gifts could not be made to teachers from public funds. (11RT 3655.) She further testified that public funds could only be spent for school purposes, which included teacher appreciation if a professional development purpose was specifically delineated. (11RT 3660, 3733.) The public funds could not benefit an individual, and even unrestricted grant funds could only be used to benefit the students and school directly. (12RT 3945.)

Examples of the improper AMEX charges that raised concerns included, a contribution to the Jewish Home for the Aging to "support our residents" rather than for networking, a Speedo brand swimsuit, which was listed as a school supply, razors, which were listed as holiday prizes and school supplies, dinner at Jerry's Famous Deli, which included the purchase of two children's meals and was listed as a business meeting, gift cards, and other after-hours meals, such as a dinner at TGI Friday's with alcohol purchases, which was listed as a teacher's appreciation lunch. (5RT 1859-1873; 6RT 2171, 2175-2177; 11RT 3734-3735.) In general many meals, purchases, and outings paid for by public funds appeared to be of a personal nature based on their occurring outside of business hours and documented as professional development, dues and subscriptions, office supplies,

[6] Delos Santos admitted she made some mistakes when she concluded which charges were or were not permitted. (11RT 3697, 2701, 3723.)

business meetings, conference and conference transportation, teacher appreciation, and other utilities and housekeeping. (9RT 3069-3086.)[7] The improper charges totaled $34,445.42 over a period of four to five years, and appellants never reduced any amounts owed to them by Ivy Academia when Ivy Academia paid for them. Appellants never reported these charges on their tax returns. (8RT 2750; 9RT 3067; 20RT 6351.)

Pilyavskaya claimed that if appellants realized they used the Ivy Academia AMEX credit cards for a personal item, they would reimburse the school. (6RT 2187; 8RT 2798.) But Christina Desiderio, the assistant principal and principal of the school from 2004 through 2006, painted a different picture. (8RT 2818.)

According to Desiderio, appellant Berkovich took her out to lunch once or twice per month, and they were not working during every lunch. (8RT 2822, 2844.) During one of these lunches, appellant Berkovich stated that she had an Ivy Academia AMEX card that could be used for unlimited expenditures. (8RT 2821.) In addition, appellants spoke with Desiderio about opening additional charter schools from which they could all become millionaires. (8RT 2823.) Appellant Berkovich stated that she and Desiderio could get manicures and pedicures together because they would have so much money. (8RT 2824.) Desiderio also recalled that appellant Berkovich gave her gift cards and jewelry. (8RT 2824-2825.) And appellants did not limit the use of the credit card to purchases for Desiderio. They also took the school's staff out to meals at which they allowed and paid for the purchase of alcohol. (8RT 2825-2826.)

Knarik Balasanyan, a former teacher at Ivy Academia from 2005 through 2007, confirmed these meals and gifts paid for by appellants. She

[7] Delos Santos provided a detailed account of the improper charges. (9RT 3070-3086, 3123-3156.)

added that appellants paid for a social outing at a bowling alley for the staff and their spouses. (8RT 2846-2853.)

Kauffman testified that he did not even know appellants had the AMEX cards. More importantly, he could not recall any discussion of the expenditures at issue. (13RT 4358.) He did not review any audited financial report setting forth the concerns about the expenditures. (13RT 4367.)

4. The rent increase on the De Soto property

On June 15, 2004, AJFK, the private business of appellants, entered into an assignment of its sublease on the De Soto Property with Alternative, the parent of Ivy Academia, subject to which Alternative became responsible for making the monthly rent payments due to Amoroso. (6RT 2224-2226; 7RT 2408.) The assignment became effective September 1, 2004, and appellant Selivanov signed on behalf of AJFK while Kaufman signed for Alternative. (7RT 2409-2410.) Amoroso had no knowledge of the assignment, which was not permitted without Amoroso's approval under the original lease. (8RT 2859, 2867.)

About three years later, the parties entered into another agreement whereby appellants then raised the rent from $18,390 to $43,870.05, despite the fact that the $18,390 figure was the appropriate valuation. (6RT 2230-2231, 2233; 7RT 2410-2411; 8RT 2866.) In fact, under the original lease with Amoroso, the rent could not be increased by more that five percent per year. (8RT 2872.)

Appellants did not bring the rent increase to Alternative's board for approval until October 2008, but the board not only approved the increase, but also approved making the increase effective July 1, 2007. (6RT 2230, 2233.) The increase and approval were despite the fact that the monthly rent of $18,390 was good until June 2014, and the fact that Kauffman claimed he never saw the lease and had no idea what risk appellants

allegedly took as guarantors of the lease that would have supported the rent increase. (7RT 2405, 2408; 13RT 4325-4326, 4344, 4350-4351.) As such, Ivy Academia should have never had to pay an increased amount. (8RT 2811.) In total, the net amount of increased rent from July 2007 through June 2008 was $237,522.19. And this amount was due to AJFK, and later to EGEN after AJFK changed its name. (7RT 2416.)

Absent the rent increase, EGEN would have actually owed money to Alternative as Ivy Academia. (7RT 2417.) But the $237,522.19 was added to the accounting records as additional money Alternative owed to EGEN. (7RT 2420.) As of January 18, 2006, Ivy Academia no longer owed money to EGEN, yet EGEN took a total of $23,000 via checks paid to it by Ivy Academia and endorsed by appellant Selivanov between late 2008 and early 2009. (7RT 2421-2425; 9RT 3324.) Appellant Selivanov endorsed another set of checks for a total of $43,795.96 as well. (7RT 2422, 2430, 2441, 2456-2477.) He supported the payments by inflating the amount of the start-up loan for Ivy Academia. (9RT 3100-3109.) As such payments continued from Ivy Academia to EGEN in excess of the loan liability. (11RT 3764.)

James Balbin, a certified public accountant, testified as an expert that the rent increase was the result of a sham transaction. His use of the term "sham transaction" was based upon his conclusion that no sound basis existed for the increased rent payment. (14RT 4538-4541.) Balbin characterized the rent increase as absurd and explained that it priced the risk taken on by appellants as personal guarantors at an amount higher than the actual amount at risk. (14RT 4541.) The fact that appellants were personally guaranteeing the rent and could have to pay to have any leasehold improvements removed, if Amoroso requested same, did not change Balbin's opinion. (14RT 4560-4561.) Not only was there no reason to increase the rent given that its original amount was locked in

through 2014, but also, imbedded in the use of public funds in a transaction is that the public entity is receiving a fair and reasonable amount for the transaction. But the assignment of the lease made it possible to remove Amoroso as an independent lessor that would ensure a fair market value for rent. (13RT 4542.)

5. The $520,000 loan from Western Commercial Bank

Appellants secured a $520,000 loan from Western Commercial Bank ("WCB") for the purpose of remodeling the De Soto Property. (5RT 1901-1902, 1904; 7RT 2503.) Carl Raggio, the CEO of WCB approved the loan. Incidentally, he later became the executive director of Ivy Academia. (7RT 2522.)

On July 1, 2007, AJFK and Ivy Academia entered into what was called an "Asset Sale," which referred to the leasehold improvements or remodeling of the De Soto Property. These assets, however, were never actually sold, and under the terms of the lease with Amoroso could not be transferred because they stayed with the property. (5RT 1946; 8RT 2867; 9RT 3328; 13RT 4543-4545.) Under the agreement, Ivy Academia transferred the $520,000 of leasehold improvements to AJFK. In exchange, AJFK agreed to assume the WCB loan. In other words, $520,000 worth of assets were removed from the accounting records of Ivy Academia, and the loan in the same amount was removed as a liability too. As noted above, the rent increase occurred at the same time and in conjunction with the Asset Sale, but they were separate transactions. The increase in rent was not in exchange for the assumption of the loan. (7RT 2503, 2526; 8RT 2788; 14RT 4545, 4554.) Subject to the Asset Sale, Ivy Academia made payments to WCB on the loan despite the loan no longer being in Ivy Academia's name. These payments were recorded as rent payments for the facility. AJFK, now operating as EGEN, however, should have been

making the payments. (5RT 1948; 7RT 2510-2511, 2524; 8RT 2793; 14RT 4545.) Kauffman testified that the board approved the above agreement without understanding the precise nature of it and reviewing it to see if it was even legal. (13RT 4333.)

Jennifer Irrizary, a former employee of WCB, was suspicious of the above-described transfer. According to Irrizary, the loan was restructured to change the borrowing entity to AJFK after appellants indicated that they needed an additional write-off. (8RT 2883-2884.) The restructuring was unusual to Irrizary because the loan was originally to be paid from state funds, yet was now in the name of a private entity. (8RT 2886-2887.) Furthermore, Raggio approved the restructuring only after an atypical short form renewal was prepared that included little financial analysis and no attached financial statements. (8RT 2885-2890.) Irrizary explained that appellants stated the collateral for the loan was the rent increase. (8RT 2887.) And although EGEN should have been making the payments on the loan following the transfer, Irrizary testified that Ivy Academia would pay the increased rent to EGEN from which EGEN would then use $25,000 to pay the loan. Irrizary was concerned that a non-profit was giving public funds to a for profit company, so that the for profit could pay its loan. (8RT 2891-2892, 2894.)

Delos Santos elaborated on the issues Irrizary raised. According to Delos Santos, the payments Ivy Academia continued to make on the WCB loan were recorded by EGEN as being for the rent increase. And any outstanding amount was recorded as money Ivy Academia owed to EGEN. (12RT 3915-3917.) Delos Santos concluded that this accounting method, as well as Ivy Academia's paying the WCB loan after the Asset Sale, was inappropriate. (12RT 3919, 3922.)

6. The Improper Tax Returns

Despite the fact that appellant Selivanov claimed no QuickBooks records were maintained for EGEN, Delos Santos was able to account for tax issues that arose for EGEN and AJFK, Ivy Academia, and appellants personally. (10RT 3374.) In addition to the improper AMEX charges that appellants never reported on their personal tax returns, they also failed to report $1,525 of income in 2007. (10RT 3344; 11RT 3764.) And as a result of flow-through tax treatment with EGEN and AJFK, appellants were able to report additional losses from the entities, including a deduction for the depreciation of leasehold improvements and the WCB loan, and even double-booked the same deductions for EGEN and Ivy Academia. (9RT 3159; 10RT 3367, 3391-3392.)

Special Agent Rigoberto Salazar of the State of California Franchise Tax Board elaborated on the tax issues based on his investigation. (12RT 3969, 3970, 3972.) Salazar confirmed that appellants failed to report improper AMEX charges as income on their personal tax returns. (12RT 3974, 3979, 3981, 3999-4000, 4050-4054; 13RT 4208-4209.) These charges, along with any other misappropriated funds had to be reported as other income. (13RT 4209.) He further confirmed that improper deductions on the EGEN and AJFK returns flowed through to appellants' personal tax returns. (12RT 3991, 3999-4000.) In other words the improper deductions decreased the tax liability of not only EGEN and AJFK, but also appellants. (12RT 4072, 4083-4089; 13RT 4203-4205.) He detailed the improper deductions such as amounts listed as school supplies and rent expenses, deductions for the same items on both the AJFK and Ivy Academia returns, and an amount for the depreciation of the leasehold improvements. (12RT 3974-4002, 4036, 4041, 4050-4054; 13RT 4241-4242; 14RT 4546.) Salazar highlighted some key items, such as: (a)

$43,795.96, which Ivy Academia paid EGEN in excess of any loan liability, yet EGEN failed to report in 2007; (b) $932,715 in income, which EGEN incorrectly overstated by $300,000 by failing to report the loan repayment in the same amount by Ivy Academia in 2004; and (c) $246,220 in deductions on the 2004 EGEN tax return, which were also recorded as an expense of Ivy Academia the same year. (13RT 4242-4248.) Salazar also explained that appellants improperly reported their deferred salary payments on the tax returns for EGEN because they should have only reported them on their personal tax returns. (12RT 4037-4040.)

B. The Defense Evidence

1. The operations of a charter school

Caprice Young founded and ran the California Charter Schools Association. She also was a member and president of the board of the Los Angeles Unified School District and ran a charter school. (14RT 4646-4647.) Young explained that charter schools were permitted to spend public funds in different ways from traditional public schools. (14RT 4651.) Yet charter schools were required to comply with federal funding rules and requirements, state rules regarding charter schools, and policies and rules codified in their charters. Otherwise, charter schools were not required to apply rules that applied to other public schools with the exception of those relating to health and safety. (14RT 4653.) But if a charter school raised money for its students, it was required to spend the money for that purpose. (14RT 4656.) Young, however, testified that the expenditure of general fund dollars given to charter schools was not governed by the reasonable, necessary, allocable, and allowable standard. Instead, the main standard relating to charter school spending was the "LA Times Standard," which required that the money be spent on behalf of the students or that the money contributed to being able to serve students more

effectively. (14RT 4657.) With this standard in mind, a director of a charter school, nevertheless, had discretion regarding spending, and the charter school's board's role was to set policies for the director to follow. (14RT 4659.) The discretion was not without limitations, and the money always had to be spent on the students and in the interest of the school. (14RT 4676.) Moreover, the school's operators had a fiduciary duty to safeguard the public funds. (14RT 4677.)

Under the above guidelines, public funds could be spent on teacher appreciation, and such expenditures were important to motivate and support faculty. Examples of permissible expenditures for appreciation were team building at a bowling party and gift cards. (14RT 4659-4660.) In addition, public funds could be spent on business meals, if the meal was related to running the charter school or cultivating a relationship with a potential donor. (14RT 4660.) But Young would not support funds being used to pay for alcohol. (14RT 4687.) Expenditures were permitted on marketing expenses, and such expenditures were necessary to interest families in sending their children to the school. (14RT 4661.) Similarly, public funds could be used to pay for membership fees to help the school become more visible in the community. (14RT 4662.)

With respect to a charter school's lease of property, Young explained that it was difficult for the school to obtain a lease. In agreeing to a lease, the rent amount was required to be equal to fair market value or a lesser figure. (14RT 4664-4665.)

Eric Premack, the executive director of the Charter Schools Development Center, a non-profit that supported charter schools, provided additional details regarding how charter schools used public funds. According to Premack, a school could receive two types of public funds, categorical block grant funds and general purpose funds. The categorical block grant funds were based on the number of students attending the

school that came with no strings attached to spending. (15RT 4962.) The general purpose funding were restricted to being used for the support of the general operations of the school. (15RT 4963, 4965.) The school's board of directors determined the precise way to spend the funds, and was required to use its best judgment to spend the money in the best interest of the school and for educational programs, even for block grant funds. (15RT 4962, 4966.) The board was governed by the school's charter and California's prohibition against gifting or giving away public funds. (15RT 4975.)

Based on the above guidelines, business meals could be an appropriate expenditure if they helped the school achieve its goals. (15RT 4967.) So too could teacher appreciation events, gifts, and marketing. (15RT 4968-4970.)

Roger Lowenstein, the founder and director of his own charter school, explained how his school used public funds. (16RT 5178.) Consistent with Young's and Premack's testimony, Lowenstein stated that he used public funds to join organizations for networking, to hold professional development events at restaurants, to purchase gift cards and meals for teachers to show appreciation, and sometimes to purchase alcohol at events. (16RT 5182-5185, 5198.) Lowenstein, however, admitted that he was a lobbyist for charter schools, and said during a break in the trial that he could have used the money California spent to prosecute appellants to start two more schools, and that, "It is not as if they stole $2 million and went to Fiji." (16RT 5204.)

2. The operation of Ivy Academia

Because Young had experience with charter schools, appellants sought advice from her when they opened Ivy Academia.[8] Young also advised the board of Ivy Academia. (14RT 4665.) But she had no knowledge of any of Ivy Academia's actual operations. (14RT 4676-4677.)

Peter Misseijer, a former coordinator for the Charter School Division of the Los Angeles School District, personally visited Ivy Academia many times as part of his responsibility to oversee charter schools.[9] (14RT 4689-4690, 4695.) As part of a team of reviewers, Misseijer mostly focused on the school's governance and academics. He noted that Ivy Academia received good scores on its performance evaluations, including ones indicating the school's board maintained active and effective control and adhered to the school's charter. (14RT 4697, 4701-4704, 4706-4707, 4709-4711.) The school also received good scores for its professional development, which Misseijer understood to refer to formal teacher training. (14RT 4707; 15RT 4807.) And Ivy Academia always had a waiting list for students wishing to attend the school, which caused Ivy Academia to institute a lottery system for enrollment. (14RT 4716.)

Jennifer Zillix-Deras was an employee at AJFK and Ivy Academia. She handled public relations, collected tuition and ran the front office. (14RT 4627-4628.) The first year that Ivy Academia was in operation was quite chaotic. Appellant Berkovich handled everything relating to public relations, students, and teachers. (14RT 4629-4630.) She worked on a tight budget and was conservative with the charter school's funds. (14RT

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[8] Young admitted she was Facebook friends with both appellants. (14RT 4678.)

[9] Misseijer was also Facebook friends with appellants. (15RT 4812.)

4631.) Appellant Berkovich was honest and hard working. (14RT 4633.) Appellant Selivanov handled all of the school's financial matters. (14RT 4638.) Zillix-Deras considered both appellants to be her friends. (14RT 4642.)

Zillix-Deras was employed at Ivy Academia for less than one year. (14RT 4644.) In that time, she never attended any bowling events, Christmas parties, or staff dinners relating to the school. (14RT 4639-4640.) She also was not privy to any of the school's financial records. (14RT 4640.)

Like Zillix-Deras, Carrie Murray was employed at Ivy Academia. (15RT 4850.) As a teacher, she explained that at the beginning of every school year, each teacher received $100 to start up her class and purchase supplies. Every month thereafter, teachers received an additional $30 to use for classroom needs. (15RT 4850, 4853.) To seek reimbursement for classroom purchases, a teacher would submit an expense report documenting the purchase. (15RT 4854.) Some specific items that Murray bought for her class were pizzas to use boxes for science experiments, and food ingredients to cook S'mores and quesadillas in the same experiment. (15RT 4855-4856.) Murray also recalled that appellant Berkovich purchased supplies, such as potatoes for science experiments and apples and corn for a harvest festival. (15RT 4857.) And these supplies were not only needed for the classroom, but also for an educational program at Ivy Academia called Ivy Community, during which the students would operate their own businesses. (15RT 4879; 16RT 5240, 5243, 5252, 5254.) Purchases were made for the end of the year silent auction at the school, at which the students could receive items like sticker books or games. (15RT 4882-4883.)

Murray was privy to professional development, team building, and teacher appreciation at Ivy Academia. Appellant Berkovich organized all

of these events. Some of the events were a mystery party in 2004, a dinner at Stonefire Grille in 2006, and a dinner at TGI Friday's in 2006. (15RT 4884.) These events, as well as gifts, made Murray feel appreciated as a teacher. (15RT 4886.) In addition to these events, teachers could receive end-of-year bonuses if their students excelled. (15RT 4889.) But Murray admitted she would have performed equally well as a teacher without the gifts and meals. (15RT 4909.)

Kimberly Hasserjian negotiated textbook purchases for Ivy Academia and ordered the books. (16RT 5124-5125.) Along with appellants, she attempted to get the best deals on the books. (16RT 5124, 5126.)

Rene Harvey was employed by Ivy Academia as the administrator in charge of the early childhood program and the director of special education. (16RT 5144.) In this capacity, she participated in professional development and concurred with Murray and Zillix-Deras regarding the importance of teacher appreciation and team building events. (16RT 5148-5151.) Harvey also participated in meetings Ivy Academia had with the Los Angeles Unified School District. At one, the Los Angeles Unified School District stated that it frowned upon serving alcohol at charter school teacher appreciation events. Following the meeting, Ivy Academia never served alcohol or paid for alcohol at an event again. (16RT 5155-5156.)

Appellants once employed Ira Schreck to counsel them regarding fund-raising at a non-profit. (15RT 4864-4865.) Ivy Academia had a goal of raising $500,000 for capital improvements, and Schreck helped organize a campaign to raise the money. (15RT 4865.) Parents of students at the school volunteered to help. (15RT 4866.) The Jewish Home for the Aging, which Ivy Academia contributed money to, later employed Schreck. (15RT 4866, 4869.) Schreck explained that people placed ads in the organizations directories and paid to be members of a group called the executives to network and be part of the community. (15RT 4868, 4877.) The Jewish

Home for the Aging, however, never wrote a check to Ivy Academia in support of the school's fund raising. (15RT 4877.)

Another organization Ivy Academia gave money to was the Los Angeles chapter of the Entrepreneurs Organization, which helped its members develop business. Appellant Berkovich was a member of the organization. (16RT 5214-5217.)

3. Expert review of Ivy Academia's operations

Gregory Moser, an attorney who practiced municipal law and advised charter schools and school districts, reviewed Ivy Academia's charter petition and the articles of incorporation and bylaws for Alternative. (17RT 5440-5441, 5443.) Moser concluded that the bylaws did not state that public funds could not be spent on teacher appreciation and business meals relating to a school purpose. They also did not prohibit expenditures for community support, networking, and marketing. (17RT 5447, 5449.) In general, the funds could be used for any purpose consistent with the management, operation, guidance, direction, and promotion of the charter school. (17RT 5449.) Although the board of directors had a fiduciary responsibility to oversee the school's operation, it was not required to approve every expenditure. (17RT 5450.) And it was typical for the approval to be delegated to the person signing the checks. (17RT 5451.) Regardless of whose responsibility the oversight was, the board had the duty to safeguard the public funds. (17RT 5461.)

Certified Public Accountant Jan Goren was retained and paid $215,000 to review the criminal charges against appellants. In doing so, he reviewed the QuickBooks for EGEN and Ivy Academia, as well as documentation prepared by independent auditors. (17RT 5475-5479.) Goren concluded that none of the transfers from Ivy Academia to EGEN and AJFK that the prosecution alleged were improper were inappropriate because appellants were owed about $230,000. (17RT 5483-5502.) He

further concluded that the rent increase was justified and neither the increase nor Asset Sale were part of any sham transaction. The lease payments and loan payments were not separate under the Asset Sale, as such, payments made by Ivy Academia to WCB were not improper. (17RT 5513-5515, 5518-5519; 18RT 5768, 5774.) Goren, however, admitted there may have been some issues with appellants' personal tax returns and EGEN's tax returns. (17RT 5529-5330, 5540-5544.)

Robert Gutzman, a real estate appraiser, was retained to appraise the De Soto Property for the period of July 1, 2007 through October 1, 2008. (18RT 5807.) Based on his review, he appraised the rent at $46,125 in July 2007, and $47,250 in October 2008. (18RT 5813.)

C. The Prosecution Rebuttal Evidence

Balbin testified that he disagreed with figures Goren used to conduct her review of Ivy Academia's and EGEN's finances. (18RT 5831.) He added that nothing in Gutzman's testimony changed his opinion regarding the impropriety of the rent increase. (18RT 5837.)

ARGUMENT

I. SUFFICIENT EVIDENCE SUPPORTED APPELLANTS' CONVICTION FOR EMBEZZLEMENT REGARDING THE AMEX CARD CHARGES

In his first argument on appeal, appellant Selivanov contends that the prosecution presented insufficient evidence from which the jury could convict him of embezzlement in connection with his use of the Ivy Academia AMEX card. Specifically, appellant Selivanov argues that the evidence did not demonstrate fraud because it failed to show that he acted outside his authority when he used the credit card or used it for a purpose

other than it was intended. (SAOB[10] 30-33.) Appellant Berkovich joins this argument. (BAOB[11] 70-71.) The argument amounts to nothing more than an improper request that this Court reweigh the evidence. Sufficient evidence showed that appellants embezzled funds by concealing personal, non-school related, purchases on the AMEX card.

When a defendant challenges the sufficiency of the evidence on appeal, the appellate court reviews the entire record in the light most favorable to the judgment to determine if the record contains substantial evidence from which the jury could have found him guilty beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) Reversal is not warranted where a review of the evidence could "reasonably be reconciled with a finding of innocence or a lesser degree of crime . . . ." (*Id*. at p. 849.) It is not the province of an appellate court "'to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) This task is left solely to the jury. (*Ibid*.)

Appellants were convicted of violating section 504, which provides:

> Every officer of this state, or of any county, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of that officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), 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.

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[10] Respondent uses the abbreviation "SAOB" to refer to the Opening Brief of appellant Selivanov.

[11] Respondent uses the abbreviation "BAOB" to refer to the Opening Brief of appellant Berkovich.

(§ 504.) To establish embezzlement, the prosecution need not demonstrate the defendant had a specific intent to permanently deprive; the intent to defraud is sufficient. (*People v. Dolbeer* (1963) 214 Cal.App.2d 619, 624-625; see also *People v. Redondo* (1993) 19 Cal.App.4th 1428, 1433 [brief, temporary use of official vehicle in criminal activity constitutes embezzlement].) Intent to defraud exists where a person acts outside his authority in the use of the property. (*People v. Sisuphan* (2010) 181 Cal.App.4th 800, 814.) It also exists where a person knowingly and intentionally uses the money or property for his own person. (*See People v. Talbot* (1934) 220 Cal. 3.) "It is well established that intent to defraud may be inferred from the circumstances surrounding the transaction in question." (*People v. Eddington* (1962) 201 Cal.App.2d 574, 579.)

Here, the jury could find beyond a reasonable doubt that appellants had the requisite intent to defraud based on their repeated efforts to disguise personal purchases as school-related ones. Before the jury was testimony that public funds could be used for staff and faculty meals, if, and only if, the person using the funds demonstrated that the meals served an educational need or necessity. (4RT 1548-1549.) The jury also learned that public funds could not be used for social events like bowling, birthdays, and sporting events, for purchasing alcohol, for buying gifts, and for making charitable donations. (4RT 1550, 1680, 1682-1683.) Despite these restrictions, the evidence showed that appellants explained items like a single Speedo bathing suit, razors, and shrimp scampi as school supplies (5RT 1861, 1871), after school hour meals that included alcohol as business meetings or teacher appreciation lunches (5RT 1865-1869), and dinners at which children's meals were purchased as business meetings (5RT 1873). And the credit card was used to pay for a dinner at the Jewish Home for the Aging, yet reported as an advertising expense. (6RT 2152.) These are just some of the many improper purchases on the AMEX card (see also 8RT

2824-2826, 2848-2853; Peo. Exh. 17), which were so egregious that an audit report documenting Ivy Academia's 2006 finances expressly stated concerns about how the card was being used. (8RT 2770-2780.) Appellant Selivanov fought to remove these concerns from the report in an obvious attempt to further his concealment of his inappropriate use of the credit card. (8RT 2780.) He also introduced additional categories for expenses on QuickBooks after the report, which coincided with a resultant reduction in the misclassification of receipts from credit card purchases. (11RT 3612.) These efforts, coupled with appellants' additional efforts to conceal the personal purchases by recording them under various business-related categories in QuickBooks was sufficient in and of itself to show that they possessed the requisite fraudulent intent to support embezzlement.

Appellant Selivanov makes much of the fact that Pilyavskaya would give the submitted receipts and expense reports to the board for approval. (5RT 1853.) That a board, consisting of members such as Kauffman, approved the expenses hardly provided credible evidence from which the jury would reject the prosecution's evidence of fraudulent intent. Indeed, Kauffman flatly admitted he never read the audit report discussing the AMEX concerns, appellants never discussed the findings of the report, he did not recall the board ever discussing AMEX expenditures, he did not know appellants had the AMEX cards, and he never reviewed Ivy Academia's accounting books or records. (13RT 4351, 4358, 4367.) Given that Kauffman was the only board member who testified, he painted the only picture of a willfully ignorant, rubber-stamping, board for the jury to consider. The jury, thus, was permitted to accept the prosecution's evidence, and reject any evidence to the contrary. In fact, that was the jury's precise role at trial, and it is not this Court's province to usurp that role on appeal. As such, this Court should reject appellants' challenge to the sufficiency of the evidence supporting their embezzlement convictions.

II. SUFFICIENT EVIDENCE SUPPORTED APPELLANT SELIVANOV'S CONVICTIONS ON COUNTS 8, 19, 22, 23, 25, AND 26, BECAUSE THE RECORD SHOWED THAT THE MONEY AT ISSUE IN THE COUNTS DID NOT BELONG TO HIM

In his second argument on appeal, appellant Selivanov contends that insufficient evidence supported his convictions on counts 8, 19, 22, 23, 25, and 26. The basis for his challenge to all of the counts is that the prosecution failed to present sufficient evidence from which the jury could conclude that he took any charter school funds when he was repaid for the start-up loan appellants gave the school. In other words, any funds the school transferred to him were his own because the school owed him money. (SAOB 34-48.) This argument, like the previous one, amounts to nothing more than an inappropriate request that this Court reweigh the evidence.

Regarding count 8, appellant claims that rent payments totaling $23,000 could not support his conviction because he was owed that money by Ivy Academia. (SAOB 37.) The prosecution presented sufficient evidence from which the jury could find beyond a reasonable doubt that he was not legally owed that money. Balbin supplied his expert opinion that the rent increase, which generated the $23,000 pay out from Ivy Academia to appellant Selivanov, was a complete sham transaction. (14RT 4541.) Balbin explained that the increase was absurd and against the policy embedded in the receipt of public funds that the recipient secure a fair and reasonable figure for a transaction. (14RT 4542.) Contrary to this policy, appellant Selivanov used a scheme through the assignment of the AJFK lease with Amoroso, to circumvent the rent of $18,390, which was locked in for a period of ten years until 2014. (5RT 2216-2224; 14RT 4542.) Not surprisingly, this assignment was easily accomplished given that appellant Selivanov signed off on it for AJFK, and Kauffman, who as discussed above was a completely ignorant board member at best, signed for Ivy

Academia. (7RT 2410.) In fact, Amoroso did not even know about the assignment even though his approval was required under the original lease with AJFK. (8RT 2859-2860, 2867.) Moreover, Amoroso concurred that the increased rent amount was not only an improper valuation, but also against the permitted annual rent increase in the original lease. (8RT 2866, 2872.)

Appellant Selivanov did not stop there. He also made certain the rent increase would be given retroactive effect to July 2007, about a year before he even brought the increase to the board's attention for its approval. (5RT 2233.) He then recorded the unlawful rent as a liability for Ivy Academia from which his private business, AJFK and then EGEN, could draw from to the sum of $23,000. (Peo. Exh. 29; 5RT 2224-2226; 7RT 2418-2419; 22RT 10525-10526.) And as testified to by Atkinson, appellant Selivanov transferred this sum to his private company despite the fact that Ivy Academia did not owe it to him. (7RT 2418-2419, 2241-2242.) As such, appellant Selivanov is incorrect in his argument that the evidence failed to show the money did not belong to him. His argument, instead, is that this Court should reweigh the evidence and then accept the evidence the defense presented over that of the prosecution. Obviously, this request disregards the clear standard of review on appeal, and this Court should reject this claim as to count 8.

Appellant Selivanov's arguments as to counts 19, 22, 23, 25, and 26 are equally flawed. Count 19 refers to $25,000 transferred from Ivy Academia to appellant Selivanov's private company on August 21, 2007. (20RT 6364.) Counts 22 and 23 refer to $20,000 transferred from Ivy Academia to appellant Selivanov's private company on November 19, 2007. And counts 25 and 26 refer to another $20,000 transferred from Ivy Academia to appellant Selivanov's private company on December 14, 2007. (20RT 6365.) As discussed below, the prosecution presented

sufficient evidence to show that appellant Selivanov engaged in fraud to try to establish he was owed these amounts, but he was not actually owed any of them.

With respect to the $25,000 at issue in count 19, Atkinson testified that Ivy Academia no longer owed EGEN money as of August 1, 2007. Appellant Selivanov, however, issued a check for $25,000 from Ivy Academia to EGEN late that month. (7RT 2440-2446, 2461.) Atkinson, thus, concluded that this transfer of money was improper because it was not owed to EGEN and, resultantly, also not owed to appellant Selivanov. (7RT 2443.) This evidence, thus, was sufficient to support the embezzlement charge because appellant Selivanov could not claim the money belonged to him. That Goren or any other defense witness disagreed with Atkinson's conclusions on this amount or the others detailed below (see e.g., 17RT 5483), is irrelevant because the jury was permitted to give more credibility to Atkinson's testimony, which it obviously did.

Turning to the November 19, 2007 transfer of $20,000, Atkinson similarly testified that appellant Selivanov transferred this amount from Ivy Academia to EGEN after Ivy Academia no longer owed EGEN money. (7RT 2462, 2465.) It is important to note that without making this transfer, appellant Selivanov would not have had enough money in the EGEN account to make the subsequent transfer of about $7,000 from EGEN to himself. He then used this amount to pay his personal credit card bill. (7RT 2467-2468, 2470-2471.) This evidence, therefore, sufficed to show that the money did not belong to him when he took it from Ivy Academia.

Finally, the December 14, 2007 transfer of $20,000 is no different from the others set forth above. Again, Atkinson testified that appellant Selivanov signed a check from Ivy Academia to EGEN after Ivy Academia no longer owed money to EGEN. (7RT 2473-2476.) Absent this improper transfer, EGEN would not have had enough money for him to issue a check

for $8,000 to Mark Shinder, which consequently was the precise amount Shinder issued a check for to appellant Selivanov shortly thereafter. (7RT 2477.) In sum, this $20,000, like the other amounts discussed above, were not owed to appellant Selivanov or his private company based on the evidence the prosecution presented through Atkinson. Appellant's efforts to diminish the quality of this evidence amount to nothing more than a request to reweigh the evidence, which this Court should not entertain.

III. SUFFICIENT EVIDENCE SUPPORTED APPELLANT SELIVANOV'S CONVICTION ON COUNT 40 BECAUSE THE RECORD SHOWED THAT IVY ACADEMIA SHOULD NOT HAVE MADE ANY PAYMENTS TO WCB AFTER THE ASSET SALE

In his third argument on appeal, appellant Selivanov contends that the prosecution presented insufficient evidence to support his conviction for embezzlement in count 40. He specifically asserts that the evidence failed to show that the payments Ivy Academia made to WCB were improper. As such, according to appellant Selivanov, these funds could not serve as the property for an embezzlement conviction. (SAOB 39-45.) Much like appellant Selivanov's previous challenges to the sufficiency of the evidence, this challenge to amounts to nothing more than an inappropriate request to this Court to reweigh the evidence.

At issue in count 40 were payments between May 1, 2009 and May 10, 2010, that Ivy Academia made to WCB on the $520,000 loan. (20RT 6372.) In support of this argument, appellant Selivanov carefully excises portions of Atkinson's testimony while noticeably omitting those portions that refute it. (SAOB 41-43.) Absent from his account of the record is Atkinson's testimony that under no circumstances could the Asset Sale and rent increase be considered a single agreement. Instead, they were separate transactions, and Atkinson explained EGEN was responsible for the WCB loan payments because as a result of the Asset Sale, Ivy Academia transferred the loan to EGEN. (7RT 2509-2511, 8RT 2785-2793.) Delos

Santos and Balbin concurred with Atkinson, but appellant Selivanov conveniently ignores this evidence too. (12RT 3919, 3922; 14RT 4545-4546, 4554.)

Appellant Selivanov, nevertheless, contends that the payments Ivy Academia made to WCB could not be the subject of an embezzlement conviction because the funds were the result of a lease contract between EGEN and Ivy Academia, with no agent or trustee relationship existing. (SAOB 40-44.) This argument has no merit because appellant Selivanov owed a fiduciary duty to Ivy Academia and, yet, entered Ivy Academia into the inappropriate lease to benefit his own private company EGEN. That EGEN and Ivy Academia were the parties to the lease agreement did not absolve him of fiduciary responsibilities or his role as the mastermind behind the scheme to use the Asset Sale and rent increase to cover the loan.

Given the state of the record, appellant Selivanov contends that EGEN was permitted to instruct Ivy Academia to pay money to WCB because Ivy Academia owed EGEN money based on the rent increase. (SAOB 44-45.) First, as stated above, Atkinson expressly testified that the loan and rent increase could not be lumped together to cause Ivy Academia to pay on the WCB loan after the Asset Sale. Second, as stated in Argument II, the rent increase was completely absurd and part of a sham transaction. As such, Atkinson added that Ivy Academia should have never been paying an increased rent at all. (8RT 2811.) Appellant Selivanov's position that the improper rent increase could create a debt that EGEN could cause Ivy Academia to pay directly to WCB is absolutely preposterous. His entire argument hinges on his theory that the rent increase was lawful. But the prosecution presented ample evidence, detailed above, that neither the rent increase nor Asset Sale were lawful transactions. The prosecution, therefore, presented sufficient evidence to show that appellant Selivanov should not have used Ivy Academia's money to pay the WCB loan,

regardless of if he characterized it as rent. Appellant Selivanov, therefore, has presented no portion of the record from which this Court should conclude that the express testimony of Atkinson, Delos Santos, and Balbin did not support the jury's conviction of him on count 40.

IV. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT ON A CLAIM OF RIGHT DEFENSE BECAUSE IT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In his fourth argument on appeal, appellant Selivanov contends that the trial court erred by failing to instruct the jury on a complete and accurate claim of right defense. He asserts that this Court must reverse his convictions on counts 8, 19, 22, 23, 25, 26, and 40 as a result. (SAOB 46-55.) His claim, however, is without merit because the instruction was not supported by substantial evidence in light of his extensive and sophisticated efforts to conceal the use of the money. In addition, even if it was error to omit the instruction, such error was harmless based on the overwhelming evidence supporting the convictions.

A. The Relevant Trial Court Proceedings[12]

On March 26, 2013, the court informed the parties that it did not intend to give a claim of right defense. It relied on *People v. Barnett* (1998) 17 Cal.4th 1044, and explained that the facts here did not show that appellants actually indicated they had a good faith belief they had a property right to the increased rent or AMEX charges. According to the court, a claim of right defense meant that the property at issue belonged to the defendant, which was not what occurred here. In other words, the property belonged to the defendant all along, so he was entitled to take and

[12] In the SAOB, appellant Selivanov purports to set forth the trial court proceedings regarding the claim of right defense. He, however, omitted the entire ruling by the trial court on instruction on a claim of right defense. (SAOB 46-47.)

use it as he pleased. For example, "when someone goes to collect a debt and ends up killing somebody . . . , and he says it wasn't a robbery because I was going to collect a debt, and that was a debt owed to me." (20RT 6303.)

Appellants argued that they had a good faith belief, evidenced by the transparency of their actions, that they were authorized to use the money in the manner they did. The court replied that it would instruct that, "they had a good faith belief that the money was theirs." (20RT 6304.) The court added that a claim of right defense would also be problematic because the instruction was unavailable if the defendant could not trace ownership of the property to a specific person. Here, the court did not find that the money could not be traced, but explained that appellants could not, "identify and say this money exactly is my money," as required by a claim of right defense. (20RT 6304-6306.) It rejected further arguments by appellants and found, "this money is so commingled it is so unclear this is not identifiable money that I believe you can make a claim of right for . . . ." (20RT 6307.) Appellants objected to the court's ruling. (20RT 6308.)

Following the jury trial, appellant Selivanov revisited the instructional issue in a motion for new trial. (22RT 10217-10218.) The court again rejected the claim that it was required to give a claim of right instruction as follows:

> There was not substantial evidence to support the giving of this instruction. *People v. Stewart* [(1976) 16 Cal.3d 133] is easily distinguishable, as the defendant got on the stand and said he believed he was entitled to the funds he embezzled. Had there been similar evidence in this case, I would have given the instruction.
>
> Moreover, the argument that they did this open and so forth, the Court, frankly, completely disagrees with that. Most of the activities that were undertaken here were not done openly. They were done – they misidentified the things that they bought with the credit cards. They would buy whatever they bought

> and they would call it school supplies, and it was the furthest thing from school supplies, or any of these things. And they did that over and over again. So rather than doing it openly, it was clear they were covering up, they were disguising what they were doing.
>
> And even with the issue of the rent increase, it was the same thing: they brought in the rent increase; they got that to occur from 18,000 for the rental of the school to 43,000, them being the recipient of this additional $25,000-and-something. And they brought that up to the board of directors a year later. And I'm also going to say a couple of things about the board of directors. I spent last night reading Kauffman's testimony, the one board of director who testified. And, frankly, having him on the board of directors was like having nobody on the board of directors.
>
> . . .
>
> And, frankly, [Kauffman's] loyalty was not with the public money that was coming to the school or the children. His loyalty was with [Selivanov] and Berkovich.
>
> So my point is that things were not done openly; they were done the opposite. They sought to approve the rent increase a year after it took place, and they got this rubber-stamped board to approve it, and I did not consider that to be something openly. There was no need to give good faith. There was nobody who expressed that they did anything in good faith. No one testified to that, and it would be a stretch to find that "claim of right" should be given. You needed someone to say that they had a claim of right to this, and that did not occur in this case.

(22RT 10246-10249.)

B. The Record Was Devoid of Evidence Supporting the Instruction

The trial court did not err when it declined to instruct on a claim of right defense. In general, a trial court is not required to give such an instruction unless the evidence supports an inference that the defendant acted with the subjective belief he had a lawful claim to the property at issue. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) The court is not

to weigh the credibility of the witnesses, but need not give the instruction where the supporting evidence is minimal and insubstantial. (*Ibid*.) """"Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive."""" (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) Sufficient evidence to support the claim-of-right may be supplied solely by the defendant's own testimony. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.)

Here, the trial court properly refused the claim of right instruction because substantial evidence did not show that appellant Selivanov acted with the belief that he had a lawful claim to the money at issue. Under the claim of right defense, a defendant charged with theft-related crimes does not have the requisite intent if the defendant obtained the property with a good faith belief that he had a right to the property, even if that belief is mistaken. (CALCRIM No. 1863; *Tufunga*, *supra*, 21 Cal.4th at pp. 938, 943.) As our Supreme Court explained:

> Although an intent to steal may ordinarily be inferred when one person takes the property of another, . . . proof of the existence of a state of mind incompatible with an intent to steal precludes a finding of either theft or robbery. It has long been the rule in this state and generally throughout the country that a bona fide belief, even though mistakenly held, that one has a right or claim to the property negates felonious intent. [Citations.] A belief that the property taken belongs to the taker [citations], or that he had a right to retake goods sold [citation] is sufficient to preclude felonious intent. Felonious intent exists only if the actor intends to take the property of another without believing in good faith that he has a right or claim to it.

(*People v. Butler* (1967) 65 Cal.2d 569, 573, fn. omitted, overruled on another ground in *Tufunga*, *supra*, 21 Cal.4th at p. 956.) The defense is applicable to "all theft-related charges." (*Tufunga*, *supra*, 21 Cal.4th at pp. 952-953, fn. 4; see also *People v. Williams* (2009) 176 Cal.App.4th 1521, 1526-1527; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1428.)

The record is devoid of substantial evidence from which a jury could reasonably find that appellant Selivanov had a good faith belief he had a bona fide claim of right in the actual ownership of the money he took. The claim-of-right defense is not available when a defendant tries to conceal his actions or knows they are illegal. (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1849; CALCRIM No. 1863.) As detailed above, appellant Selivanov engaged in repeated efforts to disguise personal purchases as school-related ones on the AMEX card. (4RT 1548-1550, 1680, 1682-1683; 5RT 1861, 1865-1869, 1871, 1873; 6RT 2152; 8RT 2824-2826, 2848-2853, 2770-2780; 11RT 3612; Peo. Exh. 17.) Appellant Selivanov similarly tried to conceal money he took from Ivy Academia by concocting an astronomical rent increase and Asset Sale, which included giving the rent increase retroactive effect a year after it occurred. (5RT 2216-2224, 2233, 2244-2226; 7RT 2418-2419, 2241-2242, 2509-2511; 8RT 2785-2793, 2866, 2872; 12RT 3919, 3922; 14RT 4545-4546, 4554; 14RT 4541-4542; 20RT 6372; Peo. Exh. 29.) And he created more false liabilities for Ivy Academia due to EGEN to take additional money. (7RT 2440-2446, 2461-2462, 2465, 2467-2468, 2470-2471, 2473-2477; 20RT 6364-6365.) Furthermore, as set forth above, rubber-stamped approvals from a board that was willfully ignorant, at best, hardly established a good faith belief in the right to the money. (5RT 1853; 7RT 2410 13RT 4351, 4358, 4367.)

Appellants presented no evidence that refuted the above concealment and established a good faith belief. In fact, the only statement from appellants that spoke to this issue was appellant Selivanov's added effort to conceal his conduct by trying to have concerns about the use of the AMEX card removed from an audited financial statement. (4RT 1657; 8RT 2780.) In view of all these facts, appellant Selivanov's purported belief was entirely implausible and not in good faith, and there was not substantial evidence to support the instruction.

In addition, a claim of right defense does not apply where a defendant takes chunks of money to satisfy a perceived larger debt. (See *People v. Proctor* (1959) 169 Cal.App.2d 269, 277 [when a defendant stole a check and, in essence, claimed the proceeds as "an offset against a debt due her for overtime wages," she was barred from relying on section 511 as a defense to embezzlement because that statute "does not excuse the unlawful retention of the property of another to offset or pay demands held against him"]; see also, *People v. Creath* (1995) 31 Cal.App.4th 312, 318 [reaffirming the *Proctor* rule and stating, "Under . . . section 511, a claim-of-right defense to embezzlement is not established where an employee unilaterally determines that he or she is entitled to certain wages and thereafter, without authorization, appropriates the property of the employer in purported payment of such wages"].) As such, appellants could not justify the takings by unilaterally determining they were owed a debt and appropriating funds in a variety of ways to justify same.

Even if this Court finds that the trial court erred by failing to give the claim of right instruction, such error was harmless. Any error of this type is subject to the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) test for harmless error. (Cf. *People v. Sojka* (2011) 196 Cal.App.4th 733, 738; *People v. Hanna* (2013) 218 Cal.App.4th 455, 462.) Under this test, a reviewing court will only reverse the conviction if it concludes "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, *supra*, 46 Cal.2d at p. 836.) In determining whether such a reasonable probability exists, a reviewing court will take into consideration the jury's factual findings on other instructions. (See, e.g., *People v. Moore* (2011) 51 Cal.4th 1104, 1132; *People v. Moye* (2009) 47 Cal.4th 537, 556-557.)

Significantly, the jury was instructed on mistake of fact and good faith, but rejected the theories. (24CT 4564, 4571.) By doing so, the jury

necessarily rejected the assertion that appellant Selivanov believed the money was lawfully his property, which implies the finding that appellant believed he stole the money. And, as set forth above, such belief was supported by overwhelming evidence in the record. This Court, therefore, should reject appellant Selivanov's instructional challenge.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED THE QUICKBOOKS OF AJFK IN EXHIBIT 105 BECAUSE THE EVIDENCE WAS ADMISSIBLE FOR A NON-HEARSAY PURPOSE AND AS AN EXCEPTION TO THE HEARSAY RULE

In his fifth argument on appeal, appellant Selivanov contends that the trial court erred by admitting certain QuickBooks as Exhibit 105 because the prosecution failed to lay the requisite foundation for their admission. (SAOB 56-63.) He is incorrect. The trial court acted well within its discretion when it admitted the evidence because Exhibit 105 was admitted for the non-hearsay purpose of providing a portion of the basis for an expert's conclusion and non-hearsay circumstantial evidence that appellant Selivanov committed the charges offenses. The court further acted within its discretion because the evidence was admissible as an exception to the hearsay rule.

A. The Relevant Trial Court Proceedings

During the direct examination of Delos Santos, the prosecution inquired whether she was familiar with Exhibit 105. Delos Santos replied that she was because the exhibit was QuickBooks for AJFK, obtained via search warrant. (10RT 3349.) When the prosecution asked if the QuickBooks were prepared in the ordinary course of AJFK's business, counsel for appellant Selivanov objected on the ground of lack of foundation. (10RT 3350.)

At sidebar, the court inquired of the prosecution how Delos Santos would be laying the foundation, and the prosecution responded that Delos

Santos would be testifying about her experience with QuickBooks, how she recognized the QuickBooks of AJFK, and how they were seized. The prosecution reminded the court that the same argument between the parties transpired during the testimony of Atkinson, and that the actual person doing the entries in QuickBooks need not testify. (10RT 3350-3351.) Counsel for appellant Selivanov conceded that the record showed the AJFK QuickBooks were on Pilyavskaya's computer, but argued that no evidence showed who prepared them. As such, counsel claimed the prosecution could not show how the QuickBooks were compiled, who made the entries to them, and if the records were kept in the ordinary course of AJFK's business. (10RT 3351-3352.) Counsel, thus, asserted that the prosecution could not satisfy the business records exception to the hearsay rule to allow for the admission of the QuickBooks. (10RT 3352.)

The court acknowledged that cases had rejected business records on the ground that their admission was "not based on the personal knowledge of the reporter or someone with a business duty to report to the recorder." (10RT 3353.) The court, however, further recognized that the cases show, "the Court is supposed to make a determination as to whether or not the method and time of preparation of the record were such as to indicate its trustworthiness." (10RT 3353.) With this duty in mind, the court noted that the QuickBooks seemed trustworthy because they came off computers belonging to AJFK. But the court wished to conduct more research before ruling. (10RT 3353-3359.)

When the court revisited the issue, it reiterated that the QuickBooks had "elements of trustworthiness." (10RT 3375.) But the court was concerned about whether or not they met the requirements of the business records exception. It proceeded to cite *People v. Dean* (2009) 174 Cal.App.4th 186, for the proposition that an expert could testify about a record, but such testimony could be limited. (10RT 3375.) The court also

cited *People v. Hovarter* (2008) 44 Cal.4th 983, which pertained to the business record exception. (10RT 3375-3376.) It then explained to the prosecution it would like to see some authority showing that someone not involved with a business could lay the requisite foundation for the exception. (10RT 3376.)

Later in the testimony of Delos Santos, the issue arose again, and the court asked appellant Selivanov's counsel why the prosecution could not use the records if they came from a server at the school. Counsel responded that the prosecution was trying to use the records to prove the truth of their contents absent any testimony regarding who prepared them. The court replied that the records were admissible for the purpose of an expert explaining what she relied on in forming her opinion. And the court also believed the records had "a certain amount of trustworthiness." (12RT 3910-3911.) The prosecution then added that because it was going to show the QuickBooks in Exhibit 105 were false based on a comparison of Exhibit 106, they were not being offered for the truth of their entries. They were, instead, offered as circumstantial evidence that appellant Selivanov knew he was lying on his tax returns. The court found this argument persuasive and ruled that Exhibit 105 was admissible to show whether there was another set of records and whether or not they were true. (12RT 3913.)

After the prosecution rested, appellant Selivanov again objected to the admission of Exhibit 105. The court asked the parties if they had obtained any cases on the admissibility of the records, and neither had found any on point. (14RT 4597-4598.) The prosecution argued that although Pilyavskaya said she did not prepare the records, she also said that only she and appellant Selivanov prepared QuickBooks. As such, by inference, appellant Selivanov must have prepared them. (14RT 4598.)

The court then ruled that it would admit Exhibit 105 as follows:

> I am allowing the records in.

> I am treating this just like you would receive a letter or another item.
>
> I had a series of cases on a piece of paper but basically it is coming in for a non-hearsay purpose to show not only that the fact that the records but these kind of records were found in a location and the school run by these people and their indicia they knew about these records and had some familiarity or some connection with these records cause of the location they were found just life if you found a telephone bill or a letter addressed to someone you could then jump from that to the fact that that person exercised dominion and control over that location, and I think that the fact that they were found on a server at the school, that these people were running, he was the executive director the wife was the president . . . .
>
> . . .
>
> That was the thing that was what I am hanging my hat on. She is also correct it would come in for an expert's opinion, but the reality is, if that were the only reason I were letting it in, I might not admit it for the jury to look at, and you would just have to rely and argue from the testimony of the witness, but I am allowing it in basically for all purposes because I think there is some indicia that this is connected to the defendants.

(14RT 4599-4600.)[13]

B. The Evidence Was Admissible for Non-Hearsay Purposes

Exhibit 105, the QuickBooks of AJFK, was admissible because it constituted non-hearsay circumstantial evidence that appellant Selivanov committed the crimes of which he was convicted. Indeed, this Court should apply to the facts here the same reasoning concluding that "pay-owe sheets" in narcotic cases, and records in bookmaking cases, are admissible as nonhearsay circumstantial evidence to prove narcotics and bookmaking

[13] In his Opening Brief, appellant Selivanov inexplicably omits this entire ruling and claims that, "[t]he trial court provided little insight into the reasoning behind its decision." (SAOB 58.)

offenses, respectively. (Ct. *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1219-1223, 1225-1226.)

Although the prosecution did not note these cases to the trial court, it made this precise argument for the exhibit's admissibility. Specifically, the prosecution argued that because it was going to show the QuickBooks in Exhibit 105 were false based on a comparison of Exhibit 106, they were not being offered for the truth of their entries. They were, instead, offered as circumstantial evidence that appellant Selivanov knew he was lying on his tax returns. The court found this argument persuasive and ruled that Exhibit 105 was admissible to show whether there was another set of records and whether or not they were true. (12RT 3913.) As discussed above, this Court should apply the reasoning of narcotics and bookmaking cases to find that the trial court's ruling on this basis was within its discretion.

In addition, Exhibit 105 was a nonhearsay basis for expert opinion testimony from Salazar and Delos Santos concerning what that exhibit was and the fact it was part of appellant Selivanov's overall criminal scheme. Appellant Selivanov cannot dispute that an extrajudicial statement which serves as a basis for expert opinion is nonhearsay. (Cf. *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208-1210.) In light of the foregoing, the evidence was admissible for two different non-hearsay purposes.

C. The Evidence Was Admissible as an Exception to the Hearsay Rule

Appellant Selivanov claims that the prosecution did not present a qualified witness who had the requisite knowledge of AJFK's recordkeeping procedures from which the trial court could admit Exhibit 105 as a business record. (SAOB 60-61.) He has too narrowly considered the evidence the court was permitted to rely on in finding that the prosecution laid the requisite foundation.

Generally, hearsay evidence is not admissible. (Evid. Code, § 1200, subd. (b).) A document containing hearsay is admissible as a business record if: "(a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian . . . testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (*Id*., § 1271.) Electronic data entry into a computer qualifies as a writing. (See *id*., § 250; *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 798.) A computer printout of data entry is considered an original of that data. (Evid. Code, § 255.) The trial court enjoys wide discretion in deciding whether a sufficient foundation has been laid to qualify evidence as a business record. (*People v. Beeler* (1995) 9 Cal.4th 953, 978.)

The foundation requirements for the admission of evidence as a business record may be inferred from the circumstances. "Indeed, it is presumed in the preparation of the records not only that the regular course of business is followed but that the books and papers of the business truly reflect the facts set forth in the records brought to court." (*People v. Dorsey* (1974) 43 Cal.App.3d 953, 960-961.) Here, the record showed that Pilyavskaya did not handle the QuickBooks for EGEN or AJFK. (5RT 1832, 1834, 1842; 6RT 2172.) But she testified that appellant Selivanov was the only other person who made entries into QuickBooks. (5RT 1849.) This testimony, coupled with appellant Selivanov's attempt to hide the AJFK and EGEN QuickBooks by claiming none existed (7RT 2527), provided sufficient evidence from which the court could infer appellant Selivanov prepared the evidence at issue. And this inference, along with the fact that the evidence was recovered as a result of a search warrant for AJFK (7RT 2454), supports the court's finding that the evidence possessed sufficient indicia of trustworthiness. Business records are generally

considered trustworthy because they are prepared by persons who are personally or through their employment invested in accurate recordkeeping. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 226, p. 943.) No evidence existed to call the trustworthiness of the document as a record of the business affairs of AJFK and EGEN into question. As such, the court acted within its discretion when it admitted the evidence as a business record.

Furthermore, the evidence was admissible as an exception to the hearsay rule under Evidence Code section 1222. Evidence Code section 1222, states, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence." As mentioned above, the AJFK QuickBooks were recovered from a server maintained by appellant Selivanov's computers at his business, and Pilyavskaya testified he was the only other person responsible for the QuickBooks. The trier of fact reasonably could have concluded from these facts that appellant Selivanov created the QuickBooks for AJFK. This Court may also uphold the admission of Exhibit 105 on this basis even though the trial court did not rely on this particular reasoning. (Cf. *People v. Smith* (2005) 135 Cal.App.4th 914, 923.) As a result, even if Exhibit 105 was hearsay, it was admissible under Evidence Code section 1222.

Finally, even if Exhibit 105 was inadmissible hearsay, it does not follow that this Court must reverse the judgment. Any error in admitting the AJFK QuickBooks was harmless because it is not reasonably probable that appellant Selivanov would have received a more favorable result if the

evidence had been excluded. (See generally Evid. Code, § 353; *Watson*, *supra*, 46 Cal.2d at p. 836; see, e.g., *People v. Davis* (2005) 36 Cal.4th 510, 538 [erroneous admission of hearsay was harmless under *Watson*].) As detailed above, overwhelming evidence showed that appellant Selivanov masterminded a scheme to take money from Ivy Academia through his private business AJFK or EGEN. More importantly, even in the absence of Exhibit 105, the jury would have still been permitted to hear the non-hearsay related uses of the evidence, including expert opinions regarding the fraudulent scheme furthered by the manipulation of the QuickBooks. For all of the above reasons, this Court should reject appellant Selivanov's evidentiary challenge.

VI. SUFFICIENT EVIDENCE SUPPORTED APPELLANT SELIVANOV'S CONVICTIONS FOR COUNTS 32 THROUGH 36 BECAUSE THE PROSECUTION SHOWED HE DID NOT BELIEVE THE STATEMENTS MADE IN THE CORPORATE TAX RETURNS WERE TRUE AND CORRECT

In his sixth argument on appeal, appellant Selivanov claims that the prosecution presented insufficient evidence to show that he did not believe the truth of statements in the corporate tax returns. On this basis, he contends this Court must reverse his convictions on counts 32 through 36. (SAOB 64-66.) Like his other challenges to the sufficiency of the evidence at trial, this challenge too constitutes nothing more than an improper request that this Court reweigh the evidence.

Here, substantial circumstantial evidence showed that appellant knowingly filed tax returns that contained false information for AJFK and EGEN from 2004-2008. California Franchise Tax Board Special Agent Salazar investigated the tax returns and provided his expert conclusions regarding the falsities contained in them. (12RT 3993-3994, 3996-4002, 4036-4040, 4050-4054.) This testimony was sufficient to meet the first element of the crime of filing a false tax return under Revenue & Taxation

Code section 19705, subdivision (a), that the corporate tax returns contained a material statement that was false or inaccurate.

As to the second element of the offense, that appellant Selivanov did not believe the corporate tax returns to be true and correct as to every material matter (Rev. & Tax. Code, § 19705, subd. (a)), appellant Selivanov's assertion that no evidence showed he had the requisite knowledge is without merit. Again, the record established that appellant Selivanov was the only other person besides Pilyavskaya who made entries into QuickBooks. (5RT 1849.) This testimony, coupled with appellant Selivanov's attempt to hide the AJFK and EGEN QuickBooks by claiming none existed (7RT 2527), provided sufficient evidence from which the jury could infer appellant Selivanov prepared the evidence at issue. And this inference, along with the fact that the evidence was recovered on a server for appellant Selivanov's computers at his business as a result of a search warrant for AJFK (7RT 2454), supported the jury's determining that the evidence supported the second element of the crime of filing a false tax return. Furthermore, appellant Selivanov's role as the mastermind of the fraudulent scheme to embezzle funds provided additional evidence that supported the jury's finding. (See *James v. United States* (1961) 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 [embezzled funds are taxable income]). To suggest that he did not know the tax returns contained false information despite the complex illegal conduct he engaged in to funnel money in and out of AJFK and EGEN belies the record. This Court, therefore, should reject this claim.

VII. SUFFICIENT EVIDENCE SUPPORTED APPELLANT SELIVANOV'S CONVICTIONS FOR FILING FALSE PERSONAL TAX RETURNS IN COUNTS 27 THROUGH 31

In his seventh argument on appeal, appellant Selivanov claims that the prosecution presented insufficient evidence to support his convictions for

filing false personal tax returns in counts 27 through 31. (SAOB 67-69.) As to counts 28 through 31, appellant Selivanov's claim is solely dependent on this Court reversing counts 2, 19, 22, and 25 because insufficient evidence supported them. (SAOB 68.) As discussed in Argument I and II above, his challenge to the sufficiency of the evidence on those counts has no merit. As such, his argument here fails as well.

As to count 27, appellant Selivanov claims that the prosecution failed to present any evidence of his unreported embezzlement income for 2004, that would have supported the conviction for filing a false personal tax return that year. (SAOB 68-69.) This assertion is predicated on his suggestion that the prosecution presented no evidence that the income on AJFK/EGEN's 2004 corporate tax returns was underreported. (SAOB 69, n. 48.) But the record completely refutes his claim.

Salazar testified that Exhibit 94 reflected his expert conclusion about the 2004 return. (12RT 4040, 4050.) A review of this exhibit shows that Salazar concluded AJFK/EGEN falsely reported $59,707 of tax deductions, which obviously reduced its tax liability. (Peo. Exh. 94.) Salazar expressly testified about this decreased tax liability flowing through to appellant Selivanov's personal tax liability. (12RT 4083-4089.) Appellant Selivanov's argument, therefore, ignores the record, and this Court should reject it.

VIII. THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION WHEN IT IMPOSED VICTIM RESTITUTION

Appellant Selivanov's eighth argument on appeal is that the trial court abused its discretion when it ordered him to pay $271,794.15 in victim restitution. (SAOB 70-79.) As detailed below, none of his five separate arguments challenging the restitution order has any merit because the court considered and relied upon appropriate evidence to support its calculation.

A. The Relevant Trial Court Proceedings

At the restitution hearing, appellant Selivanov's counsel claimed that Ivy Academia was not entitled to restitution because its board of directors did not make a claim for any on behalf of the charter school. (22RT 10506-10507.) The court disagreed, and explained that the victims went beyond the board to the parents, students, and taxpayers. (22RT 10507, 10510.) The court also stated that any settlement agreement that appellants entered into with the current board was not controlling because the victim did not get to dictate the amount of restitution ordered. (22RT 10508-10509.)

The prosecution then laid out what it believed to be the appropriate restitution amounts. First, on count 2, the prosecution argued that appellants were jointly and severally liable for $22,396.60. (22RT 10511.) This amount was calculated based on amounts spent for items that were not for educational purposes and, thus, were for personal items for appellants. (22RT 10512, Peo. Exh. 18.) As for the joint and several liability, the prosecution explained that even for charges appellant Berkovich made for personal items, the evidence showed that appellant Selivanov had control of the finances and instituted payments for the improper charges. (22RT 10512-10513.) Additionally, the prosecution claimed appellant Selivanov was individually responsible for another $12,048.82 for charges he personally made. (22RT 10513.) Appellant Selivanov's counsel claimed that appellant Selivanov was not responsible for charges appellant Berkovich made, and contended that juror declarations, which appellant Berkovich's counsel presented, showed that the only improper charges amounted to a total of $367.27. (22RT 10515.) Appellant Berkovich's counsel concurred regarding the juror declarations and claimed the amount was actually $1,500 or $2,000. (22RT 10516-10517.)

The court rejected the juror declarations and explained that if it relied on those, it would have 12 different amounts of restitution depending on what each juror thought was the correct amount. In addition, the court stated that the jurors were not cross-examined and, therefore, the court had no idea how they reached their conclusions. Finally, the court found that it was not supposed to inquire of jurors regarding the restitution amount. (22RT 10517.) With that in mind, the court agreed with the prosecution based on the evidence, particularly that presented through the auditors. (22RT 10517-10518.) And the court added that if Ivy Academia did not want the money, it could go to the State of California's educational authorities for money lost. (22RT 10520.)

The court then turned to restitution on count 25, which the prosecution proposed to be in the amount of $126,654.73. The prosecution explained that it calculated that amount by totaling the payments by Ivy Academia on the WCB loan after the Asset Sale, which was set forth in Exhibit 34. (22RT 10519.) Appellant Selivanov's counsel responded that Ivy Academia did not suffer this loss because the school benefited from the WCB loan. (22RT 10521-10522.) The court, however, noted that as a result of the sham transaction involving the rent increase and Asset sale, not only was $520,000 of assets removed from the books of Ivy Academia, but also, EGEN received tax deductions that flowed through to appellant Selivanov's personal tax returns. (22RT 10522-10523.) The court then agreed to impose the amount sought by the prosecution based on the evidence at trial that showed that appellant Selivanov engaged in a sophisticated plan to have Ivy Academia pay off loans it was not required to pay for his personal benefit. (22RT 10524.)

Next, the court reviewed $23,000 that the prosecution sought for the amounts actually paid out as a result of the rent increase. (22RT 10524-10525; Peo. Exh. 29.) The court agreed with this amount as well and

imposed it. And the court clarified that both the $126,654.73 and $23,000 were payable to Ivy Academia. (22RT 10525.)

The court then reviewed $43,795.96 related to the money laundering convictions. (22RT 10526; Peo. Exh. 38A.) Appellant Selivanov's counsel objected to the amount, arguing that the prosecution did not meet its burden of establishing that the money was an actual loss to Ivy Academia. (22RT 10526-10527.) The prosecution replied that appellant Selivanov took the money from Ivy Academia, despite not being owed it. In other words, he created fraudulent liabilities to allow him to withdraw money from the school. (22RT 10527.) The court agreed with the prosecution and found that the evidence adduced at trial supported the imposition of the requested restitution. (22RT 10528.)

Finally, Special Agent Salazar testified regarding the tax loss caused by appellant Selivanov's criminal activity. (1ART 4.) The court asked him if the Franchise Tax Board could recover the tax deficiencies he found through an audit and claim on its own. Agent Salazar replied that unless the court made a finding that EGEN was created for the purpose of engaging in fraud and, thereby all its deductions were unlawful, the Franchise Tax Board could not do so. The court would not make that finding because it did not believe the jury was asked to or that an inference could be drawn that the jury made the finding. (1ART 6-7.) For this reason, the court suggested to the prosecution that a restitution hearing was not the proper vehicle to recover special increased penalties and tax deficiencies in the amount of $392,000. (1ART 7-8, 10.)

The prosecution continued its examination of Agent Salazar on the issue of restitution relating to appellant Selivanov's tax convictions, and the court stated that it was likely to subtract any penalties under *People v. Boudames* (2006) 146 Cal.App.4th 45. (1ART 10-12; Peo. Exh. 34.) The court invited argument from the parties, and appellant Selivanov's counsel

stressed that the Franchise Tax Board did not pursue a civil audit. On this basis, counsel asserted that, "what the tax owed is, is really anyone's guess." (1ART 16.) Counsel claimed that without an audit, the underlying tax numbers were unreliable. (1ART 17.) According to counsel, without delving into the details of amounts owed, taxes due, and the appropriateness of deductions, the Franchise Tax Board was not even arguably entitled to any restitution beyond the cost of investigation. (1ART 18-19.) The amount of investigation was $28,251. (1ART 19.) And counsel actually thought this amount was not a loss to the victim and, therefore, not appropriate for restitution. (1ART 20.)

The court then explained how it intended to calculate the tax-related restitution as follows:

> I'm going to impose the amount of 28,251 for cost of investigation; I'm going to impose the amount of 14, 226 as the tax due, and I'm going to impose 10 percent of that, because that is the best I can do on this record, a 10-percent tax amount, which I think is actually under-reporting the amount that he would actually owe, so I'll put that on the record –
>
> . . .
>
> The amount that the Court is ordering per restitution based on this hearing is $43,899, and that is payable to the Franchise Tax Board.

(1ART 26-27.)

B. None of Appellant Selivanov's Challenges to the Restitution Order Has Merit

This Court should reject each of appellant Selivanov's below-discussed challenges to the trial court's restitution order. Under the California Constitution, victims have a right to restitution, and courts are required to order a defendant, following his conviction, to pay restitution in every case where a crime victim has suffered a loss. (Cal. Const., art. I, § 28, subd. (b)(13)(B).) Section 1202.4, subdivision (f), provides that "'in

every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.'" (*People v. Sy* (2014) 223 Cal.App.4th 44, 62.)

The amount of restitution must be sufficient to reimburse the victim fully for every economic loss that resulted from the defendant's criminal activity. (§ 1202.4, subd. (f)(3).) The defendant is entitled to a hearing to dispute the determination of the amount. (§ 1202.4, subd. (f)(1).)

At the hearing, the prosecution may make its prima facie case for restitution by presenting a victim's testimony or other claim or statement of the amount of the victim's economic loss. (*Sy*, *supra*, 223 Cal.App.4th at p. 63.) If the prosecution makes the prima facie showing, the burden shifts to the defendant to show that the amount is incorrect. (*Ibid*.)

On review, an appellate court evaluates if the trial court abused its discretion when it imposed restitution. (*Sy*, *supra*, 223 Cal.App.4th at p. 63.) There is no abuse of discretion if the amount of restitution that the trial court ordered has a factual and rational basis. (*Ibid*.) The question on review, therefore, is if any substantial evidence supported the trial court's findings, and the standard of proof at a restitution hearing is by a preponderance of the evidence rather than proof beyond a reasonable doubt. (*Ibid*.) In answering this question, an appellate court neither reweighs nor reinterprets the evidence. (*Ibid*.) Instead, an appellate court simply determines if sufficient evidence supports the inference the trier of fact drew. (*Ibid*.)

Appellant Selivanov's first challenge to the restitution order is that the trial court was not entitled to impose victim restitution for Ivy Academia because, "Ivy Academia made no actual claim of any economic loss." (SAOB 71.) In other words, appellant Selivanov suggests that Ivy

Academia had a duty to assert a monetary claim. In support of his argument he claims that section 1202.4, includes a condition that there be "a claim by a victim . . . ." (AOB 72.) The applicable statutes and case law, however, create no such duty on the part of victims. The assignment of victim restitution is simply a required part of the trial court's sentencing procedure. (§ 1202.4.) The victim plays no role in this judicial function other than assisting the trial court in its calculation of restitution. And, as set forth above, the prosecution need not even present a direct statement from the victim to make a prima facie case supporting the imposition of restitution. (*Sy*, *supra*, 223 Cal.App.4th at p. 63.) In fact, the actual language of section 1202.4, subdivision (f), expressly states that restitution may be imposed based upon "any other showing to the court," rather than solely from the statement of a victim. Appellant Selivanov's claim, therefore, is unsupported by the very law he cites. This Court, therefore, should reject his argument.

This Court should also reject appellant Selivanov's second argument that the trial court erred by ordering him to pay $22,396.60 jointly and severally with appellant Berkovich. (SAOB 73-74.) His suggestion that he was in no way responsible for this amount because it was only based upon charges appellant Berkovich made on her own AMEX card is without merit. As the prosecution explained, appellant Selivanov had control of the finances and instituted payments for the improper charges. (22RT 10512-10513.) The record supported the prosecution's position because it showed that Pilyavskaya, the bookkeeper, reported directly to appellant Selivanov, who, unlike appellant Berkovich, also accessed QuickBooks where the categories were used to hide the improper charges. (5RT 1820, 1920, 1925, 1958.) And appellant Selivanov further tried to hide the charges, so he and appellant Berkovich would not have to pay for them personally and so they could benefit on their personal tax returns, when he sought to have the

concerns about the use of the AMEX card removed from the 2006 report by the accounting firm. (8RT 2779-2780.) As such, his suggestion on appeal that his criminal conduct in no way caused Ivy Academia the loss attributed to charges appellant Berkovich made is belied by the record.

Appellant Selivanov's third argument that the restitution amount addressing the AMEX card charges was not based on reliable evidence is equally unavailing. (AOB 74-76.) As detailed above, the court had before it both testimony and documentation supporting the amount it imposed. (9RT 3067-3098, 3123-3158; 11RT 3764; Peo. Exh. 17.) Appellant Selivanov's challenge to this evidence is an inappropriate request that this Court reweigh the evidence that the trial court relied on when it imposed restitution.

Despite the evidence supporting the restitution amount for the AMEX card charges, appellant Selivanov claims that the trial court prohibited him from challenging the figure when it refused to consider juror declarations about the amounts they found improper when they convicted him. (SAOB 75.) Appellant Berkovich likewise asserts the trial court erred by not considering the declarations at the restitution hearing. (BAOB 62-69.) As a preliminary matter, appellants challenged the figure at trial through the use of their own experts and the cross-examination of the prosecution's witnesses. Like the other evidence the trial court relied upon in calculating the amount of restitution, the trial court was well aware of this contrary evidence as well.

More importantly, declarations from jurors concerning their mental processes by which they reached their verdict are wholly inappropriate. It is true that Evidence Code section 1150, which the trial court cited, pertains to the impeachment of a verdict, which was not at issue here. As such, it is doubtful that the provisions of Evidence Code section 1150, prohibiting the use of juror declarations concerning their mental processes, were triggered.

Nonetheless, the policy reasons for the rule of excluding evidence of jurors' internal thought processes as enunciated in *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 414), pertain to the attempted use of the juror declarations here. Inconsequential is the fact that appellants sought to introduce the juror declarations during a restitution hearing rather than a motion for new trial. The declarations would have necessitated cross-examination of the jurors and turned them into witnesses providing the evidence to prove the charges, which obviously is not the way the criminal justice system functions. (*Ibid*. [As our Supreme Court has explained, the principle underlying the exclusion of evidence of jurors' thought processes to impeach the verdict "serves a number of important policy goals: It excludes unreliable proof of jurors' thought processes and thereby preserves the stability of verdicts. It deters the harassment of jurors by losing counsel eager to discover defects in the jurors' attentive and deliberative mental processes. It reduces the risk of postverdict jury tampering. Finally, it assures the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes"].) In other words, the exclusion of the declarations thwarted the use of unreliable evidence of the thought processes of the jurors, preserves the stability of verdicts, prevents juror harassment, and assures jury deliberation privacy. (*Ibid*.)

In addition, the trial court expressed concerns regarding the right of the prosecution to confront and cross-examine the jurors. (22RT 10517.) This concern was well-founded as the declarations would have presented inadmissible hearsay regarding how fellow jurors purportedly reached their conclusions during the deliberative process. (Evid. Code, § 1200, subd. (a).) Statements in the declarations regarding how the jurors found on each AMEX charge would only be useful in any way if they were offered for the truth of the matter asserted. For this reason too, the trial court did not abuse its discretion in excluding the declarations at the restitution hearing. (See

People v. Waidla (2000) 22 Cal.4th 690, 725 [evidentiary rulings, including those based upon hearsay objection, reviewed for abuse of discretion].) The trial court, therefore, did not err in imposing the restitution for the AMEX charges because it considered all of the evidence about the charges from the trial. This Court, thus, should reject appellant Selivanov's claim that reliable evidence did not support the restitution order on the AMEX charges.

This Court should also reject appellant Selivanov's fourth argument that the trial court erred when it imposed $126,654.73 relating to the WCB loan because the payments Ivy Academia made to WCB did not cause the school economic loss. (SAOB 76-77.) As detailed above in Argument III, Ivy Academia should not have been required to pay the increased rent, which appellant Selivanov used to justify the school's paying money directly to WCB for the loan. Consequently, his challenge to the restitution amount on the same basis fails for the same reason.

Appellant Selivanov's fifth and final challenge to the restitution award on the basis that the amount of $43,899 directed to the Franchise Tax Board was supported by unreliable evidence fails like his other above arguments. (SAOB 77-79.) The court had before it ample evidence to support the calculation, including People's Exhibit 38A and the testimony of Agent Salazar. (12RT 3974-4089; 13RT 4203-4248; Peo. Exh. 38A; 1SCT 94-97.) All of appellant Selivanov's arguments that he now raises on appeal, he previously raised at the restitution hearing. (1SCT 41-43.) The court weighed all of the evidence before it reached its finding, and appellant's argument here is an improper request that this Court usurp the trial court's role and reweigh the evidence. In light of the above, the trial court exercised its discretion, considered all of the admissible evidence, and found that the evidence supported the total amount of restitution by a

preponderance of the evidence. This Court, therefore, should not disturb the restitution order.

IX. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY ON UNANIMITY FOR COUNT 2 BECAUSE THE PROSECUTION PROCEEDED UNDER THE THEORY THAT APPELLANTS ENGAGED IN A SINGLE CRIMINAL COURSE OF CONDUCT

In his ninth argument on appeal, appellant Selivanov joins appellant Berkovich's argument that the trial court erred when it failed to instruct the jury on unanimity for count 2. (SAOB 80; BAOB 14-38.) Appellants, however, are incorrect because no such instruction is required where, as was the case here, the prosecution proceeds under a theory of a single criminal course of conduct, and a defendant challenges the theory on the lone basis that he committed no wrong.

A. The Relevant Trial Court Proceedings

The court addressed if it would give a unanimity instruction. It stated that it would, but did not know if it would also list all the counts the instruction applied to versus simply giving a general unanimity instruction. (19RT 6033-6034.) Ultimately, the court ruled that it would not give the instruction on count 2. (20RT 6333-6336.)

After trial, appellants both moved for a new trial and argued, among other things, that the trial court erred by failing to instruct the jury on unanimity on count 2. (24CT 4787-4788; 25CT 4813-4820.) At the hearing on the motions, the court noted that neither appellant asserted any objection to the court's failure to give the instruction or requested it as to count 2. It added that it chose not to give the instruction because it believed that count 2 alleged a continuing course of conduct. (22RT 10239.) The court found that appellants did not present separate defenses to count 2 because they both were involved in the day-to-day operations of Ivy Academia and engaged in the same scheme to defraud by misusing the

AMEX card. The court added that the evidence was overwhelming, and appellants' contention was not certain purchases were made by mistake, but rather that the purchases were all actually made for the school. On this basis, the court found a unanimity instruction was not required and denied the motions for new trial on this instructional error claim. (22RT 10249-10251.)

B. The Trial Court Was Not Required to Instruct on Unanimity

Contrary to appellants' arguments, a unanimity instruction was not required because the prosecution's theory was that they engaged in a single criminal course of conduct to embezzle funds by using the AMEX cards for personal purchases. When a defendant is charged with a single criminal act, but the evidence reveals more than one such act, the prosecution must either select the particular act upon which it relies to prove the charge, or the jury must be instructed that it must unanimously agree beyond a reasonable doubt that the defendant committed the same specific criminal act. (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499.) If, on the other hand, there are a number of separate acts that are so closely connected as to form a single course of criminal conduct, a unanimity instruction is not required. (*People v. Diedrich* (1982) 31 Cal.3d 263, 282.) Separate acts will be considered as one continuous course of conduct either when the statute under which the defendant is charged contemplates a number of separate acts and criminalizes the aggregate of those acts, or when the separate acts are so closely connected that the defendant offers essentially the same defense for all of the acts and there is no reasonable basis for the jury to distinguish between them. (*People v. Whitman* (1995) 38 Cal.App.4th 1282, 1295-1296; *People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

Here, appellants' course of conduct over a period of a few years, was properly characterized as a single course of conduct not requiring a unanimity instruction. First, the statute under which appellants were charged contemplated the aggregation of a number of acts to constitute a single fraudulent appropriation in excess of $950. (§ 487; *People v. Bailey* (1961) 55 Cal.2d 514, 519.) Thus, what was criminalized in this case is not the individual diversions of funds. Rather, it was the diversion of an aggregate amount of more than $950 over a period of a few years. Where there is evidence that a single impulse, intention and plan motivate the fraudulent appropriations, aggregation of the individual offenses is proper. (See *Bailey*, *supra*, 55 Cal.2d at p. 519.) Here, there was evidence that appellants used their AMEX cards and systematically and regularly fraudulently classified personal purchases as business-related ones over a few years. As such, there was ample evidence that the diversion of the public funds was carried out over time according to a single plan and purpose. Aggregation of the separate acts into one offense was proper.

Second, appellants' defense to any one instance of the embezzlement using the AMEX cards was essentially indistinguishable from their defense to any other single instance. As to all of the alleged improper charges on the credit cards, appellants defended themselves by asserting that they had no fraudulent intent. Instead, they claimed they honestly believed that they could be reimbursed for the purchases because each one supported Ivy Academia, and the restrictions on the use of public funds applicable to public schools did not apply to charter schools. And if a purchase did not support Ivy Academia, appellants argued that they simply made a mistake based on their lack of experience and training, but did not engage in any fraud. (4RT 1380-1381, 1384, 1391-1393, 1406, 1410-1417.) Appellants' efforts to isolate certain purchases, seen in the overall context of the total number of charges alleged and the total sum of money embezzled, amount

to little more than quibbling over the accuracy of the final tally of the funds embezzled. Contrary to appellants' theory, the court expressly stated that the prosecution was "not arguing that there were some discreet items under embezzlement, he was arguing that's an example of $950, and if you find that alone, that's enough to convict . . . ." (22RT 10256.) Appellants' basic defense did not constitute a basis for the conclusion that a number of separate offenses had been committed and that separate defenses were being asserted. For this reason, this Court should find that the unanimity instruction was not warranted and the trial court did not err in refusing to give it.

Even if this Court finds that it was error not to give the unanimity instruction, such error was harmless. (See *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 647 [holding that failure to instruct on unanimity is reviewed for prejudice under the standard of *Chapman*, *supra*, 386 U.S. at p. 18, but acknowledging a split of authority on the issue].) By convicting appellants, the jury plainly rejected appellants' single defense to all of the purchases. In other words, the jury resolved any credibility dispute between the prosecution's and their witnesses against them. Accordingly, this Court should conclude that no prejudicial instructional error occurred.

X. APPELLANTS DID NOT HAVE A RIGHT TO A JURY TRIAL ON THE SECTION 514 FINDING THE TRIAL COURT MADE

In his tenth argument on appeal, appellant Selivanov joins appellant Berkovich's argument that this Court must reverse the trial court's finding that the funds involved in count 2 were public funds within the meaning of section 514 because appellants had a right a jury trial on the issue. (SAOB 81, BAOB 42-61.) As detailed above, none of their arguments show that the trial court's finding on section 514 violated their constitutional rights because it did not increase their punishment.

A. The Relevant Trial Court Proceedings

The prosecution informed the court that it believed the court needed to make a finding that the embezzlement involved public funds. The court agreed, but appellant Selivanov's counsel claimed that the prosecution was required to plead and prove at trial that public funds were involved. (22RT 10312.) On this basis, appellants objected to any finding by the court. The court overruled appellants' objections and found that the money embezzled was public funds. (22RT 10313.)

Appellants reasserted their challenge to the finding following sentencing in motions to correct their sentences, and the court took the opportunity to clarify its ruling. (1ART 29.) The court began by explaining that the applicable law did not support appellants' argument that its finding that the embezzled funds were public funds under section 514 violated *Apprendi v. New Jersey* (2000) 530 U.S. 466, 483 [120 S. Ct. 2348, 147 L. Ed. 2d 435]. Specifically, the rule of *Apprendi* only applied, "when the non-jury factual determinations increases the maximum penalty beyond the statutory range authorized by the jury's verdict." (1ART 36.) Here, the convictions on embezzlement by the jury authorized a maximum sentence of three years. (1ART 36.) This maximum remained the same before and after the section 514 finding. (1ART 36-37.) As such, "where a non-jury factual determination allows for a sentence within the range authorized by the verdict, the *Apprendi* rule has no effect." (1ART 37.) The court, therefore, rejected the *Apprendi* argument because it did not sentence appellants to greater than three years. That the finding may have determined if appellants were housed in county jail or state prison did not change the maximum or minimum penalty. (1ART 37.)

The court then found that even if its finding came within the purview of *Apprendi*, the failure to submit the section 514 finding to the jury was

not structural error and, in fact, was harmless error. The court explained that from the evidence in the record, there was no way to characterize the money received by Ivy Academia from the state for educational purposes other than as public money. Thus, any error was harmless because the evidence supporting the 514 finding was overwhelming and uncontested. (1ART 38.) The court added that it reached this finding independent of the jury's verdicts on the counts involving section 424, yet those convictions supported "a strong inference that the jury did find public monies were involved when they convicted Selivanov and Berkovich of the 424 counts." (1ART 39.)

The court stated that the California Penal Code did not define "public money" in section 514. Cases directed a court to look to sections 424 and 426 for a definition. The court examined some of these cases and found, "[c]learly, receiving funds for a charter school would qualify as public monies." (1ART 39-40.)

In sum, the court believed that the section 514 finding was a sentencing factor rather than an element to be set out in an indictment. The court could find no case holding that the nature of the funds as public funds was an element of the crime of embezzlement. Consistent with *Apprendi*, the court exercised its "discretion, taking into consideration various factors relating both to the offense and the offender in imposing judgment within the range proscribed by statute. (1ART 40, 42.) Similar arguments to those appellants asserted were rejected on the issue of the discretion to impose consecutive or concurrent sentences. (1ART 40-42.)

The court next turned to the argument that the section 514 finding increased punishment by subjecting appellants to parole conditions. In response, it found, "there is no case under *Apprendi* that indicates the possible or potential imposition of a parole condition is violative of *Apprendi* or increases the statutory maximum sentence that defendant

Selivanov must serve." (1ART 43.) In addition, "the differences between the available post incarceration restraints placed upon a defendant sentenced under 1170, realignment, and sentenced to state prison based on 514 are de minimus. (1ART 43.) The court could find no case supporting appellants' position that parole was more punitive than probation. Persons subject to either did "not enjoy absolute liberty to which every citizen is entitled." (1ART 44.)

The court also accepted the prosecution's "position that defendant Selivanov is subject to felony sentencing because the jury found the Penal Code section 12022.6 allegation to be true." (1ART 44.) Because the jury found appellants guilty of embezzlement and also found the section 12022.6 allegation to be true, the embezzlement conviction was to be treated as a felony. Thus, appellants' argument that they were "entitled to a misdemeanor or wobbler treatment without a finding under Penal Code section 514 cannot be reconciled with the language found in Penal Code Section 12022.6," which provided that the excessive-taking enhancement only applied to felonies. (1ART 45.)

On "the issue of whether Penal Code section 12022.6 finding converts Penal Code section 504 to straight felony and takes it out of the wobbler class," the court noted that the prosecution did not make an offer to reduce to a misdemeanor. (1ART 45.) And the court "would not deem this to be a misdemeanor based on the large sums of money that were embezzled, as well as the violation of public trust by someone associated with running a charter school." (1ART 45.) The facts in no way supported a claim that appellants would qualify as a wobbler absent a section 514 finding. (1ART 45.)

The court addressed if section 514's effect of prohibiting someone from holding public office qualified as a punishment and, resultantly violated *Apprendi*. The court identified holdings by both the United States

Supreme Court and our Supreme Court that mandatory sex registration did not constitute punishment. It was just a consequence of conviction. (1ART 46.) Drawing an analogy between the consequence of being barred from holding office and mandatory registration, the court rejected this argument as well. (1ART 46-47.) Moreover, even assuming disqualification from public office was punishment, "the fact remains that statutory maximum penalty was not increased by the finding under Penal Code section 514." Appellants would still have a felony conviction for violating section 504, regardless of the 514 finding, and a convicted felon could not hold public office. (1ART 48-50.)

B. The Trial Court's Finding Did Not Violate *Apprendi*

Appellant Berkovich's unmeritorious claim that the trial court's finding on section 514 violated *Apprendi* suggests that the finding increased punishment in the following four ways: (1) it removed the wobbler status of section 504; (2) it mandated incarceration in state prison where probation was denied; (3) it required state parole; and it imposed a parole revocation fine. (BAOB 48-59.) As detailed below, none of these arguments establishes that the trial court's finding violated *Apprendi.*

In support of this argument, appellant Berkovich relies on *Alleyne v. United States* (2013) __U.S.__ [133 S. Ct. 2151, 186 L. Ed. 2d 314], where the United States Supreme Court held that, "a criminal defendant cannot be subjected to a longer sentence – including a longer minimum sentence – on the basis of judicial fact finding." (BAOB 49-51.) In *Alleyne*, *supra*, 133 S. Ct. 2151, the United States Supreme Court extended "the logic of *Apprendi*" to mandatory minimum sentences. (*Id*. at pp. 2157, 2160.) The Supreme Court, overruling *Harris v. United States* (2002) 536 U.S. 545 [122 S. Ct. 2406, 153 L. Ed. 2d 524], held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." (*Alleyne*, *supra*, 133 S. Ct. at p. 2155.) Thus, any fact (other than a prior

conviction) that increases the penalty beyond a statutory maximum or that increases a statutorily prescribed minimum penalty must be proved to a jury beyond a reasonable doubt. (See *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1060; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1039.) The Supreme Court cautioned, however, that its decision "does not mean that any fact that influences judicial discretion must be found by a jury," and that "broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." (*Alleyne*, *supra*, 133 S. Ct. at p. 2163.)

Because nothing about the section 514 finding exposes a defendant to a longer sentence than the one available absent the finding, there is nothing inconsistent about the trial court's rejection of this very argument and the principles stated in *Alleyne*. Other courts have utilized essentially the same analysis in concluding no jury trial is required in comparable situations. In *People v. Benitez* (2005) 127 Cal.App.4th 1274, the court rejected a similar argument made in the context of section 667.61, which allows the court to make a discretionary determination that a defendant is qualified for probation as an alternative to imposing a lengthy prison sentence. The court explained that "[f]inding a defendant ineligible for probation is not a form of punishment, because probation itself is an act of clemency on the part of the trial court." Consequently, the determination "is not subject to the rule of *Blakely* [*v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]]." (*Benitez*, *supra*, 127 Cal.App.4th at p. 1278.)

In *People v. Garcia* (2004) 121 Cal.App.4th 271, the court held there was no federal constitutional right to a jury determination of whether the defendant's first degree burglary qualified as a violent felony for purposes of the presentence conduct credit limitation prescribed by section 2933.1, subdivision (c). And in *People v. Lara* (2012) 54 Cal.4th 896, 901, our Supreme Court cited *Garcia* with approval, noting that a jury determination

was not required because "facts invoked to limit conduct credits do not increase the penalty for a crime."

Finally, in *People v. Solis* (2001) 90 Cal.App.4th 1002, this Court rejected a contention that the determination of whether section 654 applies must be made by a jury as follows:

> "The question of whether section 654 operates to 'stay' a particular sentence does not involve the determination of any fact that could increase the penalty for a crime beyond the prescribed statutory maximum for the underlying crime . . . ." [Citation.] "Unlike the 'hate crime' provision in *Apprendi*, section 654 is not a sentencing 'enhancement.' On the contrary, it is a sentencing 'reduction' statute. Section 654 is . . . a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty . . . ."

(*Solis*, *supra*, 90 Cal.App.4th at pp. 1021-1022.)

As all of these cases make clear, a defendant has no constitutional right to have a jury determine whether the sentence properly imposed upon him in accordance with the law should be reduced. The jury made all of the findings required for the statutory maximum because it not only convicted appellants of the section 504 violation, but also found true the related special allegation under 12022.6, which rendered the violation a felony and removed any question about wobbler status. (24CT 4584-4627, 4690-4715.) In other words, the prosecution elected to file the charge as a felony by including the section 12022.6 special allegation, and the jury made the requisite findings to convict appellants of a felony. The trial court's finding under section 514, therefore, was not unconstitutional under *Apprendi*.

Appellant Berkovich's argument that the section 514 finding violated *Apprendi* by requiring time to be served in state prison versus county jail is without merit as well. (BAOB 53-54.) As the trial court aptly noted, that the finding may have determined if appellants were housed in county jail or state prison did not change the maximum or minimum penalty. (1ART 37.)

The trial court's reasoning was consistent with *People v. Cruz* (2012) 207 Cal.App.4th 664, 676, fn. 8, which stated as follows:

> We are not convinced that serving a sentence in county jail instead of state prison amounts to lesser punishment where, as under the Act, the sentences are the same length. Nothing before us suggests, for instance, that the rules and regulations of prisons are more burdensome or stricter than those of jails, at least with respect to the types of offenders eligible for sentencing under section 1170, subdivision (h). Moreover, in our view, the mere possibility a defendant may, in the trial court's discretion, receive a hybrid sentence cannot be said to lessen punishment.

(*Ibid*. (citations omitted).) In *Cruz*, the defendant, who was convicted and sentenced to state prison prior to realignment, but who conviction was not yet final on appeal, requested resentencing to county jail under section 1170, subdivision (h). The court determined that the Legislature intended for the statute to be prospective and denied the defendant relief. (*Id*. at pp. 673-674.) The court compared the punishment of state prison to the array of punishments included in realignment sentencing and further held that a defendant has no protectable interest in serving his sentence in county jail as opposed to state prison. (*Id*. at pp. 676-677.) Applying this same logic, this Court should reject appellant Berkovich's argument that the exposure to state prison versus county jail shows the section 514 finding violated *Apprendi*.

Equally without merit is appellant Berkovich's next argument that because the finding required parole rather than probation, it violated *Apprendi*. (BAOB 54-57.) As the court found, "there is no case under *Apprendi* that indicates the possible or potential imposition of a parole condition is violative of *Apprendi* or increases the statutory maximum sentence that defendant Selivanov must serve." (1ART 43.) In addition, "the differences between the available post incarceration restraints placed upon a defendant sentenced under 1170, realignment, and sentenced to state

prison based on 514 are de minimus. (1ART 43.) The court could find no case supporting appellants' position that parole was more punitive than probation. Persons subject to either did "not enjoy absolute liberty to which every citizen is entitled." (1ART 44.)

The trial court's logic was sound, and appellant Berkovich's reliance on *People v. Nuckles* (2013) 56 Cal.4th 601, does not call it into question. (BAOB 55-57.) *Nuckles* did not address the issue of whether parole was "punishment" within the meaning of *Apprendi*. In *Nuckles*, the defendant was convicted of being an accessory to a parolee in absconding from parole. (56 Cal.4th at p. 606.) The defendant argued that she was not assisting the parolee in escaping punishment, because the parolee had already completed his prison sentence and was on parole, which was not part of his punishment. (*Id*. at p. 607.) The court rejected the defendant's arguments and held that parole was punishment within the meaning of section 32, defining what an accessory is. (*Id*. at pp. 607-608.) It's holding did not stand for the proposition that a defendant subject to parole suffers greater punishment, such that a jury finding was required on the section 514 allegation. Furthermore, a person subject to realignment time faces similar restraints on post-incarceration liberties. These include, among other things, short-term flash incarcerations, intensive community supervision, mandatory community service, and day reporting. (*Cruz*, 207 Cal.App.4th at p. 670.) The differences between parole supervision and realignment supervision do not amount to an *Apprendi* violation as a result.

Contrary to appellant Berkovich's next assertion, the parole revocation fine does not change this result. (BAOB 57-59.) In support of the assertion, appellant Berkovich relies on *Southern Union Co. v. United States* (2012) __U.S.__ [132 S. Ct. 2344, 183 L. Ed. 2d 318]. (BAOB 58-59.) That case involved the imposition of a $38.1 million dollar fine based on the number of days a violation was to have taken place. (*Southern*

Union Co., *supra*, 132 S. Ct. at p. 2349.) The jury was never asked to determine the precise duration of the violation, which was a fact that had a direct effect on the calculation of the fine. Such direct effect was not present here, and, moreover, the *Southern Union Co.* Court itself stated that, "[w]here a fine is so insubstantial . . . the Sixth Amendment right of jury trial is not triggered, and no *Apprendi* issue arises." (*Id*. at p. 2351.) The stayed $5,000 parole revocation fine here was hardly substantial when contrasted with the million and billion dollar fines cited by the *Sothern Union Co.* Court. (*Id*. at pp. 2351-2352.)

Regardless of all of the above arguments, even if this Court finds that the section 514 finding violated *Apprendi*, the *Apprendi* error was harmless. *Apprendi* error is not reversible per se, but is reviewed under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18. (*People v. Sandoval* (2007) 41 Cal.4th 825, 838.) The test for prejudicial error is whether a reviewing court is convinced beyond a reasonable doubt that a jury would have made the factual finding necessary to support the section 514 finding. (See *id.* at pp. 838-839.)

Here, the trial court addressed this very issue. As discussed by the court, the evidence showed there was no way to characterize the money received by Ivy Academia from the state for educational purposes other than as public money. The evidence supporting the section 514 finding, therefore, was overwhelming and uncontested. (1ART 38.) There simply was no question at all that the money Ivy Academia was using to pay the AMEX card charges was provided by the state to the charter school. For all of the above reasons, this Court should reject appellants' *Apprendi* claim.

XI. NO REVERSIBLE INSTRUCTIONAL ERROR OCCURRED ON COUNT 2 BECAUSE THE TRIAL COURT FULLY INSTRUCTED THE JURY ON THE ELEMENTS OF THE CHARGED OFFENSE OF EMBEZZLEMENT

In his eleventh and final argument on appeal, appellant Selivanov joins appellant Berkovich's argument that the trial court erred by failing to instruct the jury that it was required to find that the amount taken exceeded $950 to convict on count 2. Specifically, appellants assert that because the written instructions lacked the $950 requirement, their rights to proof of each element of the offense beyond a reasonable doubt, equal protection, and due process were violated. (SLB 1-2; BAOB 7-13.) They are incorrect.

When the trial court instructed the jury, it orally referred to count 2 as theft by embezzlement. (21RT 6648.) The written instructions did the same. (24CT 4564, 4571.) In fact, the court instructed the jury in writing with CALCRIM No. 1806, which provided that appellants were charged with grand theft by embezzlement, in violation of section 504. (24CT 4571.) With respect to theft, the court orally instructed that the jury must decide whether the crime was grand theft or petty theft, and then defined grand theft as theft of property worth more than $950. (21RT 6667.) Respondent does not dispute that the written instructions were missing this final $950 provision. But the absence of the written instruction does not constitute reversible error.

The omission of this instructions from the written packet provided to the jury does not vitiate the oral instructions. Neither the United States Supreme Court nor our Supreme Court has ever held that oral jury instructions are ineffectual unless augmented by written copies of the same instructions. To the contrary, our Supreme Court has established that neither the state nor the federal Constitution guarantees a criminal

defendant the delivery of written instructions in addition to oral ones. (*People v. Seaton* (2001) 26 Cal.4th 598, 674; *People v. Ochoa* (2001) 26 Cal.4th 398, 447; *People v. Samayoa* (1997) 15 Cal.4th 795, 845 ["the provision of written instructions to the jury (although generally beneficial and to be encouraged) is not guaranteed by, and therefore does not implicate, any provision of the state or federal Constitution"].) The failure to provide written instructions is not tantamount to giving no instructions at all.

Although the omission of a written instruction is not an error of constitutional dimension, the Legislature has seen fit to ensure as a statutory matter that defendants and juries have the benefit of written instructions upon request. (§ 1093, subd. (f); *Ochoa*, *supra*, 26 Cal.4th at p. 447.) The record reflects counsel and the court intended the jury to receive a full set of instructions, and the omission of the $950 requirement arose because the trial court inadvertently omitted it when compiling the written jury instructions. As such, this omission deprived appellants of their statutory right to have a written copy of the instruction delivered to the jury.

On this record, however, that error was harmless. The jury received the requested instruction orally. On review, an appellate court presumes the jury heard and followed the oral instructions. (*People v. Pearson* (2013) 56 Cal.4th 393, 414; *People v. Whalen* (2013) 56 Cal.4th 1, 88; *People v. Homick* (2012) 55 Cal.4th 816, 867.) Appellants have pointed to nothing in the record, i.e., no evidence of confusion or indications this jury failed to understand or apply the instructions read to it, that would establish a reasonable probability of a more favorable outcome had the jury received the $950 requirement in writing. (*Watson*, *supra*, 46 Cal.2d at p. 836; *Seaton*, *supra*, 26 Cal.4th at p. 674; *People v. Cooley* (1993) 14 Cal.App.4th 1394, 1399-1400; *People v. Blakley* (1992) 6 Cal.App.4th 1019, 1023-1024.) And the jury was expressly instructed to consider the

instructions as a whole and each in light of all the others. (21RT 6627; 24CT 4551.) Based on the above, this Court should not find that reversible instructional error occurred.

XII. NO PREJUDICIAL CUMULATIVE ERROR EXISTS

Appellant Berkovich also argues on appeal that she suffered cumulative error as a result of the failure to instruct that the amount taken exceeded $950 and the failure to instruct on unanimity as to count 2. (BAOB 39-41.) "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) While no trial is perfect, any errors were harmless and did not amount to a clear miscarriage of justice, as discussed at length above. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1064.)

Appellant has made no showing of cumulative prejudicial error. (*People v. Watson* (2008) 43 Cal.4th 652, 705; *People v. Abilez* (2007) 41 Cal.4th 472, 523; *People v. Boyette* (2002) 29 Cal.4th 381, 467-468; *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692 [few errors identified were minor and either individually or cumulatively would not alter the outcome of the trial]; *People v. Catlin* (2000) 26 Cal.4th 81, 180 [same]; *People v. Cudjo* (1993) 6 Cal.4th 585, 630 [no cumulative error when the few errors which occurred during the trial were inconsequential].) Whether considered individually or for their cumulative effect, any of the errors alleged did not affect the process or accrue to appellants' detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565; *Cudjo*, *supra*, 6 Cal.4th at p. 637.) As the California Supreme Court has long held, "[A] defendant [is] entitled to a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Mincey* (1992) 2 Cal.4th 408, 454; *People v. Miranda* (1987) 44 Cal.3d 57, 123.) In this case, appellant received a fair trial.

CONCLUSION

For the reasons stated, respondent respectfully requests that this Court affirm the judgment.

Dated: April 29, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 22,410 words.

Dated: April 29, 2015

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DECLARATION OF SERVICE BY E-MAIL and U.S. MAIL

Case Name: **People v. Selivanov, et al.**
Case No.: **B252894** **Super. Court Case No. BA372244**

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.

On April 30, 2015, I electronically filed the attached **Respondent's Brief** with the Clerk of the Court using the Online Form provided by the California Court of Appeal, Second Appellate District.

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On April 30, 2015, I served the attached **Respondent's Brief** by transmitting a true copy via electronic mail using the email addresses as follows:

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On April30, 2015, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

The Honorable Stephen A. Marcus, Judge
Los Angeles County Superior Court
Central District
210 West Temple Street, Department 132
Los Angeles, CA 90012-3210
(Courtesy Copy)

The two copies for the California Appellate Project were placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

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 April 30, 2015, at Los Angeles, California.

Lily Hood
Declarant

Signature

EJK::lrh

LA2014611638