

No. \_\_\_\_\_

IN THE SUPREME COURT OF ALABAMA

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EX PARTE MICHAEL GREGORY HUBBARD, Petitioner

In re

Michael Gregory Hubbard, Appellant

vs.

State of Alabama, Appellee

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On Petition for Writ of Certiorari to the  
Alabama Court of Criminal Appeals, following appeal from  
the Circuit Court of Lee County

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PETITION FOR WRIT OF CERTIORARI

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### Petition for Writ of Certiorari

Mike Hubbard respectfully petitions this Court for a writ of certiorari to review the decision of the Alabama Court of Criminal Appeals in *Hubbard v. State*, No. CR-16-0012 (August 27, 2018), attached as Appendix A, on appeal from the Circuit Court of Lee County. The Court of Appeals denied rehearing on September 28, 2018, see Appendix B.

### Grounds for Certiorari

Certiorari is appropriate under Rule 39(a)(1)(B), (C) and (D). The issues include the following:

(1) Issues of first impression (Rule 39(a)(1)(C)) about the meaning and application of various provisions of the Ethics Law, Ala. Code § 36-25-1 *et seq.*, the resolution of which will affect all constitutional, state, and county officers (Rule 39(a)(1)(B)). Relatedly, there is the question whether a liability-expanding interpretation of these provisions, adopted as a matter of first impression, violates Hubbard's state and federal due process rights, *see Johnson v. United States*, 135 S.Ct. 2551 (2015). After resolution of each issue of statutory interpretation, there is also the question whether the evidence was sufficient to convict. These issues include the following:

(a) Does the term "principal," see Ala. Code § 36-25-1(24), include officers or employees of an entity for which a lobbyist lobbies and subject them to all the same prohibitions that apply to the entity under the Ethics Law, even when they are not acting on behalf of that entity? Can Hubbard be subjected to criminal liability on that theory, under Counts 16, 18, 19, and 23, even though it has never been hinted that such officers or employees must sign and file the reports and documents that "each principal" and "every principal" must file, see Ala. Code §§ 36-25-18(b)(6), -19(a), and even though the Ethics Commission decided intentionally to withdraw an opinion suggesting that such persons might constitute principals?

(b) Does the "full value" exception to the definition of "thing of value," Ala. Code § 36-25-1(34)(b)(9), apply only when it is the public official who is tendering money in a fair exchange? Or does that exception also apply when, as applicable to Count 16, 17, 18, and 19, the public official, in a fair exchange, provides other sorts of consideration including (for example) stock or equity?

(c) What is the meaning and application of the final proviso in Ala. Code § 36-25-1(34)(b)(10), which excepts

earned compensation from the definition of "thing of value" if the compensation is received "under circumstances which make it clear that the thing is provided for reasons unrelated to the recipient's public service as a public official or public employee"? Does that proviso, as applicable to Counts 6 and 10, make compensation a "thing of value" whenever the public official's status has any relevance at all? Or does the proviso work more narrowly, as discussed for instance in Ethics Commission Opinion No. 2018-09, looking to whether the public official or employee "leveraged" his public service to obtain the outside compensation in the sense of gaining the outside compensation in exchange for exercising his official power?

(d) Does Ala. Code § 36-25-1.1 ("No member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall represent any person, firm, corporation, or other business entity before an executive department or agency"), as applicable to Counts 12 and 13, require proof that the payor and the legislator intend that the compensation actually be "for" such representation, in the sense that representation was what the legislator was retained to do?

And, in finding the evidence sufficient, did the Court of Appeals correctly follow *Parker v. State*, 136 So.3d 1092, 1095 (Ala. 2013) ("Conviction may not be based ... on mere speculation, conjecture, or surmise. ... [W]here a conviction depends on circumstantial evidence, that circumstantial evidence must not only be consistent with guilt, but must also be inconsistent with any rational hypothesis of innocence.") (internal quotation marks, brackets, and citations omitted), where the testimony of the prosecution's own witness was that the compensation was not paid for that reason?

(e) Does Ala. Code § 36-25-5(a) ("No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself ..."), as applicable to Count 11, require proof that personal gain would actually result from the use of the position or office? And, in finding the evidence sufficient, did the Court of Appeals correctly follow *Parker v. State*, 136 So.3d 1092, 1095 (Ala. 2013), quoted *supra*?

(f) Does Ala. Code § 36-25-5(c) ("No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public



property under his or her discretion or control for the private benefit or business benefit of any ... person..., which would materially affect his or her financial interest"), as applicable to Count 14, require proof that the use of public property would affect Hubbard's financial interest, in the sense that using the public property would actually cause him financial gain or avoid him financial loss? And, in finding the evidence sufficient, did the Court of Appeals correctly follow *Parker v. State*, 136 So.3d 1092, 1095 (Ala. 2013), quoted *supra*?

(2) As to jury misconduct and the trial court's failure to investigate, the decision below conflicts with prior case law (Rule 39(a)(1)(D)). The Appeals Court held that Hubbard "failed to prove that he suffered any prejudice and, more importantly, that any juror misconduct occurred at his trial." (Slip Op., p. 44). The Court overlooked the fact that the affidavit showing severe juror misconduct and bias was evidence, and undisputed evidence at that. *Ex parte Robinson*, 565 So.2d 664, 668 (Ala. 1990) (new trial granted based on affidavit testimony). The Court also overlooked the fact that such misconduct - combined with the fact that the trial court learned of some of it during trial and

failed to investigate or to inform the defense of it - requires reversal under authorities including *Holland v. State*, 588 So.2d 543 (Ala. Crim. App. 1991).

(3) The trial court erroneously allowed former Ethics Commission official James Sumner to testify as an expert on the meaning of various provisions of the Ethics Law (and, worse yet, his views of the law were incorrect); but a jury is to hear the law from the court, not from a witness, see *Ex parte Dial*, 387 So.2d 879, 880 (Ala. 1980).

#### Statement of Facts

A Statement of Facts is attached as Appendix C. This is a verbatim copy of the Statement of Facts submitted to the Court of Appeals in the application for rehearing.

#### Argument

1. The Court should review the merits on all counts, because of important first-impression questions of statutory interpretation and the absence of probative evidence that Hubbard violated the laws.

This is exactly the sort of case in which certiorari is appropriate. It involves several issues of first impression, as to interpretation of Ala. Code § 36-25-1 et seq., the Ethics Law. The answers to those questions will affect every member of the Legislature, every other State officer, and a vast number of state and local officers and employees.

The Court of Appeals departed from important principles of statutory interpretation: that criminal statutes are to be strictly construed in favor of defendants; that such statutes are to reach no further in meaning than their words; that one who does not violate the statute as written cannot be convicted on the notion that he violated the so-called "policy" of the statute; and that all doubts concerning the interpretation of a criminal law are to be resolved in favor of lenity. *Ex parte Hicks*, 153 So. 3d 53, 58 (Ala. 2014). Those rules are especially important for ethics laws, where a too-expansive reading of a statute can wrongly deprive the people of an elected representative. A "statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *McDonnell v. United States*, 136 S.Ct. 2355, 2373 (2016).

The opposite approach, as exemplified in the opinion of the Court of Appeals in this case, is unconstitutional: it deprives a person like Hubbard of due process, by subjecting him to criminal conviction without fair notice. *Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015).

The Court of Appeals erred in these ways as to the

definition of the term "principal," in Ala. Code § 36-25-1(24). The Court held that the jury could find various individuals to be "principals" where they occupied various high roles in corporations or other entities that had lobbyists. The only authority cited for that holding was the testimony of a former Ethics Commission official. That official did not identify any occasion on which the Commission, or even its staff, had put any such view in writing or otherwise given any public notice of it. The Ethics Commission's own official forms designate the entity for which the lobbyist lobbies - not that entity's officers - as the "principal." The public has never had any reason to believe that the term "principal" would include an entity's officers or agents.

Indeed, after this trial the Ethics Commission considered an opinion (No. 2016-24) broadening "principal" to encompass some of an entity's officers; but the Commission *then withdrew* that opinion. Thus the Ethics Commission has shown that it did not (at least does not plainly and clearly) understand the law to be as the Court of Appeals has interpreted it. Moreover, and troublingly, the Appeals Court's opinion delineated no clear principle

or rule of law as to who constitutes a "principal." To convict Hubbard on a novel, expansive, and unclear view of the word "principal" is a violation of his due process rights as well as being incorrect statutory interpretation.

The Court of Appeals also held that fair-price purchases of equity in Craftmaster were illegal under Ala. Code § 36-25-5.1. Rejecting the argument that these fair-price transactions were excepted from the statutory definition of "thing of value" under Ala. Code § 36-25-1(34)(b)(9) ("Anything for which the recipient pays full value"), the Court said that Hubbard "paid" nothing but merely provided stock or equity. (Slip Op. pp. 145-46). This interpretation of the law is odd: the transaction would be lawful if the exchange went in one direction, but unlawful in the other direction at exactly the same price. The Court was wrong: the word "pays" does not refer only to payment with money. It is common usage to speak of paying or being paid in stock. See, e.g., *Commissioner v. LoBue*, 351 U.S. 243, 247 (1956) ("It makes no difference that the compensation is paid in stock rather than in money.").

The Court of Appeals erred also, on Counts 6 and 10, in regard to the "compensation" provision of Ala. Code § 36-

25-1(34)(b)(10), It applied that statute in a manner that expanded criminal liability in ways that the public could not have anticipated and in ways that the Ethics Commission has publicly avoided doing. The Ethics Commission has wrestled, even after the events at issue in this case, to define a complex analysis of when outside compensation is deemed to be unlawfully "related ... to public service" within the meaning of the "compensation" provision, section -1(34)(b)(10). Ethics Comm'n Opinion No. 2016-27. Even more recently, the Ethics Commission has looked to whether the public official or employee "leveraged" his public service to obtain the outside compensation. And the Ethics Commission has demonstrated that "leveraging" in that sense does not mean that the person's skills and status made him attractive to the outside entity, but means instead that the official acts unlawfully if he gains the outside compensation in exchange for exercising his official power. Ethics Commission Opinion No. 2018-09, p. 6; see also Ethics Commission Opinion No. 2018-08, p. 3. Here there was no evidence, and not even any allegation, that APCI or Edgenuity retained Hubbard in exchange for any use of his official authority on their behalf; as the prosecutor said,

"there's no quid pro quo charged in this case." (R-5479).

It is neither appropriate nor constitutional to premise a criminal conviction on a broad view of liability under this statute, where the Ethics Commission's own opinions have adopted a narrower scope of liability.

As to Counts 11 through 14 pertaining to Robert Abrams and his businesses, the Court of Appeals continued this same pattern of error: it did not construe the statutes strictly by their terms. The critical fact as to all of these counts was that the testimony of prosecution witness Abrams was clearly and definitively exculpatory. Abrams testified, as to why Hubbard was retained for consulting work for Capitol Cups: it was because of his network of connections in the world of sports. [R-6131 (Abrams)]. "The legislature had nothing to do with it." [R-6134 (Abrams)].

Against that clear and definitively exculpatory testimony from the prosecution's own witness, any suggestion that Hubbard was really retained to exercise public authority (or that he exercised public authority in order to retain the consulting contract) is pure speculation. Speculation about unlawful intent from circumstantial evidence, in the face of direct and plain

exculpatory evidence from the prosecution's own witness, is not sufficient to support a conviction. "Conviction may not be based ... on mere speculation, conjecture, or surmise. ... [W]here a conviction depends on circumstantial evidence, that circumstantial evidence must not only be consistent with guilt, but must also be inconsistent with any rational hypothesis of innocence." *Parker v. State*, 136 So.3d 1092, 1095 (Ala. 2013) (internal quotation marks, brackets, and citations omitted).

Because of these points, there was insufficient evidence on Counts 11 through 14, if the statutes at issue in those Counts are properly and narrowly interpreted. Counts 12 and 13 arise under Ala. Code § 36-25-1.1 ("No member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall represent any person, firm, corporation, or other business entity before an executive department or agency."). That language requires proof beyond a reasonable doubt that the official was paid "for" representing an entity before the executive branch. It is not enough that there be payment for other lawful services, and representation. The payment must be for the



representation, which in plain language means that there must be proof that the entity (here, Capitol Cups) intended to be paying for that representation. Here, the plain evidence from prosecution witness Abrams dispels any such theory; and there was nothing that would allow the jury to reject that uncontradicted testimony and to somehow "infer" from circumstantial evidence that Capitol Cups intended to pay Hubbard "for" official actions.

Similarly, Counts 11 and 14 required proof beyond a reasonable doubt that Hubbard used his office or public labor or materials "to obtain personal gain" (Count 11, Ala. Code § 36-25-5(a)) or to "materially affect his ... financial interest" (Count 14, Ala. Code § 36-25-5(c)). These statutes, properly interpreted, require proof that the things the official did using his office or public property were the means by which he secured money. Thus in the context of these charges, these statutes required proof that Capitol Cups paid and would continue to pay Hubbard only if he used his office, or public labor or materials; and there simply was no proof of that. Once again, the Court of Appeals failed to adhere to a strict and correct reading of the statutes; and it allowed speculation to

substitute for proof, even in the face of definitively exculpatory proof from the State's own witness Mr. Abrams.

**2. The Court should also grant review on the question of jury misconduct and bias, and the trial court's refusal to investigate it.**

During the trial, the trial court learned of possible misconduct by a juror; a juror reported that another juror was making improper commentary. (Slip Op., pp. 26-27). The trial court never told the defense about this, and did not meaningfully investigate. (*Id.*, pp. 26-28, 37-38). After trial, the juror gave an affidavit testifying to extremely serious and prejudicial misconduct by other jurors. Not only had various jurors made up their mind before the evidence was concluded; most extreme, one juror even smirked that he or she had lied during voir dire when attesting that he or she could put personal thoughts aside and decide the case based on the evidence. (*Id.*, p. 25).

The Court of Appeals denied relief on this point (*id.*, pp. 40-44) holding that Hubbard had failed to prove that there was misconduct or prejudice to him. This was simple error; the affidavit was evidence, unrebutted evidence at that. *Ex parte Robinson*, 565 So.2d 664, 668 (Ala. 1990) (new trial appropriately granted based on affidavit

testimony). There was never any order requiring Hubbard to supplement that affidavit with live testimony; and indeed the parties had been told not to contact jurors after trial without court approval.

The trial court's failure to inform the defense of what the trial court knew, and its failure to investigate, would warrant relief even if there were not more. *Holland v. State*, 588 So.2d 543 (Ala. Crim. App. 1991). But especially in combination with the unrebutted evidence of extreme misconduct recounted above, it is clear from the unrebutted evidence that Hubbard did not receive a fair trial.

### Conclusion

The Court should grant review on all issues addressed herein. Because of the enormous record and extensive issues in the case (an 82-volume record, and a 160-page opinion from the Court of Appeals), Hubbard respectfully requests that if the Court grants review, then (1) the page limits for briefing be expanded as they were in the Court of Appeals: 120 page principal briefs and 60 page reply (see Order of April 18, 2017, from Court of Appeals), and (2) the time for merits briefing be expanded to four weeks for each principal brief instead of the ordinary two weeks. #

Respectfully submitted,

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