SUPREME COURT
FILED
FEB 01 2018
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Deputy

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	) No. S242244
	)
Plaintiff and Respondent,	) 2ND Crim. No.B265937
	)
	) Los Angeles County
v.	) Superior Court No.
	) BA420611
ALEJANDRO O. GUZMAN,	)
	)
Defendants and Appellants.	)
	)

APPELLANT'S OPENING BRIEF ON THE MERITS

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Project Independent Case Program

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SUPREME COURT OF THE STATE OF CALIFORNIA

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Plaintiff and Respondent,	) 2ND Crim. No.B265937
v.	) Los Angeles County) Superior Court No.) BA420611
ALEJANDRO O. GUZMAN,	)
Defendant and Appellant.	)

APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUES FOR REVIEW

1. Whether the Truth-in-Evidence provision of the state constitution (Cal. Const. art. I, § 28, subd. (f), par. (2)) abrogates Penal Code section 632, subdivision (d), that makes the surreptitious recording of confidential communications inadmissible in judicial proceedings?

2. Whether the admission of an illegally recorded telephone call of a defense witness by the mother of an alleged victim violated Appellant's due process rights under the federal and state constitutions?

STATEMENT OF THE CASE

Appellant Guzman was charged by information in the Los Angeles County Superior Court with two counts of lewd act upon a child in violation of Penal Code section 288 subdivision (a). The two alleged victims were Monica M (count one) and Esmeralda F (count two). Appellant turned down the prosecution's offer of three years in prison. (CT 57-59, 2 RT 40.)[1] He was convicted of both counts by a jury and sentenced to five years. (CT 177-182, 5 RT 2109-2110.)

The Court of Appeal affirmed Appellant's convictions in a published decision on April 27, 2017. (*People v. Guzman* (2017) 11 Cal.App.5th 184.)[2]

On July 26, 2017, this Court granted the petition for review.

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[1] "CT" stands for Clerk's Transcript. "RT" stands for Reporter's Transcript.

[2] In discussing the decision of the Court of Appeal, Appellant will cite to the slip opinion.

STATEMENT OF FACTS

A. A secretly recorded phone conversation was admitted to impeach a defense witness

Both girls had accused Appellant of touching them inappropriately. Monica was Appellant's 12 year old niece who lived in an apartment below Appellant's family. Monica testified that Appellant touched her vagina and showed her his penis. (3 RT 933-955.)

Esmeralda was 10 years old and lived next door. She testified that one day Appellant told her she had a hole in her shorts. He followed her into the bathroom and touched her chest. (2 RT 641-653.)

Appellant testified in his own defense and denied the accusations. (4 RT 1306-1309.)

Appellant's 18 year old niece Lorena Leon also testified for the defense. Lorena said that Appellant was a playful and affectionate person but he never molested her. (3 RT 1061.) Lorena learned that Esmeralda told the police that Lorena had been molested by Appellant. Lorena said Esmeralda was not telling the truth. (3 RT 1066-1070.)

Monica's mother Esperanza secretly recorded a phone conversation with Lorena that was admitted into evidence over defense objection. Lorena testified that she did not know that her aunt Esperanza had recorded a phone conversation with her on September 10, 2013. Lorena listened to the tapes and said the entire call was not recorded. (4 RT 1231-1233.) On the phone, her aunt started questioning her about family issues. The aunt told her that Monica was accusing Appellant of touching her inappropriately. This was the first time Lorena had heard this. (4 RT 1234.)

The aunt asked Lorena whether she had ever been molested by Appellant. Lorena answered that Appellant is "very affectionate" and a "very loving and caring person" who "perhaps sometimes" "comes at you too close" but "never had I been touched by him in my vagina or my breast." (4 RT 1235.)

Lorena was recorded as saying that she knew Appellant 'was capable of doing that" so "that's why I believe what Monica's saying." (CT 121.) Lorena explained to the jury that when she told her aunt she believed Monica, she was "being sympathetic." (4 RT 1239.) When the aunt asked if she could be a witness for Monica "anonymously" Lorena said she first wanted to speak to Monica personally to get her side of the story. (4 RT 1240-1241.) When the aunt said Lorena had warned Monica to be careful, she did not deny

it, but she did not confirm it either. (4 RT 1247.) When she said on the call that she was not comfortable wearing shorts, she meant around any man, "personally growing up in South Central." (4 RT 1243.)

B. Defense counsel argued that the secretly recorded phone conversation violated Penal Code § 632(d)

The afternoon of the first day of trial, the prosecutor told defense counsel that Monica's mother, Esperanza Martinez, just notified her that she tape recorded Lorena. As soon as the tape recording was obtained by the police, a copy would be given to defense counsel. (2 RT 13-14.)

The tape recording was made six days before Monica's mother went to the police. Lorena said that Appellant did not touch her inappropriately but that she believed Monica. The prosecutor said she would not use the tape in her case-in-chief but if Lorena testified she would use the recording to impeach her. If defense counsel moved for a continuance based on this new evidence the prosecutor would file multiple victim allegations which would trigger a life sentence. Defense counsel complained that the late discovery was not only unfair but that the recording was barred by Penal Code section 632 subdivision (d). (2 RT 308.)

The prosecutor countered that the tape recording was admissible under sections 633 (exception for law enforcement) and 633.5 (exception for recording the commission by another party of the crimes of extortion, kidnapping, bribery, or felony violence to the person). (2 RT 308-309.)

The court believed that the tape recording was admissible under *People v. Crow* (1994) 28 Cal.App.4th 440, which allows impeachment by statements made during plea negotiations. The court acknowledged that the case was not on point. (2 RT 678.)

After Lorena testified, the court held a 402 hearing on the admissibility of the tape recorded call. Defense counsel pointed out that Penal Code section 633.5 did not apply "if someone records a third party, not the alleged suspect, if you will, the perpetrator of the crime." (4 RT 1202.) He stressed that section 632 makes it illegal to record a phone call unless all parties to the conversation agree. The exception of section 633.5 "by its precise words" is "limited to the recording of a person who is a suspected perpetrator of a crime and a party to that phone call." (4 RT 1203.) "Given that Lorena was not the suspected perpetrator of any crime" section 633.5 did not provide an exception and the recording should not be allowed. (2 RT 1203.)

The prosecutor believed that 633.5 did apply. However, even without section 633.5, it would still come in to impeach Lorena's testimony, analogizing it to a *Miranda*[3] violation where the statement would still come in to impeach "because ultimately a trial is to find and to seek the truth." (4 RT 1204.) It would be "illogical and unjust for the defense to put on a witness to say that didn't happen" but there is "evidence where she says otherwise." (4 RT 1204.)

The court again cited the *Crow* case, conceding that it was not directly on point. (RT 1205-1206.) It also found that precluding admission of this evidence would violate right to Truth-in-Evidence provision of the California Constitution. (4 RT 1206-1207.)

Defense counsel objected that the recording contained accusations made by Esperanza Martinez that Appellant had touched other unknown people. The defense was "getting broadsided by additional allegations and we have no idea if they're true." (4 RT 1224.) The statement should be excluded under 352 as more prejudicial than probative. (4 RT 1224.) The prosecutor said she would excise the references to other people. (4 RT 1225.)

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[3] (*Miranda v. Arizona* (1966) 384 U.S. 436.)

Defense counsel further complained that when Lorena testified earlier, the prosecutor could have asked her pointed questions and there was no need to impeach her. However, if the court were inclined to allow the tape he would recall Lorena to explain the conversation. (R RT 1226.)

The court ruled that portions of the tape and transcript referring to other people were not admissible, but the prosecution would be allowed to play the tape in rebuttal. It was impeachment and "the best evidence" of the conversation. (4 RT 1228-1229.)

Lorena Leon was recalled by the defense to explain what she meant during the taped conversation. (4 RT 1231-1250.) The prosecution recalled Martinez and played the tapes in rebuttal. (4 RT 1345-1364.)

C. Appellant argued on appeal that Monica's mother could testify about the conversation but the tape itself was not admissible

On appeal, Appellant argued that the plain language of sections 632 subdivision (d) and 633.5, forbid admitting the tape for any purpose. Under *Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, Esperanza

Martinez could testify to an untainted and independent recollection of the conversation but the tape was not admissible under any authority. *See infra.*

The Court of Appeal held that the exclusionary provision of section 632, subdivision (d) was abrogated by the Truth-in-Evidence provision of Article I, section 28(f) (hereinafter "Proposition 8"). The court relied heavily on *In re Lance W.* (1985) 37 Cal.3d 873, 890). (Slip opn. at pp. 15-18.)

The Court of Appeal observed that no published decision had found section 632, subdivision (d) abrogated by Proposition 8. But it found the reasoning of *People v. Ratekin* (1989) 212 Cal.App.3d 1165 to be "sound and wholly apposite" to section 632, subdivision (d). (Slip opn. at p. 13.)

The Court of Appeal also held that the secretly recorded phone conversation was admissible to impeach Lorena. (Slip opn. at p.14.)

The opinion of the Court of Appeal will be discussed in detail below.

Argument

I. PENAL CODE SECTION 632, SUBDIVISION (D) WAS NOT ABROGATED BY PROPOSITION 8

The Court of Appeal's reliance on *In re Lance W.*, to hold that Penal Code section 632, subdivision (d) was abrogated by Proposition 8 was misapplied. In order to explain why the court's reasoning was wrong it is necessary to discuss the matter in some detail.[4]

A. The Right to Privacy

California specifically recognizes that the right to privacy is an inalienable right of all people as codified in both the Penal Code and the Constitution.

In 1967, the Legislature enacted the Invasion of Privacy Act. Penal Code section 630 (Declaration of Policy) states in pertinent part:

> "The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the **invasion of privacy** resulting from

[4] Where the court's evidentiary ruling turns on the proper application of a statute, this question of law is reviewed de novo. (Slip opn. at p. 9, citing *People v. Grimes* (2016) 1 Cal.5th 698, 712.)

> the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.
>
> "The Legislature by this chapter intends to **protect the right of privacy** of the people in this state." (Emphases added.)

Penal Code section 632 was included in the 1967, Invasion of Privacy Act. Subdivision (a) makes it a crime punishable by a year in the county jail or in the state prison when "any person" "without the consent of all parties to a confidential communication" uses a "recording device to eavesdrop or record the confidential communication."

Subdivision (d) provides:

> "Except as proof in an action or prosecution for violation of this section, **no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding**." (Section 632 subdivision (d), emphasis added.)

In 1972, California voters added the right to privacy to the state Constitution as an "inalienable right" of "all people" (*White v. Davis* (1975) 13 Cal.3d 757, 773.)

> "[T]he moving force behind the new constitutional provision was a more focussed privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in

contemporary society. The new provision's primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy." (*White v. Davis*, supra, 13 Cal.3d at p. 774.)

Specifically, the very first section of the Constitution states:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and **privacy**." (Cal. Const. Art 1, sec. 1, emphasis added.)

B. The Right to Truth-in-Evidence

In 1982, the California voters added Proposition 8, the Victim's Bill of Rights, to the state Constitution. (Article I, sec. 28.)

Subdivision (f)(2)[formerly 28(d)] (hereinafter "Proposition 8") provides:

> Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

C. Penal Code section 632 has been repeatedly amended since Proposition 8

The court below and the parties agreed that Penal Code section 632 has been reenacted three times since the passage of Proposition 8. The Court of Appeal stated: "As the People acknowledge, the Legislature has amended section 632 numerous times since the voters passed Proposition 8 in 1982." (Slip opn. at p. 15.)

> "At least two-thirds of the members of each legislative house voted in favor of the legislation. (Footnote omitted.) Thus the question presented is whether the legislative enactments revived the exclusionary rule in section 632, subdivision (d), under the exception for newly enacted legislation set forth in Proposition 8." (Slip opn. at pp. 15-16.)

Relying on *In re Lance W.*, the Court of Appeal, however, held that the amendments to Penal Code section 632 and enactment of new statutes did not make "substantive changes to the wording of the exclusionary rule set forth in section 632, subdivision (d). (Slip opn. at p. 15.) Therefore, section 632 subdivision (d) was abrogated by Proposition 8. As will be explained in detail below, the Court of Appeal misread *In re Lance W.*

D. *In re Lance W* held only that Proposition 8 abrogated the judicially created vicarious exclusionary rule

Article I, section 13 of the California Constitution is nearly identical to the Fourth Amendment of the United States Constitution.

Article I, section 13 provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

For a time, California courts held that Article I, section 13, had "more exacting standards" than the Fourth Amendment, so that a state criminal defendant "had standing to object to admission of evidence seized in violation of the rights of a third party." (*In re Lance W.* (1985) 37 Cal.3d 873, 879, citing *People v. Martin* (1955) 45 Cal.2d 755 and *Kaplan v. Superior Court*

(1971) 6 Cal.3d 150, 156.) This Court held that Proposition 8 abrogated the judicially created vicarious exclusionary rule. Henceforth, a court may exclude evidence "only if exclusion is also mandated by the federal exclusionary rule application to evidence sized in violation of the U.S. Const., 4th Amendment." (*In re Lance W.,* at p. 879.)

This Court agreed that Proposition 8 did not repeal Article I, section 13 of the California Constitution; nor did it repeal section 24 ("Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.") (*In re Lance W.,* 37 Cal.3d at p. 884 and fn. 3.)

> "We agree that Proposition 8 did not repeal either section 13 or section 24 of article I. The substantive scope of both provisions remains unaffected by Proposition 8. What would have been an unlawful search or seizure in this state before the passage of that initiative would be unlawful today, and this is so even if it would pass muster under the federal Constitution. What Proposition 8 does it to eliminate a judicially created *remedy* for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled." (*In re Lance W.,* 37 Cal.3d at pp. 886-887, emphasis in the original.)

"The express intent of 28(d) [Proposition 8] is that all relevant evidence be admitted. That purpose cannot be effectuated if the judiciary is free to adopt exclusionary rules that are not authorized by statute or mandated by the Constitution." (*In re Lance W.,* 37 Cal.3d at p. 889.)

E. Article IV, section 9 and Government Code section 9605

Article IV, section 9 of the California Constitution reads in part that: "A section of a statute may not be amended unless the section is re-enacted as amended." The first two paragraphs of Gov. Code section 9605 (effect of amendment on time of enactment; presumption that statute enacted last prevails) read (emphasis added):

> "Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. **The portions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment;** and the omitted portions are to be considered as having been repealed at the time of the amendment. When the same section or part of a statute is amended by two or more acts enacted at the same session, any portion of an earlier one of such successive acts which is omitted from a subsequent act shall be deemed to have been omitted deliberately and any portion of a statute omitted by an earlier act which is restored in the subsequent act shall be deemed to have been restored deliberately.
>
> "In the absence of any express provision to the contrary in the statute which is enacted last, it shall be conclusively presumed that the statute which is enacted last is intended to prevail over statutes which are enacted earlier at the same session and, in the absence of any express provision to the contrary in the statute which has a higher chapter number, it shall be presumed that a statute which has a higher chapter number was intended by the Legislature to prevail over a statute which is enacted at the same session but has a lower chapter number."

This Court agreed that the "only effect of section 9605 is to avoid an implied repeal and reenactment of unchanged portions of an amended statute, ensuring that the unchanged portion operates without interruption." (*In re Lance W.,* 37 Cal.3d at p. 895.) "The clear intent of Government Code section 9605 is to codify the rule that the unchanged portions of the new amended statute be 'reenacted' as they existed immediately prior to the amendment." (*Id.* at p. 895, fn. 18.)

In re Lance W., examined the effect of section 9605 on amendments to Penal Code section 1538.5 subdivision (a). Subdivision (a) provided "that a defendant in a criminal prosecution may seek suppression of evidence obtained in a search or seizure in violation of state constitutional standards." (37 Cal.3d at p. 893.) Subdivision (a) also provided that a defendant could move to suppress evidence obtained in violation of the federal constitution. (*Id.* at p. 893, fn.13.)

The portion of section 1538.5 that was enacted after Proposition 8 (chapter 625 of the 1982 Statutes), was an urgency clause that "indisputably" made changes that were "procedural only." (*In re Lance W.,* 37 Cal.3d at p. 894.) These amendments were to subdivisions (f) [motions to suppress in felony prosecutions limited to evidence presented at preliminary hearings] and (j) [authorizing review of orders granting motions to suppress and reinstatment

of complaints][5] and not subdivision (a), the exclusionary provision. (*Id.* at p. 894, fn.17.) The Legislature "intended that the changes made by this act are procedural only." (*Id.* at p. 894.) Thus, the amendments "'reenacted' not the law as it was before Proposition 8, but the law as it was on August 27, 1982. (*Id.* at pp. 895-896.) "The law which continued without interruption pursuant to Government Code section 9605, and was reenacted ... was section 1538.5 as limited by the impact of Proposition 8." (*Ibid.*)

> "We conclude that the amendments to section 1538.5 adopted by the Legislature in 1982 had neither the intent nor effect of reviving exclusionary rules abrogated by Proposition 8. Therefore, although section 1538.5 continues to provide the exclusive procedure by which a defendant may seek suppression of evidence obtained in a search or seizure that violates 'state constitutional standards,' a court may exclude the evidence on that basis only if the exclusion is also mandated by the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amendment." (*In re Lance W.,* 37 Cal.3d at p. 896.)

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[5] The amendments to section 1538.5, subdivisions (f) and (j) did not concern *what* could be suppressed. (*In re Lance W.,* 37 Cal.3d at p. 894, fn. 17.)

F. The Court of Appeal held that only procedural amendments were made to Penal Code section 630, so subdivision (d) was abrogated by Proposition 8

Relying on *In re Lance W.,* the Court of Appeal held that the amendments to Penal Code section 632 did not reenact the exclusionary provision of subdivision (d).

> "The same analysis applies to the legislation amending the Invasion of Privacy Act after the passage of Proposition 8. As explained, none of the subject legislation materially altered section 632. Rather, in each instance, the legislation's only substantive effect was to amend the language in section 632, subdivision (a) by adding references to newly enacted statutes prohibiting the interception or recording of cellular or cordless telephone communications. (See Stats 1985, ch. 909, pp. 2900-2904 [adding reference to section 632.5]; Stats 1990, ch. 696, pp. 3267-3268 [adding reference to section 632.6]; Stats 1992, ch. 298, pp. 1212-1214 [adding reference to section 632.7].) In no case did the subject legislation make substantive changes to the language of section 632, subdivision (d) as it existed after the passage of Proposition 8. Thus, under our Supreme Court's holding in *Lance W.*, the law which continued without interruption pursuant to Government Code section 9605, and which was reenacted by the subject legislation pursuant to article IV, section 9 of the California Constitution, was section 632, subdivision (d) *as limited* by the impact of Proposition 8. (*Lance W.,* at p. 896.)" (Slip opn. at pp. 17-18.)

However, this Court did not hold in *In re Lance W.* that in order for an exclusionary provision to survive Proposition 8, there must be a

substantive amendment to the exclusionary provision itself. Moreover, it cannot be overemphasized that what was abrogated by Proposition 8 in that case was the *judicially created* vicarious exclusionary rule. (37 Cal.3d at p. 879.) Section 1538.5 subdivision (a) is still good law today. Section 1538.5, subdivision (a) never said anything about the vicarious exclusionary rule, but rather permits a defendant to move to suppress evidence seized in violation of the federal or state constitutions.

G. The Amendments to Penal Code section 632 were substantive, however, not procedural

In 1985, 1990, and 1992, the Legislature enacted additional statutes regarding invasion of privacy, and each time it also amended section 632, subdivision (a), to provide *increased penalties* for anyone previously convicted of violations to these new Penal Code sections.[6] This is a *substantive* change to section 632, not a procedural change.

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[6] (See section 632.5 [cellular radio telephone interceptions, application of section]; section 632.6 [cordless or cellular telephones; interception or receipt of communications without consent; punishment; exceptions]; section 632.7 [cordless or cellular radio telephones; intentional recordation of communications without consent; punishment; exceptions].)

Subdivision (d) itself has been amended subsequent to Proposition 8. In 1994, the Legislature amended the text of subdivision (d). Prior to that, the subsections of section 632 each contained a heading: "(a) Prohibited acts; punishment; recidivists ... (b) Person ... (c) Confidential communication ... (d) Evidence ... (e) Exceptions ... (f) Hearing aids." In 1994, the Legislature amended the statute to remove the headings. In 1995, section 632 subdivision (d) no longer had the heading "evidence." Thus, the Legislature actually altered the subsection itself, while leaving its substance. That constitutes a clear reenactment subsequent to Proposition 8.

In 2016, after Appellant's trial but before the decision of the Court of Appeal, the Legislature again amended section 632, subdivision (d). Instead of reading "no evidence ... shall be admissible," it reads "evidence is not admissible." The Court of Appeal viewed this as merely a "technical, nonsubstantive change." (Slip opn. at p. 10, fn.6.) But even if the wording change does not add anything to subdivision (d), the amendment is still a resounding reaffirmation of the exclusionary rule, which therefore survives Proposition 8 pursuant to Government Code section 9605.

H. *People v. Ratekin* is irrelevant to Penal Code section 632

The Court of Appeal's reliance on *People v. Ratekin*, 212 Cal.App.3d 1165, does not warrant an extensive discussion because that case is irrelevant to the issues in this case. First, *Ratekin* dealt with Penal Code section 631, which prohibits unauthorized wiretaps. The wiretap in that case was not unauthorized inasmuch as it had been obtained by federal narcotics agents pursuant to 18 U.S.C. § 2518. (*Id.* at p. 1166.) The *Ratekin* court specifically held that section 632, subdivision (d) did not apply to the case. (*Id.* at p. 1168.) The conduct of the federal agents did not constitute "eavesdropping" which is prohibited by section 632. (*Id.* at p. 1169.)

II. MONICA'S MOTHER COULD HAVE TESTIFIED TO IMPEACH LORENA BUT THE TAPE RECORDING ITSELF WAS NOT ADMISSIBLE

Appellant argued that under *Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, Monica's mother could testify to her independent recollection of the telephone conversation in order to impeach Lorena, but the tape recording itself was not admissible. The Court of Appeal did not discuss *Frio v. Superior Court.* Insofar as impeachment of a witness is important to the analysis, this case is controlling.

In *Frio v. Superior Court*, supra, 203 Cal.App.3d 1480, Frio sought writ review of a pretrial order barring him from testifying about conversations he had with several defendants in a civil lawsuit. Frio tape recorded most of the conversations on his answering machine and prepared detailed notes of these conversations. There was no dispute that these tapes were made without the consent of the other party. The recordings were no longer available but Frio still had his notes. The trial court ruled that Frio's testimony regarding the conversations was excluded by Penal Code section 632 subdivision (d). (*Id.* at p. 1484.) The Court of Appeal reversed:

> "We conclude Frio's testimony relating his present recollection of the contents of telephone conversations with others, even if refreshed by notes prepared in part by reference to tape recordings made in apparent violation of section 632, is not

> evidence obtained as a result of the illegality. Properly considered, such testimonial evidence is the result of Frio's lawful firsthand participation in the telephone conversations." (*Frio v. Superior Court, supra,* 203 Cal.App.3d at p. 1485.)

The Court first discussed the Privacy Act, section 630 et seq. which was enacted to strengthen existing law by "prohibiting wiretapping or 'electronic eavesdropping' *without the consent of all parties to the communication* which is being tapped or overheard." (*Frio v. Superior Court, supra*, 203 Cal.App.3d at p. 1487, citing legislative history, emphasis in the original.) Under section 632, a confidential communication is one made in circumstances where a party "desires it to be confined to the parties thereto," but excludes conversations made in public. (*Id.* at p. 1488.) A person who imparts private information may risk betrayal by the other party, but there is a distinction between "secondhand dissemination to an unannounced auditor" such as a "mechanical device." (*Ibid.*, citations omitted.) Section 632 confidentiality "appears to require nothing more than the existence of a reasonable expectation by one of the parties that no one is 'listening in' or overhearing the conversation." (*Id.* at p. 1490.)[7]

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[7] This Court endorsed the *Frio* test for confidential communication, which "holds that a conversation is confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 768, citing *Frio v. Superior Court*, supra, 203 Cal.App.3d 1480.) *Flanagan*

The Court next discussed the exclusionary sanction of section of 632 which "renders inadmissible all evidence obtained" by recording a confidential communication. (*Frio v. Superior Court*, supra, 203 Cal.App.3d at p. 1490.) The court said that any analysis of this statutory exclusionary rule must take into consideration the longstanding opinions of the United States Supreme Court governing the "judicially crafted rule" excluding evidence obtained as a result of an unlawful search. (*Frio.*, citing e.g. *Weeks v. United States* (1914) 232 US. 383.) The exclusionary rule prohibits the introduction of evidence "which is the derivative product of the primary evidence" but "it has long been recognized that indirectly acquired evidence is inadmissible only up to the point at which the connection with the illegality becomes 'so attenuated as to dissipate the taint." (*Frio*, at pp. 1490-1490, citing e.g. *Wong Sung v. United States* (1963) 371 U.S. 417, 484-485.) Evidence which also has an "independent source" is an exception to the exclusionary rule. (*Frio,* at p. 1491, citing e.g. *Silverthorne Lumber Co. v. United States* (1920) 251 U.S. 385, 392.)

The Court next observed that basic evidence law allows a witness' recollection to be properly refreshed by writings and papers which are

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involved a civil lawsuit for damages over an illegally recorded phone call.

not themselves admissible. (*Frio v. Superior Court*, supra, 203 Cal.App.3d at p. 1491-1492, citations omitted.) The Court held that:

> "because past recollection recorded involves a witness unable to testify fully and accurately absent use of a written memorandum, such testimony falls within the proscription of section 632, subdivision (d). **Neither the tainted recordings nor the notes derived from them can be read in evidence**." (*Frio v. Superior Court*, supra, 203 Cal.App.3d at p. 1492, emphasis added.)

The Court further held that using these materials (i.e. notes or recordings) to refresh recollection does not involve reading or offering them into evidence. "As such, section 632, subdivision (d) is not violated by using said materials in that fashion." (*Frio v. Superior Court*, supra, 203 Cal.App.3d at pp. 1492-1493.) The witness's recollection of the communications derives not from the "illegal tape recordings or the notes prepared from them" but from the "independent source" of the "witness's lawful firsthand participation in the conversations." (*Id.* at p. 1493.) "The testimony remains the witness' independent recollection of the event." (*Ibid.*) Thus, Frio could testify to the conversations of which he "enjoys an untainted recall." (*Id.* at pp. 1493, 1495.) "The statute neither can, nor purports, to remove the risk inherent in speaking, namely, the risk the party to whom the remarks are addressed might later repeat the conversation." (*Ibid.*)

Allowing Frio to testify to his independent recollection of the illegally recorded phone call would enable impeachment of the witness who was recorded *and* would satisfy the Truth-in-Evidence component of Proposition 8. (*Frio v. Superior Court*, supra, 203 Cal.App.3d at p. 1497.)

To sum up, under *Frio v. Superior Court*, 203 Cal.App.3d 1480, someone who illegally recorded a phone call in violation of Section 632 subdivision (d) may testify to their untainted independent recollection of the conversation. But the illegally tape recorded call is not admissible under any circumstances.[8]

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[8] In *Feldman v. Allstate Ins. Co.* (2003) 322 F.3d 660, 666, the Ninth Circuit held in this diversity action, that an illegally tape recorded call was not admissible in reliance on *Frio v. Superior Court*, supra, 203 Cal.App.3d at p. 1497.) "The district court may not admit the tapes themselves into evidence. However, the court should admit Laura Feldman's testimony to the extent that she enjoys independent recollection of the contents of the conversations at issue."

III. IF PENAL CODE SECTION 632 SUBDIVISION (D) IS ABROGATED BY PROPOSITION 8, APPELLANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WOULD BE ABRIDGED AS THIS EXCLUSIONARY RULE IS STILL VALID IN CIVIL CASES

The federal and state constitutions guarantee due process and equal protection of the laws. (U.S. Const., 14th Amend; Cal. Cons. Art. I, § 7, subd. (a).)

Proposition 8 applies only in criminal cases. If Proposition 8 abrogated section 632, subdivision (d) in criminal cases, the defendant's right to due process and equal protection would be abridged because the statute is still valid in civil cases. (*Frio v. Superior Court*, 203 Cal.App.3d 1480.) "The concept of equal protection of the laws requires all persons similarly situated with regard to the legitimate purpose of the law receive equal treatment." (*In re Eric J.* (1979) 25 Cal.3d 522, 531.)

> "Generally, to satisfy equal protection arguments the legislative classification need only rationally relate to a conceivable, legitimate state purpose, while cases involving 'suspect classifications' touching on 'fundamental interests' are strictly scrutinized. Under the stricter standard, the State must establish its compelling interest which justifies the law and that the distinctions drawn by the law are necessary to further its purpose." (*Carroll v. State Bar* (1985) 166 Cal.3d 1193, 1206.)

The protections of Penal Code section 632 against eavesdropping most definitely implicate a fundamental right under the California Constitution. The right to privacy is an "inalienable right" of "all People." (Art. I., sec. 1.) That the exclusionary rule of section 632, subdivision (d) applies in civil cases but not criminal cases cannot withstand strict scrutiny.

The courts have rejected equal protection claims in other cases that challenged the differences between civil and criminal cases because they did not concern fundamental rights. For example, in *People v. Ramos* (2004) 34 Cal.4th 494, 512, an equal protection challenged was raised to Code of Civil Procedure section 223 (enacted as part of Proposition 115) providing that in criminal cases the trial court conduct voir dire in the presence of other jurors. Section 223 gave counsel in civil cases, however, the right to examine, by oral and direct questioning, prospective jurors. This Court held that the "right to voir dire the jury is not constitutional, but is a means to achieve the end of an impartial jury." (*Ibid.*) The distinction between civil and criminal voir dire was rationally based because it did not affect a constitutional right and the voters sought to prevent abuse of the jury selection process in criminal cases. (*Id.* at p. 513.)

In *Lucas v. Superior Court* (1988) 203 Cal.App.3d 733, 738, the Court of Appeal found no equal protection violation in Penal Code section

1330, which requires leave of court to subpoena witnesses to a trial who are more than 150 miles away. Code of Civil Procedure section 1989 permits a party in civil cases to compel the attendance of witnesses anywhere in the state without a showing of materiality. (*Id.* at pp. 735-736.) The court noted that the equal protection challenge would be valid if criminal defendants and civil litigants "were treated unequally if they are similarly situated with respect to the purpose of the law." (*Id.* at p. 739.) The court held there was no unequal treatment because the purpose of the law was financial and not transportation convenience. Civil witnesses were entitled to demand mileage and fees in advance while criminal witnesses had no such protection. (*Ibid.*)

The purpose of section 632, subdivision (d) is to protect the inalienable right to privacy of all people. (Penal Code section 630; Calif. Const. Art. I, sec. I.) Criminal defendants and civil litigants are similarly situated vis-a-vis Penal Code section 630, but are treated unequally. This violates the federal and state constitutional rights to equal protection of the laws.

An equal protection argument was raised in an amicus brief and rejected in *In re Lance W.,* because it was speculative. Moreover, it did not concern the statutory exclusionary rule of Penal Code section 632, subdivision (d) for illegally tape recording a private conversation.

This Court characterized the equal protection argument as:

> "The basic premise of the argument, that civil litigants may take advantage of exclusionary rules that are unavailable to criminal defendants in the wake of section 28(d) [Proposition 8], assumes the applicability of the exclusionary rule to civil proceedings. That assumption is not supported by precedent in this state which to date has extended the rule only to proceedings so closely identified with the aims of criminal prosecution as to be deemed 'quasi-criminal.'" (*In re Lance W.,* 37 Cal.3d at p. 892.)[9]

In *dicta*, this Court speculated that:

> "[E]ven if there may be civil proceedings in which the circumstances under which evidence was obtained suggest that the purposes of the exclusionary rule warrant its application, criminal defendants are not thereby denied equal protection. It is constitutionally permissible for the electorate to determine that the public stake in criminal proceedings, and in assuring that all evidence relevant to the guilt of the accused be presented to the trier of fact, justifies the admission of evidence that would be excluded in other proceedings." (*In re Lance W.*, 37 Cal.3d at p. 893.)

Apart from the fact that the equal protection commentary in *In re Lance W.,* is just *dicta*, the quasi-criminal cases concerned application of the

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[9] Those quasi-criminal cases were: (*People v. One 1960 Cadillac Coupe* (1964) 62 Cal.2d 92, 96-97 [illegally seized evidence may not be used in a forfeiture action]; *People v. Moore* (1968) 69 Cal.2df 674, 682 [illegally seized evidence may not be used to commit a narcotics addict for treatment]; *Emslie v. State Bar* (1974) 11 Cal.3d 210 [exclusionary rule not applicable to State Bar proceedings]; *In re Martinez* (1970) 1 Cal.3d 641 [exclusionary rule not applicable in parole revocation proceedings]; *People v. Myers* (1972) [an outpatient of the California Rehabilitation Center retains Fourth Amendment rights].)

Fourth Amendment and its California counterpart to civil situations. In Appellant's case, he is a criminal defendant similarly situated to a civil litigant where the eavesdropping statute has been violated, yet he is denied equal protection of the law that is designed to protect an inalienable right.

IV. THE INALIENABLE RIGHT TO PRIVACY OF ALL PEOPLE OUTRANKS THE VICTIM'S RIGHT TO TRUTH IN EVIDENCE

It is said that there is a hierarchy of constitutional rights such that some are more important than others. (*Degrassi v. Cook* (2000) 85 Cal.App.4th 163, citing *Carlsbad Aquafarm, Inc. v. Department of Health Services* (2000) 83 cal.4th 809, 819-823.) But it is not clearcut as to how to "rank the importance of different constitutional provisions." (*Carlsbad*, at p. 823.)

The constitutional right to privacy is an "inalienable right" of "all people." (Cal. Const., Art. I, sec. 1.) Insofar as Proposition 8, the right to truth-in-evidence, protects victims in criminal cases (Art. 1, sec. 28 ["The Victim's Bill of Rights"], it would appear that the right to privacy outranks the right to truth-in-evidence.

This Court recognizes that the people have the right to alter or reform what is an "inalienable" right under the California Constitution. (*Strauss v. Horton* (2009) 466 Cal.4th 364, 467.) Repeal by implication, however, is disfavored. (*Id.* at p. 408.) As this Court said in *In re Lance W.*, Proposition 8 did not repeal Art I, secs. 13 or 24. (*In re Lance W.,* 37 Cal.3d at pp. 886-887.) Nor did Proposition 8 repeal anything in Art. I, sec. 1.

Penal Code section 632, subdivision (d) was enacted to protect the right to privacy and prohibits an illegal tape recording from being admitted in *any* judicial proceeding. Given that the right to privacy outranks the right to truth-in-evidence, Proposition 8 did not abrogate section 632, subdivision (d).

V. APPELLANT WAS PREJUDICED BY THE INADMISSIBLE TAPE RECORDING

The admission of the tape recording in violation of Penal Code section 632, subdivision (d), violated Appellant's federal and state constitutional rights. Further, statements on the tape where Lorena said she believed Monica were inadmissible lay opinion testimony under Evidence Code section 800.

For example, Lorena says: "That's why I believe what Monica's saying." (Peo. Exh. 1A;[10] CT 121.) Another example is when Martinez tells Lorena something that Monica said and Lorena answers, "Yes." [FV2: "And it's not like he did it once: it happened lots of times." FV1: "Yes."] (Peo. Exh. 1B; CT 130.) Or, Lorena says: "I mean it didn't happen to me like too excessively, but if he touched Monica then she'll certainly never forget that." (CT 130.)

In closing argument, the prosecutor emphasized that Lorena believed Monica:

> "[Y]ou hear on the audio, she says she believes her. And she doesn't just believe her because she knows Monica is not the type of little girl that's going to lie or make something up like

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[10] Lorena Leon is identified on the transcript as FVI. Esperanza Martinez is FV2. (4 RT 1351.)

> this. ¶ She believes her because guess what, he has [sic] doing things that made her feel uncomfortable and that's why she wouldn't wear shorts around him." (5 RT 1528.)

A lay witness may offer opinion testimony that is "rationally based on the perception of the witness" and is "helpful to a clear understanding of his testimony." (Evidence Code section 800 subdivision (b); *People v. Melton* (1988) 44 Cal.3d 713,744.) Lay opinion testimony about the veracity of another witness is inadmissible because the fact finder, not the witness, must draw the ultimate inferences from the evidence. (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 239.)

The trial court abused its discretion in admitting the illegally tape recorded phone conversation. (*People v. Thompson* (2010) 49 Cal.4th 79, 128-130 [admission of lay opinion testimony reviewed for abuse of discretion].) The tape was admitted in violation of Penal Code section 632 subdivision (d). (*Frio v. Superior Court,* supra, 203 Cal.App.4th 1480.) Defense counsel's objection under the section 632, subdivision (d) and Evidence Code section 352 should have been sustained.

Without the inadmissible lay opinion testimony, this case came down to the word of the complaining witnesses Esmeralda and Monica against that of Appellant. Lorena Leon testified that appellant was overly affectionate

but did not touch her inappropriately. She explained the telephone conversation. But when the jury impermissibly heard that Lorena said she believed Monica, it was impossible for Appellant to get a fair trial. Appellant was severely prejudiced by the admission of the tape recording in violation of Penal Code section 632 subdivision (d).

The error in admitting the tape violated appellant's right to due process and equal protection. (*People v. Partida* (2005) 37 Cal.4th 428, 430 [352 objection may be raised on appeal as a due process claim].) The erroneous admission of evidence may offend due process when its introduction" violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." (*Dowling v. United States* (1990) 493 U.S. 342, 353.) The prosecution cannot prove the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) Reversal is required.

CONCLUSION

For the foregoing reasons, Appellant's convictions must be reversed.

Date: January 26, 2018 Respectfully submitted,

/s/ verna wefald

VERNA WEFALD

Attorney for Appellant Alejandro Guzman

CERTIFICATE OF LENGTH

I, Verna Wefald, counsel for Alejandro Guzman, certify pursuant to California Rules of Court, that the word count for this document is 7,365 words, excluding the tables, this certificate, and any attachment pursuant to rule 8.204(c)(1). This document was prepared in Wordperfect, and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Pasadena, California, on January 26, 2018.

Respectfully submitted,

/s/ verna wefald

VERNA WEFALD

Attorney for Appellant Alejandro Guzman

DECLARATION OF SERVICE

Re: People v. Guzman B265937

I, Verna Wefald, declare that I am over 18 years of age, and not a party to the within cause; my business address is 65 North Raymond Avenue # 320, Pasadena, California 91103. I served a true copy of the attached:

APPELLANT'S OPENING BRIEF ON THE MERITS

on each of the following, by placing same in envelopes addressed respectively as follows:

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FOR DELIVERY TO:
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Each said envelope was then, on January 26, 2018, sealed and deposited in the United States Mail at Los Angeles County where I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 26, 2018, at Pasadena, California.

____
VERNA WEFALD