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SUPREME COURT OF THE STATE OF CALIFORNIA

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

PETITION FOR REVIEW

VERNA WEFALD
State Bar No. 127104
65 North Raymond Avenue # 320
Pasadena, California 91103
Telephone: (626) 577-2658
Facsimile: (626) 685-2562
Email: verna@vernawefald.com

Attorney for Petitioner Guzman

Appointed by the Court of Appeal
Under the California Appellate
Project Independent Case Program

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner Alejandro Guzman respectfully requests that this Court under Rule 8.500, review the decision of the Court of Appeal, Second Appellate District, Division Three, affirming his sexual assault convictions. The decision is published and was filed on April 27, 2017. (*People v. Guzman* (2017) 11 Cal.App.5th 184.) (Exhibit A [slip opinion].)

STATEMENT OF ISSUES FOR REVIEW

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

2. 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?

NECESSITY FOR REVIEW

This Court should grant review in order to determine whether the constitutional right to Truth-in-Evidence (Cal. Const. Art. I, sec. 28(f)) ["Proposition 8"] is more important than the constitutional right to privacy. (Cal. Const. Art. I, sec. 1.) In order to protect the right to privacy, the Legislature made it a potential felony to surreptitiously tape record a phone conversation and forbid the admission of said tape recording in any judicial proceeding except for a prosecution under that act. (Penal Code section 632, subdivisions (a) and (d).)

In Petitioner's case, the Court of Appeal held that Proposition 8 abrogates Penal Code section 632 subdivision (d). This effectively means that the constitutional right to Truth-in-Evidence outweighs the constitutional right to privacy. The United States Supreme Court has held that one constitutional right is not more important than another. (*See e.g. Simmons v. United States* (1968) 390 U.S. 377, 394 ["we find it intolerable that one constitutional right should have to be surrendered in order to assert another"].) This Court should

determine whether and under what circumstances one California constitutional right outweighs another.

This Court should also grant review because after the decision below, civil litigants will have greater rights to assert exclusion of illegally made tape recordings under Penal Code section 632 subdivision (d) than criminal defendants, thus violating the Fourteenth Amendment equal protection clause. (*Frio v. Superior Court* (1988) 203 Cal.App.3d 1480 [person who violated section 632 subdivision (d) may testify to his untainted independent recollection of the conversation but the tape recording is not admissible].)

The only previous case which specifically held that Proposition 8 applied to section 632 subdivision (d) was depublished by this Court. (*See People v. Algire* (2013) 222 Cal.App.4th 219.)

The issues presented by this case are important and in need of resolution. (Rule 8.500(b), Calif. Rules of Court.)

STATEMENT OF THE CASE

A. Petitioner was charged with fondling two girls

Petitioner Guzman was charged 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). Petitioner 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.)

Both girls had accused Petitioner of touching them inappropriately. Monica was Petitioner's 12 year old niece who lived in an apartment below Petitioner's family. Esmeralda was 10 years old and lived next door. Both girls testified for the prosecution. Petitioner and his wife testified for the defense. Petitioner's 18 year old niece Lorena Leon also testified for the defense. Monica's mother Esperanza secretly recorded a phone conversation with Lorena that was admitted into evidence over defense objection.

Lorena testified Petitioner was a very affectionate person but he never molested her. Lorena learned that Esmeralda had told the police that

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[1] "CT" stands for Clerk's Transcript. "RT" stands for Reporter's Transcript. "AOB" stands for Appellant's Opening Brief. "RB" stands for Respondent's Brief.

Lorena had been molested by Petitioner. Lorena was called to testify that what Esmeralda said was not true.

Lorena also 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 Petitioner of touching her inappropriately. This was the first time Lorena had heard this. (4 RT 1234.) The aunt then asked Lorena whether she had ever been molested by Petitioner. Lorena answered that Petitioner 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 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. Monica's mother secretly recorded a phone conversation with Lorena in violation of Penal Code § 632(d)

Prior to the start of jury selection on March 4, 2015, the prosecutor lodged a relevance objection to Lorena's testimony because Petitioner was not charged with molesting her. Defense counsel said Lorena would be called to impeach Monica. The court ruled Lorena's testimony would be relevant. (2 RT 5-8.)

Later that same afternoon, the prosecutor told defense counsel that Monica's mother, Esperanza Martinez, had just notified her that she tape recorded Lorena saying Petitioner did in fact touch her. 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 Petitioner 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. And, if defense counsel moved for a continuance based on this new evidence she 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. "This is a violent offense, 288 is a violent crime. The purpose of the recording was to record any Lorena statements that she herself was also victimized and that also be a crime." (4 RT 1204.) However, even without section 633.5, it would still come in to impeach Lorena's testimony. (4 RT 1204.)

The prosecutor analogized the issue to a *Miranda*[2] 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 Martinez that Petitioner had touched other unknown people. The defense was "getting broadsided by additional allegations and we

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

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.)

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

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

1. The invasion of privacy is prohibited by the California Constitution and the Penal Code

The California 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.)

Penal Code section 630 (Legislative finding and intent) 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 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.)

2. Penal code section 632 subdivision (d) bars the use of surreptitiously recorded conversations in any proceeding except a prosecution for violating the statute

Any person who records a confidential communication without the consent of all parties commits a crime punishable by a year in the county jail or in the state prison. (Penal Code section 632 subdivision (a).)

> "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.)

3. Section 633.5 provides an exception for recording the conversation of someone suspected of committing a crime

Penal Code section 633 provides an exception for law enforcement. Section 633.5 provides an exception when the *party to the conversation* is suspected of committing certain crimes. It does not provide an exception for a witness who is not suspected of any crime. Section 633.5 provides:

> Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the **commission by another party to the communication of the crime** of extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m. Nothing in Section 631, 632, 632.5, 632.6 or 632.7 renders any evidence so obtained inadmissible in a prosecution for extortion, kidnapping, bribery, any felonving violence against the person, a violation of Section 653m, or any rime in connection therewith. (Emphasis added.)

4. Under *Frio v. Superior court* the person who illegally recorded the call can testify to his or her independent recollection of the conversation but the recording is not admissible

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 appellate court 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.)[3]

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

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[3] This Court later 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.)

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 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 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.[4]

D. Respondent argued that Proposition 8 abrogated § 632(d)

In the answering brief, Respondent argued that Proposition 8, the Right to Truth in Evidence proposition, enacted in Article I, section 28 of the

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[4] 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."

California Constitution, abrogated Penal Code section 632 subdivision (d). Article I, sec. 28 subdivision (f)(2) 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.

However, the cases cited by Respondent were not on point. (RB at 25-26, citing *e.g. In re Lance W.* (1985) 37 Cal.3d 873, 890.)

Respondent cited three cases where secretly recorded conversations of jail inmates were admitted into evidence. (RB at 27, citing *People v. Plyler* (1993) 18 Cal.App.4th 535, 543-544; *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 535-5536; and *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1371-1372.) It is long settled that jail inmates have no expectation of privacy. (*See e.g. De Lancie v. Superior Court* (1982) 31 Cal.3d 865.) Given that the person who was secretly record in this case was not a jail inmate, those cases were inapposite.

Respondent also cited *People v. Ratekin* (1989) 212 Cal.App.3d 1165 (RB at 27), as holding that Proposition 8 abrogated Penal Code section

632 and the Legislature had not reinstated that rule by a two-thirds vote of the membership in each house of the Legislature. (*Id.* at p. 1169.) But that case involved a federal wiretap authorized by 18 U.S.C. § 2510 et seq.

Respondent relied on *In re Lance W*, supra, 37 Cal.3d at pp. 893-896. (RB at 29-30.) But that case did not deal with Penal Code section 632, but rather California's liberal search and seizure rules under section 1538.5. This Court held that Proposition 8 limited exclusion of evidence in a motion to suppress to that required by the federal constitution. *In re Lance W*, specifically held that California's vicarious exclusionary rule was abrogated by Proposition 8. (*Id.* at pp. 879.) *In re Lance W* did not hold that section 632 was no longer valid.

E. The Court of Appeal held that Proposition 8 abrogated section 632 subdivision (d)

The Court of Appeal did not discuss *Frio v. Superior Court.* It held that Proposition 8 abrogated section 632 subdivision (d) and relied heavily on *People v. Ratekin, supra,* 212 Cal.App.3d 1165 and *In re Lance W*, supra, 37 Cal.3d 873. (Slip opn. at pp. 13-14, 16.) The court noted that the tape recording was not subject to exclusion under the federal constitution because Monica's mother was not a government agent. (Slip opn. at p. 14.) The recording was also admissible to impeach Lorena. (*Ibid.*)

The *Lance W.* court concluded the amendments did not reinstate the abrogated provision, because the effect of the amendments was to re-enact section 1538.5 as it existed *after* the passage of Proposition 8. (*Lance W., supra,* 37 Cal.3d at p. 896.) The Supreme Court based its conclusion on Government Code section 9605, which establishes a statutory rule for interpreting legislative intent, "consistent with article IV, section 9" of the California Constitution, when a statute is amended. (*Id.* at p. 895.) Government Code section 9605 provides: "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." (Italics added.) "The clear intent of Government Code section 9605 is to codify the rule that the unchanged portions of the newly amended statute be 'reenacted' *as they existed immediately prior to the amendment*." (*Lance W.,* at pp. 895-896, fn. 18, italics added.) Because the subject legislation did not materially modify the pertinent provision of section 1538.5, the Supreme Court concluded that "[t]he law which continued without interruption pursuant to Government Code section 9605, and was reenacted by [the subject legislation] pursuant to article IV, section 9, was section 1538.5 *as limited* by the impact of [Proposition 8]." (*Lance W.,* at p. 896, italics added.) (Slip opn. at p. 17.)

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.)
>
> Proposition 8 limited the exclusionary rule set forth in section 632, subdivision (d) by allowing the admission of evidence collected in violation of the Invasion of Privacy Act where the evidence is relevant and its admission is not otherwise barred by the United States Constitution. (See *Ratekin, supra,* 212 Cal.App.3d at p. 1169; see also *Lance W., supra,* 37 Cal.3d at p. 890.) For the reasons discussed above, we conclude both prongs are met by the recordings in question. The trial court did not err when it admitted the evidence. (Slip opn. at p. 18.)

F. The issues presented by this petition are important and in need of resolution by this Court

The Court of Appeal did not discuss the elevation of Proposition 8 over the constitutional right to privacy. Nor did it discuss the fact that section 632 subdivision (d) remains good law in civil cases. (*See Frio v. Superior Court, supra,* 203 Cal.App.3d 1480.) Moreover, *Frio*, which held that the person who illegally recorded the conversation could testify to his or her untainted recollection of the conversation, though the tape itself was not admissible, satisfied Proposition 8. (*Id.* at p. 1497.)

This Court has found Proposition 8 abrogated statutes in a number of cases. (*See e.g. People v. Wheeler* (1992) 4 Cal.4th 284 [Proposition 8 abrogated Evidence Code § 788, providing felony convictions may be used for impeachment].) However, there does not appear to be a case which held that one California constitutional right was more important than other California constitutional right. (*See e.g. In re Lance W, supra,* 37 Cal.3d at pp. 886-887 [Proposition 8 does not repeal Art. I, secs. 13 or 24 and what was an unlawful search and seizure remains so; however, Proposition 8 did eliminate judicially created remedy, i.e. vicarious exclusionary rule].)

The petition for review should be granted to settle these important questions.

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Date: May 30, 2017

Respectfully submitted,

VERNA WEFALD

Attorney for Petitioner 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 4,563 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 May 30, 2017.

Respectfully submitted,

VERNA WEFALD

Attorney for Petitioner Guzman

EXHIBIT A

Opinion of the Court of Appeal

Filed April 27, 2017

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO O. GUZMAN,

Defendant and Appellant.

B265937

(Los Angeles County Super. Ct. No. BA420611)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shelly Torrealba, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant challenges his conviction on two counts of lewd and lascivious acts upon a child under 14 years old. As his sole contention on appeal, Defendant maintains the trial court prejudicially erred when it admitted a recorded telephone conversation between a defense witness and the mother of one of the victims. Defendant argues the ruling contravened the exclusionary rule stated in Penal Code[1] section 632, subdivision (d), which bars the admission of evidence obtained as a result of recording a confidential communication without the consent of all parties. We conclude the "Right to Truth–in–Evidence" provision of the California Constitution (Cal. Const., art. I, § 28, subd. (f), par. (2)), as enacted by the passage of Proposition 8 in 1982, abrogated that exclusionary rule to the extent it is invoked to suppress relevant evidence in a criminal proceeding. We therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *Charges*

The Los Angeles County District Attorney charged Defendant with two counts of lewd acts upon a child under the age of 14; count 1 pertaining to Defendant's niece, M.M., and count 2 pertaining to Defendant's neighbor, E.F.

2. *Count Two; Lewd Acts Upon E.F.*

E.F. testified that Defendant molested her in May 2011, when she was 10 years old. She had gone to Defendant's home to play with his daughter. At some point, Defendant sat down next to E.F. and pointed out that she had a hole in her leggings. He

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[1] Statutory references are to the Penal Code, unless otherwise indicated.

continued to stare at the hole, which made E.F. uncomfortable. Defendant touched E.F.'s skin through the hole, then told her she had a lot of veins that popped out of her chest. E.F. was wearing a spaghetti strap top and could feel Defendant staring at her chest. Defendant pointed to her chest and told E.F. she should examine the veins in the restroom. When E.F. went to the restroom, Defendant followed her and stuck his foot in the door before she could close it. He pressed her against the sink, touched her on the chest slowly with his right index finger, then took her hand and rubbed her chest with it. When a downstairs neighbor came up the stairs, E.F. left. She was uncomfortable and scared throughout the incident.

E.F. felt unsafe, but she was too scared to tell her mother. Immediately after the incident, she sent a text message to a neighbor, L.M., who was four or five years older. L.M. is Defendant's niece, and her family lived downstairs from him. E.F.'s text message said Defendant had rubbed her chest and thighs; it did not mention Defendant following her to the bathroom. When they spoke later in person, L.M. told E.F. not to go around Defendant if he made her uncomfortable.

The next day a teacher observed E.F. crying at school. E.F. told the teacher that Defendant had touched her chest and rubbed her leg. The teacher contacted social services and E.F. gave a statement to the police later that day.

3. *Count One; Lewd Acts Upon M.M.*

M.M. testified that Defendant molested her in 2012, when she was 12 years old. M.M. regularly visited Defendant's family to have sleepovers with her cousin (Defendant's daughter). During one overnight visit, M.M. was watching television alone in Defendant's living room when Defendant sat next to her, put

his hand inside her pajamas, and touched her vagina. Defendant also pulled his pants down, grabbed M.M.'s hand, and made her touch his penis.

In 2013, M.M. told her mother what had happened. The disclosure prompted M.M.'s mother to contact L.M., because M.M. said L.M. had warned M.M. about Defendant. During their conversation, L.M. told M.M.'s mother about the incident involving E.F. M.M.'s mother contacted the police, and M.M. told the investigating officer about the 2012 molestation.[2]

4. *Admission of the Recorded Telephone Conversation Between L.M. and M.M.'s Mother*

On the first day of trial, the court addressed evidentiary issues, including L.M.'s proposed testimony that Defendant never sexually assaulted her. The prosecutor objected that the testimony was irrelevant, because Defendant was not charged with criminal conduct related to L.M. Defense counsel argued the testimony was relevant to M.M.'s credibility, because M.M. told police that Defendant molested L.M. The court agreed the testimony was relevant to M.M.'s credibility.

After the lunch recess, the prosecutor informed the court and defense counsel that M.M.'s mother had recordings of two

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[2] At trial, Defendant testified on his own behalf and denied the accounts given by E.F. and M.M. He testified that he had pointed out some spots or splotches under E.F.'s neck and on her hand, and said he "possibly touched her hand" with his finger. He admitted pointing to her chest, but denied touching her there. He also admitted pointing to a hole in her shorts. He denied following her to the bathroom. He likewise denied ever touching M.M. and claimed the last time she spent the night at his home was in July 2012, not December 2012 when the alleged incident occurred.

telephone conversations she had with L.M. following M.M.'s disclosure of the abuse allegations. The prosecutor reported that, in the recordings, L.M. said Defendant touched her a lot, sometimes in ways that made her uncomfortable, but Defendant did not touch her in the vagina or breast areas. L.M. also said in the recordings that she believed M.M.'s allegations against Defendant. The prosecutor did not intend to use the recordings in her case-in-chief, but did want to use them if L.M. testified in a way inconsistent with the conversations.

Defense counsel objected to the recordings, citing the exclusionary rule established by section 632, subdivision (d). After a preliminary review of relevant authorities, the court indicated the recordings appeared to be admissible for impeachment purposes. The court stated a final decision on admissibility would not be made until after L.M. testified.

L.M. testified that she had a good relationship with Defendant and lived downstairs from him growing up. Defendant is her uncle and M.M. is her younger cousin. L.M. also said she knew E.F., who was a neighbor and about the same age as M.M.

L.M. confirmed she received a text message from E.F., in which E.F. indicated Defendant rubbed her chest and thighs. L.M. later spoke to E.F. and told her not to go around Defendant if he made her uncomfortable. L.M. did not tell anyone else about E.F.'s disclosure because she did not think it was her business.

L.M. testified she was surprised to learn M.M. had also made allegations against Defendant. She and M.M. were close and M.M. had never said anything about Defendant molesting her before. Although L.M.'s initial reaction was to believe M.M., she also said she was confused as she had never observed M.M. acting uneasy around Defendant.

L.M. later learned that M.M. told police that Defendant had also molested L.M. L.M. testified this had not occurred and that she was angry the accusation had been made.

Following L.M.'s testimony, the court revisited the admissibility of the recorded telephone conversations. After hearing counsels' arguments, the court ruled that "[t]o deny admission of this evidence would be a direct violation of the Right to Truth[-In-]Evidence provision of the California Constitution," which had abrogated the exclusionary rule set forth in section 632, subdivision (d) when voters passed Proposition 8 in 1982.[3] The court also concluded the recording was not made by or at the direction of law enforcement, the recording did not violate the Fourth Amendment, and the evidence was not more prejudicial than probative under Evidence Code section 352. After conducting an Evidence Code section 402 hearing, the court allowed the admission of redacted portions of the recordings for

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[3] The trial court also concluded the recordings were admissible under the exception provided by section 633.5, and as impeachment evidence under *People v. Crow*. (See § 633.5 ["Nothing in Section . . . 632 . . . prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of . . . any felony involving violence against the person"]; *People v. Crow* (1994) 28 Cal.App.4th 440, 452 [holding otherwise inadmissible statements made during plea negotiations were admissible for impeachment purposes].) Because the court's ruling was correct under the Right to Truth-in-Evidence provision of the California Constitution (Cal. Const., art. I, § 28), we need not address whether the ruling also was correct under these authorities.

impeachment purposes, insofar as they contradicted critical parts of L.M.'s testimony.

In the portion of the first recording played for the jury, L.M. told her aunt that she "[does not] feel good around [Defendant]" when "wearing shorts," while adding she had not "done anything" because "the truth is he hasn't touched me anywhere else *like* my areas *you know*? Like my vagina or my breasts *like* directly."[4] L.M. added, "I know he's capable of doing that," and "[t]hat's why I believe what [M.M.]'s saying." In the second recording, L.M. affirmed that she had told M.M. to "be careful" around Defendant and that he "fondled" her as well. L.M. added, "you can imagine *like* sometimes I think about that, and I feel like crying and . . . I mean it didn't happen to me *like* too excessively, but if he touched M.M. then she'll certainly never forget that."

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[4] L.M. and M.M.'s mother conversed in Spanish. The redacted portions of the recordings were played for the jury, and the court provided the jury a transcript that included a Spanish-to-English translation. Italicized text in the transcript indicates English words interspersed within the conversation.

The court allowed Defendant to recall L.M. to testify regarding the recording. L.M. confirmed she spoke with M.M.'s mother on the telephone, but was unaware the call was being recorded. She testified that she had listened to the recordings and noted they did not include the entire conversation. Concerning the contents of the recordings, L.M. said Defendant had been overly affectionate with her at times, but it did not make her uncomfortable. She explained that Defendant was a "very affectionate" and "very loving and caring person," who sometimes "comes at you too close," but "never had [she] been touched by him in [her] vagina or [her] breast." L.M. testified she was "being sympathetic" when she said on the recording that she believed M.M.

5. *Verdict and Sentence*

The jury found Defendant guilty on both counts. The court sentenced Defendant to a total term of five years in prison, consisting of three years on count one and two years on count two.

DISCUSSION

As his sole contention on appeal, Defendant argues the trial court prejudicially erred when it admitted the recorded telephone conversations between L.M. and M.M.'s mother into evidence. Specifically, Defendant contends the recordings were inadmissible under section 632, subdivision (d), which bars the admission of evidence obtained by recording a confidential communication without the other party's consent. The trial court ruled the subject exclusionary rule was abrogated by the state Constitution's Right to Truth-in-Evidence provision (Cal. Const., art. I, § 28, subd. (f), par. (2)) when California's voters passed

Proposition 8.[5] We agree Proposition 8 abrogated section 632, subdivision (d) in criminal proceedings where the exclusionary rule is invoked to suppress relevant evidence.

A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion. (See *People v. Williams* (1997) 16 Cal.4th 153, 196-197; see also *People v. Carmony* (2004) 33 Cal.4th 367, 377 ["a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it"].) However, where the court's evidentiary ruling turns on the proper application of a statute, the question is one of law that we review de novo. (See *People v. Grimes* (2016) 1 Cal.5th 698, 712.)

"The California Invasion of Privacy Act (§ 630 et seq.) was enacted in 1967, replacing prior laws that permitted the recording of telephone conversations with the consent of one party to the conversation. [Citation.] The purpose of the act was to protect the right of privacy by, among other things, requiring that all parties consent to a recording of their conversation." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 768–769.) Consistent with this purpose, section 632 "prohibits

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[5] Defendant's opening brief does not address Proposition 8; rather, it focuses exclusively upon the trial court's other grounds for admitting the recordings—namely, section 633.5 and the exception for impeachment evidence articulated by the court in *People v. Crow, supra,* 28 Cal.App.4th at p. 452. (See fn. 3, *ante.*) In his reply brief, Defendant argues the cases cited in the respondent brief are inapposite because none specifically applied Proposition 8 to section 632, subdivision (d). For the reasons discussed above, we conclude Proposition 8 does abrogate section 632, subdivision (d), based on the plain language of the California Constitution and controlling Supreme Court authority.

eavesdropping or intentionally recording a confidential communication without the consent of *all* parties to the communication." (*Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 928; § 632, subd. (a).) Section 632, subdivision (d) creates the following exclusionary rule for evidence obtained in violation of the statute: "Except as proof in an action or prosecution for violation of this section, evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section is not admissible in any judicial, administrative, legislative, or other proceeding." (§ 632, subd. (d).)[6]

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[6] In 2016, after the trial court made the challenged evidentiary ruling, the Legislature amended section 632. (Stats. 2016, ch. 855, § 1 (Assem. Bill No. 1671 (2015-2016 Reg. Sess.)), eff. Jan. 1, 2017.) The amendment made "technical, nonsubstantive changes" to portions of the existing law, including section 632, subdivision (d). (Stats. 2016, c. 855§ 1 (Assem. Bill No. 1671 (2015-2016 Reg. Sess.)); cf. § 632, subd. (d) ["Except as proof in an action or prosecution for violation of this section, *evidence* obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section *is not* admissible in any judicial, administrative, legislative, or other proceeding," italics added]; former § 632, subd. (d) ["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," italics added].) Because the changes were technical and nonsubstantive, we quote from the statute as currently written.

"[I]n 1982, the California voters passed Proposition 8. Proposition 8 enacted article I, section 28 of the California Constitution, which provides in relevant part: '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 . . . .' " (*People v. Lazlo* (2012) 206 Cal.App.4th 1063, 1069, quoting Cal. Const., art. I, § 28, subd. (f), par. (2).) Our Supreme Court has observed that Proposition 8 "was intended to permit [the] exclusion of relevant, but unlawfully obtained evidence, only if exclusion is required by the United States Constitution." (*In re Lance W.* (1985) 37 Cal.3d 873, 890 (*Lance W.*); *People v. Lazlo,* at p. 1069.).) Proposition 8 is applicable to statutory rules of exclusion and evidentiary restrictions. (See, e.g., *Lance W.*, at p. 893; *People v. Ratekin* (1989) 212 Cal.App.3d 1165, 1169 (*Ratekin*).)

While it appears no published opinion has applied Proposition 8 to evidence obtained in violation of section 632, the appellate court in *Ratekin* examined this question with respect to section 631—a provision of the Invasion of Privacy Act that closely resembles section 632. Section 631 "prohibits 'wiretapping,' i.e., intercepting communications by an

unauthorized *connection* to the transmission line."[7] (*Ratekin, supra,* 212 Cal.App.3d at p. 1168.) In language substantively similar to the exclusionary rule at issue in this case, section 631, subdivision (c) provides: "Except as proof in an action or prosecution for violation of this section, no evidence obtained in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding." (Cf. § 632, subd. (d); see also fn. 6, *ante*.)

In *Ratekin*, federal agents investigating a narcotics operation obtained a wiretap order from the United States District Court pursuant to section 2518, title 18, United States Code—the federal wiretap statute. (*Ratekin, supra,* 212 Cal.App.3d at p. 1167.) The trial court admitted recordings obtained from the wiretap over the defendant's objection, and the defendant appealed his subsequent conviction on the ground that the evidentiary ruling violated California's Invasion of Privacy

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[7] As noted, section 632 prohibits "eavesdropping," which the *Ratekin* court described as "the interception of communications by the use of equipment which is not connected to any transmission line." (*Ratekin, supra,* 212 Cal.App.3d at p. 1168.) The practice is different from wiretapping, which is prohibited by section 631, insofar as it does *not* require an unauthorized *connection* to a transmission line, whereas wiretapping does. (*Ibid.*) Further, because wiretapping requires an unauthorized connection, the prohibition established by section 631 is not limited to "confidential communications" as is the case for the prohibition against eavesdropping established by section 632. In all other substantive respects the conduct prohibited by the two statutes is the same.

Act.[8] Addressing whether the wiretap evidence was admissible notwithstanding section 631, subdivision (c), the *Ratekin* court invoked our Supreme Court's holding in *Lance W.*; observing, under Proposition 8, "relevant evidence may be excluded only if exclusion is required by the United States Constitution." (*Ratekin,* at p. 1169, citing *Lance W., supra,* 37 Cal.3d at p. 890.) Then, citing a uniform consensus regarding the federal wire tap statute's constitutionality, the *Ratekin* court declared it was "clear that evidence obtained under the provisions of 18 United States Code section 2510 et seq. is not required to be excluded by the United States Constitution." (*Ratekin,* at p. 1169.) Thus, because the wiretap evidence was "relevant" and obtained pursuant to a constitutional federal statute, the *Ratekin* court held the evidence was properly admitted under Proposition 8, notwithstanding section 631, subdivision (c). (*Ratekin,* at p. 1169.)

The *Ratekin* court's analysis is sound and wholly apposite to the evidentiary ruling at issue in this appeal. Under *Ratekin,* the recorded telephone conversations between L.M. and M.M.'s mother are admissible, notwithstanding section 632, subdivision (d), if the evidence is relevant and not subject to exclusion under

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[8] The defendant in *Ratekin* moved to suppress the wiretap evidence under section 632's exclusionary rule. (See *Ratekin, supra,* 212 Cal.App.3d at p. 1167.) However, the *Ratekin* court concluded section 632 did not apply because the conduct at issue involved a wiretap, as prohibited by section 631, not eavesdropping, as prohibited by section 632. (*Ratekin,* at pp. 1168-1169.) The *Ratekin* court nevertheless considered whether the evidence should have been suppressed under section 631, subdivision (c). (See *Ratekin,* at p. 1169.)

the United States Constitution. (*Ratekin, supra,* 212 Cal.App.3d at p. 1169; *Lance W., supra,* 37 Cal.3d at p. 890.) Both prongs are met in this case.

First, the recorded telephone conversations were not subject to exclusion under the United States Constitution. This is because the federal Constitution proscribes only acts of government officers or their agents, and M.M.'s mother was acting as neither when she recorded her telephone conversations with L.M. (See *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 614 [the Fourth Amendment applies only to the acts of government officers or their agents]; *Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 333 ["In order for conduct by private parties to be deemed state action under the federal Constitution, 'the party charged with the deprivation [of a federal right] must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.' "].)

Second, the record supports the trial court's conclusion that the evidence was relevant to impeach L.M. Defendant was permitted to offer L.M.'s testimony for the purpose of challenging M.M.'s credibility, particularly with respect to M.M.'s allegation that Defendant also molested L.M. In her direct testimony, L.M. denied that Defendant ever touched her inappropriately, and said that she had no recollection of ever "warning" M.M. about Defendant. However, in the recorded telephone conversations, L.M. affirmed that she told M.M. to "be careful" around Defendant and she made statements suggesting that Defendant touched her in ways that made her uncomfortable, though never on her breasts or vagina. On this record, the trial court

reasonably concluded the recordings were relevant to the issue of both M.M.'s and L.M.'s credibility.

There is a final issue to address concerning section 632 and Proposition 8. As the People acknowledge, the Legislature has amended section 632 numerous times since the voters passed Proposition 8 in 1982. In 1985, for instance, the Legislature enacted the Cellular Radio Telephone Privacy Act. (Stats 1985, ch. 909, p. 2900.) The focal element of that legislation was section 632.5, which prohibits the interception of cellular telephone communications, absent specified circumstances. (Stats 1985, ch. 909, pp. 2900-2904.) In enacting the statute, the Legislature also amended section 632 and related statutes to reflect the addition of section 632.5, without making substantive changes to the wording of the exclusionary rule set forth in section 632, subdivision (d). Subsequent amendments to the Invasion of Privacy Act have followed the same pattern, in each instance focusing on privacy issues raised by the increased use of cellular and cordless phone technology, without making substantive changes to section 632, subdivision (d). (See Stats 1990, ch. 696, pp. 3267-3269 [adding section 632.6, prohibiting interception of cordless telephone communications]; Stats 1992, ch. 298, pp. 1212-1214, 1216 [adding section 632.7, prohibiting unauthorized recording of cellular or cordless telephone communications]; see also *Flanagan v. Flanagan, supra,* 27 Cal.4th at p. 775.) At least two-thirds of the members of each legislative house voted in favor of the legislation.[9] Thus, the

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[9] The final votes for the legislation in question were as follows: Senate Bill No. 1431 (1985-1986 Reg. Sess.), the Assembly vote was 64 ayes and 7 noes, the Senate vote was 27 ayes and 4 noes (Sen. Final History, (1985-1986 Reg. Sess.)

question presented is whether these legislative enactments revived the exclusionary rule in section 632, subdivision (d), under the exception for newly enacted legislation set forth in Proposition 8. (Cal. Const., art. I, § 28, subd. (f), par. (2) [abrogating exclusionary rules in criminal proceedings, "[e]xcept as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature"].)

Our Supreme Court's analysis in *Lance W.* controls our resolution of this issue. There, the Supreme Court addressed section 1538.5, subdivision (a), which authorizes a criminal defendant to seek suppression of evidence obtained in violation of "state constitutional standards." (*Lance W., supra,* 37 Cal.3d at p. 893; § 1538.5, subd. (a)(1)(B)(v).) As the court noted, after Proposition 8 abrogated that provision, the Legislature amended section 1538.5 twice, once by a two-thirds majority in both houses of the Legislature. (*Lance W.,* at pp. 893–896.) Because article IV, section 9 of the California Constitution provides that "[a] section of a statute may not be amended unless the section is *re-enacted* as amended" (Cal. Const., art. IV, § 9, italics added), the court examined whether the amendments revived that provision. (*Lance W.,* at pp. 893-896.)

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p. 965); Assembly Bill No. 3457 (1989-1990 Reg. Sess.), the Assembly vote was 69 ayes and 0 noes, the Senate vote was 32 ayes and 2 noes (Assem. Final History, (1989-1990 Reg. Sess.) p. 2223); Assembly Bill 2465 (1991-1992 Reg. Sess.), the Assembly vote was 71 ayes and 0 noes, the Senate vote was 37 ayes and 0 noes (Assem. Final History, (1991-1992 Reg. Sess.), p. 1685.) As the Assembly has 80 members and the Senate has 40 members (Cal. Const., art. IV, § 2, subd. (a)(1), (2)), the affirmative votes constituted at least two-thirds of each house's membership for each piece of legislation.

The *Lance W.* court concluded the amendments did not reinstate the abrogated provision, because the effect of the amendments was to re-enact section 1538.5 as it existed *after* the passage of Proposition 8. (*Lance W., supra,* 37 Cal.3d at p. 896.) The Supreme Court based its conclusion on Government Code section 9605, which establishes a statutory rule for interpreting legislative intent, "consistent with article IV, section 9" of the California Constitution, when a statute is amended. (*Id.* at p. 895.) Government Code section 9605 provides: "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." (Italics added.) "The clear intent of Government Code section 9605 is to codify the rule that the unchanged portions of the newly amended statute be 'reenacted' *as they existed immediately prior to the amendment.*" (*Lance W.,* at pp. 895-896, fn. 18, italics added.) Because the subject legislation did not materially modify the pertinent provision of section 1538.5, the Supreme Court concluded that "[t]he law which continued without interruption pursuant to Government Code section 9605, and was reenacted by [the subject legislation] pursuant to article IV, section 9, was section 1538.5 *as limited* by the impact of [Proposition 8]." (*Lance W.,* at p. 896, italics added.)

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.)

Proposition 8 limited the exclusionary rule set forth in section 632, subdivision (d) by allowing the admission of evidence collected in violation of the Invasion of Privacy Act where the evidence is relevant and its admission is not otherwise barred by the United States Constitution. (See *Ratekin, supra,* 212 Cal.App.3d at p. 1169; see also *Lance W., supra,* 37 Cal.3d at p. 890.) For the reasons discussed above, we conclude both prongs are met by the recordings in question. The trial court did not err when it admitted the evidence.

DISPOSITION

The judgment of conviction is affirmed.

CERTIFIED FOR PUBLICATION

GOSWAMI, J.*

We concur:

EDMON, P. J.

ALDRICH, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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:

PETITION FOR REVIEW

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

CLERK
Los Angeles County Superior Court
210 W. Temple St. Rm. M-3
Los Angeles, CA 90012
FOR DELIVERY TO:
Shelly Torrealba, Judge

JACKIE LACEY
District Attorney
210 W. Temple St. 18th Fl.
Los Angeles, CA 90012
ATTN: Gloria Marin, Deputy

XAVIER BECERRA
Attorney General
300 South Spring Street
Los Angeles, CA 90013
By Electronic Service to:
DocketingLAAWT@doj.ca.gov
Michael.Lehmann@doj.ca.gov

CALIFORNIA APPELLATE PROJECT
520 S. Grand Ave. 4th Fl.
Los Angeles, CA 90071

ALEJANDRO GUZMAN
(Pettioner/Appellant)

ROBIN SCROGGIE, ESQ.
865 S. Figueroa St., # 1388
Los Angeles, CA 90017
By electronic service to:
rscroggie@msn.com

COURT OF APPEAL
Division Three
300 S. Spring St.
Los Angeles, CA 90013
By electronic service only

Each said envelope was then, on May 30, 2017, 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 May 30, 2017, at Pasadena, California.

/s/ verna wefald

VERNA WEFALD