In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALEJANDRO GUZMAN,

Defendant and Appellant.

Case No. S242244

Second Appellate District, Case No. B265937
Los Angeles County Superior Court, Case No. BA240611
The Honorable Shelly Torrealba, Judge

ANSWERING BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the California Constitution's "Right to Truth-in-Evidence" provision (art. I, § 28, subd. (f), par. (2)) abrogate Penal Code section 632, subdivision (d),[1] as it applies to criminal proceedings?

INTRODUCTION

Section 632, enacted in 1967 as part of the Invasion of Privacy Act (§ 630 et seq.), prohibits intentionally recording a confidential communication without the consent of all parties to the communication. Subdivision (d) prohibits the admission of evidence obtained in violation of the statute. Here, the trial court admitted evidence obtained in violation of section 632, finding that the exclusionary rule of subdivision (d) had been abrogated by Proposition 8.

In 1982, the people of California overwhelmingly voted to amend article I of the California Constitution by enacting Proposition 8, the Victim's Bill of Rights, thereby adding section 28, which included the Right to Truth-In-Evidence.[2] (Cal. Const., art. I, § 28, subd. (f), par. (2) ("section 28").) The text of section 28 is plain and unambiguous; it provides that "relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings . . . ." (Cal. Const., art. I, § 28, subd. (f), par. (2).) As this Court has long recognized, the people enacted Proposition 8 to ensure that all relevant evidence be admitted in criminal trials, except when the United States Constitution requires exclusion. (*In re Lance W.* (1985) 37 Cal.3d 873, 890.) And, as this Court has repeatedly held—contrary to appellant's

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[1] Unless otherwise indicated, all statutory references shall be to the Penal Code.

[2] See https://ballotpedia.org/California_Proposition_8,_Victims%27_Bill_of_Rights (June_1982) [56.4%-43.6%].)

assertion—section 28 abrogates all other exclusionary rules, whether judicially created or legislatively enacted, except for various enumerated provisions that do not include section 632. Moreover, the Ballot Pamphlet specifically informed the voters that the initiative would allow evidence illegally obtained through wiretapping (§ 631) or eavesdropping (§ 632) to be admissible in a criminal trial. Indeed, the opponents of Proposition 8 argued that enacting it would needlessly limit citizens' personal liberties, such as their right to privacy, and would allow the admission of evidence obtained by illegal wiretapping. Proposition 8 was intended to abrogate the exclusionary provision of section 632, subdivision (d), within the context of criminal proceedings, as the Court of Appeal held.

Proposition 8 provides that the Legislature can establish an exclusionary rule by a two-thirds vote of both houses. (Cal. Const., art. I, § 28, subd. (f), par. (2).) However, the Legislature has declined to do so. Instead, it has added various provisions to bring new technologies (e.g., cellular telephones) within the ambit of the statute's privacy protections, but those modifications have neither extended to section 632, subdivision (d), nor mentioned the exclusion of evidence. As this Court has consistently emphasized in cases interpreting the application of voter initiatives, "the Constitution's initiative and referendum provisions should be liberally construed to maintain maximum power in the people" (*Briggs v. Brown* (2017) 3 Cal.5th 808, 827, internal quotation marks, brackets, and citations omitted), and "our task . . . is not to determine whether the provision at issue is wise or sound as a matter of policy or whether we, as individuals, believe it should be a part of the California Constitution" (*Strauss v. Horton* (2009) 46 Cal.4th 364, 385, as abrogated on other grounds by *Obergefell v. Hodges* (2015) __U.S. __ [135 S.Ct. 2584, 192 L.Ed.2d 609].)

Unable to overcome the straightforward finding of abrogation under *Lance W.*, and unable to establish legislative reenactment of section 632's exclusionary rule, appellant raises for the first time two new claims—that the California Constitution's right to privacy under article I, section 1, "outranks" section 28's Right to Truth-In-Evidence provision, and that section 28 violates equal protection because it impinges on his state constitutional right to privacy. Both arguments are forfeited as appellant failed to raise them in either the trial court or the Court of Appeal. Moreover, while both arguments purport to be based on article I, section 1's right to privacy, an examination of the arguments indicates they are based on a statutory exclusionary rule, not a constitutional provision. Regardless, this Court has previously rejected an equal protection challenge to section 28 and analogous challenges based on the constitutional right to privacy, and appellant offers no persuasive basis for reconsideration.

Finally, even if Proposition 8 had not abrogated section 632, subdivision (d), in criminal proceedings, the recordings were still admissible for the limited purpose of impeachment. And, any possible error was harmless in light of the strong evidence of appellant's guilt and the equivocal nature of the challenged impeachment evidence.

STATEMENT OF FACTS AND THE CASE

A. Statement of Facts

Appellant committed two lewd acts on two different children, his neighbor Esmerelda (2RT 631) and his niece Monica (3RT 944).

One day in May 2011, when Esmeralda was 10 years old, she played with appellant's three-year-old daughter. (2RT 632-635.) Appellant told Esmeralda she had a hole in her leggings, stared at the hole, touched her skin through the hole, and told Esmeralda she had a lot of veins that popped out of her chest. (2RT 641-643.) Appellant told Esmeralda to go to the bathroom to "check them out." Appellant followed her and stood behind

her with his chest touching her back and his legs touching hers. He pressed her against the sink, touched her chest slowly with his finger, and took her hand and rubbed her chest with it. When a neighbor came upstairs, appellant left. (2RT 644-651.)

On an occasion in December 2012, when Monica was 12, she watched television in appellant's living room. Appellant sat next to her, put his hand inside her pajamas, and touched Monica's vagina. Appellant also pulled his pants down, grabbed her hand, and made her touch his penis. (3RT 937-944, 950-951, 981-982.)

B. Statement of the Case and Relevant Proceedings

1. Initial Discussion Regarding the Surreptitiously Recorded Conversation Between Appellant's Niece, Lorena, and Monica's Mother, Esperanza

Appellant was charged with two counts of lewd act upon a child under the age of 14 (§ 288, subd. (a)). (CT 57-60.) The morning of trial, the parties discussed evidentiary issues, including the prosecution's relevance objection to defense witness Lorena, appellant's niece, testifying that appellant never sexually assaulted her. (2RT 5-6.) Appellant's counsel argued that Lorena's testimony was relevant to Monica's credibility because Monica had told the police that appellant had also molested Lorena, which she disputed. (2RT 6.) The court found the proposed testimony relevant to the extent it impacted Monica's credibility. (2RT 7-8.)

Following the lunch recess, the prosecutor informed the court and appellant's counsel that Monica's mother, Esperanza, had cellphone tape recordings of her conversation with Lorena, which included "Lorena telling her that the defendant did, in fact touch her." The prosecutor explained that the investigating officer was on her way to get the tape recordings. (2RT

13.)[3] Following the afternoon break, the prosecutor told the court that the investigating officer had listened to the recordings. In them, Lorena said that appellant had touched her a lot, but did not touch her in the vagina or breast area; she also said that she believed Monica. (2RT 19-20.) The prosecutor did not plan to use the recording in her case-in-chief, but would do so if Lorena testified inconsistently with the recorded statements. (2RT 21.)

Appellant objected to the introduction of the recording for any purpose, citing section 632, subdivision (d). (2RT 308.) The next day, the court indicated that its preliminary analysis was that the tape was admissible as impeachment depending on Lorena's testimony. (2RT 679-680.)

2. Lorena's Testimony

Lorena testified that she grew up downstairs from her uncle, and had a good relationship with him. Monica is her younger cousin. She also knew Esmeralda, a former neighbor who was about the same age as Monica. (3RT 1049-1052.) One day, Lorena got a text from Esmeralda saying that appellant had rubbed her chest and thighs. Lorena asked her to come over and talk about it. Esmeralda never mentioned that appellant followed her to the bathroom. Lorena told her not to go around appellant if he made her uncomfortable. She did not tell anyone else what Esmeralda said because it was none of her business. (3RT 1052-1055.)

Lorena was surprised to hear that Monica had also said that appellant did something inappropriate. Lorena and Monica were close, and Monica

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[3] At one point, the telephone conversation was briefly interrupted. Lorena then called Esperanza back and the two continued their conversation. (CT 123-124, 128.) Accordingly, there were two distinct recordings of a single, albeit interrupted, conversation. (CT 121-124, 128-133.)

had never told her this before. (3RT 1056-1058.) Lorena knew appellant to be very affectionate—he liked to hug and was playful—but he had never molested her. (3RT 1061.) Later, Lorena's parents informed her that either Monica or Esperanza had told the police that she (Lorena) had also been molested by appellant. Lorena was contacted by the police and asked if she, too, had been a victim. Lorena told the officer she had not. (3RT 1067-1068.) Lorena was very angry and wanted to confront Esperanza. Specifically, Lorena was upset that her parents had been given the idea that Lorena was a victim of molestation. (3RT 1069-1070.)

On September 10, 2013, Lorena spoke to her aunt Esperanza on the phone. Lorena was unaware the call was being recorded. She said that appellant never molested her. Appellant had been very affectionate with her, but it did not make her uncomfortable. Lorena was surprised to hear that Monica had accused appellant of molestation, but her first instinct was to believe Monica and she told Esperanza she believed Monica. (3RT 1059-1063.) On cross-examination, Lorena testified she did not remember saying that appellant touched her in ways that made her feel uncomfortable; she specifically said that appellant had never touched her vagina or her breast. Moreover, she denied that appellant touched her excessively. (3RT 1080-1081.) Lorena also denied warning Monica about appellant touching her. (3RT 1082.)

3. The Trial Court Ruled That a Portion of the Recorded Conversation Was Admissible to Impeach Lorena and Excluded a Portion Under Evidence Code Section 352; Lorena Testifies About the Recordings

After Lorena's testimony, the trial court again addressed the admissibility of the telephonic recordings. Following argument, the trial court held 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. The exclusionary rule was abolished in 1982." (4RT 1206.)[4] The court then conducted an Evidence Code section 402 hearing regarding foundational issues, at which Esperanza testified (4RT 1209-1222), and the parties presented argument regarding the contents of the recordings (4RT 1223-1226).

The trial court allowed the admission of a redacted version of the recordings as they contradicted Lorena's testimony. It also excluded a portion of the recordings, referring to another alleged victim, pursuant to Evidence Code section 352. (4RT 1226-1229.) The court granted appellant's counsel's request to recall Lorena (4RT 1229), and she testified regarding the recordings (4RT 1231-1250).

Back in front of the jury, Lorena pointed out that the entirety of the conversation had not been recorded. (4RT 1231-1233.) When Esperanza said Lorena had warned Monica to be careful, Lorena did not deny it, but she did not confirm it either. (4RT 1247.) Lorena testified that when she told Esperanza she believed Monica, she was "being sympathetic." (4RT 1239.) There were times when appellant hugged Lorena a lot, and it made her uncomfortable, so she would tell him to stop. Appellant would always stop. She also testified that she could not think of a time when he made her feel uncomfortable. (4RT 1242-1243.)

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[4] The court found also that (1) the recording was not made by or at the direction of law enforcement and did not violate the Fourth Amendment, and (2) the evidence was not more prejudicial than probative under Evidence Code section 352. (4RT 1207.) It also held that the recording was admissible as impeachment evidence under *People v. Crow* (1994) 28 Cal.App.4th 440, and that, based on Lorena's testimony, the jury could conclude that she was a victim of an uncharged offense under Evidence Code section 1108, thus, making her a party to this case under section 633.5. (4RT 1205-1208; see *Crow*, *supra*, at p. 452 [otherwise inadmissible statements made during plea negotiations admissible for impeachment purposes].)

4. Lorena is Impeached With the Recording of Her Conversation with Esperanza

In rebuttal, the prosecution recalled Esperanza (4RT 1345-1358, 1361-1464) and played the recordings (4RT 1349-1350, 1352), the second of which was redacted. (CT 1364.)[5] In the first recording, Lorena told Esperanza the following:

> I don't feel good around him, like when I'm wearing shorts or anything. And I haven't done anything because I don't want anything to happen, because the truth is he hasn't touched me anywhere else like my areas you know? Like my vagina or my breasts like directly. [¶] But, yes I do recall that day, and I know he's capable of doing that. [¶] That's why I believe what Monica's saying.

(CT 121.) In the second recording, Esperanza said that Lorena had already told Monica to be careful around appellant, and she replied, "Aha." Esperanza then said that Monica told her that appellant had "fondled" Lorena as well. Lorena responded, "Mhmm. *I know*." (CT 130.) Lorena then said:

> Well yes, you can imagine like sometimes I think about that, and I feel like crying . . . Imagine if someone were . . . 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.)

5. Verdicts and Sentence

The jury found appellant guilty of two counts of lewd acts upon a child under 14 years old. (5RT 1802-1803.) The trial court sentenced appellant to state prison for five years. (5RT 2109-2110, 2416-2418.)

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[5] The conversation was in Spanish. The following is taken from the translation provided in the transcript; the italicized words in the transcript are English words that Lorena used in her conversation. (3RT 1348-1349.)

ARGUMENT

I. THE RIGHT TO TRUTH-IN-EVIDENCE PROVISION OF THE VICTIMS' BILL OF RIGHTS ABROGATED 632, SUBDIVISION (d)'s EXCLUSIONARY RULE IN CRIMINAL PROCEEDINGS

The Right to Truth-In-Evidence provision abrogated all exclusionary rules in existence at the time Proposition 8 was passed – including statutory rules of exclusion, such as section 632, subdivision (d) – unless exclusion is required by the United States Constitution or specifically exempted by section 28. Therefore, the trial court properly ruled that the recordings in this case were admissible, notwithstanding section 632, subdivision (d).

A. The Invasion of Privacy Act and the Victim's Bill of Rights

The Invasion of Privacy Act of 1967 (§ 630 et seq.) regulates wiretapping, electronic eavesdropping, and recording confidential communications, with the aim of limiting "intentional, as opposed to inadvertent, overhearing or intercepting of communications." (*People v. Buchanan* (1972) 26 Cal.App.3d 274, 287.) Section 632 "prohibits 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, citation omitted; § 632, subd. (a) [prohibiting "us[ing] an electronic amplifying or recording device to eavesdrop upon or record [a] confidential communication" absent consent of all parties to the communication].) This Court has held that "communications" are "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, citations omitted.) Section 632, subdivision (d), provides that "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."

In 1982, the California voters passed Proposition 8, enacting article I, section 28 of the California Constitution, which states in 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 postconviction motions and hearings, or in any trial or hearing of a juvenile court 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.

(Cal. Const., art. I, § 28, subd. (f), par. (2), italics added; see *People v. Lazlo* (2012) 206 Cal.App.4th 1063, 1069.) Section 28 "was intended to permit exclusion of relevant, but unlawfully obtained evidence, only if exclusion is required by the United States Constitution . . . ." (*In re Lance W.*, *supra*, 37 Cal.3d at p. 890.)

B. Section 28's Plain Text, Consistent with the Relevant Legislative History, Abrogates the Invasion of Privacy Act's Exclusionary Rule

It is a fundamental principle of judicial review that "the Constitution's initiative and referendum provisions should be liberally construed to maintain maximum power in the people." (*Briggs v. Brown*, *supra*, 3 Cal.5th at p. 827, internal quotation marks, brackets, and citations omitted; accord, *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1032; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675; *Carlson v. Cory* (1983) 139 Cal.App.3d 724, 728.) "Under article IV, section 1 of the California Constitution, '[t]he legislative power of this State is vested in the California Legislature which consists of the Senate

and Assembly, but the people reserve to themselves the powers of initiative and referendum.'" (*Briggs*, *supra*, at p. 827.) "'The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.'" (*Ibid.*, quoting Cal. Const., art. II, § 8, subd. (a).) This Court has declared it "our solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise." (*Ibid.*, quoting *Legislature v. Eu* (1991) 54 Cal.3d 492, 501.)

The principles of interpretation for constitutional provisions, as with statutes, are well established: the court first looks to the plain text and turns to extrinsic evidence, such as legislative or voter intent, only if the language is ambiguous. (*Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444-445, internal quotation marks and citations omitted.) As this Court held in *Lance W.*, "the express, unambiguous language of section 28(d)['s] . . . clearly stated command has only one apparent meaning," that "relevant evidence shall not be excluded in any criminal proceeding." (*In re Lance W.*, *supra*, 37 Cal.3d at p. 886.) Accordingly, that meaning governs without recourse to extrinsic interpretive aids. (See *Silicon Valley Taxpayers Ass'n, Inc.*, *supra*, 44 Cal.4th at p. 444; accord, *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 ["If the statutory language is clear and unambiguous our inquiry ends"].)

In addition, section 28 sets forth five specific exceptions to the command that "relevant evidence shall not be excluded." (Cal. Const., art. I, § 28, subd. (f), par. (2) ["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"].) Section 28 mentions neither the Invasion of Privacy Act nor section 632, subdivision (d)'s exclusionary rule. And, since the voters are presumed to have been aware of section 632, and the exclusionary rule contained in subdivision (d), when they enacted the

Victim's Bill of Rights (see, e.g., *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 324, 934, citing *In re Lance W.*, *supra*, at p. 890, fn. 11), the clear implication is that the voters intended to abrogate that exclusionary rule. (See *In re Lance W.*, *supra*, at p. 888 ["The inclusion in section 28(d) of specified exceptions to its mandate that 'relevant evidence shall not be excluded' – [] – affords further evidence of the intent to restrict exceptions to that command"]; see also *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105 ["'The expression of some things in a statute necessarily means the exclusion of other things not expressed,'" quoting *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852].)

In light of the voters' choice not to include section 632, subdivision (d), as one of the specifically enumerated exceptions to the broad, sweeping language of Proposition 8 – "relevant evidence shall not be excluded in any criminal proceeding" – this Court should decline appellant's invitation to revise section 28 by "inserting what has been omitted." (Code Civ. Proc., § 1858; *People v. Guzman* (2005) 35 Cal.4th 577, 587 ["Inserting additional language into a statute violates the cardinal rule of statutory construction that courts must not add provisions to statutes," additional quotation marks, brackets and citations omitted]; cf. *Strauss v. Horton*, *supra*, 46 Cal.4th at p. 385 ["Regardless of our views as individuals on this question of policy, we recognize as judges and as a court our responsibility to confine our consideration to a determination of the constitutional validity and legal effect of the measure in question"]; *In re Lance W.*, *supra*, 37 Cal.3d at p. 879 ["Faced with a constitutional amendment adopted by initiative, however, we are obliged to set aside our personal philosophies and to give effect to the expression of popular will, as best we can ascertain it, within the framework of overriding constitutional guarantees"].)

It follows that, in the context of criminal proceedings, section 632, subdivision (d)'s exclusion of relevant evidence obtained in violation of

subdivision (a), is inconsistent with section 28, and is therefore void. (*Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 602 ["A statute inconsistent with the California Constitution is, of course, void"]; *People v. Navarro* (1972) 7 Cal.3d 248, 260 ["Wherever statutes conflict with constitutional provisions, the latter must prevail"].)

Moreover, consideration of the relevant legislative history, the Ballot Pamphlet, bolsters the conclusion that the voters intended Proposition 8 to permit the admission of relevant evidence obtained in violation of California's statutory proscriptions against introducing evidence obtained in violation of section 632. (See *Silicon Valley Taxpayers Ass'n, Inc.*, *supra*, 44 Cal.4th at pp. 444-445 ["if the language is ambiguous, we consider extrinsic evidence in determining voter intent, including the Legislative Analyst's analysis and ballot arguments for and against the initiative," internal citations omitted]; *In re Lance W.*, *supra*, 37 Cal.3d at p. 888, fn. 8 ["Ballot summaries and arguments are accepted sources from which to ascertain the voters' intent and understanding of initiative measures," citations omitted].)

The Legislative Analyst provided the following summary of the Right to Truth-in-Evidence provision, which specifically noted that wiretapping and eavesdropping rules, like those in the Invasion of Privacy Act, would be affected:

> **Evidence**. Under current law, certain evidence is not permitted to be presented in a criminal trial or hearing. *For example, evidence obtained through unlawful eavesdropping or wiretapping, or through unlawful searches of persons or property, cannot be used in court.* This measure generally would allow most relevant evidence to be presented in criminal cases, subject to such exceptions as the Legislature may in the future enact by a two-thirds vote. The measure would not affect *federal* restrictions on the use of evidence.

(Analysis by the Legislative Analyst of Prop. 8, Ballot Pamphlet, Primary Elec. (June 8, 1982) p. 32 (hereafter "Ballot Pamp."), initial italics added, quoted in *In re Lance W.*, *supra*, 37 Cal.3d at p. 888.)

That Proposition 8 was intended to affect evidence obtained in violation of the Invasion of Privacy Act is made even clearer by the arguments of the initiative's opponents. They argued that passage of the initiative could curtail personal liberties and highlighted the impact the initiative would have on personal privacy. (Ballot Pamphlet, p. 34 ["if you care about your privacy . . . and especially if you care about effective, responsible law enforcement . . . . VOTE NO ON PROPOSITION 8"]; *ibid.* ["Yet Proposition 8 does just that . . . . it needlessly reduces your personal liberties"].) Those opponents specifically argued that Proposition 8 "condoned wiretapping." (*Ibid.* ["Proposition 8: . . . Condones the use of wiretapping and seizure of your telephone and credit records without a warrant"], quoted in *In re Lance W.*, *supra*, 37 Cal.3d at p. 889, fn. 9.)

In short, the voters were clearly informed that Proposition 8 would allow the admission of evidence illegally obtained in violation of the Invasion of Privacy Act, such as eavesdropping or wiretapping. (See Ballot Pamp., pp. 32-34; see also *Silicon Valley Taxpayers Ass'n, Inc.*, *supra*, 44 Cal.4th at pp. 444-445.) Surely the voters would have understood that other portions of the Invasion of Privacy Act, like the prohibition on illegal recordings of confidential communications, would be similarly affected. (See *Ribas v. Clark* (1985) 38 Cal.3d 355, 360-361 ["While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, *whether that auditor be a person* [eavesdropping] *or a mechanical device* [unauthorized recording],"

italics added].) Therefore, the voters must have intended Proposition 8 to have just that effect.

C. As This Court Held in *Lance W.*, Section 28 Abrogates All Exclusionary Rules – Judicially-Created and Statutory – in Criminal Proceedings

Over a quarter century ago, this Court held, within the context of a search and seizure case, that the Right to Truth-in-Evidence provision "was intended to permit exclusion of relevant, but unlawfully obtained evidence, only if exclusion is required by the United States Constitution . . . ." (*In re Lance W.*, *supra*, 37 Cal.3d at p. 890.) In so doing, the Court reviewed the plain language of the text (*id.* at pp. 886-887) and the Ballot Pamphlet (*id.* at p. 888), and found that the voters expressed a clear intent to abrogate the state constitutional exclusionary rules at issue. (*Id.* at p. 887 ["The people have apparently decided that the exclusion of evidence is not an acceptable means of implementing those rights, except as required by the Constitution of the United States. Whether they are wise in that decision is not for our determination; it is enough that they have made their intent clear"].)

First, this Court specifically held that to the extent that section 1538.5 provided a basis for exclusion of evidence based on state constitutional violations, section 28 had abrogated this statute. (*In re Lance W.*, *supra*, 37 Cal.3d at p. 893 ["Subdivision (a) of Penal Code section 1538.5 provides that a defendant in a criminal prosecution may seek suppression of evidence obtained in a search or seizure in violation of state constitutional standards. Section 28(d) abrogated this authority for exclusion of evidence obtained in violation of article I, section 13," fn. omitted].) Appellant does not dispute either the holding or the rationale in *Lance W.*, nor does he argue that this Court should reverse *Lance W.* (OB 19-20.) Rather, appellant argues that the case is distinguishable because "[t]his Court held that Proposition 8 abrogated the judicially created exclusionary rule." (OB

20.) However, that argument fails to acknowledge that *Lance W.* expressly held that Proposition 8, in abrogating the judicially-created exclusionary rule, necessarily abrogated a state statute, section 1538.5, to the same extent. (*In re Lance W.*, *supra*, at p. 893 ["Section 28(d) abrogated [section 1538.5, subdivision (a)'s] authority for exclusion of evidence obtained in violation of article I, section 13"].)

Second, even if the exclusionary rule at issue in *Lance W.* could be viewed as being purely a judicial rule, it would raise a distinction without difference, as there is nothing in the *Lance W.* rationale, the plain meaning of section 28, or the voters' intent regarding Proposition 8 that would limit its application to judge-made exclusionary rules. As explained above, section 28's exemption of enumerated Evidence Code sections and "any existing statutory rule of evidence relating to privilege or hearsay" implies that the voters understood that the initiative would abrogate other, unspecified statutory exclusionary rules. (See *Le Francois v. Goel*, *supra*, 35 Cal.4th at p. 1105 [expression of some things in a statute necessarily means the exclusion of other things not expressed]; *People v. Guzman* (2005) 35 Cal.4th 577, 588 ["Under governing principles of statutory construction, 'the expression of one thing in a statute ordinarily implies the exclusion of other things,'" citations omitted].)

Indeed, the distinction between judicially-created law on the one hand, and constitutional or statutory provisions on the other, is typically meaningless in terms of a rule's application or binding force. For example, the Evidence Code defines "Law" to include "constitutional, statutory, and decisional law." (Evid. Code, § 160.) It is telling that the definition of "confidential communications" appellant relies on for purposes of section 632, subdivision (a), is itself judicially created. In *Flanagan v. Flanagan*, *supra*, 27 Cal.4th 766, this Court interpreted that phrase broadly, holding that communications are confidential "if a party to that conversation has an

objectively reasonable expectation that the conversation is not being overheard or recorded." (*Id.* at p. 768, citations omitted.) That this broad application of the phrase comes from a Supreme Court opinion does not make it any less the law.

Third, as appellant points out (OB 20), *Lance W.* held that section 28 did not change a criminal defendant's substantive rights under the California Constitution. (*Id.* at p. 886 ["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"].) However, this also provides no basis for distinguishing *Lance W.* Section 28 does not change the substantive scope of section 632's right to "confidential communications" free from eavesdropping or unauthorized recording. Here, by recording their phone call, Esperanza violated Lorena's rights under section 632. Violating section 632 still subjects a person to criminal prosecution for a misdemeanor or felony, with corresponding punishment. (§ 632, subd. (a).) In addition, persons whose confidential communications have been recorded without their knowledge, e.g., Lorena, may bring a civil action against the person who "record[ed] the confidential communication." (See § 637.2 [civil action by person injured; injunction]; *Flanagan v. Flanagan*, *supra*, 27 Cal.4th at pp. 770-772.)[6] Section 28 merely provides that relevant recordings, and evidence obtained as a result, are admissible in the limited area of criminal proceedings.[7]

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[6] Appellant's right to have a confidential communication free of unauthorized recording was not violated as he was not a party to the conversation at issue. (4RT 1231, 1345.)

[7] Appellant's reliance on *Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1492, for the proposition that testimony falling within the (continued...)

Fourth, that the Court chiefly addressed judicially-created exclusionary rules for searches and seizures that violated the state constitution merely reflects that *Lance W.* happened to involve such a rule. (See *In re Lance W.*, *supra*, 37 Cal.3d at p. 879; see also *Gervaise v. Brookins* (1909) 156 Cal. 103, 110 ["We can decide only the case before us"].) The fact that section 632, subdivision (d) is statutory rather than judicially-created is not a basis for distinguishing the core holding of *Lance W.*: relevant evidence is admissible in criminal proceedings unless exclusion is required by the United States Constitution or one of the listed exceptions in section 28. (See *People v. Cook* (2007) 40 Cal.4th 1334, 1353 ["But nothing in *Kirby* [*v. Illinois* (1972)] 406 U.S. [682] [] 684-685 or subsequent federal case law indicates that these distinguishing facts [defendant had been in custody for a week and a criminal investigation had begun] would have made a difference in the ultimate conclusion that, until formal charges were filed, counsel was not required to be present at the lineup under the federal Constitution"]; *People v. Camacho* (2000) 23 Cal.4th 824, 833 ["Although we find slight factual differences between *Lorenzana* [*v. Superior Court* (1973) 9 Cal.3d 626] and the instant case, none implicate the core holding of *Lorenzana*"].)

Lance W.'s rationale is equally applicable to statutory exclusionary rules in existence at the time of the passage of Proposition 8, and appellant does not argue otherwise. (OB 19-20). As is set forth above, this Court examined both the plain language of the text (*In re Lance W.*, *supra*, 37 Cal.3d at pp. 886-887) and the Ballot Pamphlet (*id.* at p. 888), and found

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(...continued)
proscription of section 632, subdivision (d), is inadmissible, is wholly misplaced because *Frio* was a civil case. (See OB 28-32.) Section 28 applies to criminal matters; exclusion of evidence in civil cases under section 632 is perfectly consistent with section 28.

that the voters' intent was broad and sweeping: Proposition 8 "was intended to permit [the] exclusion of relevant, but unlawfully obtained evidence, only if exclusion is required by the United States Constitution. . . ." (*Id.* at p. 890.) Nothing in the rationale of *Lance W.* provides a basis for concluding that section 28's plain language exempts statutory rules of exclusion, such as section 632, subdivision (d), from the broad command of the Right to Truth-In-Evidence provision, much less that the voters intended to do so.

D. The Court and the Courts of Appeal Have Repeatedly Held That the Right to Truth-In-Evidence Provision Abrogates State Statutory Exclusionary Rules in the Context of Criminal Proceedings

Since *Lance W.*, both this Court and Court of Appeals have addressed section 28 in various contexts, including statutory rules of exclusion. Every such court has held that relevant evidence is admissible in criminal proceedings even in the face of statutory rules of exclusion.

In *People v. Harris* (1989) 47 Cal.3d 1047, the defendant argued that allowing a police officer to testify as to an informant's past reliability violated Evidence Code section 787. (*Id.* at p. 1080; Evid. Code, § 787 ["evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness"].) The prosecution responded that "the statutory limitations on the admission of evidence relevant to a witness's honesty or veracity are no longer applicable in criminal cases, except to the extent that exclusion is ordered pursuant to Evidence Code section 352." (*Harris*, *supra*, at pp. 1080-1081.) This Court agreed, holding "that section 28(d) effected a pro tanto repeal of Evidence Code section 790, and [we] find no basis on which to distinguish Evidence Code sections 786 and 787." (*Id.* at

p. 1081.)[8] In so doing, the Court rejected the defendant's argument that section 28's purpose was to abrogate only the judicially-created exclusionary rule for searches and seizures that violate the California Constitution:

> The construction of section 28(d) suggested by defendant is untenable. *The intent of the electorate that both judicially created and statutory rules restricting admission of relevant evidence in criminal cases be repealed except insofar as section 28(d) expressly preserves them is manifest.* Had the intent been limited to rules governing the admissibility of evidence seized as a result of an unlawful search or seizure, there would have been no necessity to except expressly "any statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782, or 1103." The grant of authority to the Legislature to enact new exclusionary rules, but only by a two-thirds vote of each house, would be meaningless.

(*Id.* at pp. 1081-1082, italics added.)

Similarly, in *People v. Wheeler*, *supra*, 4 Cal.4th 284, this Court held that notwithstanding Evidence Code sections 787 and 788, relevant misdemeanor convictions are admissible in light of section 28. In so doing, the Court reiterated that Proposition 8 was enacted to abrogate more than just judicially-created exclusionary rules under the California Constitution:

> The appellate decisions reject arguments that section 28(d) was intended only to prevent courts from excluding evidence because its seizure violated the California Constitution (cf., *In re Lance W., supra*, at p. 890 []). Were that the sole purpose, the cases reason, there was no need to preserve some, but not all, existing *statutory* limitations on the admission of relevant

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[8] *Harris* also included dictum that a misdemeanor conviction was admissible. (*Id.* at p. 1090, fn. 22.) In *Wheeler*, this Court noted that section 28 expressly preserves the hearsay rule, and held that "[t]here can be no doubt that the hearsay objection to use of misdemeanor convictions remains valid[.]" (*People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. omitted].)

> evidence. Nor was it necessary to restrict the *Legislature's* power to enact new exclusionary rules.

(*Id.* at p. 291; see also *People v. Mickle* (1991) 54 Cal.3d 140, 168 [with the enactment of section 28 "statutory rules against impeachment with acts not culminating in a felony conviction and with character traits not bearing directly upon honesty or veracity do not apply," citations omitted].)

In short, this Court has repeatedly held that that section 28 abrogates statutory exclusionary rules contained in the Evidence Code within the context of criminal proceedings. Our Courts of Appeal are no different. (E.g., *People v. Lazlo*, *supra*, 206 Cal.App.4th at pp. 1070-1071 [in probation revocation hearing, trial court properly relied on evidence suppressed in another proceeding because proscription of using such evidence contained in section 1538.5 was no longer effective in light of Proposition 8]; *People v. Sullivan* (1991) 234 Cal.App.3d 56, 63 [trial court properly admitted evidence obtained in violation of speed-trap laws because proscription of using such evidence contained in Vehicle Code section 40803 was no longer effective in light of Proposition 8].)

For instance, in *People v. Ratekin* (1989) 212 Cal.App.3d 1165, federal agents obtained a federal wiretap order pursuant to the federal wiretap statute (18 U.S.C. § 2510 et seq.). The evidence obtained as a result (recordings of four telephone calls) was admitted against the defendant in a state prosecution. (*Id.* at pp. 1167-1168.) On appeal, the defendant argued that admission of the recordings violated section 632. (*Id.* at p. 1168.) As an initial matter, the court held that the recordings constituted wiretapping, not eavesdropping, so the relevant statute was section 631, not section 632. (*Id.* at pp. 1168-1169.) The court reviewed the Right to Truth-in-Evidence provision, and determined that section 28 had abrogated the exclusionary rule of section 631, subdivision (c), in the context of a criminal trial, based on *Lance W.'s* holding that relevant

evidence may be excluded only if exclusion is required by the United States Constitution. (*Id.* at p. 1169.)

Appellant acknowledges the *Ratekin* opinion, but argues that it is distinguishable as it involved wiretapping, not eavesdropping. Further, he argues that section 631 prohibits only "unauthorized wiretaps," and by obtaining a wiretap order from a federal court, the wiretapping was "not unauthorized." (OB 27.) Appellant misreads *Ratekin.* The *Ratekin* court did not ground its holding on the authority for conducting the wiretap. Rather, in light of *Lance W.*, the court analyzed whether the evidence was relevant and whether its exclusion was required by the United States Constitution. (*People v. Ratekin*, *supra*, 212 Cal.App.3d at p. 1169.) To the extent that *Ratekin* discusses Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III" or "the Act"), it was merely to note that the challenged evidence was obtained under that authority—the defendant's sole basis for suppression was under California law; compliance with the federal statute was not at issue. (*Ratekin*, *supra*, 212 at p. 1169; cf. *People v. Otto* (1992) 2 Cal.4th 1088, 1098-1099 [where recordings were not "obtained by duly authorized law enforcement officers," "[a] plain reading of the Act, therefore, leads to the inescapable conclusion that defendants' conversations were unlawfully recorded, and should not have been received in evidence under the strict injunction of Title III," citations omitted].)

In sum, not only has this Court repeatedly held that section 28 abrogates sections of the Evidence Code within the context of criminal proceedings, but every Court of Appeal that has addressed the issue has held that statutory exclusionary rules in effect in 1982 were abrogated by the provision.

E. The Legislature Has Not Revived Section 632, Subdivision (d)'s Exclusionary Rule in Criminal Proceedings

Proposition 8 provides that the Legislature can establish an exclusionary rule by a two-thirds vote of both houses. (Cal. Const., art. I, § 28, subd. (f), par. (2).) Indeed, the Legislature did just that less than a year after *People v. Sullivan*, *supra*, 234 Cal.App.3d at page 63, held that section 28 abrogated Vehicle Code section 40803's exclusionary rule by enacting Vehicle Code § 40808 ("Subdivision (d) of Section 28 of Article I of the California Constitution shall not be construed as abrogating the evidentiary provisions of this article"). (See also Stats. 1992, ch. 538 (AB 3659), § 2.) Contrary to appellant's assertion (OB 22-26), subsequent legislative action on section 632 did not reenact the statute in a way that overcomes abrogation by section 28.

As *Lance W.* held, Government Code section 9605 establishes a statutory rule for interpreting legislative intent when a statute is amended in order to determine whether post-Proposition 8 legislation reenacted a state-law exclusionary rule. (*Lance W.*, *supra*, 37 Cal.3d at p. 895.) It provides, in pertinent part:

> 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 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, quoted in *In re Lance W.*, *supra*, 37 Cal.3d at p. 895.) In other words, Government Code section 9605 codifies the rule that the unchanged portions of a newly amended statute are reenacted as they existed immediately prior to the amendment. (*Ibid.*; *Estate of Childs* (1941) 18 Cal.2d 237, 245 ["The portion of an amended statute which

remains the same as it was prior to the amendment, continues to be the law from the time of its original enactment and any changes or additions are considered as having been enacted at the time of the amendment"].)

As the Court of Appeal recognized (Opn. 15-18), the relevant question is whether the Legislature chose to "revive" the exclusionary rule within the context of criminal proceedings by a two-third vote of both houses. A review of the relevant amendments since 1982 indicates that it did not.

The Legislature has thrice amended the Right to Privacy Act, in 1985, 1990, and 1992, to address the challenges to privacy presented by new technology, "the increased use of cellular and cordless telephones," and "'the advent of widespread use of cellular radio telephone technology.'" (*Flanagan v. Flanagan*, *supra*, 27 Cal.4th at pp. 775-776, citations omitted.)[9] None of these changes altered, or even mentioned, section 632, subdivision (d). (Stats. 1992, ch. 298, pp. 1212-1214, 1216 [adding section 632.7, prohibiting unauthorized recording of cellular or cordless telephone communications]; Stats. 1990, ch. 696, pp. 3267-3269 [adding section 632.6, prohibiting interception of cordless telephone communications]; Stats. 1985, ch. 909, § 2, pp. 2900-2904 [adding section 632.5, which prohibits the interception of cellular telephone communications, absent specified circumstances].) None of these amendments made substantive

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[9] The votes for these three bills 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.) 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.)

changes to subdivision (d), and appellant does not claim otherwise. (OB 25-26; *In re Lance W.*, *supra*, 37 Cal.3d at pp. 895-896, fn. 18 ["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," citation omitted]; *id.* at p. 896 [reenacting section 1538.5, including the language that a defendant may move to suppress evidence where the "execution of the warrant violated federal or state constitutional standards," "had neither the intent nor effect of reviving exclusionary rules abrogated by Proposition 8"].)[10]

Further, a review of the legislative history of the subsequent amendments fails to demonstrate any intent to revive the exclusionary rule in criminal proceedings. (*People v. Soto* (2011) 51 Cal.4th 229, 240 ["Committee reports demonstrate that the Legislature specifically considered whether the law should require lack of consent by children under age 14," citation omitted]; *Southern California Gas Co. v. Public Utilities Com.* (1979) 24 Cal.3d 653, 659 ["Statements in legislative committee reports concerning the statutory objects and purposes which are in accord with a reasonable interpretation of the statute are legitimate aids in determining legislative intent"].) Rather, the committee reports indicate that the sole concern was addressing technological changes in telephonic communication. (Assem. Com. on Public Safety, Rep. on Assem. Bill No.

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[10] As appellant notes, the Legislature also made non-substantive changes to the wording of section 632, subdivision (b), adding a heading in 1994, deleting it in 1995, and, in 2016, rephrasing the exclusion to read "evidence . . . is not admissible" instead of "no evidence . . . shall be admissible." (OB 26.) As he also indicates, these changes "do[] not add anything to subdivision (d)" and "leave[e] its substance" (OB 26), and respondent will not discuss these non-substantive changes. (See, e.g., Stats. 2016, ch. 855, § 1 (AB 1671 (2015-2016 Reg. Sess.) [amendment makes "technical, nonsubstantive changes"].)

2465 (1991-1992 Reg. Sess.) as amended March 9, 1991, p. 27 ["This bill provides the same penalties apply when one or more of the telephones carrying the communication is either cellular or cordless"]; Assem. Com. on Public Safety, Rep. on Assem. Bill No. 3457 (1989-1990 Reg. Sess.) Feb. 28, 1990, p. 36 ["This bill would (1) make it an alternate felony/misdemeanor to maliciously intercept a communication transmitted between cordless telephones or between a cordless telephone and a landline telephone without the consent of all parties"]; Sen. Com. on Energy & Public Utilities, Rep. on Sen. Bill No. 1431 (1985-1986 Reg. Sess.) as amended April 22, 1985, p. 26 ["SB 1341, as amended, would allow the same penalties presently enforced against landline eavesdroppers to apply to those who intercept or eavesdrop on conversations where one or more of the parties uses a cellular telephone"].)

At best, appellant asserts that the Legislature made a substantive amendment to section 632, subdivision (a) "to provide *increased penalties* for anyone previously convicted of violations of these new [] sections." (OB 25, fn. omitted.) However, a review of the committee report indicates that this is not the case. (See Sen. Com. on Energy & Public Utilities, Rep. on Sen. Bill No. 1431 (1985-1986 Reg. Sess.) as amended April 22, 1985, p. 26 ["*Under present law*, anyone who eavesdrops or records a confidential conversation over a telephone, . . . is punishable by a fine not exceeding $2,500 []. A repeated offender is punishable under the same terms for $10,000," italics added]; compare § 632, subd. (a) ["A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, . . . shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, ... If the person has previously been convicted of a violation of this section [], the person shall be punished by a fine not

exceeding ten thousand dollars ($10,000) per violation"].) Regardless, assuming the fines for violating section 632 had been increased, appellant fails to explain how this would constitute a revival of the exclusionary rule of section 632, subdivision (d), in criminal proceedings. (OB 25.)

Finally, the Legislature has demonstrated that it is perfectly capable of both reviving old exclusionary rules or enacting new ones, and clearly demonstrating that it is doing so. *People v. Sullivan*, *supra*, 234 Cal.App.3d 56, is instructive. *Sullivan* rejected the defendant's argument that the Legislature had revived the Vehicle Code's speed-trap exclusionary rule when it amended the speed trap laws with a two-thirds vote of both houses, holding that the Legislature would not implicitly revive the exclusionary rule when it was neither considered nor even discussed:

> In this case, we also find a complete lack of any legislative history indicating an intent to override section 28(d), as well as a legislative amendment unanimously adopted in a rather casual manner. . . . The speed trap remedial provisions were not themselves amended or reenacted. . . . In order to find reestablishment in this case, we would have to conclude that the amendment of section 40802 constituted an implicit reenactment of section 40803. Just as the Supreme Court in *In re Lance W.* declined to view the Legislature's postsection 28(d) reenactment of Penal Code section 1538.5 as a reestablishment of state constitutional grounds for exclusion under section 1538.5, we also do not infer that the 1986 amendment of section 40802 implicitly reestablished other statutory provisions neither discussed nor considered by the Legislature.

(*Id.* at pp. 64-65.) As noted above, the Legislature responded to *Sullivan* by enacting Vehicle Code § 40808, which provides as follows: "Subdivision (d) of Section 28 of Article I of the California Constitution shall not be construed as abrogating the evidentiary provisions of this article." (Stats. 1992, ch. 538 (AB 3659), § 2.)

In the same way, if the Legislature had intended to revive section 632's exclusionary rule, it would be a simple matter for it to add the phrase "including criminal proceedings" or "notwithstanding article 1, section 28 of the California Constitution" to the end of subdivision (d). (See § 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"].) It has not chosen to do so or to add any language that would indicate an intent to add a new exception to the ones already set forth in section 28.

In essence, appellant asks this Court to find that despite (1) failing to include language that would indicate section 632, subdivision (d)'s exclusionary rule applies in criminal proceedings and (2) failing to even mention the Right to Truth-in-Evidence provision in the legislative history, the Legislature *sub silentio* revived the statute's exclusionary rule in criminal proceedings. (OB 25-26.) That request is contrary to the fundamental rule against "interpret[ing] a statute to suspend the operation of the Constitution *sub silentio*." (*California School Boards Ass'n v. Brown* (2011) 192 Cal.App.4th 1507, 1525, fn. 21.) Appellant's theory is further undercut by the absence of public debate about the question of evidence exclusion and the minimal opposition to the amendments. (See *Lance W.*, *supra*, 37 Cal.3d at p. 894 ["We cannot assume that the Legislature understood or intended that such far-reaching consequences – virtually a legislative repeal of the "Truth-in-Evidence" section of Proposition 8 – would follow an amendment so casually proposed and adopted without opposition"].) For the reasons set forth above, appellant is mistaken.

F. Appellant Forfeited His Constitutional Right of Privacy and Equal Protection Arguments, Which Are Based on the Invasion Of Privacy Act, Not the California Constitution; Regardless, Both Arguments Are Meritless

Appellant asserts that a later-enacted provision of the California Constitution (the Right to Truth-In-Evidence provision) violates two other provisions of the California Constitution, namely, article I, section 1's right to privacy and article I, section 7's equal protection clause.[11] These arguments turn out to rest on two untenable propositions: (1) section 632 "outranks" article I, section 28, of the California Constitution, and (2) the Invasion of Privacy Act (§ 630 et seq.) confers a fundamental constitutional right requiring any equal protection analysis to be conducted on the basis of strict scrutiny.

Appellant forfeited his claims by failing to raise them in either the trial court or the Court of Appeal. Moreover, article 1, section 1 of the California Constitution contains no exclusionary rule, and this Court has never found one to be implicit in the constitutional guarantee. Of course, the exclusionary rule of section 632, subdivision (d), was enacted

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[11] Appellant argues that any equal protection analysis of section 28 requires strict scrutiny because it implicates the fundamental right to privacy contained in the California Constitution (not the federal Constitution); thus, appellant's equal protection claim is based *solely* on article I, section 7 of the California Constitution. (OB 34 ["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 but not criminal cases cannot withstand strict scrutiny"]; see also *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326 ["past California cases establish that, in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts," citation omitted]; *ibid.* [contrasting the United States Constitution's implied right to privacy in reproductive rights with the California Constitution's explicit guarantee of the right to privacy].)

independently of the constitutional provision, and cannot create or confer a fundamental constitutional right. Regardless, the constitutional Right to Truth-In-Evidence provision section 28 does not "violate" the state Constitution's right to privacy, and allowing evidence obtained in violation of section 632 in criminal proceedings while excluding them in civil litigation (or any other non-criminal proceeding) does not violate equal protection.

1. Appellant Forfeited His Constitutional Claims

Appellant forfeited his two constitutional arguments as he failed to raise them in either the trial court or the Court of Appeal. (*People v. Homick* (2012) 55 Cal.4th 816, 859 ["Defendant also maintains that the constitutional claims he presents on appeal incorporate the objection he failed to make below. But he did not raise most of those constitutional objections either, and he cannot bootstrap the current claim on their backs simply because, in some limited circumstances, we might entertain constitutional claims not raised below"]; *People v. Tully* (2012) 54 Cal.4th 952, 1066 ["Citing the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and article I of the California Constitution, defendant contends that the death qualification of juries in California is unconstitutional. The claim is forfeited by defendant's failure to raise it below," citation omitted].) Because his constitutional arguments require different legal analyses from his trial objections and appellate claims, he was required to object on these grounds below. (*Tully*, *supra*, at pp. 979-980.)[12]

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[12] In the title to his third argument, and in arguing prejudice, appellant broadly asserts that his right to due process has been violated. (OB 33, 42.) However, appellant does not present a due process argument anywhere in his brief, and it is forfeited. (See OB 33-42; *People v. Whalen* (2013) 56 Cal.4th 1, 72, fn. 28 [failure to provide argument or authority (continued...)

2. Fairly Understood, Appellant's Claims Are Based on the Invasion Of Privacy Act, Not the Constitutional Right to Privacy; That Act is Irrelevant to Any Constitutional Analysis

Both appellant's constitutional right to privacy argument and his equal protection argument – which asserts that strict scrutiny is required because the constitutional right to privacy is implicated – purport to be based on article I, section 1 of the state Constitution. However, a review of the arguments indicates that they are based on statutes or statutory schemes.

Appellant's right to privacy argument reduces to the assertion that a statute, section 632, subdivision (d), "outranks" section 28 of the California Constitution. (OB 39 ["[S]ection 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 truth-in-evidence, Proposition 8 did not abrogate section 632,

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(...continued)
supporting the defendant's contention forfeits the issue].) Further, appellant has forfeited any due process argument by failing to raise it below. (2RT 308; 4RT 1202-1203, 1223-1224; *People v. Jones* (1998) 17 Cal.4th 279, 299, fn. 1 ["it would be wholly inappropriate to reverse a superior court's judgment for error it did not commit and that was never called to its attention"].) His reliance on *People v. Partida* (2005) 37 Cal.4th 428, for the proposition that a "352 objection may be raised on appeal as a due process claim" (OB 42) is also misplaced. The only portion of the recording that appellant's counsel asked to exclude as unduly prejudicial concerned comments regarding another potential victim. (4RT 1224.) The trial court excluded that portion of the recording. (4RT 1228.) Even if appellant had raised an Evidence Code section 352 objection regarding any other portion of the tape below and argued it in this Court, that would not be a basis for preserving a distinct due process claim. (*People v. Riggs* (2008) 44 Cal.4th 248, 292 ["To the extent defendant on appeal raises a federal constitutional claim distinct from his claim that the trial court abused its discretion under Evidence Code section 352, he forfeited this claim by failing to identify that ground in his objections to the trial court," citation omitted].)

subdivision (d)"].) But, the right to privacy in Article I, section 1 does not forbid surreptitiously recording conversations, nor does it contain any sort of exclusionary rule. It provides no independent basis for exclusion of evidence; section 632, subdivision (d) does.

Similarly, appellant's equal protection challenge to section 28 is not truly premised on the California Constitution. Appellant argues that the Invasion of Privacy Act (section 630, et seq.) is the "fundamental right" requiring strict scrutiny under an equal protection analysis. (See OB 35 ["The purpose of section 632, subdivision (2) is to protect the inalienable right to privacy of all people. Criminal defendants and civil litigants are similarly situated vis-a-vis Penal Code section 630, but are treated unequally," citations omitted].) Thus, his argument is not actually premised on the California Constitution.

Of course, "fundamental constitutional rights" are not conferred by statute. (See, e.g., *In re Celine R.* (2003) 31 Cal.4th 45, 59 ["a defendant's right to counsel in criminal cases is a fundamental constitutional right, but the child's right to counsel in a dependency case is solely statutory"]; *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 781 ["the *statutory* right to be tried within 60 days cannot properly be termed 'fundamental' in the foregoing sense [that they are guaranteed by the Sixth Amendment's right to a speedy trial] and therefore beyond counsel's primary control," citation omitted].) Moreover, appellant's assertion that the "purpose" of section 632, subdivision (d)'s exclusionary rule is to protect the "inalienable right to privacy of all people" as set forth in article I, section 1 is incorrect. The Invasion of Privacy Act was enacted in 1967. (See, e.g., Stats. 1967, ch. 1509, p. 3584, § 1.) The state constitutional right to privacy was added to article I five years after the enactment of the Invasion of Privacy Act, when the voters enacted Proposition 11, the "Privacy Initiative," on November 7, 1972. (See Ballot Pamp., Prop. 11, Gen. Elec. (Nov. 7, 1972), appen., p. 11

[text of proposed law]; see also *id.* at p. 26 [Leg. Counsel's Analysis]; *id.* at pp. 26-28 [arguments for and against].)

In essence, appellant argues that a provision of the California Constitution is void because it is inconsistent with a statute (§ 632) or statutory scheme (§ 630, et seq.). (OB 33-39.) Appellant is mistaken. (*Hotel Employees & Restaurant Employees Internat. Union v. Davis, supra*, 21 Cal.4th at p. 602 ["A statute inconsistent with the California Constitution is, of course, void"]; *People v. Navarro, supra*, 7 Cal.3d at p. 260 ["Wherever statutes conflict with constitutional provisions, the latter must prevail"].)

In sum, appellant's arguments are actually based on the Invasion of Privacy Act, not article I, section 1 of the California Constitution. The Act is not a constitutional provision, nor was it enacted to protect the right to privacy as set forth in the California Constitution. Accordingly, the Act and the exclusionary rules contained therein, as well as the policy underlying it, form no part of any analysis as to whether section 28 violates either article I, section 1's right to privacy or article I, section 7's right to equal protection. In any event, as is set forth below, section 28 violates neither the constitutional right to privacy nor equal protection.

3. Appellant's Right to Privacy Argument is Meritless

As an initial matter, assuming Article I, section 1 of the California Constitution somehow contained an implicit exclusionary rule, appellant would lack standing to raise such a claim as he was not a party to the recorded conversation, and his privacy was not violated in any way. (See. e.g., *Sam Andrews' Sons v. Agricultural Labor Relations Bd.* (1988) 47 Cal.3d 157, 191 ["the residents of the camp, not the owner, possess the right to privacy and the standing to assert it"].) Regardless, appellant fails to cite any authority for the proposition that the constitutional right of

privacy "outranks" the right to truth in evidence, and respondent is aware of none. Further, the two cases appellant does cite fail to support the proposition that there is a "hierarchy of constitutional rights such that some are more important than others." (OB 38, citing *Degrassi v. Cook* (2000) 85 Cal.App.4th 163, superseded by *Degrassi v. Cook* (2002) 29 Cal.4th 333, and *Carlsbad Aquafarm, Inc. v. State Dept. of Health Services* (2000) 83 Cal.App.4th 809.) Indeed, this Court has held otherwise. (See, e.g., *Miller v. Superior Court* (1999) 21 Cal.4th 883, 892 [distinct provisions of Cal. Const. "have equal dignity as constituents of the state Constitution"].)

This Court has repeatedly rejected analogous challenges based on the constitutional right to privacy. In *People v. Hines* (1997) 15 Cal.4th 997, 1043, the defendant argued that admission of a recorded jail conversation "violated his state right to privacy (Cal. Const., art. I, § 1), the state prohibition against illegal searches and seizures (Cal. Const., art. I, § 13), and sections 2600 and 2601 of the California Penal Code [citation]." This Court explained that section 28 proscribed exclusion of the evidence even if its admission violated those constitutional and statutory provisions: "[D]efendant is not entitled to obtain suppression of the tape recording. In general, relevant evidence that is illegally obtained under California law is nonetheless admissible, so long as federal law does not bar its admission." (*Id.* at pp. 1043-1044, citing Cal. Const., art. I, § 28, subd. (d); accord, *People v. May* (1988) 44 Cal.3d 309, 319; *In re Lance W.*, *supra*, 37 Cal.3d at pp. 886-887; *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 534-536; see also *Strauss v. Horton*, *supra*, 46 Cal.4th at p. 466 ["[N]otwithstanding [the right to privacy's] 'inalienable' status—[it] long has been recognized as subject to reasonable regulation and limitation, and this is so even in the absence of a constitutional amendment explicitly limiting this right."].)

Appellant's reliance on *Degrassi v. Cook*, *supra*, 85 Cal.App.4th 163, is misplaced. In the opinion superseding the Court of Appeal decision, this Court held that the free speech clause of the California Constitution does not authorize a cause of action for damages. (*Degrassi, supra,* 29 Cal.4th at p. 335.) At no point in that opinion does the Court hold that there is a "hierarchy of constitutional rights such that some are more important than others" (OB 38, citations omitted), nor does it even mention anything approaching such a concept. (*Id.* at pp. 335-344.)

Nor is *Carlsbad Aquafarm, Inc.*, *supra*, 83 Cal.App.4th 809, on point. There, a shellfish producer sued a state agency for damages allegedly arising from a violation of its due process rights under article I, section 7 of the California Constitution. (*Id.* at p. 811.) The Court of Appeal held that "Aquafarm is not entitled to recover monetary damages based solely on the state constitution's due process provision." (*Ibid.*) The entire discussion portion of the opinion focuses on the circumstances under which a private right of action is authorized by the state or federal Constitutions. (*Id.* at pp. 815-823.) At no point does *Carlsbad Aquafarm* state or imply that there is a hierarchy of constitutional rights or that certain constitutional provisions outrank other provisions. (*Ibid.*) Further, it is well established that courts are to harmonize constitutional provisions, not "rank" them. (*McWilliams v. City of Long Beach Supreme Court of California* (2013) 56 Cal.4th 613, 627 ["[T]he City's proposal ignores our duty to harmonize constitutional provisions where 'possible,'" citation omitted].)

In short, appellant's argument that the Right to Truth-in-Evidence provision violates the right to privacy set forth in article I, section 1 of the California Constitution is meritless.

4. Appellant's Equal Protection Argument is Meritless

This Court rejected an equal protection argument in *Lance W.* That decision was correct because criminal defendants and civil litigants are not similarly situated. Moreover, allowing evidence obtained in violation of the Invasion of Privacy Act is rationally related to the State's legitimate interest in assuring that all evidence relevant to the guilt of the accused be presented to the trier of fact

a. Equal Protection

"The right to equal protection of the laws is guaranteed by the Fourteenth Amendment to the United States Constitution and by article I, section 7 of the California Constitution. The federal and state provisions are analyzed in essentially the same manner." (*In re Demergian* (1989) 48 Cal.3d 284, 291-292.) "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*People v. Brown* (2012) 54 Cal.4th 314, 328, quoting *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253, and *In re Eric J.* (1979) 25 Cal.3d 522, 530, italics added in *Cooley*, internal quotation marks omitted.) If an equal protection claim does not satisfy this preliminary requirement, the argument must fail. (*Cooley*, *supra*, at p. 254 ["For this reason, the LPS Act habeas corpus proceedings and the SVPA probable cause hearing are not 'functional equivalents' and persons utilizing these procedural protections are not 'similarly situated.' As Marentez's claim does not satisfy this preliminary requirement, his equal protection argument must fail," citation omitted].)

If two groups are sufficiently similar with respect to the law being challenged, the court considers whether disparate treatment of the two groups is justified. (*People v. McKee* (2010) 47 Cal.4th 1172, 1203.)

"Unequal treatment based on a suspect classification such as race is subject to the most exacting scrutiny. So is treatment affecting a fundamental right." (*People v. Chatman* (2018) 4 Cal.5th 277, 288, internal citations and quotation marks omitted.) "[W]here the law challenged neither draws a suspect classification nor burdens fundamental rights, the question [a court] ask[s] is different. [I]t find[s] a denial of equal protection only if there is no *rational* relationship between a disparity in treatment and some legitimate government purpose." (*Id.* at pp. 288-289, citation omitted.) "This core feature of equal protection sets a high bar before a law is deemed to lack even the minimal rationality necessary for it to survive constitutional scrutiny. Coupled with a rebuttable presumption that legislation is constitutional, this high bar helps ensure that democratically enacted laws are not invalidated merely based on a court's cursory conclusion that a statute's trade-offs seem unwise or unfair." (*Id.* at p. 299, citation omitted.)

b. This Court Rejected an Equal Protection Claim in *Lance W.*

As appellant acknowledges (OB 36), this Court has already rejected an equal protection argument in *Lance W.*:

> Moreover, even 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., supra*, 37 Cal.3d at p. 893.) Appellant argues that the Court's rejection of the equal protection claim in *Lance W.* was obiter dictum in which the Court "speculated," providing "equal protection commentary." (OB 36.) But the plain language of this portion of *Lance W.*

indicates it is an alternative holding on the equal protection claim based on the recognition that there may be examples of civil or other non-criminal proceedings where the vicarious exclusionary rule would be applicable—although the Court found no precedent to support its application outside the criminal or quasi-criminal context. (*In re Lance W.*, *supra*, 37 Cal.3d at p. 893.) In other words, even if civil litigants could invoke the exclusionary rule when criminal defendants could not, the Court provided an alternative rationale for denying the defendant's equal protection claim. (*Ibid.*)

The reasoning presented above is, at the very least, persuasive. (See, e.g., *City of Los Angeles v. San Pedro, L.A. & S.L.R. Co.* (1920) 182 Cal. 652, 660 ["The statements in the opinions of the Supreme Court of this state and of the United States relating to the 'inner bay exception,' although obiter dicta, are very persuasive as to the meaning of the patent"]; cf. *People v. Wade* (1996) 48 Cal.App.4th 460, 467 ["Dicta of our Supreme Court are highly persuasive"].) As this Court indicated, the "public stake in criminal proceedings," including "assuring that all evidence relevant to the guilt of the accused be presented to the trier of fact," justifies admitting evidence that would not be admissible in other proceedings, such as civil or family law matters. (*In re Lance W.*, *supra*, 37 Cal.3d at p. 893.) While asserting that the above-quoted portion of *Lance W.* is dictum, appellant fails to argue why it is not persuasive or why the public stake in ensuring that all of the evidence is presented in criminal trials does not justify treating criminal defendants differently than civil litigants. (OB 35-37.)

c. Criminal Defendants and Civil Litigants Are Not Similarly Situated

In any event, criminal defendants and civil litigants are not similarly situated. For example, this Court has rejected a claim that, "California's criminal justice system violates equal protection because '[c]riminal defendants are treated less favorably than . . . civil litigants.' Specifically,

[the defendant] notes that criminal defendants, unlike civil litigants, have no general right to take depositions." (*People v. Rountree* (2013) 56 Cal.4th 823, 863, quoting defendant's brief.) In doing so, this Court specifically held that criminal defendants and civil litigants are not similarly situated and that the two systems of litigation are "entirely different." (*Ibid.*; accord, *In re Sade C.* (1996) 13 Cal.4th 952, 991-992 [rejecting equal protection challenge to the appellate court's failure to independently review brief raising no issues filed by indigent parent's court-appointed counsel because "[c]riminal defendants and parents [in dependency proceedings] are not similarly situated. By definition, criminal defendants face punishment. Parents do not"].)

Moreover, the California Constitution itself treats criminal defendants and civil defendants differently in their trial rights without violating equal protection. In a civil trial, a litigant may be found liable by three-fourths of the jury. (See Cal. Const., art. I, § 16 ["in a civil cause three-fourths of the jury may render a verdict"].) By contrast, a criminal defendant has a state constitutional right to a unanimous jury. (*People v. Collins* (1976) 17 Cal.3d 687, 693, citing Cal. Const., art. I, § 16.) In addition, depending on the claim and remedy sought, a civil litigant may not have a right to a jury trial at all. (*Franchise Tax Bd. v. Superior Court* (2011) 51 Cal.4th 1006, 1010 [stating right to jury trial generally applies to civil actions but not equity].)

As this Court indicated in *People v. Rountree*, *supra*, 56 Cal.4th 823, "civil litigation is entirely different from criminal litigation." (*Id.* at p. 863.) Criminal and civil litigation serve different purposes. The goal of criminal litigation, which is initiated by the People, is to ensure public safety. (§ 1170, subd. (a)(1) ["The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice"].) By contrast, the primary goal of

civil litigation is to make the aggrieved party "whole" and, where appropriate, impose punitive damages to deter intentional torts. (See, e.g., *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 ["The civil law is normally concerned with compensating victims for actual injuries sustained at the hands of a tortfeasor. . . . Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery," citations omitted].)

Because the purposes of the proceedings and their consequences are different, the procedures for civil and criminal trial – including the admission of evidence – are different, and criminal defendants and civil litigants are not similarly situated. (Compare Cal. Const., art. 1, § 15 ["Persons may not . . . be compelled in a criminal cause to be a witness against themselves"] with *People v. Superior Court* (*Kaufman*) (1974) 12 Cal.3d 421, 427-429 [trial court may compel a witness to answer deposition questions, over the witness's assertion of privilege against self-incrimination, by granting the witness immunity against the use of the deposition answers in any criminal proceeding]; *People v. Wilkinson* (2010) 185 Cal.App.4th 543, 547 ["the potential committee may not refuse to testify"].) Appellant cites no case holding that equal protection requires identical procedures or evidentiary rules for criminal and civil proceedings (OB 33-37), and respondent is aware of none. (Cf. *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1311 [finding defendants accused of different crimes are not similarly situated for purposes of evidentiary rules].)

In short, because appellant fails to establish, as a threshold matter, that criminal defendants and civil litigants are similarly situated, his claim fails. (*Cooley v. Superior Court*, *supra*, 29 Cal.4th at p. 254.)

d. Allowing the Admission of Evidence Obtained in Violation of the Invasion of Privacy Act in Criminal Proceedings is Rationally Related to California's Legitimate Interest in Assuring That All Evidence Relevant to Guilt be Presented to the Trier of Fact

Even if appellant had met the threshold requirement of establishing that criminal defendants are similarly situated to civil litigants, section 28 would nonetheless survive equal protection analysis. As is set forth above, to the extent appellant argues the right to privacy triggers a strict scrutiny standard for his equal protection claim, it derives from section 632, subdivision (d), not article 1, section 1 of the California Constitution. (See Argument I.F.2, *ante*.)[13] Thus, any equal protection analysis is subject to the rational relationship test. (See *People v. Ramos* (2004) 34 Cal.4th 494, 512 [we "reject defendant's claim that his equal protection challenge is subject to the strict scrutiny doctrine, which is applicable when there is a significant interference with the exercise of a fundamental right"].) Appellant's claim fails as he cannot "negative every conceivable basis that might support the disputed statutory disparity." (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881, internal quotation marks and citations omitted].)

Here, given the "public stake in criminal proceedings," California has a legitimate interest in "assuring that all evidence relevant to the guilt of the accused be presented to the trier of fact." (*In re Lance W., supra*, 37 Cal.3d at p. 893.) This "justifies the admission of evidence that would be excluded in other proceedings." (*Ibid.*) Stated differently, in light of both the need

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[13] As has been noted, even appellant's statutory right to engage in confidential communications free from unauthorized recording was not violated as his conversation was not surreptitiously recorded. (4RT 1231, 1345.)

to ensure public safety and the consequences of conviction (punishment) (see § 1170, subd. (a)(1)), California has a legitimate interest in ensuring truth in evidence in criminal proceedings. Requiring the admission of evidence illegally obtained as a result of recording a confidential communication that would be excluded in other proceedings is rationally related to that goal. (See *Johnson v. Department of Justice*, *supra*, 60 Cal.4th at p. 881 ["If a plausible basis exists for the disparity, courts may not second-guess its wisdom, fairness, or logic," internal quotation marks and citations omitted].) Here, admission of the relevant portions of the recorded conversation between Lorena and Esperanza ensured that the trier of fact heard what Lorena actually said in that conversation, rather than having to rely on the competing recollections of the parties to that conversation.

In short, appellant's equal protection argument is meritless as this Court rejected it in *Lance W.*, and criminal defendants and civil litigants are not similarly situated. Regardless, allowing evidence obtained in violation of the Invasion of Privacy Act in criminal proceedings is rationally related to California's legitimate interest in assuring that all evidence relevant to the guilt of the accused be presented to the trier of fact

II. REGARDLESS, THE RECORDING WAS ADMISSIBLE TO IMPEACH LORENA'S TESTIMONY REGARDING HER CONVERSATION WITH ESPERANZA

It is well established that otherwise inadmissible evidence may be admitted to impeach a witness's testimony that is contradicted by that evidence, in this case, the recordings of the conversation between Esperanza and Lorena. For example, as the prosecutor pointed out at trial (4RT 1204), statements that would be inadmissible in a case-in-chief

pursuant to *Miranda*,[14] are admissible to impeach a testifying defendant. (See, e.g., *Harris v. New York* (1971) 401 U.S. 222, 226 ["The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances"]; see also *Oregon v. Hass* (1975) 420 U.S. 714, 772 ["it does not follow from *Miranda* that evidence inadmissible against Hass in the prosecution's case in chief is barred for all purposes"]; *People v. May*, *supra*, 44 Cal.3d at p. 311 ["In this case we consider whether Proposition 8, and its 'Truth-in-Evidence' component, abrogated the rule of *People v. Disbrow* (1976) 16 Cal.3d 101 [] (inadmissibility for impeachment purposes of defendant's extrajudicial statements elicited in violation of *Miranda* []). As will appear, we have concluded that the *Disbrow* ruling indeed has been so abrogated," citation omitted].) Indeed, well before *Miranda*, the United States Supreme Court had held that the government may introduce illegally-obtained evidence to impeach a testifying defendant. (See, e.g., *Walder v. United States* (1954) 347 U.S. 62, 65 ["It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths," citation omitted].)

As the trial court held (4RT 1205-1206), the instant case is analogous to *People v. Crow*, *supra*, 28 Cal.App.4th 440. In *Crow*, the court held that otherwise inadmissible statements made during plea negotiations were admissible for impeachment purposes:

> [W]e conclude that the rule of *Tanner* - that evidence of statements made or revealed during plea negotiations may not

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

> be introduced by the People - must be limited to those situations in which those statements are offered as substantive evidence of guilt, either in the prosecution's case-in-chief or otherwise. That rule does not prevent the prosecution from using evidence of those statements for the limited purpose of impeaching the defendant regarding testimony which was elicited either during the direct examination of the defendant or during cross-examination which is plainly within the scope of the defendant's direct examination.

(*Id.* at p. 452; see *People v. Tanner* (1975) 45 Cal.App.3d 345, 351-352.) Similarly, a defendant's testimony at a suppression hearing may not be used against him in the prosecution's case-in-chief, but may be used to impeach his inconsistent testimony at trial. (*People v. Drews* (1989) 208 Cal.App.3d 1317, 1325-1326.) Likewise, a probationer's testimony at a probation revocation hearing cannot be used to prove his guilt of the criminal charges relating to the violation, but can be used for impeachment. (*People v. Coleman* (1975) 13 Cal.3d 867, 889.) In other words, courts have generally held that even when a statement is excluded based on a prophylactic rule of evidence, the statement may nevertheless be admitted for purposes of impeachment. That same rule should apply to any exclusion under section 632, subdivision (d).

Here, appellant's proffered reason for introducing Lorena's testimony that she had never been molested by appellant was to challenge Monica's credibility in that Monica had purportedly claimed appellant had also molested her. (2RT 6.) Lorena testified, in part, that she was never molested by appellant (3RT 1061-1062), and that she was angry that either Monica or Esperanza had told the police that she had been molested (3RT 1067-1070). She further testified regarding her telephone conversation with Esperanza. (3RT 1058-1063, 1066-1068). The recordings either contradicted or provided important qualifications to that testimony. In addition, the jury was instructed that the factors to consider in evaluating a

witness's testimony include, "Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?" and "Did other evidence prove or disprove any fact about which the witness testified?" (CT 149 [CALCRIM No. 226].) Accordingly, regardless of whether the Court finds that section 28 abrogates section 632, subdivision (d), within the context of criminal trials, the recordings were admissible to impeach Lorena's testimony.

III. In Any Event, Any Possible Error Was Harmless

Assuming arguendo that the trial court erred in admitting the recordings in rebuttal, any error was harmless. No judgment shall be set aside based on improper admission of evidence, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) A miscarriage of justice occurs only when it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant cannot demonstrate prejudice.

Lorena was hardly a critical witness for either party; she was neither a percipient witness nor a victim, and her value to the defense in undermining Monica's credibility was limited even absent impeachment with the recordings. Moreover, the recordings did not fatally undercut her initial testimony. As Lorena explained, when she told Esperanza that she believed Monica, she "was being sympathetic and saying I do believe her that she's making these accusations" (4RT 1239), and that she said so before even knowing what the accusations were (4RT 1239-1240). Consistent with this, in the recordings, Lorena states, "*if* he touched Monica then she'll certainly never forget that." (CT 130, italics added.) Lorena also testified that she wanted to speak with Monica because she wanted to get her side of the story, thus, indicating she was reserving judgment. (4RT 1241.) Indeed,

Lorena's testimony that her uncle was just overly affectionate, not a child molester, was arguably bolstered by the recordings in that she specifically stated "he hasn't touched me anywhere else . . . like my vagina or my breasts like directly." (CT 121, italics omitted.) Further, appellant used the recordings as part his defense by arguing that the instant charges were initiated by Esperanza and her boyfriend as part of a family feud. (5RT 1551-1553 [defense counsel's summation].)

The prosecution's case was not based on either Lorena's or Esperanza's testimony, much less the recordings. Rather, two different girls who were about the same age made similar accusations against appellant. Appellant molested Esmeralda when his wife was in the hospital giving birth to their third child and other adults were out of the house. (2RT 632-652.) A year and a half later, appellant molested Monica when the two were alone in his living room. (3RT 937-945.) Esmeralda and Monica did not know each other at the time of either of the two incidents. (2RT 659 [Esmeralda's testimony]; 3RT 952 [Monica's testimony].)

Neither girl volunteered the information. Appellant's abuse of Esmeralda came to light when her brother's teacher, Adelina Manriquez, saw Esmeralda crying, which was very unusual. Esmeralda initially refused to tell Manriquez what was wrong, but eventually told her about the molestation that occurred the day before, crying as she did so. Her version of events was identical to the one Esmeralda provided in court. (3RT 903-913.) Appellant's abuse of Monica came to light when she and her mother were watching a movie that involved sexual abuse, and her mother told Monica to tell her if anything like that ever happened to her. Monica cried as she told her mother about the abuse. Monica also said that she had not said anything before because she was scared. (3RT 945-946, 1020-1023.) Prior to that, Esperanza had noticed that Monica had been acting differently. For example, she would wear two tops or two pairs of pants,

and she would cover her hair. When Esperanza asked Monica why she was doing that, Monica would cry. (3RT 1021-1022.)

Moreover, the two victims did not know each other in April 2014, when they testified at the preliminary hearing. (2RT 659-660 [Esmeralda's testimony]; 3RT 953-954 [Monica's testimony].) At the time of trial, the two attended the same high school, and were "friends" in the sense that they went to the same school, recognized each other, and said "hi" and "bye" when passing each other in the halls. (2RT 661 [Esmeralda's testimony]; 3RT 954 [Monica's testimony].) Appellant has failed to explain how it is that these two girls who did not know each other happened to provide similar stories regarding distinct incidents of being molested by appellant at different times in appellant's home. Appellant has failed to provide a motive for these girls to make up such similar stories. The defense evidence elicited from Lorena, even if unchallenged by her recorded statements to Esperanza, did not significantly undercut the key evidence against appellant. In short, appellant has failed to demonstrate that absent the recordings of the brief phone call between Esperanza and Lorena, which were only introduced in rebuttal, he would have received a more favorable result. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Finally, appellant's prejudice argument suffers from two additional problems. To the extent that appellant asserts that Lorena offered improper lay testimony pursuant to Evidence Code section 800, when she said that she believed Monica (AOB 40-41), the argument is forfeited because appellant never raised such a claim at trial, when any potential prejudice could have been avoided by a timely objection and a curative instruction. (See, e.g., *People v. Jones, supra*, 17 Cal.4th at p. 299, fn. 1.) Additionally, appellant's assertion that the relevant standard is that set forth in *Chapman v. California* (1967) 386 U.S. 18 (OB 40), is incorrect. Even if his claims were meritorious, appellant has not raised a federal constitutional argument

in his brief. (OB 15-39.) As is noted above, appellant's equal protection claim is based solely on the California Constitution. (See fn. 11, *ante*.) Regardless, he has failed to establish an equal protection violation under either the federal or state Constitution. (See Argument I.F.4., *ante*.)

CONCLUSION

Accordingly, for the reasons stated, the judgment of the Court of Appeal should be affirmed.

Dated: May 15, 2018

Respectfully submitted,

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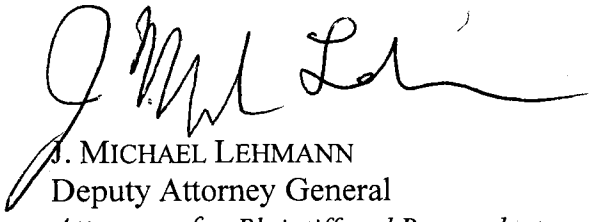
CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWERING BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 14,582 words.

Dated: May 15, 2018

XAVIER BECERRA
Attorney Generalof California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Alejandro Guzman** No.: **S242244**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

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LOS ANGELES COUNTY SUPERIOR COURT
4848 E. CIVIC CENTER WAY
DEPARTMENT – 1
LOS ANGELES, CA 90022

VERNA WEFALD, ESQ.
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PASADENA, CA 91103

On **May 15, 2018**, I served the attached **ANSWERING BRIEF ON THE MERITS** by transmitting a true copy via electronic mail to:

GLORIA MARIN
DEPUTY DISTRICT ATTORNEY
EMAIL COURTESY COPY

On **May 15, 2018**, I caused **original** and **eight copies** of the **ANSWERING BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, Room 1295, San Francisco, CA 94102-4797 by Federal Express Tracking No. 8123-7750-4596

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Erlinda Zulueta
Declarant

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