SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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Appointed by the Court of Appeal
Under the California Appellate
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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Appellant Alejandro Guzman respectfully submits his reply brief pursuant to Rule 8.412(b)(3), Calif. Rules of Court. In this brief appellant does not reply to respondent's arguments which are adequately addressed in appellant's opening brief. Appellant's failure to reply to any particular argument, subargment or allegation made by respondent does not constitute a concession or waiver by appellant. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)[1]

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

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

A. *In re Lance W.* Did not Hold that Proposition 8 Abrogates Any and All Exclusionary Rules

Respondent first argues that the language in Proposition 8 [Cal. Const., art. I, § 28, subd. (f)] is "unambiguous" and therefore the text must be construed "without recourse to extrinsic interpretative aids." (RB at 24.) Since nothing in Proposition 8 says anything about the Invasion of Privacy Act or Penal Code section 632 subdivision (d)'s exclusionary rule, the "clear implication is that the voters intended to abrogate that exclusionary rule." (RB at 24-25.)

Yet Respondent goes on to say that the legislative history (Ballot Pamphlet) shows that Proposition 8 was intended to "generally" allow most relevant evidence" "obtained through unlawful eavesdropping." (RB at 26.) Respondent cannot have it both ways. If the text of Proposition 8 is plain and unambiguous, the Ballot Pamphlet is irrelevant. Moreover, the word "generally" indicates that Proposition 8 was not a blanket call to ignore statutory and constitutional concerns about the invasion of privacy.

Respondent contends that Proposition 8 combined with *In re Lance W.* (1985) 37 Cal.3d 873, abrogates all exclusionary rules, whether judicially created or statutory, unless exclusion is required by the United States Constitution. (RB 28.) Respondent further contends that *In re Lance W.* "necessarily abrogated a state statute, section 1538.5, to the same extent." (RB at 29.) Respondent disagrees that the holding of *In re Lance W.*, is limited to the abrogation of the judicially created vicarious exclusionary rule. (RB at 29, 51.)

If *In re Lance W.,* is as sweeping as Respondent contends, however, this would upend this Court's repeated pronouncements that dicta is not controlling precedent. (See e.g. *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 ["An appellate decision is not authority for everything said in the court's opinion but only for the points actually involved and actually decided."] *Trope v. Katz* (1995) 11 Cal.4th 274, 284 ["As we have said many times, 'the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of the decision is coextensive with such facts."].)

As an example of the sweeping nature of *In re Lance W.,* Respondent cites *People v. Ratekin* (1989) 212 Cal.App.3d 1165, a case relied on by the lower court in the instant case. Respondent asserts that appellant

Guzman "misreads" *Ratekin* for arguing that the lawfully obtained federal wiretap at issue in that case was not unauthorized under Penal Code section 631. (RB at 35, citing AOB at 27.) Rather, Respondent contends that *Ratekin* held wiretap evidence should be suppressed only if its exclusion was required by the United States Constitution. (RB at 35.) It is true that the *Ratekin* court believed this was what *In re Lance W.,* held. (212 Cal.App.3d at 1169, citing *In re Lance W.,* 37 Cal.3d at 890.) But that is not what *In re Lance W.,* held. *In re Lance W.* did not apply to any and all relevant evidence of any kind, but rather to evidence seized in violation of the Fourth Amendment vis-a-vis a third party's standing to move to suppress such evidence. Thus, as appellant argued in his opening brief, *Ratekin* is irrelevant to his case *and* its reasoning is flawed. (AOB at 27.)

Most important, *Ratekin* failed to consider that Penal Code section 631 was not even enacted until 1988, six years *after* Proposition 8.

B. The Legislature Has Reenacted Penal Code Section 632 Subdivision (d)

Respondent disagrees that when the Legislature increased the fines for violations of section 632, this did not constitute a revival of

subsection (d) in criminal proceedings. (RB at 39-40.) Respondent asserts that there is nothing in the legislative history of the amendments to demonstrate a revival of subdivision (d). (RB at 40.)

By way of illustration, Respondent notes that the Legislature enacted Vehicle Code section 40808 as expressly stating that Proposition 8 does not abrogate the "evidentiary provisions of this article." (RB at 40.) Section 40808 was enacted after *People v. Sullivan* (1991) 234 Cal.App.3d 56 held that section 40803 [evidence obtained via illegal speed trap must be suppressed] was abrogated by Proposition 8.

There is nothing, however, in Proposition 8 that says the Legislature must enact a statute specifically stating that Proposition 8 does not apply in order to revive a statutory exclusionary rule. The Legislature may have enacted section 40808 to make it clear that *Sullivan* was wrongly decided.

The plain language of Proposition 8 says in pertinent part: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature." There is nothing ambiguous about this phrase. Therefore, legislative history is not helpful. Here again, Respondent seeks to rely on the plain language of a statute when it helps and on the legislative history (or the lack thereof) when it hurts.

For that matter, there is nothing in Proposition 8 or Government Code section 9605 which says that in order for a statute to be revived, amendments must be substantive rather than procedural.

Respondent also states that "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.'" (RB at 41.) Respondent fails to explain why section 632 is in the *Penal Code* if it does not apply to criminal proceedings.

Penal Code section 632 subdivision (d) has been reenacted several times since Proposition 8 by two-thirds of the Legislature. Therefore, subdivision (d) has not been abrogated by Proposition 8. The tape recording made by Monica's mother was illegal and it should not have been admitted into evidence.

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

Respondent addresses *Frio v. Superior Court* (1988) 203 Cal.App.3d 1480 only in a footnote. The Court of Appeal did not discuss this case at all, even though appellant discussed it at length. Respondent states that appellant's reliance on *Frio* is misplaced because it is a civil case. (RB at 30-31, n.7.) *Frio*, however, presented a sensible solution to any dilemma posed by Proposition 8 and Penal Code section 632 subdivision (d). (AOB at 28-32.)

To the extent that a witness to the illegally tape recorded conversation could testify to an independent recollection of the conversation, there was no bar to her taking the stand. But the illegal tape recording was not admissible. The solution offered by *Frio* was compatible with Evidence Code sections 771 (production of writing used to refresh memory) and 1237 (past recollection recorded). It goes without saying that the Evidence Code applies in both civil and criminal cases.

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

A. The Equal Protection Argument Is Not Forfeited

Respondent does not dispute that appellant objected to the admission of the illegal tape recording at trial under Penal Code section 632 subdivision (d). (2 RT 308.) Thus, this Court has the authority to review the equal protection argument. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn.6.) The appellate court may exercise its discretion to reach an issue in "cases presenting an important legal issue." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, citing e.g. *Hale v. Morgan* (1978) 22 Cal.3d 388, 394 [constitutionality of statute raised for first time on appeal may be addressed particularly where it implicates important issue of public policy].)

Further, a change in theory is permitted for the first time on appeal when "a question of law only is presented on the facts appearing in the

record." (*Wade v. Taggert* (1959) 51 Cal.2d 736, 742.) The equal protection argument is a pure question of law and an important one.

For an issue to be forfeited, there must be a "meaningful opportunity to object." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) It was on the afternoon of the first day of trial that the prosecution told defense counsel about the illegal tape recording. (2 RT 13-14.) The prosecutor threatened that if counsel sought a continuance based on this new evidence she would file multiple victim allegations that would trigger a life sentence. (2 RT 41.) Under the circumstances, counsel's objection that the tape recording was not admissible under Penal Code section 632 subdivision (d) should be deemed sufficient to preserve the constitutional claims on appeal.

Respondent lists numerous cases highlighting the difference between civil and criminal litigants. (RB at 51-53.) Appellant does not contend that civil and criminal litigants are equal in all or even most cases. However, he does contend that Penal Code section 632 subdivision (d) confers equal rights to both criminal and civil litigants. Should Proposition 8 be construed to suppress illegal tape recordings only in civil cases, a criminal defendant would indeed be denied equal protection of the law.

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

Respondent argues that appellant does not have standing to assert the right to privacy because "he was not a party to the recorded conversation and his privacy was not violated in any way." (RB at 46.) Penal Code section 632 subdivision (d) confers standing on appellant because it states that an illegally recorded conversation is not "admissible" "in any judicial ... proceeding."

Respondent also argues that "analogous challenges based on the constitutional right of privacy," have failed. (RB at 47 citing *People v. Hines* (15 Cal.4h 997, 1043.) *Hines* concerned the tape recording of a jailhouse conversation for which it has been long settled, there is no expectation of a right to privacy. *(Ibid. citing e.g. Lanza v. New York* (1962) 370 U.S. 139, 143 ["In prison, official surveillance has traditionally been the order of the day."].)

Respondent disputes that there is a hierarchy of constitutional rights. Rather, "it is well established that courts are to harmonize constitutional provisions, not 'rank' them." (RB at 48, citation omitted.) Nevertheless, Respondent contends that Proposition 8 overcomes any right to

privacy. To the extent that Article I, § 1 (right to privacy) and § 28(d) (Proposition 8) may be harmonized, *Frio v. Superior Court*, supra, 203 Cal.App.3d 1480 offers a solution. A party to the conversation may testify to his or her independent recollection but the illegal tape recording is not admissible. Thus relevant evidence is not suppressed while the right to privacy is maintained.

V. APPELLANT WAS PREJUDICED BY THE INADMISSIBLE TAPE RECORDING

A. Lorena's prejudicial statement on the tape that she believed Monica was irrelevant because it was inadmissible lay opinion testimony

Respondent argues that California has a legitimate interest in assuring that: (1) all relevant evidence be admitted in criminal cases (to overcome an equal protection claim) (RB at 54); (2) the illegal tape recording was admissible to impeach defense witness Lorena (RB at 55); and (3) any error was harmless as Lorena was not that important a witness anyway. (RB at 58.)

The statements made by Lorena were not impeaching because they were not inconsistent with what she said on the stand. Both in court and in the illegal tape recording, Lorena said that appellant never touched her inappropriately. (3 RT 1061, 4 RT 1235.)

Her opinion on the tape that she "believed" (CT 121) Monica, however, was inadmissible lay opinion testimony. Lay opinion testimony as

to the credibility of another witness is inadmissible because it is irrelevant. Proposition 8 only authorizes the admission of "relevant evidence."[2]

Lorena's expressed belief in Monica's truthfulness (CT 121) (which she subsequently explained in court as just being "sympathetic") (RT 1239) was, however, highly damaging. The prosecutor seized on this statement in closing argument:

> "[Y]ou hear on the audio, she says she believes her. And she doesn't just believe her because she knows Monica is not the type of little girl that's going to lie or make something up like this. ¶ She believes her because guess what, he has [sic] doing things that made her feel uncomfortable and that's why she wouldn't wear shorts around him." (5 RT 1528.)

Because Lorena's statement that she believed Monica was irrelevant, it was therefore admitted in violation of Proposition 8, which mandates admission only of "relevant evidence," not irrelevant evidence.

> "Lay opinion about the veracity of particular statements by another is inadmissible on that issue. As the Court of Appeal

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[2] On the tape, Lorena also says that appellant touched Esmeralda. (CT 123.) This statement is also inadmissible hearsay. (Evid. Code, § 1200, et seq.)

recently explained ..., the reasons are several. With limited exceptions, the fact finder, not the witness must draw the ultimate inferences from the evidence ... a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence, nor does it bear on any of the other matters listed by statute as most common affecting credibility [citation]. Thus, such an opinion has 'no tendency in reason' to disprove the veracity of the statements." (*People v. Melton* (1988) 44 Cal.3d 713, 744, citing Evidence Code sections 210 and 350.)[3]

B. The Issue Is Not Forfeited

Respondent does not dispute that lay opinion testimony as to whether someone believes another person is telling the truth is inadmissible. However, Respondent contends that the objection is forfeited because it was

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[3] Evidence Code section 210 (relevant evidence) provides: 'Relevant evidence, means evidence, including evidence related to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence Code section 350 provides that "No evidence is admissible except relevant evidence."

not made below. (RB at 60.) Not so. As discussed above, appellant objected to the entirety of the tape recording being admitted. It cannot be overemphasized that defense counsel complained he was being "broadsided" (4 RT 1224) when he was first informed about the tape recording on the afternoon of the first day of trial. Counsel could not request a continuance in order to further evaluate his objections to the tape recording without risking the prosecutor upping the ante by filing multiple victim allegations triggering a life sentence. (2 RT 41.)

C. The Admission of the Illegal Tape Recording Was Not Harmless Error

In terms of prejudice, Respondent states that appellant "fails to explain how it is that these two girls who did not know each other happened to provide similar stories" and that "appellant has failed to provide a motive for these girls to make up such similar stories." (RB at 60.) Both girls, however, lived very close to each other, so their claim that they did not know each other at the time is highly suspect. Esmeralda lived in an apartment complex next to appellant (2 RT 630-632) and Monica lived downstairs from appellant. (3 RT 933-934.)

Appellant's wife, Rosario Mejia, testified that Monica was her brother's daughter. After Monica's mother, Esperanza, and her brother split up, the cousins remained close. Esperanza began to live with another man who was a drunkard and her children were not being fed. Then Esperanza moved in with another man who refused to allow Monica and her siblings to visit. (4 RT 1266-1278.)

It was Esperanza who first claimed that Monica was accusing appellant and it was Esperanza who made the illegal tape recording. Should there be a retrial, Esperanza's financial motive to have her daughter falsely accuse appellant will be front and center. At sentencing, over defense counsel's objection (5 RT 2402), Esperanza asked the court to award as restitution: $16,000 for a car; $1,300 for a surveillance system, lost wages, and braces for her daughter's teeth; plus $50,000. She wanted the "maximum that they can give me."(5 RT 2407.)

Not only did the court find that most of her request was inappropriate for restitution, but Esperanza could not provide any documentation for her hefty requests. (5 RT 2403.) She claimed to work in a factory delivering food but left because she was "scared." (5 RT 2405.) She could not prove that she was ever so employed. (5 RT 2405.) She asked for money to pay for a car she bought but had no proof of purchase. (5 RT 2407.)

She either lost the receipts for the surveillance system or her husband threw them away. (5 RT 2408.) Martinez spent $4,500 on braces for her daughter to "cheer her up." (5 RT 2410.) She also wanted $50,000 because it was not "fair" that appellant and his family had two houses. (5 RT 2410-2411.)

The court ultimately denied Esperanza's demands because she had no documentation and they were inappropriate. The total amount of restitution awarded was $1,300, plus $5,589 to the victim restitution fund. (5 RT 2416-2418.)

CONCLUSION

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

Date: July 25, 2018 Respectfully submitted,

VERNA WEFALD

Attorney for Appellant Alejandro Guzman

CERTIFICATE OF LENGTH

I, Verna Wefald, counsel for Alejandro Guzman, certify pursuant to California Rules of Court, that the word count for this document is 2,959 words, excluding the tables, this certificate, and any attachment pursuant to rule 8.204(c)(1). This document was prepared in Wordperfect, and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Pasadena, California, on July 25, 2018.

Respectfully submitted,

VERNA WEFALD

Attorney for Appellant Alejandro Guzman

DECLARATION OF SERVICE

Re: People v. Guzman S242244

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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

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Each said envelope was then, on July 25, 2018, sealed and deposited in the United States Mail at Los Angeles County where I am employed, with the postage thereon fully prepaid.

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

Executed on July 25, 2018, at Pasadena, California.

VERNA WEFALD