No. _____

In The

# Supreme Court of the United States

JOSE ARMANDO ALGIRE,

*Petitioner,*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District, Division Four**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1) Does a legislature demonstrate its intent for a statute to remain effective by voting to re-enact that statute?

2) Or, does a lack of extrinsic legislative history expressly stating that a specific portion of a re-enacted statute is to remain effective constitute sufficient grounds for an appellate court to assume that the legislature did not intend for that portion of the statute to remain effective?

3) Based on the foregoing, does an appellate court violate the *ex post facto* principles of the Due Process Clause by finding that a statute a defendant relies upon at trial to show his innocence is no longer effective due to the lack of express legislative intent that the specific portion of the re-enacted statute remain effective?

## PARTIES TO THE PROCEEDINGS

The Petitioner-Defendant is Jose Armando Algire.

The Respondent-Plaintiff is the People of the State of California.

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## OPINIONS BELOW

On March 19, 2014, the California Supreme Court denied Petitioner Jose Armando Algire's ("Petitioner") petition for review under California Supreme Court Case No. S216109 and ordered the decertification of the December 17, 2013, decision of the Second District, Division Four, of the California Court of Appeal that denied Petitioner's appeal under California Appellate Case No. B244557. Petitioner originally appealed the order of the Los Angeles Superior Court, Case No. NA090057.

## JURISDICTION

The California Supreme Court denied Petitioner's petition for review under California Supreme Court Case No. S216109 on March 19, 2014. The United States Supreme Court has jurisdiction over this case under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution are set forth in the appendix, as well as the relevant provisions of the California Privacy Act and Article 1, section 1 of the California Constitution.

## STATEMENT OF THE CASE

The *ex post facto* principles of the Due Process Clause were violated when the appellate court ruled that the provision of the California Privacy Act ("Privacy Act") that expressly prohibits the introduction into evidence of secretly recorded conversations of a defendant was no longer valid law. The appellate court erroneously ruled that because the California State Legislature, in re-enacting the Privacy Act, did not *specifically state* that the exclusionary provision of the re-enacted Privacy Act remained effective law, that the Legislature therefore intended that the exclusionary provision *was no longer valid*. The ruling was contradictory to the plain language of the statute, and was completely unpredictable by Petitioner, who relied on the statute entirely for his defense at trial only to see the law eviscerated by the appellate court.

Petitioner was convicted under California Penal Code section 289(a)(1) after the trial court admitted into evidence a secretly recorded conversation between Petitioner and the accuser that was recorded for the sole purpose of helping the accuser learn English. The conversation was not recorded to investigate a crime.

Under the Privacy Act, at the time of Petitioner's trial, a secretly recorded conversation of a defendant, in which the defendant has a reasonable expectation of privacy, was *prohibited from admission into evidence* unless recorded for self-protection or for the

purpose of obtaining evidence reasonably believed to relate to the crime. (Cal. Pen. Code § 632(d); Cal. Pen. Code § 633.5.)

The Privacy Act states that "[e]very person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine . . . or imprisonment. . . ." (Cal. Pen. Code § 632(a).) "Except as proof in an action or prosecution for violation of this section, **no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding**." (Cal. Pen. Code § 632(d).) Under the then existing interpretations of the relied upon provision of the Privacy Act, "under section 632, 'confidentiality' requires nothing more than the existence of a reasonable expectation by one of the parties that no one is 'listening in' or overhearing the conversation." (*Frio v. Superior Court* (2nd Dist. 1988) 203 Cal. App. 3d 1480, 1490.)

The California Supreme Court and the lower court of appeal ignored the clear language of the statute, and relied on an unreasonable interpretation of the Privacy Act that deprived Petitioner of due process of law because it violated the principles of

statutory interpretation to an unprecedented degree, thereby further violating the prohibition against *ex post facto* punishment.

## FACTS ESTABLISHED AT TRIAL

### 1. The Trial Court Admitted into Evidence a Secretly Recorded Conversation that Was Not Taped For the Protection of the Victim or to Collect Evidence of the Crime

English is not Stevie's primary language. (RT 462, ll. 1.) However, to learn English, she developed a custom of recording conversations and reviewing them later with a dictionary. (RT 462, ll. 1; *see also*, RT 5, ll. 5-8.)

In January of 2008, Stevie secretly recorded a conversation while she and Petitioner were together alone and waiting for an appointment with Stevie's immigration attorney. (RT 5, ll. 9-11; CT 13, ll. 2-5.) Stevie testified that Petitioner used the word "orgasm" in the conversation. (RT 461, ll. 23-27.) Because she did not understand the word, she used her phone dictionary to look it up. (RT 462, l. 1.) As she had done in the past "with other people," she recorded the conversation. (RT 462, ll. 7-23.)

Explicitly, the purpose of the recording was to "help" Stevie "learn English" as she intended to review the recording and look up specific words. (RT 462, ll. 17-23.) In the preliminary hearing, defense counsel specifically asked Stevie if she recorded the

conversation to gather evidence, to which Stevie replied "no." (CT 22, ll. 21-23) She went on to say "I recorded the conversations only because [of ] the English barrier. If he says some big words I don't understand, that's where I record it." (CT 22, ll. 26-28.) Petitioner was never aware that Stevie recorded her conversations. (RT 1000, ll. 6-9.)

The trial court admitted the secret recording and transcript into evidence over the objections of Petitioner who argued that the decision violated the Privacy Act because the recording was not performed for the purpose of either self-protection or to obtain evidence. (CT 58, 69.)

**2. The Allegations**

Stevie was a citizen of China living in America and was the step-daughter of Petitioner. (RT 434-435.) Stevie alleged that on a single occasion in 2006 Petitioner touched her breasts without her consent, and on a separate occasion that same year touched her vagina without consent. (RT 439; Id. 645, ll. 6-11.)

Stevie did not tell anyone that she had been abused by her step-father until after her immigration issues arose. (RT 632, ll. 12-19; RT 918.) Stevie first told a police officer stationed at the mall where she worked that her step-father was "making inappropriate comments" but never mentioned any form of physical abuse. (RT 661, ll. 11-13.) When the officer asked her if there was "anything criminal" going on, she responded "no, I'd just like him to stop bothering

me. What I'd like to do, would you talk to him and tell him to stop bothering me?" (RT 663, ll. 1-4.) Stevie filed a civil lawsuit for damages against Petitioner before the case below proceeded to trial. (RT 904-906.)

### 3. Petitioner Denied The Allegations

Petitioner testified that he married Stevie's mother, Ping and that almost immediately after their marriage Ping asked that Petitioner sponsor Stevie's citizenship. (RT 950-951.) He lived with Ping, Stevie, and his children, Kenneth and Tracy. (RT 952, ll. 1-2.)

Petitioner explained that when Stevie moved into his residence, he attempted to implement a schedule of chores similar to that which he held his own children, but Stevie had obedience problems and difficulty participating in the chores. (RT 952, ll. 12-17.)

Petitioner stated that Stevie would stay up late at night talking to her friends from China and would also watch lesbian pornography on the computer. (RT 953-954.) Stevie would leave the pornography on display when she left the computer. (RT 953, ll. 25-28.)

Petitioner ultimately told Stevie that he was not going to sponsor the renewal of her visa. (RT 960, ll. 15-26.) Petitioner filed for divorce with Ping on April 22, 2010 after learning that she had previously engaged in immigration fraud. (RT 963, l. 1.)

Petitioner explained the circumstances of his meeting with Stevie in the mall food court. (RT 966-969.) He explained that Stevie called unexpectedly

and he went to the food court because he was concerned that something terrible had happened to Stevie or that she had gotten into some kind of trouble. (RT 966-969.) When he met with her, he was approached by officers who told him to sit down, shut up, and listen. (RT 972, ll. 5-11.) One officer specifically told him not to talk. (RT 972, ll. 13-15.)

Petitioner testified that at that time, Stevie pulled out her phone and told him she had a recording that would get him into trouble and that if he did not help her get her Visa she would get him into trouble. (RT 972, ll. 19-25.) Then, Stevie played the tape in front of Petitioner and the officers, but Petitioner could not make out any spoken words from the tape. (RT 973, ll. 14-22.)

Petitioner testified that he believed Stevie was trying to extort money from him. (RT 976.) Petitioner explained that the only sexual related conversations he ever had with Stevie were his attempts to convey to Stevie that she should think out of the box and question whether or not she is truly a lesbian. (RT 980-981.) He expressly denied ever inappropriately touching Stevie or discussing orgasms as described in the transcript. (RT 978, ll. 2-7.)

### 4. Petitioner's Forensic Expert Identified An Edit In The Recording

Mr. Thomas Guzman-Sanchez, a court appointed forensic expert, testified that he found an edit in the recording. (RT 1206.) Mr. Guzman-Sanchez is an

expert in sound wave examination. (RT 1209, ll. 9-12.) He explained that it is very easy to combine different samples of sound into one. (RT 1210, ll. 16-20.) In his opinion, the graphed slopes and gradation of the audio recording demonstrated "a clear edit" in the recording. (RT 1213, ll. 22-27.)

### 5. The Trial Court Denied Petitioner's Motion To Exclude The Audio Recording And Denied Petitioner's Motion For New Trial

The trial court overruled the oral and written objections of Petitioner, who argued that the decision would violate the Privacy Act. (CT 58, 69.) The court's stated rationale was that the evidence was admissible under Penal Code section 633.5 because it "involves the recording of the defendant for the purpose of obtaining evidence reasonably related to [the] commission of a serious or violent felony by the defendant." (RT 307.) The court reasoned that because Petitioner was allegedly talking about touching the named victim, the recording was an "admission of conduct" and therefore admissible under *People v. Parra* (1st District 1985) 165 Cal. App. 3d 874. *Parra*, however, never mentions such an exception. (*Ibid*.) (RT 307, ll. 14-20.)

The trial court also admitted the transcript of the recording into evidence over the objection of Petitioner and it was handed out to the jury on multiple occasions. (CT 69.) The trial court attempted to resolve the conflict by advising the jury that the

transcript was not evidence and only to be used as an aid. (RT 602, ll. 12-25.)

During defense counsel's case in chief and the People's cross-examination of Mr. Algire, the court again handed out the transcript to the jury as the tape was played aloud. (RT 1002, l. 24.) In the People's closing, the recording was played a third time to the jury as they were allowed to follow along with the transcript in the People's rebuttal. (RT 1297.) The trial court, after Mr. Algire correctly stated that the recording was illegal, told the jury that "the Court has found this is legal evidence." (RT 1012, ll. 4-6.)



## REASONS WHY CERTIORARI SHOULD BE GRANTED

The issue of secretly recorded conversations used as evidence has never been more directly placed into the national spotlight given the recent sale of the Clippers basketball organization following the release of the secretly recorded conversation between Donald Sterling and his girlfriend, V. Stiviano. There are compelling reasons why secretly recorded conversations should not be admitted against a defendant who had a reasonable expectation of privacy at the time the conversation was recorded.

The first is context. What may be said in jest behind closed doors may be presented years later as something entirely different than what was originally intended. Jurors do not have the benefit of being

present for the circumstances of the recording. They do not know the history between the conversing parties. What may sound like a threat to a stranger could simply be an inside joke among friends.

The second is manipulation. A grave danger in allowing the admission into evidence of conversations in which a defendant had a reasonable expectation of privacy is the opportunity of an ill-willed accuser to manipulate the defendant into saying something that could later be used against his interests. If a defendant knew his words would be used against him, he might be more cautious in what he says, because what an individual says to a friend may possess an entirely different meaning than what is said to a group of strangers. Allowing secretly recorded conversations to be used as evidence allows the recorder to manipulate the unknowing party.

Petitioner's position does not conflict with the interests of a criminal prosecution; petitioner argued that secretly recorded conversations should remain admissible when recorded for the *purpose* of criminal investigation, which is consistent with the clear language of the Privacy Act. What Petitioner argues should be precluded from admission into evidence are secretly recorded conversations recorded between private citizens who have reasonable expectations of privacy.

But beyond the context of privacy is the principle of fairness. When an appellate court contradicts the plain meaning of a statute, not only does that court

violate the doctrine of separation of powers, but it blindsides the citizens who rely on the statute. Here, the trial court and the appellate court invented an exception to the law that no defendant could ever reasonably foresee. This deprives defendants of due process of law, because defendants prepare their defenses based upon the current meaning of the law, and they are not tasked with anticipating novel inventions of law that are created *after* their trial.

### 1. The Trial Court And The Appellate Court Incorrectly Invented an Exception To The Exclusionary Provision Of The Privacy Act

Under California law at the time of trial, a secretly recorded conversation of a defendant in which the defendant has a reasonable expectation of privacy may not be admitted into evidence unless recorded for self-protection or to obtain evidence reasonably believed to relate to the crime. (Cal. Pen. Code §§ 632(d); 633.5; 42 U.S.C. § 3711; *Kearney v. Salomon Smith Barney, Inc*. (2006) 39 Cal. 4th 95, 117-118; *People v. Parra* (1st Dist. 1985) 165 Cal. App. 3d 874, 880-881; *People v. Ayers* (2nd Dist. 1975) 51 Cal. App. 3d 370, 377; *see also People v. Montgomery* (1st Dist. 1976) 61 Cal. App. 3d 718, 731; *People v. Strohl* (2nd Dist. 1976) 57 Cal. App. 3d 347.)

"Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential

communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine . . . or imprisonment. . . ." (Cal. Pen. Code § 632(a).)

"Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding." (Cal. Pen. Code § 632(d).)

"[T]he Privacy Act has long been held to prevent one party to a conversation from recording it without the other's consent. (Citations omitted.) 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 or mechanical device." (*Ribas v. Clark* (Cal. 1985) 38 Cal. 3d 355, 360-361.)

"In sum, under section 632 'confidentiality' appears to require nothing more than the existence of a reasonable expectation by one of the parties that no one is 'listening in' or overhearing the conversation." (*Frio v. Superior Court* (2nd Dist. 1988) 203 Cal. App. 3d 1480, 1490.)

Here, the appellate court ignored the doctrine of separation of powers – and the clear text of the law – while paying lip service to the clear language of the same "Truth-In-Evidence" provision the court relied upon in concluding that the re-enactment of section 632(d) was a nullity: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings. . . ." (Cal. Const., Art. I, § 28, subd. (f), par. (2) (emphasis added); App. 1.) Here, there is no dispute that section 632(d) was re-enacted by a two-thirds vote of the legislature. The California Constitution provides that "[a] section of a statute may not be amended unless the section is re-enacted as amended." (Cal. Const., Art. IV, § 9.) Based on the plain language of the "Truth-In-Evidence" provision, section 632(d) applies and should have resulted in exclusion of the illegal recording.

But instead of complying with the obvious language of the Truth-In-Evidence" provision, California Constitution article IV, section 9, and section 632(d), the appellate court made the far-reaching comparison of the instant matter to the *In re Lance W.* (1985) 37 Cal. 3d 873, 890, a decisional analysis of Penal Code section 1538.5. (App. 1.) In *Lance W.*, the court found that the re-enactment of section 1538.5 during the course of a "non-controversial 'clean-up' amendment" did not allow the Court to "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." (*Lance W., supra*, 37 Cal. 3d at 894.)

There is no fair comparison of the *Lance W.* decision to the case before the Court. In *Lance W.*, the Court dealt with the statutory embodiment of the exclusionary rule itself, the very statute that the Truth-In-Evidence amendment was designed to defeat. (*Lance W., supra*, 37 Cal. 3d at 895, "Senate Bill No. 1744 was not intended to, and did not, restore the pre-Proposition 8 law relative to admission of unlawfully obtained evidence.")

Moreover, there was legislative history demonstrating that the amendment was "non-controversial" and "casually proposed." (*Id*. at 894.) Comparatively, here, there is no support for the theory that the re-enactment of section 632(d) was "casual" or "non-controversial." Instead, the appellate court improperly reads *Lance W*. to somehow require extrinsic evidence of legislative intent to show that the legislature really meant to re-enact the statute. (App. 1.)

This argument is laughable when the language of section 632.5 is examined, which, as the Decision admits, was the "focal element" of the amendment. (App. 1.) Section 632.5 states in part: " . . . If the person has been previously convicted of a violation of this section or Section 631, 632, 632.6, 632.7, or 636,

the person shall be punished by a fine not exceeding ten thousand. . . ." (Cal. Pen. Code § 632.5.)

Indeed, the "focal point" of the legislation explicitly refers to section 632. Ignoring this, the appellate court imposes a burden onto Appellant to dig up extrinsic evidence from legislative records created 20 years ago that are not readily accessible online, in order to verify that the legislature, in re-enacting section 632, and directly referencing section 632 in the focal point of the legislation, meant what it wrote.

But "[i]f the statutory language is not ambiguous on its face and no latent ambiguity is identified, we presume the Legislature meant what it said and the plain meaning of the statute governs." (*Pratt v. Vencor, Inc*. (2003) 105 Cal. App. 4th 905, 909.) And "[w]hen a court reviews extrinsic material to determine whether a latent ambiguity exists, it must be careful not to rewrite an unambiguous statute." (*Coburn v. Sievert* (2005) 133 Cal. App. 4th 1483, 1495-96; *see* Cal. Code Civ. Proc. § 1858; *Whaley v. Sony Computer Entertainment America, Inc*. (2004) 121 Cal. App. 4th 479, 486.) "In other words, a court should not create a latent ambiguity where none exists." (*Coburn*, 133 Cal. App. 4th at 1495-96.)

The intent of the Invasion of Privacy Act was to prohibit "unconsented-to recording or monitoring regardless of the content of the conversation or the purpose of the monitoring, and is intended to protect rights separate and distinct from the right to prevent the disclosure of improperly obtained private

information." (*Kight v. CashCall, Inc*. (2011) 200 Cal. App. 4th 1377, 1389.) "While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between a secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or mechanical device." (*Ibid.*; *quoting Flanagan v. Flanagan* (2002) 27 Cal. 4th 776, 775.)

In this case, the appellate court went to novel lengths to create an ambiguity "where none exists." (*Ibid*.) In so doing, the court violated the doctrine of separation of powers. (*Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal. 4th 287, 298.) While it made sense in *Lance W.* for the Court to decide that the legislature was not attempting to destroy the "Truth-in-Evidence" provision entirely, here, the appellate court has stretched *Lance W.* to an untenable end that results in a dangerous precedent of judicial authority to ignore the clear language of a statute. (*Lance W., supra*, 37 Cal. 3d at 894.)

Finally, unlike *Lance W*., here, the appellate court even admits that the language in subsection d, the subsection which contains the exclusionary rule, was amended, but attempts to glean over this fact by stating that the amendment was not "substantial." (App. 1.) But why would the legislature make "substantial" changes at all if it intended on reviving subsection (d) "as-is"? The appellate court's gross speculation only demonstrates the dangers of over

reliance on requiring extrinsic evidence of legislative intent to enforce a statute. Perhaps the legislature determined that it was obvious by the re-enactment and amendment of the statute that it intended to revive the statute. Unfortunately, here, the appellate court mistook its gavel for a legislator's pen. The Court should reverse the decision of the appellate trial and order a new trial because Appellant was convicted using illegal evidence.

### 2. The Conversation Was Private And Petitioner Had A Reasonable Expectation In The Privacy Of The Statement

Here, the trial court blatantly ignored that Stevie secretly recorded the conversation for the explicit and exclusive purpose of learning English as she intended to review the recording and look up specific words. (RT 462, ll. 17-23.) This was established not only at trial, but at the preliminary hearing when defense counsel specifically asked Stevie if she recorded the conversation to gather evidence, to which Stevie replied "no" and clarified that she "recorded the conversations only because [of ] the English barrier. If he says some big words I don't understand, that's where I record it." (CT 22.) Thus, there can be no credible argument by the People that the purpose of the secret recording was either "obtaining evidence" or for self-protection. (Pen. Code 633.5; *Kearney*, *supra*, 39 Cal. 4th at 118.)

Moreover, Stevie recorded the conversation when she was "alone" with Appellant and Appellant was never aware that Stevie recorded her conversations. (CT 13, ll. 2-5; RT 5 ll. 9-11; RT 1000, ll. 6-9.) The private nature of the conversation demonstrates "the existence of a reasonable expectation by one of the parties that no one is 'listening in' or overhearing the conversation." (*Frio, supra*, 203 Cal. App. 3d at 1490.) It follows that the "simultaneous dissemination" of the conversation "to an unannounced second auditor" in the form of a "mechanical device" violated the Privacy Act and resulted in an inadmissible recording, the admission of which into evidence violated Appellant's constitutional privacy rights and the right to a fair trial. (Cal. Const., Art. I; U.S. Const. Amend. VI; *Ribas, supra*, 38 Cal. 3d at 360-361; Cal. Pen. Code §§ 632; 633.5.)

### 3. The Invention Of An Exception By The Appellate Court Violated Petitioner's Due Process Rights To Fair Notice

Deprivation of the right to fair warning implicit in the Due Process Clause can result both from vague statutory language and from unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face; thus, if judicial construction of a criminal statute is unexpected and indefensible by reference to a law which had been expressed prior to conduct in issue, such construction may not be given retroactive effect. (*See Rogers v. Tennessee* (2001) 532 U.S. 451, 457, 121

S.Ct. 1693, 1698, 149 L.Ed.2d 697.) As explained above, the decision of the appellate court was "so clearly at odds with the statute's plain language" as to deprive Petitioner of due process of law. (*Id*. at 458.)

## CONCLUSION

This Petition for Writ of Certiorari should be granted.

Date: June 17, 2014

Respectfully submitted,

BOB BERNSTEIN, ESQ.
*Attorney for Petitioner*
*Jose Armando Algire*

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JOSE ARMANDO ALGIRE,<br>Defendant and Appellant. | B244557<br>(Los Angeles County Super. Ct. No. NA090057)<br>(Filed Dec. 17, 2013) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed.

Bernstein Law Office, Inc., Bob Bernstein and Nathaniel Clark for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part B of the Discussion.

Appellant Jose Armando Algire challenges his conviction for forcible sexual penetration. He maintains that the trial court erred in admitting a recorded conversation, denying a continuance, and limiting his expert's testimony. In the published portion of this opinion, we reject appellant's contention that the trial court contravened the exclusionary rule in Penal Code section 632, subdivision (d), in admitting an audio recording of a conversation between appellant and his victim. We conclude that the "Right to Truth-in-Evidence" provision of the California Constitution (Cal. Const., art. I, § 28, subd. (f), par. (2)), as enacted by the passage of Proposition 8 in 1982, abrogated that exclusionary rule. In the unpublished portions of the opinion, we reject appellant's remaining contentions. We therefore affirm.

## PROCEDURAL BACKGROUND

On March 14, 2012, an information was filed, charging appellant with sexual penetration with a foreign object (Pen. Code § 289, subd. (a)(1)).[1] Appellant pleaded not guilty. A jury found appellant guilty as charged. On October 3, 2012, the trial court sentenced appellant to a term of eight years in prison.

[1] All further statutory citations are to the Penal Code, unless otherwise indicated.

## FACTS

A. *Prosecution Evidence*

Stevie J., appellant's victim, is also his step-daughter.[2] Stevie was born in China in 1988. In April 2006, following her mother's marriage to appellant, Stevie came to the United States to live with her mother, appellant, and his two children. She was then 17.

Stevie testified as follows: When she took up residence with appellant, he repeatedly hugged her. Stevie initially believed that his conduct was a "Western cultural thing," as it did not occur in China. Appellant soon began trying to kiss her during the hugs, and also engaged in other inappropriate behavior. On one occasion, he told her that when he was young, a neighbor compensated him for mowing her lawn by having sex with him. On another occasion, appellant approached her from behind while she was reading a book, and placed his hands on her breasts. When Stevie pushed him away, he said that if she discussed the incident with her mother, he would "kick [Stevie] back to China." Stevie said nothing to her mother regarding appellant's misconduct because she did not want to endanger her mother's marriage.

On October 25, 2006, while Stevie's mother was absent, appellant asked Stevie to enter his bedroom.

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[2] Although the information identifies the victim as Wen S., Stevie testified that she changed her name from Wen S. when she became a United States citizen.

When she did so, he pushed her onto the bed and kissed her. He then moved his hands to her underwear and inserted his fingers into her vagina. Stevie struggled away from him, went to her room, and locked the door. Appellant said through the door, "If you tell anyone[ ] else[,] including your mom, I'm going to kick you guys back to China and your green card is over, the marriage is over." Stevie contacted a friend, who accompanied Stevie to a park. There, Stevie told the friend only that appellant had threatened her. Stevie did not expressly report appellant's sexual misconduct to anyone, as she was fearful that doing so would end her mother's marriage.

In December 2006, after her natural father died in China, Stevie visited China for approximately six months. During Stevie's visit, appellant informed her by e-mail that he wanted to teach her about sex. She rejected his proposal.

In May 2007, following Stevie's return from China, appellant again asked her to enter his bedroom. She refused to do so, but stood in the bedroom doorway. Appellant directed her attention to a computer screen, which displayed a pornographic image involving a man and woman. When he asked whether Stevie wanted him to do what the image showed, she refused and tried to leave, but he grabbed her arm. She kicked him and ran to her room. Stevie related the incident to no one.

A few days later, while appellant was giving Stevie a driving lesson, he asked whether she wanted

him to teach her about sex. He explained that it was permissible for him to do so because she was not his "blood daughter." When she replied that she did not want to learn about sex from him, he said, "[S]chool's over, [your] green card is over, and you [will] go back to China." Because Stevie's conditional green card expired in 2008, she understood appellant to mean that he intended to send her back to China.

Immediately after the incident, Stevie contacted Tae Boettcher, whom she knew through her karate class. When Stevie told her that appellant wished to have sex with Stevie and threatened her immigration status, Boettcher arranged for Stevie to see a counselor at the high school she had attended. Before talking to the counselor, Stevie told her mother that appellant had acted improperly toward her. The counselor directed Stevie to the high school police, who told her they could not offer assistance because she was then 18 years old. In addition, the counselor located an alternative residence for Stevie and urged her to move out of appellant's house. Stevie decided to do so. After moving out of appellant's residence, she found employment in a food court in a shopping mall, and met Torrance Police Department Officer Steven Janguard, who also worked in the mall.

In December 2007, appellant told Stevie and her mother that they needed to contact a lawyer in order to renew Stevie's green card. Later, in January 2008, appellant and Stevie went to their lawyer's office in order to sign some paperwork. Although Stevie's mother was supposed to accompany them, she was

not present. After meeting with the lawyer, appellant and Stevie had a conversation. While appellant talked to her, he used the word "orgasm," which she did not understand. According to Stevie, she had a practice of recording conversations "[t]o help [her] . . . learn English." She thus began recording their conversation.[3]

During the conversation, appellant stated that the last time he touched Stevie, she was not "wet at all," and that he believed that she needed instruction in sex from him because her body did not "understand what [was] happening." She rejected his proposal. Stevie's recording of the conversation was played for the jury.

After the incident, Stevie told Janguard that she had "issues" with appellant. Janguard suggested that Stevie arrange a meeting with appellant at the mall where she worked, so that Janguard could try to overhear their conversation. Although the meeting occurred, appellant said little during it. Shortly afterward, Stevie received a letter from appellant. The letter stated that if she stopped making her accusations against him, he would assist her in obtaining her a green card. She did not respond to the letter. Later, her lawyer told her that appellant had withdrawn his sponsorship of her green card application. She asked for advice from Janguard, who later acted as her sponsor.

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[3] The conversation was recorded on Stevie's cell phone.

Stevie had no further dealings with appellant, and did not participate in his and her mother's divorce. In 2009, Stevie had her breasts removed because they reminded her of what appellant had done to her. In April 2010, after the renewal of Stevie's green card, she reported appellant's sexual misconduct to the police.

Boettcher testified that she became friends with Stevie through Stevie's karate lessons. According to Boettcher, when Stevie told her that appellant had "touched" her, Boettcher arranged for Stevie to meet with a counselor and police officers at Stevie's high school. In addition, Boettcher helped Stevie find a new place to live.

Officer Janguard testified that he met Stevie in a mall where they both worked. In January 2008, while in the mall's food court, Stevie told him that she was having problems with appellant, but did not specify the nature of the problems or identify them as a crime. In addition, she played an audio recording of a conversation between Stevie and appellant. According to Janguard, the background noise in the food court made the recording difficult to understand, but it appeared to Janguard that appellant had made inappropriate remarks to Stevie.

After consulting with a police sergeant, Janguard asked Stevie to arrange a meeting with appellant in the mall. When the meeting took place, Janguard approached appellant and asked him to "listen to Stevie" because "there [was] some inappropriate

talking going on." Appellant said nothing to Janguard. Janguard then walked away from Stevie and appellant. Although he saw them talking, he did not overhear their conversation. A few weeks later, Stevie told Janguard that appellant had withdrawn his support for her green card. After learning that Stevie needed to renew her green card, Janguard and his wife agreed to act as her sponsors.[4]

B. *Defense Evidence*

Appellant, who testified on his own behalf, denied any misconduct regarding Stevie. He stated that after he married Stevie's mother and sponsored her for citizenship, she asked him to arrange for Stevie to live with them. When Stevie arrived, she disregarded his authority, used profane language, and performed few household chores. She also dressed like a boy, and viewed pornography on her laptop.

According to appellant, he became concerned whether he should take responsibility for Stevie's conduct by sponsoring her for a green card. After Stevie returned from her visit to China, he told her that he would not "renew [her] visa." Regarding the

[4] The prosecution also called attorney Arnoldo Casillas as a witness. In testifying, Stevie stated that she was unaware that a civil lawsuit against appellant had been filed on her behalf. Casillas testified that Stevie had authorized him to file a civil lawsuit against appellant only after the criminal action against him was completed, and that he initiated the civil lawsuit without her knowledge.

conversation that Stevie recorded, appellant denied that he made any remarks referring to an event during which he touched her. At trial, appellant asserted that no such remarks were audible on the recording, and that the recording had been "doctored." Appellant also maintained that during the conversation, he intended only to encourage Stevie to learn about her sexuality.

Appellant further testified that after the conversation occurred, Stevie asked appellant to meet her at a shopping mall. There, Officer Janguard told appellant to "shut up and listen" to Stevie. Stevie then played her recording of the conversation for appellant, but the recording was inaudible. Later, appellant wrote a letter informing Stevie that he would assist her in obtaining a new visa only if she stopped her accusations against him. At trial, appellant maintained that Stevie's accusations were baseless, and that she had been engaged in "extortion."

Thomas Guzman-Sanchez, an expert in audio analysis, opined that Stevie's audio recording had been edited. According to Guzman-Sanchez, the four-minute recording disclosed a single edit at approximately the mid-point of the recording.

Yi Fan Shang, who attended high school with Stevie, testified that they shared secrets while they were classmates. During that time, Stevie told her that she was a lesbian. Stevie's only complaints against appellant were that he verbally abused her and touched her breasts. In addition, on one occasion,

Stevie asked her to pick her up from her house. They went to a park, where Stevie told her that appellant had tried to touch her. Not until 2011 did Stevie suggest that appellant had sexually assaulted her.

Gloria Kalatzis, a counselor at Stevie's high school, testified that Stevie told her only that appellant verbally abused her. She provided information regarding shelters to Stevie, who responded that she was not interested in living in a shelter.[5]

## DISCUSSION

Appellant contends the trial court erred in admitting the audio recording of his conversation with Stevie, denying his request for a continuance, and limiting his expert's testimony. For the reasons discussed below, we disagree.

### A. *Admission of Audio Recording*

Appellant contends the trial court contravened section 632 in admitting the audio recording of his conversation with Stevie. That statute is a provision of the Invasion of Privacy Act (§ 630 et seq.), enacted in 1967. (Stats. 1967, ch. 1509, p. 3584, § 1.) The Invasion of Privacy Act regulates wiretapping and

[5] In addition to these witnesses, Kenneth and Tracy Algire, appellant's children, testified that while Stevie lived with them, she wore boyish clothes, had girlfriends, and viewed lesbian pornography on her laptop.

electronic eavesdropping (*People v. Chavez* (1996) 44 Cal.App.4th 1144, 1148), 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.)

Generally, section 632 "prohibits eavesdropping or intentionally recording a confidential communication without the consent of all parties to the communication. [Citation.]"[6] (*Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 928; § 632, subd. (a).) Absent specified exceptions, the statute bars the admission of any such recorded confidential communications in judicial proceedings. (§§ 632, subd. (d), 633, 633.1, 633.5, 633.6, 633.8.) Pertinent here is the exception stated in section 633.5, which provides that nothing in section 632 "prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of . . . any felony involving violence against the person," or "renders any evidence so obtained inadmissible in a prosecution

[6] Subdivision (c) of section 632 provides: "The term 'confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

for . . . any felony involving violence against the person. . . . "

Appellant maintains that the trial court erred in admitting Stevie's audio recording under the exception described above. Regarding this contention, the record discloses that during the preliminary hearing, Stevie testified that she recorded her conversation with appellant solely to help her learn English, and not to support her claim that appellant had engaged in criminal conduct. Before trial, appellant objected to the admission of Stevie's audio recording on the basis of section 632. In response, the prosecutor argued that the recording fell within the exception stated in section 633.5, and alternatively, that Proposition 8 had abrogated the statutory rule requiring the exclusion of such evidence. The trial court concluded that the recording was admissible under section 633.5. Later, during the trial, Stevie again testified that she recorded the conversation to "help [her] learn English."

It is unnecessary for us to determine the propriety of the court's ruling under section 633.5, as the recording was admissible on the alternative ground offered by the prosecutor. On appeal, we will affirm the admission of the recording on any theory properly established by the record. (*People v. Mason* (1991) 52 Cal.3d 909, 944.) As explained below, Proposition 8 abrogated the exclusionary rule upon which appellant relies.

"[I]n 1982, the California voters passed Proposition 8. Proposition 8 enacted Article I, section 28 of the California Constitution, which provides in relevant part: "Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings. . . ." (Cal. Const., art. I, § 28, subd. (f), par. (2).) (*People v. Lazlo* (2012) 206 Cal.App.4th 1063, 1069.) The "Truth-in-Evidence" provision in subdivision (f), paragraph (2), of article I, section 28 of the California Constitution (section 28(f)(2)) "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.* (1985) 37 Cal.3d 873, 890 (*Lance W.*).) Section 28(f)(2) is applicable not only to judicially created rules of exclusion (*In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1247), but also to statutory evidentiary restrictions (*Lance W.*, *supra*, 37 Cal.3d at p. 893; *People v. Ratekin* (1989) 212 Cal.App.3d 1165, 1169 (*Ratekin*)).[7]

In *Ratekin*, the appellate court examined section 631, a provision of the Invasion of Privacy Act that closely resembles section 632. As originally enacted

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[7] When *Lance W.* and *Ratekin* were decided, the "Right to Truth-in-Evidence" provision enacted by Proposition 8 was found in subdivision (d) of article I, section 28 of the California Constitution.

and in its present form, section 631 bars wiretapping without the consent of all parties to the communication, and states that evidence obtained in contravention of that prohibition is inadmissible in a judicial proceeding. (*Ratekin*, *supra*, 212 Cal.App.3d at p. 1169; § 631, subds. (a), (c).) The appellate court concluded that section 28(d) abrogated the exclusionary rule in section 631, noting that following Proposition 8, the Legislature had not reinstated that rule by a two-thirds vote of the membership in each house of the Legislature. (*Ratekin*, *supra*, at p. 1169.)

We confront an issue not presented in *Ratekin*. As respondent observes, in 1985, the Legislature enacted the Cellular Radio Telephone Privacy Act of 1985 (1985 Act). (Stats 1985, ch. 909, p. 2900.) The focal element of that legislation is section 632.5, which prohibits the interception of cellular telephone communications, absent specified circumstances.[8]

[8] Section 632.5 provides: "(a) Every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cellular radio telephones or between any cellular radio telephone and a landline telephone shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), by imprisonment in the county jail not exceeding one year or in the state prison, or by both that fine and imprisonment. If the person has been previously convicted of a violation of this section or Section 631, 632, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail not exceeding one year or in the state prison, or by both that fine and imprisonment. [¶] (b) In the following instances, this section shall not apply: [¶] (1) To any public utility engaged in the

(Continued on following page)

(Stats 1985, ch. 909, pp. 2900-2904.) In enacting the statute, the Legislature also amended section 632 and related statutes to reflect the addition of section 632.5, without making substantial changes to the wording of the exclusionary rule set forth in subdivision (d) of section 632. At least two-thirds of the members of each house of the Legislature voted in favor of the 1985 Act.[9] The question thus presented is whether its enactment revived the exclusionary rule in subdivision (d) of section 632, abrogated by section 28(f)(2).

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business of providing communications services and facilities, or to the officers, employees, or agents thereof, where the acts otherwise prohibited are for the purpose of construction, maintenance, conduct, or operation of the services and facilities of the public utility. [¶] (2) To the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of the public utility. [¶] (3) To any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility. [¶] (c) As used in this section and Section 635, 'cellular radio telephone' means a wireless telephone authorized by the Federal Communications Commission to operate in the frequency bandwidth reserved for cellular radio telephones."

[9] The legislative basis of the 1985 Act was Senate Bill No. 1431. (Sen. Final History, (1985-1986 Reg. Sess.) p. 965.) Regarding that bill, the Assembly vote was 64 ayes and 7 noes, and the Senate vote was 27 ayes and 4 noes. (*Ibid.*) As the Assembly has 80 members and the Senate has 40 members (Cal. Const., art. IV. § 2, subd. (a)), the affirmative votes constituted at least two-thirds of each house's membership.

We find dispositive guidance on this issue from *Lance W.* There, the Supreme Court addressed subdivision (a) of section 1538.5, which – as originally enacted and in its present form – states, inter alia, that a criminal defendant may seek suppression of evidence obtained through a search or seizure in violation of "state constitutional standards." (*Lance W.*, *supra*, 37 Cal.3d at p. 893; § 1538.5, subd. (a)(1)(B)(v).) As the court noted, after section 28(d) abrogated that provision of section 1538.5, the Legislature amended section 1538.5 twice, once by a two-thirds majority in both houses of the Legislature. (*Lance W.*, *supra*, at pp. 893-896.) Because the California Constitution provides that "[a] section of a statute may not be amended unless the section is reenacted as amended" (Cal. Const., art. IV. § 9), and the amendments did not materially modify the pertinent provision of section 1538.5, the court examined whether the amendments revived that provision. (*Lance W.*, *supra*, 37 Cal.3d at pp. 893-896.)

The court determined that the amendments did not reinstate the abrogated provision, as there was no evidence of a legislative intent to do so. (*Lance W.*, *supra*, 37 Cal.3d at pp. 893-896.) As the court observed, neither the legislative history of the amendments nor the Legislature's declarations regarding them manifested any intent to nullify the operation of Proposition 8. (*Ibid*.) Indeed, when the Legislature amended section 1538.5 by a two-thirds majority in both houses, the amendment was an element of a group of amendments that the legislative history

described as a "noncontroversial 'clean up'"; moreover, those "'clean up'" amendments were unanimously adopted by the Legislature. (*Lance W.*, *supra*, at p. 894.) The court stated: "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." (*Ibid.*)

Based on our Supreme Court's analysis in *Lance W.*, we reach a similar conclusion regarding the abrogated exclusionary rule set forth in subdivision (d) of section 632. Accompanying the 1985 Act was a declaration of legislative intent that focused exclusively on the need to protect private cellular phone communication. (Stats. 1985, ch. 909, § 2, pp. 2900-2901.) The declaration states: "[T]his act is intended to provide recourse to those persons whose private cellular radio telephone communications have been maliciously invaded by persons not intended to receive such communications." (*Ibid.*) The narrow scope of the Legislature's intent is further confirmed by section 632.5 itself, the primary element of the 1985 Act. That provision discloses no intent to nullify the operation of Proposition 8, as it contains no provision akin to subdivision (d) of section 632 establishing an exclusionary rule. Appellant has directed us to no portion of the legislative history – and we have found none – evincing the Legislature's intent to annul the effects of section 28(f)(2). Because there is no suggestion that the Legislature's intent in enacting the 1985

Act was to revive the abrogated exclusionary rule contained in subdivision (d) of section 632, we conclude that legislation did not do so.[10] Accordingly, the audio recording of Stevie and appellant's conversation could be excluded only under the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amendment. (*Lance W., supra,* 37 Cal. 3d at p. 896.)

Thus, the remaining question is whether the United States Constitution required exclusion of the audio recording. (*Lance W.*, *supra*, 37 Cal.3d at p. 890.) As Stevie did not record the conversation while acting as a government officer or agent, the recording does not implicate appellant's interests under the Fourth Amendment of the United States Constitution. (*Jones v. Kmart Corp.* (1988) 17 Cal.4th 329, 333.) Furthermore, under federal statutory law, recordings of conversations between private individuals made with the consent of only one party to the conversation are ordinarily admissible in judicial

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[10] Appellant maintains that the exclusionary rule in section 632 remains effective notwithstanding section 28(f)(2). His reliance on *People v. Parra* (1985) 165 Cal.App.3d 874 (*Parra*), *People v. Montgomery* (1976) 61 Cal.App.3d 718, *People v. Strohl* (1976) 57 Cal.App.3d 347, and *People v. Ayers* (1975) 51 Cal.App.3d 370, disapproved on another ground in *People v. Collie* (1981) 30 Cal.3d 43, 52-53, is misplaced. Three of the four cases pre-date the passage of Proposition 8 in 1982. In *Parra*, the appellate court did not address any contention predicated on Proposition 8, and found the pertinent evidence admissible under section 633.5. (*Parra*, *supra*, 165 Cal.App.3d at pp. 878-881.)

proceedings. (*Zhou v. Pittsburg State University* (D. Kan. 2003) 252 F.Supp.2d 1194, 1203-1204; 18 U.S.C. § 2511(2)(d).) Accordingly, we conclude that the admission of the audio recording did not offend the United States Constitution. (See *Ratekin*, *supra*, 212 Cal.App.3d at p. 1169.) In sum, the audio recording was properly admitted.

B. *Remaining Contentions*

Appellant asserts two contentions arising from the prosecution's presentation of a transcript of the recorded conversation to the jury. He maintains that the trial court erred in denying a continuance to permit his expert to evaluate the transcript, and in limiting his expert's testimony regarding what was said during the recorded conversation.

1. *Underlying Proceedings*

In January 2012, Bob Bernstein first appeared in the underlying proceedings as appellant's counsel. Soon afterward, he obtained a copy of the recorded conversation, which he submitted to a court reporting service for transcription.

In March 2012, at the preliminary hearing, Stevie testified that she began recording her conversation with appellant when he used the word "orgasm." She further stated that during the conversation, he said that when he "touch[ed her] the last time," she was not "wet," which was unusual for girls

her age. In addition, according to Stevie, appellant suggested that he needed to teach her "what's going on."

On Tuesday, July 19, 2012, immediately before the selection of the jury, the prosecutor provided the trial court and Bernstein with a transcript of the recorded conversation, which reflected the remarks that Stevie had described during the preliminary hearing. In response, Bernstein filed a motion for a continuance of the trial.[11]

On July 18, 2012, the trial court conducted a hearing on the motion. Bernstein stated that he requested a continuance until Monday, July 23, 2012, to allow a forensic tape expert to analyze the recording and determine whether it had been modified or edited. He argued that before he saw the transcript of the recording, he did not know the prosecution intended to claim that the inculpatory remarks Stevie ascribed to appellant were audible on the recording. He maintained that when he had the recording transcribed, the court reporting service identified the pertinent portions of the recording as inaudible. In response, the prosecutor asserted that the request for a continuance was untimely, arguing that Bernstein had adequate notice of the prosecution's view regarding the contents of the recording.

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[11] The motion for a continuance is not included in the record on appeal.

In denying the request, the trial court stated: "It is the tape and not the transcript that governs[.] . . . The exchange of the transcript is inconsequential. . . . I will be giving an instruction . . . before the tape is played that[ ] if [the jurors] see a discrepancy between what they hear and what they read[,] . . . what they read does not govern. It's what they hear that governs[.] [T]hat's the evidence."

On July 18, 2012, following the selection of the jury, the prosecution began its case-in-chief. When the audio recording was played for the jury during Stevie's testimony, the court instructed the jury in accordance with its ruling.[12]

On Friday, July 20, 2012, appellant began his defense by presenting testimony from several percipient witnesses, including himself. During the afternoon session, the trial court conducted a hearing on the proposed testimony from Thomas Guzman-Sanchez, appellant's expert in audio analysis. Bernstein stated that in order to rebut the prosecution's

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[12] The court informed the jury: "The transcript is not the evidence. The transcript is only to be used as an aid to let you follow along with what you hear. If you hear a discrepancy between what is in the tape and what you read in the transcript, it is what is in the tape that governs, that is the evidence. At the conclusion of the playing of the [tape], we will take the transcripts away from you. You will not, repeat, will not have the transcript in the jury room during deliberations." Although the court later admitted the transcript into evidence, it did not permit the jury to examine the transcript during the jury's deliberations.

transcript, appellant hired Guzman-Sanchez to examine the recording for edits, and provide an alternative interpretation of what was said during the conversation. In reply, the prosecutor maintained that Guzman-Sanchez's evidence should be excluded because she first received Guzman-Sanchez's report that morning. Additionally, she argued that if the court allowed Guzman-Sanchez to testify, he should not be permitted to opine as an expert regarding what was said during the conversation.

The trial court permitted Guzman-Sanchez to testify, subject to several limitations. The court ruled that Guzman-Sanchez could play an enhanced version of the recording he had prepared and opine whether he heard the disputed remarks reflected in the prosecutor's transcript. However, the court excluded a transcript that Guzman-Sanchez had prepared, and barred him from offering an opinion regarding what appellant had said, in lieu of the remarks reflected in the prosecutor's transcript. Regarding this ruling, the court stated: "[T]he expert cannot tell me what the words are. . . . The tape is the tape. That is evidence."

In addition, the trial court permitted Guzman-Sanchez to testify whether he detected edits in the recording, but prohibited him from demonstrating how the edits may have been made. The court also ruled that Guzman-Sanchez's testimony was potentially subject to a "late discovery" instruction.

No proceedings occurred on Monday, July 23, 2012. The following day, appellant called Guzman-Sanchez, who testified that he was a video forensics investigator who also performed audio analysis. He stated that he had subjected the audio recording provided by the prosecutor to sound wave analysis. According to Guzman-Sanchez, that analysis disclosed irregularities in sound patterns characteristic of an edit. The defense did not play the enhanced recording Guzman-Sanchez had prepared, and he was not asked whether he heard in the recording the disputed remarks reflected in the prosecution's transcript.

2. *Request for Continuance*

Appellant contends the trial court erred in denying his request for a continuance to permit an analysis of the audio recording. We disagree. Generally, a continuance may be granted only on a showing of good cause. (§ 1050, subd. (e).) To obtain a continuance, defendants must show "they exercised due diligence and all reasonable efforts to prepare for trial. . . ." (*People v. Grant* (1988) 45 Cal.3d 829, 844.) A court has broad discretion to deny a motion for a continuance. (*Ibid*.)

We find no abuse of discretion here. Although appellant's counsel received the transcript shortly before trial, he had long been aware that the prosecution planned to rely on the disputed remarks reflected in the transcript, as Stevie testified regarding their

existence during the preliminary hearing. Furthermore, because the prosecution disclosed the audio recording well before trial, appellant's counsel had ample opportunity to submit the recording to expert analysis to determine the extent to which it supported Stevie's testimony. The trial court thus did not err in denying the continuance. (See *People v. Danielson* (1992) 3 Cal.4th 691, 705, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1068, fn. 13 [court properly denied defendant's request for three-day continuance during jury selection to permit expert to evaluate jurors' questionnaires when defense counsel failed to deliver them to expert in timely manner].)

Additionally, even if appellant had established an abuse of discretion, the record discloses no prejudice to appellant from the denial of the continuance. (*People v. Jackson* (2009) 45 Cal.4th 662, 678 [denial of continuance does not support reversal of the judgment absent a showing of prejudice].) Here, appellant sought a continuance of "at least three days" to Monday, July 23, 2012, to permit an expert to examine the audio recording for edits, enhance it, and develop an opinion regarding what was said during the conversation. Notwithstanding the denial of the continuance, Guzman-Sanchez performed those tasks by Friday, July 20, 2012, well before he testified on Tuesday, July 24, 2012.

Nor did the denial of the continuance operate to curtail Guzman-Sanchez's testimony regarding the matters for which appellant sought a continuance.

The trial court permitted Guzman-Sanchez to testify regarding possible tampering with the recording. The court also made clear that it would permit the enhanced recording Guzman-Sanchez prepared to be played, but the defense declined to do so. Furthermore, although the court excluded Guzman-Sanchez's proposed transcript and barred him from opining regarding what was said during the conversation, for reasons explained below, those rulings were proper (see pt. B.3., *post*).[13] In sum, the trial court did not err in denying the requested continuance.

3. *Limitation on Expert Testimony*

Appellant maintains the trial court erred in precluding Guzman-Sanchez from presenting his interpretation of the audio recording. The crux of appellant's argument is that the court unfairly permitted the prosecution to present its belatedly disclosed transcript to the jury, while barring him from offering Guzman-Sanchez's opinion regarding what was said during the recorded conversation. For the reasons discussed below, we reject appellant's contention.

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[13] We recognize that the court also barred Guzman-Sanchez from demonstrating to the jury how the tampering might have been performed. However, as appellant does not challenge that ruling on appeal, he has forfeited any contention of error regarding it.

At the outset, we observe that our inquiry has a limited scope, as appellant forfeited material aspects of his contention. Generally, a trial court may employ at least two procedures regarding a transcript of an audio recording, depending upon the purpose of the transcript. If the transcript is submitted as evidence to the jury, the court ordinarily should inquire into the accuracy of the transcript by examining the circumstances of its preparation, listening to the audio recording, and permitting the parties to challenge the transcript. (*People v. Polk* (1996) 47 Cal.App.4th 944, 953-956.) Alternatively, if the transcript is provided only as a guide for the jury, the court may instruct the jury regarding the transcript's limited purpose, including that the transcript is not to be viewed as evidence. (*People v. Brown* (1990) 225 Cal.App.3d 585, 597-599.)

Although appellant maintains on appeal that the prosecution's transcript was untimely, that it was "inflammatory," and that its accuracy was "impossible to verify," he neither challenged the procedure adopted by the trial court nor contested the presentation of the transcript on the ground that it was belatedly disclosed to him. Rather, the remedy he sought was a continuance in order to have an expert examine and enhance the audio recording. Accordingly, he has forfeited any contention regarding the presentation of the prosecution's transcript to the jury. (*People v. Houston* (2012) 54 Cal.4th 1186, 1213-1214.)

The sole issue properly before us is whether the trial court improperly barred Guzman-Sanchez from

opining as to what was said during the conversation. We conclude that the court's ruling was proper on the ground advocated by the prosecutor and apparently credited by the court, namely, that Guzman-Sanchez's interpretation of what was said during the conversation was not a proper subject of his expert testimony.

In contrast with the prosecution's transcript, which was not submitted as evidence to the jury, appellant sought to admit Guzman-Sanchez's interpretation of the recorded conversation into evidence. That interpretation – whether offered in the form of a transcript or in the form of opinion testimony – was founded exclusively on Guzman-Sanchez's purported expertise, as he was not a percipient witness to the underlying conversation. Generally, "'[o]pinion testimony may be admitted in circumstances where it will assist the jury to understand the evidence or a concept beyond common experience. Thus, expert opinion is admissible if it is "[r]elated to a subject that is sufficiently beyond common experience [and] would assist the trier of fact." (Evid. Code, § 801, subd. (a).)'" (*People v. Singleton* (2010) 182 Cal.App.4th 1, 20.) "Whether an expert should be permitted to opine on a particular subject is consigned to the trial court's discretion." (*People v. Sandoval* (2008) 164 Cal.App.4th 994, 1001.)

"'Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness.' [Citation.]" (*People v. Torres* (1995) 33 Cal.App.4th 37, 45, quoting Evid. Code § 801, subd.

(a).) Similarly, as explained in *People v. King* (1968) 266 Cal.App.2d 437, 445, an expert opinion is not admissible if it concerns a subject outside the expert's field of expertise. There, the trial court permitted an expert who specialized in the analysis of recorded speech to opine regarding the identity of a speaker in a recorded conversation. (*Id*. at pp. 441-457.) In reversing the judgment, the appellate court concluded that there was no showing that the expert's qualifications as an audio analyst established his expertise in recognizing speakers. (*Id*. at p. 457.)

We confront a situation similar to that presented in *King*, as there is no evidence that Guzman-Sanchez had any expertise superior to the abilities of the jury regarding the recognition of words on audio recordings. Guzman-Sanchez's only demonstrated expertise concerned the enhancement of audio recordings to make conversations on them more audible, and the analysis of sound patterns on recordings, for purposes of locating edits and other anomalies.

According to Guzman-Sanchez, as a video forensics investigator, his "background, training, [and] experience" lay in "[v]ideo production," in the "entertainment industry," that is, "creating . . . any type of visual presentation in the digital or analogue format." In the entertainment industry, he worked as an editor. After becoming a video forensics investigator, he had performed work in criminal actions involving "[v]ideo enhancing, stabilization, [and] time/date verification." However, Guzman-Sanchez did not suggest that he had any special experience or training

in the recognition of words spoken in a problematic audio recording, or that he had ever prepared a transcript from such a recording. Accordingly, the trial court did not abuse its discretion in ruling that as an expert, Guzman-Sanchez was not qualified to "tell [anyone] what the words are." In sum, the trial court did not err in precluding Guzman-Sanchez from testifying regarding his interpretation of the audio recording.

## DISPOSITION

The judgment is affirmed.

**CERTIFIED FOR PARTIAL PUBLICATION.**

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

Court of Appeal, Second Appellate District,
Division Four – No. B244557

**S216109**

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

(Filed Mar. 19, 2014)

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THE PEOPLE, Plaintiff and Respondent,

v.

JOSE ARMANDO ALGIRE, Defendant and Appellant.

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The petition for review is denied.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed December 17, 2013, which appears at 222 Cal.App.4th 219. (Cal. Const., art. VI, section 14; rule 8.1125(c)(1), Cal. Rules of Court.)

/s/ CANTIL-SAKAUYE
*Chief Justice*

**Article 1, Section 9, Clause 3 of the United States Constitution:**

No Bill of Attainder or ex post facto Law shall be passed.

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**The Fifth Amendment to the United States Constitution:**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." FIFTH AMEND. U.S. CONST.

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**The Fourteenth Amendment to the United States Constitution:**

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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**Article 1, section 1 of the CA Constitution:**

SECTION 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

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**California Penal Code § 632:**

(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

(b) The term "person" includes an individual, business association, partnership, corporation, limited liability company, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication.

(c) The term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

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

(e) This section does not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited by this section are for the purpose of construction, maintenance, conduct or operation of

the services and facilities of the public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(f) This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

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**California Penal Code § 633.5:**

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

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