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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. DAVID ROBERT DALEIDEN; SANDRA SUSAN MERRITT, Defendants.	CASE NOS.: 2502505/17006621 **DEFENDANT SANDRA SUSAN MERRITT'S WRITTEN CLOSING ARGUMENT FOR PRELIMINARY HEARING** Date: October 22, 2019 Time: 2:30 p.m. Dept.: 23 Judge: The Honorable Christopher Hite

Pursuant to the Court's request at the close of the Preliminary Hearing, Defendant Sandra Susan Merritt ("Merritt") hereby submits her written closing argument, and also joins in the closing argument of her co-defendant, David Daleiden ("Daleiden") submitted on this same date. For each and all of the reasons that follow, the Court should dismiss with prejudice each of the remaining 14 counts against Merritt.[1]

[1] The Court dismissed Count 8 at the close of the Attorney General's case, for failure to present any evidence as to Doe 8. (Transcript of Preliminary Hearing (hereinafter "Tr.") 870:23-24). Accordingly, this Closing Argument will not address Count 8.

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INTRODUCTION

The evidence adduced at the Preliminary Hearing demonstrated what Merritt has been maintaining all along: there are no facts to support this first-of-its-kind prosecution against her. The Attorney General's prosecution founders on numerous fronts. Its so-called "investigation" has now been shown to be grossly insufficient. None of the 14 remaining claims can survive, and it would be a miscarriage of justice to force Merritt to undergo the degradation and expense of a jury trial on this flimsy a record. For all of the reasons that follow, each of the remaining Counts in the Amended Complaint must be dismissed, and Defendant Merritt must be discharged.

ARGUMENT

I. THE PRELIMINARY HEARING STANDARD OF REVIEW.

The preliminary hearing "was designed to protect the accused from groundless or unsupported charges." *Jones v. Superior Court*, 4 Cal. 3d 660, 667 (1971).

> 'The preliminary examination is not merely a pretrial hearing.' The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial. **Many an unjustifiable prosecution is stopped at that point where the lack of probable cause is clearly disclosed**.

Id. at 667–68 (emphasis added) (quoting *People v. Elliott*, 54 Cal. 2d 498, 504 (1960), and citing *Mitchell v. Superior Court*, 50 Cal. 2d 827, 829 (1958)).

"[T]he complete failure to present evidence on an element **requires** dismissal of the allegation." *Thompson v. Superior Court*, 91 Cal. App. 4th 144, 149 (2001) (emphasis added).

> If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate **shall** order the complaint dismissed and the defendant to be discharged….

Cal. Penal Code § 871 (emphasis added).

> The purpose of a preliminary hearing is to determine whether a defendant charged with a felony by criminal complaint should be held for trial. (*See Correa v. Superior Court* (2002) 27 Cal. 4th 444, 452). The defendant will be bound over to superior court and held to answer if 'it appears from the examination that a public offense has been committed and there is **sufficient cause** to believe that the defendant is guilty.' (§ 872). Conversely, the magistrate **must** order the complaint dismissed when 'it appears either that no public offense has been committed or that there is

> not **sufficient cause** to believe the defendant guilty of a public offense.' (§ 871). 'The term 'sufficient cause' is generally equivalent to 'reasonable and probable cause,' that is, such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain **a strong suspicion** of the guilt of the accused.' (*People v. Uhlemann* (1973) 9 Cal. 3d 662, 667).

People v. Esmaili, 213 Cal. App. 4th 1449, 1459–60 (Ct. App. 2013) (emphasis added).

> At the preliminary hearing, the burden is on the prosecution to show there is probable cause to believe the defendant committed the charged offense. (*Cummiskey v. Superior Court* (1992) 3 Cal. 4th 1018, 1041).

Id. at 1460.

> In determining whether probable cause exists at the preliminary hearing, the magistrate may "weigh the evidence, resolve conflicts, and give **or withhold credence to particular witnesses**." (*Uhlemann*, *supra*, 9 Cal. 3d at 667).

Id. (emphasis added).

For the reasons that follow, the Attorney General has failed to raise a strong suspicion that Merritt is guilty of any of the remaining counts in its Amended Complaint. They must, therefore, be dismissed.

II. THE ATTORNEY GENERAL HAS FAILED TO RAISE A STRONG SUSPICION THAT MERRITT VIOLATED, OR CONSPIRED TO VIOLATE, PENAL CODE SECTION 632.

A. General Legal Principles.

1. The Elements of Section 632: Communications That Are Not Desired To Be Confined To The Parties Thereto, Or That May Reasonably Be Expected To Be Overheard By Non-Participants, Are Not "Confidential" And May Lawfully Be Recorded Without Consent.

Penal Code Section 632(a), provides, in relevant part:

> A person who, **intentionally** and without the consent of all parties to a **confidential communication**, uses an electronic amplifying or recording device to eavesdrop upon or **record** the **confidential communication**, 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) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

Id. (emphasis added).

Notwithstanding the Attorney General's breathtaking declaration that "[t]here is no definition of 'confidential' in the statute" he is seeking to enforce in this prosecution (Tr. 850:24-27), there is, in fact, a very clear statutory definition of what is, and is not, a "confidential communication" for purposes of Section 632:

> For the purposes of this section, "confidential communication" means 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 other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard** or recorded.

Cal. Penal Code § 632(c) (emphasis added).

As this Court has previously recognized in its February 14, 2019 Order on Preliminary Hearing Rulings, "[t]he California Supreme Court explained that 'a conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation **is not being overheard** or recorded." (*Id*. at 5 (quoting *Flanagan v Flanagan*, 27 Cal. 4th 766, 776-77 (2002)). *See also*, *Safari Club Int'l v. Rudolph*, 862 F.3d 1113 (9th Cir. 2017) (same).

Moreover, the definition of "**may**" in Section 632(c) is "expressing possibility," such that the Attorney General must negate even the **possibility** that the parties "reasonably expect[ed] that the communication may be overheard or recorded." *See*, "may," Oxford Dictionary (https://www.lexico.com/en/definition/may). The word "may" is applied both to the **possibility** of a reasonable expectation and to the **possibility** of being overheard or recorded. (§ 632(c)). The burden on the Attorney General is thus to establish that the parties to the conversations **couldn't** "reasonably expect that the communications may be overheard or recorded." *See, e.g.*, antonym of "may," Power Thesaurus (https://www.powerthesaurus.org/may/antonyms).

2. Constitutional Due Process Prohibits This Court From Adopting Brand New Exceptions To The "Overheard" Exception, And Applying Them Retroactively To Merritt.

a. No Court Has Ever Adopted The Interpretations Of Section 632 Advanced By The Attorney General In This Case, And Certainly Not In A Criminal Case.

This is the first criminal prosecution of undercover investigators under Penal Code Section 632 in the history of California. No other court has applied Section 632 in a **criminal** case in any circumstances even remotely similar to this case. The success of the Attorney General's prosecution depends wholly and entirely on this Court's willingness to interpret and apply Section 632 for the first time in ways it has never been applied before in a criminal prosecution. This, the Court cannot do, for at least the three separate reasons discussed in the next section.

As shown at the Preliminary Hearing, and as will be recapped below, the evidence is undisputed and uncontroverted that each of the 13 remaining Does was recorded in circumstances where the conversations could reasonably be expected to be overheard by non-participants, and were, in fact, easily overheard. Every recording involved non-participant bystanders or passersby whom the recorded Does did not know and did not vet, such as waiters, restaurant staff, hotel staff, elevator passengers and other total and complete strangers.

In addition to hotel staff, an elevator passenger, lobby loiterers and other complete strangers, the recorded conversations of the 7 remaining Does recorded at the National Abortion Federation ("NAF") Conference in April 2014 (Does 1-7) could **also** be expected to be overheard by numerous other conference attendees and exhibitors, whom the Does did not personally know and did not personally vet. The Attorney General is asking this Court to be **the first** court to fashion an exception to the "overheard" exception to "confidential communications" under Section 632, and to apply it retroactively to Merritt and Daleiden. Specifically, the Attorney General is asking the Court to hold that conversations that can be overheard by **complete strangers** with supposedly shared professional interests at a professional conference are still "confidential" within the meaning of Section 632(c), notwithstanding that Section's clear definition of "confidential

communications" to exclude communications that may be reasonably expected to be overheard by non-participants.

The Attorney General may also ask this Court to expand Section 632 in other ways that no court has ever expanded before. For instance, the Attorney General will likely ask the Court to hold that if only "snippets" or "non-substantive" portions of conversations could be overheard by others, the conversations would still be "confidential" within the meaning of Section 632(c), notwithstanding the total lack of such limiting factors in that Section.

To be clear, no other court has ever interpreted or applied Section 632 in this fashion in a **criminal** case. The California Supreme Court cases related to Section 632's application, *Flanagan v. Flanagan* (*Flanagan*), 27 Cal. 4th 766, and *Sanders v. Am. Broad. Cos.* (*Sanders*), 20 Cal. 4th 907 (1999), are **civil** cases deciding varying issues under varying standards, making these cases wholly distinguishable.[2] In neither case does the Court even hint that principles applied in a civil case can be mechanically superimposed in a criminal case. They cannot. *Sanders* not only stands for the proposition that there is no *per se* application of privacy, but rather it **only** construes privacy in a **different tort** with **different elements** after a jury decided there was **no violation of Section 632**. *Id*. at 910-11. Neither do the courts in *Lieberman v. KCOP Television, Inc*., 110 Cal. App. 4th 156 (Ct. App. 2003), nor in *Safari Club Int'l v. Rudolph*, 862 F.3d 1113, purport to construe a **criminal** application of Section 632.

Lieberman, another **civil** case, dealt with review of an anti-SLAPP motion, a proceeding in which a party need merely "present a prima facie case" and—unlike this Court in this

[2] Moreover, any factual distinction that may be found, *e.g*., due to the nature of the relationship of co-workers in *Sanders* is flatly not comparable to the facts developed at the preliminary hearing. The Attorney General produced no evidence that any attendee of the NAF conference purported to have intimate co-worker knowledge (or even shared background information collected by NAF) of any other attendee. Indeed, the testimony was uniform from the testifying Does that they did not know the identity of bystanders and passersby at the NAF conference (*e.g.*, Doe 7 (Tr. 122:9-17; 124:13-125:2; 126:26-127:7; 129:22-130:2; 130:26-131:2), and they did not know of any specific vetting or background check that NAF may or may not have done on other exhibitors. (*E.g.*, Doe 3 (201:19-202:5)). Agent Cardwell similarly failed to ask any of Does 1, 2, 4, 5 or 6 whether they even knew the people around them, or any supposed vetting procedures of NAF. (Tr. 819:22-25; 832:15-18; 834:17-19). Nothing in *Sanders* suggests that confidentiality may be retained with admitted overhearers of this kind.

proceeding—the court "do[es] not resolve issues of credibility" which it leaves "for the jury to decide." *Id*. at 169. The conversation in *Lieberman* was held **in a closed doctor's exam room**, and the defendant argued that a silent companion of the patient in that small exam room was somehow not a participant to the conversation, for the purposes of being overheard under Section 632. When the *Lieberman* Court opines that, "[t]he presence of others does not necessarily make an expectation of privacy objectively unreasonable," 110 Cal. App. 4th at 169, the Court is clearly opining on whether known silent participants are "parties" to a conversation, for the purpose of overhearing. The *Lieberman* Court never insinuated that it was changing the plain meaning of "may be overheard" to bring strangers into conversations to which they are clearly not parties. In fact, *Lieberman* reinforces that "words must be given their ordinary and commonly understood meaning." *Id*. at 168. That means, when at a dinner conversation, sitting at a table in a restaurant, the "parties" are one's dining companions. Unless one is placing an order or asking for more wine, the waitstaff are not parties to your conversation. In a conference exhibit hall, the "parties" to a conversation at one's exhibit booth are clear—and they don't include other attendees passing by or neighboring exhibitors or hotel staff tending to the coffee station. *Lieberman* thus supports Defendants' arguments, since the Does and the Attorney General have conceded that none of these conversations occurred in private rooms. The Attorney General has the burden of proof to negate that these conversations may be overheard, but he has not only failed to meet this burden but conceded that total strangers, whether walking by or standing away from the parties, may have overheard the conversations in question. This Court should reject the Attorney General's argument that, because of the NAF contracts, NAF's 860-person trade show is a unitary "confidential communication" under Section 632, where all 860 people must be considered parties to that communication. No other court has ever come close to such a breathtaking proposition, let alone in a criminal case. The Attorney General's reliance on contract law to circumvent the clear "overhearing" requirement of Section 632(c) is unsupported by case law and a plain reading of Section 632.

Similarly, *Safari Club*, another **civil** case, is not binding on this Court but also arises in the anti-SLAPP context, where a low "prima facie" bar applies, with no weighing of evidence as happens at a Preliminary Hearing. In *Safari Club*, the Ninth Circuit likened the applicable standard to a directed verdict, where "no reasonable jury could find for the plaintiff." *Id*. at 1123. Again, the Attorney General has not even attempted to present evidence meeting his burden to negate that the conversations may be overheard—his concession on this point should be determinative. In sharp contrast, the plaintiff in *Safari Club* expressly averred, with factual support, that "the conversation 'was not capable of being heard.'" *Id*. The Attorney General has not at all credibly sought to establish the same here.

A key point to remember, in light of all of the **civil** cases upon which the Attorney General seeks to establish **criminal** liability in this case is that, as discussed *infra* at Section II.B., criminal law in this case requires analysis as a **specific intent** crime. As such, this novel criminal prosecution against citizen journalists must heed constitutional protections not applicable to suits brought by private parties. *See Bouie v. City of Columbia*, 378 U.S. 347, 358 (1964); *Kight v. CashCall, Inc.*, 200 Cal. App. 4th 1377, 1388 (Ct. App. 2011) (both discussed *infra* at Section II.A.2.b, and Section V). The two fundamentally distinct contexts are not interchangeable; Section 632's civil application here would work "an unforeseeable judicial enlargement of a criminal statute, [which] applied retroactively, [would] operate[] precisely like an *ex post facto* law, such as Art. I, s 10, of the Constitution forbids." *Bouie v. City of Columbia*, 378 U.S. at 353.

Moreover, none of the above cases purport to add new hair-splitting terms to Section 632's statutory definition of a "confidential communication" to define the length which must be overheard (*e.g.*, a "snippet" versus a longer portion), or the type of content which must be overheard (*e.g.*, "substantive" versus "non-substantive") before a communication ceases to be "confidential" under Section 632(c). These are brand new concepts that the Attorney General is advocating to be adopted here for the first time, and applied retroactively against Merritt and Daleiden. The judiciary is not permitted to read new terms into Section 632. "When the words of the statute are clear, the court should not add or alter them to accomplish a purpose that does not

appear on the face of the statute or from its legislative history." *Estate of Kramme*, 20 Cal. 3d 567, 572 (1978).

b. The Brand-New Interpretations And Enlargements Of Section 632 Advanced By The Attorney General Are Unnecessary, Precluded By The Clear Statutory Language, And Cannot Be Retroactively Applied Without Violating Merritt's Due Process Guarantees.

As noted, there are at least **three reasons** why this Court cannot be the first to craft the brand-new interpretations and enlargements of Section 632 and apply them retroactively to Merritt (and Daleiden).

First, the new interpretation advanced by the Attorney General is unnecessary. Even if the Court were to adopt it, the Attorney General's claims as to Does 1-7 would **still** fail, because those Does were also overheard by hotel staff, elevator passengers, and other complete strangers who had not been vetted by anyone and who owed no confidentiality obligations to anyone. (*See* discussion of individual Does in Section II.E., *infra*).

Second, this Court should decline the Attorney General's invitation for a brand new interpretation of Section 632, because its definition of what is and is not a "confidential communication" is already very clear and unambiguous: "'confidential communication' … **excludes a communication made** … **in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard**...." Cal. Penal Code § 632(c) (emphasis added). There is nothing ambiguous about this. Conversations that may reasonably be expected to be overheard by non-participants are excluded and cannot be the subject of **criminal** liability. (*Id.*) Where as here, a statute is clear and unambiguous, the Court must apply it as written, and not interpret it otherwise. *See e.g., People v. Woodhead,* 43 Cal. 3d 1002, 1007–08 (1987) ("When the language is clear and unambiguous, there is no need for construction."); *Kight v. CashCall, Inc.*, 200 Cal. App. 4th at 1387–88 (same) ("We read the words of the statute according to their usual, ordinary, and common sense meaning"). And, even if Section 632 (c) were ambiguous, which it is not, "it is an established rule of construction **that ambiguities in penal statutes are to be construed most favorably to the accused**." *Woodhead*,

43 Cal. 3d at 1011 (emphasis added) (citing *Keeler v. Superior Court*, 2 Cal. 3d 619, 631 (1970)). Therefore, this Court has no authority to adopt the new interpretation advanced by the Attorney General. *Id*.

Third, even if this Court could interpret Section 632 in the manner favorable to and advanced by the Attorney General, the Court could not apply that interpretation retroactively to Merritt (and Daleiden), because that would violate her (and his) constitutional due process.

> Courts violate constitutional due process guarantees when they impose **unexpected criminal penalties** by **construing existing laws** in a manner that the accused **could not have foreseen** at the time of the alleged criminal conduct.

People v. Whitmer, 59 Cal. 4th 733, 742 (2014) (emphasis added) (citation omitted). The *Whitmer* Court noted its ultimate decision in that case was "an **unforeseeable judicial enlargement** of the crime of voluntary manslaughter, and thus [could] not be applied retroactively to the defendant." *Id*. at 742 (quoting *People v. Blakely*, 23 Cal. 4th 82, 92 (2000)).

Similarly, in *Bouie v. City of Columbia*, 378 U.S. 347, the South Carolina Supreme Court improperly applied an interpretation of a trespass statute that, at the time of the incident in question, only prohibited trespass after notice was given not to **enter**. *Id*. at 349 n.1, 355. Two African-American college students entered Eckerd's Drug Store, which had a restaurant, but had no sign prohibiting entry. *Id*. at 348. After the students sat in a booth (but were not served), the store chained off the area with a no trespassing sign. *Id*. The store and the police asked them to leave but the students refused, engaging in a sit-in protest. *Id*. The South Carolina Supreme Court applied in this case a construction of that statute to prohibit **remaining** (as opposed to **entering**) after being notified. *Id*. at 350 & n.2. The United States Supreme Court not only held that the unreasonable expansion of the statute violated the Fourteenth Amendment's Due Process Clause, but also that, even if **civil** trespass laws could have been applied, the **judicial expansion in the criminal context was unconstitutional, and violated *ex post facto* principles as much as a retroactive statute**:

> 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of **ordinary intelligence fair notice** that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'

> Thus we have struck down a state criminal statute under the Due Process Clause where it was **not 'sufficiently explicit to inform** those who are subject to it what conduct on their part will render them liable to its penalties.'

Bouie, 378 U.S. at 351 (emphasis added) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926)).

> There can be no doubt that a **deprivation of the right of fair warning** can result not only from vague statutory language but also from **an unforeseeable and retroactive judicial expansion of narrow and precise statutory language**. As the Court recognized in *Pierce v. United States*, 314 U.S. 306 [1941], 'judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.'

Bouie, 378 U.S. at 352 (emphasis added).

> Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, **operates precisely like an ex post facto law**, such as Art. I, s 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.'

Id. at 353 (emphasis added) (quoting *Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648 (1798)).

Under *Whitmer* and *Bouie*, the brand-new interpretation of Section 632 advanced by the Attorney General, to **criminally** forbid recording of even communications that may reasonably be expected to be overheard by others, cannot be retroactively applied to Merritt even if this Court were inclined to adopt it going forward, which it should not do given the statute's clear language to the contrary.

B. All Counts Fail Because The Attorney General Has Failed To Adduce Any Evidence On Specific Intent, And Has Failed To Rebut Merritt's Undisputed Evidence That She Did Not Specifically Intend To Record Confidential Communications Without Consent.

Notwithstanding its more relaxed application in civil contexts, the California Supreme Court has long held that **criminal** enforcement of Penal Code Section 632 requires **specific intent**, not just to record, **but to specifically record a "confidential communication"** as defined by the statute:

> Defendant contends that the word 'intentionally' as used in subdivision (a) [of former Section 653j, now Section 632] (see fn. 7, ante) goes only to the act of putting the recording equipment in operation. In other words, he argues, a mere intention to start the equipment without more satisfies the requirement of intent and makes the person involved in the act **criminally** liable. This reading of the statute seems to us to slight if not ignore the prevailing trend away from the imposition of criminal sanctions in the absence of culpability where the governing statute, by implication or otherwise, expresses no legislative intent or policy to be served by imposing strict liability…. Eavesdropping is not one of that class of crimes that affects public health, welfare or safety for which strict liability is most often imposed without any ingredient of intent…, and **there is no other indication that the Legislature intended to impose criminal sanctions in the absence of criminal intent**.
>
> ***
>
> In the light of these principles **we think the word 'intentionally' must be read in relation to the entire substance of the statute**. Thus examined, there is no basis for the fragmentation of the statute attempted by defendant. Fairly read, **the statute does not isolate the actor's intent from the object to which it is directed, namely the confidential communication**; **the two are inextricably bound together**. Thus the statute imposes criminal liability on a person 'who intentionally and without the consent of a party to a confidential communication ... eavesdrops upon or records a confidential communication. ...' (Former § 653j, subd. (a).) In short, **it is not the purpose of the statute to punish a person who intends to make a recording but only a person who intends to make a recording of a confidential communication**.... **We conclude that a necessary element of the offense proscribed by former section 653j is an intent to record a confidential communication**.
>
> * * *
>
> For purposes of former section 653j, the recording of a confidential conversation is intentional if the person using the recording equipment **does so with the purpose or desire of recording a confidential conversation, or with the knowledge to a substantial certainty that his use of the equipment will result in the recordation of a confidential conversation**.

People v. Superior Court of Los Angeles County, 70 Cal. 2d 123, 132–34 (1969) (quotations and citations omitted) (emphasis added).

The specific intent required in *People v. Superior Court of Los Angeles County*, is particularly appropriate where Defendants here have raised a defense under Section 633.5. The Attorney General must prove that Defendants had the **specific intent** to record "confidential communications" in violation of Section 632 as outlined above by the California Supreme Court, regardless how Section 632 may be analyzed in **civil** cases. As mentioned previously, the civil application of a statute may not be mechanically superimposed here, in a criminal prosecution. *See, e.g., Bouie v. City of Columbia*, 378 U.S. at 358 (judicial expansion of civil trespass laws in criminal context was unconstitutional); *Kight v. CashCall, Inc*., 200 Cal. App. 4th at 1388 (where

sole issue before court was **civil** liability under Section 632, court expressly "made no attempt to determine whether [its] interpretation [would] extend[] to a **criminal** matter").

Ten months after deciding *People v. Superior Court of Los Angeles County*, the California Supreme Court provided a general definition of both general and specific intent crimes:

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. **When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.**

People v. Hood, 1 Cal. 3d 444, 456–57 (1969) (emphasis added). And almost ten years later, in *Estate of Kramme*, 20 Cal. 3d at 572 n.5, the California Supreme Court again reaffirmed its stance that a **criminal** application of Section 632 requires specific intent analysis, where it found the intent requirement of former Section 653j(a) (now Section 632(a)) analogous to the intent requirement of Probate Code Section 258, an intestacy statute, which "specifies that a particular **result**, rather than a particular act, must have been intended." *Id*. at 572 (emphasis added).[3]

Here, to show a violation, not only does Section 632 require the person charged to have "intentionally" "recorded" a communication without the consent of all parties, but the statue requires a further act—to record a "confidential communication," which has a specific statutory definition. Moreover, Section 633.5 allows a defendant charged under Section 632 to raise a state-of-mind defense, by demonstrating **another purpose** or state of mind. Thus, the **whole statutory scheme** all the more falls within the *Hood* Court's definition of a specific intent crime. Where Defendants are raising a defense under Section 633.5, reading Sections 632 and 633.5 together, to avoid illegality, the statutes require that the charged defendant have had an "**intent to do some further act or achieve some additional consequence**." *Hood*, 1 Cal. 3d at 457 (emphasis added). That further act or consequence is the lawful "recording the communication **for the purpose of**

[3] As noted by the Court in *Estate of Kramme*, "intentionally" in former Section 653j(a) "**require[s] an intent to record a confidential communication, rather than simply an intent to turn on a recording apparatus which happened to record a confidential communication**." *Id*. at 572 n.5 (emphasis added).

obtaining evidence reasonably believed to relate to … any felony involving violence against the person." § 633.5. As such, the Attorney General must prove specific intent, rather than a general intent, on the part of Merritt to record a specific type of communication—a confidential communication—without any legal excuse.

That the Attorney General failed to adduce any evidence at the Preliminary Hearing to demonstrate Merritt's specific intent to record **confidential communications** is obvious:

- Daleiden testified, **without any rebuttal**, that his and Merritt's intent was to record evidence of criminal conduct. (Tr. 899:27-900:11; 904:18-905:11; 908:23-909:6; 977:20-978:4; 998:27-999:4; 1125:20-24; 1094:10-1095:9; 1126:11-15).
- Daleiden testified, **without any rebuttal**, that he and Merritt were keenly aware of the provisions of Section 632, and worked dutifully to comply with it, by only recording in public places and where bystanders or passersby could reasonably be expected to overhear the recorded conversations. (Tr. 1131:23-1132:20; 905:22-906:14; 1066:7-9; 1068:3-19; 1074:19-25; 1080:1-15).
- Daleiden testified, **without any rebuttal**, that he and Merritt purposefully avoided private meeting rooms within the restaurants where they recorded lunch or dinner meetings, and private side-rooms at the NAF conference, because they wanted to comply with the law. (Tr. 1131:23-1132:8; 1157:13-18).
- Daleiden testified, **without any rebuttal**, that he and Merritt turned down invitations and opportunities to visit (and record at) private Planned Parenthood facilities in California, and thereby missed out on even more potentially useful information for their undercover investigation, because they wanted to comply with the law. (Tr. 1132:21-1133:20).
- Daleiden testified, **without any rebuttal**, that, prior to recording in California, he received legal advice from numerous attorneys who confirmed his understanding that the recordings he was contemplating complied with Section 632, and he shared this

information with Merritt. (Tr. 905:16-18; 905:20-907:2; 907:27-908:4; 1125-1126; 908:23-909:6; 1096:5-8).

- Daleiden testified, **without any rebuttal**, that, prior to recording in California, he amassed significant information and evidence, including from doctors and other experts, that Planned Parenthood was committing crimes, including violent felonies, in connection with its fetal tissue "donation" program, that he shared all of this information with Merritt, and that in light of the lack of any follow-up on previous evidence and exposés, he and Merritt needed to investigate this matter which they deemed to be of great public importance. (Tr. 880-888; 893:15-896:14; 898:27-899:2; 952:19-22; 1021:21-1023:27; 1125:2-6; *see also*, Daleiden Written Closing Argument (reviewing pre-recording evidence)).
- Daleiden testified, **without any rebuttal**, that, prior to releasing the videos he and Merritt recorded to the public, he visited numerous law enforcement agencies to report the criminal conduct he believed to have uncovered, and gave them the fruits of his and Merritt's investigation. (Tr. 1119:24-26; 1142:26-1143:4; 1200:14-1204:12). Persons with guilty minds, who do not wish to confess to crimes, do not go to the police and hand them the evidence of crimes. Daleiden's voluntary contact with law enforcement agencies removes all doubt that he and Merritt lacked the specific intent to violate Section 632.
- Finally, to further remove any doubt, Daleiden testified, **without any rebuttal**, that he and Merritt did not intend to record any "confidential communications" in California, as that term is defined in Section 632. (Tr. 906:6-14; 907:24-908:4; 1097:4-10; 1130:9-21; 1132:19-20).

In the face of all of this undisputed evidence, the Attorney General cannot possibly have raised a strong suspicion that Merritt (and Daleiden) had the specific intent not just to press the "record" button on their cameras, but to actually record communications that they knew to be

"confidential" within the meaning of Section 632, and without any justification or excuse under Section 633.5. Accordingly, all counts must be dismissed.[4]

C. Counts 1, 2, 3, 4, 5, 6, 7 and 15 Fail Because The Evidence is Undisputed That Merritt Did Not Make Those Specific Recordings, And The Attorney General Has Failed To Raise A Strong Suspicion That Merritt Conspired To Violate Penal Code Section 632.

At the Preliminary Hearing, the testimony from the testifying Does, Agent Cardwell and Daleiden was uniform and undisputed that Merritt **did not record Doe 1** (Tr. 816:17-26), **Doe 2** (Tr. 831:1-7), **Doe 3** (Tr. 136:27-137:1; 139:24-27), **Doe 4** (Tr. 479:2-5; 827:16-21), **Doe 5** (Tr. 810:26-811:20), **Doe 6** (Tr. 833:3-15), and **Doe 7** (Tr. 118:20-119:5). The Attorney General made no effort to rebut this testimony. Accordingly, the Attorney General has failed to raise a strong suspicion that Merritt is directly liable for any of those recordings.

To the extent the Attorney General is relying on indirect, conspiratorial liability against Merritt for these charges, it has also failed to raise a strong suspicion that Merritt conspired with Daleiden to violate Penal Code Section 632. Like substantive violations of Section 632 themselves (*see* Section II.B., *supra*), conspiracy to violate Section 632 is a specific intent crime, requiring a dual specific intent:

> The crime of conspiracy is defined in the Penal Code as "two or more persons conspir[ing]" "[t]o commit any crime," together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance thereof. (Pen. Code, §§ 182, subd. (a)(1), 184.) **"Conspiracy is a 'specific intent' crime.... The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy**.... **To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of that offense**." (*People v. Horn* (1974) 12 Cal. 3d 290, 296).

People v. Swain, 12 Cal.4th 593, 599–600 (1996) (emphasis added). "Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by

[4] As demonstrated in Section II.C. *infra*, the separate conspiracy count asserted in the Amended Complaint (Count 15) also requires a showing of specific intent, and also fails for largely the same reasons.

itself, to prove that the person was a member of the conspiracy." Judicial Council of California Criminal Jury Instruction 415, "Conspiracy." Without evidence of a specific intent to **both**, agree to commit and commit, the offense, conspiratorial liability does not attach and a conspiracy claims fails. *Swain*, 12 Cal. 4th at 599-600.

Here, the Attorney General's conspiracy theory of liability for videos Merritt did not personally record fails the first and second specific intent prongs, because the evidence at the Preliminary Hearing was undisputed and uncontroverted that Merritt neither intended to agree to violate Penal Code Section 632, nor did she intend to commit the offense itself, and specifically to record without consent "confidential communications" – communications that could not be reasonably expected to be overheard:

> Q. Yes. Did you and Ms. Merritt **intend to agree** to record confidential communications in California unlawfully?
> A. **No**.
> Q. Did you and Ms. Merritt, **in fact, agree** to record confidential communications unlawfully in California?
> A. **No**.
> Q. Did you and Ms. Merritt **intend to record** any conversations in California that could not reasonably be expected to be overheard by others?
> A. **No**.

(Tr. 1130:9-18 (emphasis added)). Daleiden specified that his understanding of "confidential communications" for purposes of this testimony is the same as in Penal Code Section 632. (Tr. 1129:14-17).

On re-cross examination, the Attorney General did not ask Daleiden **a single question** to even probe, let alone rebut, any of his testimony in regard to any agreements between him and Merritt or their intent. (Tr. 1196:23-1200:9; 1207:23-1208:5). And the Attorney General offered no affirmative evidence on this issue. (*Id*.) Accordingly, there is a "complete failure to present evidence on an element [which] **requires** dismissal of the allegation." *Thompson v. Superior Court*, 91 Cal. App. 4th at 149 (emphasis added).[5]

[5] The Attorney General has not pled aiding and abetting as a theory for Merritt's liability for videos she did not personally record, but even if he had, that theory could not survive the Preliminary Hearing any more than the conspiracy theory. "**Neither presence at the scene of a**

Finally, in addition to conspiracy liability for Counts 1-7, the Attorney General asserts a separate Count (15) for conspiracy against Merritt, which is identical: a conspiracy "to commit the crime of Recording a Confidential Communications [*sic*], 632(a) of the California Penal Code, a felony." (Amended Complaint, Count 15). Because the elements for conspiracy under Count 15 are exactly the same as the elements for conspiratorial liability under Counts 1-7, Count 15 fails for the same reason: the Attorney General has failed to adduce any evidence as to Merritt's specific intent to agree to violate Section 632, and specific intent to commit the elements of that offense.

Accordingly, because of a complete failure to present evidence on essential elements as to Counts 1, 2, 3, 4, 5, 6, 7 and 15, these Counts must be dismissed as to Merritt.

D. Counts 1, 2, 4, 5, 6, 11, 13 and 14 Fail Because The Attorney General's Proposition 115 Witness Is Not Credible, Failed to Conduct A Proper Or Meaningful Investigation To Assist The Court, Failed to Support The Elements Of The Charged Offense, And Was Dishonest With The Court.

1. Agent Cardwell Admittedly Failed To Use His Special Training And Extensive Experience To Obtain Critical Details From Non-Testifying Witnesses, Failed To Conduct A Proper Investigation, Failed to Submit To A Meaningful Cross-Examination, And Failed To Assist The Court.

Proposition 115 **permits** the Court to rely upon the hearsay testimony of a sufficiently experienced or trained law enforcement officer, but does not **require** the Court to accept such testimony when it is not credible, not reliable or dishonest. *See Whitman v. Superior Court*, 54 Cal. 3d 1063, 1072–73 (1991). "[I]t is the responsibility of the committing magistrate to weigh the

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crime, nor failure to take steps to attempt to prevent a crime, establish that a person is an aider or abettor. … There must be proof that the accused not only aided the actor but at the same time shared the criminal intent." *Pinell v. Superior Court*, 232 Cal. App. 2d 284, 287 (Ct. App. 1965) (emphasis added) (issuing writ of prohibition under Penal Code Section 999(a) for failure to adduce sufficient evidence of aiding and abetting at preliminary hearing). Mere presence at the scene, even with knowledge that a crime is occurring is insufficient for a holding order. *Id*. As detailed above, the evidence is uncontroverted that Merritt did **not** "intend to record any conversation in California **that could not reasonably be expected to be overheard by others**." (Tr. 1130:15-18 (emphasis added)). In addition, Daleiden testified that Merritt provided neither "advice" nor "aid or assistance" to record a "confidential communication" in California without consent, nor did she "promote," "instigate," or "encourage" such a recording. (*Id*. at 1134:10-21). The Attorney General had zero questions, zero response, and zero affirmative evidence on this issue.

evidence, resolve conflicts and give **or withhold credence** to particular witnesses." *Jones v. Superior Court*, 4 Cal. 3d at 667 (emphasis added) (rejecting testimony of alleged victim as not credible and dismissing charged offenses of rape and sodomy for failure of proof). "The magistrate is not bound to believe even the uncontradicted testimony of a particular witness, especially where … the magistrate has reason to believe that **other testimony of the witness is untruthful**." *Id*. (emphasis added).

> Of course, in a given case the **magistrate** (or the superior court on a section 995 motion or an appellate court in a writ proceeding) **might conclude that an officer's testimony does not provide a sufficient indication of reliability to permit introduction of the extrajudicial statement.**

Hosek v. Superior Court, 10 Cal. App. 4th 605, 610 (Ct. App. 1992) (emphasis added).

In *Whitman*, the California Supreme Court analyzed Penal Code Section 872, which codified Proposition 115, and explained three reasons why the statutory requirement of special training or lengthy experience for the testifying officer is so important. 54 Cal. 3d at 1074-75. First,

> in permitting only officers with **lengthy experience** or **special training** to testify regarding out-of-court statements, Penal Code section 872, subdivision (b), plainly contemplates that **the testifying officer will be capable of using his or her experience and expertise to assess the circumstances under which the statement is made and to accurately describe those circumstances to the magistrate so as to increase the reliability of the underlying evidence**.

54 Cal. 3d at 1074 (emphasis added). Second, when the testifying officer actually uses his or her training and experience to properly question witnesses out of court, and is able to provide important details to the Court, he or she can "meaningfully assist the magistrate in assessing the reliability of the statement." *Id*. at 1075. And third, only by actually employing his or her training and expertise to gather important details, and by being available for "**meaningful**[] cross-examin[ation] … regarding the circumstances under which the out-of-court statement was made" can the testifying officer ensure that the constitutional right of the defendant to confront and cross-examine his or her accusers is not violated. *Id*. at 1074-75 (emphasis added).

And, in *Hosek*, the court further explained the duties of a Prop 115 officer in meaningfully questioning out-of-court witnesses as opposed to merely "passively listen[ing]" to them, so that the officer can provide meaningful testimony and assistance in court:

> The underlying **presumption** of the statute is that the **experienced or trained investigating officer will do more than passively listen to the … witness**. The investigating officer presumably will know enough about the use in court of the particular … testimony and **will ask the right questions** … to establish a substantial degree of reliability of the [witness'] statement for preliminary examination purposes. The qualifications requirement contemplates that the investigating officer will use significant discretion "to assess the circumstances under which the [extrajudicial] statement is made and to **accurately describe those circumstances to the magistrate so as to increase the reliability of the underlying evidence**." (*Whitman v. Superior Court*, *supra*, 54 Cal.3d at p. 1074, 2 Cal.Rptr.2d 160, 820 P.2d 262.)

Hosek, 10 Cal. App. 4th at 609 (emphasis added). Although the out-of-court witness at issue in *Hosek* was an expert, *Whitman* makes it clear that the testifying officer's duty to properly investigate and question out-of-court witnesses applies to any and all witnesses. *Whitman*, 54 Cal. 3d at 1074-75.

Accordingly, where, as here, a testifying officer fails to obtain the important details from the out-of-court witness, and is "unable to answer potentially significant questions" in court about the out-of-court statements as to which he or she testifying, the court must disregard such "testimony." *Id.* (granting peremptory writ and ordering that defendant's motion to set aside the information be granted because testimony of Prop 115 witness failed to provide necessary details and should have been discarded).

To say that Agent Cardwell failed to carry out his presumed investigatory duties is a great understatement. Cardwell admitted that he has training to listen to witnesses, to probe their assertions, and to not merely listen and uncritically accept what they say at face value, but to ask relevant questions and ferret out the truth. (Tr. 789:5-10). Cardwell testified that these skills are important in law enforcement investigations because witnesses do not always tell the truth. (Tr. 789:9-12). And yet, Cardwell made some breathtaking admissions about the "investigation" he did in this case—his first ever case investigating alleged violations of Section 632. (Tr. 788:1-7). Indeed the uniform chorus of "No's" uttered by Agent Cardwell in response to virtually every "Did

you ask the Doe…." question asked of him on the stand is much too long to recount here. Among the most important and critical questions that Agent Cardwell never asked during his roughshod investigation are the following:

- Despite his training and experience to do otherwise, Agent Cardwell admitted that he merely accepted and did not probe any of the Does' claims that their conversations were "confidential." (Tr. 829:3-9). This includes even conversations that Cardwell saw on video, and that clearly included strangers within earshot, such as the elevator conversation with Doe 4 (828:9-829:5), or the restaurant waiter hovering over Doe 11's mouth. (Tr. 838:19-839:2).
- Agent Cardwell admitted that he asked no questions as to what the Does understood by "confidential communications," and made no efforts at all to determine whether their understanding was in line with Section 632. (Tr. 838:13-18; 849:2-9; 850:2-851:18).
- Agent Cardwell admitted that he did not ask the Does whether their recorded conversations could have been overheard by non-participants. (Tr. 838:19-22; 818:15-17; 821:2-5; 822:5-7; 831:8-11; 833:16-18; 838:19-27; 843:23-25).
- Agent Cardwell admitted that he did not ask the Does whether they took any steps to ensure that other people in the vicinity of their recorded conversation could not overhear them. (Tr. 812:13-16; 818:11-14; 825:27-826:2; 831:23-26; 839:3-6).
- Agent Cardwell admitted that he never simultaneously watched the videos with any of the Does as he interviewed them. (Tr. 781:2-5).

By failing to ask these critical questions and numerous others, Agent Cardwell rendered the specialized training and experience required by Prop 115 superfluous, deprived Merritt and Daleiden of their right to confront and cross-examine their accusers, and deprived this Court of a meaningful opportunity to determine the reliability of the out-of-court statements sought to be introduced by the Attorney General. *Whitman*, 54 Cal. 3d at 1074-75. Exclusion of Agent Cardwell's testimony is the only proper and meaningful remedy.

2. Agent Cardwell Failed To Provide The Court With Anything Other Than The Subjective Feelings Of The Alleged Victims, Which Are Irrelevant To Section 632's Objective Standard.

In light of all of the pertinent and material questions that Agent Cardwell chose not to ask of the Prop 115 witnesses, the question that he did ask – whether they "felt" that the recorded communications were "confidential" makes no sense and is not relevant to any inquiry before the Court. Without any information or ability to understand what the witnesses meant or understood by "confidential" and whether they line up with the definition in Section 632(c), the Court has no way of knowing whether a violation took place. Clearly, the Doe witnesses could not have the same understanding of "confidential" as is present in Section 632(c), because there is no way that Doe 4, for example, could credibly claim that she did not expect her elevator conversation to be overheard by the stranger in the elevator, or that it is reasonable to expect that conversation not to be overheard. And yet Doe 4 (and all the others) told Agent Cardwell that she "felt" the conversation was "confidential," which Agent Cardwell dutifully reported in his arrest warrant affidavit, without even the slightest effort to probe what she meant or how she could make that claim in light of the actual facts. (Tr. 828:4-20).

And that is really the sum and substance of Agent Cardwell's "investigation" and testimony to the court—that Does 1, 2, 4, 5, 6, 11, 13, and 14 subjectively "felt" that their recorded conversations were "confidential." (Tr. 828:4-12 (Doe 4 "**felt**" conversation was "confidential"); 811:26-812:4 (Doe 5 "**felt**" conversation was "confidential"); 766:14-26 ("only question" Cardwell asked Doe 6 was if he "**felt**" the conversation was "confidential"); 767:2-12 ("only thing" Cardwell asked Doe 7 was if she "**felt** the conference was private"); 838:9-839:2 (Doe 11 told Cardwell she "believed" and "thought" and "felt" that the conversation was "confidential," and he asked no questions to probe); 849:2-9 (Doe 13 told Cardwell that he "believed the conversation was confidential" and he asked no questions to probe or determine what he meant); 850:2-851:18 (Doe 14 told Cardwell that she "**believed** the conversation was confidential," and he did not probe at all); 803:16-21 ("**several** of the Does" "**felt**" that the setting at NAF conference was "private");

829:3-9 (**all** the Does Cardwell spoke with told him they "**felt** that the conversations were confidential," and he accepted those representations without any probing).

This testimony is of virtually no use to the Court, and to these proceedings, because the standard for whether a recorded communication is "confidential" within the meaning of Section 632(c) is **objective**, not subjective, and does not depend on a recorded person's subjective "belief" and "feelings." *See* Penal Code Section 632(c) ("'confidential communication' means 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 any other circumstances in which the parties to the communication may **reasonably** expect that the communication may be overheard or recorded) (emphasis added). *See also, Kight v. CashCall, Inc.*, 200 Cal. App. 4th at 1396 ("A communication is 'confidential' under this definition if a party to the conversation had an *objectively reasonable expectation* that the conversation was *not being overheard or recorded.*) (italics original).

Because Agent Cardwell provided no useful information or testimony to the Court, his testimony is irrelevant and should be given no weight. All Counts premised upon his testimony fail and should be dismissed.

3. Agent Cardwell's Deficient Testimony Should Not Be Believed Because He Was Dishonest With The Court.

Not only did Agent Cardwell fail to conduct a proper investigation, but he admitted on the witness stand that he made material false statements and omissions to the Court in his sworn affidavit to convince the Court that probable cause existed for Merritt's and Daleiden's arrest. Agent Cardwell admitted that he knew of his legal obligation to tell the truth and be complete in his arrest warrant affidavit, which included the obligation to apprise the Court of exculpatory information. (Tr. 793:21-794:17). Agent Cardwell admitted that he withheld material exculpatory information from the Court in his sworn affidavit:

- Agent Cardwell failed to tell the Court that Doe 5 told him that her recorded conversation with Daleiden probably could have been overheard by non-participants

and passersby. (Tr. 813:14-815:10). Agent Cardwell knew that this information was material, and exculpatory, because he knew that "whether or not a party the communication may reasonably expect that they are overheard is an important aspect of investigating potential violations of Section 632." (Tr. 788:23-789:4)

- Agent Cardwell failed to tell the Court that Doe 1 had told him that she was recorded in a "loud," "crowded," "busy" and "**public**" area, and he failed to tell the Court that there were at least two or three individuals in very close proximity to the conversation that were not part of the conversation. (Tr. 817:23-818:6; 823:9-27).
- Agent Cardwell failed to tell the Court that Doe 4's supposedly "confidential communication" took place inside an elevator with a complete stranger (other than Daleiden) riding along. (Tr. 826:25-827:21). Instead, referring specifically to the elevator-ride-with-stranger, Cardwell merely told the Court that Doe 4 "felt all the conversations she had with Daleiden, including the one in San Francisco, were confidential." (Tr. 827:22-828:12). This was highly misleading, and entirely devoid of the key exculpatory fact that the conversation clearly could reasonably be expected to be overheard by a stranger in a small elevator space.
- Agent Cardwell told the Court about an investigation by Pasadena law enforcement authorities into the recording of Doe 10 and Doe 11, including the findings of their investigations, because they were favorable to the prosecution. (Tr. 842:17-26). Agent Cardwell also mentioned that Doe 9 had filed a complaint with the Los Angeles police department, but completely failed to tell the Court that LAPD concluded that the recorded conversation was **not** confidential. (Tr. 842:6-16; 842:27-843:11).

Beyond material omissions in the face of his known duty to fully apprise the Court of exculpatory information, Agent Cardwell also admitted that his sworn arrest warrant affidavit contained false statements and implications, which were also material:

- Agent Cardwell told the Court that Doe 13 indicated to him that "the restaurant was not crowded and they were seated in an area of the restaurant that contained no

other customers," and, as a result Doe 13 "did not believe other customers could overhear or record their conversation." (Tr. 848:8-18). Cardwell failed to tell the Court that other customers showed up at some point during the dinner, and sat immediately next to Doe 13's booth – close enough to make elbow contact, even though Cardwell was aware of this from seeing the recorded video. (Tr. 848:19-849:1; 847:17-848:3). Agent Cardwell admitted that his statement to the Court regarding "no other customers" was false. (Tr. 848:24-849:1).

Given Agent Cardwell's demonstrated and demonstrable willingness to omit material exculpatory facts and make false statements and false implications to the Court in **one** probable cause determination (arrest warrant), this Court can have absolutely no assurance that Cardwell would not, and did not, do the same in **another** probable cause determination (Preliminary Hearing). What did the Prop 115 witnesses tell Agent Cardwell that he withheld from the parties or the Court, as he did before in this same case, and how would that withheld information affect the existence of probable cause to bind the Defendants for trial? We cannot know.

California law is clear that when a witness is untruthful to a Court in any aspect of his or her testimony, the Court may disregard that witnesses' entire testimony. *People v. Reyes*, 195 Cal. App. 3d 957, 965-66 (Ct. App. 1987); *People v. Toledo-Corro*, 174 Cal. App. 2d 812, 820 (Ct. App. 1959). Here, Agent Cardwell is unreliable at best, misleading in the middle, and perhaps even untruthful at worst. The Court cannot and must not credit any of his testimony, particularly when Defendants cannot cross-examine the witnesses he interviewed. As discussed above, crediting Agent Cardwell's testimony under these circumstances would violate Defendants' right to confront and cross-examine their accusers, and would vitiate the entire reason for requiring Prop 115 testifying witnesses to have specialized training or lengthy experience. The Court should reject Agent Cardwell's testimony *in toto*.

4. Without The Deficient, Unreliable and Untrustworthy Testimony Of Agent Cardwell, Counts 1, 2, 4, 5, 6, 11, 13 and 14 Fail For Lack of Evidence.

For all of the foregoing reasons, the Court should reject and/or exclude Agent Cardwell's hearsay testimony under Prop 115. The Attorney General has no "Plan B" for the Prop 115 witnesses it sought to introduce through Agent Cardwell. The Attorney General has no evidence from which it could meet its evidentiary burden and raise a "strong suspicion" that Merritt (or Daleiden) is guilty on Counts 1, 2, 4, 5, 6, 11, 13 and 14. Accordingly, without (and even with) Agent Cardwell's testimony, all Prop 115 Counts fail and must be dismissed.

E. Each of the Remaining Counts Fails Because The Recorded Conversations Were Not "Confidential Communications" Within The Meaning Of Penal Code Section 632.

In addition to the grounds detailed in the preceding sections, each of the Counts in the Amended Complaint fails for the separate and independent reason that the Attorney General failed to adduce sufficient evidence to raise a strong suspicion that the recorded conversations were "confidential communications" within the meaning of Penal Code Section 632. The Evidence at the Preliminary Hearing was undisputed that each of the recorded conversations were not desired to be confined to the participants thereto, and reasonably could be expected to be overheard by non-participants who were strangers to the conversations and strangers to the Does.

1. Count 1 Fails Because The Recorded Conversation With Doe 1 Was Not "Confidential."

Applicable not only for Doe 1, but **for all of the Does recorded at the NAF conference (Does 1-7)**, the undisputed testimony was that:

- There were a lot of people in the exhibitor space, and there was no way of knowing if those in the exhibitor space were members of NAF or not, or if they were just there to sell merchandise. (Tr. 541:4-9).
- There was no way of knowing if the exhibitors at NAF were pro-life or pro-choice. (Tr. 541:10-12).

- Hotel staff and photographers hired by NAF were also in the exhibitor area. (Tr. 548:1-12).

With respect to Doe 1, specifically, the undisputed testimony was insufficient to establish the Attorney General's claim:

- Agent Cardwell admitted on direct that Doe 1 repeatedly admitted that the exhibit hall where she was recorded was a "**public setting**." (Tr. 464:4-7; 465:26-28; 540:2-5; 818:4-6).
- Agent Cardwell admitted that Doe 1 told him that the exhibitor area was crowded, busy, and loud, (Tr. 817:15-818:3), which he withheld from his sworn arrest warrant affidavit. (Tr. 823:9-27).
- Agent Cardwell admitted on review of the video that Doe 1 made no effort to confine her conversation with Daleiden, such as lowering voice. (Tr. 823:3-8).
- Agent Cardwell admitted that he did not ask Doe 1 if she could be overheard and did not ask if she had taken any steps to avoid being overheard. (Tr. 540:6-9; 818:7-17). He further did not ask Doe 1 if she knew any of a variety of people who were shown in close proximity to the conversation or whether they could overhear the conversation. (Tr. 820:23-822:9).
- Agent Cardwell admitted that he did not ask Doe 1 whether she was aware of any specific procedures and policies NAF has with respect to exhibitors and exhibit booth personnel. (Tr. 819:22-25).
- Agent Cardwell admitted that Doe 1 did not tell him that she spoke with Merritt, and he conceded that Merritt was not part of the conversation with Doe 1. (Tr. 816:11-26). Agent Cardwell confirmed instead that on the video of the conversation between Doe 1 and Daleiden, he could faintly overhear a separate conversation between Merritt and another gentleman. (Tr. 822:18-21).

2. Count 2 Fails Because The Recorded Conversation With Doe 2 Was Not "Confidential."

Regarding Doe 2, the undisputed testimony was likewise insufficient to establish the Attorney General's claim:

- Agent Cardwell admitted that he did not ask Doe 2 if his recorded conversation could be overheard by others. (Tr. 542:10-13).
- Agent Cardwell admitted that he did not ask Doe 2 if he could be overheard or whether Doe 2 had taken any steps to ensure the conversation could not be overheard. (Tr. 831:8-26).
- Agent Cardwell conceded that the conversation with Doe 2 took place in the busy, crowded, public exhibit hall. (Tr. 832:3-6).
- Agent Cardwell admitted that he did not ask Doe 2 whether she was aware of any specific procedures and policies NAF has with respect to exhibitors and exhibit booth personnel. (Tr. 832:8-18).
- Agent Cardwell admitted that as to Doe 2, solely Daleiden and Doe 2 were participants to that conversation, not Merritt. (Tr. 830:20-831:7).

3. Count 3 Fails Because The Recorded Conversation With Doe 3 Was Not "Confidential."

With respect to Doe 3, the undisputed testimony at the Preliminary Hearing established without doubt that her conversation could be overheard by non-participants, that she was aware of that fact, and that she took no steps to prevent it. Specifically:

- Before Daleiden approached, Doe 3 was standing at an exhibitor's booth, on one of the main aisles in the exhibitors' hall, which lead from a conference room into the hallway of the hotel and guest bathrooms. (Tr. 182:26; 174:21-26).
- After Doe 3's conversation with Daleiden started, Doe 3 noticed that "people [were] passing by **all the time.**" (Tr. 175:8-13; 176:21-24 (emphasis added)).
- Doe 3's conversation with Daleiden took place in the open, as opposed to a secluded, area of the exhibitor's hall. (Tr. 177:7-10).

- The ambient noise in the exhibitor's hall was not loud. (Tr. 186:4-7).
- As people passed by Doe 3, she did not pause her conversation with Daleiden, **nor did she take any actions to indicate to Daleiden that she did not want her conversation to be overheard**. (Tr. 176:25-28; 179:12-15; 180:15-18; 184:23-25; 188:27-189:2; 194:10-13; 195:22-25). Neither did Doe 3 lower her voice (Tr. 177:4-6).
- Doe 3 herself admitted that individuals who were passing by Doe 3, whom she did not know, **could have overheard** her conversation or fragments of her conversation with Daleiden. (Tr. 184: 26-27; 191:7-24; 194:5-9).
- Daleiden himself testified that, while he was talking with Doe 3, he could overhear the conversations others were having around him and Doe 3. (Tr. 997:17-20).
- Daleiden also testified, without any rebuttal, that at some point during Doe 3's conversation with Daleiden, the artist who was working at the adjacent exhibitor's booth was present and could overhear their conversation. (Tr. 996:12-25).

4. Count 4 Fails Because The Recorded Conversation With Doe 4 Was Not "Confidential" And Not Authenticated.

Count 4 of the Amended Complaint fails, in the first place, because the Attorney General and Agent Cardwell failed to properly identify Doe 4 or authenticate the subject video, with admissible, non-hearsay evidence based upon a percipient lay witness:

- Agent Cardwell testified he has never met and has no "personal perception" of the alleged Doe 4. (Tr. 480:11-15; 487:16-18; 829:15-16).
- Agent Cardwell further admitted that the alleged Doe 4 had no idea whether or not she had been recorded. (Tr. 483:11-13).
- Agent Cardwell admitted he did not interview on or go over the video with the alleged "Doe 4." (Tr. 484:5).
- There is no evidence that the alleged Doe 4 provided Agent Cardwell her picture or otherwise confirmed her visual appearance.

- Agent Cardwell admitted that he called Does 4 and 5 in April 2019, to confirm they are depicted in the videos, but they did not return his phone calls. (Tr. 809:3-5, 17-22; 829:17-830:2).

Agent Cardwell's so-called "identification" of the alleged "Doe 4" and the video clip he purportedly authenticated should not be allowed into evidence under Cal. Evid. Code § 800 and *People v. Perry*, 60 Cal. App. 3d 608, 613 (1976) ("The statutory and decisional law permitting lay opinion testimony on the question of identity **is limited to opinion founded on personal perception**." (emphasis added)). Nor did the Attorney General produce in its case-in-chief the kind of evidence required in *People v. Beckley*, 185 Cal. App. 4th 509, 515 (2010), for the admission of the video clip. Just as in *Beckley*, the Attorney General here did not provide "the testimony of a person who was present at the time a film was made," to testify "that it accurately depicts what it purports to show," nor did the Attorney General provide a photographic or video expert.

As a separate and independent ground, Count 4 fails because, as with all the others, the Attorney General failed to show that the recorded conversation was a "confidential communication" within the meaning of Section 632. It was undisputed at the Preliminary Hearing that almost the entire recorded communication between Doe 4 and Daleiden took place **in an unsecured, public elevator, with one other person in it who was a complete stranger**. The remainder of the conversation was in the main, unsecured lobby of a hotel, where Doe 4 and Daleiden were practically yelling in the presence of other **strangers** (non-conference attendees). If even **this** kind of conversation can be "confidential" under Section 632, nothing is out of its reach. Specifically:

- Agent Cardwell admitted he did not ask the alleged Doe 4 whether there was anyone else on the elevator with her. (Tr. 544:12-22). Upon reviewing the video clip in question, Agent Cardwell conceded that an entirely unknown person shares the elevator with Doe 4 and Daleiden, **who he would expect heard the conversation**. (Tr. 545:22-26; 546:3-547:1).

- Agent Cardwell admitted he did not ask the alleged Doe 4 whether she knew a pair of individuals passing by the alleged Doe 4 and Daleiden as they conversed in the main, unsecured area of the hotel lobby. (Tr. 825:1-16).
- Agent Cardwell admitted that Doe 4 did not change the tone, subject, or nature of the conversation she had with Daleiden at any time. (Tr. 825:23-26).
- Agent Cardwell further admitted that he did not ask the alleged Doe 4 if she had taken any measures to ensure that the passersby shown in the video could not overhear her. (Tr. 825:27-7).
- Agent Cardwell admitted that in his arrest warrant, he did not include that the alleged Doe 4 and Daleiden were sharing an elevator with a stranger during the allegedly confidential conversation. (Tr. 827:1-21).

Under these circumstances and undisputed facts, the Attorney General's continued pressing of Count 4 is not only without merit, but borderline frivolous and bad faith.

5. Count 5 Fails Because The Recorded Conversation With Doe 5 Was Not "Confidential" And Not Authenticated.

Count 5 fails for the same two reasons as Count 4. First, there has not been a proper identification of Doe 5, nor a proper authentication of the subject video:

- Agent Cardwell testified he has never met and has no "personal perception" of the alleged Doe 5, having never sent the allegedly illegally recorded video to Doe 5, never asked Doe 5 to review the video, and never confirmed with the alleged Doe 5 that she was in the video. (Tr. 778:27-779:3).
- Agent Cardwell conceded that his only identification of Doe 5 is from photos he located on the internet. (Tr. 810:5-13; 490:14-17).
- As noted above, the alleged Does 4 and 5 are incommunicado and have not identified themselves in the videos.
- Agent Cardwell admitted that he had only spoken to the alleged Doe 5 once, on November 17, 2016. (808:21-22; 808:28-809:1).

Under these circumstances, Agent Cardwell's identification of the alleged Does 4 and 5 and their video clips must be stricken. Agent Cardwell did not show the alleged illegally recorded videos to the individuals he spoke with who he alleges are Does 4 and 5. Those same alleged individuals have now been incommunicado for presumably years, and for at least the past 6 months. There is no evidence that these individuals otherwise recounted any details of the conversations that were allegedly illegally recorded or otherwise authenticated the alleged videos. Agent Cardwell's only information identifying the alleged Does 4 and 5 are from alleged Google searches, which are inadmissible hearsay. As noted in *Beckley*, internet images are untrustworthy under California law. Does 4 and 5 are ciphers—incommunicado witnesses who were disembodied voices on the other end of telephone lines. Counts 4 and 5 should be dismissed.

In addition, Count 5 also fails because of insufficient evidence to establish that the recorded conversation was a "confidential communication" within Section 632. Specifically:

- Agent Cardwell admitted that the alleged Doe 5 volunteered that she **probably could be overheard** by passersby, conceded that the identity of those passing by is **unknown**, and conceded that there were individuals passing by during her conversation with Daleiden. (Tr. 547:13-16, 21-26; 813:14-28).
- Agent Cardwell further admitted that he did not include in his arrest affidavit the fact that the alleged Doe 5 stated she probably could have been overheard. (Tr. 814:19-815:10).
- Agent Cardwell admitted that the only participants to the allegedly illegally recorded video of the alleged Doe 5 are Daleiden and the alleged Doe 5, not Merritt. (Tr. 810:23-811:20).

6. Count 6 Fails Because The Recorded Conversation With Doe 6 Was Not "Confidential."

The evidence regarding the recording of Doe 6 at the NAF conference is likewise insufficient to establish that the communication was "confidential" within the meaning of Section 632:

- Agent Cardwell admitted that he did not ask Doe 6 if he could be overheard or if he wanted the conversation confined to himself and Daleiden. (Tr. 548:13-16; 833:16-18; 833:27-834:6).
- Agent Cardwell admitted that the conversation with Doe 6 took place in the exhibit hall. (Tr. 833:21-26).
- Agent Cardwell admitted that he asked only **a single question** about confidentiality with Doe 6, merely whether he "felt" his conversation with Daleiden was confidential. (Tr. 548:13-16; 834:20-835:5).
- Agent Cardwell admitted that he did not ask Doe 6 whether he was aware of any specific procedures and policies NAF has with respect to exhibitors and exhibit booth personnel. (Tr. 834:10-19).
- Agent Cardwell admitted that as to Doe 6, solely Daleiden and Doe 6 were participants to that conversation, not Merritt. (Tr. 833:3-15).

7. Count 7 Fails Because The Recorded Conversation With Doe 7 Was Not "Confidential."

The claim as to Doe 7 (the last remaining attendee of the NAF conference) fares no better, and it too suffers fatally from lack of sufficient evidence to demonstrate that the recorded communication was "confidential" within the meaning of Section 632:

- Doe 7 admitted that there was a lot of noise in the exhibit hall which required Doe 7 to speak loudly during her conversation with Daleiden. (Tr. 89:13-18; 119:11-14).
- Doe 7 admitted that during her conversation with Daleiden, Doe 7 was standing approximately three feet away. (Tr. 121: 5-8).
- Doe 7 admitted that although there were other individuals who passed or stood nearby as Doe 7 was speaking with Daleiden, Doe 7 took no steps, such as lowering her voice, changing the subject or stopping the conversation, in order to prevent

those individuals from overhearing her conversation. (Tr. 89:22-25; 122:26-123:18; 125:23-126:10; 127:12-14; 127:28-128:2; 128:20-22; 130:9-10; 131:6-8).

- Doe 7 admitted that she did not know or recognize any of the individuals who passed or stood nearby. (Tr. 121:19-122:17; 124:13-28; 127:1-4; 129:25-26).
- Doe 7 admitted that there was nothing preventing those other individuals who were nearby from overhearing her conversation with Daleiden. (Tr. 89:26-28).
- Doe 7 admitted that she could hear individuals talking across the exhibit hall. (Tr. 119:15-17).
- Doe 7 admitted that **it was possible for individuals she did not know, who were three feet away from her, to overhear her conversation with Daleiden**. (Tr. 127:8-11; 127:21-23; 128:17-28; 130:3-5; 131:3-5).

8. Count 9 Fails Because The Recorded Conversation With Doe 9 Was Not "Confidential."

The undisputed evidence at the Preliminary Hearing was that the conversation between Doe 9, Merritt and Daleiden could have been overheard by others, and that it was reasonable to expect and assume that it would be overheard. Indeed, Doe 9 herself assumed this at the time of the conversation. This starts and ends the inquiry for purposes of Section 632. Among Doe 9's numerous (and dispositive) admissions:

- **Doe 9 admitted it was reasonable to assume the conversation could be overheard by the waitstaff**. (Tr. 231:5-232:10). This is all that the Court needs to dismiss this Count under 632(c).
- Doe 9 admitted that it is possible to overhear a conversation from the distance between the witness stand and defense counsel table, which she estimated was 8 to 10 feet, and a waiter to overhear at a restaurant table less than 2 to 3 feet away. (Tr. 290:16-21, 291:13-26).
- Doe 9 admitted that Daleiden and Merritt chose the restaurant, and table and seating arrangement. (Tr. 223:27-224:3, 229:18-26).

- Doe 9 admitted that she did not indicate to Daleiden and Merritt that the information conveyed during the conversation was desired to be confined to the parties. (Tr. 227:6-9).
- Doe 9 admitted that she did not indicate to Daleiden and Merritt that the conversation was intended to be confidential or that she was switching between supposed "confidential" and "nonconfidential" information during the conversation. (Tr. 227:10-13, 228:1-8).
- Doe 9 admitted that she did no vetting of the restaurant staff or BioMax representatives. (Tr. 224:4-8, 24-26).
- Doe 9 admitted the conversation was intended to help the BioMax representatives and provide them information they could use to succeed in the field of fetal tissue procurement. (Tr. 292:23-26, 293:10-294:2).
- Doe 9 admitted she **expected** the conversation to be shared with others at BioMax. (Tr. 294:3-24). This is the exact opposite of a desire to confine the communication to the parties thereto.
- Doe 9 admitted texting a Dr. Rachel Steward during the lunch to see if she was working with any other fetal tissue procurers, with the associated video indicating the activity. (Tr. 265:2-14). Thus, Doe 9 was providing information from the lunch conversation to and from non-parties to that conversation, which is also the exact opposite of a desire to restrict the information to the parties thereto.
- Lastly, Doe 9 admitted that, when she first saw the video of her conversation released to the public, she "didn't get the big deal," and "there was nothing wrong in the video." (Tr. 289:11-26). This testimony and conduct is entirely consistent with Doe 9's understanding that her conversation could be overheard by others, and could be shared by Merritt and Daleiden with others.

The Attorney General did nothing in redirect to rehabilitate Doe 9's repeated admissions that the conversations could be overheard by strangers, nor the admissions that Doe 9 did not

desire the communication to remain between her, Daleiden and Merritt. Under these facts, there is no dispute that Doe 9's recorded conversation is not "confidential" within the meaning of Section 632. Count 9 fails and must be dismissed.

9. Counts 10 and 11 Fail Because The Recorded Conversation With Does 10 and 11 Was Not "Confidential."

By every legal and factual measure, the lunchtime conversation at the restaurant in Pasadena between Doe 10, Doe 11, Daleiden and Merritt was not a "confidential communication" within the meaning of Section 632:

- Doe 10 admitted that she did no background check on either the restaurant staff or the BioMax representatives (Tr. 721:6-722:4).
- Quite the opposite from desiring the communication to be confined to the parties thereto, Doe 10 admitted that "I expected them to share certain information with the imaginary partners that they had and scientific organizations" (Tr. 725:12-14), and then added that "**I was totally willing for them to share the information with legitimate research partners**" (Tr. 725:27-28 (emphasis added)), and even that "I was confident and comfortable that they were planning to share the information with legitimate scientific researchers." (Tr. 726:14-16).
- Doe 10 admitted that it was possible for someone to sit at the booth immediately behind her, and for her not to notice (Tr. 729:4-9).
- Doe 10 admitted that she was wearing a hearing aid, which are sometimes affected by background music such as was playing at the restaurant, but the conversation at her table was loud enough for her to hear without any issue (Tr. 729:10-21), which necessarily means others in the vicinity without hearing aids could hear it even better.
- Critically, Doe 10 admitted that multiple restaurant staff came to service the table during their conversation, that she "understood that **they could overhear whatever was being discussed at that time**." (Tr. 731:17-23).

- Also critically, for each of the several video clips that were played for her in court, Doe 10 admitted that when restaurant staff came to the table, she didn't stop speaking abruptly, didn't lower her voice, didn't ask others to lower their voices or stop talking, didn't change the subject (away from fetal tissue procurement), and took no measures to ensure that the conversation could not be overheard. (Tr. 732:28-733:15; 734:15-735:27; 736:14-738:13; 738:24-740:20).
- Among the many examples above, the Court will recall that one of them involved a waiter at the side of the table literally reaching over the table with his hands and body, and being only a few inches away from (above) Doe 11's mouth, as Doe 11 continued to talk in the same tone of voice, on the same subject, without any concern about the stranger in her personal space. (736:14-738:13).

Under these circumstances, it is clear that Does 10 and 11 did not intend for their conversation with Merritt and Daleiden to be confined to the parties thereto, and that the conversation could reasonably be expected to be overheard by non-participants that Does 10 and 11 knew nothing about. Under the authorities above, this communication cannot be "confidential" for purposes of Section 632. Counts 10 and 11 fail and must be dismissed.

10. Count 12, 13, and 14 Fail Because The Recorded Conversation With Does 12, 13 and 14 Was Not "Confidential."

The facts adduced at the Preliminary Hearing leave no doubt that the dinner conversation between Merritt, Daleiden, and Does 12, 13 and 14 was not a "confidential communication" within the meaning of Section 632:

- On May 22, 2015, Merritt, Daleiden, Doe 12, Doe 13 and Doe 14 met together at a restaurant and had one dinner conversation to which all 5 were parties. (Tr. 359:13-19; 639:15-24).
- The reservation was made by Daleiden under the name of Susan Tenenbaum. (Tr. 1156:6-17). Daleiden and Merritt were taken to the table first, before the others

arrived, and determined the seating arrangements, into which Does 12, 13 and 14 had no input. (Tr. 1159:27-1160:5).

- The dinner meeting was a business meeting, and Doe 12 did not expect the information discussed to be confined to the parties, but expected that information to be shared with the respective business teams of both BioMax and StemExpress. (Tr. 572:14-28; 645:28-646:5).
- There was a service station in use by restaurant staff **immediately adjacent** to the table where the dinner conversation was taking place. (Tr. 652:15-18).
- During the dinner meeting, wait staff approached the table and the service station, no more than five feet away, and were close enough that they could overhear the conversation at the table. (Tr. 1079:11-1080:8).
- At one point during the dinner meeting, another party was seated at the adjacent booth, with one patron directly behind Doe 12 and Doe 14. **The patron was close enough for Doe 13's elbow to make contact with him**. (Tr. 1080:9-20). The patron and others were able to overhear the conversation at the table where Merritt, Daleiden and Does 12, 13 and 14 were seated. (Tr. 1080:21-28).
- When Doe 13's elbow made contact with the patron in the adjacent booth, Merritt asked "**Am I talking to loudly**?" and **Doe 13 responded that she was not**, but that he had just touched the patron with his elbow. (Tr. 1165:26-1170:19). **Two separate video files, from two vantage points, confirmed this**. (*Id.*) From that point on, **the discussion continued with no change in subject, no change in tone**. (Tr. 1170:20-27). The presence of other patrons close enough to make physical contact with them had **no impact** at all on the subject, tone and nature of the discussion between Merritt, Daleiden, Doe 12, Doe 13 and Doe 14. (*Id.*)
- At one point in the dinner discussion, the parties were discussing **making profits from the sale of human organs**. (Tr. 1172:5-1173:25). The video shows that the patron sitting at the adjacent booth has his ears no more than **18 inches** away from

the mouths of Doe 12 and Doe 13. (*Id*.) **Doe 12 and Doe 13 took no steps to ensure that the complete stranger could not over them**. (*Id*.) Because the other patron was only 18 inches away, he could certainly overhear the discussion about profiting from the sale of human organs. (*Id*.)

- At another point during the dinner meeting, the parties were discussing the procurement of **human livers**, including quantities, quality and profitability. (Tr. 1161:16-1162:11). A waiter came to the table during that discussion, and **Doe 13 continued to talk on the same subject, in the same tone of voice, without any effort to stop or change the conversation by Doe 13 or Doe 12**. (Tr. 1162:12-1163:1; 1163:8-13). There is no doubt that the waiter could overhear the discussion regarding human livers. (1163:2-7).
- Doe 12 testified that Doe 13 supposedly told her that Doe 13 had sent a draft NDA to BioMax prior to the May 22, 2015 dinner meeting, but testified that she did not learn about this supposed fact until **after** the dinner meeting was concluded, "directly **after** dinner, standing outside the restaurant." (Tr. 352:2-21). Doe 12 recalls no details of that supposed conversation. (Tr. 355:1-10).
- StemExpress could find no email indicating that an NDA was sent to BioMax prior to June 18, 2015, nor prior to the May 22, 2015 dinner meeting. (Tr. 348:6-351:2).
- Doe 12 is not aware of any documents that could show that an NDA was sent to BioMax prior to the May 22, 2015 dinner meeting.
- StemExpress has no record of an NDA that was sent to BioMax prior to the May 22, 2015 dinner meeting. (Tr. 621:14).
- An NDA was ultimately executed between StemExpress and BioMax on June 22, 2015, one month **after** the dinner meeting. (Tr. 357:10-21). The effective date of the NDA was June 22, 2015. (Tr. 636:7-13).
- Doe 12 is aware that, without NDAs, business partners would be free to disclose StemExpress' confidential information, and that is why she and StemExpress

require signed NDA agreements to be in place before confidential information is discussed. (Tr. 618:12-619:4).

- As the CEO of StemExpress, Doe 12 understands the difference between a proposed agreement and a signed agreement. (619:27-620:2).

With these facts, and under these circumstances, the Attorney General cannot possibly meet her burden of proof as to Counts 12, 13 and 14. The willingness of Does 12, 13 and 14 to discuss profiting from human organ sales in the presence of complete strangers that were **close enough to make physical contact**, coupled with Doe 13's response to Merritt that she was **not talking too loud**, leaves no doubt that the parties did not desire to confine that communication to just themselves, and the parties reasonably expected that they could be overheard. Counts 12, 13 and 14 should be dismissed.

III. THE ATTORNEY GENERAL HAS FAILED TO CONTROVERT MERRITT'S AFFIRMATIVE DEFENSE UNDER PENAL CODE SECTION 633.5.

A. Legal Principles And Burdens.

Merritt has raised an affirmative defense under Penal Code Section 633.5, which provides, in relevant part:

> Sections 631, 632, 632.5, 632.6, and 632.7 **do not prohibit** 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….

§ 633.5 (emphasis added).

Under California law, a defendant's burden to demonstrate an affirmative defense is very light—even lighter than a preponderance of the evidence:

> In California we impose only the **most minimal burden upon a defendant** with respect to **excuse or justification.** All that is required is that there be **some evidence supportive of excuse or justification** or that the defendant in some manner inform the court that he is relying upon such a defense. In such a case the jury must be instructed on the defense and **the prosecution bears the burden of disproving it beyond a reasonable doubt.**

People v. Frye, 7 Cal. App. 4th 1148, 1158–59 (Cal. App. 1992) (emphasis added).

This Court, in its September 16, 2019 Order denying Daleiden's Motion to Quash or Traverse the Search Warrant, agreed that the Attorney General does bear the burden of disproving Defendants' affirmative defense under 633.5 with evidence beyond a reasonable doubt, and that at trial Defendants' "burden … is merely to raise a reasonable doubt as to [their] guilt." (*Id*. at 8 (quoting *People v. Mower*, 28 Cal. 4th 457, 480-81 (2002)).

In the context of a preliminary hearing, however, a defendant's proof of an affirmative defense can demonstrate the prosecution's lack of probable cause, sufficient to dismiss the case:

> [At a preliminary hearing] the defendant must be permitted, if he chooses, to elicit testimony or **introduce evidence tending to** overcome the prosecution's case or **establish an affirmative defense**.

Jones v. Superior Court, 4 Cal. 3d at 667–68 (emphasis added).

B. Defendants Have Greatly Exceeded Their "Minimal Burden" Of Showing That They Reasonably Believed That The Evidence They Were Gathering Related To the Commission Of Violent Felonies.

Over the course of two days, Daleiden testified at length and in detail about a plethora of evidence he had gathered, prior to the first recording in California, which reasonably led him to believe that Planned Parenthood – acting through its various employees – was engaged in violent felonies, including medical battery (changing abortion procedure to increase profits from organ sales, without proper consent), partial birth abortion, and homicide and torture (harvesting organs from born-alive infants in failed abortions). The mountain of evidence gathered by Daleiden in the four years prior to the first California recording is detailed in his concurrently-filed closing argument. For the sake of brevity, Merritt hereby adopts in full and incorporates Daleiden's closing argument, as if fully set herein.

Critically, Daleiden testified that, prior to the first recording in California, he shared **all** of the evidence he had gathered with Merritt. (Tr. 1125:2-28). This included "all of the reasons why he believe[d] that various abortion providers or tissue procurement organizations were engaged in illegal activity or violent felonies." (Tr. 1125:20-24). Daleiden also shared with Merritt all of the evidence and findings that he gathered during the Human Capital Project itself, as it was being gathered. (Tr. 1126:1-10). As a result, "the things that [Daleiden] knew before and during [his]

investigation regarding the world of fetal tissue procurement and potential illegal activity—**Ms. Merritt knew those things by and large as well**." (Tr. 1126:11-14 (emphasis added)). The Attorney General made no effort to rebut **any** of the evidence that Ms. Merritt's knowledge and belief was co-extensive with Daleiden's.

C. The Attorney General Made No Effort To Rebut Any Of The Evidence Presented By Defendants As To The Reasonableness Of Their Belief That The Evidence They Were Gathering Related To the Commission Of Violent Felonies.

The Attorney General also made absolutely **no effort** to rebut any of the evidence presented by Defendants as to the basis for, and the reasonableness of, their pre-recording belief that the evidence they would gather related to the commission of violent felonies. **Nothing** about the 20/20 undercover investigation and its findings. **Nothing** about the Dean Alberti revelations. **Nothing** about the Stanford Study and the StemExpress-Planned Parenthood connection. **Nothing** about the expert opinions from Dr. Deisher or Dr. Smith. **Nothing** about the revelations from Perrin Larton. **Nothing** about Holly O'Donnell. And **nothing** about the numerous contacts Daleiden had with law enforcement authorities prior to releasing the videos to the public, demonstrating that he indeed harbored a good faith, reasonable belief that he was uncovering, and had uncovered, evidence of violent felonies. Guilty people with guilty minds don't go to the police and provide them with the evidence of their crimes.

In other words, the Attorney General has presented **nothing about anything**.

Not only did the Attorney General completely fail to cross-examine Mr. Daleiden on any of these evidentiary bases, but the Attorney general also completely failed to present any of its own witnesses or testimony in rebuttal. The Attorney General's evidentiary failure is glaring. Under these circumstances, the Attorney General cannot possibly have raised a "serious suspicion" that Daleiden and Merritt are guilty of the charged offenses, because the Attorney General did nothing to rebut or overcome their complete, affirmative defense. The remaining 14 counts must be dismissed.

IV. NONE OF THE COUNTS IN THE AMENDED COMPLAINT CAN PROCEED TO TRIAL, BUT IF ANY OF THEM DO, THEY MUST BE CONSOLIDATED.

As demonstrated above, none of the remaining 14 counts in the Amended Complaint can proceed to trial, and all must be dismissed. However, if the Court decides to save any of the counts, which it should not do, the Court should consolidate all surviving Section 632 charges into one count.

Daleiden's uncontroverted testimony at the Preliminary Hearing demonstrates that, as happened in *People v. Bailey*, 55 Cal. 2d 514, 518–19 (1961), any surviving Section 632 charges should be consolidated into one count, because all recordings were indisputably part of **one** overarching plan and **one** undercover investigation with **one** intent to investigate possible criminal conduct:

> The test applied … in determining if there were separate offenses or one offense is **whether the evidence discloses one general intent or separate and distinct intents.**

Bailey, 55 Cal. 2d at 518–19 (emphasis added).

When asked about the manner in which the recordings of the remaining 13 Does were carried out, Daleiden testified that they were all done as "part of a single overarching plan," (Tr. 1126:16-20), called the Human Capital Project, which was a "unified whole" with all of the undercover work, and which he began developing approximately between January and February of 2013. (*Id*. at 1126:21-1127:2). The first of the recordings began in April 2014, (*id*. at 1127:7-10), and during that project, the recording equipment would automatically separate video files out approximately every 20 to 30 minutes, (*id.* at 1127:11-24). Within the **one** Human Capital Project, the remaining 13 Does were recorded in only a handful of recording events, (*id*. at 1127:25-1128:4), each of which Mr. Daleiden explained began and ended with the touch of the "on" and "off" buttons on the video recorder. (*Id.* at 1128:5-7).

Mr. Daleiden clarified in further testimony that recordings at the NAF conference (recording Does 1-7, with Doe 8 dismissed) happened in close proximity, each instance within a few minutes of the next, and were sometimes contained in the same video file. (*Id.* at 1128:12-21).

Similarly, the restaurant lunches and dinners involved multiple Does sitting **together** (*e.g.*, Does 10 and 11; Does 12, 13 and 14) for **one** conversation. (*Id*. at 1128:8-11).

Even if this Court declines to apply the rule set forth in *Bailey*, it must still consolidate at least: (1) any surviving Counts 1-7 (NAF recordings) together into one; (2) any surviving Counts 10 and 11 together into one; and (3) any surviving Counts 12, 13 and 14 together into one. *See People v. Whitmer*, 59 Cal. 4th at 737; *People v. Wilson*, 234 Cal. App. 4th 193, 199 (Ct. App. 2015). As described by the California Supreme Court in *Whitmer*, "[i]n *Bailey*, the defendant committed a single misrepresentation and then received a series of welfare payments due to that misrepresentation. Other than omitting to correct the misrepresentation and accepting the payments, the defendant committed no separate and distinct fraudulent acts." *Whitmer*, 59 Cal. 4th at 740 (emphasis in original); *see also People v. Wilson*, 234 Cal. App. 4th at 199 ("'Answering a unit of prosecution question requires courts to determine when the 'actus reus prohibited by the statute—the gravamen of the offense—has been committed more than once.'" (quoting *Whitmer* 59 Cal. 4th at 744)).

The plain text of Section 632(a) bears out that one recorded conversation, even if multiple persons are present, constitutes only one prosecutorial unit:

> A person who, intentionally and without the consent of all partie**s** to **a** confidential communication, uses **an** electronic amplifying or recording device to eavesdrop upon or record **the** confidential communication, whether the communication is carried on among the partie**s** 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) **per violation**, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment….

Id. (emphasis added). The legislature recognized the common sense notion that one communication (singular) may have multiple parties (plural), and that is why it referred to the plural–consent of "all parties," while in the same paragraph referring to "**a**" and "**the**" "confidential communication" (singular). *Id*. The prohibitory focus of Section 632(a) is on the recording of the communication itself, always used in the singular, and not on how many multiple parties may be

part of one communication. *Id*. Therefore, the legislature could only have intended one unit of prosecution per recorded conversation, even if multiple parties are present. (*Id*.)

Moreover, because Section 637.2 (which allows civil claims for alleged violations of Section 632) expressly contemplates certain damages **per victim, per violation**, the legislature's intent can reasonably be understood as intentionally deciding **not to** provide the People in criminal cases with an avenue to stack counts (by prosecuting per victim rather than per recorded confidential communication) in a criminal prosecution: "It is an equally settled axiom that when the drafters of a statute have employed a term in one place and omitted it in another, **it should not be inferred where it has been excluded**." *People v. Woodhead*, 43 Cal. 3d 1002 (emphasis added). Considering, then, the textual differences between Sections 632(a) and 637.2(a), the only reasonable conclusion that can and must be drawn is that the legislature knew how to define the unit of prosecution to include or exclude multiple victims per recorded confidential communication under 632(a), and it expressly chose to **exclude** multiple victims.

As such the counts must be defined by the number of "confidential communications" allegedly recorded, not by the Attorney General's baseless method of assigning counts per number of Does irrespective of how many were recorded simultaneously or during the same incident (e.g., same conference, same lunches, or same dinner). Here, the evidence is undisputed that the NAF recordings took place at the same, continuous conference at the same hotel. (Tr. 1153:28—1154:8 (Does 1, 2, 3, 5, 6, 7); 545-546 (Doe 4)). Likewise, the evidence is undisputed that Does 10 and 11 were part of the same, single conversation, a common-sense fact that the Does themselves admitted. (*E.g.*, Doe 10 (Tr. 677:28-678:6; 679:27-680:4; 720:24-721:1)). And similarly, the evidence is undisputed that Does 12, 13 and 14 were also part of the same, single conversation, another common-sense fact admitted by Doe 12 (Tr. 359:13-19; 639:15-24), and confirmed by Agent Cardwell (Tr. 452:17-20; 453:17-22; 509:11-18; 510:5-14).

In *Whitmer*, the Court held that "'[w]hether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case . . ..'" 59 Cal. 4th at 737 (quoting *Bailey*, 55 Cal. 2d at 519). The facts adduced at the Preliminary Hearing, that all recordings were

conceived and undertaken under one plan—the Human Capital Project—and one intent (to investigate and report on potentially criminal conduct), require that all surviving counts be consolidated into one. Alternatively, the evidence at least demonstrates that any surviving Counts 1-7 should be consolidated into one, any surviving Counts 10 and 11 should be consolidated into one, and any surviving Counts 12, 13, and 14 should be consolidated into one.

Finally, Merritt must end this section the same way she started it, by underscoring that it would be a miscarriage of justice for **any** of the Counts to survive and for her to be bound over for trial on the current record. Nothing in this section should be construed as any indication that the Attorney General has met his burden as to any Count. All Counts should be dismissed.

V. NONE OF THE COUNTS IN THE AMENDED COMPLAINT CAN PROCEED TO TRIAL, BUT IF ANY OF THEM DO, THEY SHOULD BE REDUCED TO MISDEMEANORS.

As demonstrated above, none of the remaining 14 counts in the Amended Complaint can proceed to trial, and all must be dismissed. However, if the Court decides to save any of the counts, which it should not do, the Court should use its discretion under Penal Code Section 17(b)(5) to reduce the charges against Merritt to misdemeanor charges. There was more than sufficient evidence introduced at the Preliminary Hearing to warrant a reduction.

The Amended Complaint charges Merritt with felony violations of Penal Code Sections 632(a) (Counts 1-7, 9-14), and 182(a)(1) (Count 15). The felony charges under both of those statutes qualify for reduction to misdemeanor offenses under Section 17(b)(5), because both statutes are "wobblers" – they provide alternative punishment options of either state prison or county jail, and/or either fine or imprisonment in county jail. *See*, Cal. Penal Code. § 632(a) ("shall be punished by a fine … or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment"); Cal. Penal Code. § 182(a)(1) ("shall be punishable by imprisonment in a county jail for not more than one year, or pursuant to subdivision (h) of Section 1170, or by a fine not exceeding ten thousand dollars ($10,000), or by both that imprisonment and fine").

Penal Code §17(b)(5) provides, in relevant part:

> (b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:
>
> *** * ***
>
> (5) **When, at** or before **the preliminary examination** … **the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.**

Id. (emphasis added).

Section 17(b)(5) "sets forth the magistrate's authority to determine a wobbler to be a misdemeanor 'at or before the preliminary examination….'" *People v. Superior Court* (*Alvarez*), 14 Cal. 4th 968, 973 n.2 (1997).

> [S]ection 17(b), read in conjunction with the relevant charging statute, rests the decision whether to reduce a wobbler solely in the discretion of the court. By its terms, the statute sets a broad generic standard. . . .The governing canons are well established: This discretion ... is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice…

Id. at 977 (quotations and citations omitted). The *Alvarez* Court found "scant" judicial authority that would prescribe factors for consideration but explained that, "since all discretionary authority is contextual, **those factors that direct similar sentencing decisions are relevant**, including **the nature and circumstances of the offense, the defendant's appreciation of an attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial**." *Id.* at 978 (emphasis added) (quotations and citations omitted).

> [A] defendant is entitled to have an independent determination of whether he should be held to answer on a felony or a misdemeanor.... ([*Esteybar v. Municipal Court* (1971) 5 Cal. 3d 119, 126].) We have no doubt that this entitlement to an independent determination is a substantial right. (*Jackson v. Superior Court* (1980) 110 Cal. App. 3d 174, 177) . . . [I]t is ordinarily the preliminary examination which is the examination of the circumstances of the particular case that justifies reduction [at this stage under subsection (5)].

People v. Kunkel, 176 Cal. App. 3d 46, 52 (Ct. App. 1985).

In this case, numerous undisputed facts adduced at the Preliminary Hearing weigh in favor of reduction from felony to misdemeanor charges.

First, as to Merritt's "traits of character as evidenced by [her] behavior and demeanor at the trial," *Alvarez*, 14 Cal. 4th at 978, the Court has had an opportunity to observe – not just at the lengthy preliminary hearing but at every hearing since the inception of this prosecution – that Merritt is a polite, courteous, elderly grandmother, who, despite obvious physical disabilities, has conscientiously and attentively attended every required hearing, at great personal and physical costs (especially now that she lives across the country, in Florida). That the Attorney General is still prosecuting her for **felonies**, and still seeking a prison term of **more than a decade** – potentially a life sentence for Merritt – is unconscionable.

Second, there is no question that, irrespective of where one falls on the pro-choice to pro-life spectrum, there was a strong and weighty public interest in Defendants' journalistic, undercover investigation into the potentially illegal changing of abortion procedure to maximize profits from human body parts. *See, e.g., Safari Club International v. Rudolph,* 862 F.3d at 1122 ("public interest" is broadly construed to include "private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." (citation omitted)). The federal and state investigations, and criminal prosecutions, resulting from Mr. Daleiden's and Merritt's journalistic investigations are no secret, and this Court was made aware of them in prior briefs. For example, as Merritt noted previously, and as confirmed by Daleiden at the Preliminary Hearing (Tr. 1205:21-1206:13), at least two fetal tissue profiteering companies in California were successfully prosecuted, forced to pay almost $8 million in penalties, and shuttered permanently in connection with their unlawful human organ transactions. (*Id*.) The prosecuting authority in those cases, the Orange County District Attorney, specifically credited Defendants' and CMP's undercover investigation for tipping them off, and providing them the requisite evidence, regarding the crimes being committed. (*Id*. at 1206:9-13). It is unconscionable to prosecute Merritt as a felon, when **actual** criminals have already been caught – and punished – because of the very investigation that is claimed to be criminal here.

Third, this entire prosecution—and notably **the very first** criminal prosecution against undercover investigation activities in California—is premised on Daleiden's and Merritt's

endeavor to ferret out their strong suspicions of criminal activity, which were detailed at the Preliminary Hearing, and which were and remain **entirely uncontroverted and unrebutted** before the Court. (*See* Section II.B., *supra*; *see also*, Daleiden closing argument). Merritt's and Daleiden's undercover investigation necessarily entailed their freedom of speech under the state and federal constitutions. *See Lieberman v. KCOP Television, Inc*., 110 Cal. App. 4th at 66 (undercover news gathering still protected under First Amendment, despite lack of privilege to violate criminal law; plaintiff's complaint fell within the scope of California's anti-SLAPP statute). Thus, this Court cannot ignore the overarching public interest and fundamental speech rights undergirding Defendants' conduct when considering whether to reduce any remaining charges to misdemeanors.

Fourth, because this is the first criminal prosecution in California (and in the nation) of this kind, there are no cases applying Section 632 in the context of undercover citizen journalists investigating potential crimes. The Attorney General's **felony** prosecution depends entirely on making new law, and on a strict application of Section 632 taken from **civil** litigation. The fundamental due process violations involved in creating new criminal law and applying it retroactively were discussed in Sections II., V., *supra*. *See also, Bouie v. City of Columbia*, 378 U.S. at 358 (regardless that civil trespass laws could have applied, judicial expansion in criminal context was unconstitutional); *Kight v. CashCall, Inc*., 200 Cal. App. 4th at 1388 (where sole issue before court was civil liability under Section 632, court expressly "made no attempt to determine whether [its] interpretation [would] extend[] to a criminal matter"). These concerns counsel against any further prosecution altogether, but they certain militate against subjecting Merritt to further felony charges.

Fifth, not only is there a dearth of applicable law in this case, there is also a dearth of facts to support the Attorney General's prosecution, as explained more fully in Sections II.B.,C., *supra*. As uncovered at the Preliminary Hearing, many of the Doe "victims" did not even know they were "victims" until Agent Cardwell called to tell them. (*E.g.*, **Doe 1** (Tr. 464:19-26; 772:23-28; 774:7-11; 778:2-5, 15-28; 779:15-28); **Doe 2** (Tr. 471:4-14; 474:9-10; 778:2-5; 772:23-28; 774:7-11);

Doe 3 (Tr. 137:4-12); **Doe 4** (Tr. 479:10-22; 778:27-28; 779:1-11); **Doe 6** (Tr. 778:2-5; 780:3-4; 772:23-28; 773:1-3; 774:7-11); and **Doe 7** (Tr. 80:23-26; 94:23-28; 95:1-11; 17-23). The patent inadequacy and insufficiency of Agent Cardwell's "investigation," and the admitted untrue and misleading statements in his **sworn** arrest warrant affidavit, are detailed in Section II.D., *supra*. Moreover, from Doe 9, who testified that she just didn't get "the big deal" when she first saw the video of her conversation released, and that "there was nothing wrong in the video" (Tr. 289:11-26), to Doe 4, who never even saw the video and whose supposedly "confidential" communication took place almost entirely in an elevator, with a complete stranger along (Tr. 545:22-26; 546:3-547:1), to Does 12, 13 and 14, who were within elbow-distance of a complete stranger during their restaurant conversation with Defendants (Tr. 1080:9-20; 1165:26-1170:27) – this **felony** prosecution has no basis in fact.

Sixth, Daleiden's **unrefuted** testimony at the Preliminary Hearing concerning Defendants' good faith efforts made to avoid violating criminal law demonstrated Defendants' genuine basis for proceeding with their undercover investigation. For example, Daleiden testified about several precautionary measures Defendants took to avoid illegality, including at the expense of their investigation:

> Well, the biggest measure was to be sure to only video record in places of public accommodation, like the lobby and the lobby mezzanine level of the St. Francis Hotel and also like public restaurants like Craft and AKA Bistro and Bistro 33. In addition, for the restaurants that -- where we chose the location, like Craft and AKA Bistro, both of those restaurants have private meeting rooms where you can reserve a completely enclosed, four walls enclosed, closed door space to have a private meeting. And we specifically selected places at those restaurants that were not in the private meeting room, that were in places that were completely publicly accessible. And that's also why I was concerned about the seating arrangement in El Dorado. Because I wanted to make sure we were not in a private meeting room.

(Tr. 1131:23-1132:8). Daleiden further testified that, "I chose to keep the recordings within the boundaries of the California law as I understood it." (*Id.* at 1132:19-20). And Daleiden testified – also without any rebuttal – that he and Merritt were invited and had unique opportunities to record inside private Planned Parenthood facilities within California, where they would have expected to gather even more useful information for their investigation, but they turned down those prime

opportunities because they wanted to remain compliant with the law, as they reasonably understood it. (*Id*. at 1132:21-1133:20). In addition, Daleiden testified that Merritt never advised, aided, assisted, promoted, encouraged, nor instigated any illegal recording of known confidential communications in California. (*Id*. at 1134:10-21). Merritt's (and Daleiden's) good faith attempts to comply with a novel California law that had never before been applied against undercover investigators merit a downward reduction for any charges that can somehow survive the Preliminary Hearing.

Seventh, and finally, beyond the above precautions, Daleiden (and through him, Merritt) **sought, received and relied on legal advice** as to the legality of the contemplated undercover investigation, prior to making the first recording in California, (*id*. at 905:16-18), as demonstrated in the transcript excerpts below:

> I obtained advice from **quite a few different attorneys actually**. …[A]s far as what is permissible under California Penal Code Section 632, you know, from that point working with Live Action in 2008 and on, I and we were always very conscious of the plain language of Penal Code Section 632, the rules surrounding confidential conversations compared to public conversations or conversations in public areas where people can overhear. And I was also aware since about 2008 or 2009 of Penal Code Section 633.5 as a further sort of limitation or circumscription of the definition of different kinds of communications treated under the California recording law. So I don't know that I would say beginning in 2013. I think probably starting in 2012, maybe 2011, it was sort of a – sort of an ongoing -- I wouldn't say consultation, but every so often, you know, I would kind of compare notes with people about the recording law in California. And when it came time to actually put together this project proposal in 2013, **I did talk very specifically in detail with attorneys at the Thomas More Society, attorneys at Life Legal Defense Foundation, and attorneys at Alliance Defending Freedom, all about the specific provisions of Penal Code Section 632 and 633.5**.

(*Id*. at 905:20—907:1 (emphasis added)). And, in fact, Daleiden testified that he was advised specifically that:

> **As of 2013, I was told by multiple attorneys that my understanding of the California law was correct and it was legal to record public conversations in public spaces with other people in California surreptitiously**. **… where other people can overhear**.

(*Id*. at 907:27-908:4 (emphasis added)).

And, critically, Daleiden testified that he shared his information with Merritt on numerous occasions, **including the aforementioned legal advice he obtained**, knowledge he gained about the fetal tissue procurement market, research findings obtained between 2010 and 2013, the 20/20 video, and "all the reasons why [he] believe[d] that various abortion providers or tissue procurement organizations were engaged in illegal activity or violent felonies. (*Id*. at 1125-26).

None of this was ever rebutted, disputed or controverted by the Attorney General. In the face of these undisputed facts, allowing any of the remaining charges to proceed to trial would be a serious miscarriage of justice, but allowing them to survive as felonies would be an outright travesty.

CONCLUSION

For these reasons, those discussed at the Preliminary Hearing, and those that will be discussed at the October 22, 2019 hearing, the Court should find that the Attorney General has not presented sufficient cause to believe that Merritt is guilty of any public offense, and should order that the Amended Complaint be dismissed and Merritt be discharged.

Respectfully submitted,
DEFENDANT SANDRA S. MERRITT
By Counsel.

BY: _____

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CERTIFICATE OF SERVICE

Pursuant to Cal. Code Civ. P. §§ 1013(g), 1013a and 1010.6, I hereby certify that, on **October 8, 2019**, I served the foregoing *Defendant Sandra Susan Merritt's Written Closing Argument for Preliminary Hearing*, on the following parties/entities via the following methods:

Johnette Jauron Deputy Attorney General California Department of Justice 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102 Johnette.Jauron@doj.ca.gov	Steve Cooley Brentford J. Ferreira Steve Cooley & Associates 5318 E. 2nd Street, #399 Long Beach, CA 90803 Steve.Cooley@stevecooley.com Bjferreira47@hotmail.com
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Via Electronic Mail at the email addresses shown above, pursuant to their agreement to receive electronic service.

I further certify that I am over the age of 18 and not a party to this action.

Dated: October 8, 2019

Horatio G. Mihet