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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 MERRITT'S NOTICE; MOTION TO DISMISS UNDER PENAL CODE SECTION 995; AND MEMORANDUM OF POINTS AND AUTHORITIES.** **Hearing Date: TBD** **Time: TBD** **Dept. No.: 28** **Judge: Suzanne Bolanos**

TO THE SUPERIOR COURT AND TO THE PEOPLE OF THE STATE OF CALIFORNIA AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that Defendant Sandra Susan Merritt ("Merritt") will move this Court for an order dismissing all Counts of the Information in the above-captioned matter, pursuant to Cal. Penal Code Section 995.

Merritt files her Motion to Dismiss Under Penal Code Section 995 based on this Notice, and the attached Memorandum of Points and Authorities. In support thereof, Merritt further relies

upon the files, records in this case, and such argument as may be presented at the hearing on this matter.

Respectfully submitted

DEFENDANT SANDRA SUSAN MERRITT,

By Counsel.

DATED: April 13, 2020

Respectfully submitted,
DEFENDANT SANDRA S. MERRITT
By Counsel.

BY: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

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CORRELATION CHART FOR COUNTS AND DOES
AT PRELIMINARY HEARING AND IN THE INFORMATION

Initially, in the Amended Complaint, the Attorney General charged 14 counts of illegal recording under Penal Code Section 632, each involving a correspondingly numbered alleged "Doe" victim. Six of those counts were dismissed by Judge Hite at the Preliminary Hearing, and therefore eight Counts and eight "Doe" alleged victims remain.

Confusingly, in the subsequently filed Information, the Attorney General has now **renumbered** the Counts and Does, so they no longer match the numbers used at the Preliminary Hearing and in the transcript. Throughout this motion, Merritt makes every effort to delineate "Information Does" from "Preliminary Hearing Does," but the task is admittedly difficult and cumbersome, as will be the Court's review of the Information in light of the Preliminary Hearing Transcript. Merritt regrets the needless confusion caused by the Attorney General.

The following chart correlates the Information Does with the Preliminary Hearing Does. The chart also identifies those Does which did not testify at the Preliminary Hearing, and regarding which the Attorney General is relying solely upon the Proposition 115 hearsay testimony of its investigator, which is relevant for the argument in Section IV, *infra*.

PRELIMINARY HEARING DOE AND COUNT NUMBER	INFORMATION DOE AND COUNT NUMBER	PROP 115
1	1	YES
2	2	YES
3	3	
4	DISMISSED	
5	4	YES
6	5	YES
7	6	
8	DISMISSED	
9	DISMISSED	
10	7	
11	8	YES
NOT ASSERTED	9 (NEW; No Doe)	
12	DISMISSED	
13	DISMISSED	
14	DISMISSED	
15 (Conspiracy; No Doe)	10 (Conspiracy; No Doe)	

INTRODUCTION

The evidence adduced at the Preliminary Hearing leaves no doubt that the Attorney General has failed to meet his burden of showing probable cause as to each and every one of the ten felony charges now brought in the Information. For the reasons that follow, this Court should dismiss all of those charges, and the entire Information.

STATEMENT OF FACTS

Defendant Sandra Susan Merritt ("Merritt") is a 67-year-old grandmother. Between 2013 and 2015, Merritt worked as an undercover investigator on a citizen journalism project called "Human Capital Project," led by the Center for Medical Progress ("CMP") and Defendant David Daleiden ("Daleiden"), to investigate potential violent criminal acts within the abortion industry, including illegal trafficking in human body parts and born-alive infant homicide. (Tr. 897:2-10).[1] For many months prior to commencing the undercover recordings that are the subject of this prosecution, Daleiden meticulously gathered documentary and video evidence from numerous sources within the abortion and fetal tissue industry, which left him the strong and firm suspicion that abortion providers were violating federal laws with respect to fetal tissue procurement and profiting, committing medical battery on unconsenting patients, and committing crimes of violence against born-alive human beings in order to procure fetal tissue and profit therefrom. (*See* Daleiden Motion to Dismiss Under Penal Code Section 995, pp. 2-55).[2] So voluminous was the **pre-recording** evidence obtained by Daleiden, that it required several days to present to The Honorable Judge Christopher Hite[3] at the Preliminary Hearing, and several dozen pages to summarize for this Court. (*Id*.)

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[1] Throughout this motion, "Tr." refers to the Reporter's Transcript of Proceedings from the Preliminary Hearing held in this matter in September 2019, filed on December 16, 2019. A copy of the transcript is provided for convenience with this motion.

[2] Merritt joins in, and adopts as her own, Daleiden's Section 995 Motion to Dismiss.

[3] The undersigned counsel's practice and preference when seeking review of a judicial decision is to refer to the judge whose decision is being reviewed as "the Court," rather than by name. In the somewhat different posture of a Section 995 review, "the Court" below and this reviewing Court are one and the same. Accordingly, to avoid confusion, this motion refers to the

Daleiden shared all of the extensive evidence he collected with Merritt prior to making the recordings at issue in this case. (Tr. 1125:2-28). Merritt therefore shared Daleiden's belief that violent crimes were potentially taking place in the fetal tissue procurement world and needed to be investigated. (Tr. 1126:11-14). Merritt thus assisted Daleiden and CMP as an undercover investigator, and the Human Capital Project recorded numerous undercover interviews in California and elsewhere. The interviews were conducted in public restaurants, public hotels and other public places, and the persons recorded who testified at the Preliminary Hearing readily admitted that (1) they expected Daleiden and Merritt to share the contents of the recorded conversations with others who were not present there, and (2) they knew that the conversations could be overheard by unknown restaurant staff, hotel staff and other persons not parties to the conversations. (*See* Sections V.B.-C., *infra*).

Prior to recording the undercover interviews in California, Daleiden sought the advice of "**quite a few different attorneys**, … as far as what is permissible under California Penal Code Section 632." (Tr. 905:20—907:1 (emphasis added)). Discussing his proposed course of conduct "very specifically in detail with attorneys" from **three separate public interest law firms**, including "the specific provisions of Penal Code Section 632 and 633.5," Daleiden "was **told by multiple attorneys that … it was legal to record public conversations in public spaces with other people in California surreptitiously, … where other people can overhear**." (Tr. 907:27-908:4 (emphasis added)). Prior to recording the conversations at issue, Daleiden shared the legal advice he received "from no fewer than three separate law firms regarding the provisions of Section 632" with Merritt. (Tr. 1125:25-28). The two of them formed a good faith, sincere belief that their proposed recordings would not violate Section 632, because they would not be recording "confidential communications." (*Id*.)

Throughout the investigation, Daleiden and Merritt worked dutifully to stay within the bounds of Section 632, as they understood it and as it was explained and confirmed to them by the

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Court below primarily as "Judge Hite," and occasionally as "the Magistrate Judge." Merritt and her counsel have the utmost respect for Judge Hite and do not wish for this less formal naming convention to be construed otherwise.

attorneys. They took numerous precautions to ensure that their recordings remained legal, including making "sure to only video record in places of public accommodation," avoiding "private meeting rooms" at restaurants and selecting instead "places at those restaurants that were … completely publicly accessible." (Tr. 1131:23-1132:8). Critically, Daleiden and Merritt were invited and had unique opportunities to record inside private abortion facilities within California, where they would have expected to gather even more useful information for their investigation, but **they turned down those prime investigative opportunities because they wanted to remain compliant with the law**, as they reasonably understood it. (*Id*. at 1132:21-1133:20).

The interviews recorded during the undercover investigation confirmed many of Daleiden's and Merritt's beliefs about potentially illegal activities and violent felonies occurring in the fetal tissue procurement industry. Demonstrating that he and Merritt honestly believed all along that their undercover investigation and recordings were legal under Section 632, before taking their significant findings to the public Daleiden voluntarily took the evidence they collected to numerous law enforcement agencies. (Tr. 1119:24-26; 1142:26-1143:4; 1200:14-1204:12). Some of those agencies and other government bodies have relied upon the evidence collected by Daleiden and Merritt to start investigations of fetal tissue providers and traffickers, to limit or restrict public funds from being spent on illegal activities, and even to indict and prosecute those who were caught red-handed in breaking the law. 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 uncovered by Merritt and Daleiden**. (Tr. 1205:21-1206:13). The prosecuting authority in those cases 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).

The Attorney General of California, however, has taken a different tack. Rather than prosecuting the persons and organizations caught on tape to be engaging in egregious abuses and violations of law, the Attorney General has chosen to bring this prosecution against Daleiden and

Merritt – the first prosecution of its kind in California and possibly the nation. In the Amended Complaint, the Attorney General initially brought 14 felony charges against Merritt and Daleiden for alleged illegal recording of "confidential communications" in violation of Penal Code Section 632, and a fifteenth felony charge for conspiracy to violate the same statute. At the Preliminary Hearing, Judge Hite dismissed six of the charges under Section 632. The Attorney General then filed the remaining 9 charges in the Information, and added a tenth count for an alleged violation of Penal Code Section 483.5(a).

As shown herein, the Attorney General failed to meet his burden of proof at the Preliminary Hearing for all counts now pled in the Information. It was error for Judge Hite to decline to dismiss all of the charges. This Court should now dismiss the entire Information.

LAW AND ARGUMENT

I. STANDARD FOR REVIEW UNDER SECTION 995 AND FOR PROBABLE CAUSE AT THE PRELIMINARY HEARING.

In reviewing this motion to dismiss under California Penal Code Section 995,[4] this Court's "power is limited to determining—on the basis of the transcript of the preliminary hearing alone and without attempting to reconcile conflicting testimony or witness credibility—whether probable cause was demonstrated that the defendant is guilty of the offense added in the information." *People v. Brice*, 130 Cal. App. 3d 201 (1982) (citing *People v. McKee*, 267 Cal. App. 2d 509, 514 (1968)).

> 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).

[4] All further statutory references are to the California Penal Code, unless otherwise noted.

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

"[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 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)).

Reviewing the substantial record established at the Preliminary Hearing in this case demonstrates that the Attorney General did not meet his burden of demonstrating probable cause as to any of the offenses charged in the Information. This Court should therefore dismiss the Information in its entirety.

II. THE COURT SHOULD DISMISS THE NEWLY-MINTED COUNT 9 OF THE INFORMATION, BECAUSE THE EVIDENCE PRESENTED AT THE PRELIMINARY HEARING DOES NOT SHOW THAT MERRITT VIOLATED SECTION 483.5(a).

In Count 9 of the Information filed after the issuance of Judge Hite's Commitment Order, the Attorney General now attempts to bring a brand new felony charge against Merritt for the manufacture, furnishing, transporting etc. of "a deceptive identification document" in violation Penal Code Section 483.5(a). (Information at 4, Count 9). This charge was not permitted in the Commitment Order, and in more than three years since this case was filed the charge had never been included in any of the multiple iterations of the Attorney General's criminal Complaints prior

to the Preliminary Hearing. In a separately filed demurrer, now pending before Judge Hite, Merritt demonstrates that this belated charge is barred by either the three- or four-year statute of limitations. However, even if the Attorney General could clear the fatal limitations hurdle, this Court should dismiss the new charge because it was not shown as to Merritt at the preliminary hearing, and it is brought in violation of Penal Code Section 739.

Section 739 permits the Information to include **only** "offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate [at the preliminary hearing] to have been committed." *Id*. (emphasis added). "Many cases illustrate **the rule** that a defendant may not be prosecuted for an offense not shown by the evidence at the preliminary hearing…." *People v. Burnett*, 71 Cal. App. 4th 151, 165 (1999) (emphasis added) (collecting cases); *see also*, *People v. Dominguez*, 166 Cal. App. 4th 858, 866 (2008), *as modified on denial of reh'g* (Oct. 2, 2008) (same); *People v. Graff*, 170 Cal. App. 4th 345, 360 (2009), *as modified* (Feb. 9, 2009) (same).

As shown below, the new charge against Merritt was not proven at the preliminary hearing, and therefore must be dismissed, for either of two independent reasons: (A) the Attorney General failed to establish an essential element of the offense because he failed to introduce into evidence any "deceptive identification document" bearing Merritt's name, alias or image, and failed to establish that any such identification document allegedly used by Merritt lacked the disclaimer language required by Section 483.5(a); and (B) the Attorney General failed to adduce any evidence that Merritt did any of the enumerated acts prohibited by the statute.

A. The Attorney General Failed to Establish an Element of an Alleged Violation of Section 483.5(a).

Penal Code Section 483.5(a) provides:

> No deceptive identification document shall be manufactured, sold, offered for sale, furnished, offered to be furnished, transported, offered to be transported, or imported or offered to be imported into this state **unless** there is diagonally across the face of the document, in not less than 14-point type and printed conspicuously on the document in permanent ink, the following statement:
>
> **NOT A GOVERNMENT DOCUMENT**

and, also printed conspicuously on the document, the name of the manufacturer.

Id. (emphasis added). Plainly, whether or not the alleged deceptive identification document at issue bears the required "not a government document" statement is an element of any offense charged under this Section. *Id*. Equally plain, the Attorney General failed to establish at the Preliminary Hearing that any allegedly deceptive identification document was connected to Merritt or lacked the mandated statement.

First**, no driver license bearing the image of Defendant Merritt, or the "Susan Tennenbaum" alias that she used during the undercover investigation, or otherwise connected to Merritt, was introduced into evidence** at the Preliminary Hearing. Agent Cardwell testified that four "counterfeit driver's licenses" were seized from Daleiden's apartment and/or computer – two bearing the alias and picture of Daleiden, and two bearing the alias and picture of another investigator – Briana Allen – who was not charged with any crime. (Tr. 414:2- 417:22). These four specimen were admitted into evidence as Exhibits 7A, 7B, 7C and 7D. (*Id*.) However, when the Attorney General asked Agent Cardwell if he had located "**any** other identity document," including any "in the name of Defendant Sandra Merritt," Agent Cardwell responded that he was "not seeing one in her name." (*Id*. at 419:13-19 (emphasis added)). Accordingly, **no "driver license" or "identity document" of any kind bearing Merritt's alias or likeness, or otherwise connected to her was introduced into evidence**. (*Id*.)

Second, and equally fatal, the Attorney General solicited testimony from **Daleiden** (not Merritt), that **he** (Daleiden, **not Merritt**) "created a mock-up photo ID with the name of Susan Tennenbaum," and that document had "Ms. Merritt's picture." (Tr. 1108:2-11). However, the Attorney General did not ask Daleiden, or any other witness, whether or not that document with Ms. Merritt's picture contained the disclaimer required by Section 483.5(a). (*Id*.) Accordingly, without that alleged document in evidence (it was never introduced or admitted into evidence at the preliminary hearing), and without any testimony about its required disclaimer, there is nothing in the record for this Court to consult to determine whether Merritt committed a violation of Section 483.5(a). To conclude that probable cause exists for a violation, this Court would have to

speculate, guess, conjecture or otherwise assume, without any **evidence**, that the document described by Daleiden lacked the disclosure mandated by the statute. But this is exactly what this Court cannot do, because on a Section 995 review "it is the duty of [this Court] to discard - as unreasonable - inferences which derive their substance from guesswork, speculation, or conjecture." *Birt v. Superior Court*, 34 Cal. App. 3d 934, 938 (1973) (citing *Willens v. Superior Court*, 19 Cal. App. 3d 356 (1971); *Malleck v. Superior Court*, 142 Cal. App. 2d 396 (1956); *Bunker* v. *Superior Court*, 96 Cal. App.2d 107 (1950)).

Indeed, probable cause cannot be established without **evidence** (not guesswork) for **each element** of an offense: "[T]he complete failure to present **evidence** on an element requires dismissal of the allegation." *Thompson v. Superior Court*, 91 Cal. App. 4th at 149 n.4 (emphasis added). Having failed to establish that any allegedly deceptive identification document connected to Merritt lacked the disclaimer required by Section 483.5(a), the Attorney General failed to adduce evidence on an element of that offense, and the charge must now be dismissed.

B. The Attorney General Failed to Adduce Any Evidence That Merritt Committed Any of the Enumerated Acts Prohibited by the Statute.

The newly minted Count 9 also fails for a second, independent reason: the Attorney General produced no evidence to show that Merritt did any of the enumerated acts prohibited by Section 483.5(a). As quoted above, Penal Code Section 483.5(a) prohibits nine, **and only nine**, acts in connection with a deceptive identification document that lacks the required disclaimer: (1) manufacture, (2) sale, (3) offer for sale, (4) furnishing, (5) offer to furnish, (6) transport, (7) offer to transport, (8) import into California, or (9) offer to import. *Id*. Notably **absent** from this list are possessing, using, showing or displaying a deceptive identification document. *Id*. **None** of those acts are criminalized by Section 483.5(a).

At the Preliminary Hearing, the Attorney General produced evidence to show, at most, that **Daleiden** (not Merritt) "created a mock-up photo ID" for Merritt (Tr. 1108:2-11), and that Merritt and Daleiden, at most, "**showed** the mock-up photo IDs **in our wallets** to the NAF check-in people at the NAF check-in desk for about half a second to match up with the registrations that [Daleiden]

already paid for about two months previously." (Tr. 1108:16-21). Thus, even if the subject "mock-up photo ID" used by Merritt were a "deceptive identification document" within the meaning of Section 483.5, and even if it had lacked the required disclaimer – neither of which has been shown and neither of which is conceded – the Attorney General has still failed to show that Merritt did any of the nine prohibited acts. Showing that Merritt might have possessed, used, showed or displayed a document – when she allegedly showed it for "half a second" to someone at a registration desk, without even taking it out of her wallet, and without ever relinquishing possession of it – is irrelevant to the charged offense, because **none of those things are among the nine acts actually prohibited by Section 483.5(a)**.

This Court has no authority to graft new prohibitions unto Section 483.5(a), or to otherwise expand the list of nine prohibited acts to include possession, use, showing or display of a deceptive identification document, as the Attorney General apparently entreats. Instead, this Court must "presume the Legislature intended everything in a statutory scheme, and … **should not read statutes to omit expressed language or include omitted language**." *Jurcoane v. Superior Court*, 93 Cal. App. 4th 886, 893-94 (2001) (emphasis added). "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) (emphasis added).

Indeed, the California Legislature has demonstrated that it knows how to prohibit use, possession, showing or display of certain documents, and has prohibited these acts in various circumstances and contexts in at least **three** other statutes that are **not charged** as offenses in this case. *See e.g.*, Cal. Penal Code § 470b (prohibiting the "**display**" or "**possession**" of "any driver's license or identification card … with the intent … to facilitate the commission of any forgery" (emphasis added)); Cal. Penal Code § 472 (prohibiting "**possession**" and willful concealment of counterfeits of various government or public seals (emphasis added)); Cal. Penal Code § 529.5 (imposing **misdemeanor** penalty on "any person who **possesses**" a document purporting to be a government-issued identification card or driver's license, but knowing that it is not actually issued

by government (emphasis added)). By leaving these terms out of Section 483.5(a), the Legislature must be "presumed" to have intended to omit them from its sweep. *Jurcoane*, 93 Cal. App. 4th at 893-94.

Moreover, "[i]n interpreting statutes, our primary goal is to give effect to the Legislature's intent in enacting the law." *Id*. at 892-93. Here, the legislative history of Section 483.5(a) makes it very clear that it was intended to prohibit and punish only acts **in the supply chain** of deceptive identification documents, and not what the recipient end-users of those documents do with them, which is already covered by other statutes. For starters, Section 483.5 is titled "Deceptive identification documents; **requirements for manufacture, sale or transport**; punishment," which clearly indicates that it addresses supply chain manufacturers, sellers and transporters of deceptive identification documents. *Id*. Indeed, prior to a 1995 amendment, Section 483.5(a)'s predecessor (Bus. & Prof. Code § 22430) prohibited **only** the manufacture, sale and offer for sale of deceptive identification documents. *See* S. Comm. on Crim. Proc., Comm. Analysis of AB 156, 1995-96 Reg. Sess., at 2 (Cal. June 6, 1995) (hereinafter "Senate Bill Analysis") (attached hereto as **Exhibit 1**); Assemb. Comm. on Public Safety, Comm. Analysis of AB 156, 1995-96 Reg. Sess., at 2 (Cal. Apr. 4, 1995) (hereinafter "Assembly Bill Analysis") (attached hereto as **Exhibit 2**). In 1995, the Legislature enacted AB 156, which duplicated the predecessor provision at newly added Section 483.5, and added prohibitions on furnishing, offers to furnish, transporting, offers to transport, importing and offers to import. (Senate Bill Analysis, Exh. 1 at 2; Assembly Bill Analysis, Exh. 2 at 1). In adding the new prohibitions on "furnishing," "transporting" and "importing," the Senate indicated that it was attempting to "fill[] in a loophole in existing law." (Senate Bill Analysis, Exh. 1 at 2). The Senate acknowledged that existing statutes not charged here (*i.e.*, Sections 472, 470(b) and 529.5) already punished "the possession or use of a forged driver's license or identification card." (*Id*.) The Senate's concern was therefore elsewhere: "the typical sale of a fraudulent card involves anywhere from three to five sellers and a buyer," but under Section 483.5(a)'s predecessor (Bus. & Prof. Code § 22430), "**not everyone in the chain can be prosecuted**," and "[t]he runner and salesperson on the street who solicits the sale, records

the information, and collects the money are not charged with a crime." (*Id*. (emphasis added)). The Senate indicated that "this bill would close **that** loophole by including the furnishing, transportation, or importation of fraudulent cards." (*Id*. (emphasis added)).

The Assembly was even more clear that its reason for adding "furnishing," "transporting" and "importing" to existing law was to close loopholes in prosecuting those **sellers and middle men** involved in the supply chain of deceptive identification documents, not end users who were already covered by other laws not charged as offenses in this case:

> 1) Purpose. …
>
> We need to amend the Business and Professions Code section 22430 and adopt the proposed legislation because **the sale** of forged cards is doing great damage to our communities. The current law does not adequately provide for the prosecution **of the sellers of these cards**, and the proposed legislation would close the existing loopholes and give prosecutors the tools they need to combat the growing crime problem.
>
> 2) Potential Effect. This bill is **designed to deter the booming sales** of fake identification documents and **allow law enforcement to prosecute not only individuals who make fake ID's but also the sellers and middle men and women** involved in the lucrative fake ID trade.

(Assembly Bill Analysis, Exh. 2 at 2 (emphasis added)).

Thus, the legislative history of Section 483.5 clearly supports and confirms what its title makes plain, which is that only supply chain actions by "sellers" "runners" and "middle men and women" are prohibited, and that "furnishing" and "transporting" were intended to mean the "furnishing" and "transport" of deceptive identification documents **by their manufacturers and middle-men in the supply chain**, and not the momentary showing of a document by an alleged end-user to a door bouncer in order to obtain admission into a conference. One who allegedly shows a document from one's own wallet to a door bouncer at a registration booth, **without even relinquishing possession of it**, cannot possibly "furnish" that document to its fleeting and temporary viewer – not in the plain meaning of that term, and especially not within the meaning and intent of Section 483.5(a).[5]

[5] Additionally, "*Ejusdem generis* instructs that when a statute contains a list or catalogue of items, a court should **determine the meaning of each by reference to the others,** giving

In sum, whatever "evidence" the Attorney General presented as to Merritt at the Preliminary Hearing, there can be no question that he did not present **any** evidence showing that Merritt was engaged in the supply chain of deceptive identifications – as a manufacturer, supplier, runner or middle woman. The Attorney General's decision to "pile on" the felonies in this case and to charge Merritt under Section 483.5(a) is bizarre, and cannot withstand this Court's review under Section 995.

Finally, even if the plain language of Section 483.5(a) and the legislative intent behind it were not clear, and even if the language could be susceptible to another construction, because this is a penal statute and this is a criminal case the Court must adopt the interpretation which is "more favorable to the offender," and "[t]he defendant is entitled to the benefit of every reasonable doubt … as to the true interpretation of words or the construction of language used in a statute." *People v. Bradley*, 146 Cal. App. 3d 721, 725 (1983) (quoting *People v. Davis* 29 Cal. 3d 814, 828 (1981)). The Court may not adopt the interpretation of 483.5(a) apparently pushed by the Attorney General, and must interpret and apply the statute according to its clear words and legislative history. Count 9 should therefore be dismissed.

III. THE COURT SHOULD DISMISS ALL OF THE SURVIVING COUNTS FOR ILLEGAL RECORDING BECAUSE THE ATTORNEY GENERAL FAILED TO SHOW, AND THE MAGISTRATE JUDGE ERRED IN FAILING TO EXAMINE, DEFENDANTS' REQUISITE SPECIFIC INTENT TO VIOLATE SECTION 632.

A. The Magistrate Judge Erred in Conflating Defendants' Specific Intent With the Statutory Definition of "Confidential Communication," and in Failing to Analyze the Former Separately From the Latter.

Following the precedent established by the California Supreme Court on at least two occasions, Judge Hite correctly concluded that Section 632 "**requires** a finding of **specific intent** to commit the crime, [and] the prosecution must establish that the **defendant had the specific intent to record a confidential communication**." (Commitment Order at 8 (emphasis added).)

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preference to an interpretation that **uniformly** treats items similar in nature and scope." *In re Corrine W.*, 45 Cal. 4th 522, 531 (2009) (emphasis added) (citations omitted). Thus, "furnished" and "transported" within Section 483.5(a) must be construed in reference to all the other prohibited actions in the list, namely "manufactured, sold, offered for sale," and "imported" – all of which focus on the supply chain of deceptive identification documents and not on the end user.

This is in line with the California Supreme Court's teaching in *People v. Superior Court of Los Angeles County*, 70 Cal. 2d 123, 132–34 (1969) ("a necessary element of the offense … is an intent to record a confidential communication") – which Judge Hite cited. (Commitment Order at 8). This was also in line with the California Supreme Court's holding ten years later in *Estate of Kramme*, 20 Cal. 3d 567, 572 n.5 (1978) (Section 632 "requires 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.")

In light of the plethora of evidence summarized below – **undisputed and unrebutted by the Attorney General** – that Merritt (and Daleiden) did not have the specific intent to record any "confidential communication" as defined by Section 632, Judge Hite's correct conclusion that a showing of specific intent is required for criminal liability should have been the end of the matter, and should have resulted in the outright dismissal of all illegal recording claims. However, Judge Hite erred in immediately discarding the specific intent requirement he had just recognized for **criminal** liability, and supplanting it with the "objective basis" for "what constitutes a 'confidential communication'" found in **civil** cases. (Commitment Order at 8). In concluding that an objective test is applied to determine which communications are "confidential," and that "the defendant's subjective belief is legally irrelevant," Judge Hite cited only *Coulter v. Bank of Am*. 28 Cal. App. 4th 923, 929 (1994) – a **civil** case. (Commitment Order at 8). While that conclusion might have ended the inquiry in a civil case – where there is no specific intent requirement – it could not have ended the inquiry in this criminal case, where the California Supreme Court and Judge Hite agree that a showing of specific intent to violate Section 632 **is** required.

In other words, even assuming (without conceding[6]) that the **objective** standard from civil cases could be imported into criminal cases to determine whether a recorded communication is

[6] The civil application of a statute may not be mechanically superimposed in a criminal prosecution. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 358 (1964) (judicial expansion of civil trespass laws in criminal context was unconstitutional); *Kight v. CashCall, Inc.*, 200 Cal. App. 4th 1377, 1388 (2011) (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").

"confidential" within the meaning of Section 632, and even assuming (without conceding) that under that **objective** standard the communications at issue in this case were "confidential," that does not answer the further critical question of whether Defendants **specifically intended** to record "confidential communications" as is required for criminal liability. This is because, if Defendants harbored a good faith, **subjective** belief that the communications they were recording were not confidential (which, as shown below they clearly and indisputably did), they would lack the requisite specific intent to record "confidential communication" **even if they turned out to be legally wrong about the statutory definition**.[7]

The California Supreme Court has repeatedly held that a good faith mistake of law is a defense to specific intent crimes. *See e.g.*, *People v. Howard*, 36 Cal. 3d 852, 862–63, 686 P.2d 644 (1984) (Bird, C.J. concurring) ("Since section 278.5 was a specific intent crime, an accused was entitled to … any defense which applies to specific intent crimes …. A good faith mistake of law is such a defense …."); *People v. Eastman*, 77 Cal. 171, 172 (1888) ("a mistaken idea of legal rights honestly entertained" is a defense to specific intent crimes). Indeed, that an honest mistake of law negates specific intent to violate that law is now hornbook law:

> … ignorance of the law is not a defense to a general intent crime. A ***good faith*** mistake of law, however, is a defense to negate the ***specific intent*** required for a ***specific intent*** crime.

3 California Criminal Defense Practice § 73.07 (bold, italics and underline in original). This principle was further elucidated in *People v. Vineberg*, 125 Cal. App. 3d 127, 137 (1981):

> The People assert that a mistake of law based upon the advice of counsel is not a defense to a criminal charge. This proposition is valid as respects **general intent** crimes. … This principle, however, has no application with respect to crimes requiring a specific intent. **It has been recognized in California since the turn of the century that ignorance or mistake of law can negate the existence of a specific intent** ….

[7] Defendants do not at all concede that the recorded communications were "confidential" within the meaning of Section 632, or that their understanding of Section 632 was mistaken. As demonstrated in Section V, *infra*, none of the recorded communications were actually "confidential," under any standard, within the meaning of Section 632. The point here is that even if Defendants were mistaken about the nature of the recorded communications viz Section 632, they **still** lacked the requisite specific intent to violate that statute.

Id. (emphasis added).

In *People v. Urziceanu*, 132 Cal. App. 4th 747 (2005), the Court of Appeal rejected defendant's argument that his cultivation and sale of marijuana was legal under California's medical marijuana law. *Id*. at 773. The Court, however, reversed defendant's conviction for conspiracy to sell marijuana, concluding that the trial court erred in denying defendant's mistake of law defense:

> Here, defendant's mistake that his formation and operation of FloraCare complied with the Compassionate Use Act was a mistake of law. Had he been convicted of selling marijuana, this mistake of law would provide no defense. Here, however, defendant was convicted of conspiracy to sell marijuana. To commit the crime of conspiracy, defendant must have had the **specific intent** to violate the marijuana laws (i.e., he must have known what he was doing was illegal and he must have intended to violate the law) before he can properly be convicted of conspiracy to violate those laws. **Because conspiracy requires a specific intent, a good faith mistake of law would provide defendant with a defense**.

Id. at 776 (emphasis added).

Judge Hite was therefore in error to conclude that "defendant's subjective belief is legally irrelevant" in this criminal, specific intent case. (Commitment Order at 8). Had Judge Hite continued his analysis into the plethora of facts – never disputed by the Attorney General – showing that Merritt and Daleiden subjectively did not intend to record "confidential communications" and did not intend to violate Section 632, because they subjectively and in good faith believed – **upon the advice of multiple lawyers** – that their recordings were legal, he would have had to dismiss all of the illegal recording charges. This Court must do so now.[8]

B. The Attorney General Failed to Adduce Any Evidence on Specific Intent, and Failed to Rebut Merritt's and Daleiden's Undisputed Evidence That They Subjectively and in Good Faith Believed Their Recordings Were Legal, and That They Did Not Specifically Intend To Record "Confidential Communications" Without Consent.

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

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[8] As demonstrated in Section V.D., infra, conspiracy is also a specific intent crime, and therefore Information Count 10, charging a conspiracy to violate Section 632, fails for the same reasons.

- 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's Section 995 Motion to Dismiss (reviewing pre-recording evidence)).

- Daleiden testified, **without any rebuttal**, that, prior to releasing to the public the videos he and Merritt recorded, 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. Judge Hite erred in stopping his inquiry after applying an objective analysis to the statutory definition of "confidential communication," and in failing to examine the extensive and unrebutted proof of Merritt's subjective, good faith belief that she was not violating Section 632, in the context of Merritt's specific intent. Accordingly, all illegal recording counts, including the count for conspiracy to illegally record, must be dismissed.

IV. THE COURT SHOULD DISMISS INFORMATION COUNTS 1, 2, 4, 5 AND 8 BECAUSE THE ATTORNEY GENERAL'S PROPOSITION 115 WITNESS 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.

At the Preliminary Hearing, Merritt demonstrated that all of the Counts which the Attorney General sought to support solely through the hearsay testimony of Agent Cardwell, its Proposition 115 witness, should be dismissed because Agent Cardwell's testimony was invalid and wholly failed to establish the requisite probable cause. Specifically, as detailed below, Merritt demonstrated that Agent Cardwell failed to use his special training and experience to obtain critical details from non-testifying alleged victims, failed to conduct a proper investigation that could assist the Court, failed to provide the Court with anything other than the **statutorily-irrelevant** subjective feelings of the alleged victims, and was dishonest with the Court. This should have led to a finding that Agent Cardwell – and therefore the Attorney General – failed to demonstrate probable cause for the Counts premised on his testimony.

Judge Hite did not engage with or analyze any of these deficiencies – each of them fatal – and merely announced in a one-sentence footnote that he "rejects the defendants' request to discharge the counts testified to by Agent Cardwell." (Commitment Order at 9). This Court should now review these deficiencies and find that Information Counts 1, 2, 4, 5 and 8 (which were Counts/Does 1, 2, 5, 6 and 11 at the Preliminary Hearing) [9] cannot survive the Preliminary Hearing.

A. 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.

As codified in Penal Code Section 872, Proposition 115 permits the Court to rely upon the hearsay testimony of a sufficiently experienced or trained law enforcement officer, but:

[9] *See* Correlation Chart for Counts and Does at Preliminary Hearing and in the Information, p. viii, *supra*.

> 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 (1992) (emphasis added). Even though Judge Hite did not undertake the required analysis of these critical issues, pursuant to *Hosek* this Court now has the authority – indeed the **duty** – to examine on this Section 995 motion whether the hearsay testimony met the indicia of reliability mandated by Section 872 and Proposition 115, and to dismiss the charges based on that testimony if it is found insufficient. *Hosek*, 10 Cal. App. 4th at 610.

In *Whitman v. Superior Court*, 54 Cal. 3d 1063 (1991), the California Supreme Court analyzed Penal Code Section 872 and explained three reasons why the statutory requirement of special training or lengthy experience for the hearsay 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 required investigatory duties is a great understatement. Agent 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). Agent 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, Agent 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 Agent Cardwell saw on video, and that clearly included strangers within earshot, such as the hotel elevator conversation involving Preliminary Hearing Doe 4 (now dismissed) with a complete stranger sharing the elevator (828:9-829:5), or the restaurant waiter hovering near Preliminary Hearing Doe 11's mouth as she was speaking to Defendants. (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).

These are critical questions that should have been asked, because the answers to those questions could be dispositive of the illegal recording claims. Indeed, in concluding that some of the Counts for some of the other alleged victims lacked probable cause and should be dismissed, Judge Hite examined **these very same questions**. (*See e.g.*, Commitment Order at 13 (concluding that Preliminary Hearing Doe 9's recorded conversation was not confidential because "there is no evidence in the record that Doe 9 took any steps to ensure the confidentiality of the conversation" or prevent others from overhearing); *Id.* at 15 (concluding that the conversation involving Preliminary Hearing Does 12, 13 and 14 was not confidential because "there is no evidence in the

record that Does 12, 13 and 14 took reasonable steps to ensure the confidentiality of this particular meeting" such as ensuring that other restaurant patrons or staff could not overhear them)).

By failing to ask these critical questions and numerous others, Agent Cardwell deprived the Court of the opportunity to make the same determinations of absent "victims" as it made of the alleged victims who testified in person. 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 the 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, and dismissal of the Counts supported only by his testimony is the only remedy. *Id*.

B. 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 one 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 alleged victims meant or understood by "confidential," and whether their subjective understanding of what is "confidential" matches with the specific statutory definition in Section 632(c), Judge Hite had (and now this Court has) no way of determining whether a violation took place.

Because he failed to ask critical investigatory questions, the sum and substance of Agent Cardwell's "investigation" and testimony to the court was **only** that the alleged victims he interviewed, and as to which he was offering hearsay testimony, subjectively "felt" that their recorded conversations were "confidential." (Tr. 828:4-12 (Preliminary Hearing Doe 4 "**felt**" conversation was "confidential"); 811:26-812:4 (Preliminary Hearing Doe 5 "**felt**" conversation was "confidential"); 766:14-26 ("only question" Agent Cardwell asked Preliminary Hearing Doe 6 was if he "**felt**" the conversation was "confidential"); 767:2-12 ("only thing" Agent Cardwell asked Preliminary Hearing Doe 7 was if she "**felt** the conference was private"); 838:9-839:2

(Preliminary Hearing Doe 11 told Agent Cardwell she "believed" and "thought" and "felt" that the conversation was "confidential," and he asked no questions to probe); 849:2-9 (Preliminary Hearing Doe 13 told Agent Cardwell that he "believed the conversation was confidential" and he asked no questions to probe or determine what he meant); 850:2-851:18 (Preliminary Hearing Doe 14 told Agent 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 Agent 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, as Judge Hite recognized in the Commitment Order, 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." (Commitment Order at 4 ("The determination of whether the recording is of a confidential nature is an objective test."); *see also* 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); *Kight v. CashCall, Inc.*, 200 Cal. App. 4th 1377, 1396 (2011) ("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).[10]

Because Agent Cardwell provided no useful information or testimony to the Court, his testimony is irrelevant and could not have supplied the requisite probable cause for the Counts premised on his testimony. Those Counts fail and should be dismissed.

[10] However, as explained in Section III, *supra*, the subjective beliefs of the Defendants are still very much relevant, not necessarily to determine whether a recorded conversation meets the statutory definition of "confidential," but to determine whether Defendants had the requisite specific intent to record what they subjectively believed to be a "confidential" communication.

C. Agent Cardwell's Deficient Testimony Can 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 arrest warrant 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 Preliminary Hearing 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 Preliminary Hearing 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 Preliminary Hearing Doe 4's supposedly "confidential communication" took place inside a hotel elevator with a complete stranger (other than Daleiden) riding along. (Tr. 826:25-827:21). Instead, referring specifically to the elevator-ride-with-stranger, Agent 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 Preliminary Hearing 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 Preliminary Hearing 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 Preliminary Hearing 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). However, 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 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 Agent Cardwell would not, and did not, do the same in **another** probable cause determination (Preliminary Hearing). This begs the questions: What else 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 in his arrest warrant affidavit? And how would that withheld information affect the existence of probable cause in this case?

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 (1987); *People v. Toledo-Corro*, 174 Cal. App. 2d 812, 820 (1959). 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*.

D. Without the Deficient and Irrelevant Testimony of Agent Cardwell, Information Counts 1, 2, 4, 5 and 8 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 and 8 of the Information. Accordingly, without (and even with) Agent Cardwell's testimony, all Prop 115 Counts fail and must be dismissed.

V. THE COURT SHOULD DISMISS ALL OF THE SURVIVING COUNTS FOR ILLEGAL RECORDING BECAUSE THE ATTORNEY GENERAL FAILED TO RAISE A STRONG SUSPICION THAT MERRITT VIOLATED, OR CONSPIRED TO VIOLATE, SECTION 632.

A. 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 at the Preliminary Hearing 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 Judge Hite recognized in the Commitment Order, "[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." (Commitment Order at 3 (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). In other words, as also recognized by Judge Hite, "[a] 'communication is not confidential when the parties may reasonably expect other persons to overhear it.'" (Commitment Order at 3 (quoting *Lieberman v. KCOP Television Inc.*, 110 Cal. App. 4th 156, 168 (2003)).

Moreover, the definition of "**may**" in Section 632(c) is "expressing possibility," such that the Attorney General was required to 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 of confidentiality and to the **possibility** of being overheard or recorded. (§ 632(c)). The Attorney General's burden thus included the burden to establish that the parties to the conversations **could not** "reasonably expect that the communications may be overheard or recorded." *See, e.g.*, antonym of "may," Power Thesaurus (https://www.powerthesaurus.org/may/antonyms). As shown below, the Attorney General failed to meet this burden as to any of the claims for illegal recording.

B. The Magistrate's Reasons for Properly Dismissing Does 9, 12, 13 and 14 Mandate Dismissal of Information Does 7 and 8.

In this prosecution, the Attorney General initially brought 14 claims for illegal recording, which involved video recordings taken of 14 alleged "Doe" victims at **four events**, all as part of one undercover investigation into potential crimes: Preliminary Hearing Does 1-8 were recorded at the NAF conference in San Francisco in 2014; Preliminary Hearing Doe 9 was recorded at a restaurant lunch meeting; Preliminary Hearing Does 10 and 11 were recorded at another lunch meeting; and Preliminary Hearing Does 12, 13 and 14 were recorded at yet another lunch meeting.

Judge Hite correctly dismissed the claims arising from two out of the three lunch meetings (Preliminary Hearing Does 9, 12, 13 and 14), concluding that those two lunch meetings, and the recorded conversations there, were not "confidential" within the meaning of Section 632. (Commitment Order at 12-16). In so doing, Judge Hite considered various factors, detailed below. As shown below, however, those same exact factors also exist as to the third lunch meeting, involving Preliminary Hearing Does 10 and 11 (Information Does 7 and 8). There is nothing materially dissimilar about this third lunch meeting to warrant saving those claims, and it was error for Judge Hite to decline to dismiss the two counts rising from that lunch meeting as well. This Court should correct that error and dismiss Information Counts 7 and 8.

1. The Same Factors Requiring Dismissal of Preliminary Hearing Does 9, 12, 13 and 14 Are Present for, and Require Dismissal of, Preliminary Hearing Does 10 and 11.

A review of Judge Hite's Commitment Order and the Preliminary Hearing transcript demonstrates that the same factors he found to be dispositive of Preliminary Hearing Does 9, 12, 13 and 14 are equally present and dispositive of Preliminary Hearing Does 10 and 11:

a. Judge Hite correctly found that Preliminary Hearing Doe 9 did not have a business relationship with Defendants prior to the lunch, and met them in a public restaurant to discuss tissue procurement without vetting Defendants in advance and without requiring them to sign a non-disclosure agreement. (Commitment Order at 12). Judge Hite also found the same factors present as to the lunch meeting involving Preliminary Hearing Does 12, 13 and 14. (*Id*. at 14-15). **The same is true of**

Preliminary Hearing Does 10 and 11. (Tr. 721:25-722:20 (Doe 10 admitting that she could not recall ever meeting Defendants prior to the recorded lunch meeting; that she did not vet Defendants in advance; and that she did not require them to sign any non-disclosure agreements)).[11]

b. Judge Hite correctly found that Preliminary Hearing Doe 9 did not choose the restaurant, did not choose the table or seating arrangement in the restaurant, did not know or vet the restaurant staff, and did not require the restaurant or its staff to sign a non-disclosure agreement. (Commitment Order at 12). Judge Hite found the same factors present as to Preliminary Hearing Does 12, 13 and 14. (*Id*. at 13-14). **The same is true of Preliminary Hearing Does 10 and 11**. (Tr. 721:2-24 (Doe 10 admitting that she did not choose the restaurant, did not know the restaurant staff, did not vet the restaurant staff, and did not require non-disclosure agreements); *Id*. at 727:19-21 (Doe 10 admitting that she did not choose the table or seating arrangement)).

c. Judge Hite correctly found that Preliminary Hearing Doe 9 did not "tell the [D]efendants not to record the conversation or share it with others." (Commitment Order at 12). Judge Hite found the same factor to be true of Preliminary Hearing Does 12, 13 and 14. (Commitment Order at 15). **The same is true of Preliminary Hearing Does 10 and 11**. (Tr. 725:4-727:4 (Doe 10 admitting that she did not ask Defendants not to record the conversation; admitting that she was "totally willing" and she "expected them to share" the information being discussed with other people not present at the lunch; admitting that she never told Defendants that she expected privacy over the matters being discussed; and admitting that she never told

[11] Preliminary Hearing Doe 11 (present at the same lunch meeting as Doe 10 and seated next to her) did not testify at the Preliminary Hearing, and, as discussed in Section IV, *supra*, Agent Cardwell did not ask her about any of these or other details beyond whether she subjectively "felt" that the meeting was "confidential."

Defendants that they could only share the information with some people but not others)).

d. Judge Hite correctly found that the lunch table where Preliminary Hearing Doe 9 was recorded was attended by several waiters and staff during the lunch, who could overhear the things being discussed at the table while they were there, and Doe 9 took no steps to prevent the unknown, unvetted waiters and staff from overhearing the conversation. (Commitment Order at 12). Judge Hite found the same factors to be true of Preliminary Hearing Does 12, 13 and 14. (Commitment Order at 14). **The same is true of Preliminary Hearing Does 10 and 11**. (Tr. 731:17-23 (Doe 10 admitting that multiple restaurant staff came to service the table during their conversation, and that she "understood that **they could overhear whatever was being discussed at that time**." (emphasis added); *id*. at 732:28-733:15; 734:15-735:27; 736:14-738:13; 738:24-740:20 (Doe 10 admitting, for each of the several video clips played in court, 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**.; *id*. at 736:14-738:13 (Doe 10 admitting that a waiter at the side of the table was literally reaching over the table with his hands and body, was only a few **inches** away from (above) Doe 11's mouth as she was speaking, and Doe 11 continued to talk in the same tone of voice, on the same subject, **without any concern about being overheard by the stranger in her personal space**.)).

Given all of these virtually identical scenarios, it is not possible to reconcile Judge Hite's proper dismissal of Preliminary Hearing Does 9, 12, 13 and 14 with his decision not to dismiss Preliminary Hearing Does 10 and 11, and Judge Hite did not explain the reason for the different outcomes in the Commitment Order. (Commitment Order at 12-16).

2. Judge Hite's Reasoning for Treating Preliminary Hearing Does 10 and 11 Differently Is Not Legally Relevant and Is Erroneous.

At the December 6, 2019 hearing announcing the Commitment Order, Judge Hite did explain that he believed the restaurant lunch involving Does 10 and 11 was "a more private setting," because there were fewer **patrons** at this restaurant than at the other two. (Tr. 1360). However, whether a recorded communication took place in "a more private setting" is not the correct legal standard. Instead, the correct legal standard, recognized by Judge Hite, is whether or not "**a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard** or recorded" by others who are not party to the conversation. (Commitment Order at 3 (quoting *Flanagan v Flanagan*, 27 Cal. 4th 766, 776-77 (2002) and *Lieberman v. KCOP Television Inc.*, 110 Cal. App. 4th 156, 168 (2003)).

Here, whether this particular lunch was a "more private setting" or had fewer **patrons** than the other two lunches is not relevant, because it is undisputed that this lunch meeting was attended by multiple **wait staff**, unknown to the parties and unvetted by the parties, and Doe 10 readily admitted that the wait staff could overhear the conversation because neither she, nor anyone else at the table, took any steps to prevent them from overhearing. (Tr. 731:17-23; 732:28-733:15; 734:15-735:27; 736:14-738:13; 738:24-740:20). Indeed, the Court need not have to wonder whether there was an objectively reasonable "expectation," because **Doe 10 readily admitted that she was <u>actually aware</u> that the conversation could be overheard** by non-parties. (Tr. 731:17-23 (Doe 10 admitting that multiple restaurant staff came to service the table during their conversation, and that she "understood that **they could overhear whatever was being discussed at that time**." (emphasis added)).

Also not relevant is Judge Hite's pointing out that "Doe 10 told the defendants they should be discrete during their conversation," and at times "stopped talking when the restaurant staff serviced the table." (Tr. 1360:16-21). Judge Hite also acknowledged that at other times Does 10 and 11 did **not** stop talking when unknown and unvetted staff were at the table. (*Id*. at 1360:21-23). And, of course, Doe 10 herself admitted of numerous instances when waiters were present at the table and neither she, nor Doe 11 nor the Defendants stopped talking, nor changed the subject,

nor even lowered the volume of their ongoing conversation. (Tr. 732:28-733:15; 734:15-735:27; 736:14-738:13; 738:24-740:20).

The point, according to Section 632 and the cases acknowledged by Judge Hite, is not whether the parties were being "discrete," or whether they were **actually** being overheard by non-parties – instead, the statute and the cases make it clear that it is the mere **potential** for overhearing that makes the conversation not confidential within the meaning of Section 632. (*See* discussion of "may be overheard" in Section V.A., *supra* pp. 26-27). Doe 10's admission that the lunch conversation was not only potentially, but actually, overheard is fatal to this charge.

Incidentally, Judge Hite also found that "[a]t times, the Does [12, 13 and 14] would stop their conversation" when "restaurant staff attended the table," but he still correctly dismissed those charges because "at other times [they] would continue to talk about the same topics (fetal tissue procurement and donation), and in the same tone and volume of voice." (Commitment Order at 14). The same outcome should have obtained as to Does 10 and 11, who admitted to several instances where they continued their conversation, on the same subject, in the same tone and at the same volume, within very close proximity and earshot of unknown and unvetted restaurant staff who were not parties to their communication.

Judge Hite erred in declining to dismiss the charges as to Preliminary Hearing Does 10 and 11. This Court should correct that error and dismiss Counts 7 and 8 of the Information.

C. Each of the Remaining Recording Charges (Information Counts 1-6) Fails Because The Recorded Conversations Were Not "Confidential Communications" Within The Meaning Of Penal Code Section 632.

In addition to the other grounds detailed in this motion, the illegal recording Counts 1-6 in the Information fail 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 was 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. This evidence is detailed in the subsections that follow.

Critically, in the Commitment Order Judge Hite merely announced that "the People have presented sufficient probably cause as to these counts," without **any** analysis of, or engagement with, **any** of the evidentiary items below which demonstrate the contrary. (Commitment Order at 9). Judge Hite likewise did not explain or analyze these issues whatsoever at the December 6, 2019 hearing announcing the Commitment Order. (Tr. 1348-1383). On the other hand, in **dismissing** the charge based on Preliminary Hearing Doe 4 – who was an attendee recorded at the same 2014 NAF conference as Information Does 1 through 6 discussed below – Judge Hite found it important and determinative that "there is no evidence in the record that Doe 4 knew the [bystander who overheard that recorded conversation], knew whether the [bystander] was part of the conference … and Doe 4 took no steps to ensure the conversation could not be overheard by the unknown person…." (Commitment Order at 11). As shown below, the same is true of Information Does 1 through 6, which Judge Hite did not address and did not dismiss.

Had Judge Hite engaged with or considered the plethora of evidence below, he would have been constrained to dismiss these charges as well. This Court should right this error and dismiss these charges.

1. Count 1 of the Information Fails Because the Recorded Conversation With Doe 1 Was Not "Confidential."

Applicable not only for Information Doe 1, but **for all of the Does recorded at the NAF conference (Information Does 1-6)**, 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 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 vetting 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 Information 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 he was aware of any specific vetting 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 Information 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 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 Alleged Recorded Conversation With Information Doe 4 Was Not Authenticated and Not "Confidential."

Count 4, involving Information Doe 4 (Preliminary Hearing Doe 5)[12] fails for two reasons: a failure of authentication, and a failure of proof as to the "confidential communication" element of the alleged crime.

a. The Alleged Recorded Conversation With Information Doe 4 Was Not Authenticated.

Judge Hite's Commitment Order overlooked and never examined the authentication failure as to Doe 4. This Court should engage in the required examination and correct the palpable error.

[12] *See* Correlation Chart for Counts and Does at Preliminary Hearing and in the Information, p. viii, *supra*. Information "**Doe 4**" in this section is referred to as "**Doe 5**" in the Preliminary Hearing Transcript.

The Attorney General utterly failed to authenticate the identity and the alleged recording of Doe 4:

- Agent Cardwell testified he has never met and has no "personal perception" of the alleged Doe 4; he never sent the allegedly illegally recorded video to Doe 4, never asked Doe 4 to review the video, and never confirmed with the alleged Doe 4 that she was in the video. (Tr. 778:27-779:3).
- Agent Cardwell conceded that his only identification of Doe 4 is from photos he located on the internet. (Tr. 810:5-13; 490:14-17).
- **Does 4 is incommunicado, has not returned the Attorney General's phone calls, and has never identified herself in the video**. (Tr. 809:3-5, 17-22).
- Agent Cardwell admitted that he had only spoken to the alleged Doe 4 once, on November 17, 2016, after which **Doe 4 stopped returning his calls**. (808:21-22; 808:28-809:1).

Defense objections to this purported authentication were overruled, however, under these circumstances, Agent Cardwell's identification of the alleged Doe 4 and her video clip must be stricken. Agent Cardwell did not show the alleged illegally recorded video to the individual he spoke with who the Attorney General alleges to be Doe 4. That same alleged individual has now been incommunicado, presumably for years. There is no evidence that this individual otherwise recounted any details of the conversation that was allegedly illegally recorded, or otherwise authenticated the alleged video. Agent Cardwell's only information identifying the alleged Doe 4 is from his alleged Google search, which Defendants objected to as inadmissible hearsay. Because Agent Cardwell's testimony and purported authentication were not based upon his perception, they are precluded by Cal. Evid. Code § 800.

Moreover, Agent Cardwell's so-called "identification" of the alleged "Doe 4" and the video clip he purportedly authenticated cannot be allowed into evidence under *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 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." The Attorney General likewise did not provide a photographic or video expert. As noted in *Beckley*, 185 Cal. App. 4th at 515-16, internet images are untrustworthy under California law.

In sum, Doe 4 is a cipher—an incommunicado witness who was a disembodied voice on the other end of telephone lines. Judge Hite erred in not considering or addressing the demonstrable authentication failure as to Information Doe 4. Count 4 should be dismissed.

b. The Alleged Recorded Conversation With Information Doe 4 Was Not "Confidential."

In addition, Information Count 4 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 4 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 4 stated she probably could have been overheard. (Tr. 814:19-815:10).
- Agent Cardwell admitted that the only participants to the alleged illegally recorded video of the alleged Doe 4 are Daleiden and the alleged Doe 4, not Merritt. (Tr. 810:23-811:20).

5. Count 5 Fails Because the Recorded Conversation With Doe 5 Was Not "Confidential."

Count 5, involving Information Doe 5 (Preliminary Hearing Doe 6)[13] fails because the evidence regarding the recording of Information Doe 5 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 5 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 5 took place in the exhibit hall. (Tr. 833:21-26).
- Agent Cardwell admitted that he asked only **a single question** about confidentiality with Doe 5 – 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 5 whether he was aware of any specific vetting procedures and policies NAF has with respect to exhibitors and exhibit booth personnel. (Tr. 834:10-19).
- Agent Cardwell admitted that as to Doe 5, solely Daleiden and Doe 5 were participants to that conversation, not Merritt. (Tr. 833:3-15).

[13] *See* Correlation Chart for Counts and Does at Preliminary Hearing and in the Information, p. viii, *supra*. Information "**Doe 5**" in this section is referred to as "**Doe 6**" in the Preliminary Hearing Transcript.

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

Count 6, involving Information Doe 6 (Preliminary Hearing Doe 7)[14] also fails for lack of sufficient evidence to demonstrate that the recorded communication was "confidential" within the meaning of Section 632:

- Doe 6 admitted that there was a lot of noise in the exhibit hall which required Doe 6 to speak loudly during her conversation with Daleiden. (Tr. 89:13-18; 119:11-14).
- Doe 6 admitted that during her conversation with Daleiden, Doe 6 was standing approximately three feet away. (Tr. 121: 5-8).
- Doe 6 admitted that, although there were other individuals who passed or stood nearby as Doe 6 was speaking with Daleiden, **Doe 6 took no steps to prevent those individuals from overhearing her conversation**, such as lowering her voice, changing the subject or stopping the 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 6 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 6 admitted that there was nothing preventing those other individuals who were nearby from overhearing her conversation with Daleiden. (Tr. 89:26-28).
- Doe 6 admitted that she could hear individuals talking across the exhibit hall. (Tr. 119:15-17).
- Doe 6 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).

[14] *See* Correlation Chart for Counts and Does at Preliminary Hearing and in the Information, p. viii, *supra*. Information "**Doe 6**" in this section is referred to as "**Doe 7**" in the Preliminary Hearing Transcript.

D. Information Counts 1, 2, 3, 4, 5, 6 and 10 Also Fail Because the Attorney General Failed to Present Sufficient Evidence for Any Conspiracy Liability Against Merritt.

At the Preliminary Hearing, the testimony from the testifying Does, Agent Cardwell and Daleiden was uniform and undisputed that Merritt **did not record Information Doe 1** (Tr. 816:17-26), **Doe 2** (Tr. 831:1-7), **Doe 3** (Tr. 136:27-137:1; 139:24-27), **Doe 4** (Preliminary Hearing Doe 5) (Tr. 810:26-811:20), **Doe 5** (Preliminary Hearing Doe 6) (Tr. 833:3-15), and **Doe 6** (Preliminary Hearing 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, he 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 III.A., *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 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 claim 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).

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).[15]

[15] 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 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 (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

For these reasons, more fully discussed also in Section III, *supra*, the Attorney General has failed to present sufficient evidence as to specific intent, and that failure vitiates not only direct but also conspiratorial liability for the charges under Section 632.

Finally, in addition to any indirect conspiracy liability for Information Counts 1-6, the Attorney General also asserts against Merritt a separate Count (10) for conspiracy, which is identical: a conspiracy "to commit the crime of Recording a Confidential Communication, a felony violation of Penal Code section 632(a)…." (Information, Count 10, p.4). Because the elements for any direct conspiracy under Count 10 are exactly the same as the elements for indirect conspiratorial liability under Counts 1-6, Count 10 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 elements of Counts 1, 2, 3, 4, 5, 6 and 10 of the Information, these Counts must be dismissed.

VI. THE COURT SHOULD DISMISS ALL OF THE SURVIVING COUNTS FOR ILLEGAL RECORDING BECAUSE THE ATTORNEY GENERAL FAILED TO CONTROVERT MERRITT'S AFFIRMATIVE DEFENSE UNDER SECTION 633.5.

A. The Magistrate Judge Erroneously Rejected Defendants' Extensive Affirmative Defense Evidence, Without Explanation, Without Putting the Attorney General to His Burden of Proof, and Without Considering the Attorney General's Complete Failure to Controvert That Evidence or Otherwise Meet His Burden of Proof.

In pre-hearing rulings, Judge Hite correctly concluded that Defendants were entitled to present affirmative defenses at the Preliminary Hearing. The parties and the Court then devoted dozens of hours over the course of ten hearing days to Defendants' presentation of extensive proof as to their affirmative defense under Section 633.5. Defendants' testimonial evidence on this affirmative defense yielded **hundreds** of pages of transcript and numerous video and document

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"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.

exhibits, which are detailed in Daleiden's separately and concurrently filed motion to dismiss under Section 995. After the evidence presentation, Judge Hite then received several dozen pages of written closing argument from the Defendants on this affirmative defense.

All of this substantial evidence was rejected by Judge Hite with a single sentence, without any analysis or explanation whatsoever: "The Court is not persuaded to discharge these counts based on the presented affirmative defenses." (Commitment Order at 9).[16] Judge Hite did not make any credibility determinations, did not weigh any of the evidence presented as to the affirmative defense, and did not address at all the Attorney General's utter failure to even attempt to controvert Defendants' affirmative defense. (*Id*.) This was error. Because Defendants succeeded in raising their affirmative defense under Section 633.5, and because the Attorney General ignored this substantial evidence and made no effort to controvert it, Judge Hite should have dismissed all of the surviving counts. This Court should do so now.

Penal Code Section 633.5, provides a **justification** or **excuse** to a charge of unlawful recording under Section 632:

> 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).

In the context of a preliminary hearing, 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).

[16] At the December 6, 2019 hearing announcing the Commitment Order, Judge Hite's oral decision disposing of Defendants' affirmative defense was nearly identical in brevity, substance and lack of analysis: "The Court is not persuaded to discharge these counts based on the affirmative defenses offered by the defense." (Tr. 1358:23-24).

Under California law, a defendant's burden to raise an affirmative defense is very light—even lighter than a preponderance of the evidence, and then the burden shifts to the prosecution, which must disprove the affirmative defense beyond a reasonable doubt:

> 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).

In discussing the "burden of proof on the affirmative defense" in the Commitment Order, Judge Hite appears to incorrectly place that burden on Defendants, in contravention of *Frye*. (Commitment Order at 7). While stating that Defendants "may present an affirmative defense to attack reasonable doubt or probable cause in the context of a preliminary hearing," (*id*. at 8), Judge Hite does not acknowledge that this burden is light when on Defendants (to raise the affirmative defense), nor that the burden is then shifted and increased to require the Attorney General to disprove the affirmative defense. (*Id*.) It is perhaps for this reason that Judge Hite did not consider or discuss **at all** the Attorney General's complete failure to even address, let alone overcome, the extensive affirmative defense evidence presented by Defendants. This is an error that must be redressed.

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 the 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 painstakingly detailed in his concurrently-filed

motion to dismiss under Section 995. For the sake of brevity, Merritt hereby adopts as her own in full and incorporates Daleiden's motion to dismiss, 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. Accordingly the evidence and argument presented on Section 633.5 in Daleiden's Section 995 motion to dismiss are equally applicable to Merritt and incorporated herein.

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 (and by extension Merritt) indeed harbored a good faith, reasonable belief that they were 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**. Not only did the Attorney General completely fail to cross-examine Mr. Daleiden on any of the affirmative defense evidence presented, 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.

Judge Hite was presented with the Attorney General's glaring evidentiary failure, but did not consider or explain why probable cause could still be shown. This Court should correct this error, find that the Attorney General has failed to meet his burden to disprove Defendants' affirmative defense under Section 633.5, and dismiss all surviving claims.

VII. THE COURT SHOULD CONSOLIDATE ANY SURVIVING RECORDING COUNTS.

As shown above, none of the Counts in the Information can survive the Preliminary Hearing, and all should be dismissed. But if any of the Counts do survive, they should be consolidated. Judge Hite erred in denying Merritt's motion to consolidate surviving counts, and in concluding that the counts that survive "constitute separate and distinct acts of recording confidential communications of different victims in violation of section 632(a)." (Commitment Order at 17 (citing *People v. Whitmer*, 59 Ca1. 4th 733, 741 (2014)). At the December 6, 2019 hearing, Judge Hite indicated that Merritt's consolidation argument would be better addressed post-conviction, under Section 654:

> I certainly understand some of the arguments of defense counsel, but I do think that it is properly addressed – more properly addressed in a Penal Code Section 654 analysis, although I certainly could see scenarios where there may be issues with whether or not certain counts should be consolidated, but I don't see that in this particular case, so the motion is denied at this time.

(Tr. 1365:4-13). In so ruling, Judge Hite appears to have adopted the Attorney General's theory of charging each count **per victim**, rather than **per recording**. In the Attorney General's view, as stated at the Preliminary Hearing, "[t]he Court will hear from the victims at the jury trial, all of

them. And this is an individual privacy right that's been violated here." (Tr. 1364:25-1365:3). This charging method is clearly at odds with both the text and California Supreme Court's construction of Section 954. *See People v. Vidana*, 1 Cal. 5th 632, 648 (2016) ("a defendant may not be convicted on [different statements of the same offense] based on the same course of conduct").

Section 954 provides, in pertinent part,

> An accusatory pleading may charge two or more **different offenses** connected together in their commission, or **different statements of the same offense** or two or more different **offenses** of the same class of crimes or offenses, **under separate counts**, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant **may be convicted of any number of the offenses charged**, ...

Cal. Penal Code § 954 (emphasis added). Although the text of Section 954 permits the Attorney General to charge "different statements of the same offense," here the Attorney General is not charging more than one count under alternate theories so as to obtain one conviction on either one count or another. Instead, the Attorney General is errantly charging one count per victim instead of per recording, which is an improper method of charging for alleged violations of Section 632(a).

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 eight 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 eight Does were recorded in less than 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 Information Does 1-6) 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 lunch involved both Information Doe 7 and 8 sitting **together** for **one** conversation. (*Id*. at 1128:8-11).

Not only did Defendants, to the extent that Merritt participated, have one plan and one intent in mind (to obtain evidence of criminal wrongdoing), but the plain text of Section 632(a) states that **one** recorded conversation, **even if multiple persons are present**, constitutes only **one** permissible charge:

> (a) A person who, intentionally and without the **consent of all parties** to **a confidential communication**, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, 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. . . .

Cal. Penal Code § 632 (emphasis added). The legislature, by referring to the plural–consent of "**all parties**" – but in the same paragraph referring to the singular – "confidential communication" – could only have intended one unit of prosecution per recorded conversation, regardless that multiple persons are present. *Id*. (emphasis added).

Moreover, because Section 637.2 (which allows civil claims for the same offense) expressly contemplates certain damages **per victim, per violation**, the Legislature's intent can reasonably be understood as intentionally deciding **not** to provide the People with an avenue to stack counts (by prosecuting per victim rather than per recorded confidential communication):

> (a) **Any person** who has been injured by *a violation* of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:
>
> (1) Five thousand dollars ($5,000) per violation.
> (2) Three times the amount of actual damages, if any, sustained by the plaintiff.

Cal. Penal Code § 637.2(a) (emphasis added). Considering 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.

Section 954 permits a defendant to be "convicted of any number of the offenses charged," and thus the manner in which the Attorney General has charged Counts 1 through 8 is not permissible under California law. In *People v. Vidana*, the Court, after holding that larceny and embezzlement are different statements of the same offense, 1 Cal. 5th at 647-48, considered whether "section 954 permit[s] multiple convictions for different statements of the same offense[.]" *Vidana*, 1 Cal. at 649. The Court quoted, with approval, the defendant's construction of Section 954:

> As defendant notes, "It is significant that section 954 uses the term 'different offenses' in conjunction with only two of the three categories of charges that may be properly joined in a proceeding—'different offenses connected together in their commission,' and 'different offenses of the same class of crimes or offenses, under separate counts.' The remaining category of charges—'different statements of the same offense'—differs from the other two categories as it concerns an alternative means of pleading the same offense rather than a different one. And most importantly, this category is not referenced in the language that addresses the charges of which a defendant may be convicted. The most reasonable construction of the language in section 954 is that the statute authorizes multiple convictions for different or distinct offenses, **but does not permit multiple convictions for a different statement of the same offense when it is based on the same act or course of conduct."** . . ..

Id. at 650 (emphasis added). The Court further agreed with defendant's conclusion that, "[i]t logically follows that if a defendant cannot be convicted of a greater and a lesser included offense based on the same act or course of conduct, **dual convictions** for the **same offense** based on alternate legal theories would necessarily be **prohibited**." *Id.* at 650 (emphasis added).

Although the Attorney General is permitted to charge **alternative theories** for the **same offense**, at the preliminary hearing, the Attorney General disavowed that each count was based upon only alternative theories. Instead, the Attorney General is improperly charging dual charges upon which Merritt could be **improperly convicted** under Section 954. Section 654 does not provide a remedy, because it only prohibits an "act or omission [from being] punished under **more than one provision**." § 654(a) (emphasis added). Thus, the court erred in its ruling to the extent that the court agreed with the Attorney General's charging theory, holding that each of the surviving counts "constitute **separate and distinct acts** of recording confidential communications of different victims in violation of section 632(a)." (Commitment Order at 17:10-13 (citing *People v. Whitmer* (2014) 59 Ca1.4th 733, 741)).

Because the Attorney General has erred in reading Section 632(a) to permit one charge per alleged victim rather than one charge per recording, the court erred in permitting the Attorney General to charge duplicative counts for **one recording act** under the **same statute**, Section 632(a). Section 954 does not permit more than one charge **per offense**, any more than it permits more than one conviction on alternative theories ("different statements") of the same offense[.]" *Vidana*, 1 Cal. at 649.

This Court should correct this error, and should consolidate all remaining recording counts (if any) into one. Even if this Court declines to apply the rule set forth in *Bailey*, it must still consolidate at least: (1) Information Counts 1-6 (NAF recordings) together into one; and (2) Information Counts 7-8 together into one. *See People v. Whitmer*, 59 Cal. 4th at 737; *People v. Wilson*, 234 Cal. App. 4th 193, 199 (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)).

VIII. THE COURT SHOULD REDUCE ANY SURVIVING COUNTS TO MISDEMEANORS.

For the above-stated reasons, none of the counts in the Information can or should survive, but if any of them do survive, they should be reduced to misdemeanors. A magistrate's denial of a request for reduction of felony charges to misdemeanors under Section 17(b)(5) at a preliminary hearing is reviewable through a Section 995 motion to dismiss. *See Jackson v. Superior Court*, 110 Cal. App. 3d 174, 177 (1980) ("There must be a method, other than by writ, to challenge a misapplication of section 17, subdivision (b)(5). A section 995 motion provides such a quick and efficient remedy.")

Here, Merritt (joined by Daleiden) requested a reduction of all surviving felony charges to misdemeanor, based on at least **seven** separate and independent factors, detailed below. Judge Hite denied this request in one sentence, without any analysis of explanation in the Commitment Order. (*Id*. at 17 ("The defense motion to reduce the remaining charges pursuant to Penal Code section 17(b) is denied.")).[17] Consideration of all seven factors by this Court demonstrates that Judge Hite's failure to consider all relevant factors, and his resulting decision, were in error and should be corrected.

All of the charges in the Amended Complaint (violations of Penal Code Sections 632(a) (Counts 1-14), and 182(a)(1) (Count 15)), and all surviving charges in the Information, including the newly-minted Count 9 (violation of Penal Code Section 483.5(a)), 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

[17] At the December 6, 2019 hearing announcing the Commitment Order, Judge Hite added one additional sentence, addressing only **one of the seven factors** presented by Defendants – the lack of prior criminal history – and concluding that "felony exposure" is nonetheless warranted. (Tr. 1635:21-1366:1).

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"); Cal. Penal Code. § 483.5(f) ("…shall be punished by imprisonment in a county jail not to exceed one year, or by imprisonment pursuant to subdivision (h) of Section 1170").

As a result, the felony charges under all three statutes qualify for reduction to misdemeanor offenses under Section 17(b)(5), which 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). Courts considering a reduction request should be guided by "**those factors that direct similar sentencing decisions**…, 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 (1985) (emphasis added).

The seven reduction factors presented to Judge Hite, which warrant reduction of the felony charges to misdemeanors here are as follows:

First, as to Merritt's "traits of character as evidenced by [her] behavior and demeanor at the trial," *Alvarez*, 14 Cal. 4th at 978, Judge Hite had an opportunity to observe – not just at the lengthy preliminary hearing but at every hearing since the inception of this prosecution more than three years ago – that Merritt is a polite, courteous, **67-year-old** grandmother, who, despite obvious physical disabilities, conscientiously and attentively attended every required hearing, at great personal and physical costs (especially after she moved across the country, to 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 at Merritt's age and physical handicap – 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 were documented for Judge Hite in prior briefs and at the Preliminary Hearing. 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 uncovered by these Defendants**. (*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 VI, *supra*; *see also*, Daleiden's Section 995 motion to dismiss). 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 – as the Magistrate did – 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. There are fundamental due process violations involved when creating new criminal law and applying it retroactively. *See People v. Whitmer*, 59 Cal. 4th 733, 742 (2014) ("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" (emphasis added)); *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 certainly 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 throughout this memorandum. 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 6** (now Information Doe 5) (Tr. 778:2-5; 780:3-4; 772:23-28; 773:1-3; 774:7-11); and **Doe 7** (now Information Doe 6) (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 IV, *supra*.

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 all the foregoing reasons, Merritt respectfully asks that the Court dismiss the Information, or, alternatively, consolidate any surviving counts and reduce them to misdemeanors.

Respectfully submitted,
DEFENDANT SANDRA S. MERRITT
By Counsel.

BY: _____

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EXHIBIT 1

CA B. An., A.B. 156 Sen., 6/06/1995

California Bill Analysis, Senate Committee, 1995-1996 Regular Session, Assembly Bill 156

June 6, 1995
California Senate
1995-1996 Regular Session

SENATE COMMITTEE ON CRIMINAL PROCEDURE

Senator Milton Marks, Chair

1995-96 Regular Session

AB 156 (Napolitano)

As amended March 30, 1995

Hearing date: June 6, 1995

Penal Code and Business and Professions Code

MLK:js

DOCUMENTS: DECEPTIVE IDENTIFICATION

HISTORY

Source: Los Angeles District Attorneys Office

Prior Legislation: AB 2417 (Napolitano, 1994) failed on the Assembly floor

Support: California Secretary of State; California Attorney General; City and County of San Francisco (if amended); California District Attorneys Association

Opposition: None

Assembly Floor Vote: Ayes 73 - Noes 0

KEY ISSUE

should the law prohibit the FURNISHING, transporting and importing of counterfeit identification documents? (SEE COMMENT 7 FOR oTHREE STRIKESo IMPACT, WHICH DOES NOT INCLUDE THE CREATION OF A NEW FELONY.)

PURPOSE

Under existing law production of a counterfeit government seal, with the intent to defraud, or possession and willful concealment of a counterfeit government seal, knowing it is counterfeit, is a wobbler punishable by 16 months, two or three years in state prison, or by up to one year in county jail. (Penal Code section 472.)

Under existing law the possession or use of a forged driveros license or identification card with the intent to commit forgery is a wobbler punishable by 16 months, two or three years in state prison, or by up to one year in county jail. (Penal Code section 470(b).)

Under existing law the selling or offering to sell a government issued identification card or driveros license is a misdemeanor punishable by imprisonment in county jail for up to one year or by an escalating fine for subsequent offenses, or both imprisonment and fine. A violation of this offense by a person under the age of 21 years may also result in the suspension of driving privileges for one year. (Penal Code section 529.5.)

Under existing law the production, sale, or offer to sell a deceptive identification document, without specified labeling stating it is not a government document, is subject to an injunction. If it is known or reasonably should be known that the deceptive identification is to be used for a fraudulent purpose, then such a violation is a wobbler punishable by 16 months, two or three years in state prison, or by up to one year in county jail. (Business and Professions Code section 22430.)

This bill would also make the furnishing, transporting, importing of a deceptive identification document which is not specifically labeled that it is not a government document, or offering to do any of these acts, a wobbler punishable by 16 months, two or three years in state prison, or by up to one year in county jail. This bill adds these provisions to existing Business and Professions Code section 22430 and adds an identical section in the Penal Code.

The purpose of this bill is add to the provision prohibiting the production and sale of fraudulent identification documents a prohibition against the furnishing, transporting and importing of such documents.

COMMENTS

1. Need for the Bill.

The sponsor states that this bill fills in a loophole in existing law.

Existing law only allows for the prosecution of persons who possess, sale or manufacture deceptive identification documents which are not specifically marked oNOT A GOVERNMENT DOCUMENTo. According to the sponsor, the typical sale of a fraudulent card involves anywhere from three to five sellers and a buyer. The modus operandi is as follows: one seller will solicit customers on the street and take orders, i.e., records the information the customer wants on the false card; a second person operates as a runner who takes the information from the seller to the omillo, where the false card is made; often there is a supervisor who must approve the quality of the card before the runner, a new person, delivers the finished product to the customer.

The sale of these documents is a complex operation, however, not everyone in the chain can be prosecuted under existing law. Thus, in the typical sale, only the runner who carries the finished cards to the buyer, and the buyer can be charged, assuming possession of the card can be shown through willful concealment. The runner and salesperson on the street who solicits the sale, records the information, and collects the money are not charged with a crime.

The sponsor believes this bill would close that loophole by including the furnishing, transportation, or importation of fraudulent cards.

2. This Bill.

This bill adds to the existing Business and Professions Code section which makes the sale or manufacture of odeceptive identification documentso a wobbler the prohibition against the furnishing, transporting or importing

these documents, or offering to do any of these things. It also adds to the Penal Code a section identical to the one in the Business and Professions Code.

3. Fraudulent Uses.

Fraudulent cards are used for a variety of reasons, including but not limited to the following:
Undocumented workers from other countries purchase fake cards to obtain work in California.
Persons seeking to cash stolen or forged checks obtain fake identification cards to reflect the payee or account name on the check.
Underage persons wanting to purchase alcohol obtain fake identification to reflect an age of over 21 years.
Persons seeking fraudulent welfare payments are enabled to do so with the assistance of fake social security cards.

4. Impact of the Bill.

Based on a survey of law enforcement agencies, the Los Angeles projects an additional 120 arrests, 80 criminal filings, 30 cases filed as a felony, 20 felony convictions and 1-2 new state prison commitments per year if this bill is enacted.

5. Penal Code Section.

This bill brings the wording of Business and Professions Code section 22430 to the Penal Code to make it more accessible to prosecutors. Prosecutors do not usually refer to the Business and Professions Code when filing charges. This section will be part of the oForgery and Counterfeitingo section of the Penal Code and thus be placed near similar crimes.

6. City and County of San Francisco Amendment.

The City and County of San Francisco suggests that this bill be amended to include restrictions on the sale of embossing seals and pre-engraved security paper which bears the seal of a government agency. Under existing law it is legal to sell these items and thus people may produce official looking documents without committing forgery. San Francisco notes that this is a concern particularly in the area of birth certificates.

7. Three-Strikes.

This bill does not create a new felony. It does broaden the categories of who may be prosecuted under an existing felony. That expanded category is arguably consistent with the current law and is a oclarificationo of that law based upon real world experience with the realities of the practice of offenders.

CA B. An., A.B. 156 Sen., 6/06/1995

End of Document

EXHIBIT 2

CA B. An., A.B. 156 Assem., 4/04/1995

California Bill Analysis, Assembly Committee, 1995-1996 Regular Session, Assembly Bill 156

April 4, 1995
California Assembly
1995-1996 Regular Session

Date of Hearing: April 4, 1995

Consultant: Natasha Fooman

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Paula L. Boland, Chair

AB 156 (Napolitano) - As Amended: March 30, 1995

ISSUE: SHOULD THE FURNISHING, TRANSPORTING, OR IMPORTING OF COUNTERFEIT DOCUMENTS BE PROHIBITED?

DIGEST

Under current law:

1) Production of a counterfeit government seal, with the intent to defraud, or possession and willful concealment of a counterfeit government seal, knowing it is counterfeit, is an alternate felony/misdemeanor punishable by 16 months, two or three years in state prison, or by up to one year in county jail. (Penal Code section 472.)

2) The production, sale, or offer to sell a deceptive identification document, without specified labeling stating it is not a government document, is subject to enjoinment. If it is known or reasonably should be known that the deceptive identification is to be used for a fraudulent purpose, then such a violation is an alternate felony/misdemeanor punishable by 16 months, two or three years in state prison, or by up to one year in county jail. (Business and Professions Code section 22430.)

3) Possession or use of a forged drivers license or identification card with the intent to commit forgery is an alternate felony/misdemeanor punishable by 16 months, two or three years in state prison, or by up to one year in county jail. (Penal Code section 470(b).)

4) Selling or offering to sell a government issued identification card or drivers license is a misdemeanor punishable by imprisonment in county jail for up to one year or by an escalating fine for subsequent offenses, or both imprisonment and fine. A violation of this offense by a person under the age of 21 years may also result in the suspension of driving privileges for one year. (Penal Code section 529.5.)

This bill makes it a misdemeanor/felony to furnish, transport, offer to transport, import, or offer to be imported into California, a deceptive identification document, knowing that it is intended to be used for fraudulent purpose.

COMMENTS

1) Purpose. According to the author:

> We need to amend the Business and Professions Code section 22430 and adopt the proposed legislation because the sale of forged cards is doing great damage to our communities. The current law does not adequately provide for the prosecution of the sellers of these cards, and the proposed legislation would close the existing loopholes and give prosecutors the tools they need to combat the growing crime problem.

2) Potential Effect. This bill is designed to deter the booming sales of fake identification documents and allow law enforcement to prosecute not only individuals who make fake ID's but also the sellers and middle men and women involved in the lucrative fake ID trade.

3) Micas. This is the slang term used on the streets to describe fake cards such as driver's licenses, resident alien cards, and social security cards.

4) Fraudulent Uses. Fraudulent cards are used for a variety of reasons, including but not limited to the following:

a) Undocumented workers from other countries purchase fake cards to obtain work in California.

b) Persons seeking to cash stolen or forged checks obtain fake identification cards to reflect the payee or account name on the check.

c) Underage persons wanting to purchase alcohol obtain fake identification to reflect an age of over 21 years.

d) Persons seeking fraudulent welfare payments are enabled to do so with the assistance of fake social security cards.

5) Increase in Counterfeit Documents. The Los Angeles District Attorney's Office cites U.S. Department of Justice statistics demonstrating a 50% increase over a recent one year period, in the seizure of counterfeit documents in Los Angeles County. Immigration and Naturalization Service seizures, during the same one year period totaled 395,950 counterfeit documents, having a street value of $15,838,000. Other law enforcement agencies within the County of Los Angeles corroborate the 50% increase. Los Angeles Police Department states they could bring about 300 cases per week to the District Attorney's Office for filing if the law were amended to include all persons in the chain of sale of documents.

6) Manufacture and Distribution Chain. According to the Los Angeles District Attorney's Office, the typical sale of a fraudulent card involves anywhere from three to five sellers and a buyer. The modus operandi is as follows: one seller will solicit customers on the street and take orders, i.e., records the information the customer wants on the false card; a second person operates as a runner who takes the information from the seller to the "mill", where the false card is made; often there is a supervisor who must approve the quality of the card before the runner, a new person, delivers the finished product to the customer.

7) Addressing the Problem. The complexity of the mica operation involves several individuals, similar to the sale of narcotics. However, only some of the participants involved may be prosecuted under the provisions of section 22430. Thus, in the typical sale, only the runner who carries the finished cards to the buyer, and the buyer can be charged, assuming possession of the card can be shown through willful concealment. The runner and salesperson on the street who solicits the sale, records the information, and collects the money are not charged with a crime. This bill would include furnishing, transportation, or importation of fraudulent cards.

8) Definition of Deceptive Identification Document. Any document not issued by a government, which purports to be, or which might deceive an ordinary reasonably person into believing that it is a document issued by such an agency, including, but not limited to, a driver's license, identification card, birth certificate, passport, or social security card. (Penal Code section 483.5(b).)

9) Penalty. This bill makes it a crime punishable by up to one year in the county jail, or by imprisonment in the state prison (wobbler) to furnish, transport, offered to be transported, import, or offered to be imported into California, a deceptive identification document, knowing that it is intended to be used for fraudulent purpose.

10) Prior Legislation. AB 2417 (Napolitano) of 1993-1194 legislative session failed on the floor in the Assembly. The original version of AB 2417 was identical to AB 156 as introduced. AB 2417 was amended on March 2, 1994 to eliminate three strikes exposure. The consensus is that the bill did not pass off the floor of the Assembly because the language that was added to the bill eliminate three strikes treatment, to the extent individuals which two violent or serious priors are charged with felony deceptive documenting. AB 156 as amended on March 29, 1995 makes deceptive documenting a misdemeanor/felony.

SOURCE: Los Angeles District Attorney's Office

SUPPORT:	Government Relations Oversight Committee California District Attorneys Association San Bernardino County Sheriff's Department California Association of Independent Business, Inc.

OPPOSITION: California Attorneys for Criminal Justice

CA B. An., A.B. 156 Assem., 4/04/1995

CERTIFICATE OF SERVICE

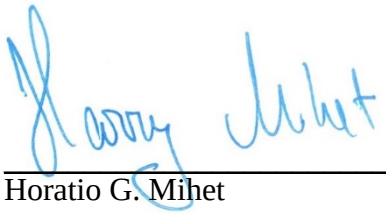
Pursuant to Cal. Code Civ. P. 1013(a), I hereby certify that, on April 13, 2020, I served the forgoing *Defendant Merritt's Notice; Motion to Dismiss Under Penal Code Section 995; and Memorandum of Points and Authorities*, on the following parties/entities via the following methods:

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
Attorney for the State of California	Attorneys for Defendant David Daleiden

[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: April 13, 2020



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