THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION _____

SANDRA SUSAN MERRITT, Petitioner, vs. THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO, DEPT. 17 Respondent; PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	Case No.: _____

VERIFIED PETITION FOR PENAL CODE SECTION 999a WRIT OF PROHIBITION; MEMORANDUM; AND APPENDIX OF EXHIBITS

From the Orders of the Superior Court of California, County of San Francisco, Dept. 17
Case No. 17006621
The Honorable Christopher C. Hite
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CORRELATION TABLE FOR COUNTS AND DOES

The following chart correlates the Counts and alleged "Doe" victims between the Preliminary Hearing and the subsequent Information. 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 Memorandum Section III, *infra*. The charges dismissed at the Section 995 Hearing are also identified, in the last column.

PRELIMINARY HEARING DOE AND COUNT NUMBER	INFORMATION DOE AND COUNT NUMBER	PROP. 115	SECTION 995 HEARING OUTCOME
1	1	YES	UPHELD
2	2	YES	UPHELD
3	3		UPHELD
4	DISMISSED		N/A
5	4	YES	UPHELD
6	5	YES	UPHELD
7	6		UPHELD
8	DISMISSED		N/A
9	DISMISSED		N/A
10	7		UPHELD
11	8	YES	DISMISSED (CONSOLIDATED WITH COUNT 7)
NOT ASSERTED	9 (NEW; No Doe)		DISMISSED AS TO MERRITT ONLY
12	DISMISSED		N/A
13	DISMISSED		N/A
14	DISMISSED		N/A
15 (Conspiracy; No Doe)	10 (Conspiracy; No Doe)		UPHELD

PETITION

Pursuant to California Penal Code §999a,[1] Petitioner SANDRA SUSAN MERRITT ("Merritt" or "Petitioner"), respectfully petitions this Court for a Writ of Prohibition directing the Respondent Court to dismiss all counts of the Information and to refrain from proceeding to trial or holding further proceedings against Petitioner, on the ground that Petitioner has been committed on the Information without reasonable or probable cause. In support hereof, Petitioner shows this Court as follows:

I

Petitioner and Real Party in Interest

Merritt is a Defendant in a felony action now pending in Respondent Court, entitled *The People of the State of California v. David Robert Daleiden and Sandra Susan Merritt,* No. 17006621. The People of the State of California, represented by the Attorney General, are the Real Party in Interest.

II

Respondent

Respondent is the Superior Court of California, County of San Francisco, with the Honorable Judge Christopher C. Hite (Dept. 17) presiding as a magistrate at Merritt's preliminary hearing, and exercising judicial functions in this felony prosecution.

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[1] Unless otherwise noted, all statutory references are to Penal Code sections.

III

Venue is Proper

All proceedings related to this Petition have occurred within the territorial jurisdiction of Respondent, and of the Court of Appeal of the State of California, First Appellate District.

IV

No Prior Petitions

Merritt has filed no other petition for writ of prohibition pursuant to Section 999a.

V

Related Proceedings and Petitions

Also pending in the same Superior Court is a separately docketed prosecution against David Daleiden ("Daleiden"), Merritt's co-defendant, bearing the same name (*The People of the State of California v. David Robert Daleiden and Sandra Susan Merritt*), but docketed as No. 2502505. The two prosecutions have been consolidated and are proceeding synchronously.

Concurrently with the filing of this Petition by Merritt, Daleiden is filing his own, separate petition for writ of prohibition under Section 999a in this court, from the partial denial of his own, separate Section 995 motion to dismiss. Merritt hereby joins in Daleiden's petition in full, and adopts his arguments as, and in addition to, her own arguments herein.

VI

Statement of Grounds for Relief

This Court should grant this Petition to correct the following **six** demonstrable errors of the magistrate, the individual and combined result of which was to unlawfully commit Merritt upon an Information without the required showing of probable cause:

1. Immediately after correctly concluding that Section 632 (and thus all of the counts at issue here) "requires a finding of specific intent to commit the crime" of illegally recording a "confidential communication," the magistrate erred by: (a) expressly discarding, in the very next sentence, "the defendant's subjective belief [a]s legally irrelevant," and (b) ignoring the plethora of undisputed and uncontroverted testimony that Defendants – **based upon the advance advice of multiple attorneys** – subjectively and in good faith believed that the recordings were legal. (Commitment Order at 8; App.V24p1515).[2] The effect of this error was to commit Merritt on charges requiring a showing of specific intent, without probable cause that she specifically intended to violate the law.

2. The magistrate erred in declining to dismiss the five counts of illegal recording premised entirely on the hearsay testimony of the Attorney General's Proposition 115 investigator-witness, because that witness admittedly failed to use his special training and experience to obtain critical details from non-testifying alleged victims, and failed to

[2] "App." refers to the Appendix of Exhibits, being filed manually herewith, and denotes the Volume ("V") and page ("p") where a record reference may be found.

provide the Court with anything other than the alleged victims' subjective feelings that their recorded conversations were "confidential," which is wholly irrelevant under the objective standard of Section 632. The demonstrable effect of this error was to preclude Merritt from meaningful cross-examination of both, the absent alleged victims and the unprepared and unknowledgeable Proposition 115 witness, in violation of Merritt's due process rights, as held by the California Supreme Court in *Whitman v. Superior Court*, 54 Cal. 3d 1063 (1991), and by the Court of Appeal in *Hosek v. Superior Court,* 10 Cal. App. 4th 605 (1992).

3. The magistrate erred in concluding for each of the surviving counts that probable cause exists to believe that Merritt recorded a "confidential communication" under Section 632, because each and every one of the recorded persons admitted: (1) that their conversations with Merritt could be overheard by others; (2) that they took no measures to prevent nearby bystanders from overhearing their conversations; (3) that they expected Merritt and Daleiden to share the information exchanged in the recorded conversations with other people; and (4) that they neither vetted nor required non-disclosure agreements of the Defendants or the bystanders. With these admissions, the recorded conversations could not possibly qualify as "confidential communications" under Section 632(c), because that section expressly "**excludes** a communication made in . . . any other circumstance in which the parties to the communication may

reasonably expect that the communication may be overheard . . .." *Id.* (emphasis added).

4. The magistrate erred by: (a) ignoring Defendants' extensive and unrebutted evidence that they reasonably believed that their undercover recordings would relate to the commission by others of felonies involving violence against the person, and thus were protected under Section 633.5; and (b) declining to require the Attorney General to rebut Defendants' statutory defense under Section 633.5.

5. The magistrate erred by declining to consolidate all of the surviving counts for illegal recording into one count, because the evidence was undisputed that all of the undercover recordings at issue were undertaken close in time, as part of **one** undercover investigation with **one** intent to investigate possible criminal conduct.

6. Finally, the magistrate erred by summarily declining to exercise his discretion to reduce the surviving felony counts to misdemeanors under Section 17(b)(5), because each and every one of **seven** relevant factors militates strongly in favor of reduction.

A. Statement of Facts.

Petitioner 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 her co-Defendant Daleiden, to investigate potential violent criminal acts within the abortion industry, including illegal trafficking in human body parts and born-alive infant

homicide. (Prelim. Hrg. Tr.[3] 897:2-10; App.V19p993). For many months prior to commencing the undercover recordings at issue in this prosecution, Daleiden meticulously gathered documentary and video evidence from numerous sources within the abortion and fetal tissue industry, which left him with the strong suspicion that abortion providers were violating federal laws with respect to fetal tissue procurement, committing medical battery on unconsenting patients, and committing crimes of violence against born-alive human beings. (Tr. 880-888, App.V18p974-982; Tr. 893:15-896:14, App.V18p987; Tr. 898:27-899:2, App.V19p994-995; Tr. 952:19-22, App.V19p1052; 1021:21-1023:27, App.V20p1127-1129; 1125:2-6, V19p1052; *see also*, Daleiden Section 999a Petition, filed concurrently with this Petition). So voluminous was the pre-recording evidence obtained by Daleiden, that it required several **days** to present at the Preliminary Hearing. (*Id.*)

Prior to making any of the undercover recordings at issue in this case, Daleiden shared with Merritt all of the extensive pre-recording evidence he had collected. (Prelim. Hr. Tr. 1125:2-28; App.V21p1233). Merritt therefore shared Daleiden's belief that violent crimes were potentially taking place in the fetal tissue procurement world and needed to be investigated. (*Id.* at 1126:11-14; App.V21p1234).

Also prior to recording any of the undercover interviews in California, Daleiden sought the advice of "**quite a few different**

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[3] Unless otherwise noted, "Tr." hereinafter refers to the Preliminary Hearing transcript.

attorneys, … as far as what is permissible under California Penal Code Section 632." (*Id.* at 905:20-907:1; App.V19p1001-03 (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**." (*Id.* at 907:27-908:4; App.V19p1003 (emphasis added)).

Also prior to recording any of the undercover investigative conversations at issue, Daleiden shared the legal advice he received with Merritt. (*Id.* at 1125:25-28; App.V21p1233). The two of them therefore formed a good faith belief that their proposed recordings would not violate Section 632, because they sincerely believed that the anticipated recordings would not be "confidential" within the meaning of that statute. (*Id.*)

Equipped with the foregoing pre-recording knowledge, attorney advice, and good faith beliefs, Merritt then 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, and (2) they knew that the conversations could be overheard by

other persons not parties to the conversations. (*See* Memorandum Section IV.A-B, *infra*).

Throughout the undercover investigation, Daleiden and Merritt worked conscientiously and dutifully to stay within the bounds of Section 632, **as they understood it and as it was confirmed to them by the attorneys**. They took precautions to ensure that their recordings remained legal, including making "sure to only video record in places of public accommodation," avoiding "private meeting rooms" and selecting instead "places at those restaurants that were … completely publicly accessible." (Tr. 1131:23-1132:8; App.V21p1239-40). Critically, Daleiden and Merritt had unique opportunities to record inside private abortion facilities in California, where they would have expected to gather even more useful information, but **they turned down those opportunities because they wanted to remain compliant with the law**, as they reasonably understood it. (*Id*. at 1132:21-1133:20; App.V21p1240-41).

The undercover interviews 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, before taking their significant findings to the public **Daleiden voluntarily took the evidence to numerous law enforcement agencies**. (Tr. 1119:24-26, App.V21p1227; Tr. 1142:26-1143:4, App.V21p1254-55; Tr. 1200:14-1204:12; App.V21p1312-16).

Some of those law enforcement agencies voluntarily contacted by Defendants, and other government bodies, have relied upon CMP's undercover recordings to investigate fetal tissue providers and traffickers, to limit public funds from being spent on illegal activities, and even to prosecute those who were caught red-handed on the undercover recordings. 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**. (*Id.* at 1205:21-1206:13; App.V21p1317-18). The prosecuting authority credited Defendants' and CMP's undercover investigation for its success in bringing the wrongdoers to justice. (*Id.* at 1206:9-13; App.V21p1318).

The Attorney General of California, however, has taken a different course. Rather than joining other law enforcement agencies to prosecute the persons and organizations caught by Defendants 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 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 Section 632, and a fifteenth felony charge for conspiracy to violate the same statute.[4]

[4] The Counts have changed numbers from the Preliminary Hearing to the Information. *See* Correlation Table, p. 7, *supra*.

B. Proceedings Below.

The Preliminary Hearing was held on eleven court days between September 3-18, 2019, and December 6, 2019. In the Commitment Order entered on December 6, 2019, Respondent Superior Court Judge Christopher Hite, sitting as a magistrate, dismissed six of the charges under Section 632, and held Merritt and Daleiden to answer on the remaining nine charges. (Commitment Order; App.V24p1508).

The Attorney General then re-filed the surviving nine felony charges in the Information, on December 13, 2019. (Information at 1-7; AppV24p1530-36). In addition, the Attorney General also added a new, tenth felony charge against both Defendants under Section 483.5(a), for alleged manufacture, transport, furnishing, etc., of allegedly deceptive identification documents. (*Id*. at Count 9; App.V24p1530).

Both Merritt and Daleiden timely filed separate motions to set aside the Information pursuant to Section 995, which were heard together by Superior Court Judge Suzanne Bolanos on July 28, 2020. (Section 995 Hrg. Tr. at 1; App.V24p1537).

On her Section 995 review, Judge Bolanos dismissed the new felony charge regarding deceptive identification (Count 9) as to Merritt only, concluding that the Preliminary Hearing transcript did not contain sufficient evidence of probable cause as to Merritt. (Section 995 Hrg. Tr. 65-66; App.V24p1601-02).[5] Judge Bolanos also dismissed one of the illegal recording charges, Count 8, as to both Defendants,

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[5] Judge Bolanos denied Daleiden's motion to dismiss the same Count 9 as to him. (Section 995 Hrg. Tr. 66; App.V24p1602).

concluding that it was duplicative of Count 7 because both counts involved the same recording. (*Id.* at 66; App.V24p1602).[6]

In all other respects, Judge Bolanos denied Merritt's and Daleiden's Section 995 motions, thus leaving intact eight felony charges against Merritt and nine felony charges against Daleiden. This Petition under Section 999a was timely filed by Merritt within 15 days of the disposition of her Section 995 motion.

C. Statement of Legal Issues.

This Court should grant this Petition to review, consider and resolve the following legal issues:

1. Whether, in the context of a specific intent crime, the magistrate erred by expressly discarding Defendants' subjective belief as "legally irrelevant," and by ignoring the undisputed testimony that Defendants – based upon the advice of multiple attorneys – subjectively and in good faith believed that their undercover investigative recordings would not violate Section 632?

2. Whether the magistrate erred by declining to dismiss the five counts of illegal recording premised entirely on the hearsay testimony of a Proposition 115 investigator-witness, when that witness admitted that he failed to use his training and experience to obtain

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[6] Judge Bolanos' conclusions are summarized herein and elsewhere in this Petition for procedural and information purposes only. On a Section 999a review of the denial of a Section 995 motion, this Court "disregard[s] the ruling of the superior court and directly review[s] the determination of the magistrate.'" *Zemek v. Superior Court*, 44 Cal. App. 5th 535, 544–45 (2020). *See generally* Memorandum Section I, *infra*.

critical details from the non-testifying alleged victims, and failed to provide the Court with anything other than the legally-irrelevant subjective feelings of the alleged victims?

3. Whether the magistrate erred in finding for each of the surviving counts that probable cause exists to believe that Merritt recorded a "confidential communication" under Section 632, when each and every one of the recorded persons admitted: (1) that their conversations with Merritt could be overheard by others; (2) that they took no measures to prevent nearby bystanders from overhearing their conversations; (3) that they expected Merritt and Daleiden to share the information exchanged in the recorded conversations with other people; and (4) that they neither vetted nor required non-disclosure agreements of the Defendants or bystanders?

4. Whether the magistrate erred by ignoring Defendants' extensive and unrebutted evidence that they reasonably believed that their undercover recordings would relate to the commission by others of felonies involving violence against the person, and thus were protected under Section 633.5; and by declining to require the Attorney General to rebut Defendants' statutory defense under Section 633.5?

5. Whether the magistrate erred by declining to consolidate all of the surviving counts for illegal recording into one count, when the evidence was undisputed that all of the undercover recordings at issue were undertaken close in time, as part of **one**

undercover investigation with **one** intent to investigate possible criminal conduct?

6. Whether the magistrate erred by summarily declining to exercise his discretion to reduce the surviving felony counts to misdemeanors under Section 17(b)(5), when each and every one of **seven** relevant factors militates strongly in favor of reduction?

VII

Petitioner Has No Other Adequate Remedy

"When the evidence produced at the preliminary examination does not meet [the probable cause] test, the order holding a defendant to answer should be set aside on motion pursuant to section 995 of the Penal Code, and if this is not done **the trial will be prevented by a writ of prohibition issued under section 999a of the Penal Code**." *Williams v. Superior Court*, 71 Cal. 2d 1144, 1147 (1969) (emphasis added). Therefore, "Penal Code section 999a permits [s]tatutory review by prohibition of a denial of a motion to set aside an information which is predicated upon the ground that the defendant [h]ad been committed on an information without reasonable or probable cause." *Johnson v. Superior Court*, 97 Cal. App. 3d 682, 684 n.1 (1979).

Petitioner has no other adequate remedy, because "Section 999a . . . provides the sole procedure for obtaining pretrial appellate relief from any order denying a section 995 motion." *Ghent v. Superior Court*, 90 Cal. App. 3d 944, 951 n.7 (1979). Accordingly, this is the exclusive means for seeking a pre-trial review of Petitioner's

substantial right not to be committed or held over for trial on an information without reasonable or probable cause. *See id*; *see also*, Cal. Penal Code §999a; *Jones v. Superior Court*, 96 Cal. App. 3d 390, 393 (1979) ("Prohibition is an appropriate method to test the right of the People to proceed with a prosecution when the validity of an indictment or information is challenged.").

VIII

Petitioner Has Timely Fulfilled All Statutory Requirements

Merritt has timely complied with the requirements of both Sections 1510 and 999a.

The Preliminary Hearing concluded on December 6, 2019. (Prelim. Hrg. Tr. 1348, 1382-83; App.V23p1470, 1504-05). The Commitment Order was entered on the same date. (App.V24p1508). The Information was then filed on December 13, 2019. (App.V24p1530). Merritt was arraigned on February 21, 2020.

Merritt timely filed a Section 995 motion to set aside the Information on April 15, 2020, within sixty days of her felony arraignment, in compliance with Section 1510, and that motion was granted in part and denied in part on July 28, 2020. (Section 995 Hrg. Tr. 65-66; App.V24p1601-02).

Merritt then filed this Petition on August 12, 2020, within fifteen days of the disposition of her Section 995 motion, in compliance with Section 999a.

IX

Petitioner Will Be Irreparably Harmed Absent Writ Relief

> It is an elementary rule of law that before a defendant may be held to answer in the superior court, it must appear from the testimony at the preliminary examination that a public offense has been committed. [Citation omitted]. It is also elementary that a court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information.

Jones v. Superior Court, 96 Cal. App. 3d 390, 393 (1979). Accordingly, Merritt will be irreparably harmed absent the relief sought herein, because she will be held to answer and forced to proceed to trial without a valid Information, supported by probable cause, and thus without jurisdiction. *See id*.

PRAYER

WHEREFORE, Petitioner prays that this Court issue a Writ of Prohibition pursuant to Penal Code Section 999a, directing the Respondent Court to dismiss all counts of the Information and to refrain from proceeding to trial or holding further proceedings against Petitioner; or, alternatively, to consolidate any remaining counts into one, and to reduce any remaining charges to misdemeanors; and that this Court grant Merritt such other and further relief as may be appropriate and just.

DATED: August 12, 2020

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VERIFICATION

I am the Petitioner in this action. All facts alleged in the above document, not otherwise supported by citation to the record, exhibits, or other documents are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 12, 2020, in Broward County, Florida.

/s/Sandra Susan Merritt
SANDRA SUSAN MERRITT
Petitioner

MEMORANDUM IN SUPPORT OF WRIT PETITION

I. STANDARD OF REVIEW.

"When we review a section 995 motion, we 'disregard the ruling of the superior court and directly review the determination of the magistrate.'" *Zemek v. Superior Court*, 44 Cal. App. 5th 535, 544–45 (2020), *review denied* (Apr. 22, 2020) (quoting *People v. San Nicolas*, 34 Cal. 4th 614, 654 (2004) (alterations omitted)). "We conduct an **independent review** of the evidence." *San Nicolas*, 34 Cal. 4th at 654 (emphasis added) (citing *People v. Hall* 3 Cal. 3d 992, 996 (1971)).

Critically, while this Court "will not substitute [its] judgment for that of the magistrate as to the credibility or weight of the evidence," *Zemek*, 44 Cal. App. 5th at 545 (quoting *San Nicolas*, 34 Cal. 4th at 654), the magistrate's "**legal conclusions [are] review[ed] independently**." *Zemek*, 44 Cal. App. 5th at 546 (emphasis added) (quoting *People v. Bautista*, 223 Cal. App. 4th 1096, 1102 (2014), *as modified* (Feb. 10, 2014)).

To determine whether a magistrate's treatment of, and conclusions regarding, the testimony of witnesses constitute factual findings subject to deference, or legal conclusions subject to independent review, this Court looks at whether: (1) the "witnesses' testimony was . . . inherently improbable," (2) the witnesses were "significantly impeached," and (3) "the magistrate made . . . findings as to their demeanor." *Zemek*, 44 Cal. App. 5th at 546 (alterations omitted) (quoting *Bautista*, 223 Cal. App. 4th at 1102). Where, as here, "the magistrate did not make any express credibility findings . . . [and]

there was little [or no] evidence that the . . . witnesses were not credible . . . [and] [t]heir testimony was not inherently implausible [and] they were not significantly impeached[,] we conclude that . . . the magistrate expressly or impliedly accepted the evidence and simply reached **the ultimate legal conclusion**" that probable cause was sufficient. *Zemek*, 44 Cal. App. 5th at 547 (emphasis added) (alterations omitted) (citing *Pizano v. Superior Court*, 21 Cal. 3d 128, 145 (1978). Such legal conclusion is not entitled to deference and is subject to independent review by this Court. *See id*.

Ultimately, the preliminary hearing "was designed to protect the accused from groundless or unsupported charges." *Jones v. Superior Court*, 4 Cal. 3d 660, 667 (1971). "**Many an unjustifiable prosecution is stopped at that point where the lack of probable cause is clearly disclosed**." *Id*. at 667–68 (emphasis added). "[T]he complete failure to present evidence on an element **requires** dismissal …." *Thompson v. Superior Court*, 91 Cal. App. 4th 144, 149 (2001) (emphasis added). *See also* Cal. Penal Code § 871.

> [B]inding a defendant over for trial is not a perfunctory exercise. Preliminary hearings serve important purposes. They weed out groundless charges of grave offenses and relieve the accused of the degradation and expense of a criminal trial. Preliminary examinations operate as a judicial check on the exercise of prosecutorial discretion and help ensure that the defendant is not charged excessively which can confer a tactical advantage upon the prosecutor. . ..

People v. Herrera, 136 Cal. App. 4th 1191, 1202 (2006) (internal quotes, citations and alterations omitted).

II. THE MAGISTRATE ERRED BY EXPRESSLY DECLARING THAT MERRITT'S "SUBJECTIVE BELIEF IS LEGALLY IRRELEVANT" TO THE SPECIFIC INTENT CRIMES CHARGED, AND BY IGNORING THE UNCONTROVERTED EVIDENCE THAT MERRITT SUBJECTIVELY AND IN GOOD FAITH BELIEVED THAT THE RECORDINGS WERE LEGAL.

A. The Magistrate Erred in Conflating Petitioner's Specific Intent with the Statutory Definition of "Confidential Communication," in Failing to Analyze the Former Separately from the Latter, and in Declaring Petitioner's Subjective Belief to be "Legally Irrelevant."

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; App.V24p1515 (emphasis added)). 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; App.V24p1515), as well as *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 resulted in the dismissal of all claims. However, Judge Hite erred in discarding the specific intent requirement he had 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; App.V24p1515).

That is, immediately after concluding that "the statute requires a finding of specific intent," in the very same breath and in the same paragraph titled "Specific Intent" – indeed, in the very next sentence – Judge Hite expressly declared that "the defendant's subjective belief is legally irrelevant:"

> **D. Specific Intent**
>
> Based on an analysis of the statute and the applicable law, the Court finds that the statute requires a finding of specific intent to commit the crime. In order to establish a violation of Penal Code section 632(a), the prosecution must establish that the defendant had the specific intent to record a confidential communication. (*People v. Superior Court* (1969) 70 Cal.2d 123, 133.) However, as discussed above, what constitutes a "confidential communication" is determined on an objective basis, the defendant's subjective belief is legally irrelevant. (*Coulter v. Bank of Am.* (1994) 28 Cal. App.4th 923, 929.)

(Commitment Order at 8; App.V24p1515).

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; App.V24p1515). 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 a showing of specific intent to violate Section 632 **is** indisputably required.

In other words, even assuming (without conceding) that the **objective** standard from civil cases could be imported into criminal cases to determine whether a recorded communication is "confidential" within Section 632, and even assuming (without conceding) that under that **objective** standard the communications at issue here were "confidential," that does not answer the separate, additional and 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 were not confidential (which, as shown below, they indisputably did), they would lack the requisite specific intent to record "confidential communications" **even if they eventually turned out to be legally wrong about the statutory definition**.[7]

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[7] Defendants do not concede that the recorded communications were "confidential" within the meaning of Section 632, or that their understanding of Section 632 was mistaken. *See* Section IV, *infra*, demonstrating that all recorded communications were not "confidential."

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). *See also*, *People v. Vineberg*, 125 Cal. App. 3d 127, 137 (1981) ("**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** ...." (emphasis added)); 3 California Criminal Defense Practice § 73.07 ("A ***good faith*** mistake of law, however, is a defense to negate the ***specific intent*** required for a ***specific intent*** crime." (all emphasis in original)).

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 the medical marijuana law, but reversed his conviction for conspiracy to sell marijuana, a specific intent crime:

> Here, defendant's mistake that his formation and operation of FloraCare complied with the Compassionate Use Act was a mistake of law. … **Because conspiracy requires a specific intent, a good faith mistake of law would provide defendant with a defense**.

Id. at 773, 776 (emphasis added).

Judge Hite was therefore in error to expressly declare that "defendant's subjective belief is legally irrelevant" in this criminal, specific intent case. (Commitment Order at 8; App.V24p1515). Had Judge Hite continued his analysis into the multitude of undisputed facts showing that Merritt and Daleiden 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.

B. The Magistrate Erred By Ignoring and Declining to Consider the Plethora of Undisputed and Unrebutted Evidence that Merritt Did Not Specifically Intend to Record "Confidential Communications," Because She Subjectively Believed – Based on the Advice of Multiple Attorneys – that the Recorded Communications Were Not "Confidential" Under Section 632.

The magistrate did not merely **say** that Defendants' "subjective belief is legally irrelevant," to the question of their specific intent, but actually treated it as irrelevant and declined to examine it. Over the course of the multi-day Preliminary Hearing, Defendants presented a great deal of evidence – all of it unrebutted by the Attorney General – that they did not intend to record "confidential communications" within the meaning of Section 632(c), as they understood it after it had been explained by multiple attorneys. For instance:

- Daleiden testified, **without any rebuttal**, that his and Merritt's intent was to record evidence of suspected criminal conduct within the fetal tissue procurement industry. (Tr. 899:27-900:11, App.V19p995-96; Tr. 904:18-905:11, App.V19p1000-1001; Tr. 908:23-

909:6, App.V191004-1005; Tr. 977:20-978:4, App.V19p1077-78; Tr. 998:27-999:4, App.V19p1098-1099; Tr. 1125:20-24, App.V21p1233; Tr. 1094:10-1095:9, App.V20p1200-120; Tr. 1126:11-15, App.V21p1234).

- 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 where bystanders could reasonably be expected to overhear the recorded conversations. (Tr. 1131:23-1132:20, App.V21p1239-1240; Tr. 905:22-906:14, App. V19p1001-1002; Tr. 1066:7-9, App.V20p1172; Tr. 1068:3-19, App.V20p1174; Tr. 1074:19-25, App.V20p1180; Tr. 1080:1-15, App.20p1186).

- 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. (Tr. 1131:23-1132:8, App.V21p1239-1240; Tr. 1157:13-18, App.V21p1269).

- Daleiden testified, **without any rebuttal**, that he and Merritt turned down invitations and opportunities to visit private Planned Parenthood facilities in California, because they wanted to comply with the recording law. (Tr. 1132:21-1133:20, App.V21p1240-1241).

- 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, App.V19p1001; Tr. 905:20-907:2, App.V19p1001-1003; Tr. 907:27-908:4, App.V19p1003-1004; Tr. 1125-1126, App.V21p1233-1234; Tr. 908:23-909:6, App.V19p1004-1005; Tr. 1096:5-8, App.V20p1202).

- 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 **they honestly believed that undercover recordings were therefore exempted under Section 633.5**. (Tr. 880-888, App.V18p974-982; Tr. 893:15-896:14, App.V18p987; Tr. 898:27-899:2, App.V19p994-995; Tr. 952:19-22, App.V19p1052; 1021:21-1023:27, App.V20p1127-1129; 1125:2-6, V19p1052; *see also*, Daleiden's concurrently filed Section 999a Petition).
- 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 they uncovered, and gave them the fruits of their investigation. (Tr. 1119:24-26, App.V21p1227; Tr. 1142:26-1143:4, App.V21p1254-1255; Tr. 200:14-1204:12, App.V21p1312-1316). This is not what guilty people with guilty minds do.
- Finally, to further remove any doubt, Daleiden testified, **without any rebuttal**, that he and Merritt did not intend to record any "confidential communications," as that term is defined in Section

632. (Tr. 906:6-14, App.V19p1002; Tr. 907:24-908:4, App.V19p1003-1004; Tr. 1097:4-10, App.V20p1203; Tr. 1130:9-21, App.V21p1130; Tr. 1132:19-20, App.V21p1240).

C. The Magistrate's Determinations Regarding Specific Intent are Conclusions of Law to be Reviewed Independently and Without Deference.

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. The magistrate's errors in this regard are not factual determinations, but rather legal conclusions that should be reviewed independently and non-deferentially.

First, Judge Hite's express declaration that "defendant's subjective belief is legally irrelevant" to the question of specific intent is the quintessential conclusion of law, and indisputably not a factual determination. Indeed, Judge Hite cited only to a legal case, and not to any record evidence, as support for his legal conclusion.

Second, under the three factors identified in *Zemek v. Superior Court*, 44 Cal. App. 5th 535, 545–47 (2020), *see* Memorandum Section I, *supra*, Judge Hite's decision not to engage with any of the unrebutted facts and testimony adduced by Defendants on the question of their subjective beliefs and intent, including the legal advice Defendants received which caused them to believe that their recordings would be legal, is also a legal conclusion to be reviewed independently and without deference. First, the defense witnesses were not impeached **at**

all, let alone "significantly impeached," *Zemek*, 44 Cal. App. 5th at 546, on their subjective beliefs, their intent, the legal advice they received and relied upon, their good faith efforts to only film in places where they believed filming would be legal, and their decision to voluntary take their findings to law enforcement. Second, Judge Hite made no "findings as to the[] demeanor" of Daleiden or other defense witnesses, and no credibility determinations whatsoever. *Id.* And third, there was nothing inherently implausible in Daleiden's testimony about the legal advice that he received and shared with Merritt prior to the recordings, nor about the extensive steps they took to ensure that they would only record in places and under circumstances where they were advised that undercover recording would be legal, nor about the voluntary disclosure of their undercover recordings – and the evidence they gathered – to law enforcement first, before the public. *Id.* Consequently, rather than making factual or credibility determinations on the issue of specific intent that might have been entitled to deferential review, "the magistrate expressly or impliedly accepted the evidence and simply reached the ultimate legal conclusion" that probable cause was sufficient. *Zemek*, 44 Cal. App. 5th at 547. That legal conclusion should be reviewed independently by this Court and reversed for error.

III. THE MAGISTRATE ERRED IN DECLINING TO DISMISS THE FIVE COUNTS PREMISED ON THE INCOMPLETE INVESTIGATION AND DEFICIENT TESTIMONY OF THE ATTORNEY GENERAL'S PROPOSITION 115 WITNESS.

At the Preliminary Hearing, Merritt demonstrated that Agent Cardwell, the Attorney General's Proposition 115 witness, failed to use

his special training and experience to obtain any critical details from non-testifying alleged victims, failed to conduct a proper investigation, and failed to provide the Court with anything other than the **statutorily-irrelevant** subjective feelings of the alleged victims. 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, App.V24p1516). This Court should now review these deficiencies and dismiss Information Counts 1, 2, 4, 5 and part of 8.[8]

A. Agent Cardwell Had a Statutory and Constitutional Duty to Use His Special Training and Experience to Obtain Critical Details from Non-Testifying Witnesses.

As codified in Section 872, Proposition 115 permits the Court to rely upon the hearsay testimony of a sufficiently experienced or trained law enforcement officer, under specific due process requirements and safeguards. *Id*. The sufficiency of such a witness, and the compliance with due process requirements and safeguards, is subject to independent, non-deferential review via both a Section 995 motion to dismiss and a Section 999a writ petition:

[8] At the 995 hearing, Superior Court Judge Bolanos dismissed Information Count 8, because it was duplicative of Count 7. (Section 995 Hrg. Tr. 65-66; App.V24p1601-1602). Because Count 8 (and Doe 8) will be consolidated with Count 7 (and Doe 7), Merritt seeks the dismissal of Doe 8, from whatever count Doe 8 may be included.

> 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** [pursuant to Proposition 115] **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).

In *Whitman v. Superior Court*, 54 Cal. 3d 1063 (1991), the California Supreme Court provided three reasons why the statutory requirement of special training or lengthy experience for the hearsay testifying officer is critical. 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 Proposition 115 officer in meaningfully questioning out-of-court witnesses as opposed to merely "passively listen[ing]" to them, so that the officer can provide useful testimony 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.)

10 Cal. App. 4th at 609 (emphasis added).[9]

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

[9] Although the out-of-court witness in *Hosek* was an expert, *Whitman* holds that the testifying officer's duty to properly investigate and question out-of-court witnesses applies to any Proposition 115 witness. *Whitman*, 54 Cal. 3d at 1074-75.

statements as to which he or she testifying, the court **must** disregard such "testimony." *Whitman*, 54 Cal. 3d at 1074-75 (granting peremptory writ and ordering that Information be dismissed because Proposition 115 witness failed to provide necessary details).

B. Agent Cardwell Admittedly Failed to Use His Special Training and Experience to Obtain Critical Details from Non-Testifying Witnesses and Failed to Conduct a Proper Investigation.

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, App.V15p870). As demonstrated, this is what *Whitman* and *Hosek* plainly require, to protect Merritt's constitutional due process rights to meaningfully confront her accusers. Indeed, Agent Cardwell testified that these skills are important in law enforcement investigations because witnesses do not always tell the truth. (Tr. 789:9-12, App.V15p870).

Nevertheless, despite these clear requirements and his knowledge of them, Agent Cardwell made some breathtaking admissions about his "investigation"—his first ever case involving Section 632. (Tr. 788:1-7, App.V15p869). Indeed, the uniform chorus of "No's" uttered by Agent Cardwell in response to virtually every "Did you ask the [alleged victim]…." question 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, App.V17p918). 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) sharing the elevator with a complete stranger (Tr. 828:9-829:5, App.V17p917-918), or the restaurant waiter hovering near Preliminary Hearing Doe 11's mouth as she was speaking to Defendants. (Tr. 838:19-839:2, App.V17p927, V18p930).
- 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 of that critical term was in line with Section 632. (Tr. 838:13-18, App.V17p927; Tr. 849:2-9, App.V18p940; Tr. 850:2-851:18, App.V18p941-942).
- Agent Cardwell admitted that he did not ask the Does whether their recorded conversations could have been overheard by non-participants, which is critical to whether they were "confidential" under Section 632(c). (Tr. 838:19-22, App.V17p927; Tr. 818:15-17, App.V17p907; Tr. 821:2-5, App.V17p910; Tr. 822:5-7, App.V17p911; Tr. 831:8-11, App.V17p920; Tr. 833:16-18, App.V17p922; Tr. 838:19-27, App.V17p927; Tr. 843:23-25, App.V18p934).
- **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, App.V16p899; Tr. 818:11-14, App.V17p907; Tr. 825:27-826:2, App.V17p914-915; Tr. 831:23-26, App. V17p920; Tr. 839:3-6, App.V18p930).

- Agent Cardwell admitted that he never simultaneously watched the videos with any of the Does as he interviewed them. (Tr. 781:2-5, App.V15p862).

These are critical questions that should have been asked, because the answers could be dispositive of the illegal recording claims. Indeed, in concluding that some of the other Counts lacked probable cause and should be dismissed, Judge Hite examined **these very same questions**. (*See e.g.*, Commitment Order at 13, App.V24p1520 (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, App.V24p1522 (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.")).

By failing to ask these essential questions, Agent Cardwell deprived the magistrate of the opportunity to make the same determinations of absent "victims" as he made of the alleged victims who testified in person. Agent Cardwell thus 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. *Whitman*, 54 Cal. 3d at 1074-75. Exclusion of Cardwell's testimony, and dismissal of the Counts supported only by his testimony is the only remedy. *Id*.

C. 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 absent witnesses, the one question he did ask – whether they "felt" that the recorded communications were "confidential" is not relevant to any inquiry before the Court. Without any information or ability to understand what the alleged victims meant by "confidential," and whether their subjective understanding of what is "confidential" matches the specific definition in Section 632(c), Judge Hite and this Court have 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 was **only** that the alleged victims he interviewed subjectively "felt" that their recorded conversations were "confidential." (Tr. 828:4-12, App.V17p917 (Preliminary Hearing Doe 4 "**felt**" conversation was "confidential"); Tr. 811:26-812:4, App.V16p898 (Preliminary Hearing Doe 5 "**felt**" conversation was "confidential"); Tr. 766:14-26, App.V15p847 ("only question" Agent Cardwell asked Preliminary Hearing Doe 6 was if he "**felt**" the conversation was "confidential"); Tr.

767:2-12, App.V15p848 ("only thing" Agent Cardwell asked Preliminary Hearing Doe 7 was if she "**felt** the conference was private"); Tr. 838:9-839:2, App.V17p927, V18p940 (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); Tr. 849:2-9, App.V18p940 (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); Tr. 850:2-851:18, App.V18p941-942 (Preliminary Hearing Doe 14 told Agent Cardwell that she "**believed** the conversation was confidential," and he did not probe at all); Tr. 803:16-21, App.V16p890 ("**several** of the Does" "**felt**" that the setting at NAF conference was "private"); Tr. 829:3-9, App.V17p918 (**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 no use to the Court 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, App.V24p1511 ("The determination of whether the recording is of a confidential nature is an objective test."); *see also* Section 632(c).

Because Agent Cardwell's testimony is irrelevant and could not have supplied the requisite probable cause, all Counts premised on his testimony fail and should be dismissed.[10]

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[10] 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 **withheld material exculpatory information from the Court** in his sworn affidavit, such as: (1) failing to tell the Court that Preliminary Hearing Doe 5 admitted to him that her recorded conversation with Daleiden probably could have been overheard by non-participants and passersby (Tr. 813:14-815:10, App.V16p900, V17p903-04); (2) failing to tell the Court that Preliminary Hearing Doe 1 admitted to him that she was recorded in a "loud," "crowded," "busy" and "**public**" area, with at least two or three strangers in very close proximity (Tr. 817:23-818:6, App.V17p906-07; Tr. 823:9-27, App.V17p912); (3) failing 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, who could obviously overhear that conversation in that small and confined space (Tr. 826:25-827:21, App.V17p915-16); and (4) failing to tell the Court that, while investigating a complaint by Preliminary Hearing Doe 9, the Los Angeles police department concluded that Doe 9's recorded conversation was **not** confidential. (Tr. 842:6-16, App.V18p933; Tr. 842:27-843:11, App.V18p933-34).

Worse than his material omissions of exculpatory information, Agent Cardwell also admitted that his sworn arrest warrant affidavit contained **false statements and implications**. Agent Cardwell admitted that his statement to the Court regarding "no other customers" being present during the restaurant conversation involving Doe 13 **was false**. (Tr. 848:8-18, App.V18p939-940; Tr. 848:24-849:1, App.V18p939-940). Not only were other customers present, but, having watched the video, Agent Cardwell **knew** that those other customers sat immediately next to Doe 13's booth – close enough to make elbow

D. Agent Cardwell's Admitted Failure to Conduct a Proper Investigation and to Obtain Critical Details from Non-Testifying Witnesses Is Not Merely a Credibility or Weight-of-Testimony Issue, But a Fundamental Due Process Violation Independently Reviewable by This Court.

Although this Court disregards the Superior Court Judge's conclusions and looks directly and independently at the magistrate's findings, *Zemek v. Superior Court*, 44 Cal. App. 5th 535, 544–45 (2020), *review denied* (Apr. 22, 2020), it is noteworthy here that, in her Section 995 review, Judge Bolanos agreed that the numerous questions Agent Cardwell failed to ask "might have been good questions," but erroneously opined that these admitted failures "really go only to the weight of Agent Cardwell's testimony, not its admissibility." (Section 995 Hrg. Tr. 5:20-20; App.V24p1541). As demonstrated in Section III.A., *supra*, both *Whitman* and *Hosek* preclude this result, because both of them hold that the duty of a Proposition 115 witness to ask the right questions of the absent witnesses goes to the heart of a defendant's constitutional due process right to meaningfully confront and cross-examine her accusers. *Whitman*, 54 Cal. 3d at 1074-75; *Hosek*, 10 Cal. App. 4th at 609. Because Merritt was only able to cross-examine Agent Cardwell on the irrelevant topic of the absent alleged

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contact and overhear Doe 13's conversation with Defendants. (Tr. 848:19-849:1, App.V18p939-940; Tr. 847:17-848:3, App.V18p938-939).

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).

victims' subjective feelings as to confidentiality, Merritt was deprived of a substantial, constitutional right. *Id*. The only remedy is exclusion of the Proposition 115 testimony, and dismissal of the charges based upon that testimony. *Id*.

IV. THE MAGISTRATE ERRED IN CONCLUDING THAT PROBABLE CAUSE EXISTS TO BELIEVE THAT MERRITT VIOLATED, OR CONSPIRED TO VIOLATE, SECTION 632.

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**, … shall be punished ….

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, App.V18p941), there is, in fact, a very clear statutory definition:

> "confidential communication" means any communication carried on in circumstances as **<u>may</u>** 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 <u>may</u> 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, App.V24p1510 (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, App.V24p1510 (quoting *Lieberman v. KCOP Television Inc.*, 110 Cal. App. 4th 156, 168 (2003)).[11]

A. The Magistrate's Reasons for Properly Dismissing Does 9, 12, 13 and 14 Require 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

[11] 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 AG'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).

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 and Does 12, 13 and 14), concluding that those recorded conversations were not "confidential" under Section 632. (Commitment Order at 12-16, App.V24p1519-23). As shown below, the same exact factors considered dispositive by Judge Hite also exist as to the third lunch meeting, involving Preliminary Hearing Does 10 and 11 (Information Does 7 and 8), and Judge Hite erred in declining their dismissal.

1. The Same Factors Requiring Dismissal of Preliminary Hearing Does 9, 12, 13 and 14 Require Dismissal of 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 previous relationship with Defendants 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, App.V24p1519). 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, App.V24p1521-22). **The same is true of Preliminary Hearing Does 10 and 11**. (Tr. 721:25-722:20, App.V13p796-97 (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)).[12]

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, App.V24p1519). Judge Hite found the same factors present as to Preliminary Hearing Does 12, 13 and 14. (*Id*. at 13-14, App.V24p1520-21). **The same is true of Preliminary Hearing Does 10 and 11**. (Tr. 721:2-24, App.V13p796 (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, App.V13p802 (Doe 10 admitting that she did not choose the table or seating arrangement)).

[12] Preliminary Hearing Doe 11 (present at the same lunch as Doe 10 and seated next to her) did not testify at the Preliminary Hearing, and, as discussed in Section III, *supra*, Agent Cardwell did not ask her about these details.

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, App.V24p1522). **The same is true of Preliminary Hearing Does 10 and 11**. (Tr. 725:4-727:4, App.V13p800-02(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 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, App.V24p1519). Judge Hite found the same factors to be true of Preliminary Hearing Does 12, 13 and 14. (Commitment Order at 14, App.V24p1521). **The same is true of Preliminary Hearing Does 10 and 11**. (Tr. 731:17-23, App.V13p812 (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); Tr. at 732:28-733:15, App.V13p807-08; Tr. 734:15-735:27, App.V13p809-10; Tr. 736:14-738:13, App.V13p811-813; Tr. 738:24-740:20, App.V13p813, V14p816-17 (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**.)).

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.

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

At the December 6, 2019 hearing, Judge Hite explained 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, AppV23p1482). 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." (Commitment Order at 3, App.V24p1510).

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 and neither she, nor anyone else at the table, took any steps to prevent them from overhearing. (Tr. 732:28-733:15, App.V13p807-08; Tr. 734:15-735:27, App.V13p809-10; Tr. 736:14-738:13, App.V13p811-13; Tr. 738:24-740:20, App.V13p813, V14p816-17) (*See also id*. at Tr. 731:17-23, App. V13p806 (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, App.V23p1482). 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, App.V23p1482). 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, App.V13p807-08; Tr. 734:15-735:27, App.V13p809-10; Tr. 736:14-738:13, App.V13p811-13; Tr. 738:24-740:20, App.V13p513, V14p816-17).

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* note 11, *supra*). Doe 10's admission that the lunch conversation was not only potentially, but actually, overheard is fatal to this charge.[13]

[13] 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, App.V24p1521). 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.

The magistrate erred, and this Court should order that he dismiss Count 7 (as to both Doe 7 and 8) of the Information.[14]

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

In addition to the other grounds detailed herein, 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 Section 632. As detailed below, the evidence was undisputed that each of the recorded conversations was not desired to be confined to its participants, and reasonably could be expected to be overheard by non-participants, thereby falling within the express exemption of Section 632(c).

Critically, in the Commitment Order Judge Hite merely announced that "the People have presented sufficient probable 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, App.V24p1516).[15] Had Judge Hite engaged

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[14] As previously noted, Judge Bolanos on her Section 995 review dismissed Count/Doe 8 and consolidated it with Count 7.

[15] Judge Hite likewise did not explain or analyze these issues whatsoever at the December 6, 2019 hearing. (Tr. 1348-1383, App.V23p1470-1505). 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

with the plethora of evidence below, he would have been constrained to dismiss these charges as well. This Court should right this error and order the dismissal of these charges.

For all of the Does recorded at the NAF conference (Information Does 1-6), the undisputed testimony was that: (1) 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, App.V10p600); (2) there was no way of knowing if the exhibitors at NAF were pro-life or pro-choice (Tr. 541:10-12, App.V10p600); and (3) hotel staff and photographers hired by NAF were also in the exhibitor area. (Tr. 548:1-12, App.V10p607). None of these Does were aware of any specific vetting procedures of policies employed by NAF for exhibitors, hotel staff or photographers. (*E.g.*, Tr. 819:22-25, App.V17p908 (Doe 1); Tr. 832:8-18, App.V17p921 (Doe 2); Tr. 834:10-19, App.V17p923 (Doe 5)).

As to Information **Doe 1**: (1) she admitted that the exhibit hall where she was recorded was a "**public setting**" (Tr. 464:4-7, App.V7p512; Tr. 465:26-28, App.V7p5123; Tr. 540:2-5, App.V10p599; Tr. 818:4-6, App.V17p907), and was **crowded, busy, and loud** (Tr.

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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, App.V24p1518). As shown below, **the same is true of Information Does 1 through 6**, which Judge Hite did not address and did not dismiss.

817:15-818:3, App.V17p906-07 ; (2) she **made no effort to confine her conversation with Daleiden**, such as lowering voice (Tr. 823:3-8, App.V17p912); (3) Agent Cardwell 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, App.V10p599; V17p907).

As to Information **Doe 2**: Agent Cardwell did not ask Doe 2 if his recorded conversation could be overheard by others (Tr. 542:10-13, App. V10p601), nor did he ask whether Doe 2 had taken any steps to ensure the conversation could not be overheard. (Tr. 831:8-26, App.V17p920). The conversation with Doe 2 took place in the **busy, crowded, public** exhibit hall, where it could be overheard. (Tr. 832:3-6, App.V17p921).

As to Information **Doe 3**: Doe 3 noticed that "people [were] passing by **all the time.**" (Tr. 175:8-13, App.V2p198; 176:21-24, App.V2p199 (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, App.V2p200). 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, App.V2p198; Tr. 179:12-15, App.V2p202; Tr. 180:15-18, App.V2p203; Tr. 184:23-25, App.V2p207; Tr. 188:27-189:2, App.V2p211-12; Tr. 194:10-13, App.V2p217; Tr. 195:22-25, App.V2p218). Neither did Doe 3 lower her voice. (Tr. 177:4-6, App.V2p200). Critically, Doe 3 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, App.V2p207; Tr. 191:7-24, App.V2p214; Tr. 194:5-9, App.V2p217). And Daleiden likewise testified that, while he was talking with Doe 3, he could overhear the conversations others were having around him and Doe 3, and the others could overhear Daleiden and Doe 3. (Tr. 997:17-20, App.V19p1097; Tr. 996:12-25, App.V19p1096).

As to Information **Doe 4**: The Attorney General utterly failed to authenticate the identity and the alleged recording of Doe 4, because Agent Cardwell never met and has no "personal perception" of the alleged Doe 4, and Cardwell 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, App.V15p589-60). Agent Cardwell conceded that his only identification of Doe 4 is from photos he located on the internet. (Tr. 810:5-13, App.V16p897; Tr. 490:14-17, App.V8p545). And **Doe 4 is incommunicado, has not returned the Attorney General's phone calls, and has never identified herself in the video**. (Tr. 808:21-809:22, App.V16p895-896).

Beyond the failure of authentication, Doe 4 admitted to Agent Cardwell that she **probably could be overheard** by passersby whom she did not know. (Tr. 547:13-16, 21-26, App.V10p606; Tr. 813:14-28, App.V16p900). This renders her recorded conversation not "confidential" under Section 632.

As to Information **Doe 5**, 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, App.V10p607; Tr. 833:16-18, App.V17p922; Tr. 833:27-834:6, App.V17p922-23). Instead, Agent Cardwell only asked Doe 5 **a single question** about confidentiality – whether he "felt" his conversation with Daleiden was confidential. (Tr. 548:13-16, App.V10p607; Tr. 834:20-835:5, App.V17p923-24). As demonstrated above, this is legally irrelevant.

Finally, as to Information **Doe 6**, she admitted that: (1) she spoke loudly during her conversation with Daleiden (Tr. 89:13-18, App.V1p107; Tr. 119:11-14, App.V2p139); (2) although there were other individuals who passed or stood nearby, **Doe 6 took no steps to prevent those individuals from overhearing her conversation**, such as lowering her voice or changing the subject or stopping the conversation (Tr. 89:22-25, App.V1p107; Tr. 122:26-123:18, App.V2p142-143; Tr. 125:23-126:10, App.V2p145-46; Tr. 127:12-14, App.V2p147; Tr. 127:28-128:2, App.V2p147-48; Tr. 128:20-22, App.V2p148; Tr. 130:9-10, App.V2p150; Tr. 131:6-8, App.V2p151; (3) she did not know or recognize any of the individuals who passed or stood nearby (Tr. 121:19-122:17, App.V2p141-42; Tr. 124:13-28, App.V2p144; Tr. 127:1-4, App.V2p147; Tr. 129:25-26, App.V2p149); (4) there was nothing preventing those other individuals who were nearby from overhearing her conversation with Daleiden (Tr. 89:26-28, App.V1p107); (5) she could hear individuals talking across the exhibit hall (Tr. 119:15-17, App.V2p139); and (6) **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,

App.V2p147; Tr. 127:21-23, App.V2p147; Tr. 128:17-28, App.V2p148; Tr. 130:3-5, App.V2p150; Tr. 131:3-5, App.V2p151).

Under these circumstances, none of these conversations were "confidential" under Section 632, and all of these Counts should have been dismissed.

C. 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.

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, App.V17p905), **Doe 2** (Tr. 831:1-7, App.V17p920), **Doe 3** (Tr. 136:27-137:1, App.V2p156-57; Tr. 139:24-27, App.V2p159), **Doe 4** (Preliminary Hearing Doe 5) (Tr. 810:26-811:20, App.V16p897-98), **Doe 5** (Preliminary Hearing Doe 6) (Tr. 833:3-15, App.V17p922), and **Doe 6** (Preliminary Hearing Doe 7) (Tr. 118:20-119:5, App.V2p138). The Attorney General made no effort to rebut this testimony. Accordingly, the AG has failed to raise a strong suspicion that Merritt is directly liable for 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 Section 632. Like substantive violations of Section 632 themselves (*see* Section II, *supra*), conspiracy to violate Section 632 is a **specific intent crime**, requiring a **dual** specific intent – agreement to commit the offense and commission of the offense. *See People v. Swain*, 12 Cal. 4th 593, 599–600 (1996).

Here, the Attorney General's conspiracy theory of liability for videos Merritt did not personally record fails because the evidence at the Preliminary Hearing was undisputed and uncontroverted that Daleiden and Merritt neither intended to agree to violate Section 632, nor did they intend to commit the offense itself – to record without consent "confidential communications" that could not be reasonably expected to be overheard. (Tr. 1130:9-18, App.V21p1238).

V. THE MAGISTRATE ERRED BY IGNORING DEFENDANTS' UNREBUTTED EVIDENCE THAT THEY REASONABLY BELIEVED THAT THEIR UNDERCOVER RECORDING WOULD RELATE TO THE COMMISSION BY OTHERS OF FELONIES INVOLVING VIOLENCE AGAINST THE PERSON, AND WERE THUS PROTECTED UNDER SECTION 633.5.

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

> Section[] 632 . . . **do[es] 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).

Daleiden testified that, prior to the first recording in California, **he shared all of the evidence he had meticulously gathered with Merritt**. (Tr. 1125:2-28, App.V21p1233). 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, App.V21p1233). 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, App.V21p1234). 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), App.V21p1234). Accordingly, the evidence and argument presented on Section 633.5 in Daleiden's Section 999a Petition concurrently filed with this Petition are equally applicable to Merritt and adopted by Merritt as if fully set herein.

The Attorney General 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.

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' defense under Section 633.5, and order that all surviving counts be dismissed.

VI. THE MAGISTRATE ERRED IN DECLINING TO CONSOLIDATE ALL OF THE SURVIVING COUNTS FOR ILLEGAL RECORDING INTO ONE COUNT.

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, App.V24p1524 (citing *People v. Whitmer*, 59 Ca1. 4th 733, 741 (2014)).

Defendants' 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 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).[16]

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[16] Although the California Supreme Court in *People v. Whitmer*, 59 Cal. 4th 733 (2014), clarified *Bailey*'s interpretation to state that "a defendant may be convicted of multiple counts … based on separate and distinct acts … even if committed pursuant to a single overarching scheme," *id.* at 735, the *Whitmer* Court refused to apply this new interpretation retroactively, for pre-*Whitmer* conduct, because of due process concerns. (*Id.* at 735 ("we also conclude we cannot constitutionally apply this rule … retroactively.")). *Whitmer* was decided on July 24, 2014. In the Information, the Attorney General charges that Counts 1 and 2 took place "[o]n April 6, 2014," Count 3 took place "[o]n April 7, 2014," and Counts 4, 5, and 6 took place "[o]n April 8, 2014," all of them **before** *Whitmer*. (Information, Counts 1-6, pp. 1-3, App.V24p1530-32). The Attorney General also alleges that Count 10 began "[o]n … October 9, 2013," also long **before** *Whitmer*.

When asked about the manner in which the recordings were carried out, Daleiden testified that they were all made as "part of a single overarching plan," (Tr. 1126:16-20, App.V21p1234), 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, App.V21p1234-35). The first of the recordings began in April 2014, (*id.* at 1127:7-10, App.V21p1235), and during that project, the recording equipment would automatically separate video files out approximately every 20 to 30 minutes. (*Id.* at 1127:11-24, App.V21p1235). Within the **one** Human Capital Project, the recordings were made in less than a handful of recording events, (*id.* at 1127:25-1128:4, App.V21p1235-36), 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, App.V21p1236).

Mr. Daleiden testified 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, App.V21p1236).

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**

(Information, Count 10, p. 4, App.V24p1533). Therefore, *Bailey*, not *Whitmer*, controls this case, and requires consolidation.

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**, … shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) **per violation**, . . .

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).

Judge Hite erred by declining to consolidate any of the surviving counts. On her Section 995 review, Judge Bolanos did consolidate just two of the Counts (7 and 8) into one count (Count 7), (Section 995 Hrg. Tr. 65-66; App.V24p1601-02), but she did not go as far as required by *Bailey* and Section 632 and did not consolidate the remaining counts. This Court should correct this error, and should consolidate all remaining recording counts (if any) into one.

VII. THE MAGISTRATE ERRED IN DECLINING TO REDUCE THE SURVIVING FELONY COUNTS TO MISDEMEANORS.

A magistrate's denial of a request for reduction of felony charges to misdemeanors under Section 17(b)(5) made 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."). Merritt raised this issue in her Section 995 motion to dismiss, and the Superior Court judge denied relief. (Section 995 Hrg. Tr. 39-41; App.V24p1575-77). The decision is now reviewable by this Court. *See Jackson*, 110 Cal. App. 3d at 177-78 (granting writ of prohibition following denial of Section 995 motion to review magistrate's refusal to reduce felony charges).

Here, Merritt (joined by Daleiden) requested a reduction of all surviving felony charges to misdemeanor, based on at least **seven** separate and independent factors. The magistrate denied this request in one sentence, without any analysis or explanation in the Commitment Order. (Commitment Order at 17; App.V24p1524).[17] Consideration of all seven factors demonstrates that Judge Hite's failure to consider all relevant factors, and his resulting decision to deny the reduction, were in error and should be corrected.

All of the surviving charges in the Information 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); Cal. Penal Code. § 182(a)(1). As a result, the felony charges under all three statutes qualify for reduction to misdemeanor offenses under Section 17(b)(5).

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,

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[17] At the December 6, 2019 hearing, Judge Hite added one additional sentence and stated that "felony exposure" is warranted. (Prelim. Hrg. Tr. 1365:21-1366:1, App.V23p1487).

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). 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 that Merritt is a polite, courteous, **67-year-old** grandmother, who, despite obvious physical disabilities, conscientiously attended every required hearing, at great personal and physical costs. Judge Hite made no findings, in the Commitment Order or elsewhere, that impugn Merritt's character, behavior or demeanor in the slightest. (Commitment Order at 1-22; App.V24p1508-29)

Second, there was a strong and weighty public interest in Defendants' undercover investigation. The federal and state investigations and criminal prosecutions resulting from Daleiden's and Merritt's investigation were documented at the Preliminary Hearing. For example, 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. (Prelim Hrg. Tr. 1205:21-1206:13, App.V21p1317-18) The prosecuting authority in those cases specifically credited CMP's undercover investigation. (*Id*. at 1206:9-13, App.V21p1318).

Third, this entire prosecution—and notably **the very first** criminal prosecution against undercover investigators 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 V, *supra*; *see also*, Daleiden's Section 999a Petition).

Fourth, because this is the first criminal prosecution in California 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)).

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 Petition and Memorandum.[18] 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' good faith basis for proceeding with their undercover investigation. (Tr. 1132:21-1133:20, App.V21p1240-41).

Seventh, and finally, beyond the above precautions, Daleiden (and through him, Merritt) **sought, received and relied on legal advice from multiple lawyers and law firms** prior to making the first recording in California. (*Id*. at 905:16-908:4, App.V19p1001-04).

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. This Court should issue the Writ, and if any claims are to

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[18] Most 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, App.V7p512; Tr. 772:23-28, App.V15p853; Tr. 774:7-11, App.V15p855; Tr. 778:2-5, 15-28, App.V15p859; Tr. 779:15-28, App.V15p860); **Doe 2** (Tr. 471:4-14, App.V7p519 ; Tr. 474:9-10, App.V7p522; Tr. 778:2-5, App.V15p859; Tr. 772:23-28, App.V5-853; Tr. 774:7-11, App.V15p855); **Doe 3** (Tr. 137:4-12, App.V2-157); **Doe 6** (now Information Doe 5, App.V24p153) (Tr. 778:2-5, App.V15p859; Tr. 780:3-4, App.V15p861; Tr. 772:23-28, App.V15p853; Tr. 773:1-3, App.V15p854; Tr. 774:7-11, App.V15p855); and **Doe 7** (now Information Doe 6, App.V24p1532) (Tr. 80:23-26, App.V1p94; Tr. 94:23-28, App.V1p112; Tr. 95:1-11, 17-23, App. V1p113).

survive, it should order that they be reduced to misdemeanors pursuant to Section 17(b)(5).

CONCLUSION

For all the foregoing reasons, this Court should issue a Writ of Prohibition as requested in the Prayer for Relief.

Respectfully submitted

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DATED: August 12, 2020

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CERTIFICATION OF COMPLIANCE

I, Nicolai Cocis, certify that, pursuant to California Rules of Court, Rules 8.204(b), 8.204(c)(l) and 8.204(c)(3), the attached petition with memorandum of points and authorities is prepared in 13-point Century Schoolbook font and contains **13,971 words**, including footnotes, but not including caption, tables, verification, any signature blocks, this certificate, proof of service, or exhibits, and is thus within the 14,000 word limit. The total number of words was calculated through the use of the word count feature of the computer program used to prepare the brief**.**

Dated: August 12, 2020

/s/ Nicolai Cocis
Nicolai Cocis

CERTIFICATE OF SERVICE

Pursuant to Cal. Code Civ. P. § 1013(a) and § 1010.6, I hereby certify that, on August 12, 2020, I served the forgoing *Verified Petition for Writ of Prohibition; Memorandum; And Appendix of Exhibits* on the following parties/entities via the following methods:

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

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