In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHRISTINA MARIE ANZALONE,

Defendant and Appellant.

COPY

Case No. S192536

Sixth Appellate District, Case No. H035123
Santa Clara County Superior Court, Case No. CC935164
Honorable Ron M. Del Pozzo, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

ISSUE

If the failure of the trial court to strictly adhere to the statutory procedures for the return of the verdict constitutes reversible error, is retrial barred by double jeopardy?

INTRODUCTION

In respondent's opening brief on the merits (RBOM), we argue that the trial court substantially complied with the statutory requirements for the return of the verdict and that any error was harmless. In Argument III of appellant's opening brief (ABOM), she maintains that the Court of Appeal erred in finding double jeopardy did not preclude her retrial on the charges. This is our answer to that contention.

STATEMENT OF THE CASE AND FACTS

Respondent incorporates its statement of the case and facts. (RBOM, at pp. 2-7.)

ARGUMENT

I. DOUBLE JEOPARDY DOES NOT BAR RETRIAL FOR A PROCEDURAL STATUTORY TRIAL ERROR

"The double jeopardy clauses of the Fifth Amendment of the United States Constitution and article I, section 15, of the California Constitution provide that a person may not be twice placed 'in jeopardy' for the 'same offense.' 'The double jeopardy bar protects against a second prosecution for the same offense following an acquittal or conviction, and also protects against multiple punishment for the same offense. [Citations.]'" (*People v. Anderson* (2009) 47 Cal.4th 92, 103-104.)

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to

embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (*Green v. United States* (1957) 355 U.S. 184, 187-188.) "The stated design, in terms of specific purpose, has been expressed in various ways. It has been said that 'a' or 'the' 'primary purpose' of the Clause was 'to preserve the finality of judgments,' [citation], or the 'integrity' of judgments, [citation]. But it has also been said that 'central to the objective of the prohibition against successive trials' is the barrier to 'affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' [Citation.] Implicit in this is the thought that if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." (*United States v. DiFrancesco* (1980) 449 U.S. 117, 128.)

"The principle that [the clause] does not preclude the Government's retrying a defendant whose conviction is set aside because of an *error in the proceedings* leading to conviction is a well-established part of our constitutional jurisprudence." (*Burks v. United States* (1978) 437 U.S. 1, 14.) "As a general rule, . . . if the defendant secures on appeal a reversal of his conviction based on trial errors other than insufficiency of evidence, he is subject to retrial. [Citations.] [¶]As we stated recently . . . , if sufficient evidence exists to support a conviction, retrial simply affords the defendant a second opportunity to seek a favorable judgment and does not violate the constitutional prohibition against double jeopardy." (*People v. Hernandez* (2003) 30 Cal.4th 1, 6-7, internal quotation marks omitted [dismissing juror without good cause and substituting alternate was reversible error but did not bar retrial].)

Accordingly, subject to the exception for the insufficiency of the evidence, "if the first trial has ended in a conviction, the double jeopardy

guarantee 'imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside.'" (*DiFrancesco*, *supra*, 449 U.S. at p. 131 quoting *North Carolina v. Pearce* (1969) 395 U.S. 711, 720.) "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." (*DiFrancesco*, at p. 131, quoting *United States v. Tateo* (1964) 377 U.S. 463 466.) "From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest." (*Tateo*, *supra*, 377 U.S. at p. 466.) "'[T]o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect" with the exception of a reversal on the ground of insufficiency of the evidence. (*DiFrancesco*, *supra*, 449 U.S. at p. 131; see *United States v. Scott* (1978) 437 U.S. 82, 90-91.)

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

(*Burk*, 437 U.S. at p. 15; see *People v. Tong* (1909) 155 Cal. 579, 581-582 ["If it be the doctrine of the cases . . . that the defendant has been once in jeopardy in every case wherein a verdict of guilty of a crime not strictly embraced within the pleadings has been returned, and the jury has been discharged without consent, then those cases should be overruled"]; *People v. Sachau* (1926) 78 Cal.App. 702, 705-706 [finding the verdict "void" does not preclude retrial; "Where a verdict is so defective that no judgment can be entered on it, and the defendant fails to have it corrected when rendered, he is considered as consenting to the verdict, and as waiving any objection, including the plea of former jeopardy, to being put again on trial before another jury"].)

With this background the Court has recognized the double jeopardy clause is not to be applied in a rigid, mechanical manner:

> Courts "have disparaged 'rigid, mechanical' rules in the interpretation of the Double Jeopardy Clause. [Citation.]" ([*Serfass v. United States* (1975) 420 U.S. 377] at p. 390.) "The exaltation of form over substance is to be avoided." (*United States v. DiFrancesco* (1980) 449 U.S. 117, 142.) The standards for determining when a double jeopardy violation has occurred are not to be applied mechanically. (*Arizona v. Washington* (1978) 434 U.S. 497, 506; see *Illinois v. Somerville* (1973) 410 U.S. 458, 469.)

(*People v. Saunders* (1993) 5 Cal.4th 580, 593, parallel citations omitted; see also *People v. Wilson* (1996) 43 Cal.App.4th 839, 848 ["The double jeopardy clause of the United States Constitution applies to a new trial following either conviction or acquittal. [Citations.] However, these principles are not to be applied in a rigid or mechanical fashion . . . and the double jeopardy clause, with minimal exceptions, does not prohibit the retrial of charges after a successful appeal."].)

Here, as the Court of Appeal observed, appellant's jury was not discharged "before it reached a verdict, and defendant was not deprived of a

verdict from [her] chosen jury. Rather, that jury deliberated and rendered a verdict, which was read and entered." (Slip op. at p. 9.) There was nothing inconsistent, incomplete, or otherwise defective in the verdicts themselves. There was "ample if not overwhelming" evidence to support the verdict reflected in the verdict forms. (Slip op. at p. 7.) Moreover, there was "nothing in the record to suggest that the jurors did not agree with the verdict when read." (Slip op. at p. 7.) The verdict forms, which the foreperson gave to the court upon the court stating that it understood that the jury reached a verdict, were read in open court in the presence of all parties and all jurors, and then recorded. Appellant was subsequently sentenced on the basis of the verdicts as entered. There was at most a procedural trial error in failing to have the foreperson expressly affirm the verdict. This case fits comfortably within decisions allowing retrial when a verdict is subsequently set aside on appeal assuming that trial error resulted in reversal of the judgment.

Appellant asserts an analogue to an improvidently granted mistrial without consent or legal necessity. The flaw in her reasoning is that the cases on which she relies involve the unjustified discharge of the jury *before* it reaches a verdict. (See *Curry v. Superior Court* (1970) 2 Cal.3d 707 ["discharge of the jury without a verdict is equivalent in law to an acquittal and bars a retrial, unless the defendant consented thereto or legal necessity required it"].)

In *Curry*, a prosecution witness testified that a third person told her that some friends of the defendants threatened to shoot her. She also testified on cross-examination that she was under psychiatric care. The judge, on his own motion, determined that it would be impossible for either the prosecution or the defendant to have a fair trial and granted a mistrial. This Court noted that a discharge of a jury "without a verdict is equivalent in law to an acquittal and bars a retrial, unless the defendant consented

thereto or legal necessity required it." (*Id.* at p. 712.) The Court found that defendants never expressly consented to the granting of the mistrial or discharge of the jury. (*Id.* at p. 713.) It further found that a defendant is under no duty to object and that his silence in the face of an ensuing discharge cannot be deemed a waiver. (*Ibid.*) The Court noted that there were many reasons a defendant may not move for or consent to a mistrial. The defendant may believe that no error occurred, or that it was not prejudicial, or that it could be cured by admonition or refuted by impeaching the witness. Alternatively, the defendant may not want to start the process anew to minimize the embarrassment, expense, and anxiety. (*Id.* at p. 717.)

This Court further found that there was no legal necessity for the trial court's actions like the inability of the jury to agree or physical causes beyond the control of the court, such as death, illness, or absence of judge or juror. (*Curry*, *supra*, 2 Cal.3d at pp. 713-714.) "A mere error of law or procedure, however, does not constitute legal necessity." (*Id.* at p. 714.) The Court noted that "it may be doubted" whether the testimony admitted had been erroneous. (*Id.* at p. 715.) But in any event, it concluded that even if improperly admitted, "the ruling would not have constituted legal necessity for a mistrial under the foregoing principles. The court could have completed the trial of the cause, and, in the event of a conviction, subsequently granted a motion for a new trial." (*Id.* at p. 714.) The Court emphasized that it was not dealing here "with a mere technicality of the law." (*Id.* at p. 718.)

Unlike the mistrial in *Curry*, the trial court below discharged the jury after the verdict had been received and read in the presence of all parties and jurors, and then recorded. There is no question of the sufficiency of the evidence to support the verdict of conviction. One of the main reasons that a defendant cannot be tried again if the jury is discharged without

defendant's consent before reaching a verdict is that it "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." (*Green v. United States*, *supra*, 355 U.S. at p. 188.) Where the jury *did* reach a verdict supported by the evidence, that concern is not present. (See *People v. Hernandez*, *supra*, 30 Cal.4th at pp. 9-10 [no undue advantage in improperly dismissing juror who was bothered by the tone of the prosecutor's cross-examination of a defense witness; the error in discharging a juror "should be treated no differently from any other trial error leading to reversal on appeal . . . the law is clear that, as a general rule, errors other than insufficiency of evidence do not preclude retrial following reversal of conviction"].)[1]

Appellant maintains that "what the jury rendered before they were discharged, and what was read by the clerk, were merely verdict forms, not a valid, true verdict. To become a true verdict, the jury had to orally acknowledge they had agreed. In the absence of this oral acknowledgment, appellant *was* deprived of a verdict from her chosen jury, even though the jury deliberated and handed in verdict forms, because the jury was discharged in violation of section 1140 before 'they agreed upon their verdict and rendered it in open court' in compliance with section 1149." (ABOM at p. 26.)

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[1] Appellant attempts to distinguish *Hernandez*, arguing that it did not address a situation "in which the entire jury was discharged before agreeing on their verdict and rendering it in open court by orally acknowledging their agreement under section 1149." (ABOM at p. 27.) The fallacy in his argument is that the jury here *did* agree on a verdict, which was read in open court and recorded. The jury in *Hernandez* reached a verdict convicting the defendant; however that verdict was not valid because the court improvidently dismissed the juror, thereby depriving defendant of his chosen jury.

To orally acknowledge the verdict, the jury in effect would have to be polled. (See *People v. Mestas* (1967) 253 Cal.App.2d 780, 786, citing *People v. Wiley* (1931) 111 Cal.App. 622, 625 [the provision in section 1149 that the jury "must, on being required, declare the same" refers to polling of the jury, which is only required upon a party's request].) Essentially appellant is claiming that without a poll, there is no verdict. She cites no case finding a constitutional obligation to poll a jury, as opposed to a statutory right applicable upon a party's request. (See *People v. Lessard* (1962) 58 Cal.2d 447, 452 [failure to make proper request imposes no burden upon the court to poll jury, nor in absence of such request does failure to poll the jury constitute a denial of a constitutional right]; *Cabberiza v. Moore*, (11th Cir. 2000) 217 F.3d 1329, 1336-1337 ["Although polling the jury is a common practice, we know of no constitutional right to have a poll conducted"]; *United States v. Beldin* (5th Cir. 1984) 737 F.3d 450, 455 ["The right to poll the jury derives not from the Constitution, but from rule 31(d)"]; *United States v. Miller* (4rd Cir. 1995) 59 F.3d 417, 419 [polling not of constitutional dimension].)

Appellant's attempt to equate the situation in his case to an improvidently granted mistrial without consent or legal necessity should be rejected. The failure to have the jury assent to a guilty verdict pursuant to a statutory requirement arguably might render the verdict "irregular" or a "mistake in the law," but appellant's argument that *no* verdict exists lacks authority. (See *People v. Anderson* (2009) 47 Cal.4th 92, 114 [discussing implications of recording a partial verdict and discharging the jury where only verdict is for a lesser included offense].) California rules for the taking of a verdict do not implicate double jeopardy protections. (Cf. *Tibbs v. Florida* (1982) 457 U.S. 31, 43-45 [finding that appellate reversal for evidentiary weight, not sufficiency, under state law does not bar retrial].)

Even if the verdicts are defective because of the trial court's failure to strictly comply with a statutory procedural requirement on the return of the verdict, and even if such a defect rises to the level of prejudicial error, it is not one against which implicates the protection of the double jeopardy clause. The preclusion of retrial on remand from a reversal of the judgment in such a case is not compelled.

CONCLUSION

Accordingly, the judgment of conviction should be affirmed.

Dated: February 13, 2012

Respectfully submitted,

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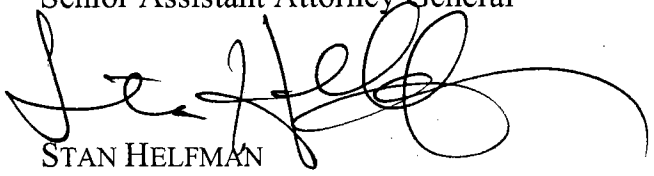

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 2,722 words.

Dated: February 13, 2012

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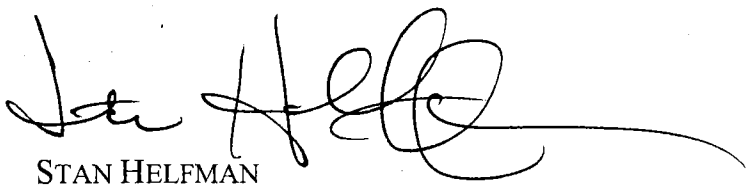

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Anzalone**

No.: **S192536**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 14, 2012, at San Francisco, California.

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