

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE) Supreme Court No.
OF CALIFORNIA,) S210545
)
Plaintiff and Appellant,) Court of Appeal No:
) B231411
)
v.)
) Superior Court (Los
KHRISTINE EROSHEVICH, et al.,) Angeles) No. BA353907
)
Defendants and Respondents.)
_____)

ANSWER BRIEF ON THE MERITS

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

Honorable Robert J. Perry, Judge

SUPREME COURT
FILED

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ISSUES PRESENTED

(1) If a trial court issues a ruling equivalent to an acquittal after a jury has entered a guilty verdict and the Court of Appeal reverses the trial court's ruling on appeal, does the trial court's erroneous acquittal nevertheless bar retrial under principles of double jeopardy if, on remand, the defendant renews an earlier motion for a new trial?

(2) In such circumstances, is the Court of Appeal permitted to direct a trial court to dismiss charges and acquit a defendant if the trial court decides to grant the defendant's motion for a new trial under Penal Code section 1181?

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INTRODUCTION

The prosecution charged Respondent Howard K. Stern and two physicians with a laundry list of offenses relating to medication prescribed to the actress Anna Nicole Smith. A jury acquitted Mr. Stern of all the charges it considered against him save two counts of conspiracy which alleged that he had conspired to commit the target offenses of obtaining medication prescribed for Ms. Smith through fraud or the use of false names.

In a motion for new trial, Mr. Stern alleged that the prosecution had failed to present sufficient evidence to support the conspiracy convictions. Finding the conspiracy verdicts contrary to the evidence, the trial court granted the new trial motion and then dismissed these charges pursuant to Penal Code section 1385.

The appellate court concluded that substantial evidence supported the conspiracy convictions and reversed the trial court's grant of a new trial and dismissal order. It then remanded for the trial court to consider additional grounds Mr. Stern had raised in his new trial motion, but which the trial court had not reached. The appellate court further held that if the trial court grants the renewed

new trial motion, double jeopardy precludes the prosecution from retrying Mr. Stern.

This court granted Appellant's petition for review on (1) whether the trial court's acquittal in granting Mr. Stern's new trial motion bars retrial under double jeopardy principles if, on remand, the trial court grants the renewed motion for new trial, and (2) whether the appellate court properly directed the trial court to dismiss the charges against Mr. Stern under such circumstances.

As detailed in this Answer Brief on the Merits, well-settled law makes clear that when a trial court acquits a defendant based on insufficiency of the evidence, double jeopardy precludes the prosecution from retrying the defendant even if the ruling granting the acquittal was patently erroneous. Thus, if the trial court grants Mr. Stern's renewed motion for new trial on remand, the case must then be dismissed on double jeopardy grounds because otherwise Mr. Stern would be subjected to retrial. Moreover, under the circumstances presented, and in order to protect Mr. Stern's double jeopardy rights, the appellate court properly directed the trial to dismiss the charges if it grants Mr. Stern a new trial on remand.

PROCEDURAL HISTORY

On October 29, 2010, a jury found Mr. Stern not guilty of seven of nine charges it considered against him relating to the unlawful prescription of controlled substances. (14CT 2725, 2734-2738.)¹ The jury convicted Mr. Stern of two counts of conspiracy to obtain a controlled substance by fraud (Health & Saf. Code § 11173, subd. (a)) and by giving a false name (Health & Saf. Code § 11174). (22CT 5172, 5174.) The jury either found not true or hung on other target crimes alleged in these counts. (22CT 5172-5180.)

On January 6, 2011, the trial court found that the evidence did not support Mr. Stern's conspiracy convictions and granted his Penal Code section 1181 motion for a new trial relating to these convictions. (23CT 5304; 48RT 15329.)² The court then

¹ Citations to "CT" denote the Clerk's Transcript on Appeal, and citations to "RT" denote the Reporter's Transcript on Appeal. These citations are preceded by the transcript volume number and followed by the page reference. All statutory references are to the Penal Code unless otherwise specified or evident by context.

² Mr. Stern's motion for new trial alleged, among other things, that insubstantial evidence supported his conspiracy convictions, the prosecution violated his due process rights by selectively
(continued...)

dismissed these counts in furtherance of justice pursuant to Penal Code section 1385 because the evidence showing Mr. Stern specifically intended to join a conspiracy was so lacking. (23CT 5304; 48RT 15329.)

In a March 28, 2013 decision, the Court of Appeal concluded that substantial evidence supported Mr. Stern's conspiracy convictions. (Opinion 25-28.) Accordingly, it reversed the trial court's grant of a new trial and dismissal of the conspiracy charges. (Opinion 28-30.) Recognizing that the trial court had not reached additional grounds raised in the new trial motion and the request for dismissal, the Court of Appeal remanded for the trial court to exercise one of four options: (1) deny Mr. Stern's new trial motion; (2) deny the new trial motion, but dismiss the case pursuant to Penal Code section 1385 other than on evidentiary insufficiency grounds; (3) grant the new trial motion after reweighing the evidence as a so-called 13th juror; or (4) dismiss the charges other

²(...continued)
prosecuting him, the prosecutor committed misconduct during closing argument, and the trial court should reduce his felony conspiracy convictions to misdemeanors. (*See* Opinion 5; 23CT 5201-5225.)

than on legal insufficiency grounds. (Opinion 30-31.) The Court of Appeal added, however, that if the trial court grants the new trial motion or dismisses the case, double jeopardy precludes the prosecution from retrying Mr. Stern. (Opinion 31-33.)

Appellant petitioned this court for review of the double jeopardy aspect of the Court of Appeal's decision in the event the trial court grants Mr. Stern's new trial motion. This court granted Appellant's petition for review on November 28, 2007. The court limited the issues to be briefed to the following questions:

(1) If a trial court issues a ruling equivalent to an acquittal after a jury has entered a guilty verdict and the Court of Appeal reverses the trial court's ruling on appeal, does the trial court's erroneous acquittal nevertheless bar retrial under principles of double jeopardy if, on remand, the defendant renews an earlier motion for a new trial?

(2) In such circumstances, is the Court of Appeal permitted to direct a trial court to dismiss charges and acquit a defendant if the trial court decides to grant the defendant's motion for a new trial under Penal Code section 1181?

STATEMENT OF FACTS

A statement of facts underlying Mr. Stern's convictions is not relevant to the issues presented in this matter. However, Mr. Stern notes for this court's reference that the Court of Appeal set forth a statement of facts in its March 28, 2013 opinion. (Opinion 9-21.)

ARGUMENT

I. IF A TRIAL COURT GRANTS AN ACQUITTAL BASED ON INSUFFICIENCY OF THE EVIDENCE AFTER THE JURY'S GUILTY VERDICT, BUT AN APPELLATE COURT REVERSES THE TRIAL COURT'S RULING, THE ERRONEOUS ACQUITTAL NEVERTHELESS BARS RETRIAL UNDER THE DOUBLE JEOPARDY CLAUSE IF, ON REMAND, THE TRIAL COURT GRANTS THE DEFENDANT'S RENEWED MOTION FOR NEW TRIAL.

A. The Relevant Law Relating To Double Jeopardy.

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb" The Fifth Amendment guarantee against double jeopardy is applicable to the states through the Fourteenth Amendment. (*Benton v. Maryland* (1969) 395 U.S. 784, 787.)

Similar to the federal constitution, the California Constitution provides: "Persons may not twice be put in jeopardy for the same offense" (Cal. Const., art. I, § 15; *see also* Pen. Code §§ 687, 1023.) "[T]he protections afforded by our state constitution are broader than those afforded by the federal constitution." (*People v. Craig* (1998) 66 Cal.App.4th 1444, 1447, citing *People v. Monge* (1997) 16 Cal.4th 826, 844.)

The constitutional guarantee against double jeopardy "is deeply ingrained in American legal traditions. . . . [I]t has been a part of American jurisprudence since the founding of this nation." (*People v. Bright* (1996) 12 Cal.4th 652, 685 (dis. opn. of Mosk, J.)) The core protection of the Double Jeopardy Clause attaches to an acquittal, prohibiting a retrial for the "same offense" after an acquittal. (*United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 571.) In addition to a jury's not guilty verdict, an acquittal for double jeopardy purposes occurs when a trial court finds insufficient evidence as a matter of law to support a guilty verdict and as a result, grants either a motion for new trial or orders a dismissal. (*See, e.g., Hudson v. Louisiana* (1981) 450 U.S. 40, 44; *People v. Hatch* (2000) 22 Cal.4th 260, 273; *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, n.6 [where trial court grants motion for new trial, "[d]ouble jeopardy . . . bar[s] retrial . . . when [the] court, using the 'substantial evidence' test, determines as a matter of law that the prosecution failed to prove its case."].)

In this regard, Penal Code section 1181, subdivision (6), authorizes a trial court to grant a defendant a new trial "[w]hen the

verdict . . . is contrary to the law or evidence" "The court extends no evidentiary deference in ruling on an 1181(6) motion for new trial. Instead, it independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt to the judge, who sits, in effect, as a '13th juror.'" (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.) In ruling on a motion for new trial under section 1181, subdivision (6), a trial court may either (1) grant a new trial; (2) deny the new trial motion and enter judgment on the jury's verdict; or (3) modify the verdict either to a lesser degree of the crime reflected in the jury's verdict or to a lesser included offense of that crime. (*Ibid.*)

Penal Code section 1385, subdivision (a), allows a trial judge "either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, [to] order an action to be dismissed." (*See People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531.) A defendant may "informally suggest" that the court consider such a dismissal. (*People v. Konow* (2004) 32 Cal.4th 995, 1022; *Polanski v. Superior Court* (2009) 180

Cal.App.4th 507, 527.) "[T]he standard for dismissal under section 1385 is quite broad and permits dismissal under a variety of circumstances," including for insubstantial evidence. (*People v. Hatch, supra*, 22 Cal.4th at p. 272-273.)

Whether a trial judge ostensibly proceeds under section 1181 or section 1385, "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action. Rather, appellate courts 'must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" (*People v. Hatch, supra*, 22 Cal.4th at p. 270, quoting *United States v. Martin Linen Supply Co., supra*, 430 U.S. at p. 571; *see also Hudson v. Louisiana, supra*, 450 U.S. at p. 41-45 [though never termed an "acquittal," trial court's finding that the state had not proved its case, made during course of granting new trial motion, constituted an acquittal for double jeopardy purposes]; *Mannes v. Gillespie* (9th Cir. 1992) 967 F.2d 1310, 1316 ["[W]hether the Double Jeopardy Clause bars a prosecution is not determined by the characterization of a dismissal under state law, nor by the trial judge's personal

understanding in this regard. What matters is whether the ruling in [defendant's] favor was actually an 'acquittal' even if state law or the trial court may have labeled it otherwise." (citation omitted).)

Once the trial court acquits a defendant by ruling that "the evidence is insufficient as a matter of law, then the ruling bars retrial even if it is patently erroneous or the court has no statutory authority to make it." (*People v. Hatch, supra*, 22 Cal.4th at p. 270-271, citing *Sanabria v. United States* (1978) 437 U.S. 54, 64 [a trial court finding of legal insufficiency based on an erroneous foundation is still an acquittal for double jeopardy purposes]; *Fong Foo v. United States* (1962) 369 U.S. 141, 143 [a ruling by a trial court acquitting a defendant bars retrial even if the ruling is "egregiously erroneous" and the court lacks the power to make the ruling]; *People v. Valenti* (1957) 49 Cal.2d 199, 203, 209 [a trial court dismissal for legal insufficiency made without statutory authorization bars retrial under the California Constitution].)

Indeed, the United States Supreme Court has recently reaffirmed that

the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is "based

upon an egregiously erroneous foundation." A mistaken acquittal is an acquittal nonetheless, and we have long held that "[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution."

(*Evans v. Michigan* (2013) ___ U.S. ___, 133 S.Ct. 1069, 1074, citations omitted.)³

³ The Supreme Court in *Evans* further elaborated that

an acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence, [*Sanabria v. United States, supra*, 437 U.S. at p. 68–69]; a mistaken understanding of what evidence would suffice to sustain a conviction, [*Smith v. Massachusetts* (2005) 543 U.S. 462, 473]; or a "misconstruction of the statute" defining the requirements to convict, [*Arizona v. Rumsey* (1984) 467 U.S. 203, 211]; *cf.* [*Smalis v. Pennsylvania* (1986) 476 U.S. 140, 144–145, n.7]. In all these circumstances, "the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character." [*United States v. Scott* (1978) 437 U.S. 82, 98] (internal quotation marks and citation omitted).

(*Evans v. Michigan, supra*, 133 S.Ct. 1074.)

- B. After Finding That The Trial Court Had Erroneously Granted Mr. Stern An Acquittal Based On Legally Insufficient Evidence, The Court Of Appeal Correctly Ruled That The Acquittal Nonetheless Bars Retrial Under the Double Jeopardy Clause If, On Remand, The Trial Court Grants Mr. Stern's Renewed Motion For New Trial.

The Court of Appeal in this case found that the trial court had granted Mr. Stern's motion for new trial based on insufficiency of the evidence, but that the trial court had erred because substantial evidence supported Mr. Stern's conspiracy convictions. (Opinion 3, 25-28, 33.) As the Court of Appeal also concluded, the trial court's determination in ruling on the new trial motion constituted an acquittal for double jeopardy purposes. (Opinion 3, 31.) Moreover, authority from both this court and the United States Supreme Court have consistently made clear that the Double Jeopardy Clause precludes a retrial even if a trial court's ruling granting an acquittal was patently erroneous. (See, e.g., *Evans v. Michigan*, *supra*, 133 S.Ct. at p. 1074; *Smith v. Massachusetts*, *supra*, 543 U.S. at p. 473; *Arizona v. Rumsey*, *supra*, 467 U.S. at p. 211; *Sanabria v. United States*, *supra*, 437 U.S. at p. 64; *Fong Foo v. United States*, *supra*, 369 U.S. at p. 143; *People v. Hatch*, *supra*, 22 Cal.4th at p. 270-

271; *People v. Valenti, supra*, 49 Cal.2d at p. 203, 209; Opinion 31-33.) Accordingly, as the Court of Appeal held, if on remand the trial court grants Mr. Stern's motion for a new trial when it considers the grounds it had not previously reached, the case must then be dismissed on double jeopardy grounds because otherwise Mr. Stern would be subjected to retrial. (Opinion 31, 33.)

Indeed, *Arizona v. Rumsey, supra*, is analytically akin to this case. There, defendant was convicted by a jury of first degree murder and armed robbery. The trial court subsequently conducted a hearing to determine defendant's eligibility for the death penalty. The court found that none of the three aggravating factors alleged by the prosecution existed and therefore sentenced defendant to a prison term of 25 years to life instead of the death penalty. The prosecution appealed the trial court's ruling to the Arizona Supreme Court, contending that the lower court had erroneously found inapplicable an aggravating factor describing killings for pecuniary gain. Agreeing with the prosecution's contention, the Arizona Supreme Court ordered the trial court to set aside defendant's life sentence and remanded the matter for the trial court to redetermine

the question of defendant's eligibility for the death penalty. On remand, the trial court held a new hearing during which it found the presence of the pecuniary gain aggravating factor and sentenced defendant to death.

The United States Supreme Court first noted that the proceeding at issue sufficiently resembled a trial proceeding for purposes of the Double Jeopardy Clause. (*Arizona v. Rumsey*, *supra*, 467 U.S. at p. 209.) The Supreme Court then decided that the trial court's initial "judgment, based on findings sufficient to establish legal entitlement to the life sentence, amount[ed] to an acquittal on the merits" of the death penalty issue. (*Id.* at p. 211.) Reversal of defendant's subsequently imposed death sentence was therefore required since the acquittal barred any remand for new proceedings on the death penalty question. (*Ibid.*) The Supreme Court emphasized that the fact the trial judge had mistakenly understood the law in finding no aggravating factors was immaterial to its double jeopardy analysis:

In making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. Reliance on an error of law, however, does not change the double jeopardy

effects of a judgment that amounts to an acquittal on the merits. "[T]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination, but it does not alter its essential character."

(*Ibid.*, citation omitted.)

As in *Rumsey*, the trial court here made a ruling amounting to an acquittal based on legally insufficient evidence. The Court of Appeal then found that the trial court's ruling granting the acquittal was erroneous as a matter of law. Despite the erroneous nature of the trial court's acquittal, however, and consistent with the United States Supreme Court's decision in *Rumsey*, double jeopardy bars a retrial after remand to the trial court. (*See Arizona v. Rumsey*, *supra*, 467 U.S. at p. 211.) Thus, as indicated above, if the trial court grants Mr. Stern's renewed motion for new trial, the case must be dismissed on double jeopardy grounds.

C. Appellant Mistakenly Argues That Double Jeopardy Is Not Implicated If The Trial Court Grants Mr. Stern's Renewed Motion For New Trial On Remand.

In its Opening Brief on the Merits, Appellant agrees that the trial court granted Mr. Stern's motion for new trial based on legally insufficient evidence and that the trial court's ruling constituted an

acquittal for double jeopardy purposes. (Appellant's Opening Brief on the Merits ("AOB") 2, 4, 14, 20, 25.) Nevertheless, Appellant argues that even if the trial court grants Mr. Stern a new trial on remand after Mr. Stern renews the grounds he raised in his original motion for new trial, double jeopardy is not implicated. (*See, e.g.*, AOB 5, 18, 32.) Appellant is wrong.

Initially, Appellant repeatedly states that the only appropriate remedy is reinstatement of the jury's verdict. (AOB 2, 5, 19, 23, 27, 33.) But Appellant apparently does not really mean this because Appellant states in a footnote:

The propriety of allowing defendants to re-litigate their 1181 and 1385 motions pursuant to the Court of Appeal's opinion is not being challenged in this Appeal due to the clouded procedural history of this case, and in an effort to correct the greater legal issue pertaining to the remedy available pursuant to a section 1181 motion and the double jeopardy implications of retrial.

(AOB 17, n.15.)⁴ Appellant further alleges that if Mr. Stern does renew the grounds from his new trial motion which the trial court

⁴ Appellant also does not challenge the authority cited in the Court of Appeal's opinion authorizing a remand for the trial court to hear the unconsidered grounds from Mr. Stern's new trial motion. (*See* Opinion 30, citing Pen. Code § 1260; *People v. Braxton* (2004) 34 Cal.4th 798, 818-819.)

never reached, then he simultaneously waives his right to jeopardy, after which the trial court can grant a new trial. (*See* AOB 5, 16, 18, 32.)

To support its waiver theory, Appellant relies on authority indicating that when a defendant moves for a new trial, he impliedly waives any double jeopardy protections to the extent the trial court grants the motion and orders a retrial. (AOB 12, citing *United States v. Smith* (1947) 331 U.S. 469, 474 *People v. Porter*, *supra*, 47 Cal.4th at p. 16; *United States v. Alvarez-Moreno* (9th Cir. 2011) 657 F.3d 896, 900.) But none of the cases Appellant cites has anything to do with the situation where a trial court first granted an acquittal based on legal insufficiency, that acquittal got reversed on appeal, and the appellate court then remanded for the trial court to consider the defendant's renewed motion for new trial. Rather, *Smith*, *Porter*, and *Alvarez-Moreno* all deal with the effect of a trial court's ruling on a new trial motion in the first instance. Moreover, as the considerable law Mr. Stern discussed in the last two sections holds, once a trial court grants an acquittal based on insufficiency of the evidence, even if that ruling is subsequently

deemed erroneous, the Double Jeopardy Clause bars any retrial. (See, e.g., *Evans v. Michigan, supra*, 133 S.Ct. at p. 1074; *Smith v. Massachusetts, supra*, 543 U.S. at p. 473; *Arizona v. Rumsey, supra*, 467 U.S. at p. 211; *Sanabria v. United States, supra*, 437 U.S. at p. 64; *Fong Foo v. United States, supra*, 369 U.S. at p. 143; *People v. Hatch, supra*, 22 Cal.4th at p. 270-271; *People v. Valenti, supra*, 49 Cal.2d at p. 203, 209.)

In an attempt to get around this authority, Appellant relies primarily on footnote 9 from *Evans v. Michigan, supra*, and *United States v. Wilson* (1975) 420 U.S. 332. (AOB 18-21, 27-29.) In footnote 9 of *Evans*, the United States Supreme Court observed:

If a court grants a motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court's acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial. *United States v. Wilson*, 420 U.S. 332.

(*Evans v. Michigan, supra*, 133 S.Ct. at p. 1081, n.9.)

According to Appellant, *Wilson* and footnote 9 from *Evans* delineate the differing remedies applicable "when an acquittal has been entered by a trial court *prior to a jury's verdict*, versus that which has been entered *after a jury's verdict*. (AOB 18, emphasis

in original.) Thus, Appellant alleges that the double jeopardy rule from cases like *Evans*, *Smith v. Massachusetts*, and *Sanabria v. United States* precluding retrial even after an erroneous acquittal applies only where the trial court granted the acquittal *prior* to the jury's verdict, whereas when the acquittal is *post-verdict*, double jeopardy does not prevent a retrial. (AOB 19.)⁵ The reason for this, Appellant claims,

appears quite clear: when an acquittal is entered *prior to jury verdict*, reversal would require retrial because there would be no verdict to reinstate and additional fact-finding would be required. Conversely, *after a jury's verdict*, Double Jeopardy concerns are mitigated because the court is not required to retry the accused, it may simply reinstate the jury's verdict.

(AOB 19-20, emphasis in original.)

Appellant misreads the relevant authority. The cases do *not* hold that double jeopardy bars retrial depending simply on whether an acquittal was made pre-verdict or post-verdict. Rather, the determinative factor in all of these cases is whether or not the defendant will be subjected to a retrial after the acquittal. As *Evans*

⁵ Appellant relies on various state cases for the same proposition that it relies on *Wilson* and footnote 9 from *Evans*. (See AOB 21-23, relying on *People v. Salgado* (2001) 88 Cal.App.4th 5, and *People v. Craney* (2002) 96 Cal.App.4th 431.)

indicates, where the only remedy available after the reversal of a trial court's acquittal is reinstatement of the jury's verdict, the Double Jeopardy Clause does not preclude a review of the trial court's acquittal order. (*Evans v. Michigan, supra*, 133 S.Ct. at p. 1081, n.9 [no double jeopardy barrier to government's appeal of trial court's acquittal where "reversal would result in reinstatement of the jury verdict of guilt, not a new trial."]; *see also United States v. Martin Linen Supply Co., supra*, 430 U.S. at p. 569-570 ["where a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended."]; *United States v. Wilson*, 420 U.S. at p. 344-345 [government could appeal trial court's post-verdict dismissal of indictment based on pre-indictment delay without offending double jeopardy "[s]ince reversal on appeal would merely reinstate the jury's verdict"]⁶)

⁶ Appellant argues that unlike *United States v. Wilson*, the United States Supreme Court's decision in *Hudson v. Louisiana* fails to "address what courts must do when the trial court's acquittal -- even in a new trial context -- was wrong." (AOB 27.) Not so. *Hudson* provides a very clear remedy -- retrial is barred; Appellant just does not like that remedy. (*Hudson v. Louisiana, supra*, 450 U.S. at p. 45.)

Here, double jeopardy is implicated precisely because when the trial court rehears Mr. Stern's motion for new trial on remand, the possible outcomes are not restricted to a reinstatement of the jury's verdict as in *Wilson*, but include a retrial. Thus, as the Court of Appeal properly held, to the extent the trial court grants a new trial on remand -- necessitating a retrial -- double jeopardy precludes the prosecution from retrying Mr. Stern. (Opinion 31-33.)

Ultimately, Appellant simply does not like that double jeopardy would bar it from retrying Mr. Stern if the trial court grants the renewed motion for new trial. (AOB 5.) According to Appellant, this would "permit Defendant Stern a second review of his case pursuant to a 13th Juror standard of review, where the only possible outcomes are denial of the motion, or constructive acquittal." (AOB 5.) Mr. Stern agrees that under the unusual procedural history of this case, Appellant has identified the possible outcomes of the trial court's resolution of the new trial motion on remand. However, it is the nature of the Double Jeopardy Clause that its application will sometimes result in seemingly unfair outcomes. (*See, e.g., Sons v. Superior Court* (2004) 125

Cal.App.4th 110, 120 [noting possibility that "double jeopardy protection preserves, for example, a jury-nullification acquittal that may be unfair to the People."] (citing *People v. Batts* (2003) 30 Cal.4th 660, 679 and n.12).) And significantly, not even Appellant alleges that Mr. Stern is somehow responsible for the unique history of this case.

Similarly, Appellant criticizes the Court of Appeal's remand order as a "pointless legal endeavor." (AOB 17.) It is not. As Appellant recognizes, the trial court's ruling on the renewed new trial motion can have at least two distinct outcomes -- a denial resulting in the affirmance of Mr. Stern's convictions or a grant resulting in a dismissal of the case against Mr. Stern.⁷ Again, Appellant is displeased that the Double Jeopardy Clause acts to prevent it from retrying Mr. Stern. (See AOB 17 ["This result unfairly subverts the People's proverbial 'one bite at the apple,' by eviscerating guilty verdicts supported by substantial evidence while allowing the Defendant to gain immunity from further prosecution for having successfully obtained an *earlier and erroneous* acquittal

⁷ The trial court could also agree to reduce Mr. Stern's felony conspiracy convictions to misdemeanors. (See Opinion 5; AOB 7.)

by the trial court."] (emphasis in original.) Yet, as just explained, a double jeopardy bar will sometimes of necessity result in seemingly unfair results. Moreover, contrary to Appellant's implication, Mr. Stern did not "successfully obtain" or do anything untoward to cause the "earlier and erroneous acquittal;" he should not lose his double jeopardy protections merely because of the trial court's error which the prosecution did nothing to correct.

II. IF AN APPELLATE COURT REVERSES A TRIAL COURT'S POST-VERDICT ACQUITTAL GROUNDED ON INSUFFICIENCY OF THE EVIDENCE, THE APPELLATE COURT CAN AND MUST DIRECT THE TRIAL COURT TO DISMISS THE CHARGES AGAINST THE DEFENDANT IF, ON REMAND, THE TRIAL COURT GRANTS THE DEFENDANT'S RENEWED MOTION FOR NEW TRIAL UNDER PENAL CODE SECTION 1181.

As noted above, a trial court ruling on a motion for new trial under section 1181, subdivision (6), may either (1) grant a new trial; (2) deny the new trial motion and enter judgment on the jury's verdict; or (3) modify the verdict either to a lesser degree of the crime reflected in the jury's verdict or to a lesser included offense of that crime. (*Porter v. Superior Court, supra*, 47 Cal.4th at p. 133.) A court has no authority under section 1181, subdivision (6), to order an acquittal in connection with a new trial grant. (*Ibid.*; *People v. Serrato* (1973) 9 Cal.3d 753, 762.)

Nevertheless, trial courts are "empowered to grant [a] new trial motion on the legal ground the evidence was insufficient as a matter of law." (Opinion 28, citing *Hudson v. Louisiana, supra*, 450 U.S. at p. 44; *People v. Lagunas, supra*, 8 Cal.4th at p. 1038, n.6; see also *United States v. Martin Linen Supply Co., supra*, 430 U.S. at p. 571 ["what constitutes an 'acquittal' is not to be

controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." (citations omitted); *People v. Hatch, supra*, 22 Cal.4th at p. 270-271 [once trial court acquits defendant after finding insufficient as a matter of law, that ruling bars retrial even if "the court ha[d] no statutory authority to make it."].)⁸

Once the trial court here granted an acquittal and the Court of Appeal reversed that ruling, the Court of Appeal had an obligation

⁸ Appellant made this very point in its opening brief before the Court of Appeal. (Appellant's Opening Brief in the Court of Appeal at 32 ["On a motion for new trial, a court may rule that the evidence is insufficient as a matter of law to support the verdict."] (citing *People v. Hatch, supra*, 22 Cal.4th at p. 271-272; *People v. Salgado, supra*, 88 Cal.App.4th at p. 10; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1306-1308.) However, before this court, Appellant now argues for the first time that pursuant to *Porter*, "a court has no authority to grant an acquittal in connection with an 1181 motion," and "the law is well settled that a court reviewing the jury's verdict under section 1181 lacks the power to acquit the defendant based on the court's view of the evidence." (AOB 30, quoting *Porter v. Superior Court, supra*, 47 Cal.4th at p. 133, 136.) Appellant's reliance on *Porter* is suspect given its stance before the Court of Appeal. In any event, Appellant ultimately does not dispute that pursuant to *Hudson, Lagunas, Hatch, Salgado*, and *Johnston*, trial courts have an inherent power to grant a new trial motion on the ground of insufficiency of the evidence.

to protect Mr. Stern's rights under the Double Jeopardy Clause by preventing the state from subjecting him to a retrial, as discussed in the last Argument. In order to do so, it rightly directed the trial court to dismiss the charges against Mr. Stern if that court grants Mr. Stern's renewed motion for new trial under section 1181.

Appellant complains that by prohibiting a retrial under the circumstances presented, "the Court of Appeal has created a new procedural scenario in which trial courts can guarantee an acquittal and evade meaningful judicial review." (AOB 31.) But the United States Supreme Court answered this very same concern in *Evans v. Michigan, supra*, rejecting the premise that its double jeopardy ruling would "make it easier for courts to insulate from review acquittals that are granted as a form of nullification" because "[w]e presume . . . that courts exercise their duties in good faith." (133 S.Ct. at p. 1079.) Moreover, in alleging that the appellate court's double jeopardy ruling will encourage rogue courts to circumvent the law, Appellant ignores the fact that trial courts already have the power to "guarantee an acquittal and evade meaningful review" simply by granting a pre-verdict motion to acquit pursuant to Penal

Code section 1118.1. (See Pen. Code § 1118.2 ["A judgment of acquittal entered pursuant to the provisions of Section . . . 1118.1 shall not be appealable and is a bar to any other prosecution for the same offense."]; *Evans v. Michigan, supra*, 133 S.Ct. at p. 1074.)

Appellant's parade of horrors must be rejected as illusory.

CONCLUSION

For the foregoing reasons, Respondent Howard Stern respectfully requests this court to affirm the Court of Appeal's double jeopardy analysis and conclude that if the trial court grants his renewed motion for new trial on remand, he cannot be retried.

DATED: August 20, 2013

Respectfully submitted,

By



Peter Gold
Attorney for Respondent
Howard K. Stern

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d), I certify that this Answer Brief on the Merits contains 5,296 words.



Peter Gold

CERTIFICATE OF SERVICE

I, Peter Gold, am over 18 years of age. My business address is 5758 Geary Blvd., #160, San Francisco, California, 94121. I am not a party to this action.

On August 21, 2013, I served the within

ANSWER BRIEF ON THE MERITS

upon the parties named below by depositing a true copy in a United States mailbox in Libertyville, Illinois, in a sealed envelope, postage prepaid, and addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 21, 2013.

Peter Gold