S192538

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **CHRISTINA ANZALONE,** Defendant and Appellant.	No. Appellate court No. **H035123** County of Santa Clara Superior Court No. **CC935164** Hon. Ron Del Pozzo, Judge, Presiding

PETITION FOR REVIEW

AFTER THE DECISION BY THE COURT OF APPEAL,
SIXTH APPELLATE DISTRICT,
OF MARCH 17, 2011

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In Association with the
Sixth District Appellate
Program

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **CHRISTINA ANZALONE,** Defendant and Appellant.	No. Appellate court No. **H035123** County of Santa Clara Superior Court No. **CC935164** Hon. Ron Del Pozzo, Judge, Presiding

PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Defendant-Petitioner Christina Anzalone, by and through counsel, hereby petitions for review, pursuant to California Rules of Court, rule 8.500, subdivision (b)(4), following the decision of the Court of Appeal for the Sixth District filed March 17, 2011, attached to this Petition as Exhibit 1.

STATEMENT OF THE ISSUE PRESENTED

In this case, a unanimous Court of Appeal found that reversal was required where the trial court had erred by failing to obtain a valid verdict from the jury before discharging them. The question presented to this Court is, in the context of a case where the entire jury panel is discharged without a verdict, without legal necessity, and without consent of the defendant, can that defendant be retried on the same case without offending longstanding double-jeopardy considerations?

WHY THE PETITION SHOULD BE GRANTED

Pursuant to Rule 8.500, subdivision (b)(4), petitioner requests that this Court remand the matter to the Court of Appeal with instructions to implement the remedy this Court has consistently announced for cases where an entire jury panel is discharged, without a verdict, without legal necessity, and without consent of the defendant. See *People v. Hernandez* (2003) 30 Cal.4th 1, 5: "a discharge *of the entire jury* without a verdict is equivalent to an acquittal and bars a retrial unless defendant consented to it, or legal necessity required it." (Citing *Curry v. Superior Court* (1970) 2 Cal.3d 707, 717-718; *Paulson v. Superior Court* (1962) 58 Cal.2d 1, 9; italics in original.) See also, *Carillo v. Superior Court* (2006) 145 Cal.App.4th 1511, 1524: "Once a defendant is placed on trial in a court of competent jurisdiction, on a valid accusatory pleading, before a jury duly impaneled and sworn, a discharge of that jury without a verdict is equivalent in law to an acquittal and bars a retrial, unless the defendant consents to the discharge or legal necessity requires it." (Citing *Curry,* 2 Cal.3d at 712.)

In the alternative, should this Court find that its precedents noted above (as well as the additional authorities cited in Section I(a) of this brief) do *not* clearly compel a prohibition of retrial in this case, petitioner requests that this Court grant review pursuant to Rule 8.500, subdivision (b)(1), for the purpose of clarifying whether retrial is barred when a trial court discharges a jury without first obtaining a verdict.

STATEMENT OF THE CASE AND FACTS[1]

On June 1, 2009, appellant was arraigned on a four-count information, charging (1) a felony violation of Penal Code section 245, subdivision (a)(1), including an allegation of personal use of a deadly weapon within the meaning of sections 667 and 1192.7, (2) a felony violation of section 422, including an enhancement for personal use of a deadly weapon within the meaning of section 12022, subdivision (b)(1), (3) a misdemeanor violation of section 594, and (4) a violation of section 417, subdivision (a)(1).[2] (CT 52-55.)

Jury trial began on September 30, 2009. Argument and instruction took place on October 7, 2009, and the jury returned with verdict forms on October 8, 2009, finding appellant guilty of the felony charges in Counts (1) and (2), and the misdemeanor in count (4). (CT 138-145.) In addition, the jury verdict forms found both allegations true. (*Ibid.*)

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[1] A "Statement of Facts" regarding the incidents that underlie petitioner's convictions is omitted as the petition is concerned solely with the ramifications of the trial court's failure to obtain a verdict. For the purpose of this petition, petitioner adopts the statement of facts as set forth in the Court of Appeal's opinion. (Op. at 2-3.)

[2] All statutory references are to the Penal Code.

At the time that the jury returned with its verdict forms, the trial court indicated its belief that the jury has reached a verdict, asked the foreperson to give the verdict forms to the court, and asked the clerk to read them. (RT 378.) After the clerk read the verdict forms, the court thanked the jurors for their service and excused them. (RT 379-381.) The trial court never made any inquiry of any kind to the jury before discharging them. (*Ibid.*) Nor did the court ever suggest to the jury that it was appropriate for them to address the court before they were discharged. (*Ibid.*) Similarly, the court made no inquiry of counsel before discharging the jury. (*Ibid.*) At no time did the prosecutor make any objection to the trial court's actions. (*Ibid.*) Most significantly, at no time did the trial court require the jury or its foreperson to give or confirm its verdict orally in open court.[3]

On December 4, 2009, the trial court sentenced appellant as follows: three years on count (1), eight months, to be served consecutively, on count (2) and an additional year, consecutive, for the

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[3] Such an oral declaration of the verdict is required by section 1149 of the Penal Code and the California Constitution, article I, § 16. Section 1149 reads: "When the jury appear they *must* be asked by the court, or clerk, whether they agreed upon a verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same." (Italics added.)

allegation attached to count (2) pursuant to section 12022, subdivision (b)(1), for a total of four years, eight months. (CT 188-189.)

Appeal

On March 17, 2011, a unanimous Court of Appeal for the Sixth District ruled that the trial court had failed to obtain a verdict before discharging the jury. (Op. at 7.) Shortly before oral argument, the Court asked the parties to be prepared to argue the question: "Is retrial barred by the constitutional protection against double jeopardy?" (Letter of the Clerk of Court to counsel dated January 26, 2011.) In its opinion, the Court of Appeal answered that question in the negative and ruled that retrial was not barred. (Op. at 9-10.) Based on its finding that the trial court had erred in failing to obtain a valid verdict, the Court of Appeal "consider[ed] it unnecessary to address defendant's other claims of error." (Op. at 10, fn.4.)

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ARGUMENT

I. This Court Has Consistently Held That "a Discharge of the Entire Jury without a Verdict Is Equivalent to an Acquittal and Bars a Retrial Unless Defendant Consented to It, or Legal Necessity Required It."

a. This Court's Longstanding Precedents Have Held That Retrial is Barred Where the Jury is Unjustifiably Discharged.

"Once jeopardy has attached, any unjustified discharge of the jury before it reaches a verdict gives rise to the defense of double jeopardy. A discharge is unjustified unless it is with the defendant's consent or for recognized reasons of strict necessity." (Op. at 8, citing *Curry v. Superior Court* (1970) 2 Cal.3d 707, and 1 Witkin & Epstein, *Cal.Criminal Law* (3d ed., 2000), Defenses, sec. 119, p. 464.)

In this case, the very essence of the trial court's error was distilled by the Court of Appeal below as follows: "without an oral acknowledgement of unanimity, there is simply no verdict." (Op. at 5, citing *People v. Traugott* (2010) 184 Cal.App.4th 492, 500.) Thus, this case falls squarely within the rule quoted from *Curry* – "there is simply no verdict," and it is uncontested that there was no consent from the defense, and no legal necessity.

This Court has acknowledged this simple, clear rule, repeatedly. See, *e.g., Jackson v. Superior Court* (1937) 10 Cal.2d 350, 359: where a mistrial was granted before a valid verdict was reached, and without defendant's consent, this Court wrote, "under the rules prevailing in California jeopardy attached when the jury was sworn and that respondents have lost jurisdiction to try them again for the offenses of which they, in the eyes of the law, have been acquitted." See also, *Paulson v. Superior Court* (1962) 58 Cal.2d 1, 9, where the judge improvidently discharged a jury which he erroneously believed to be deadlocked: "Once the jury is impaneled and sworn, the defendant is in jeopardy. He cannot be deprived of any benefit to be derived from that jeopardy and is entitled to have the jury render a verdict, when, as in this case, he has not consented to the discharge of the jury and there is no legal necessity for such discharge." Similarly, in *Curry v.Superior Court* (1970) 2 Cal.3d 707, this Court wrote: the "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." See also, *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, 275, to the same effect.

More recent decisions by this Court have not varied from the above principle. See, *e.g., Carillo v. Superior Court* (2006) 145 Cal.App.4th 1511, 1524: "Once a defendant is placed on trial in a court of competent jurisdiction, on a valid accusatory pleading, before a jury duly impaneled and sworn, a discharge of that jury without a verdict is equivalent in law to an acquittal and bars a retrial, unless the defendant consents to the discharge or legal necessity requires it."

Another recent opinion of this Court is instructive, *People v. Hernandez* (2003) 30 Cal.4th 1. There, this Court found that the improper replacement of a single juror with a qualified alternate required reversal. However, *because* the jury was not discharged, and *because* a valid verdict was reached, this Court ruled that retrial was not barred. In doing so, this Court emphasized that it was not in any way rethinking the rule set forth in its numerous precedents noted above: "The appellate court correctly observed that a discharge *of the entire jury* without a verdict is equivalent to an acquittal and bars a retrial unless defendant consented to it, or legal necessity required it." (*Id.*, at 5, *italics in original.*)

Finally, it should be noted that the rule in federal courts is the same. See, *e.g., Green v. United States* (1957) 355 U.S. 184, 191: "For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense."

b. The Court of Appeal Erroneously Cited This Court's Opinion in *People v. Hernandez* for the Proposition That Only Reversals Based on "Insufficiency of the Evidence" Bar Retrial.

The lower court ruled that retrial was not barred because this was "plain reversible trial error." (Op. at 10.) This finding, which is inconsistent with the above precedents, is based on the language of one cited case, *People v. Hernandez* (2003) 30 Cal.4th 1: "it is well settled that 'if the defendant obtains reversal of a conviction on appeal based on trial errors other than insufficiency of the evidence, [the defendant] is subject to retrial.'" (Op. at 9, quoting *Hernandez* at p. 6.)

This quote is taken out of context. First, it should be noted that the above language in *Hernandez* is prefaced by the phrase, "*As a general rule,* it is well settled . . ." (*Hernandez*, 30 Cal.4th at 6, italics added.) That qualifier is critical, because as the *Hernandez* opinion makes clear itself, there are at least *two* exceptions to the general rule – where there is insufficient evidence to support the conviction, *and* where there is a discharge of an entire jury panel without a valid verdict. Indeed, this Court made that explicit almost immediately prior to the language quoted by the Court of Appeal in that case. This Court wrote, "a discharge of the entire jury without a verdict is equivalent to an acquittal and bars a retrial unless defendant consented to it, or legal necessity required it. (*Id.*, at 5, citing *Curry v. Superior Court* (1970) 2 Cal.3d 707, 717-718; *Paulson v. Superior Court* (1962) 58 Cal.2d 1, 9.)[4]

In short, neither in its facts, nor in its language, does the *Hernandez* case stand for the proposition that the longstanding principle enunciated by *Paulson, Curry* and the other precedents listed

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[4] This clarification is critical, of course, because, as noted in section I(a) above, the Court of Appeal explicitly found in this case that, because of the trial court's failure, "there is simply no verdict." (Op. at 5, citing *People v. Traugott* (2010) 184 Cal.App.4th 492, 500.)

in subsection (a), above, has been abrogated. Indeed, as indicated here, its language shows unwavering support for the continuing vitality of the principle that where an entire jury is discharged without a valid verdict, retrial of the defendant is barred unless he consented to the discharge or legal necessity required it.

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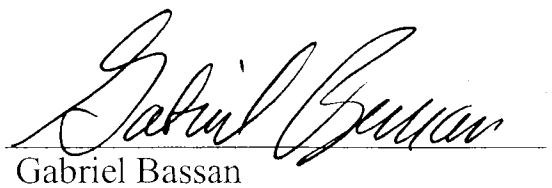
CONCLUSION

On the above grounds, petitioner requests that this Court grant review pursuant to Rule 8.500, subdivision (b)(4), and remand the matter back to the Court of Appeal with instructions to reconsider its finding that retrial is not barred in light of this Court's prior holdings in *Curry v. Superior Court* (1970) 2 Cal.3d 707, *et al.*

In the alternative, should this Court find that its precedents noted in Section I(a) of this brief do *not* clearly compel a prohibition of retrial in this case, petitioner requests that this Court grant review pursuant to Rule 8.500, subdivision (b)(1), for the purpose of clarifying whether retrial is barred when a trial court discharges a jury without first obtaining a verdict.

Dated: April 25, 2011.

Respectfully submitted:



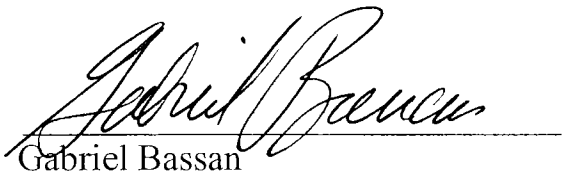
Gabriel Bassan
Attorney for Petitioner Anzalone

CERTIFICATE OF WORD COUNT

I, the undersigned, hereby certify that the within Petition for Review, including Tables of Contents and Authorities, contains 2749 words. This certification is based on the word count produced by the word-processing software used to create this petition.

Dated: April 25, 2011.

Respectfully submitted:



Gabriel Bassan
Declarant

PROOF OF SERVICE

I, the undersigned say:

I am over eighteen years of age and not a party to the above action. My business address is 520 Frederick St., No. 26, San Francisco, Ca., 94117.

On April 25, 2011, I personally caused the attached Petition for Review to be served on the following, by hand or by U.S. mail, postage prepaid:

OFFICE OF THE ATTORNEY GENERAL
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Attn: S. Birenbaum

Clerk of Court
COURT OF APPEAL, SIXTH DISTRICT
333 West Santa Clara Street, Ste. 1060
San Jose, CA 95113

SUPERIOR COURT, SANTA CLARA COUNTY
Hall of Justice
191 N. First Street
San Jose, CA 95113
Attn: Judge Del Pozzo

OFFICE OF THE DISTRICT ATTORNEY
70 W. Hedding Street, West Wing
San Jose CA 95110

Christina ANZALONE, Defendant and Petitioner

by email: SIXTH DISTRICT APPELLATE PROGRAM

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 25, 2011, at San Francisco, California.

Gabriel Bassan, Declarant

EXHIBIT 1

EXHIBIT 1

SEE CONCURRING OPINION

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTINA MARIE ANZALONE,

Defendant and Appellant.

H035123
(Santa Clara County
Super. Ct. No. CC935164)

I. STATEMENT OF THE CASE

A jury convicted defendant Christina Marie Anzalone of assault with a deadly weapon, making a criminal threat, and brandishing a deadly weapon and further found that she personally used a knife in committing the assault and making the threat. (Pen. Code, §§ 245, subd. (a)(1), 422, 417, subd. (a)(1), 667, 1192.7, 12022, subd. (b)(1).)[1] The court sentenced her to a term of 4 years 8 months.

On appeal from the judgment, defendant claims she was denied her right to a complete, valid, and unanimous verdict. She claims the court erred in admitting a prior assault for purposes of impeachment, failing to sanitize it, and providing inadequate instructions on its consideration by the jury. Last, she claims the court erred in imposing

[1] The jury acquitted defendant of misdemeanor vandalism. (Pen. Code, § 594, subd. (a)(b)(2)(A).)

All unspecified statutory references are to the Penal Code.

a full term enhancement on the threat conviction and failing to stay the term for brandishing.

We conclude that there was no valid verdict in this case and reverse the judgment.

II. FACTS

On February 22, 2009, around 5:00 p.m., Atul Patel, who ran the Hedding Inn motel in San Jose, was at his desk when defendant came in and asked to speak to Leon Wallace, who lived there. Patel said he was not there. She then asked to go to his room, but Patel said she was not allowed there. Defendant accused him of lying and left. A few minutes later, she returned, pushed Patel's computer over, and threatened to "hurt" and "kill" him. She was holding a knife, and Patel was afraid that she would use it because she appeared to have been drinking. He called 911, and she left.

Later that day, defendant encountered Richard Malott and his wife Kimberly at the City Team Ministries. The Malotts had gone there to eat, but Kimberly left after a short time. Outside, defendant started talking to her. When Richard came out, he told Kimberly to come to their truck to leave. Defendant said she was not finished talking to her, she started swearing at him, accused him of abusing Kimberly, and then "chest butt[ed]" him. He started walking away and then turned around. Defendant threw a bagel and an open knife at him. The knife hit him in the chest. He picked up the knife and went to his truck. Kimberly joined him seconds later. As they tried to leave, defendant blocked their way and then grabbed the antennae, which broke off as Richard drove away.

A police officer was across the street during the incident. He testified that, immediately after the incident, defendant was too angry and drunk to be interviewed.

The Defense

Defendant testified that she was intoxicated when she went to the Hedding Inn motel. She said that she pushed over Patel's computer because he had lied to her and had falsely told police that she was breaking into a room. She said she may have threatened

to return but did not threaten to hurt or kill him. She denied taking her knife from its clip on her sweatshirt or opening it.

Defendant said she went to the City Team Ministries to get some food from people she knew who were leaving because she was not allowed inside. She started talking to Kimberly. Richard came out and verbally abused Kimberly. Defendant then started yelling at him and trying to provoke a fight. Her knife was clipped to her sweatshirt, and as she railed against him and waived her arms, the knife flew off and skidded to the ground. Richard then picked it up and went to his truck. She followed and demanded that he return it.

III. UNANIMOUS VERDICT

Defendant contends she was denied the right to complete, valid, and unanimous verdict because the court discharged the jury without an oral endorsement in open court that it had reached a unanimous verdict.

Background

On October 7, 2009, after final argument and instructions, the jury retired to deliberate. On October 8, the jury reported that it had reached a verdict. After the jurors returned to the courtroom, the court stated, "I understand you've reached a verdict" and then asked, "Who is the foreperson? Mr. (Juror)?" That juror responded, "Yes." The court received the verdict forms from the foreperson and handed them to the clerk, who read them. When the clerk finished, the court stated, "Ladies and gentlemen of the jury, you've now completed your jury service in this case and on behalf of the judges and attorneys and everyone in the court, please accept my sincere thanks for your time and effort that you put into your verdicts in this case." The court gave jurors additional instructions concerning payment, communications with the parties, and the privacy and the release of personal information about jurors. The court concluded, "Again, I can't thank you enough for your attention during this trial. I never say this, I'll say you're one of the best juries I've ever had as far as being prompt, attentive to the evidence. [¶] We

notice that, we all notice it here and we talked about it and I appreciate your service. You are now excused for at least one year and if you want to talk to the attorneys, they will be out in about three minutes in the hall, otherwise you can leave . . . "

Applicable Statutes and Legal Principles

Under the California Constitution, a defendant in a criminal case has a fundamental right to a unanimous jury verdict. (*People v. Collins* (2001) 26 Cal.4th 297, 304; *People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Jones* (1990) 51 Cal.3d 294, 305; see Cal. Const., art. I, § 16.)[2]

Section 1149 provides: "When the jury appear they *must* be asked by the Court, or Clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they *must*, on being required, declare the same." (Italics added.)

Section 1163 provides: "When a verdict is rendered, and before it is recorded, the jury may be polled, *at the request of either party*, in which case they must be severally asked whether it is their verdict, and if any one answers in the negative, the jury must be sent out for further deliberation." (Italics added.)

Section 1164, subdivision (a) provides in relevant part, "When the verdict given is receivable by the court, the clerk shall record it in full upon the minutes, *and if requested by any party* shall read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall . . . be discharged from the case." (Italics added.)

It is settled that the written verdict forms do not by themselves constitute the verdict; rather, it is the oral acknowledgement of the verdict reflected in the verdict forms

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[2] Article I, section 16 of the California Constitution provides, in relevant part, "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. . . . [¶] . . . [¶] In criminal actions in which a felony is charged, the jury shall consist of 12 persons. . . ."

in open court that constitutes a complete verdict. (*People v. Hendricks* (1987) 43 Cal.3d 584, 597; *People v. Traugott* (2010) 184 Cal.App.4th 492, 500 (*Traugott*); *People v. Green* (1995) 31 Cal.App.4th 1001, 1009 (*Green*); *People v. Lankford* (1976) 55 Cal.App.3d 203, 211, disapproved on other grounds in *People v. Collins* (1976) 17 Cal.3d 687, 694, fn. 4; *People v. Mestas* (1967) 253 Cal.App.2d 780, 786.) "[T]he right to an oral affirmation of the verdicts by the jurors is not a mere procedural formality. Even if each of the jurors voted to convict a defendant during deliberations, jurors may equivocate or change their vote when called upon in open court." (*Traugott, supra,* 184 Cal.App.4th at p. 501; *Chipman v. Superior Court* (1982) 131 Cal.App.3d 263, 266; e.g., *Green, supra,* 31 Cal.App.4th 1001 [although jury announced it had reached a verdict, in court one juror equivocated, and jury sent back for further deliberations]; *People v. Superior Court (Thomas)* (1967) 67 Cal.2d 929 [mistrial upheld after one juror equivocated when asked about verdict].) Thus, without an oral acknowledgement of unanimity, there is simply no verdict. (*Traugott, supra,* 184 Cal.App.4th 492, 500; *People v. Thornton* (1984) 155 Cal.App.3d 845, 858 (*Thornton*); see 6 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Criminal Judgment, § 44, p. 71.)

However, the requirement of an oral acknowledgement does not mean that the court must poll each juror. Rather, the foreperson of the jury may speak collectively for the jury and provide the requisite oral acknowledgement. (*People v. Wiley* (1931) 111 Cal.App. 622, 625; *Stalcup v. Superior Court* (1972) 24 Cal.App.3d 932, 936, disapproved on other grounds in *People v. Dixon* (1979) 24 Cal.3d 43, 53.) If the foreperson does so and a party questions whether the verdict was unanimous, then that party may request that the jurors be individually polled. (See §§ 1163, 1164.) However, "[t]he polling of the jury is a right available only upon the request of either party. [Citation.] A failure to make a proper request imposes no burden upon the court to poll the jury, nor in the absence of such a request does a failure to so poll constitute a denial of a constitutional right." (*People v. Lessard* (1962) 58 Cal.2d 447, 452.) Whereas the

complete failure to orally acknowledge a written verdict in open court would normally invalidate the verdict (*Thornton, supra*, 155 Cal.App.3d at pp. 856-860), individual polling errors do not require reversal in the absence of a showing of prejudice. (*People v. Masajo* (1996) 41 Cal.App.4th 1335, 1339-1340.)

Discussion

Attorney General argues that there was a sufficient collective acknowledgement of the verdict. According to the Attorney General, the trial court "stated it had been informed the jury reached a verdict, and asked for the foreman who acknowledged they reached a verdict." She refines this rather awkward description of what happened, alternatively stating that "[u]pon being asked, the jurors collectively affirmed this was their verdict." The Attorney General opines that it is reasonable to assume that "jurors would not sit there in silence if in fact that was not their verdict." Thus, she argues that if defendant had doubts about whether the verdict was unanimous, it was incumbent on her to request individual polling, which she did not do.

The Attorney General misreads the record. The court did not state that it had been informed that the jury had reached a verdict. Although that is a reasonable inference, the court asserted only that it understood that a verdict had been reached. The record does not suggest how the court came by its understanding.

Moreover, and contrary to the Attorney General's reading, the foreperson did not expressly acknowledge the verdict in open court; nor was the foreperson asked to do so. As quoted above, the court's assertion about the verdict was not a question but an affirmative statement. The only question the court asked was *who* the foreperson was, and whether it was a particular juror. The person the court referred to answered that question, saying "Yes, sir." The Attorney General reads the foreperson's "yes" as the requisite oral acknowledgement. However, we find this reading to be unreasonable, and we reject it.

We note that after the juror acknowledge being the foreperson, the court moved on to other matters, and although the clerk read the written verdict forms, the court did not then ask the foreperson to acknowledge the verdict. The court simply advised jurors about other matters and discharged them.[3]

In sum, we conclude that although the jury deliberated and rendered a verdict, which was read in court, the lack of oral acknowledgement by the jurors individually or by the foreperson rendered the jury's verdict incomplete, defective, and invalid. And, without a valid verdict, there can be no valid judgment. Furthermore, this defect is structural and not subject to harmless-error analysis. Although there is ample if not overwhelming evidence to support the verdict reflected in the verdict forms, and although there is nothing in the record to suggest that the jurors did not agree with the verdict when read, it is not possible for us to know whether the foreperson would have acknowledged the verdict; and if so, whether defendant would have requested that jurors be individually polled; and if polled, whether all of the jurors would have endorsed the verdict as his or her verdict.

The court in *Thornton, supra*, 155 Cal.App.3d at page 860 expressed our situation this way: "[W]e are faced with error of constitutional proportions whose actual prejudicial effect is insusceptible of calculation. There is no false humility in recognizing that we lack the omniscience that would enable us to say that no juror in this case would have impeached the guilty verdict form had defendant been afforded his right to *timely* test each juror in open court. We cannot say that they were not influenced by outside

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[3] At oral argument, the Attorney General argued that taken together, (1) the court's understanding that a verdict had been reached, (2) its receipt of the verdict forms from the foreperson, and (3) the reading of the verdict by the clerk on the record constitutes substantial compliance with section 1149. We disagree and fail to see how they represent the functional equivalent of an *oral* acknowledgement or substantial compliance with section 1149.

forces encountered after discharge. We, therefore, have no choice but to find the errors prejudicial per se."

IV. DOUBLE JEOPARDY

We asked the parties to consider whether a retrial would be barred by constitutional protections against double jeopardy if the judgment were reversed, an issue not raised by defendant. At oral argument, the parties disagreed. Defendant argued that retrial would be barred because the court dismissed the jury without a verdict and without necessity or consent. The Attorney General argued that retrial would not be barred because the court's failure to secure an oral acknowledgment of the verdict simply constitutes reversible trial error. We agree with the Attorney General.

The state and federal constitutions prohibit placing a person in jeopardy more than once for the same offense. (U.S. Const., 5th Amend.; Cal. Const. art. I, § 15.) "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 defendant is in jeopardy where, as here, he or she is placed on trial for an offense; on a valid indictment or information or other accusatory pleading; before a competent court; and with a competent jury, duly impaneled, sworn, and charged with the case. (See *Jackson v. Superior Court* (1937) 10 Cal.2d 350, 352, 355.)

Once jeopardy has attached, any unjustified discharge of the jury before it reaches a verdict gives rise to the defense of double jeopardy. A discharge is unjustified unless it is with the defendant's consent or for recognized reasons of strict necessity. (*Curry v. Superior Court* (1970) 2 Cal.3d 707; see 1 Witkin & Epstein, Cal. Criminal Law (3d ed.

2000) Defenses, § 119, p. 464; Pen. Code, § 1141.) This rule "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; e.g., *Jackson v. Superior Court, supra,* 10 Cal.2d at p. 357 [mistrial for error or misconduct over defendant's objection]; *People v. Arnett* (1900) 129 C. 306 [defective verdict accepted by the court]; *Paulson v. Superior Court* (1962) 58 Cal.2d 1 [premature discharge due to apparent jury deadlock].) Thus, the "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." (*Curry v. Superior Court, supra,* 2 Cal.3d at p. 712.)

On the other hand, it is well settled that "if the defendant obtains reversal of a conviction on appeal based on trial errors other than insufficiency of the evidence, [the defendant] is subject to retrial." (*People v. Hernandez* (2003) 30 Cal.4th 1, 6 (*Hernandez*).) In *Hernandez, supra,*30 Cal4th 1, the court evaluated the rule precluding retrial after an unnecessary mistrial is declared and the defendant is deprived of a verdict from his or her chosen jury. The court concluded that this rule is inapplicable when a juror is improperly discharged and a reconstituted jury renders a verdict. (*Id.* at pp. 8-9.) Although the verdict could not stand because of the improper discharge of the juror, the court reasoned that the double jeopardy bar was not applicable because the "defendant's chosen jury was not discharged but instead, with the substitution of a preselected alternate juror, remained intact until a verdict was rendered." (*Id.* at p. 9.)

We conclude that retrial is not barred in this case. The court did not discharge the jury before it reached a verdict, and defendant was not deprived of a verdict from his chosen jury. Rather, that jury deliberated and rendered a verdict, which was read and entered. Although nothing in the record suggests that all of the jurors did not agree with the verdict when it was read, that verdict was defective because the court failed to comply

with section 1149 and have the jury orally acknowledge it in open court before being discharged. This was plain reversible trial error.

In our view, the circumstances here are more akin to those in *Hernandez* than to the unjustified discharge of the jury before it has reached and delivered a verdict. Accordingly, we find applicable the general rule that reversal on appeal for trial error, other than for insufficiency of the evidence, does not bar retrial.

IV. DISPOSITION[4]

The judgment is reversed.

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[4] Given our disposition, we consider it unnecessary to address defendant's other claims of error.

RUSHING, P.J.

I CONCUR:

ELIA, J.

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PREMO, J., Concurring

I concur. I write separately only to express my disappointment at having to reverse the judgment over such an elementary issue. "[I]t is a matter of regret that occasion for it should ever have arisen." (*People v. Smalling* (1892) 94 Cal. 112, 117.) It is a simple enough matter to ask the question, "Is that your verdict." While it seems a small thing, the failure to ask the question deprives any equivocating juror of the opportunity to express his or her reservations. Nor is it appropriate to interpret the jury's silence as assent since there was no question to which the jury could have assented, silently or otherwise. "The record clearly shows that irregularities existed in the manner in which [the verdict was] returned into court; irregularities occasioned without necessity, and which could have been easily avoided. In cases of felony . . . the only correct procedure is to adhere strictly to the statute. Any other course is a dangerous innovation, which generally results in a miscarriage of justice." (*Id.* at p. 120.)

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Premo, J.