S192536

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTINA MARIE ANZALONE,

Defendant and Appellant.

Case No. S192536

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

APPELLANT'S OPENING BRIEF ON THE MERITS

SUPREME COURT
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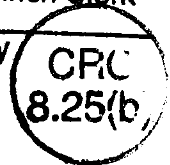

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED ii

SPECIFICATION OF ISSUES TO BE BRIEFED 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO OBTAIN THE JURY'S ORAL ASSENT TO THE VERDICT AS REQUIRED BY PENAL CODE SECTION 1149 AND THEREFORE NO VALID, TRUE VERDICT WAS EVER RETURNED 3

A. The Trial Court Failed to Comply with Section 1149 3

B. The Trial Court Did Not "Substantially Comply" with Section 1149 12

C. Conclusion 15

II. THE TRIAL COURT'S ERROR IN FAILING TO OBTAIN THE JURY'S ORAL ASSENT TO THE VERDICT IS REVERSIBLE PER SE AS STRUCTURAL ERROR 16

III. DOUBLE JEOPARDY BARS RETRIAL OF APPELLANT BECAUSE HER JURY WAS DISCHARGED BEFORE THEY ORALLY STATED THEY HAD AGREED UPON A VERDICT AND RENDERED IT IN OPEN COURT 23

IV. APPELLANT DID NOT FORFEIT HER APPELLATE CLAIMS BY FAILING TO OBJECT TO THE TRIAL COURT'S FAILURE TO COMPLY WITH PENAL CODE SECTION 1149 28

CONCLUSION 34

CERTIFICATE OF WORD COUNT 34

TABLE OF AUTHORITIES CITED

Cases **Page**

Case	Page
Arizona v. Fulminante (1991) 499 U.S. 279	19, 20
Chapman v. California (1967) 386 U.S. 18	18
Chipman v. Superior Court (1982) 131 Cal.App.3d 263	10
Curry v. Superior Court (1970) 2 Cal.3d 707	24-26, 29
El Monte v. Superior Court (1994) 29 Cal.App.4th 272	30
Green v. United States (1957) 355 U.S. 184	23
In re Chapman (1976) 64 Cal.App.3d 806	10
Jackson v. Superior Court (1937) 10 Cal.2d 350	24
People v. Bento (1998) 65 Cal.App.4th 179	9
People v. Collins (1976) 17 Cal.3d 687	5
People v. Galindo (2006) 142 Cal.App.4th 531	30
People v. Green (1995) 31 Cal.App.4th 1001	5, 10
People v. Heard (2003) 31 Cal.4th 946	7
People v. Hendricks (1987) 43 Cal.3d 584	5
People v. Hernandez (2003) 30 Cal.4th 1	27
People v. Lankford (1976) 55 Cal.App.3d 203	5
People v. Lessard (1962) 58 Cal.2d 447	33
People v. Lewis (1983) 147 Cal.App.3d 1135	33

TABLE OF AUTHORITIES CITED (cont.)

Cases (cont.)	Page
People v. Mestas (1967) 253 Cal.App.2d 780	5
People v. Radil (1977) 76 Cal.App.3d 702	33
People v. Rodriquez (1998) 17 Cal.4th 253	30
People v. Saunders (1993) 5 Cal.4th 580	25, 31, 32
People v. Superior Court (Marks) (1991) 1 Cal.4th 56	29, 30
People v. Superior Court (Thomas) (1967) 67 Cal.2d 929	10
People v. Thornton (1984) 155 Cal.App.3d 845	5, 8, 9, 15-17, 19, 28
People v. Toro (1989) 47 Cal.3d 966	33
People v. Traugott (2010) 184 Cal.App.4th 492	5
People v. Upshaw (1974) 13 Cal.3d 29	25
People v. Webster (1991) 54 Cal.3d 411	33
People v. Wright (1990) 52 Cal.3d 367	33
Rose v. Clark (1986) 478 U.S. 570	20
Sullivan v. Louisiana (1993) 508 U.S. 275	18, 19
United States v. Gonzalez-Lopez (2006) 548 U.S. 140	21

Statutes

Penal Code

§ 417	2
§ 422	2

TABLE OF AUTHORITIES CITED (cont.)

Statutes (cont.) **Page**

§ 1140	11
§ 1147	13
§ 1149	*passim*
§ 1157	29
§ 1164	11, 24
§ 1181	10
§ 1258	21
§ 1404	21
§ 12022	2

Constitutions

California Constitution

Art. I, § 15	23
Art. I, § 16	7
Art. VI, § 13	21

United States Constitution, Amend. V 23

California Rules of Court

rule 8.516 28

Jury Instructions

CALCRIM No. 3550 11
CALJIC No. 17.40 11

Others

Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2011) 25

CJER Bench Handbook: Jury Management (CJER 2011 rev.) Verdict and Discharge 6-8, 28

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHRISTINA MARIE ANZALONE, Defendants and Appellants.	S192536 Court of Appeal No. H035123 (Santa Clara County Super. Ct. No. CC035164)

SPECIFICATION OF ISSUES TO BE BRIEFED

The court's order granting review specified the following issues to be briefed and argued: (1) Did the trial court err by failing to obtain the jury's oral assent to the verdicts, and if so, was the error structural and thus reversible per se, or subject to harmless error analysis? (2) If the latter, was the error prejudicial? (3) If the former, does double jeopardy bar retrial?

Appellant's answer to the first half of the court's first question is that the trial court did err by failing to obtain the jury's oral assent to the verdicts when it did not ask the jury if they had agreed upon their verdict as required by Penal Code section 1149. Appellant's answer to the second part of the first question is that the trial court's error was structural and reversible per se. That answer obviates the need to respond to the court's second question. Appellant's answer to the court's third question is that double jeopardy does bar appellant's retrial.

STATEMENT OF THE CASE AND FACTS

Out of an incident on February 22, 2009 at the Hedding Inn motel in San Jose, appellant was convicted of exhibiting a knife in a threatening manner and of making a criminal threat with a true finding on a knife use allegation. (Pen. Code,[1] §§ 417, subd. (a)(1), 422, and 12022, subd. (b)(1); CT[2] 52-53, 140, 142.) Appellant went to the motel looking for a friend who worked there and had a hostile exchange with the clerk about going to the friend's room. (1 RT 41-42, 60, 66.) She left the lobby, returned after a few minutes, pushed over the clerk's computer monitor, and, while holding a closed knife in her hand, threatened to hurt the clerk and to come back and kill him. (1 RT 43-48, 61.)

Out of another incident later the same day, appellant was convicted of assault with a deadly weapon, a knife. (§ 245, subd. (a)(1); CT 52, 138.) The victim and his wife had gone to City Team Ministries to eat. When the wife went outside, appellant started talking to her. When the victim came out and told his wife to "come on," appellant accused him of beating his wife and chest butted him. He walked away, but appellant followed. When the victim turned around, she threw a bagel and an open knife at him, hitting him in the chest with the knife and leaving a red mark. (1 RT 71-72, 79, 83-84, 87-88, 96-98, 136, 139-142.)

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[1] Statutory citations are to the Penal Code unless otherwise stated.

[2] "CT" refers to the single volume of the clerk's transcript. The two volumes of the reporter's transcript will be cited as "1 RT" and "2 RT."

ARGUMENT

I.

THE TRIAL COURT ERRED BY FAILING TO OBTAIN THE JURY'S ORAL ASSENT TO THE VERDICT AS REQUIRED BY PENAL CODE SECTION 1149 AND THEREFORE NO VALID, TRUE VERDICT WAS EVER RETURNED

A. The Trial Court Failed to Comply with Section 1149

Analysis of the trial court's error in failing to obtain the jury's oral assent to the verdict must begin with the language of section 1149. The section states:

> MANNER OF TAKING VERDICT. 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.

Section 1149 is phrased in unambiguous, mandatory language: the jury "*must* be asked . . . whether they have agreed upon their verdict," and if the foreman's "answer" is yes, the court goes from there to obtain the jury's declaration of the verdict.

The record here reveals that the trial court never asked whether the jury had agreed on their verdict, which means the court failed to comply with the requirements of section 1149. The record shows the following:

> THE COURT: We're back on the record in the presence of the jury now as well. And ladies and gentlemen, I understand you've reached a verdict. Who is the foreperson? Mr. (Juror)?

JUROR: Yes, sir.

THE COURT: Hand the verdict forms to the deputy. I'll hand those to the clerk to read the verdict.

(2 RT 378.) The clerk then read the verdict with no interruptions to inquire whether the jury had, in fact, agreed on what was read from the verdict forms. (2 RT 378-379.)

When the clerk finished reading, neither the court nor the clerk asked if the jurors had agreed on what was read, and the court did not ask if either party wished to have the jurors polled. Instead, the court immediately told the jurors: "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." (2 RT 379.) The court then instructed the jurors on the 90-day waiting period before they could negotiate or agree to accept payment for information about the case, told them they could now speak to the attorneys if they chose, directed them to report any unreasonable contact by the attorneys or anyone else, explained they would be given notice of any effort to obtain their personal identifying information and could oppose release of the information, thanked them again, excused them from jury service for at least a year and dismissed them from the courtroom. (2 RT 379-381.)

This record leaves clear that there was no compliance with the mandate of section 1149. Neither the court nor the clerk ever asked the jury whether they had agreed on their verdict. The court merely declared it

understood the jury had reached a verdict without asking if they had agreed, and the clerk merely read the written verdict as directed by the court without ever asking if the jurors had agreed on what was read. The jury was then discharged without orally assenting to the verdict. As the Court of Appeal observed, after the trial court made the affirmative statement that it understood the jury had reached a verdict, the only questions it asked were who the foreperson was and whether it was a particular juror, which prompted the foreperson to answer, "Yes, sir." (Court of Appeal slip opn. ["Slip. opn."], p. 6; 2 RT 378.) These questions could not and did not substitute for what section 1149 requires courts to do: ask the jury whether they have agreed.

For many years, California case law has held that it is the jury's oral assent to the result of their deliberations that constitutes the true verdict: "'*the oral declaration by the jurors unanimously endorsing a given result is the true "return of the verdict" prior to the recording thereof.*'" (*People v. Thornton* (1984) 155 Cal.App.3d 845, 858 (orig. italics), quoting *People v. Mestas* (1967) 253 Cal.App.2d 780, 786; see also *People v. Hendricks* (1987) 43 Cal.3d 584, 597 [a "complete" verdict is "a verdict that has been received and read by the clerk, *acknowledged by the jury*, and recorded" (italics added)]; *People v. Traugott* (2010) 184 Cal.App.4th 492, 500; *People v. Green* (1995) 31 Cal.App.4th 1001, 1009 ["there is no verdict absent unanimity in the oral declaration"].) While the use of verdict forms is the established custom, "[t]he oral declaration of the jurors endorsing the result is the true return of the verdict" and "[t]here is no requirement that the verdict be in written form." (*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.) What *is* required to obtain a true verdict is set out in section 1149: the court or the clerk must elicit the jury's oral acknowledgment that they have agreed upon their verdict. If the jury orally indicates it has, then the jury must declare the verdict when the court asks them to. The common practice for accomplishing this is to have the clerk read the written verdict forms and then for the court to ask if what the clerk has read is the jury's verdict.

The duties that section 1149 imposes on trial courts are not arcane or esoteric. They describe what everyone expects to happen when the jury tells the bailiff and the bailiff tells the court, either directly or through the clerk, that the jury has a verdict. Chapter four of the CJER Bench Handbook on Jury Management has scripted the procedure for California trial courts to use in receiving verdicts in civil and criminal cases. Section 4.2 of the handbook addresses receiving the verdict and polling the jury in criminal cases. It directs trial courts as follows:

> After the jury has agreed on a verdict, it must be conducted into the courtroom by the bailiff. Pen C §1147. You must call the roll, which is a statement reflecting the presence of the defendant, both counsel, and all the jurors. See Pen C §§1147–1148. You then ask the foreperson or presiding juror whether the jury has arrived at a verdict. Pen C §1149. If the foreperson says "yes," you ask the foreperson to hand the verdict to the bailiff, who in turn hands it to you. See Pen C §1149. You should examine the verdict and ascertain whether it is signed and in proper form. See Pen C §§ 1151–1154. If the verdict is in proper form, you give the verdict to the clerk, who then reads it. If the verdict is not in proper form, you give it back to the foreperson for correction. See Pen C §1156.

After a "TIP" box that warns courts to make sure the verdict addresses degree findings in cases involving a crime divided into degrees, the jury management handbook continues:

> You then ask both counsel, or a defendant in pro per, if they wish to have the jury polled. If so, you may poll the jury or ask the clerk to poll the jury. Pen C §1163. If the verdict is unanimous, you direct the clerk to record the verdict. Pen C§§689, 1164. If not, you send the jurors back to the jury room for further deliberation. Pen C §1163. If during polling any juror answers that the verdict is not his or her verdict, you must order further deliberations.

(CJER Bench Handbook: Jury Management (CJER 2011 rev.) Verdict and Discharge, § 4.2, p. 109; see *People v. Heard* (2003) 31 Cal.4th 946, 966, fn. 9 [reminding trial courts that using CJER publications can help them avoid reversible error].)

The CJER script for taking a criminal verdict does not perfectly comply with section 1149. It directs trial courts to "ask the foreperson or presiding juror whether the jury has *arrived* at a verdict" when the actual question section 1149 requires courts to ask is whether the jury "have *agreed* upon their verdict." The use of the word "agreed" in section 1149 is important because it focuses the question on whether the jury has acted in accordance with the criminal defendant's right to a unanimous verdict under Article I, section 16 of the California Constitution. To help guarantee trial court compliance with section 1149, CJER's script for receiving criminal verdicts could also benefit by incorporating part of the script for taking civil verdicts. The civil case script directs courts that "[a]fter the verdict is read, the judge (or clerk) should ask the jurors if this is their verdict" and, if

three-fourths agree that it is and no one requests polling, should seek counsel's stipulation to have the verdict recorded as read, enter the verdict and discharge the jury. (CJER Bench Handbook: Jury Management (CJER 2011 rev.) Verdict and Discharge, § 4.1, p. 107.) Given section 1149's mandate that the court obtain the jury's oral assent to the verdict, it would make sense in criminal cases to ask the jury after the verdict is read if the reading stated their verdict. That did not happen at appellant's trial.

Putting aside any imperfections in the CJER script for receiving criminal verdicts, the script makes clear it is the trial court's responsibility to comply with section 1149, not the responsibility of the parties or the jurors. *People v. Thornton, supra,* 155 Cal.App.3d 845 ("*Thornton*") made this point explicit. There, the trial court failed to notice that the three verdict forms the jury handed in included a signed guilty verdict on a lesser included offense and not just the signed not-guilty verdict on the charged greater offense. The court asked the foreperson if the jury had reached a verdict, received a "yes" as the oral response, had the clerk read the not-guilty verdict, asked the jurors collectively if that was their verdict, "so say you one, so say you all," received their collective answer in the affirmative and then discharged them after confirming there was no request to poll the jury. (*Id.*, at p. 849.) None of the jurors said anything to alert the court they had also agreed on a guilty verdict, and neither the court nor the parties asked any questions about the two other verdict forms. *Thornton* stated:

> Before reviewing the cases that do offer some guidance, we must note that we are not dealing here with juror error. Jurors are not technicians in the law. Here, they performed all that was required of them by deliberating,

> submitting to the court the three verdict forms they had been given, and answering all inquiries directed to them. The proper implementation of the verdict reading and recording pursuant to the requirements of Penal Code section 1164 and 1149 is the exclusive province of the trial court, not the jury. In what sometimes appears as a sterile atmosphere in the courtroom, it would be too much to require the jury to know if and when they should speak up. For all appellant's jury knew, the reading of but one verdict form was all that was necessary.

(*People v. Thornton, supra,* 155 Cal.App.3d at p. 852.)

The duties that section 1149 imposes on trial courts are not mere formalities. This is shown first by the statute's unambiguously mandatory language. The statutory command that the jury "*must* be asked by the Court, or the clerk, whether they have agreed upon their verdict" leaves no room to argue that this is a meaningless optional step. The Legislature clearly intended courts to follow the procedure in every case.

The importance of this procedure to the protection and enforcement of the California defendant's constitutional right to a unanimous verdict also shows why the requirements of section 1149 cannot be dismissed as dispensable. As Justice Premo observed in his concurring opinion, a trial court's failure to ask the section 1149 question "deprives any equivocating juror of the opportunity to express his or her reservations." (Slip. opn., conc. opn.) The question presents the only occasion for jurors to express reservations if the jury is not polled. (See *People v. Bento* (1998) 65 Cal.App.4th 179.) Section 1149, in other words, is the only mandated mechanism by which a trial court elicits the foreperson's oral assertion that

the jury has unanimously agreed so as to transform the written verdict signed by only the foreperson into a valid, true verdict, and it is the sole mandated mechanism by which all the jurors will hear the foreperson's assertion they have reached agreement, an assertion that gives notice to any juror who disagrees that the time is at hand to express that disagreement.

Case law demonstrates the importance of giving equivocating jurors an opportunity to react to the foreperson's claim that the jury has agreed. A verdict is not complete unless jurors have been given the opportunity to dissent either by the court's compliance with section 1149 or by polling done under section 1163 at the request of either party. (*People v. Green, supra,* 31 Cal.App.4th at p. 1010 ["verdict is not 'complete' if any juror dissents from the verdict as rendered"].) And dissent does occur. (*Id.*, at p. 1008 [in response to being asked during polling if verdicts read were her verdicts, juror said she really did not know]; *Chipman v. Superior Court* (1982) 131 Cal.App.3d 263, 265 [juror "wasn't sure in the jury room," but voted yes, then said "no" to court during polling]; *In re Chapman* (1976) 64 Cal.App.3d 806, 809-812 [jury foreman said they had reached a verdict, but revealed that all 12 had not agreed on the not-guilty verdict]; *People v. Superior Court (Thomas)* (1967) 67 Cal.2d 929, 930-931 [juror balked when asked if verdict read was his verdict, then said that he "went with the majority," signaling he did not give his individual decision].)

A trial court's compliance with the mandate of section 1149 also is important because it creates an opportunity to uncover whether a verdict was reached by actual agreement among the jurors and not by an improper, alternative route. (See Pen. Code, § 1181, subd. 4 [a court may grant a new

trial "[w]hen the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors"]; CALCRIM No. 3550 [admonishing jurors not to decide case by the flip of a coin]; CALJIC No. 17.40 [admonishing jurors not to decide by the flip of a coin or any other chance determination].) Compliance with section 1149 gives jurors an opportunity to dissent from the foreperson's oral assertion that they have agreed on a verdict, and asking the question may prompt disclosure that the case was decided by using a chance determination to resolve differences rather that by actual agreement through legitimate deliberations.

A court's compliance with section 1149 through asking the question it mandates also guarantees that trial courts will not violate the prohibition against discharging the jury after the cause is submitted to them before the jurors have agreed on their verdict. This prohibition is found in sections 1140 and 1164, subdivision (b). Section 1140 states: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." Asking the jurors if they have *agreed* in compliance with section 1149 and obtaining an affirmative response assures the court that a subsequent discharge of the jury will be lawful.

In similar terms to section 1140, subdivision (b) of section 1164 states: "No jury shall be discharged until the court has verified on the record that the jury has either reached a verdict or has formally declared its

inability to reach a verdict on all issues before it, including, but not limited to, the degree of the crime or crimes charged, and the truth of any alleged prior conviction whether in the same proceeding or in a bifurcated proceeding." Again, asking the jurors if they have agreed in compliance with section 1149 and obtaining an affirmative response assures the court that the subsequent discharge of the jury will be lawful.

B. The Trial Court Did Not "Substantially Comply" with Section 1149

Respondent's opening brief on the merits ("ROBOM") contends there was no error because the trial court "substantially complied" with section 1149. (ROBOM, pp. 11-15.) But the record shows that neither the court nor the clerk asked the assembled jury the simple question that section 1149 mandates: "whether they have agreed upon their verdict." The result was that no one orally assented to the verdict: not the foreman, not the jury collectively, and not any other individual juror. Respondent's effort to read the record to show substantial compliance fails because *no* compliance with section 1149 cannot constitute substantial compliance with the section.

In arguing substantial compliance, respondent cites the Court of Appeal's analysis that the trial court "did not state that it had been informed that the jury had reached a verdict," and that, even though that was "a reasonable inference," all the trial court said was that it understood a verdict had been reached without explaining how it had come to that understanding. (Slip. opn., p. 6.) Respondent argues that the record actually does show how the court came to that understanding because, before the jurors were brought into the courtroom, the court said, "Jury has indicated they have a

verdict." (ROBOM, p. 12.) The defect in respondent's analysis is that what the court said outside the jury's presence did not establish that the jury itself had somehow *orally* communicated with the court that it had agreed upon a verdict. Unless the court engaged in improper off-the-record communications with the jury in the absence of counsel and the defendant, its statement that the jury had indicated it had a verdict must have come from the bailiff sworn to take custody of the jury. That, in fact, is exactly what is shown by the minute order for the proceedings of October 8, 2009. (1 CT 143 ["The jury advises the bailiff that they have a verdict"].) The key point here is that no communication between the jury and the bailiff, or between the bailiff and the clerk, or between the bailiff and the court, that does not occur in open court in the presence of counsel, the defendant and all 12 jurors, can substitute for what section 1149 requires: that, after the entire jury is conducted into open court in compliance with section 1147, the court or the clerk must ask the jury on the record "whether they have *agreed* upon their verdict." Unless that question is asked and the foreperson affirms on the record that the jury has agreed, there is no compliance with section 1149, there is no oral assent to the verdict, and there is no valid, true verdict.

In claiming there was substantial compliance with section 1149, respondent also argues the record does not support the Court of Appeal's analysis that "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." (ROBOM, pp. 12-14; Slip opn., p. 6.) It is important to emphasize here that the Court of Appeal said this in relation to whether the court complied with the statutory mandate of section 1149 that the jury

"must be asked . . . whether they have *agreed* upon their verdict." The opinion went on to correctly observe that the trial court's assertion about the verdict – "ladies and gentlemen, I understand you've reached a verdict" – was "an affirmative statement" rather than a question, and that the only questions the court asked were who the foreperson was and whether it was a particular juror. The Court of Appeal then logically interpreted the foreperson's "yes" uttered in response to these questions as an affirmation that he was the foreperson since that was all he was asked. (Slip opn., p. 6.) It was based on this commonsense reading of the record that the Court of Appeal rejected as unreasonable respondent's contention that the foreman's "yes" answer constituted oral acknowledgment in compliance with section 1149 that the jury had *agreed* upon their verdict, a question the foreperson was never asked.

Against the Court of Appeal's logic, respondent argues that the foreperson's "yes" response to the question whether he was the foreperson "was oral assent of the foreperson that the jury *reached* a verdict as the trial court stated," and that what followed – the foreman's delivery of the verdict forms to the bailiff and the reading of the forms by the clerk – constituted substantial compliance with the requirements of section 1149 because it "reveals an acknowledgment, in substance, that the jury had *reached* a verdict." (ROBOM, pp. 12-14; italics added.) What this argument ignores is that the focus of section 1149's mandatory question is on whether the jury has *agreed* on a verdict. The phrasing of the question is designed to protect the California criminal defendant's constitutional right to the jury's unanimous *agreement* on the resolution of the charges. Section 1149's point in seeking the jury's oral assent that they have *agreed* on a verdict is

to establish there is a true verdict by testing whether the wrritten assertion of agreement in the verdict forms is bona fide by giving any doubting or wavering juror, including the foreperson, an opportunity to express his or her doubts or reservations in response to hearing the court ask whether they have agreed on their verdict.

Respondent's substantial compliance argument approaches section 1149 as if all it requires is for the jury foreperson to hand in verdict forms. To read the statute that way would be contrary to the clear statutory language and would disregard the statute's purpose. Respondent's substantial compliance argument should therefore be rejected.

C. Conclusion

The trial court erred by failing to obtain the jury's oral assent to the verdict as required by section 1149. Respondent's "substantial compliance" argument has no merit because the record shows there was no compliance at all. The consequence of the court's error was that the jury was discharged without rendering a true verdict, i.e. a verdict backed by an oral affirmation stating the jury had agreed. As the Court of Appeal held, what the trial court accepted as the verdict based on the clerk's mere reading of the verdict forms constituted an "incomplete, defective, and invalid" verdict, [a]nd, without a valid verdict, there can be no valid judgment." (Slip opn., p. 7; see *People v. Thornton, supra,* 155 Cal.App.3d at p. 858 [merely turning in the verdict form of guilty on the lesser offense could not support a judgment of guilt without the jury's oral assent that they agreed on it].)

II.

THE TRIAL COURT'S ERROR IN FAILING TO OBTAIN THE JURY'S ORAL ASSENT TO THE VERDICT IS REVERSIBLE PER SE AS STRUCTURAL ERROR

After concluding that what the trial court accepted as the verdict was invalid and resulted in an invalid judgment, the Court of Appeal held that the error in failing to comply with section 1149 was reversible per se. It stated:

> 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.

(Slip opn., p. 7.)

In support of this holding, the Court of Appeal relied on the prejudice analysis in *People v. Thornton, supra,* 155 Cal.App.3d 845 which held that the trial court's error in failing to obtain the jury's oral assent to the verdict form on the lesser included offense was reversible per se:

> In numerous other cases, the processes of requiring the jury to orally acknowledge their verdict and express individual assents to it have revealed that the entire jury was mistaken in signing a particular verdict form, or that one or more jurors acceded to a verdict in the jury room but was

> unwilling to stand by it in open court. [Citations.] Thus, these processes are far from empty formalities of the type that, under [*People* v.] *Gilbert* [(1880) 57 Cal. 96] and [*People* v.] *Smith* [(1881) 59 Cal. 601], might be deemed inconsequential to the defendant's constitutional rights. It is these procedures that allow the defendant to "test" whether the verdict form that was signed in the privacy of the jury room represents the "true verdict," i.e., the verdict that each and every juror is willing to hold to under the eyes of the world, or whether it is a product of mistake or unduly precipitous judgment. Moreover, the acknowledgment and polling procedures represent the defendant's only opportunity to test the verdict as represented on the verdict form, since after the jury has been discharged, the verdict, with few exceptions not applicable here, cannot be impeached. [Citations.]
>
> Under these circumstances, failure to allow a defendant to test a verdict in open court must be deemed prejudicial per se. In the instant case, in order to conclude that defendant was not prejudiced, we would have to rely on juror statements (those made upon reconvening) that are (1) irrelevant to this appeal in that we must view the case as it existed at the time of the initial discharge [citations], (2) noncognizable in any event as a belated impeachment of the completed not guilty verdict [citation], and (3) made after the jurors were subject to the type of influences that might naturally cause them to stand by a signature on a verdict form that one or more of them otherwise might have repudiated.
>
> In effect, we 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 forces encountered after discharge. We, therefore, have no choice but to find the errors prejudicial per se.

(*People v. Thornton, supra,* 155 Cal.App.3d at pp. 859-860.)

The prejudice analysis of the Court of Appeal here and in *Thornton* is supported by the United States Supreme Court's conclusion in *Sullivan v. Louisiana* (1993) 508 U.S. 275 ("*Sullivan*") that it was structural error and reversible per se to deliver an instruction that defined in constitutionally deficient terms the beyond a reasonable doubt standard of proof. The Supreme Court first noted that the interrelationship of "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict" means that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." (*Id.*, at p. 278.) Next, in analyzing whether the instructional error was subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, the court observed that the question *Chapman* instructs reviewing courts to consider "is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand," i.e. "the guilty verdict actually rendered." (*Sullivan, supra*, 386 U.S. at p. 279.) Then the court went on to reject harmless-error review on the following reasoning:

> Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate.

(*Id.*, at p. 280.)

Under California law, a written verdict form that is not orally acknowledged by the jury as what has been agreed upon as section 1149 requires is an invalid verdict. As *Thornton* teaches, a verdict form signed by the foreperson does not become a valid, true verdict just because the jury handed it in. The jury must orally acknowledge they have agreed upon what the verdict form says. It is that oral acknowledgment that provides the guarantee that the verdict represents the unanimous agreement of the jury required under the California Constitution and that transforms it into a true verdict. The absence of a true verdict due to the trial court's failure to comply with section 1149 erects the same barrier to harmless-error review as did the absence of any jury verdict of guilty-beyond-a-reasonable-doubt in *Sullivan*. When there is no true verdict under California law, it is meaningless to ask whether the same verdict would have been rendered absent the error because there is no valid verdict and no valid judgment "upon which harmless-error scrutiny can operate." (*Sullivan, supra,* 508 U.S. at p. 280.)

The Court of Appeal's conclusion that the trial court's failure to comply with section 1149 was structural error and per se reversible is also supported by the distinction the United States Supreme Court has drawn between structural error and "trial errors" that do not automatically require reversal of a conviction. *Arizona v. Fulminante* (1991) 499 U.S. 279 ("*Fulminante*") held that the erroneous admission of a coerced confession in violation of the Fifth and Fourteenth Amendments can be harmless error. *Fulminante* noted that "the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless," then cited to a long list of cases supporting this point. (*Id.*, at

pp. 306-307.) The court then summarized this case law as follows: "The common thread connecting these cases is that each involved 'trial error' – error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.*, at pp. 307-308.) *Fulminante* then went on to contrast such "trial error" with the types of constitutional deprivations that are not subject to harmless-error analysis, each of which involves "a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself" and a basic protection without which "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" (*Id.*, at p. 310, citing *Rose v. Clark* (1986) 478 U.S. 570, 577-578.)

Here, the trial court's error in failing to comply with the mandate of section 1149 was not merely "trial error" because it did not occur during the presentation of the case to the jury and cannot be quantitatively assessed in the context of the trial evidence. The error occurred in the process by which California law requires trial courts to determine whether the jury has *agreed* upon a verdict in accordance with the California Constitution's mandate that verdicts in criminal cases must be unanimous. Expressed in the terms used in *Fulminante*, section 1149 protects a key part of the framework within which a California criminal trial proceeds and without which the trial cannot reliably serve its function as a vehicle for the determination of guilt or innocence by unanimous agreement of the jury. Under the analysis used in *Fulminante*, the trial court's error in failing to

comply with section 1149 was not merely trial error. It was structural error and therefore reversible per se.

Finally, the Courts of Appeal here and in *Thornton* were on solid legal footing in finding structural error based on the impossibility of assessing the effect of the error. In *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, the Supreme Court held that the denial of the Sixth Amendment right to counsel of choice is structural error and prejudicial per se because of the "difficulty of assessing the effect of the error" in that the consequences of the deprivation were "'unquantifiable and indeterminate.'" (*Id.*, at p. 149, fn. 4, and p. 150.) The court found it "impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings," and concluded that "[h]armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." (*Id.*, at p. 150.) A "speculative inquiry into what might have occurred in an alternate universe" is exactly what the Court of Appeal properly refused to conduct in holding that the trial court's failure to comply with section 1149 was structural error and reversible per se.

Respondent relies on Article VI, section 13, of the California Constitution and sections 1258 and 1404 as barriers to the reversal of a conviction for errors that do not result in a miscarriage of justice and do not affect the defendant's substantial rights. (ROBOM, pp. 17-18.) But the trial court's failure to comply with the mandate of section 1149 denied appellant the guarantee the section afforded her that the jury's verdict would reflect unanimous jury agreement as the California Constitution

requires. Imposition of judgment in the absence of that guarantee, and therefore in the absence of a valid, true verdict, constitutes a miscarriage of justice and an error that affected appellant's substantial rights. This is especially true given the impossibility of knowing what would have transpired if the court had complied with section 1149's demands.

III.

DOUBLE JEOPARDY BARS RETRIAL OF APPELLANT BECAUSE HER JURY WAS DISCHARGED BEFORE THEY ORALLY STATED THEY HAD AGREED UPON A VERDICT AND RENDERED IT IN OPEN COURT

The appellate record discloses that the trial court discharged the jury before they reached a valid, true verdict. By discharging the jury without complying with section 1149's mandate, the court did what section 1140 forbids: it discharged the jury after the cause was submitted to them but before they "agreed upon their verdict and rendered it in open court." The trial court's failure to comply with section 1149 means that written verdict forms were all the jury rendered, forms that no member of the jury ever orally acknowledged as accurately stating what they had agreed upon.

The third question this court posed for briefing and argument is whether double jeopardy bars appellant's retrial. The Court of Appeal rejected appellant's argument that retrial was barred. (Slip opn., pp. 8-10.) In doing so, the court correctly summarized the fundamental principles underlying the constitutional prohibition against placing a defendant twice in jeopardy. But in applying those principles, the court reached the wrong conclusion.

The Court of Appeal first observed that the Fifth Amendment of the United States Constitution and Article I, section 15 of the California Constitution both "prohibit placing a person in jeopardy more than once for the same offense." (Slip opn., p. 8.) It then explained the theory underlying the double jeopardy protection with a quote from *Green v. United States* (1957)

355 U.S. 184, 187-188: "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." (Slip opn., p. 8.) The Court of Appeal also explained how appellant was placed once in jeopardy by being "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." (Slip opn., p. 8, citing *Jackson v. Superior Court* (1937) 10 Cal.2d 350, 352, 355; see also *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712 ("*Curry*").)

In reliance on *Curry*, the Court of Appeal then stated, "[o]nce jeopardy has attached, any unjustified discharge of the jury before it reaches a verdict gives rise to the defense of double jeopardy," and defined an unjustified discharge as one done without the defendant's consent and not for "recognized reasons of strict necessity." (Slip opn., p. 8.) As *Curry* explained this principle, "a discharge of [a duly impaneled and sworn] 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, supra,* 2 Cal.3d at p. 712.) *Curry* cited section 1140 in support of this principle in recognition that the section enforces double jeopardy protections by prohibiting trial courts from discharging the jury "until they have agreed upon their verdict and rendered it in open court." (See also § 1164, subd. (b).)

The Court of Appeal correctly concluded that the trial court's failure to comply with section 1149 means the jury never rendered a valid, true verdict, with the result that there was no valid judgment against appellant. Where the Court of Appeal went wrong was in failing to recognize that this meant the jury's discharge without reaching a valid verdict was unjustified because it was not done with appellant's consent and it was not done for reasons of legal necessity. It was done because the trial court failed to perform its mandated duty under section 1149.

That error is fully comparable to a court granting a mistrial without the defendant's consent and without legal necessity, the situation that *Curry* addressed. As to the defendants' lack of consent, *Curry* stated:

> At no time did petitioners, in person or through counsel, expressly consent to the granting of the mistrial or the discharge of the jury. The People maintain that petitioners impliedly gave such consent, but the contention does not withstand analysis. When a trial court proposes to discharge a jury without legal necessity therefor, the defendant is under no duty to object in order to claim the protection of the constitutional guarantee, and his mere silence in the face of an ensuing discharge cannot be deemed a waiver.

(*Curry, supra,* 2 Cal.3d at p. 713; see also *People v. Saunders* (1993) 5 Cal.4th 580, 592; *People v. Upshaw* (1974) 13 Cal.3d 29, 34; Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2011), § 26.27, p. 761.)

As to the absence of legal necessity, *Curry* stated:

> Secondly, there was no 'legal necessity' – as that concept has been limited in our decisions – for the court to

> declare a mistrial and discharge the jury without petitioners' consent. In California, legal necessity for a mistrial typically arises from an inability of the jury to agree [citations] or from physical causes beyond the control of the court [citations], such as the death, illness, or absence of judge or juror [citations] or of the defendant [citations]. A mere error of law or procedure, however, does not constitute legal necessity.

(*Curry, supra,* 2 Cal. 3d at pp. 713-714.)

Here, in addressing the trial court's failure to comply with section 1149, the Court of Appeal correctly concluded that "the lack of oral acknowledgment by the jurors individually or by the foreperson rendered the jury's verdict incomplete, defective, and invalid," and with no valid verdict, "there can be no valid judgment." (Slip opn., p. 7.) Then, in addressing appellant's argument that retrial was barred on double jeopardy grounds, the court reversed field to incorrectly assert that the trial court "did not discharge the jury before it reached a verdict, and defendant was not deprived of a verdict from his chosen jury" because "that jury deliberated and rendered a verdict, which was read and entered." (Slip opn., p. 9.) But 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. The jury was therefore discharged without appellant's consent and without legal necessity due to an error of law and

procedure such that double jeopardy bars retrial.

The Court of Appeal relied on *People v. Hernandez* (2003) 30 Cal.4th 1 ("*Hernandez*") in reaching its conclusion that double jeopardy did not bar a retrial for appellant. But *Hernandez* 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. All the trial court did wrong in *Hernandez* was to excuse a *single* juror without good cause and to replace that juror with an alternate who had been chosen as part of the jury during the regular voir dire process. This court rejected the defendant's contention that the improper dismissal of a single juror deprived him of his "chosen jury" because "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 pp. 8-9.) *Hernandez* provides no guidance in the circumstances in appellant's case where her chosen jury *was* discharged before it rendered a valid, true verdict.

The trial court's error in failing to comply with section 1149 led to the discharge of the jury without a true verdict. The discharge was without appellant's consent and without legal necessity, which means double jeopardy bars appellant's retrial.

IV.

APPELLANT DID NOT FORFEIT HER APPELLATE CLAIMS BY FAILING TO OBJECT TO THE TRIAL COURT'S FAILURE TO COMPLY WITH PENAL CODE SECTION 1149

Respondent's opening brief on the merits contends that appellant forfeited her right to raise her appellate claims because she did not request that the court comply with its duty under section 1149 to ask the jury if they had agreed on a verdict, and because she did not request polling and did not object to recording the verdicts or discharging the jury. (ROBOM, pp. 16-17.) This court's order granting review does not specify forfeiture as an issue to be briefed and argued. While the issue was raised in respondent's petition for review, it was not previously raised in the Court of Appeal, which explains why the Court of Appeal opinion did not discuss it. Thus, as a preliminary matter, the court must decide whether to address respondent's forfeiture argument or adhere to its general rule that it does not address issues raised for the first time in the petition for review. In addition, since the court did not specify forfeiture as an issue to be briefed and argued, it must also decide whether it is an issue fairly included within the issues the court did specify. (Calif. Rules of Ct., rule 8.516, subd. (a)(1).)

Assuming arguendo that respondent's forfeiture claim is properly before the court, the claim should be rejected. First, as both *Thornton* and CJER have recognized, properly receiving the verdict under section 1149 is the exclusive province of the trial court. (*People v. Thornton, supra,* 155 Cal.App.3d at p. 852; CJER Bench Handbook: Jury Management (CJER 2011 rev.) Verdict and Discharge, § 4.2, p. 109.) Section 1149's statutory

language does not permit any other reading; it mandates that "[w]hen the jury appear they must be asked by the Court, or Clerk, whether they have agreed upon their verdict." The statute does not require any request from defense counsel to trigger the court's sua sponte duty to ask this question.

The second reason there is no forfeiture here is that the trial court's failure to comply with section 1149 was to appellant's advantage because it created the prospect that the court's error would result in a double jeopardy bar to retrial based on the argument raised in this appeal. Under these circumstances, appellant had no obligation to bring to the trial court's attention its error under section 1149 so that the proceedings would result in a true verdict of conviction, a result manifestly against her interests. Appellant's situation is identical to that of the defendant in *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56 ("*Marks*") where the jury's verdict convicting him of murder did not specify the degree of the murder, with the result that it had to be deemed murder in the second degree under section 1157. This court determined that the defendant had no obligation to bring the omission of the degree finding to the trial court's attention, just as a defendant has no obligation to object "[w]hen a trial court proposes to discharge a jury without legal necessity" in order to preserve a double jeopardy claim for appeal. (*Id.*, at p. 77, fn. 20, citing *Curry, supra,* 2 Cal.3d at p. 713.)

Marks further held that the prosecution had to bear at least partial responsibility (along with the trial court) for the absence of any finding of degree in the jury's verdict on the murder charge, and therefore there was no unfairness to the People in holding that double jeopardy barred the defendant's retrial on first degree murder. *Marks* stated:

> The consequences of an irregular verdict are well settled, and nothing precludes the prosecution from calling the deficiency to the court's attention before it discharges the panel. [Fn. 21omitted; citations.] Since any failure to do so results from neglect rather than lack of notice and opportunity to be heard, the People's right to due process is accordingly not offended."

(*Marks, supra,* 1 Cal.4th at p. 77.)

Respondent's forfeiture contention is also rebutted by the rule that a defendant in a criminal case is not obliged to object to the prosecution's failure to present sufficient evidence to support the verdict in order to raise an insufficiency of the evidence claim on appeal. (*People v. Rodriquez* (1998) 17 Cal.4th 253, 262; *People v. Galindo* (2006) 142 Cal.App.4th 531, 538.) Even in a civil trial context, the defendant has no obligation to object to the plaintiff's failure of proof on a matter at issue. In *El Monte v. Superior Court* (1994) 29 Cal.App.4th 272 ("*El Monte*"), the plaintiffs were entitled to punitive damages but allowed the jury to be discharged without presenting evidence on that issue. The Court of Appeal held the plaintiffs forfeited the right to present such evidence and were not entitled to have a second jury impaneled to allow them to do it. In holding that defense counsel was blameless in the discharge of the jury, *El Monte* stated:

> In our adversary system, defense counsel had no obligation to help try plaintiffs' case by pointing out evidence which had been omitted. Nor do we believe that defense counsel was required to advise the court of this deficiency in plaintiffs' case. In fact, defense counsel would have violated his obligation to his clients had he done so.

(*Id.*, at p. 277.)

Here, defense counsel would have violated his obligation to his client if he had helped the prosecution obtain true verdicts against appellant by objecting to the trial court's failure to comply with section 1149. Compliance with section 1149 was within the trial court's exclusive province, but if anyone should bear responsibility for failing to object to the error and to the trial court's discharge of the jury before it rendered a true verdict, it is the People. An objection by the prosecutor was the route by which the People could have protected their interests and turned the potential results reflected in the verdict forms into a true verdict that would have been insulated against the appellate claims raised here.

The cases respondent cites in support of finding forfeiture address claims of error entirely distinguishable from appellant's claim that the trial court failed to comply with the duties section 1149 imposed on it. In the case on which respondent primarily relies, *People v. Saunders, supra,* 5 Cal.4th 580 ("*Saunders*"), the defendant sought and was granted a bifurcated trial on his prior convictions, but during the trial defense counsel told the court off the record that her client would waive his right to a jury trial on the priors. The court discharged the jury after taking their verdict without any objection from the defense. The next day, defense counsel confirmed that her client would waive his right to a jury trial on the priors, and he did so. The prosecution presented certified records to prove the priors, and the matter was put over to the next day. When the case resumed, defense counsel asserted she was unaware the jury had been discharged (a colleague had stood in for her the day the verdict was returned) and would not have had her client waive his right to a jury trial if she had known. The trial court allowed the defendant to withdraw his jury waiver but denied the

defense motion to dismiss the priors on double jeopardy grounds based on the theory that the jury was discharged before it had rendered a verdict on the priors. Instead, a new jury was selected and the prior conviction allegations were tried to that jury and found true. (*Id.*, at pp. 586-587.)

This court held that "the trial court violated sections 1025 and 1164 by discharging the jury before the jury had determined the truth of the alleged prior convictions," but that defense counsel's failure to object to the jury's discharge precluded appellate relief based on the statutory error. (*Saunders, supra,* 5 Cal.4th at p. 589.) The court stated:

> Thus, although sections 1025 and 1164 prohibit a trial court from discharging a jury until it has determined the truth of any alleged prior convictions, a defendant may not complain on appeal of a departure from this procedural requirement unless the error has been brought to the attention of the trial court by means of a timely and specific objection. We do not believe that the Legislature, in enacting sections 1025 and 1164, intended to create a procedural trap that would enable defense counsel to ambush the trial judge and deprive the People of their statutory right to prove one or more alleged prior convictions for the purpose of enhancing the punishment of the repeat offender. Nor should the law place a defense attorney in the untenable position of having to choose between honoring counsel's commitment to the court (that jury trial on the prior conviction allegation would be waived) and counsel's duty to his or her client (to offer all available defenses to the charges and allegations contained in the accusatory pleading).

(*Id.*, at pp. 590-591.)

Saunders does not support respondent's argument that appellant

forfeited her claims that the trial court erred in failing to comply with the mandate of section 1149 and that double jeopardy bars retrial. Defense counsel did not "ambush" the trial judge into failing to comply with section 1149, and the court's error is in no way attributable to the defense. Nothing defense counsel did deprived the People of their right to prove their case or denied them their opportunity to protect their interest in obtaining a true verdict by bringing to the trial court's attention its failure to comply with section 1149. The trial court's error was all its own; it was not in any way provoked or manipulated into making the error by defense counsel.

The other cases respondent relies on to argue forfeiture involved appellate claims readily distinguishable from appellant's claims. This case does not involve any appellate claim that the polling of the jury was incomplete. (See *People v. Lessard* (1962) 58 Cal.2d 447, 452; *People v. Wright* (1990) 52 Cal.3d 367, 415.) Nor does it involve a claim that a verdict form was defective in some respect. (See *People v. Webster* (1991) 54 Cal.3d 411, 446; *People v. Toro* (1989) 47 Cal.3d 966, 976-977; *People v. Lewis* (1983) 147 Cal.App.3d 1135, 1142; *People v. Radil* (1977) 76 Cal.App.3d 702, 710.) The claims here are that section 1149 imposed a duty on the trial court to ask the jury if they had agreed on a verdict, that the court's failure to comply with that duty is prejudicial per se, that the court's error led to the discharge of the jury before they had rendered a true verdict, and that double jeopardy bars retrial because the jury's discharge was done without appellant's consent and without legal necessity.

CONCLUSION

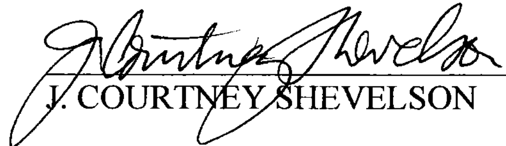
For all the reasons stated, appellant respectfully requests this court to affirm the Court of Appeal's decision that the trial court's failure to obtain the jury's oral assent to the verdict was structural error that is reversible per se, and to hold that double jeopardy bars appellant's retrial and reverse the Court of Appeal's contrary holding on that issue.

Respectfully submitted,

J. COURTNEY SHEVELSON
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies pursuant to rule 8.520(c)(1) of the California Rules of Court that this opening brief on the merits contains approximately 9,441 words based on the word count of the computer program used to prepare it.



J. COURTNEY SHEVELSON

DECLARATION OF SERVICE BY MAIL

I, J. Courtney Shevelson, declare:

I am over eighteen (18) years of age and not a party to the within cause; my business address is PMB 187, 316 Mid Valley Center, Carmel, California 93923; I served a copy of the

APPELLANT'S OPENING BRIEF ON THE MERITS

on each of the following, by placing same in an envelope or envelopes addressed as follows:

Attorney General
455 Golden Gate Avenue, Suite 11000
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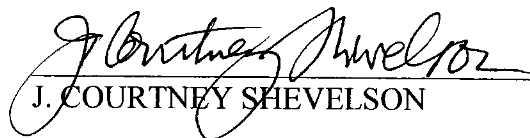
Each said envelope was then, on November 18, 2011, sealed and deposited in the United States mail at Monterey, California, the county in which I am employed, with postage fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed on November 18, 2011, at Monterey, California.



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