In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHRISTINA MARIE ANZALONE,

Defendant and Appellant.

COPY

Case No. S192536

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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Arguments I, II and IV of appellant's opening brief on the merits (ABOM) address the issues raised in respondent's opening brief on the merits (RBOM). This reply addresses those arguments.[1]

ARGUMENT

I. THE PEOPLE'S CLAIM OF APPELLATE FORFEITURE IS PROPERLY BEFORE THIS COURT AND HAS MERIT

In appellant's Argument IV, she acknowledges her failure to object at trial to the court's procedure in taking and entering the verdicts. She denies, however, the forfeiture of her appellate claim that the trial court failed to obtain the jury's oral assent to the verdicts as read in open court. (See Pen. Code, § 1149.)

None of her claims on these points can be sustained. One of appellant's main assertions is that respondent has forfeited its appellate forfeiture argument: "While the [forfeiture] 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." (ABOM at p. 28.) It is true the opinion did not discuss the forfeiture issue. It is untrue that respondent did not raise the issue in the Court of Appeal.

First, respondent's brief in the Court of Appeal specifically argued, "There was no request for further inquiry of the jury, no request that the jury be polled, no objection to the court discharging the jury, and absolutely no evidence of any irregularity in the verdicts. *The failure of appellant to make any objection or request for further acknowledgment of the verdict*

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[1] Argument III of appellant's opening brief asserts the double jeopardy claim from her petition for review. Respondent's answer brief on that claim is filed concurrently with this reply.

waives his [sic] current complaint." (Repondent's Brief (H035123, July 29, 2010) p. 23, italics added.) "'In this context, the terms 'waiver' and 'forfeiture' have long been used interchangeably,'" even though this Court characterizes the issue as whether counsel's failure to object at trial "forfeited, rather than waived, the issue on appeal." (*People v. McKinnon* (2011) 52 Cal.4th 610, 636, fn. 16, quoting *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.)

Second, among the authorities expressly cited by respondent to the Court of Appeal before oral argument was "*People [v.] Saunders* (1993) 5 Cal.4th 580, 590-592 (principles of waiver discussed in context of the prohibition under Penal Code sections 1025 and 1164 from discharging a jury until it has determined the truth of any alleged prior conviction allegations, specifically finding that 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')." (Respondent's Letter Brief (H035123, February 15, 2011) p. 1.) Thus, the record refutes both the assertion that the issue of forfeiture is raised for the first time in this Court and the assertion that appellant's failure to object in the trial court was not raised as a defense to her claim in the Court of Appeal by respondent.

At any rate, this Court has departed from its policy to decide only issues raised in the Court of Appeal (Cal. Rules of Court, rule 8.500(c)(1)) where an "important countervailing purpose would be served." (*Sonic-Calabasas A., Inc. v. Moreno* (2011) 51 Cal.4th 659, 684, fn. 10 [recognizing that "this court has the discretion to consider important issues of law not argued by the parties below"].) Respondent's forfeiture argument is closely linked to the policy and legal considerations supporting its claim that there was substantial compliance with procedural requirements for accepting verdicts and that the trial court committed no

reversible error. Thus, a departure from the policy of rule 8.500(c)(1) would serve an "important countervailing purpose" here even if appellant had been able to sustain her incorrect assertion that respondent raised the forfeiture claim for the first time in the petition for review.

Appellant further argues this Court's "order granting review does not specify forfeiture as an issue to be briefed and argued." (ABOM at p. 28.) The Court's grant of review directed the parties to address "whether the court erred 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." As argued *ante*, appellant's forfeiture of her claim in the trial court raises policy and legal considerations so closely linked to the substantive issue of reversible error arising from procedures for oral assent by the jury to the verdicts that a departure from the policy embodied in rule 8.500(c)(1) would be justified even had the issue not been raised in the Court of Appeal as, in fact, it was. By the same token, the forfeiture issue is "fairly included" within the issues specified by the Court for briefing and argument. (Cal. Rules of Court, rule 8.516(a)(1).) The issue is therefore properly before this Court both because it was properly raised in the Court of Appeal and because it is embraced in the issues whether the court erred by failing to obtain the jury's oral assent to the verdicts and if such error is reversible.

Appellant argues that the receipt of the jury's verdict "is the exclusive province of the trial court" and that the statute "does not require any request from defense counsel to trigger the court's sua sponte duty to ask this question [whether the jury agreed upon their verdict]." (ABOM at pp. 28-29.) This argument, in so many words, replays one of the points of the dissent in *People v. Saunders* (1993) 5 Cal.4th 580. *Saunders* rejected that exact point. (*Id.* at p. 591, fn. 7 [denying the dissent's assertion "that as a general rule '[a] party forfeits a legal right by silence only when the law

allocates to that party the legal duty or obligation to speak'" and explaining that cases cited by the dissent involve only "discrete exceptions to the general rule . . . that a failure to object results in a forfeiture of the right sought to be asserted"].) Appellant has made no argument establishing that footnote 7 of *Saunders* is incorrect.

Appellant does attempt to distinguish the holding in *Saunders*. It also falls flat. *Saunders* concerned Penal Code section 1025's requirement that if a defendant does not admit a prior conviction, the "question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty . . . or by the court if a jury is waived." Penal Code section 1164, subdivision (b) provides that 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*. (Italics added.) In *Saunders*, the trial court discharged the jury before it heard and determined the truth of alleged prior conviction allegations, which had been bifurcated from the guilt trial. The trial court later convened a new jury that found the prior conviction allegations. On appeal, the defendant asserted a denial of his statutory right to a determination of the prior allegations by the jury that had determined his guilt. This Court held an "appellate court will ordinarily not consider procedural defects or erroneous rulings . . . where an objection could have been, but was not presented to the lower court by some appropriate method . . . [T]he explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial." (*Id.* at pp. 590; see also RBOM at p. 17 [citing cases].)

Saunders, contrary to appellant's mistaken impression, did not turn on the trial defense counsel in that case initially telling the court that defendant intended to waive jury trial on the prior allegations. Instead, this Court made clear that "defendant's failure to object precludes his obtaining appellate relief on the basis of the statutory error committed by the trial court." (*Saunders, supra*, 5 Cal.4th at p. 589.) "[A]lthough 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." (*Id.* at p. 590.)[2] On the other hand, the failure to object did not preclude the defendant's assertions on appeal that he was twice placed in jeopardy and that he was denied his state constitutional right to a jury trial. (*Id.* at p. 589, fn. 5, citing *People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 77, fn. 20 (*Marks II*) and *People v. Holmes* (1960) 54 Cal.2d 442, 443–444.)

Citing footnote 20 of *Marks II*, appellant maintains that there was no forfeiture in her trial. She reasons that the 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" and therefore it would have been against the defendant's interests to object. (ABOM at p. 29.) *Saunders*

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[2] Similarly, Penal Code section 1170, subdivision (c) states in part that the "court shall state the reasons for its sentence choice on the record at the time of sentencing." That statute does not require a defendant to ask for a statement of reasons, an obligation which is uniquely a duty of the trial court. Nevertheless, a defendant must object to preserve a claim on appeal that the trial court inadequately complied with its statutory duty to give a statement. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

citation to footnote 20 of *Marks II* answers the point: appellant cannot now raise her statutory error claim, though her failure to object does not forfeit her double jeopardy claim. To the extent appellant's argues that a failure to object at trial is not a forfeiture when it is to the defendant's advantage not to bring a matter to the attention of the court, her argument cannot be sustained without the overruling of *Saunders* and all like forfeiture cases. That is because she parades as a virtue the very wrong that forms the reason for the forfeiture rule:

> The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 . . . : "'In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'" (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 784.)

(*Saunders*, *supra*, 5 Cal.4th at p. 590, parallel citations omitted.)

Appellant asserts that respondent's forfeiture claim is "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." (ABOM at p. 30.) Appellant does not explain how her claim of a procedural defect in procuring the oral assent of jurors to the verdicts analogizes to a claim that insufficient evidence supports the conviction. This is not a case of insufficient evidence by any stretch of the imagination. The Court of Appeal acknowledged that the evidence supporting the verdicts here was "ample if not overwhelming" and that "there is nothing in the record to suggest that the jurors did not agree with the verdict when read . . . ." (Typed opn. at p. 7.)

Appellant argues that she did not "ambush" the trial court and that she did not deprive the People of "their right to prove their case" or "to protect their interest in obtaining a true verdict" by an objection under Penal Code section 1149. (AOB 33.) Her arguments in this vein might be germane if claim forfeiture were not the issue. This is not a case of failure of proof or detrimental reliance, or estoppel by conduct. Instead, this case is controlled by *Saunders*, where the failure to object barred the claim that the trial court failed to comply with statutory requirements when the jury failed to determine the truth of all allegations before the discharge. Appellant's claim that the trial court failed to comply with statutory requirements to obtain oral assent to verdicts that did determine the truth of all the allegations before the discharge is forfeited.

For all the above reasons, as well as those stated in Respondent's Opening Brief on the Merits, appellant has forfeited the issue on appeal by failing to make a timely objection at trial.

II. THERE WAS NO ERROR IN THE RETURN OF THE VERDICT

In Argument I of appellant's brief, she asserts that section 1149 requires the court or clerk to "elicit the jury's oral acknowledgment that they have agreed upon their verdict" and that there was not substantial compliance with the statutory requirement. (ABOM at pp. 6-7, 12-14.)

As discussed in our opening brief, the circumstances demonstrate the recording of complete verdicts and the court's substantial compliance with the statutory requirements for the return of verdicts. The jury was fully instructed on the burden of proof and the requirement that the verdicts be unanimious. After the court was informed that the jury reached a verdict, the jurors were brought into the courtroom. The trial judge addressed the jury. The court stated that it understood the jurors had reached a verdict. It asked for the foreperson, and directed the foreperson to hand the verdict forms to the bailiff, who then gave it to the court to give to the clerk to

read. The verdict forms were read in open court immediately and were then recorded when no party requested a poll. After further remarks by the court, the jury was discharged.

The reasonable interpretation of the record is that the jury foreman acknowledged the verdict. (RBOM at pp. 11-14.) Apart from the vacated holding of the Court of Appeal below, we are unaware of a decision finding that proper verdict forms addressing all counts and allegations with no discrepancies or inconsistencies or omissions, when presented to the trial judge by the foreperson and immediately read aloud in the presence of all parties and jurors and recorded without a request for polling do not constitute "verdicts."

Like the Court of Appeal, appellant places emphasis on holdings that the oral declaration by jurors is the "true" return of the verdict. (ABOM at pp. 5-6.) Appellant does not address respondent's point that these cases involve inconsistencies, omissions, or anomalies respecting the verdicts themselves. (RBOM at pp. 26-28.) For example, in *People v. Thornton* (1984) 155 Cal.App.3d 845, on which the Court of Appeal and appellant primarily rely, the verdict form was overlooked, and consequently the verdict was never read, acknowledged, or even recorded before the jury was discharged. That case, by its terms, is inapposite. No such defects are present in this case.

Appellant simply has assumed a rule that the signed verdicts forms returned and read and recorded in open court in the jury's presence are, by the terms of section 1149, made incomplete, pending the express oral assent by the jury. Section 1149 does not so state. Section 1149's requirement that if the foreperson acknowledges the verdict, the jury "must, on being required, declare the same," refers to polling of the jury. Such polling is only required upon a party's request. (RBOM at pp. 14-15; see *People v. Mestas* (1967) 253 Cal.App.2d 780, 786, citing *People v. Wiley* (1931) 111

Cal.App. 622, 625.) Appellant has failed to respond to this point in our brief.

The contrary rule sought by appellant would be unsound. The oral verdict as the "true" verdict necessarily has exceptions. For example, the written verdict form in certain circumstances may prevail over the oral verdict. (See *United States v. Boone* (9th Cir. 1991) 951 F.2d 1526, 1532-1533 [written verdict form prevails over the oral verdict delivered in open court and affirmed by the jury where the verdict had been misread stating "[i]t would elevate form over substance to find that the misread verdict was the operative verdict."]; *United States v. Rojas* (2nd Cir. 2010) 617 F.3d 669, 679 [to conclude jury agreed with mistaken reading of the verdict, rather than the jury's written verdict, "requires us to assume that the jurors unanimously changed their minds in a split second . . . It is unreasonable to expect the jurors to have corrected the [deputy's] misreading of their verdict and to conclude that by their failure to do so [they had] assented to the misread verdict[]."].)

Appellant's secondary authority is unpersuasive. She recites the CJER's script for receiving civil verdicts. It states 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." (ABOM at pp. 7-8.) Appellant does not cite a CJER script for criminal cases even though it is a Penal Code statute she claims requires the rule she seeks. At any rate, CJER is authority for best practices, not legal error. Nothing in CJER suggests the procedures in the instant case for the return of the verdicts is not substantial compliance with the statutory requirements.

Appellant views it as apparently critical that section 1149 provides that the jury be asked by the court or clerk whether they have "agreed

upon" their verdict, while here the trial judge stated that the court understood the jury "reached" a verdict. Appellant asserts that "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." (ABOM at p. 14.) This hypertechnical argument fails to persuade. There is no consequential difference between the jury *agreeing* on a verdict and *reaching* a verdict. Black's Law Dictionary defines a "verdict" as "the formal and unanimous decision or finding made by a jury, impaneled and sworn for the trial of a cause and reported to the court (and accepted by it), upon the matters or questions submitted to them upon the trial." (Black's Law Dict. (4th ed. 1951) p. 1730.) Section 1164, subdivision (b), provides: "(b) 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 . . . ." (Italics added.)

The jury in this case was instructed that its verdict on each count and special allegation had to be unanimous. (2 RT 376.) Whether the jury was said by the court to have "agreed" on its verdicts or to have "reached" its verdicts, is beside the point. There is simply no question the verdict forms delivered by the foreperson to the trial judge and read in open court were the jury's verdicts. There was substantial compliance with the statutory requirements for the return of a verdict. (Cf. *Stone v. Superior Court* (1982) 31 Cal.3d 503, 511 [holding that a verdict of guilty of a lesser included offense constitutes an implied acquittal of the greater offense and rejecting the prosecution's contention "that a jury verdict in a criminal case cannot be given effect unless the formal statutory procedures are followed. (See §§1149, 1163, 1164.)"].)

III. ANY ERROR WAS NONSTRUCTURAL AND HARMLESS

Argument II of appellant's opening brief asserts that structural error results from a trial court's failure to elicit an oral acknowledgment of the verdicts as the jury's. He claims that the Court of Appeal's decision on that point "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 for the trial court to instruct deficiently on standard of proof beyond a reasonable doubt. (ABOM at p. 18.) We disagree.

A. Any Assumed Error Is Amenable to a Finding of Harmlessness

As argued in respondent's opening brief, defects with respect to statutory procedures on the return of a verdict are trial errors subject to a finding of harmlessness. (RBOM at pp. 17-29.) As explained fully in that brief, *People v. Thornton* (1984) 155 Cal.App.3d 845, and other cases cited by appellant, are not authority for a finding of structural error. (RBOM at pp. 23-26.)

Nor are such errors analogous to a misinstruction on the constitutionally required standard of proof as in *Sullivan v. Louisiana*. There the deficient instruction on the standard of proof affected "the framework within which the trial proceeds." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) Because a defendant is entitled to an acquittal unless the prosecution proves to the jury's satisfaction every element of the offense beyond a reasonable doubt, the standard of proof underlies each factual finding the jury is required to make. When the jury instead determines the elements of the offense using a deficient standard of proof, nothing exists on which harmless error can operate, making the error one of the few that infects "the entire trial process" and that "necessarily render[s]

a trial fundamentally unfair." (*Neder v. United States* (1999) 527 U.S. 1, 8-9.)

Moreover, the instructional error in *Sullivan* was unique in that it defied harmless error analysis. Instructional error itself requires finding not only what the trial court did wrong, but what, if anything, the jury did wrong; a defective instruction in and of itself is not enough. (See, e.g., *People v. Romero* (2008) 44 Cal.4th 386, 424; *Middleton v. McNeil* (2004) 541 U.S. 433, 437.) To constitute instructional error, there must be a reasonable likelihood that the jury misapplied the law. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4.) In *Sullivan*, however, the trial court's deficient burden of proof instruction established not only a reasonable probability that the jury misapplied the law, it made it impossible to establish the jury determined any elements of the crime by a standard of proof beyond a reasonable doubt. That instructional error was a systemic defect in the jury's factfinding, which necessarily infected the entire trial from beginning to end. (See *People v. Mil* (Jan. 23, 2012, S184665) ___ Cal.4th ___ [2012 D.A.R. 906, 909] (*Mil*) [distinguishing *Sullivan* wherein the "erroneous reasonable-doubt instruction 'vitiates *all* the jury's findings' . . . and produces 'consequences that are necessarily unquantifiable and indeterminate"].)

The same analysis applies to another decision relied upon by appellant. In *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, the Supreme Court held the erroneous denial of a defendant's right to counsel of choice was structural. In *Gonzalez-Lopez*, it was impossible to assess how a different defense attorney might have presented the case. It cannot be known what motions and objections might have been made by another counsel, how another counsel might have investigated the case, or what witnesses might have been called to testify at trial by the other counsel. That situation makes 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." (*Id.* at p. 150.) Like a deficient reasonable doubt instruction, the denial of the defendant's chosen counsel, as in *Gonzalez-Lopez*, is structural not only because it alters the framework of the entire trial, but also because the consequences of the error are nonverifiable so as to defy any harmless error analysis.

A very narrow set of circumstances fit that template. Not surprisingly, the Supreme Court "has said very clearly that structural errors 'are the exception and not the rule" and "[t]rue to its word, the Court has been highly parsimonious in adding to the list of rights which, if violated, amount to structural error." (*Rice v. Wood* (1996) 77 F.3d 1138, 1141.) Even very serious constitutional errors are not deemed structural. These include the admission of a coerced confession fully implicating defendant (*Arizona v. Fulminante* (1991) 499 U.S. 279), a comment on the defendant's failure to testify at trial (*Doyle v. Ohio* (1976) 426 U.S. 610, 611; *Griffin v. California* (1965) 380 U.S. 609, 615), and shifting the burden of proof to defendant on an element of the offense (*Sandstrom v. Montana* (1979) 442 U.S. 510; *Yates v. Evatt* (1991) 500 U.S. 391, 402; *Carella v. California* (1991) 491 U.S. 263, 266). Likewise, the defendant's absence from the courtroom when the jury returns a verdict of death is not structural. (*Rice v. Wood*, *supra*, 77 F.3d at pp. 1142-1144].)

This Court's structural error jurisprudence is consistent with these decisions and with respondent's argument here. In *Mil*, for example, this Court found the omission of two elements from felony-murder special circumstances instructions was not structural error. It reasoned:

> The high court has "repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal." (*Washington v. Recuenco* (2006) 548 U.S. 212, 218.) An error is "'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases,'" such

> as the complete denial of counsel, a biased decisionmaker, racial discrimination in jury selection, denial of self-representation at trial, denial of a public trial, and a defective reasonable-doubt instruction. (*Neder*, *supra*, 527 U.S. at p. 8.) What unites this class of errors is "a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'. . . Put another way, these errors deprive defendants of 'basic protections' 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 pp. 8–9.)
>
> If, on the other hand, "'the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" (*Neder*, *supra*, 527 U.S. at p. 8.) "[W]hile there are some errors to which *Chapman* does not apply, they are the exception and not the rule." (*Rose v. Clark* (1986) 478 U.S. 570, 578.) Accordingly, "'most constitutional errors can be harmless.'" (*Neder*, *supra*, at p. 8.) For example, the omission of an element of a charged offense or sentencing factor is harmless when "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." (*Neder*, *supra*, at p. 17; see also *Washington v. Recuenco*, *supra*, 548 U.S. at p. 220.)

(*Mil*, *supra*, 2012 D.A.R. at p. 908.)

The Court concluded in *Mil* that an omission preventing a complete verdict in violation of the federal and state constitutional guarantees of jury trial for lack of a jury finding on each element of the crime is not structural:

> Defendant is correct that the omission of two or more elements from an instruction would prevent the jury "from rendering a 'complete verdict' on every element of the offense" (*Neder*, *supra*, 527 U.S. at p. 11) and thus violates the accused's Sixth Amendment right to a jury as well as the "inviolate right" to a jury under the California Constitution (Cal. Const., art. I, § 16). But the incursion on the right to a jury trial occurs whether the instruction omits one element or multiple elements of the offense, yet both the high court and this court have already held that the omission of an element of the offense is amenable to

> harmless-error analysis. (*Neder*, *supra*, 527 U.S. at p. 13; *Flood*, *supra*, 18 Cal.4th at p. 490.) Plainly, not every violation of the state and federal right to a jury trial is a structural defect requiring reversal without regard to whether the defendant suffered actual prejudice.

(*Id.* at pp. 908-909; see also *id* at p. 910 [state Constitution affords no greater protection than the federal Constitution in these circumstances].)

Any error here does not amount even to the deprivation of a "complete verdict" as in *Mil*, let alone to a structural defect in the entire trial process as in *Sullivan* and *Gonzalez-Lopez*.

Appellant, of course, had counsel throughout a trial in which an impartial adjudicator presided. A properly selected jury heard all the evidence. The jury was properly instructed on the standard and burden of proof and the elements of the offenses. The verdicts were read before all parties and jurors in open court. The parties had ample opportunity to request polling of the jury if they so wished, but neither party so requested. All or any of the jurors had like opportunity to express disagreement with the verdicts as read before the jurors were discharged from service.

Harmless error analysis here in no sense amounts to "a speculative inquiry into what might have occurred in an alternate universe" as appellant maintains is the case. The court's failure to ask the foreperson, after the jurors were brought into the courtroom, whether "they have agreed upon their verdict" is, at most, a procedural defect not strictly compliant with California statute. That omission neither affected the framework in which trial proceeded, nor defies the possibility of harmless error analysis.

B. Under the Facts of This Case, the Error Was Harmless

It is inconceivable the foreperson and every other juror would have remained mute if the verdicts as read in open court were not those unanimously agreed upon by the jury under the instructions it had been given. (Cf. *Cabberiza v. Moore* (11th Cir. 2000) 217 F.3d 1329, 1336

["We cannot imagine that, having just asked for a poll, the attorneys (or the court) would have remained mute if the clerk had forgotten to call one of the juror's names."].)

The trial judge stated that the court understood the jury reached a verdict and immediately thereafter directed the foreperson to "[h]and the verdict forms to the deputy. I'll hand those to the clerk to read the verdict." Thus, the *foreperson*, in the presence of all parties and all jurors in open court, handed the verdict forms to the baliff and saw them given to the court in response to the trial judge's direction to deliver the "verdict forms." Those verdict forms were then handed by the court to the clerk, who read them aloud in front of all parties and all jurors. There was no expression by anyone of any surprise, disagreement, or concern about the verdicts as read. As noted *ante*, the Court of Appeal itself recognized "ample if not overwhelming evidence to support the verdict reflected in the verdict forms" and the absence of anything "in the record to suggest that the jurors did not agree with verdict when read."

Given these facts, any notion of prejudice, on a view that the foreperson, if asked, might not have acknowledged the verdicts or that a juror, if polled, might not have endorsed the verdicts, amounts itself to a "speculative inquiry into what might have occurred in an alternate universe." (*United States v. Gonzalez-Lopez*, *supra*, 548 U.S. at p. 150.) In the circumstances that appear here, a finding of harmlessness is compelled.

"[A]n overly broad rule of reversible error that compels the reversal of judgments rendered in fairly tried criminal proceedings on the basis of errors that are unlikely to have affected the outcome, often will have the detrimental effect of eroding the public's confidence in the criminal justice system." (*People v. Cahill* (1993) 5 Cal.4th 478, 508-509; see also *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 ["reversal for error,

regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."].)

Any error in the court's failure to comply strictly with section 1149 amounts to a state statutory procedural error, rather than structural error. Therefore, any error is amenable to a finding of harmlessness. Given the facts of the instant case, a result more favorable to appellant if the foreperson had been explicitly asked to affirm the verdicts is not reasonably probable. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)[3]

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[3] Appellant apparently attempts to claim that this was a violation of his right to jury trial. However, under the circumstances of the instant case, in which appellant had an intact jury, that was properly instructed on the burden of proof and the requirement that it be unanimous, in which the entire jury was present when the court stated its understanding it reached a verdict, in which the foreperson handed the verdict forms to the court upon request, and in which the forms were read in the presence of all parties and jurors, and in which the only claimed error is one of a technical, state statutory procedure in the return of the verdict, she has failed to show a violation of any federal constitutional right. In any event, given the circumstances of the instant case, any error was harmless even under the more onerous federal harmless error test in *Chapman v. California* (1967) 386 U.S. 18.

CONCLUSION

Accordingly, respondent respectfully requests that the Court of Appeal's decision reversing the judgment be reversed, and the case be remanded to the Court of Appeal to address the other properly raised claims not reached by the Court based on its reversal.

Dated: February 10, 2012

Respectfully submitted,

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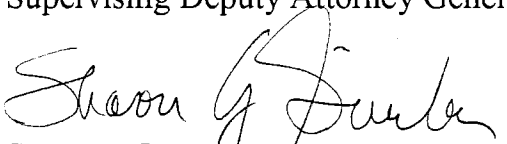
Supervising Deputy Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General



SHARON G. BIRENBAUM
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 5,685 words.

Dated: February 10, 2012

KAMALA D. HARRIS
Attorney General of California

SHARON G. BIRENBAUM
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Anzalone**

No.: **S192536**

I declare:

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

On February 14, 2012, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

J. Courtney Shevelson
Attorney at Law
PMB 187
316 Mid Valley Center
Carmel, CA 93923-8516

County of Santa Clara
Superior Court of California
Hall of Justice - Criminal Division
191 North First Street
San Jose, CA 95113-1090

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Sixth District Appellate Program
Attn: Executive Director
100 North Winchester Blvd., Suite 310
Santa Clara, CA 95050

Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

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

S. Agustin
Declarant

S. Agustin
Signature