

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

SUPREME COURT  
FILED

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Deputy

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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**THE PEOPLE,**

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**CHRISTINA MARIE ANZALONE,**

**Defendants and Appellants.**

**S192536**

**Court of Appeal No. H035123**

**(Santa Clara County  
Super. Ct. No. CC035164)**

**INTRODUCTION**

The Attorney General’s Answer Brief on the Merits responds to the third argument raised in Appellant’s Opening Brief on the Merits. That argument explains why double jeopardy bars retrial of the charges against appellant if, as the opening brief demonstrates, the trial court’s error in failing to comply with Penal Code section<sup>1</sup> 1149 constitutes structural error. The Attorney General’s answer to that argument is founded on a false premise that the jury returned a valid verdict because the foreperson signed verdict forms. But verdict forms are not enough to comply with section 1149’s requirement that the jury must orally acknowledge they have agreed on a verdict in order to return a valid, true verdict. In the absence of a true verdict, the discharge of appellant’s jury violated section 1140 because the jury was discharged before they “agreed upon their verdict and rendered it in open court,” and therefore double jeopardy bars appellant’s retrial.

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<sup>1</sup> Statutory citations are to the Penal Code unless otherwise stated.

## ARGUMENT

### **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**

As appellant has summarized in Appellant's Opening Brief on the Merits, decisional law explains how section 1149 defines a "verdict" under California law. The case law has held for many years 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.)

This same point is made in section 33.27 of the 2011 edition of California Criminal Law: Procedure and Practice. It states:

**§ 33.27      A. Definition of Verdict**

A verdict is reached in a criminal case when all 12 jurors impaneled to try the case have agreed on the issues submitted to them. Cal Const art I, § 16; *People v. Superior Court (Thomas)* (1967) 67 C2d 929, 64 CR 327. The only other requirement is that on reaching this agreement they must be brought into the courtroom to declare their verdict. See Pen C §§ 1147, 1149. Thus, the jurors' assent in court is the "true return of the verdict." *People v. Lankford* (1976) 55 CA3d 203, 211, 127 CR 408; see *People v. Hernandez* (1985) 163 CA3d 645, 209 CR 809; *People v. Mestas* (1967) 253 CA2d 780, 786, 61 CR 731.

(Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2011), § 33.27, p. 989.)

What this says is that section 1149 defines what must happen in the courtroom for a true verdict to exist: the court or the clerk must elicit from the foreperson, as the jury's representative, an oral acknowledgment that they have agreed upon their verdict. That did not happen at appellant's trial. As a consequence of its failure to comply with section 1149, the trial court discharged the jury before they reached a valid, true verdict. And 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.

Respondent's position is that double jeopardy does not limit the power to retry a defendant if the first trial ended in a conviction and the defendant appeals unless the reviewing court concludes that the trial evidence was legally insufficient. (Resp. Answer Br., pp. 2-4.) What this position ignores, however, is that appellant's first trial did not end in a conviction because the trial did not produce a true verdict. Without a true verdict there is no valid conviction. Respondent argues that the Court of Appeal correctly concluded appellant's jury was not discharged before it reached a verdict because the jury produced written verdict forms that were read by the clerk and subsequently acted upon by the trial court as if they constituted true verdicts. (Resp. Answer Br., pp. 4-5.) But the jury foreperson never orally assented to the verdict forms in open court as section 1149 requires and neither did any other juror. As a result, by definition, the verdict forms did not constitute a true verdict.

The double jeopardy argument in appellant's Opening Brief on the Merits contends 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, and therefore there was no valid judgment. But the Court of Appeal then erred in failing to recognize that this meant the court's discharge of the jury was unjustified because it was done before a true verdict was reached and was done without legal necessity and without appellant's consent. Appellant relied on *Curry v. Superior Court* (1970) 2 Cal.3d 707 ("*Curry*") as authority that double jeopardy bars retrial under these circumstances.

Respondent contends that appellant's reliance on *Curry* is flawed

because *Curry* involved the unjustified discharge of a jury before it reached a verdict whereas appellant's jury reached a verdict. Respondent claims that the trial court discharged the jury after the "verdict" had been received, read and then recorded. (Resp. Ans. Br., pp. 5-7.) Once again, however, respondent is relying on the premise that the jury's production of *verdict forms* was sufficient to produce a valid "verdict." And once again, respondent's reliance on the mere existence of verdict forms is misplaced because, under the definition of a verdict under section 1149 and California case law, the verdict forms are insufficient by themselves to constitute a true verdict in the absence of the jury's oral acknowledgment that they have agreed upon what the forms say.

Respondent's final argument is that appellant's position should be rejected because it "essentially" argues that the jury "in effect" would have to be polled to orally acknowledge the verdict even though there is no constitutional obligation to poll the jury, only a statutory right to have the jury polled upon request. (Resp. Br., p. 8.) Appellant's Opening Brief on the Merits does not argue or in any way suggest that a jury must be polled in order to produce a valid, true verdict. What it argues is that the trial court must comply with section 1149 in order to turn mere verdict forms into a true verdict. In enacting section 1149, the Legislature decided that oral acknowledgment by the jury's foreperson that the jury "have agreed upon their verdict" is sufficient to validate the fact of agreement. But at least that step must be taken for the jury to demonstrate its assent to what is in the verdicts forms as their true verdict.

Nothing in respondent's Answer Brief alters appellant's double

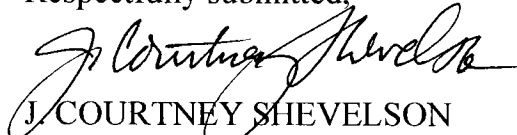


jeopardy analysis. The trial court's error in failing to comply with section 1149 led to the discharge of the jury without a true verdict. The discharge was without appellant's consent and without legal necessity, which means double jeopardy bars appellant's retrial.

### **CONCLUSION**

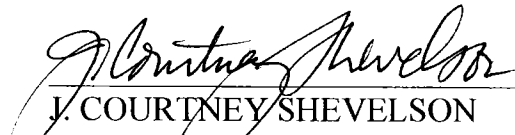
For all the reasons stated in Appellant's Opening Brief on the Merits and in this Reply Brief on the Merits, appellant respectfully requests this court to affirm the Court of Appeal's decision that the trial court's failure to obtain the jury's oral assent to the verdict was structural error that is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

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 Reply Brief on the Merits contains approximately 1,447 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 REPLY BRIEF ON THE MERITS**

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

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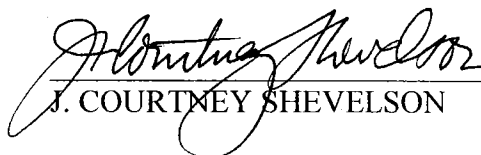
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Each said envelope was then, on March 14, 2012, sealed and deposited in the United States mail at Monterey, California, the county in which I am employed, with postage fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed on March 14, 2012, at Monterey, California.

  
\_\_\_\_\_  
J. COURTNEY SHEVELSON