In the Supreme Court of the State of California

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THE PEOPLE OF THE STATE OF CALIFORNIA, **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

OPENING BRIEF ON THE MERITS

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The Court directed the parties to "address whether the court erred in failing to obtain the jury's oral acknowledgment of the verdicts, and if so, whether such error is structural and reversible per se, or subject to harmless error analysis, and if reversal is warranted, whether double jeopardy bars retrial."

INTRODUCTION

In this case, the trial court announced in open court that the jury had indicated it reached a verdict. It had the jury brought into the courtroom. Addressing the assembled jurors, the court said that it understood the jury had reached a verdict and had the jury foreperson deliver the verdict forms to the court. In the presence of all jurors and both parties, the court had the clerk read the verdict forms, which declared appellant guilty on three counts with true findings as to special allegations, and not guilty on a remaining count. After the verdicts were recorded, the court gave standard instructions and dismissed the jury. Neither counsel objected or made any requests during or after the proceedings relative to the return of the verdicts.

The Court of Appeal held the absence of oral assent by the jury to the verdicts was a statutory violation constituting structural error and reversed for retrial.

Here, respondent argues that the record reflects substantial compliance with the statutory requirements for the return of verdicts and that, accordingly, the Court of Appeal incorrectly found error. Moreover, were state law found to demand the jury's oral assent to the verdicts even when unrequested by either party, the omission is a technical statutory

procedural defect, not structural error. In the circumstances of this case, any error was immaterial and nonprejudicial.[1]

STATEMENT OF THE CASE AND FACTS

Appellant was charged with assault with a deadly weapon on Richard Malott (Pen. Code, §245, subd. (a)(1), count 1) and making a criminal threat to Atulkumar Patel (Pen. Code, §422, count 2), with allegations of her personal use of a deadly weapon in both counts (Pen. Code, § 667, 1192.7, 12022, subd. (b)(1)). Additionally, she was charged with misdemeanor vandalism (Pen. Code, §594, subd. (a)(b)(2)(A), count 3), and misdemeanor exhibition of a deadly weapon in the presence of Atulkumar Patel (Pen. Code, §417(a)(1), count 4). (CT 51-54.)

A. Jury Trial Evidence

On February 22, 2009, about 5:00 p.m., appellant, apparently intoxicated, entered the lobby of Atul Patel's motel and asked to speak to a resident. (1 RT 39, 41-42, 58.) Patel said the resident was not there and appellant could not go to the person's room. Appellant angrily accused Patel of lying. (1 RT 42, 66.) She left, then returned about three minutes later and told Patel, "I'll kill you. I'll hurt you." She knocked over Patel's computer and speakers, and pulled a knife from her pocket. (1 RT 44-47, 49, 61-62, 67-68.) Patel said he was calling the police, and appellant responded, "Fuck you and fuck the police." She said she did not care, and told Patel she would see him later. (1 RT 50, 52-53.)

Around 5:30 p.m., police officer Kelso saw appellant and another woman in a Dodge Caravan near City Team Ministries some three minutes'

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[1] The clerk advised that the opening briefs should address only those issues raised by a respective party's own petition for review with the expectation that each party will file a cross-answer and a cross-reply. Therefore, this opening brief does not address the double jeopardy claim raised in appellant's petition for review.

distance from Patel's motel. Noticing appellant's nervousness and thinking it was because he could see a large red knife by her, Kelso assured her that he was just handing out fliers. (1 RT 93-94; 2 RT 196-199, 201-202.) Some 15 minutes later, Kelso realized from a police broadcast about the motel incident that appellant matched the suspect description, but she was gone when he drove back to City Team Ministries. (2 RT 201-203.) He looked around, heard a female yell, "Fuck you bitch." He then saw appellant hanging off the side view mirror of a pickup truck and fall as the truck drove off. (2 RT 204-208.) Appellant was okay, and Kelso detained her. (2 RT 209.) The driver of the pickup truck, Richard Malott, drove up and gave Kelso a knife, which Malott reported appellant had thrown at him and which Kelso recognized as the one by appellant in the Dodge earlier. (2 RT 209-211.)

Malott and his wife Kimberly had gone to City Team Ministries for food. Kimberly left before Richard. (1 RT 133-135, 138.) Appellant approached her outside complaining they had not let her inside because she was drunk. Kimberly did not know appellant, but gave her a couple of bagels, thinking she was hungry. (1 RT 139-141.) Richard came out and told Kimberly to "come on," but appellant retorted she was not done talking to "her." (1 RT 141-142.) As Richard went to his truck, appellant accused him of beating his wife, which Kimberly denied. Appellant got in Richard's face, "chest butt" him, called him names, and threatened to "beat [his] ass." (1 RT 79-84, 144.) As appellant seemed to be trying to get him to react, Richard ignored her. (1 RT 84-85.) Walking to his truck, he heard appellant behind him and turned around. Appellant reached into her pocket and threw an open knife at him. The butt end of the knife hit him in the chest and fell to the ground. A bagel in her hand also went flying. (1 RT 85-88, 96-98, 146, 148-149, 154-155.) Richard picked up the knife and said that he would give it back if appellant would stay away from him and

that he was going to his truck and would throw it out the window. (1 RT 100-101, 155.) Richard and Kimberly got in the truck, but appellant stood in front of the truck, spit on the windshield, and extended her arms over the hood so Richard could not leave. (1 RT 103.) She screamed for him to give her knife back. (1 RT 160.) Richard told her to get out of the way. (1 RT 104-105.) Appellant moved to the passenger side, grabbed the side mirror and antenna, and hung on as Richard began to drive away. (1 RT 106-109.) Appellant fell off, breaking the antenna. (1 RT 108-109.) Kimberly called 911. (1 RT 165.) She was concerned about appellant, so they drove back and found appellant being taken into custody. Richard gave appellant's knife to the officer and told him what happened. (1 RT 110-113, 166-170.)

Appellant testified that she carried the knife for protection because she was homeless. (2 RT 218-219, 252-253.) The day of these incidents, she was drunk, but not "falling down drunk;" she was aware of what was going on. She went to the motel to see a friend and was upset because her friend's truck was parked at the motel, and, therefore, believed Patel was lying when he said her friend was not there. (2 RT 221, 222-228, 250-252, 258-259.) She was angered when Patel called the police and claimed she was trying to break into a room when she had not tried to enter any rooms. She yelled at Patel that he was lying and pushed over his computer monitor, speakers, and some paperwork. (2 RT 228-231, 266-268.) She denied threatening to kill Patel, removing the knife clipped to her sweatshirt, or opening the knife to expose the blade. (2 RT 219-220, 232, 269, 256-257.)

Appellant left the motel and went to City Team Ministries to get food. (2 RT 232-233.) She was denied entrance due to a prior incident with the Ministries director, but she knew people there who would bring food out to her. (2 RT 232-233, 276-278.) While sitting in a van drinking beer with a friend, an officer came up to show them a flier. Appellant took off the

knife and placed it on the ground between her feet. (2 RT 234-235.) Later, appellant started talking to Kimberly Malott, but could not recall most of their conversation. Richard Malott came outside and appellant believed he was abusive because of the way he talked to Kimberly. (2 RT 237-238.) Appellant started yelling, telling him that he probably beat his wife. (2 RT 238, 285-286.) She admitted that she continuously yelled at him as he walked toward his truck. When he turned around, she got in his face and continued yelling at him. He turned his back on her and continued walking. She followed, trying to provoke him into a fight. (2 RT 240-241, 290-291.) It irritated her that he did not take the bait. (2 RT 298-299.) As appellant moved her arms around while yelling, the knife flew off her sweatshirt and skidded across the ground. The knife was not open, and it did not hit Richard. (2 RT 243-244, 247, 294-295, 301.) Richard took the knife, but appellant wanted it back. Appellant denied standing in front of the truck, but admitted holding onto its antenna and mirror. (2 RT 245-247, 305.)

B. The Proceedings on the Return of the Verdict

The following proceeding occurred in open court:

THE COURT: We're in session in Docket CC935164. Attorneys are present, Mr. Hultgren and his client and DA Ms. Frazier.

Jury has indicated they have a verdict. We'll bring them out. Thank you.

(*JURY PRESENT*)

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.*

THE CLERK: Superior Court of California Santa Clara County. People of the State of California plaintiff versus Christina Marie Anzalone defendant. Case number CC935164.

The department 39. Count 1, we the jury in the above entitled cause find the defendant Christina Marie Anzalone guilty of a felony to wit: assault with a deadly weapon in violation of Penal Code section 245 subsection A, subsection 1.

Special allegation number 1. We further find the allegation that the said defendant personally used a dangerous or deadly weapon, a knife within the meaning of Penal Code section 667 and 1192.7 to be true. Dated and signed.

Same cause, same action. We the jury in the above entitled cause find the defendant Christina Marie Anzalone guilty of a felony to wit: threats to commit a crime resulting in death or great bodily injury in violation of Penal Code section 422. Special allegation number 1. We further find the allegation that the said defendant personally used a dangerous or deadly weapon, a knife within the meaning of Penal Code section 12022 subsection b, subsection 1 to be true. Dated and signed.

Same cause, [s]ame action. We the jury in the above entitled cause find the defendant Christina Marie Anzalone not guilty of a misdemeanor to wit: vandalism less than $400 in violation of Penal Code section 594 subsection a slash subsection b, subsection 2, subsection A. Dated and signed.

Same cause, same action. Count 4. We the jury in the above entitled cause find the defendant Christina Mar[ie] Anzalone guilty of a misdemeanor to wit: exhibiting a deadly weapon other than a firearm in violation of Penal Code section 417, subsection a, subsection 1. Dated and signed.

THE COURT: 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 378-379, emphasis added; see also CT 143-145.)

The verdicts were recorded. (CT 145.)

The court gave predischarge instructions to the jury concerning payment, communications with the parties, and the privacy and the release of personal information about jurors. It then excused the jurors. (2 RT 379-381.) There was no objection to the court's action, nor was there a request by either party to have the jury polled.

The trial court sentenced appellant on December 4, 2009, to a total prison term of four years, eight months. (CT 188-190.)

C. The Court of Appeal's Ruling

The Court of Appeal held that "the lack of oral acknowledgement by the jurors individually or by the foreperson rendered the jury's verdict incomplete, defective, and invalid. And, without a valid verdict, there can be no valid judgment." (Typed opn. at p. 7.)[2]

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[2] The following statutes are relevant to this case:

Penal Code section 1147 provides:

> When the jury have agreed upon their verdict, they must be conducted into the court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that case the action may be again tried.

Penal Code section 1149 provides:

> When the jury appear they must be asked by the Court, or Clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same.

Penal Code section 1163 permits polling of the jury upon request of a party:

> When a verdict is rendered, and before it is recorded, the jury *may* be polled, *at the request of either party*, in which case they must be severally asked whether it is their verdict, and if any one

(continued...)

The Court of Appeal acknowledged that the jury had actually "deliberated and rendered a verdict" (typed opn. at p. 7), that the "court did not discharge the jury before it reached a verdict," that "defendant was not deprived of a verdict from his chosen jury," and that the jury's verdict "was read and entered" (typed opn. at p. 9). The court also found "ample if not overwhelming evidence to support the verdict reflected in the verdict forms" and "nothing in the record to suggest that the jurors did not agree with the verdict when read." (Typed opn. at pp. 7 and 9.) The crucial element for a complete verdict, it reasoned, was the requisite oral acknowledgement under section 1149, which permits the foreperson to speak collectively for the jury. (Typed opn. at p. 5.) It cited *People v.*

(...continued)

> answer in the negative, the jury must be sent out for further deliberation.

(Emphasis added.)

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

(Emphasis added.)

Thornton (1984) 155 Cal.App.3d 845, 856-860, for the proposition that a "complete failure to orally acknowledge a written verdict in open court would normally invalidate the verdict . . . ." (typed opn. at p. 6 & *id.* at pp. 7-8). Stating that the foreperson "did not expressly acknowledge the verdict in open court" (typed opn. at p. 6), the court found this "defect is structural and not subject to harmless-error analysis" (typed opn. at p. 7). The court reasoned that 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." (*Ibid.*) It therefore reversed the judgment without harmless error analysis. (*Id.* at pp. 7-8.)

In a subsequent part of the opinion, the Court of Appeal rejected appellant's claim that retrial was barred by the double jeopardy clause "because the court dismissed the jury without a verdict and without necessity or consent." (Typed opn. at p. 8.) It characterized a violation of section 1149 of the Penal Code as "trial error" that is "plain" and "reversible," and found no premature jury discharge for lack of a verdict:

> The court did not discharge the jury before it reached a verdict, and defendant was not deprived of a verdict from his chosen jury. Rather, that jury deliberated and rendered a verdict, which was read and entered. Although nothing in the record suggests that all of the jurors did not agree with the verdict when it was read, that verdict was defective because the court failed to comply with section 1149 and have the jury orally acknowledge it in open court before being discharged. This was plain reversible trial error.

(Typed opn. at pp. 9-10.)

SUMMARY OF THE ARGUMENT

The record establishes that the trial court procedure in the return of the verdict substantially complied with the statutory requirements, including Penal Code section 1149.

Even if there was error in not explicitly asking the foreperson to affirm the verdict, the defect amounts at most to a technical statutory procedural error subject to harmless error analysis. "The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence [citation], and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, *The Riddle of Harmless Error* 50 (1970) ('Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it')." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; accord, *Arizona v. Fulminante* (1991) 499 U.S. 279, 308; *Rose v. Clark* (1986) 478 U.S. 570, 577; see *People v. Cahill* (1993) 5 Cal.4th 478, 508-509 ["[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."].)

Under the circumstances of this case, any defect was immaterial and could not have prejudiced appellant.

ARGUMENT

I. THERE WAS SUBSTANTIAL COMPLIANCE WITH THE STATUTES IN THE RETURN OF THE VERDICT

A. The Verdict Was Properly Received and the Court Substantially Complied with Penal Code Section 1149

On the record, the trial court stated that defense counsel, appellant, and the prosecutor were present and that the "[j]ury has indicated they have a verdict. We'll bring them out." (2 RT 378.) Thereafter, as the record indicates, the jury was present during the return of its verdict in court. (2 RT 378 ["JURY PRESENT"].) Thus, the court complied with Penal Code section 1147, as when the jury "have agreed upon their verdict, they must be conducted into the court by the officer having them in charge."[3]

With the jury assembled in the courtroom, the trial court stated, "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)?" A juror responded, "Yes, sir." The court then directed the juror to "[h]and the verdict forms to the deputy. I'll hand those to the clerk to read the verdict." (2 RT 378.)

Penal Code section 1149 states that when the jurors 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. (Emphasis added.) Rejecting respondent's assertions that the trial court already had been informed the jury reached a

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[3] Section 1147 states that the juror "names must then be called, and if all do not appear, the rest must be discharged without giving a verdict." While the names were not called on the record, the record shows that the jury was present; there is nothing to indicate that any juror was missing. Appellant never complained below or on appeal that the juror names were not called. (See *People v. Rodundo* (1872) 44 Cal. 538, 541 [failure to call names pursuant to section 1147 harmless].)

verdict, the Court of Appeal found that the "court did not state that it had been informed that the jury had reached a verdict. *Although that is a reasonable inference,* the court asserted only that it understood that a verdict had been reached. The record does not suggest how the court came by its understanding." (Opn. at p. 6, emphasis added.)

Why the "reasonable inference" is not also a sufficient inference is not stated in the opinion. In fact it is more than reasonable. The trial court's statement immediately before the jury was brought into the courtroom states *explicitly* how the court "came by its understanding" —from a communication of the jury: "*Jury* has indicated they have a verdict. We'll bring them out." (2 RT 378, emphasis added.) The Court of Appeal's conclusion is "as inexplicable as it is unexplained." (*Felkner v. Jackson* (2011) 131 S.Ct. 1305, 1307.)

Likewise without support is the Court of Appeal's statement 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." (Typed opn. at p. 6, emphasis added.) The purported failure of the foreperson to acknowledge *explicitly* in open court the jury had reached a verdict is the lynchpin for the Court of Appeal's finding of reversible error. The appellate court held that the foreperson's positive response ("Yes, sir.") when the trial court stated it understood the jury reached a verdict and asked for the foreperson did not reasonably constitute an oral assent that the jury had reached a verdict, only an acknowledgement of the juror being the foreperson, after which "the court moved on to other matters." (Opn. at pp. 6-7.)

Contrary to that finding, "Yes, sir," reasonably read, was oral assent of the foreperson that the jury reached a verdict as the trial court stated. Moreover, the "other matters" to which the trial court "moved on to" was to request the foreperson to hand the verdict forms to the bailiff. At this

request, the foreperson immediately handed "the verdict forms" to the bailiff, without comment or reference that the forms were, in contemplation of the jury, something else like a lunch order, a request for a recess, or a question about the evidence. True, what was omitted after the "Yes, sir" is any formalism like "This, the verdict of the jury to which Your Honor refers, I present as the foreperson." Yet, no less clear from the context is the foreperson's oral acknowledgment that the jury reached the verdict in the verdict forms.

We cannot conceive any other reasonable interpretation of the record. Significantly, it was the *foreperson* who gave the verdict forms to the bailiff in open court as instructed by the court. This is not an instance leaving open possibilities of mistake or something sinister, as where the bailiff or the clerk arrives with an envelope of unknown source containing purported verdict forms. The "verdict forms" the foreperson had in open court, recognized by the judge as such, were the verdict forms the foreperson gave to the bailiff, the verdict forms the court handed to the clerk with instructions to read in the presence of the entire jury, and the verdict forms so read and entered. These "other matters" referred to by the Court of Appeal seem quite dispositive of the actual assent of the jury to its verdict. Again, the opinion by the Court of Appeal does not venture even bare speculation of any conceivable interpretation of the record otherwise.

Respondent submits that the "Yes, sir" was a reasonably clear acknowledgment by the foreperson and an oral assent that the jury reached a verdict as the court stated. In any event, the combination of the court's stating its understanding the jury reached a verdict, its asking the foreperson to identify himself, the foreperson's complying, the court's asking the foreperson to hand the verdict forms to the bailiff, the foreperson's complying again without further qualification or comment, and the clerk's reading the verdict in the presence of the jury and the parties

amounted to substantial compliance with section 1149's requirement of an acknowledgment by the foreperson that the jury had reached its verdict. If this case does not demonstrate *explicit* assent by the foreperson on behalf of the jury to the verdict as the Court of Appeal held, the record nevertheless reveals an acknowledgment, in substance, that the jury had reached the verdict. That is sufficient under state law. (Cf. *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173-174 [as to advising defendants pleading guilty of immigration consequences, this Court in *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 208, implicitly recognized that substantial, not literal, compliance with section 1016.5 is sufficient].) The strongest evidence for that conclusion beyond the record is the Court of Appeal's own subsequent holding that the verdict was complete for purposes even of the double jeopardy clause.

Since a sufficient acknowledgment of the verdict appears, section 1149 did not further require the court to have the jury "declare the same." The statute provides that "if the foreman answers in the affirmative, they [the jury] must, *on being required*, declare the same." (Emphasis added.) Courts have recognized that this refers to polling of the jury. "In *People v. Wiley* (1931) 111 Cal.App. 622, the court said at page 625: 'The authenticity of the verdict is ascertained by requiring it to be orally declared in open court by the foreman. If demanded by either party, the verdict must be declared by each member of the jury as provided by section 1149 of the Penal Code. This is what is commonly termed polling the jury." (*People v. Mestas* (1967) 253 Cal.App.2d 780, 786.)

"The polling of the jury is a right available only upon the request of either party. (Pen. Code, §1163.) A failure to make a proper request imposes no burden upon the court to poll the jury, nor in the absence of such request does a failure to so poll constitute a denial of a constitutional right." (*People v. Lessard* (1962) 58 Cal.2d 447, 452; see *People v.*

Mestas, *supra*, 253 Cal.App.2d at p. 786.) Even "[w]here a jury is incompletely polled and no request is made for correcting the error, such further polling may be deemed waived by defendant, who cannot sit idly by and then claim error on appeal when the inadvertence could have readily been corrected upon his merely directing the attention of the court thereto." (*Lessard* at p. 452.) Thus, only on request of a party is the jury is required to "declare the same." No such request was made.

Because the record shows at least substantial compliance with the statutory requirements on the return of the verdicts, the Court of Appeal erred in concluding that the verdict was defective and invalid.[4]

B. Any Error Was Not Structural, But Forfeited by Appellant's Failure to Object and Harmless

Even if the trial court erred in not explicitly asking the foreperson to acknowledge the verdicts, any defect in the taking of the verdict was

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[4] Penal Code section 1163 provides that "the jury *may* be polled, *at the request of either party*," and Penal Code section 1164 provides that when the "verdict given is receivable by the court, the clerk shall record it in full upon the minutes, and *if requested by any party* shall read it to the jury, and inquire of them whether it is their verdict." (Emphasis added.) Nothing in either statute requires the trial court, without request, to inquire of the jurors whether it is their verdict or to individually poll jurors, Neither of those statutes require the parties to be informed of their rights under the sections.

Defense counsel presumably was aware that a poll could be sought. However, there was no apparent reason to seek one. There was no confusion in the verdicts as read by the clerk. As the Court of Appeal acknowledged, and the statement of facts shows, the evidence of appellant's guilt in this case was "ample if not overwhelming," and nothing indicated any of the jurors disagreed with the verdict. (Typed opn. at pp. 7, 9; see *People v. Coddington* (2000) 23 Cal.4th 529, 656, disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [no ineffective assistance of counsel for failing to ask for jury polling as "the record does not reflect that any of the dangers polling seeks to avoid actually occurred."].)

forfeited by appellant's failure to object and was neither structural nor prejudicial.

1. Forfeiture

Appellant has forfeited the claim presented here by failing to object below. She did not request the jury be asked if it had reached a verdict before the reading. Nor did defense counsel request the jurors declare if the verdicts, as read, were theirs. The defense did not request polling of the jury. Nor did the defense object to the recording of the verdicts, or to the discharge of the jury. Ample time existed in which to object, thus avoiding any error.

In *People v. Saunders* (1993) 5 Cal.4th 580, 591-592, this Court rejected the defendant's claim that he was denied his statutory right to a determination of alleged prior convictions by the same jury that determined his guilt as required by Penal Code section 1025, subdivision (b) ("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" if not a guilty plea or if the defendant has not waived jury trial) and section 1164, subdivision (b) (no jury shall be discharged until the court has verified that the jury has verified on the record it has reached a verdict or declared its inability to reach a verdict on all issues, including the truth of any alleged prior conviction). The Court explained: "An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppels or waiver . . . . Often, however, the 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 p. 590.)

In *People v. Lessard*, 58 Cal.2d at page 452, this Court found that where the jury is incompletely polled and no request is made for correcting the error, "such further polling may be deemed waived by defendant, who cannot sit idly by and then claim error on appeal when the inadvertence could have readily been corrected upon his merely directing the attention of the court thereto." (See also *People v. Wright* (1990) 52 Cal.3d 367, 415, [failure to individually poll one of the 12 jurors was waived by failure to object], disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Similarly, defects in verdict forms are deemed waived if not raised in the trial court. (See *People v. Toro* (1989) 47 Cal.3d 966, 976, fn. 6, disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; *People v. Webster* (1991) 54 Cal.3d 411, 446 [defendant's complaint on appeal that the verdicts finding him guilty of murder "were neither general nor special, and were unauthorized" was waived by defendant's failure to object or seek corrective measures below]; *People v. Lewis* (1983) 147 Cal.App.3d 1135, 1142; *People v. Radil* (1977) 76 Cal.App.3d 702, 710 [when there is unmistakable intent to convict, a defect in the form of the verdict is disregarded as immaterial absent objection by the defendant in the trial court.].)

2. The error identified by the Court of Appeal is not reversible per se and was harmless

Article VI, section 13, of the California Constitution provides that "[n]o judgment shall be set aside, or new trial granted, in any cause, . . .for any error as to any matter of procedure, unless, after an examination of the entire cause . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Penal Code section 1404 provides: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Penal Code section 1258 requires: "After hearing the appeal, the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties."

a. Structural error

Structural error "def[ies] analysis by 'harmless error' standards." (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 309; see *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-281 [structural error is error with consequences that are necessarily unquantifiable and indeterminate; an erroneous definition of "beyond a reasonable doubt" allows reviewing court only to speculate what a reasonable jury would have done]; *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150 [deprivation of constitutional right to counsel of choice results in "consequences that are necessarily unquantifiable and indeterminate. . . ."].) This Court has explained: A structural defect is the type of error "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," one that "'transcends the criminal process'" and "def[ies] analysis by 'harmless-error' standards." (*People v. Marshall* (1996) 13 Cal.4th 799, 851, quoting *Arizona v. Fulminante*, *supra*, 499 U.S. at p. 309-311.)

"[I]t is the rare case in which [even] a constitutional violation will not be subject to harmless error analysis." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 282 (conc. opn. of Rehnquist, C.J.).) Even an omitted or erroneous instruction on an element of the offense is subject to harmless error analysis. (*Neder v. United States* (1999) 527 U.S. 1, 8-15, 19; *People v. Flood* (1998) 18 Cal.4th 470, 502-503, 506.) *Washington v. Recuenco*

(2006) 548 U.S. 212, 218 reiterated, "Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal."[5]

The Supreme Court addressed the basic underpinning of the harmless error doctrine as applied to constitutional error in these terms:

> In *Chapman v. California*, 386 U.S. 18 (1967), this Court rejected the argument that errors of constitutional dimension necessarily require reversal of criminal convictions. And since *Chapman*, "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." That principle has been applied to a wide variety of constitutional errors. Our application of harmless-error analysis in these cases has not reflected a denigration of the constitutional rights involved.

(*Rose v. Clark*, *supra*, 478 U.S. at pp. 576-577, citations omitted.)

The Supreme Court recognizes that "some errors necessarily render a trial fundamentally unfair. The state of course must provide a trial before an impartial judge, with counsel to help the accused defend against the State's charge. Without these basic protections, 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." (*Rose v. Clark*, *supra*, 478 U.S. at pp. 577-578, citations omitted.) However, the errors to which harmless error analysis does not apply

> are the exception and not the rule. [Citation.] Accordingly, if the defendant had counsel and was tried by an impartial

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[5] A footnote in *Recuenco* cites these rare instances: *Gideon v. Wainwright* (1963) 372 U.S. 335 (complete denial of counsel); *Tumey v. Ohio* (1927) 273 U.S. 510 (biased trial judge); *Vasquez v. Hillery* (1986) 474 U.S. 254 (racial discrimination in selection of grand jury); *McKaskle v. Wiggins* (1984) 465 U.S. 168 (denial of self-representation at trial); *Waller v. Georgia* (1984) 467 U.S. 39 (denial of public trial); and *Sullivan v. Louisiana*, *supra*, 508 U.S. 275 (defective reasonable doubt instruction). (*Washington v. Recuenco*, 548 U.S. at p. 218, fn. 2.)

> adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one."

(*Id.* at pp. 578-579.)

b. The error identified by the Court of Appeal is not structural error and was harmless

"A defendant in a criminal prosecution has a right to a trial by jury under both the federal Constitution (*Duncan v. Louisiana* (1968) 391 U.S. 145) and our state Constitution (Cal. Const., art. I, §16). (See also Pen. Code §§689, 1042.)" (*People v. Ernst* (1994) 8 Cal.4th 441, 444-445.) "In a criminal case in California, the jury verdict must be unanimous. (*People v. Collins* (1976) 17 Cal.3d 687, 693; see Cal. Const., art. I, §16 [stating that 'in a civil cause three-fourths of the jury may render a verdict' and thereby implying that in a criminal cause, only a unanimous jury may render a verdict].)" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

In *People v. Ernst*, *supra*, 8 Cal.4th 441, this Court held that because the case was tried to the court without an express waiver by defendant of the right to jury trial, defendant was denied his right to trial by jury. (*Id.* at p. 445, 448.) This Court found this complete denial of jury trial a structural error: "It long has been established that the denial of the right to a jury trial constitutes a '"structural defect[]" in the judicial proceedings' that by its nature, results in such a 'miscarriage of justice." (*Id.* at p. 449.)

In *Ernst*, there was a total deprivation of the right to a jury. Here appellant was tried by a jury. The jury remained intact throughout the proceeding. After the jury had been deliberating, the trial court

specifically stated that the jury indicated it reached a verdict, had the *entire* jury brought into the court room, addressed the jury, stating it understood they reached a verdict and asking for the foreperson, then directed the foreperson to give the verdict forms to the bailiff. The verdicts were then given to the clerk, who read them in open court in the presence of all 12 jurors, as well as appellant and her attorney. None of the jurors indicated at any time they had not reached a verdict or that the verdicts read in court were not their verdicts, and there was no request for polling. There is nothing in the record to show that the verdicts were otherwise incomplete, inconsistent, or defective. Under such circumstances, any technical violation of statute governing the return of the verdict is no more than procedural state trial error, subject to harmless error analysis. It is not the rare total deprivation of a constitutional right constituting structural error. (Compare *Gideon v. Wainwright*, *supra*, 372 U.S. 335 [complete denial of counsel structural] and *United States v. Gonzalez-Lopez*, *supra*, 548 U.S. 140 [complete denial of counsel of choice structural error] with *Strickland v. Washington* (1984) 466 U.S. 668, 687-690 [to reverse on the ground that defendant was deprived of effective assistance of counsel, defendant has the burden to establish prejudice as well as incompetence of counsel].)

The Court of Appeal found the error could not be assessed for harmlessness because "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." (Typed opn. at p. 7.) The Court's analysis is based on conjecture and speculation, not a reasonable examination of the record. Here, after the court addressed the jury, stating it understood they reached a verdict, it asked the foreperson to hand the verdicts forms to the bailiff. The clerk read the verdict forms received from the foreperson in the

presence of all the jurors, including the foreperson, and all parties. The Court of Appeal acknowledged "there is nothing in the record to suggest that the jurors did not agree with the verdict when read . . . ." (Typed opn. at p. 7.) Under these circumstances, there is no reasonable basis to suggest that the foreperson would not have acknowledged the verdicts if explicitly asked.

The Court of Appeal said it did not know if polling would have been requested. While polling the jurors is a prophylactic protection of the constitutional right to a unanimous verdict, polling itself is a statutory right and only operative upon request of a party. Nothing in the statutes requires the trial court to ask the parties, on the record, if they wish the jury to be polled. As this Court has recognized, "[t]he polling of the jury is a right available only upon the request of either party . . . A failure to make a proper request imposes no burden upon the court to poll the jury, nor in the absence of such a request does a failure to so poll constitute a denial of a constitutional right." (*People v. Lessard*, *supra*, 58 Cal.2d at p. 452; see *People v. Masajo* (1996) 41 Cal.App.4th 1335, 1340 [noting that even under federal law, the right to poll the jury is not of constitutional dimension, and finding harmless the failure of the trial court to individually poll the jurors upon request rather than asking for a show of hands]; see also Pen. Code, §1163 ["When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either party. . ."].)

Neither defense counsel nor the prosecutor requested that the jury be polled. The record shows no inadequacy of counsel as nothing exists to suggest any juror would have disavowed the verdict. Again, the Court of Appeal recognized 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.) All the jurors were present when the verdicts were

read in open court. None of the jurors said or did anything that would indicate that the verdict forms read was anything other than its unanimous verdict.[6]

The cases cited by the Court of Appeal to support its decision are distinguishable. Each involved defects, mistakes, or inconsistencies in the verdicts themselves, or the absence of a juror or party, none of which was present here.

People v. Thornton (1984) 155 Cal.App.3d 845, and *People v. Hendricks* (1987) 43 Cal.3d 584 addressed the power of the trial court to reconvene juries that had been dismissed in order to rectify mistakes. In *Thornton*, the clerk read the verdict form finding defendant not guilty of the charged offense. After the jury affirmed this verdict, the verdict was recorded and the jury dismissed. It was later discovered that the jury had signed a second verdict form finding defendant guilty of the lesser included offense. Because it went unnoticed, the verdict was not read, acknowledged, or recorded before the jury was dismissed. Over objection by the defendant, the trial court reconvened the excused jury the next day to read and record the verdict on the lesser included offense. *Thornton* held that once a complete verdict has been rendered[7] and the jurors discharged, the trial court has no jurisdiction to reconvene the jury. The court held that if a complete verdict has not been rendered or if the verdict is otherwise irregular, jurisdiction to reconvene the jury depends on whether the jury has left the court's control. If it has, there is no jurisdiction to reconvene the

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[6] The jury had been properly instructed that their verdict on each count and special allegation had to be unanimous. (2 RT 376.) It is presumed that the jury follows the court's instructions. (*People v. Gonzales* (2011) 52 Cal.4th 254, 292.) Indeed, there is nothing in the record to show otherwise.

[7] The court defined a "complete" verdict as one taken in accordance with Penal Code sections 1149 and 1164. (*Id.* at p. 856.)

jury, and if it has not, the jury may be reconvened. (*Id.* at p. 855.) Because the not guilty verdict read in court was "complete" and because the jury had been dismissed and "sent back to the outside world," *Thornton* concluded that the trial court lacked jurisdiction to reconvene the dismissed jury and held the proceeding in which the guilty verdict was read, acknowledged, and recorded to be a nullity. (*Id.* at pp. 855-856.)

The court in *Thornton* acknowledged this Court's holdings that nonprejudicial departures from statutory procedures do not require the rejection of a defective verdict. (See *People v. Gilbert* (1880) 57 Cal. 96, *People v. Smith* (1881) 59 Cal. 601, *People v. Smalling* (1892) 94 Cal. 112). *Thornton* distinguished those decisions as cases in which the verdicts were read, recorded, and acknowledged. (*Thornton*, *supra*, 155 Cal.App.3d at p. 857.) In *Thornton*, the guilty verdict was not only unacknowledged, it was *unknown*. Because the clerk read only a not guilty verdict, neither party knew the jury rendered still another verdict. Therefore, there was no opportunity to make a request for the jury to be polled on the lesser offense. More importantly, the appellate court could not consider the subsequent acknowledgment of the guilty verdict by the reconstituted jury, since it had been discharged in the interim, depriving the trial court of jurisdiction over the jurors themselves. There can be no acknowledgment of any jury verdict when no jury exists.[8]

Here, unlike *Thornton*, all verdicts and findings given to the court by the foreperson were read in open court in the presence of all jurors and parties, including appellant and defense counsel. Thus, unlike *Thornton*,

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[8] *Thornton* found the error "reversible per se." (*Thornton*, 155 Cal.App.3d at pp. 859-860.) Whether or not the error in *Thornton* was structural, reversible per se error need not be addressed here, as the circumstances in *Thornton* were completely distinguishable from the instant case, as discussed below.

counsel had the opportunity to request that the jury further acknowledge the verdict and be polled, but counsel did not do so, and did not object to the jury being discharged after the verdicts were read.

The jurors themselves in *Thornton* did not say anything about the missing guilty verdict when the not guilty verdict was read. There was no juror error, since "[j]urors 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 the appellant's jury knew, the reading of but one verdict form was all that was necessary." (*Thornton*, 155 Cal.App.3d at p. 852.) Unlike the instant case, in *Thornton* the jurors had no reason to say anything about an unread verdict—they would not have the *legal* knowledge of the *procedures* required when verdicts are received, and they could have believed only not guilty verdicts are read in court. However, jurors are aware of a *factual* mistake in a verdict that is read aloud, e.g., if they voted not guilty but the verdict read in court was guilty, or vice versa—and reasonably could be expected to speak up. (Cf. *People v. Guiton* (1992) 4 Cal.4th 1116, 1119 [jury "fully equipped to detect" factual inadequacy, but not legal inadequacy]; *Griffin v. United States* (1991) 502 U.S. 46, 59-60 [distinguishing mistake of law and mistake of fact].)

Accordingly, *Thornton* is inapposite.

People v. Hendricks (1987) 43 Cal.3d 584, a special circumstance murder case, also addressed the jurisdiction of the court to reconvene a jury. There, the jury found defendant guilty of special circumstance

murder, and set the penalty at death. At sentencing, the parties reminded the court that a sanity hearing had not been conducted after the guilt phase, as required by statute. Over defendant's objection, the court reconvened a new jury to decide sanity. That jury deadlocked and a mistrial was declared. The trial court, over defendant's objection, then reconvened the original guilt phase jurors, who had been discharged five months earlier, for a new sanity hearing. This Court reversed, agreeing with *Thornton* that "once the court loses control over the jurors, it is without jurisdiction to call them together again." (*Id.* at p. 597.)

Hendricks and *Thornton* are not controlling here and for the same reason. The basic error in those cases was proceeding with a reconstituted jury after discharge, not defective statutory procedures on the return of a verdict. Unlike in *Hendricks* and *Thornton*, the verdict here was read in open court in the presence of all jurors when the verdict was returned. The "court did not discharge the jury before it reached a verdict, and defendant was not deprived of a verdict from his chosen jury. Rather, that jury deliberated and rendered a verdict, which was read and entered." (Typed opn. at p. 9.)

The Court of Appeal cited several cases for the proposition that only the oral declaration of the jurors endorsing the verdict is the true return of the verdict. However, these cases involve inconsistencies or anomalies between the written and oral verdicts. In *People v. Lankford* (1976) 55 Cal.App.3d 203 (disapproved on another ground in *People v. Collins* (1976) 17 Cal.3d 687, 694), the verdict was signed and dated before one of the original jurors had been replaced by an alternate. However, the verdict was orally acknowledged in court by the eleven original jurors and the alternate. In that context, the Court of Appeal stated that the "oral declaration of the jurors endorsing the result is the true return of the verdict." (*Id.* at p. 211.)

In *People v. Mestas*, *supra*, 253 Cal.App.2d 780, the jury signed and dated verdict forms purporting to find the defendant both guilty and not guilty of the offense. The *Mestas* court found the trial court did not err in immediately sending the jury back for further deliberations, and allowing them to return and acknowledge only the guilty verdict. It was in this context that the *Mestas* court stated that the oral declaration by the jurors unanimously endorsing a given result is the true return of the verdict. (*Id.* at p. 786.)

In *Stalcup v. Superior Court* (1972) 24 Cal.App.3d 932, disapproved on other grounds in *People v. Dixon* (1979) 24 Cal.3d 43, 53, the jury foreman told the court that the jury was unanimous that defendant committed murder, but they could not agree on degree. (*Id.* 934.) The trial court declared a mistrial and set a new trial, but the Court of Appeal granted defendant's petition for writ of prohibition. Citing *Mestas*, the court stated that the "oral declaration by the jurors, unanimously endorsing a given result is the true 'return of the verdict' prior to the recording thereof.'" (*Id.* at p. 936.) The court held that when the foreman answered in the affirmative and declared a unanimous verdict of murder, and defendant accepted the verdict without asking for polling, the verdict was complete. The jury's failure to fix the degree of the verdict triggered Penal Code section 1157, requiring that the degree be fixed at the lesser degree. (*Id.* at pp. 936-937.)

In *People v. Traugott* (2010) 184 Cal.App.4th 492, 500, one of the 12 jurors was absent when the verdicts were read. The court found reversible error, stating that Penal Code section 1147 specifically provides that if all jurors do not appear after the jury agrees on a verdict, "the rest must be discharged without giving a verdict" and the action may be again tried. It further found that a stipulation to a trial by a jury of fewer than 12 persons requires a personal waiver. Defendant "never expressly waived her right to

a unanimous verdict of 12 jurors or consented to fewer jurors than the constitutional minimum." (*Id.* at pp. 501-502.)[9] *Traugott* is also inapposite. Appellant and all 12 jurors were present when the court stated its understanding the jury had reached a verdict, the foreperson handed the verdict forms to the court to be read, and the clerk read the verdicts.[10]

The errors in the cited cases that caused reversal are not present here. All jurors and parties were present at the time the verdicts were returned. The jury rendered verdicts and findings on all counts and special allegations. There was no inconsistency or duplication of verdicts on any count. Instead, there was at most a technical violation of a state statute—a failure to obtain the foreperson's explicit acknowledgment of the verdicts. This was not prejudicial. It is like the failure to call juror names in *People v. Redundo*, *supra*, 44 Cal. 538, or the discharge of the jury before recording the verdicts in *People v. Gilbert*, *supra*, 57 Cal. 96; *People v. Smith*, *supra*, 59 Cal. 601, and *People v. Smalling*, *supra*, 94 Cal. 112. (Cf. *People v. Epps* (2001) 25 Cal.4th 19, 29 [court need not consider the dual federal harmless error standards because the right to jury trial on prior conviction allegations is purely a creature of state statutory law; because the error was purely one of state law, the state harmless error test applies]; *People v. Bolin* (1998) 18 Cal.4th 297, 331 ["technical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense

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[9] A further complication in *Traugott* was that defendant was absent from the proceeding when the verdicts were read. (*Id.* at pp. 498-499.)

[10] In *People v. Wright*, *supra*, 52 Cal.3d 367, 415, this Court found that the failure to individually poll one of the 12 jurors was waived by failure to object. In *People v. Lessard*, *supra*, 58 Cal.2d at p. 452, this Court found that even when a jury is incompletely polled, where no request is made to correct the error, such further polling may be deemed waived by defendant. Whether *Traugott* is inconsistent with these cases need not be addressed here where all 12 jurors were present and no party requested polling.

within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice"].)

The trial court stated in the presence of the parties that the jury indicated they had reached a verdict. It had *all* jurors brought into the courtroom. It addressed the jurors collectively stating it understood they reached a verdict, sought the jury foreperson, asked the foreperson to hand in those verdicts, and had the verdicts which the foreperson handed in read in open court in the presence of all jurors and parties. No party objected to any of the proceedings or made any requests for additional proceedings. On this record, any error by the court in not explicitly asking the foreman or jury after the verdicts were read to affirm it was their verdict was harmless.

CONCLUSION

Accordingly, respondent respectfully requests that the Court of Appeal's decision reversing the judgment be reversed.

Dated: September 28, 2011

Respectfully submitted,

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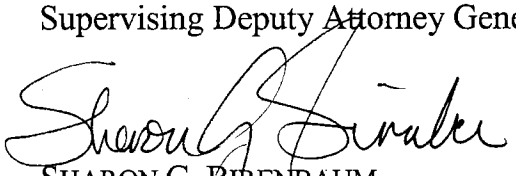

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 9,421 words.

Dated: September 28, 2011

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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 September 28, 2011, I served the attached **OPENING 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:

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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 September 28, 2011, at San Francisco, California.

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Declarant

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Signature