IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Appellant,

v.

KHRISTINE ELAINE EROSHEVICH et al.,

Defendant and Respondents.

No. S210545

(Second District Court of Appeal No. B231411

Los Angeles Superior Court No. BA353907)

OPENING BRIEF ON THE MERITS

From the Los Angeles County Superior Court
Honorable Robert Perry, Judge Presiding

Respectfully submitted,
JACKIE LACEY
District Attorney of
Los Angeles County

IRENE T. WAKABAYASHI
State Bar No. 132848
Head Deputy District Attorney

SHIRLEY S. SUN
State Bar No. 112803

NATASHA COOPER
State Bar No. 126396

GILBERT WRIGHT
State Bar No. 141529

PHYLLIS C. ASAYAMA
State Bar No. 88919

SERENA R. MURILLO
State Bar No. 185297

Deputy District Attorneys
Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012

Telephone: (213) 974-5911
Direct Line: (213) 893-0632

Attorneys for Plaintiff and Appellant

TOPICAL INDEX

TABLE OF AUTHORITIES

CODES AND STATUTES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. KHRISTINE ELAINE EROSHEVICH, et al., Defendants and Respondents.	) **No. S210545**)) (Court of Appeal,) Second Appellate) District Five - No.) B231411))) **OPENING BRIEF**) **ON THE MERITS**)

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, the People of the State of California, by and through their attorney, Jackie Lacey, District Attorney for Los Angeles County, hereby request that this court reverse a portion of the opinion published by the Second Appellate District, Division Five, which issued an order authorizing the trial court to dismiss and thereby acquit respondents pursuant to a Penal Code[1] section 1181 motion on grounds of double jeopardy.

ISSUES PRESENTED FOR REVIEW

1) If a Court of Appeal reverses a trial court's ruling that the prosecution's evidence was insufficient as a matter of law pursuant to sections 1181 and 1385, upon reinstatement of the verdict, is the defendant barred from thereafter waiving jeopardy in order to have his motion for new

1. Unless otherwise indicated, all other statutory references are to the Penal Code.

trial heard by the trial court pursuant to section 1181? Or, as Justice Mosk suggests in his dissent, is it only the People, not the defendant, who are barred from requesting retrial?

2) May the Court of Appeal depart from the three statutorily authorized remedies available to a trial court pursuant to section 1181, namely granting a new trial, denying the motion, or modifying the verdict, in order to allow a trial court to dismiss and acquit a defendant pursuant to that motion?

INTRODUCTION

In its March 28, 2013 opinion, the court of appeal relied heavily upon *Hudson v. Louisiana* (1981) 450 U.S 40 [101 S. Ct. 970, 67 L.Ed.2d 30] (hereafter *Hudson*), for the proposition that even during a motion for new trial, the content of a trial court's ruling can have the effect of acquittal if that trial court applies the substantial evidence standard in ruling that there is insufficient evidence to support a jury's verdict. (Slip Opinion (hereafter Slip Opn.), at p. 30.) In the case at bar, the People agree that as to Defendant Stern, (hereafter Stern), the trial court applied the substantial evidence test - either pursuant to section 1181 or 1385 - and entered an acquittal.

At issue is the remedy that may be imposed once a legal acquittal, based upon an erroneous application of the substantial evidence standard, is reversed. It is the People's position that due to the double jeopardy effect of said acquittal, the only remedy which may now be imposed is reinstatement of the jury's verdict.

Although the Court of Appeal has correctly relied upon *Hudson* to define when the *content* of a trial court's ruling will be tantamount to an acquittal, it has also illogically relied upon that same

precedent to dictate what *remedy* may be imposed when the trial court's post-conviction acquittal is *reversed*. Further, because the acquittal may have been entered during a new trial motion, like *Hudson*, the Court of Appeal has for the first time and in contravention of established state and federal authority stretched the bounds of *Hudson* by relying upon it to modify the three remedies available pursuant to section 1181 within this state.

The application of *Hudson* in this manner -- for the purpose of crafting a remedy for erroneous acquittals entered by trial courts during a section 1181 motion -- muddies the waters in an already turbid area of law which this Court has made great strides in clarifying since the United States Supreme Court's opinion in *United States v. Burks* (1978) 437 U.S. 1 [98 S. Ct. 2146, 57 L.Ed.2d 1] (hereafter *Burks*.) Furthermore, the Court of Appeal's application of *Hudson* for this purpose creates a new and untenable procedural outcome for a perfectly predictable scenario -- that which occurs when a trial court combines motions pursuant to sections 1181 and 1385 -- and does not apply the correct standard of review.

Using *Hudson* to hold that double jeopardy grounds may bar retrial upon a grant of new trial pursuant to section 1181 misleads trial courts into ruling that anytime they use the words "legal insufficiency" in connection with that motion, a new trial is simultaneously granted and yet barred by Double Jeopardy. Thus, motions for new trial pursuant to section 1181 are transformed into section 1385 acquittals upon the trial court's utterance of the words "legal insufficiency" – regardless of whether the trial court meant "lack of credible evidence," pursuant section 1181 as opposed to a "lack of sufficient evidence," pursuant to an application of the substantial evidence standard during a section 1385 hearing.

This reverses traction this court has gained in clarifying the methods, reasons, standards of review and remedies which must be employed and adhered to by trial courts in order for them to unambiguously grant either motion. (*Porter* v. *Superior Court* (2009) 47 Cal.4th 125; *People v. Serrato* (1973) 9 Cal.3d 753; People v. *Hatch* (2000) 22 Cal.4th 260; *People v. Watkins* (2012) 55 Cal.4th 999; *People v. Lagunas* (1994) 8 Cal.4th 1030; *People v. Trevino* (1985) 39 Cal.3d 667.)

Furthermore, this application of *Hudson*, whose rationale was based upon its predecessor, *Burks*, contravenes the Court of Appeal's holding in *People v. Veitch* (1979) 89 Cal.App.3d 722, review denied, April 26, 1979, wherein that court succinctly and clearly applied the *Burks* rationale within the prescribed function of each motion pursuant to both section 1181 and 1385 and stated, "[t]he function of the court, ruling on a motion for new trial is to grant a new trial if it finds the evidence insufficient. A court reviewing the verdict under section 1181 has no authority to acquit the defendant expressly, impliedly, or inadvertently." (*People v. Veitch, supra*, 89 Cal.App.3d at p. 727, citing *People v. Serrato, supra*, 9 Cal.3d at p. 762.)

In the case at bar, the people do not dispute that after both defendants were convicted, the trial court applied the substantial evidence test as to Defendant Stern and entered an acquittal on that basis. Neither do the People dispute the Court of Appeal's reversal of that acquittal and decision that substantial evidence supported the jury's verdict against Defendant Stern.

The trial court's post-conviction ruling as to Defendant Eroshevich (hereafter Eroshevich), stands in stark contrast, since the trial court never applied the substantial evidence test as to her 1385 order. The

People agree with the Court of Appeal's reversal of the trial court's 1385 order as to Eroshevich.

The issue here is one of remedy. The People maintain that the only outcome which does not offend the Double Jeopardy clause is reinstatement of the verdict as to both defendants.

However, the Court of Appeal has not only ordered that both Defendants be permitted to re-initiate their motions for new trial and acquittal, but has also egregiously modified the remedy available pursuant to a section 1181 motion by paradoxically inviting Defendant Stern to initiate a motion for new trial, where no new trial may be heard.

> [T]he trial court could grant the new trial motion after reweighing the evidence (acting as the so-called "13th juror") subject to the following double jeopardy analysis...[¶]...***But if the trial court grants Mr. Stern's new trial motion, the case against him must be dismissed on double jeopardy grounds.*** Mr. Stern may not be retried.

(Slip Op. at pp. 30, 33, *italics added.*)

If this court permits the Defendants to re-initiate their new trial motions, then they impliedly waive jeopardy, and retrial is not barred. Alternatively, if there is no waiver of jeopardy, then there cannot be a new trial and defendants have no basis for requesting the motion. *But there is no authority to support the Court of Appeal's order that double jeopardy requires Defendant Stern be permitted to request retrial when said outcome is barred.* Otherwise, the new trial motion proposed by the Court of Appeal permits Defendant Stern a second review of his case pursuant to a 13th Juror standard of review, where the only possible outcomes are denial of the motion, or constructive acquittal. As Justice Mosk stated in his dissent, it is the People who are barred from a retrial, not the defendant. (Slip Opn., dis.

opn. of Mosk, J.)

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

A

Facts Underlying the Jury's Guilty Verdict

The Court of Appeal thoroughly set forth the procedural history and facts of the case in its Slip Opinion. (Slip Opn. at pp. 3-21.) The People incorporate the procedural history and facts as stated by the Court of Appeal in the aforementioned pages, herein. The facts giving rise to the offenses charged against Defendants Stern and Eroshevich are not relevant to the issue raised in this petition as the People are not requesting review of the Court of Appeal's decision to reverse the trial court's finding of insufficiency of evidence as a matter of law.

B

Facts Underlying Appeal

After a jury trial, Defendants Stern and Eroshevich, were each convicted by jury of two felony counts: Count 1, Conspiracy to obtain controlled substances by fraud, deceit or misrepresentation or concealment of a material fact between September 11, 2006 and February 8, 2007;[2] and Count 3, Conspiracy to unlawfully give false names or addresses for prescriptions for controlled substances between June 5, 2004 and September

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2. Count 1 is a violation of Health and Safety Code section 11173, subdivision (a), which states, "No person shall obtain or attempt to obtain controlled substances, or procure or attempt to procure the administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a material

10, 2006.[3] (Slip. Opn. at pp. 3-4.) In addition, Defendant Eroshevich was convicted of two other felonies: Count 7, Obtaining controlled substances by fraud or misrepresentation in violation of Health and Safety Code section 11173, subdivision (a); and count 9, Giving a false name or address for a controlled substance prescription in violation of Health and Safety Code section 11174. (Slip Opn. at p. 4.)

On November 29, 2010, Defendant Stern, himself an attorney, filed a motion requesting the trial court dismiss counts 1 and 3 pursuant to section 1385. His motion alleged there was a lack of substantial evidence supporting the jury's finding that he lacked good faith to believe that his method of acquiring controlled substances for Vicki Lynn Marshall, also known as celebrity figure, Anna Nicole Smith, was legal. The motion also claimed that he was "selectively targeted" for prosecution in violation of his due process rights. On the same date, Defendant Stern also filed a new trial motion contending, in addition to the grounds argued in his invitation to dismiss, that a Deputy District Attorney committed prejudicial misconduct in argument to the jury, and that the trial court should reduce the two felony conspiracy verdicts to misdemeanors. (Slip Opn. at p. 5.)

On December 1, 2010, Defendant Eroshevich filed a single "omnibus request" for dismissal, new trial, or to reduce the felonies to misdemeanors. The basis for her request was based upon several

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(..continued)
fact."

3. Count 3 is a violation of Health and Safety Code section 11174, which states, "No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a controlled substance, give a false name or false address."

arguments. (Slip Opn. at pp. 5-6.) In addition, she argued that Count 9 was a lesser included offense of count 7. (*Ibid.*)

After making factual findings which were contrary to both the jury's verdict and the trial court's earlier denial of Defendant's mid-trial motion for acquittal pursuant to section 1118.1,[4] the trial court found as to Defendant Stern, "[T]here is [no] evidence in the record at all that Howard Stern lacked a good faith belief that the practice of obtaining prescription medicines for [Ms. Marshall] in names other than [her true name] could be against the law." (Slip Opn. at p. 7.) The trial court found Stern acted to protect Ms. Marshall's privacy, as had most of the doctors and hospitals that had dealt with her. The trial court concluded: "When I consider all the evidence, and even viewing it in a light most favorable to upholding the verdict, I find it is clearly insufficient. Under these circumstances, I find no reasonable trier of fact could find that Howard Stern had a specific intent to violate either of these target crimes ... and I do grant a motion for new trial to Mr. Stern on these [conspiracy] counts ...." (*Ibid.*) Immediately after granting Mr. Stern's new trial motion, the trial court stated: "[B]ut I'm going further. [¶] I find the evidence at trial was so lacking and insufficient to show a specific intent to join a conspiracy on the part of Howard Stern to commit these target crimes, that I do believe the interest of justice supports the dismissal of these counts as to Mr. Stern, and I so order. And this, of course, is under Penal Code section 1385...." (*Ibid.*)

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4. On September 29, 2010, the trial court denied the section 1118.1 motion as to Counts 1 and 3 after the defendant's case in chief, but before submitting the cause to the jury. (Reporter's Transcript 42, at pp. 12198-12199.)

The minute order prepared for Defendant Stern set forth the trial court's reasons for dismissing counts 1 and 3 as required by section 1385: "On the court's motion, counts 1 and 3 are dismissed due to insufficiency of the evidence. [¶] The court further clarifies that it is dismissing counts 1 and 3 in their entirety, which includes all hung target offenses, due to insufficiency of the evidence as a matter of law pursuant to Penal Code section 1385." (Slip Opn. at p. 7)

With respect to Defendant Eroshevich, the trial court turned to her motions and concluded: "I don't think there was an agreement between the two of them to violate the law, and ... I don't think the conspiracy counts can stand [as to Dr. Eroshevich], and so I dismiss those as well...." (Slip Opn. at p. 8.) The minutes concerning this finding stated, "The cause is argued and the court grants defense motion to dismiss counts 1 and 3 pursuant to ... section 1385 due to insufficiency of the evidence." (*Ibid.*) The court never considered Defendant Eroshevich's new trial motion. (*Id.* at p. 33.)

In its published opinion, the Court of Appeal concluded that the trial court erroneously granted Defendant Stern's motion for acquittal, finding that substantial evidence supported the jury's guilty verdicts. The Court of Appeal went on to outline the facts which supported this finding. (Slip Opn. at pp. 25-27.)

Similarly, the Court of Appeal reversed the dismissal order as to Defendant Eroshevich finding that the trial court was legally incorrect and thus, did not possess the discretion to dismiss counts 1 and 3. (Slip Opn. at p. 34.)

After reversing the dismissal order as to Defendant Stern, the Court of Appeal went on to state that in accord with the prosecution's

argument, Mr. Stern's verdicts must be reinstated. (Slip Opn. at p. 30.)

Conversely, with regard to Defendant Eroshevich, no mention was made of reinstatement of the verdict. Instead, the Court of Appeal held that the trial court "may decide to grant Dr. Eroshevich's new trial motion as to counts 1 and 3. Or the trial court may decide to dismiss counts 1 and 3 on other grounds. We express no opinion on how the trial court should exercise its discretion." (Slip Opn. at p. 34.)

With regard to Defendant Stern, the Court of Appeal went beyond simply reinstating the verdict to dictating what may occur upon issuance of a remittitur. (Slip Opn. at pp. 30-33.) The Court of Appeal stated that after the verdict is reinstated, "there are a series of hurdles that must be overcome." (*Id.* at p. 30.) Despite the fact that the trial court "granted" Defendant Stern's new trial motion for insufficiency of the evidence, the Court of Appeal highlighted the fact that there were issues raised in the new trial motion that were never ruled upon. (*Ibid.*) The Court of Appeal pointed out that the trial court ruled that the evidence was insufficient as a matter of law, but that "[n]o effort was made to rule on these other matters nor was there any reason to do so given the dismissal order and the new trial motion evidentiary insufficiency finding." (*Ibid.*)

Because the trial court did not rule on these other grounds, the Court of Appeal outlined four post-remittitur options:

> [T]he trial court could deny the new trial motion and sentence Mr. Stern to prison, place him on probation or reduce the two conspiracy counts to misdemeanors. Or the trial court could deny the new trial motion but dismiss the case pursuant to section 1385 on some ground other than evidentiary insufficiency as a matter of law. ***Or the trial court could grant the new trial motion after reweighing the evidence (acting as the so-called "13th juror") subject to the following double jeopardy analysis.*** Or the trial court could

dismiss counts 1 and 3 on other than legal insufficiency grounds.

(Slip Opn. at p. 30, *italics added.*)

Despite the Court of Appeal's invitation to reweigh the evidence as a "13th juror," as described earlier, the court engaged in a lengthy analysis of *Hudson* and *Burks* in order to hold that due to the "double jeopardy effect" of the trial court's finding of legal insufficiency as a matter of law, that there can be no retrial. (Slip Opn. at p. 33.) Thus, "if the trial court grants Mr. Stern's new trial motion, the ***case against him must be dismissed*** on double jeopardy grounds. Mr. Stern may not be retried." (*Ibid.*)

SUMMARY OF ARGUMENT

It is well settled that the State is barred from retrying a defendant in two definitive scenarios: after acquittal by jury and following a trial court's grant of a defendant's *mid-trial* motion for acquittal.[5]

It is equally well settled that *after conviction*, the trial court may review the validity of the jury's decision pursuant to both Penal Code

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5. In *Evans v. Michigan* (2012) 568 U.S. at p. __ [133 S.Ct. 1069], the United States Supreme Court held that a midtrial acquittal on the merits is an acquittal for double jeopardy purposes. In California, midtrial motions for acquittal are heard pursuant to section 1118.1 which states, "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal...." Furthermore, pursuant to section 687, "[n]o person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted."

section 1181, utilizing the "13th Juror" standard of review[6], and section 1385, utilizing the "substantial evidence" standard of review.[7]

The granting of a new trial pursuant to section 1181 does not violate Federal and State Constitutional principles against successive prosecutions for the same offense because application for a second trial must, and can only, be made by the defendant himself.[8] Said application is thus construed as a waiver of jeopardy. (*Porter v. Superior Court*, *supra*, 47 Cal.4th at p. 136 (hereafter *Porter*) ["In filing a motion for new trial, petitioner impliedly waived any double jeopardy protections he might have had under state law, just as if he had consented to a mistrial."]; *United States v. Alvarez-Moreno* (9th Cir. 2011) 657 F.3d 896, 900 (hereafter *Alvarez-Moreno*) ["But a defendant who appeals and is found entitled to a new trial has waived his right to claim double jeopardy at the second trial. [Citation.] In other words, by appealing or collaterally attacking his conviction on the basis of legal error, the defendant is taken to have consented to being retried should he succeed."]; *United States v. Smith* (1947) 331 U.S. 469, 474 [67 S.Ct. 1330, 91 L.Ed. 1610] ["For it is such request which obviates any later objection the defendant might make on the ground of double jeopardy. [Citations.]"].) In fact, without the defendants'

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6. *People v. Veitch*, *supra*, 89 Cal.App.3d at pp. 827-828; *People v. Robarge* (1953) 41 Cal.2d 628.

7. *People v. Hatch*, *supra,* 22 Cal.4th at pp. 272-273 (hereafter *Hatch*).

8. "When a verdict has been rendered or a finding made against the defendant, the court may, *upon his application*, grant a new trial...." (§1181.) The same cannot be said of motions pursuant to section 1118.1 where "the court on motion of the defendant or on its own motion" may enter a judgment of acquittal, or section 1385 where "[t]he judge or magistrate may, either of his or her own motion or upon the application of

waiver, the *trial court* would violate the defendants' right against double jeopardy if it were to order a new trial on its own motion. (*Alvarez-Moreno*, *supra*, 657 F.3d at p. 901; *See also*, *Gonzalez v. Municipal Court* (1973) 32 Cal.App.3d 706, 712-713; *Mourmouris v. Superior Court* (1981) 115 Cal.App.3d 956, 962.)

Alternatively, for purposes of a "legal acquittal"[9] pursuant to section 1385, notions of jeopardy are not violated because *after a verdict*, reversal of the trial court's ruling would not result in a second trial, but rather reinstatement of the jury's verdict. (*People v. Salgado* (2001) 88 Cal.App.4th 5, 13 (hereafter *Salgado*), review denied July 25, 2001, ["But with the jury's guilty verdict in this case, a successful appeal will not require retrial."]; *United States v. Wilson* (1975) 420 U.S. 332, 344-345 (hereafter *Wilson*) [95 S.Ct. 1013, 43 L.Ed.2d 232] ["So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition."]; *Evans v. Michigan, supra*, 568 U.S. at p. __, fn. 9, [133 S. Ct. 1069] ["If a court grants a motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court's

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the prosecuting attorney" grant a motion to dismiss. (§§ 1118.1, 1385.)

9. As previously stated, "legal acquittal" will be used in reference to an acquittal entered by a trial court or court of appeal upon consideration of whether a jury's verdict was insufficient as a matter of law utilizing the substantial evidence standard wherein "the record must show that the court viewed the evidence in the light most favorable to the prosecution and concluded that no reasonable trier of fact could find guilt beyond a reasonable doubt." (*Hatch, supra*, 22 Cal. 4th at p. 273.) Furthermore, section 1385 states, "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." (§ 1385.)

acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial. [Citation omitted].")

Indeed, this is the very reason that section 1385 dismissals, *post-verdict*[10], are subject to appeal by the Government in the first instance. (*Wilson, supra*, 420 U.S. at pp. 344-345 ["Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution."]; *People v. Statum* (2002) 28 Cal.4th 682, 693.)

Here, after both defendants were convicted by jury of two felony counts, namely counts one and three, they each applied for a new trial pursuant to section 1181 and urged the trial court to acquit pursuant to section 1385. The trial court acquitted both defendants pursuant to section 1385 in abrupt rulings that blended both motions and only clearly entered a legal acquittal based upon the "substantial evidence standard"[11] as to Stern. In addition, the trial court granted Stern's motion for new trial by applying the substantial evidence standard of review in lieu of sitting as a "13th

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10. Compare *United States v. Martin Linen Supply Co.* (1977) 430 U.S.564 [97 S. Ct. 1349, 51 L. Ed. 2d 642] (hereafter *Martin-Linen*); *Sanabria v. United States* (1978) 437 U.S. 54 [98 S. Ct. 2170, 57 L. Ed. 2d 43]; *Smalis v. Pennsylvania* (1986) 476 U.S. 140 [106 S. Ct. 1745, 90 L. Ed. 2d 116]; *Smith v. Massachusetts* (2005) 543 U.S. 462 [125 S. Ct. 1129, 160 L. Ed. 2d 914]; *Fong Foo v. United States* (1962) 369 U.S. 141 [82 S. Ct. 671, 7 L. Ed. 2d 629]; *People v. Valenti* (1957) 49 Cal.2d 199, which pertain to *mid-trial* acquittals, *i.e.* before a jury's verdict, and are thus not subject to appeal by the Government.

11. This refers to the standard of review which must be employed by trial courts in considering whether a jury's verdict is insufficient as a matter of law wherein "the record must show that the court viewed the evidence in the light most favorable to the prosecution and concluded that no reasonable trier of fact could find guilt beyond a reasonable doubt." (*Hatch, supra*, 22 Cal. 4th at p. 273.)

Juror," and failed to address all grounds raised in the motion.

With regard to defendant Eroshevich, the trial court entered an acquittal without having applied the "substantial evidence standard," and failed to address her motion for new trial at all. Thus, no such restriction on her motion for new trial was mandated by the Court of Appeal due to the trial court's failure to have applied the substantial evidence test when it acquitted her pursuant to section 1385.[12]

As previously stated, the People have no quarrel with the Court of Appeal's unanimous opinion that substantial evidence supported the verdicts and that the trial court's decision must be reversed. (Slip Opn., at p. 22.)

However, with regard to the remedy outlined in the Court of Appeal's majority opinion[13] entitled, "Post-Remittitur Proceedings[14]," the

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12. In its opinion, the Court of Appeal clearly rejected the notion that retrial against Dr. Eroshevich would be barred on double jeopardy grounds. This was due to the trial court's failure to have applied the substantial evidence standard in acquitting her for legal insufficiency. "We reject any suggestion that Dr. Eroshevich's dismissal bars retrial on double jeopardy grounds...[¶]...Here, the trial court made no such express statement concerning the use of substantial evidence test when orally dismissing counts 1 and 3." (Slip Opn. at p. 33.)

13. Justice Mosk succinctly dissented from the majority's view on this issue. "I have difficulty with the majority's conclusion in Section IV. C. 3. The District Attorney cogently questions why, upon reinstatement of the verdict, Mr. Stern may not reinitiate his Penal Code section 1181 motion if he so chooses, and receive a new trial if the trial court grants the motion acting as a so-called "13th juror," or on other grounds applicable under that provision. By opting to move for a new trial, Mr. Stern would, in effect, waive his Double Jeopardy rights. [Citations Omitted] As the District Attorney suggests, the People are barred from retrial, not the defendant." (Slip Opn. dis. opn. of Mosk, J.)

14. In section IV, subdivision C, Part 3 of the Court of Appeal's

court goes *beyond reinstatement of the verdict* to insist that Stern may *move for a new trial, but may not be retried.* In fact, his successful section 1181 motion *would require dismissal and acquittal.* As Justice Mosk soundly noted in his dissent on this issue, "by opting to move for a new trial, [the defendant] would, in effect, waive his Double Jeopardy rights...the People are barred from a retrial, not the defendant." (Slip Opn., dis. opn. of Mosk, J.)

This court has itself made great strides in clarifying the methods, reasons, standard of review and remedies which must be employed and adhered to by trial courts in order for them to unambiguously grant either motion pursuant to sections 1181 or 1385. (*Porter*, *supra*, 47 Cal.4th 125; *Serrato*, *supra,* 9 Cal.3d 753, *Hatch*, *supra,* Cal.4th 260; *People v. Watkins* (2012) 55 Cal.4th 999; *People v. Lagunas* (1994) 8 Cal.4th 1030; *People v. Trevino* (1985) 39 Cal.3d 667.)

Because the Court of Appeal has reversed the trial court's finding of legal insufficiency pursuant to section 1385, considerations of fairness and judicial economy weigh heavily against allowing a defendant

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opinion entitled, "Post-remittitur proceedings," the majority outlined what the trial court may consider *after* reinstatement of the verdict.

> the trial court could grant the new trial motion after reweighing the evidence (acting as the so-called "13th juror") subject to the following double jeopardy analysis...[¶]...***But if the trial court grants Mr. Stern's new trial motion, the case against him must be dismissed on double jeopardy grounds***. Mr. Stern may not be retried.

(Slip Opn. at pp. 30, 33, *italics added.*)

to raise "interminable" new trial motions. (*Coombs v. Hibberd* (1872) 43 Cal.452, 453; *People v. Wisely* (1990) 224 Cal.App.3d 939, 948; *see also*, *People v. DeLouize* (2004) 32 Cal.4th 1223, 1228-1230.)[15] It has always been the position of the People that new trial motions and motions to dismiss pursuant to section 1385 should not be reconsidered on additional grounds.

However, of greater concern is that a majority of the Court of Appeal invites the trial court to engage in a pointless legal endeavor -- motion for new trial -- where the only remedy available in this case *is* the prohibited new trial.[16] To worsen matters, the reviewing court has held that if the trial court grants the new trial motion by applying a "13th Juror" analysis- the case must be dismissed. (Slip Opn. at pp. 30, 33.) This result unfairly subverts the People's proverbial "one bite at the apple," by eviscerating guilty verdicts supported by substantial evidence while allowing the Defendant to gain immunity from further prosecution for having successfully obtained an *earlier and erroneous* acquittal by the trial court.

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15. The propriety of allowing defendants to re-litigate their 1181 and 1385 motions pursuant to the Court of Appeal's opinion is not being challenged in this Appeal due to the clouded procedural history of this case, and in an effort to correct the greater legal issue pertaining to the remedy available pursuant to a section 1181 motion and the double jeopardy implications of retrial.

16. Pursuant to section 1181, the trial court may grant a new trial, modify the verdict, or deny the motion. It may not acquit the defendant. (Cal. Pen. Code, §1181; *Porter, supra,* 47 Cal.4th at p. 133; *People v. Serrato (1973)* 9 Cal.3d 753, 762 (hereafter, *Serrato*); *Veitch, supra*, 89 Cal.App.3d at pp. 726-727.) Here, based upon the charges, modification of the verdict is not available because there is no lesser degree, or lesser included offense. Thus, the court may only deny the motion or grant a new

The Court of Appeal has gone beyond the permissible scope of legal remedies available upon a post-verdict reversal of a legal acquittal. As will be argued in more detail, *post*, this Court should reverse the Court of Appeal's remedy so that if the Court of Appeal insists that the new trial motion be heard, either Stern impliedly waives jeopardy upon *his application* for retrial, or he doesn't. If he asks for retrial, there is no double jeopardy bar upon hearing his motion. If he doesn't move for a new trial, then the trial court has no basis for hearing it. But under no circumstances may double jeopardy bar retrial upon his motion for new trial.

ARGUMENT

I

REINSTATEMENT OF THE VERDICT IS THE ONLY REMEDY AVAILABLE FOLLOWING REVERSAL OF AN ERRONEOUS POST VERDICT ACQUITTAL

Evans v. Michigan (2013) 568 U.S. ___ [133 S.Ct. 1069] (hereafter *Evans*), includes a brief, but powerful footnote that sustains the heart of the People's position by meaningfully distinguishing the difference between two separate and distinct analytical frameworks: that which exists when an acquittal has been entered by a trial court *prior to a jury's verdict*, versus that which has been entered *after a jury's verdict*. Furthermore, and most importantly, the footnote serves to clarify the respective remedies available pursuant to each analysis, and whether the Double Jeopardy

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trial.

Clause of the State and Federal Constitutions bar retrial following certain acquittals.

In *Evans*, the high court considered whether a clearly erroneous legal ruling based upon insufficient evidence *entered midtrial* served to bar further proceedings based upon the Double Jeopardy clause. (*Evans, supra,* 568 U.S. at p. __ [133 S. Ct. at p. 1073].) The Court found that, "[t]here is no question that the trial court's ruling was wrong; it was predicated upon a clear misunderstanding of what facts the State needed to prove under State law." (*Id.* at p. 1075.) The high court went on to state that "*Martin Linen, Sanabria, Rumsey, Smalis and Smith* all instruct that an acquittal due to insufficient evidence precludes retrial, whether the court's evaluation of the evidence was correct or not." (*Id.* at pp. 1075-1076.)[17] Thus, the court held that "*a midtrial acquittal* in these circumstances is an acquittal for double jeopardy purposes as well." (*Id.* at p. 1073.) It is noteworthy that *Martin Linen, Sanabria, Smalis, and Smith* all pertained to *midtrial acquittals*, as opposed to acquittals after a jury's verdict.

However, in footnote 9, the high court excluded from its sweep those cases where acquittals occurred *after the jury had convicted.* In those cases, the court noted that deferring consideration of a motion to acquit until after the jury had returned a verdict mitigated double jeopardy concerns. (*Evans, supra,* 568 U.S. at p. __ [133 S.Ct. at p. 1081].) The reason for this appears quite clear: when an acquittal is entered *prior to jury verdict*, reversal would require retrial because there would be no verdict to

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17. *Martin Linen, supra,* 430 U.S. 564 [97 S. Ct. 1349, 51 L. Ed. 2d 642]; *Sanabria v. United States*, *supra,* 437 U.S. 54 [98 S. Ct. 2170, 57 L. Ed. 2d 43]; *Smalis v. Pennsylvania*, *supra,* 476 U.S. 140 [106 S. Ct. 1745, 90 L. Ed. 2d 116]; *Smith v. Massachusetts*, *supra,* 543 U.S. 462 [125 S. Ct.

reinstate and additional fact-finding would be required. Conversely, *after a jury's verdict*, Double Jeopardy concerns are mitigated because the court is not required to retry the accused, it may simply reinstate the jury's verdict. The high court's intent on this issue could not have been more clear: "[I]f a court grants a motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court's acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial." (*Ibid.*, at fn. 9, citing *Wilson, supra,* 420 U.S. 332 [95 S. Ct. 1013, 43 L. Ed. 2d 232].)

It is undisputed that in the case at hand, the trial court entered what was tantamount to a legal acquittal based upon legal insufficiency when it granted Respondent Howard Stern's motion for new trial and acquittal pursuant to both sections 1181 and 1385.[18] Neither do the People have any quarrel with the Court of Appeal's opinion that there was substantial evidence to support the verdicts, and that both the trial court's orders, pursuant to sections 1181 and 1385, should be set aside. Similarly, the trial court's section 1385 order in favor of Eroshevich was set aside, but for a different reason.[19]

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1129, 160 L. Ed. 2d 914].

18. In its ruling, the trial court stated, "When I consider all the evidence, and even viewing it in a light most favorable to upholding the verdict, I find it is clearly insufficient. Under these circumstances, I find no reasonable trier of fact could find that Howard Stern had a specific intent to violate either of these target crimes.. and I do grant the motion for new trial to Mr. Stern on these [conspiracy] counts... ." (Slip Op. at pp. 6-7.)

19. The Court of Appeal held that despite the trial court's statement in the minutes that there was insufficient evidence, the fact that the court did not employ the substantial evidence standard of review, it had not

Thus, having reversed the legal acquittal, the only remedy available is reinstatement of the verdict. The rationale underlying footnote 9 of *Evans*, as stated in *Wilson* was relied upon in a case nearly indistinguishable from the one at bar in *Salgado, supra,* 88 Cal.App.4th 5, *review denied* July 25, 2001. In *Salgado*, following jury verdicts of guilty, the trial court granted its own motion for new trial, and further dismissed the case after finding the evidence legally insufficient as a matter of law. (*Id.* at pp. 5-7.) The trial court's decision met all the requirements of section 1385. (*Id.* at p. 6.) Thus, because the trial court's ruling implicated Double Jeopardy considerations, the court weighed the threshold consideration left unanswered by *Hatch, supra,* 22 Cal.4th 260, and asked whether a dismissal for insufficiency was even subject to appeal. (*Salgado, supra*, at p. 10.) After analyzing the legislative history of section 1238, subdivision (a)(8), "an order or judgment dismissing or otherwise terminating all or any portion of the action including such an order or judgment after a verdict or finding of guilty..." the court determined that a legal acquittal *after the verdict* is subject to review. (*Id.* at p. 12.)

Significantly, the court in *Salgado, supra,* 88 Cal.App.4th at p. 12, then relied upon both *Wilson, supra,* 420 U.S. 332, and *Martin Linen, supra*, 430 U.S. 564, ["with the jury's guilty verdict in this case, a successful appeal will not *require retrial*,"], for its holding that the remedy for a trial court's erroneous declaration of legal acquittal is reinstatement of

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entered legal acquittal. Thus, the trial court did not possess the discretion to dismiss counts 1 and 3. Dr. Eroshevich's dismissal order was reversed. (Slip Opn. at pp. 33-34.)

the jury's verdict for that is the only remedy that does not offend principles of Double Jeopardy. The court stated:

> The purpose of the double jeopardy clause, however, is not undermined when the jury reaches a guilty verdict before the trial court acts. Even if it is the functional equivalent of an acquittal, appellate review of a dismissal for legal insufficiency will not result in another trial. Where the jury convicts and the court then "acquits," an error in the court's ruling can be corrected by restoring the jury verdict and entering judgment accordingly.

(*Salgado, supra,* at pp. 15-16.)

The court's determination, in *Salgado* stemmed from authority provided by the United States Supreme Court in both *Wilson, supra, 420 U.S. 332,* and *Martin Linen, supra,* 430 U.S. at p. 571. In *Martin Linen*, the Supreme Court found that the appropriate remedy for an erroneous post-conviction dismissal was "restoration of the verdict, and not a new trial," (*Id.* at p. 570), citing its prior decision in *Wilson*, *supra,* 420 U.S. at pp. 344-345 ["Reversal on appeal would merely reinstate the jury's verdict ...."], overruled on other grounds in *United States v. Scott* (1978) 437 U.S. 82, 94-101 [98 S. Ct. 2187, 57 L.Ed.2d 65]. (*Martin Linen*, *supra*, 430 U.S. at p. 570.)

Although persuasive and not binding, further support for the court's decision in *Salgado* was found in *United States v. Sharif* (9th Cir. 1987) 817 F.2d 1375, 1376 ["A different situation is presented where the jury returns a guilty verdict and the district court enters a judgment of acquittal. In that situation, a successful appeal by the government would result merely in a reinstatement of the original verdict, not a new trial. (See *Wilson*, *supra*, 420 U.S. at pp. 344-345.)"] (*Salgado*, *supra*, 88 Cal.App.4th at p. 14.)

In *Salgado*, Division Six of the Second Appellate District additionally quoted the United States Supreme Court's public policy consideration in restoring the verdict, stating:

> "[T]he government's interest in preserving a conviction fairly attained obviously is far greater than its interest in investing additional time and resources in reprosecuting a defendant following a jury's failure to reach a verdict and a trial court's judgment of acquittal." (*Martin Linen*, *supra*, 430 U.S. at p. 570, fn. 7.)

(*Salgado*, *supra*, 88 Cal.App.4th at p. 14.)

The court's remedy in *Salgado* has been followed by other divisions within the Second Appellate District. In *People v. Craney* (2002) 96 Cal.App.4th 431, 439-442 (hereafter, *Craney*), Division Five of the Second Appellate District found that "appellate review of a dismissal for legal insufficiency will not result in another trial." (*Id.* at p. 442.) More recently, in *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1306-1307, Division Four of the Second Appellate District followed the Court's opinion in *Salgado*, and held:

> If the [trial court] order [dismissing a case under section 1385] is made post verdict ... a successful prosecution appeal will not result in a new trial. In that situation, the case can be resolved by entering judgment on the verdict.

(*Id.* at p. 1306, citing *Salgado*, *supra*, 88 Cal.App.4th at pp. 12-13, and citing *Craney*, *supra*, 96 Cal.App.4th at pp. 439-442.)

Further support for this premise is also found outside the arena of mid-trial motions for acquittal as held in *Arizona v. Rumsey* (1984) 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (hereafter *Rumsey*). In *Rumsey*, a trial court sitting without a jury sentenced a defendant to life without the possibility of parole in lieu of the death penalty based upon a

balancing of aggravating versus mitigating circumstances, and an incorrect theory of law. (*Rumsey, supra*, 467 U.S. at pp. 205-207 [104 S. Ct. 2305, 81 L. Ed. 2d 164].) Because the trial court misinterpreted the law, the matter was "remanded for redetermination of aggravating and mitigating circumstances and resentencing," by the State Supreme Court. (*Id.* at p. 207.) Upon redetermination and resentencing, the defendant was sentenced to death. (*Id.* at p. 208.) In his mandatory appeal to the Supreme Court of Arizona, respondent argued that imposition of the death sentence on resentencing, after he had effectively been "acquitted" of death at his initial sentencing, violated the Double Jeopardy clause of the Fifth Amendment..." (*Ibid.*) Ultimately, the United States Supreme Court agreed with respondent and held that an acquittal on the merits bars retrial even if based on legal error. (*Id.* at p. 211.)

However, again, the United States Supreme Court excised from its sweep those cases where the prosecution could appeal from a judgment of acquittal entered by the trial judge after the jury had returned a verdict of guilty. Again, citing *Wilson*, the nation's high court distinguished between those cases where "the trial judge could simply order the jury's guilty verdict reinstated," from those where "new fact-finding" would be necessary. (*Rumsey, supra*, 467 U.S. at pp. 211-212 [104 S. Ct. 2305, 81 L. Ed. 2d 164] ["*United States v. Wilson*, 420 U.S. 332 (1975), held that the prosecution could appeal from a judgment of acquittal entered by the trial judge after the jury had returned a verdict of guilty. But that holding has no application to this case. No double jeopardy problem was presented in *Wilson* because the appellate court, upon reviewing asserted legal errors of the trial judge, could simply order the jury's guilty verdict reinstated; no

new fact finding would be necessary, and the defendant therefore would not be twice placed in jeopardy."]).

Here, the trial court erroneously granted the motion for a new trial. Accordingly, based upon the foregoing authority, most recently highlighted in *Evans* and including the court's decision in *Salgado*, the only appropriate remedy is that the jury's verdicts be reinstated.

II

HUDSON V. LOUISIANA DOES NOT CONTEMPLATE WHAT REMEDY IS AVAILABLE WHEN A LEGAL ACQUITTAL IS REVERSED, THUS ONLY *WILSON* IS APPLICABLE

In its opinion, the Court of Appeal has steadfastly adhered to the notion that because the trial court's new trial order was in effect a legal acquittal, then pursuant to *Hudson v. Louisiana* (1981) 450 U.S. 40 [101 S. Ct. 970, 67 L. Ed. 2d 30], retrial is barred. Indeed, *the People are not requesting a retrial.* The Court of Appeal has maintained that *Hudson* is controlling in this case because in making a finding of legal insufficiency during a new trial motion, the trial court in this case spoke with "materially greater clarity" than did the trial court in *Hudson.* (Slip Opn. at p. 33.) *However, the People do not disagree that the trial court's determination was tantamount to a legal acquittal.* Moreover, *Hudson* does not dictate the Court of Appeal's conclusion as to what happens to the case after reversal and is readily distinguishable on that basis.

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***Hudson* Governs The Content Of A Trial Court's Ruling**

The holding in *Hudson* reaffirms the premise that when a trial court employs what has come to be known as the substantial evidence standard and determined that the People's evidence is insufficient then the defendant must be acquitted. *Hudson* in no way speaks to what *remedy* is afforded the People when the trial court *erroneously* enters a post-verdict acquittal. Specifically, what was left unanswered by the United States Supreme Court in *Hudson* is what remedy would be employed *had the high court disagreed with the trial court's determination*? In *Hudson*, the trial court's finding of legal insufficiency was bolstered, as opposed to set aside, by the United States Supreme Court. It is not known what the United States Supreme Court would have held had it agreed with the Louisiana Supreme Court's questionable interpretation of the trial court's ruling, and upheld their faulty analysis of *Burks v. United States* (1978) 437 U.S. 1 [98 S. Ct. 2141, 57 L. Ed. 2d 1]. Thus, *Hudson* does not offer a remedy on point with the facts of this case.

Furthermore, the fact that the trial court acquitted the defendant pursuant to a new trial motion is of no consequence. The defendant in *Hudson* did not have any other remedy in order to seek an acquittal other than in a post-verdict new trial motion. "Petitioner then moved for a new trial, which under Louisiana law was petitioner's only means of challenging the sufficiency of the evidence against him." (*Hudson v. Louisiana, supra*, 450 U.S. at p. 41.) Thus, the fact that *Hudson* brought his motion to acquit for legal insufficiency pursuant to a new trial motion, as opposed to a motion to acquit, exalts the nature of the motion

above its substance. The fact that *Hudson* brought his motion to acquit pursuant to a new trial motion in a state that does not offer more does not immediately transform every new trial motion in every state of the union as having mythical significance and double jeopardy implications. The People agree with the Court of Appeal that "'what constitutes an "acquittal" is not controlled by the form of the judge's action.'" (Slip Opn. at p. 31.)

However, the People disagree that *Hudson* is of assistance in terms of providing guidance as to what *remedy* must be employed when a legal acquittal is *reversed* in the new trial context. The Court of Appeal relies upon *Hudson* to illustrate that, "in the new trial order context – an order granting a new trial motion on the ground of evidentiary insufficiency bars a retrial." (Slip Op. at p. 30.) As stated earlier, even in the new trial context, the People agree that the court entered an acquittal based upon evidentiary insufficiency. But *Hudso*n is the beginning, not the end, of the inquiry. While *Hudson* unquestionably outlines what constitutes a legal acquittal and that the government is barred from retrying a defendant, it does not address what courts must do when the trial court's acquittal – even in a new trial context-- was *wrong*.

B

Wilson Provides A Remedy

United States v. Wilson, supra, 420 U.S. 332, offers an appropriate remedy and dictates that despite the nature of a post-verdict acquittal, Double Jeopardy will not be disturbed by reversal and reinstatement of the verdict. "Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecutions." (*Wilson, supra*, at pp. 344-345.) "Although review of any ruling of law discharging a defendant obviously

enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial...." (*Id.* at 345.) Furthermore, *Wilson* cited Judge Learned Hand's position in *United States v. Zisblatt* (1949) 172 F. 2d 740, 743, "So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition." (*Ibid.* at fn. 14.)

C

Pursuant To *Hudson*, The Double Jeopardy Clause Does Not Bar Retrial When The Trial Court Sits As A "13th Juror"

In *Hudson*, despite that trial court's clear statement after the first trial that there was "no evidence, certainly not evidence beyond a reasonable doubt," the defendant in *Hudson* was tried and convicted a second time. Upon review by the United States Supreme Court, the high court explained that "the trial judge granted the new trial because ***the State had failed to prove its case as a matter of law***, not merely because he, as a '13th juror,' would have decided it differently from the other 12 jurors." (*Hudson, supra*, 450 U.S. at pp. 44-45.) Because the Defendant in *Hudson* had already been convicted a second time, the Supreme Court's only remedy was to bar retrial and acquit that Defendant.

Here, despite the similarity in the words used by the trial court, this case presents an ***opposing factual scenario***. Unlike *Hudson*, substantial evidence supports the verdicts in this case. Furthermore, nowhere does the opinion in *Hudson* hold that following *an erroneous acquittal*, the *defendant* is barred from *seeking a new trial*, or from being

retried at his request. In fact, in *Hudson* the high court makes clear that the Double Jeopardy clause does not bar retrial following a new trial motion where a judge sits as a "13th Juror."

> We do not decide whether the Double Jeopardy Clause would have barred Louisiana from retrying petitioner if the trial judge had granted a new trial in that capacity, for that is not the case before us. We note, however, that *Burks* precludes retrial where the state has failed as a matter of law to prove its case despite a fair opportunity to do so. [Citation Omitted.] By definition, a new trial ordered by a trial judge acting as a "13th juror" is not such a case. Thus, nothing in *Burks* precludes retrial in such a case.

(*Hudson, supra*, 450 U.S. at p. 45, fn. 5.)

In sum, the Court of Appeal's reliance on *Hudson* in its majority opinion, under the facts here, is erroneous and contrary to Double Jeopardy jurisprudence. Footnote 9 of *Evans* excises *Wilson* from the sweep of its opinion and is the only relevant precedent here as it breaks down the *remedy* available when a legal acquittal is reversed *prior to a jury's verdict* (retrial is barred, even if the acquittal is based upon an egregiously erroneous foundation[20]) from the remedy available when legal acquittal is reversed *after a jury's verdict.* (The verdict is reinstated.[21]) Furthermore, nothing in *Hudson* indicates that retrial is barred for purposes of a new trial motion.

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20. *See Evans*, citing *Sanabria v. United States*, *supra*, [98 S.Ct. 2170, 57 L.Ed.2d 43] 437 U.S. 54, *People v. Valenti*, *supra,* 49 Cal.2d 199 *Fong Foo v. United States*, *supra,* 369 U.S. 141[82 S.Ct 671, 7 L.Ed 2d 629].

21. See *United States v. Wilson*, *supra,* [95 S.Ct. 1013, 43 L.Ed.2d 232] 420 U.S. 332 (1975).

III

A TRIAL COURT MAY NOT ACQUIT A DEFENDANT PURSUANT TO A SECTION 1181 MOTION FOR NEW TRIAL

In an apparent attempt to simplify the review of whether a trial court *meant* to invoke the substantial evidence standard versus the traditional "13th juror" analysis, this court held in *Porter, supra,* 47 Cal.4th 125, that pursuant to section 1181: "Significantly, a court has no authority to grant an acquittal in connection with an 1181 motion." (*Porter, supra*, at p. 133, citations omitted.) Further, "a trial court considering a section 1181 motion to modify a verdict on the ground that it is contrary to the evidence *is limited to three options specified in the statute*: (1) it can set aside the verdict of conviction and grant the defendant a new trial, (2) it can deny the motion and enter judgment on the verdict reached by the jury; or (3) it can modify the verdict either to a lesser degree of the crime reflected in the jury verdict or to a lesser included offense of that crime..." (*Ibid.*)

In addition, in discussing whether or not a Petitioner waives jeopardy by filing a motion for a new trial, this court stated, "[y]et the law is well settled that a court reviewing the jury's verdict under section 1181 lacks the power to acquit the defendant based on the court's view of the evidence." (*Porter, supra,* 47 Cal.4th at p. 136, citations omitted.) A plain reading of the statute supports this court's conclusion. The rationale for this rule was stated as "permit[ting] trial court oversight of the verdict, but ensur[ing] that the People, like the defendant, have the charges resolved by a jury." (*Id.* at p. 133.)

Alternatively and more recently in *Watkins*, *supra*, 55 Cal.4th 999, this court clearly assigned distinct remedies to both section 1181 and

1385 decisions in discussing the substantial evidence standard that is applied in mid-trial motions for acquittal. This Court thus stated:

> The same standard of review applies when a defendant asks the trial court to review the legal sufficiency of the evidence after the jury has returned its verdicts. (*People v. Hatch* (2000) 22 Cal.4th 260, 268-269.) We have since clarified that a defendant seeking to challenge the legal sufficiency of the evidence in the trial court after the case has been submitted to the jury ***should not move for a new trial under section 1181, subdivision 6, but should instead invite the court's dismissal under section 1385***. (*Hatch, supra*, at pp. 268-271; *Porter v. Superior Court* (2009) 47 Cal.4th 125.)

(*Watkins, supra*, 55 Cal.4th at 1019, fn. 11.)

In dealing with a predictable scenario -- where a trial court has blended the standards for 1181 and 1385 motions by utilizing the substantial evidence standard for both -- the Court of Appeal has created a new procedural scenario in which trial courts can guarantee an acquittal and evade meaningful judicial review. The opinion is legally flawed.

The notion that the accused may "waive jeopardy" is not a new one. In *Evans,* the high court recognized that when a defendant persuades the court to declare a mistrial, jeopardy continues and retrial is generally allowed, but in that scenario, the defendant consents to a disposition that contemplates re-prosecution, whereas when a defendant moves for acquittal, he does not. (*Evans, supra,* 568 U.S. at p. __ [133 S. Ct. 1069, 1079], citing *United States v. Dinitz* (1976) 424 U.S. 600, and *Sanabria v. United States, supra,* 437 U.S. at p.75 [98 S. Ct. 2170, 57 L. Ed. 2d 43].)

Furthermore, this Court has held that "[i]n filing a motion for a new trial, petitioner impliedly waived any double jeopardy protections he might have had under state law, just as if he had consented to a mistrial."

(*Porter, supra*, 47 Cal. 4th at p. 136.) "It is a familiar principle that a defendant who has succeeded in having his conviction set aside impliedly waives any objection to being retried on the charge of which he was convicted." (*Ibid.*, citing *Serrato*, *supra*, 9 Cal.3d at p. 759.) "A new trial can only be granted on the defendant's motion." (*Ibid.*, citing 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 90, p. 121.) *See also*, *Gonzalez, supra,* 32 Cal.App.3d 706 (where judgment on prior conviction was vacated on courts own motion and not on petitioner's request, jeopardy attached to preclude petitioner from being tried again.)

Therefore, if the Court of Appeal insists that Defendant Stern's new trial motions be heard again, there is no reason that both Defendants may not thereafter waive jeopardy *if they choose*. Their implied waiver of jeopardy would not require the hybrid remedy created by the Court of Appeal.

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CONCLUSION

For the foregoing reasons, the People respectfully request that the Court of Appeal's remedy inviting Respondents to bring a second new trial motion, yet insisting that a new trial would violate double jeopardy, be reversed and that the verdicts as to both defendants be reinstated.

Respectfully submitted,

JACKIE LACEY
District Attorney of
Los Angeles County

By
PHYLLIS C. ASAYAMA
Deputy District Attorney

SERENA R. MURILLO
Deputy District Attorney

Attorneys for Real Party In Interest

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed **Opening Brief on The Merits**, is produced using 13-point Roman type including footnotes and contains approximately 10,051 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 9, 2013

SERENA MURILLO
Deputy District Attorney

DECLARATION OF SERVICE BY MAIL

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the attached document by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed as follows:

THE HONORABLE ROBERT J. PERRY Los Angeles County Superior Court Department 103 210 West Temple Street Los Angeles, CA 90012 **LANCE WINTERS** Senior Assistant Attorney General Attorney General's Office 300 South Spring Street Los Angeles, CA 90013 **JANYCE BLAIR, ESQ.** 321 Richmond St. El Segundo, Ca. 90245 Attorney for *Eroshevich*	**PETER GOLD, ESQ.** 5758 Geary Blvd., Suite 160 San Francisco, Ca. 94121 Attorney for *Stern* **CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE** 300 South Spring Street Los Angeles, CA 90013

Executed on, August 9, 2013 at Los Angeles, California.

PATRICIA L. HOUSEL