

**COPY**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

PEOPLE OF THE STATE OF CALIFORNIA,	) No. S210545
	)
Plaintiff and Appellant,	) (Court of Appeal,
	) Second Appellate
v.	) District Five –
	) B231411
KHRISTINE ELAINE EROSHEVICH, et al.,	)
	) Los Angeles
Defendants and Respondents.	) Superior Court No.
	) BA353907)

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

**REPLY BRIEF AS TO RESPONDENT KHRISTINE EROSHEVICH**

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SUPREME COURT  
**FILED**

SEP 19 2013

Frank A. McGuire Clerk  

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Deputy

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	)	

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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<sup>1</sup> section 1181 motion on grounds of double jeopardy.

**INTRODUCTION**

In her Answer Brief on the Merits (hereafter ABM), Khristine E. Eroshevich (hereafter Eroshevich), argues that “the gravamen of petitioner’s complaint,” is “the Court of Appeal’s exercise of its discretionary section 1260 authority.” (Answer Brief on the Merits, (hereafter ABM), at p. 2.) The characterization of the People’s complaint in this manner caused Eroshevich to reply to the People’s argument with an

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

analysis of Penal Code<sup>2</sup> section 1260, *People v. Braxton* (2004) 34 Cal.4th 798 (hereafter *Braxton*), and *People v. Rodriguez* (1998) 17 Cal.4th 253 (hereafter *Rodriguez*), in order for her to conclude that the Court of Appeal's order permitting the trial court to grant her new trial motion and potential dismissal is "just under the circumstances," as to her and should thus be upheld. (ABM at pp. 17-18.)

The scope of the Court of Appeal's authority under section 1260 is not the basis of the People's complaint, and most importantly, is not an issue for which this court granted review.<sup>3</sup> Thus, in her Answer Brief, Eroshevich never addresses the propriety of a defendant waiving jeopardy, or whether the Court of Appeal may depart from the three statutorily authorized remedies available under section 1181. In fact, despite the People's position that "new trial motions and motions to dismiss pursuant to

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(..continued)  
the Penal Code.

2. Unless otherwise indicated, all further references are to the Penal Code.

3. This Court's order dated July 10, 2013, stated that "the issues to be briefed and argued are limited to the issues raised in the petition for review." In the People's Petition for Review, the two issues stated were, "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 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?" (Petition for Review, at p. 2.)

section 1385 should not be reconsidered on additional grounds,” we have made clear that the propriety of allowing re-litigation of these issues “is not being challenged in this Appeal due to the clouded procedural history of the 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.” (Opening Brief on the Merits, at p. 17, fn. 15.)

However, even assuming *arguendo* that the issues framed by Eroshevich are properly framed within the issues presented for review, nothing within section 1260, *Braxton*, or *Rodriguez* compels Eroshevich to be entitled to multiple requests *for dismissal*.

## ARGUMENT

### I

#### INTERMINABLE REQUESTS FOR DISMISSAL ARE NOT “JUST UNDER THE CIRCUMSTANCES”

The People stated in their Opening Brief on the Merits that, “considerations of fairness and judicial economy weigh heavily against allowing a defendant 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.)” (OBM, at pp. 16-17.)

Eroshevich has cited *People v. Braxton, supra*, for the proposition that, “[a] limited remand is appropriate under section 1260 to allow the trial court to resolve one or more factual issues affecting the validity of the judgment but distinct from issues submitted to the jury, or for the exercise of any discretion that is vested by law in the trial court. [Citations omitted.]” (OBM, at pp. 8, 12, 13, 14.) Thus, *Eroshevich* argues,

the Court of Appeal's remand for new trial *and dismissal* is appropriate since both involve the "exercise of discretionary acts by the trial court..." (OBM, at p. 13.)

However, *Braxton* pertained only to a defendant's right to have his *motion for new trial* heard after the trial court refused to hear his attorney's oral motion before sentencing. (*Braxton, supra*, 34 Cal.4th at pp. 806-807.) This Court upheld the Court of Appeal's remand to the trial court for a new trial hearing based largely upon section 1202, which states in pertinent part, "[i]f the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion before pronouncing judgment or the making of an order granting probation, then the defendant shall be entitled to new trial." (*Braxton*, at p. 805.)

While *Braxton* may support Eroshevich's argument that she be entitled to a new trial motion since her original motion was filed, but not ruled on by the trial court, *Braxton* has no application to requests for dismissal. Similarly, while *Rodriguez* at least pertained to section 1385 in the context of the trial court's authority to strike prior convictions alleged pursuant to the "Three Strikes" law, the opinion does not support the proposition that section 1260 authorizes multiple requests for dismissal.

In *Rodriguez*, this court held that section 1260 authorized the Court of Appeal to find that it was "just under the circumstances," to require the presence of defendant during a hearing to determine whether to dismiss one or more prior felony conviction findings pursuant to section 1385. (*Rodriguez*, 17 Cal.4th at p. 260.) While the People do not deny that section 1260 authorizes reviewing courts to direct trial courts to conduct "such further proceedings as may be just under the circumstances," the facts



of Rodriguez are not analytically akin to those presented here. (*Id.* at p. 339.)

Certainly, in a case such as this, where Eroshevich's request for dismissal has been heard, granted, and then overturned, requiring the People to repeatedly respond to multiple requests for dismissal, especially in a case such as this where the Court of Appeal itself has determined that substantial evidence supported the verdicts, is not "just under the circumstances."

### CONCLUSION

For the foregoing reasons, as to Eroshevich, the People respectfully request that the Court of Appeal's remedy inviting her to request dismissal after that motion has been heard, granted, and overturned, be denied.

Respectfully submitted,

JACKIE LACEY  
District Attorney of  
Los Angeles County

By *Phyllis C. Asayama*

PHYLLIS C. ASAYAMA  
Deputy District Attorney




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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed **Reply Brief as to Eroshevich**, is produced using 13-point Roman type including footnotes and contains approximately 1,141 words, which is less than the 4,200 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 17, 2013

  
SERENA MURILLO  
Deputy District Attorney

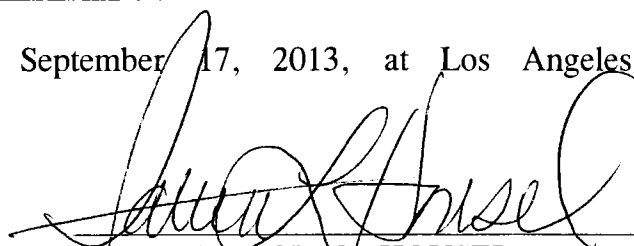
**DECLARATION OF SERVICE BY MAIL**

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 (**REPLY BRIEF AS TO EROSHEVICH**) 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:

<p><b>THE HONORABLE ROBERT J. PERRY</b> Los Angeles County Superior Court Department 103 210 West Temple Street Los Angeles, CA 90012</p> <p><b>LANCE WINTERS</b> Senior Assistant Attorney General Attorney General's Office 300 South Spring Street Los Angeles, CA 90013</p> <p><b>JANYCE BLAIR, ESQ.</b> 321 Richmond St. El Segundo, Ca. 90245 Attorney for <i>Eroshevich</i></p>	<p><b>PETER GOLD, ESQ.</b> 5758 Geary Blvd., Suite 160 San Francisco, Ca. 94121 Attorney for <i>Stern</i></p> <p><b>CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE</b> 300 South Spring Street Los Angeles, CA 90013</p>
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Executed on, September 17, 2013, at Los Angeles,  
California.



PATRICIA L. HOUSEL