

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)

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

REPLY BRIEF AS TO RESPONDENT HOWARD K. STERN

JACKIE LACEY
District Attorney of
Los Angeles County

PHYLLIS ASAYAMA
State Bar No. 088919
Deputy District Attorney

SERENA MURILLO
State Bar No. 185297
Deputy District Attorney

Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012
Telephone: (213) 974-5911

Attorneys for Plaintiff and Appellant

SUPREME COURT
FILED

SEP. 19 2013

Frank A. McGuire Clerk

Deputy

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)

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

REPLY BRIEF AS TO RESPONDENT HOWARD K. STERN

JACKIE LACEY
District Attorney of
Los Angeles County

PHYLLIS ASAYAMA
State Bar No. 088919
Deputy District Attorney

SERENA MURILLO
State Bar No. 185297
Deputy District Attorney

Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012
Telephone: (213) 974-5911

Attorneys for Plaintiff and Appellant

TOPICAL INDEX

	<u>PAGES</u>
REPLY BRIEF	1
INTRODUCTION	1
ARGUMENT	
I THE DOUBLE JEOPARDY CLAUSE DOES NOT CREATE A RIGHT TO A MOTION FOR NEW TRIAL	5
CONCLUSION	10

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
Arizona v. Rumsey (1984) 467 U.S. 203	8, 9
Brown v. Ohio 432 U.S. 161, 165, 97 S. Ct. 221, 53 L. Ed. 2d 187 (1977)	7
People v. Braxton (2004) 34 Cal.4th 798	6
People v. Sachau (1926) 78 Cal. App. 702	5
People v. Sarazzawski (1945) 27 Cal.2d 7, 17	4
Porter v. Superior Court (2009) 47 Cal.4th 125	8
Richardson v. United States (1984) 468 U.S. 317	7
Veitch v. Superior Court (1979) 89 Cal.App.3d 722	4, 6
CODES AND STATUTES	
Penal Code	
Section 1118.1	6
Section 1181, subdivision 6	6
Section 1016	4, 5
Section 1181	4, 7, 9

Section 1260 6

California Constitution

Article I, Section 15 4, 5

United States Constitution

Fifth Amendment 4, 5

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,)
) **REPLY BRIEF AS**
 Defendants and Respondents.) **TO STERN**
)
 _____)

INTRODUCTION

In his Answer Brief on the Merits (hereafter ABM), Howard K. Stern (hereafter Stern), persuasively argues that well-settled law makes clear that when a trial court acquits a defendant based on insufficiency of the evidence, double jeopardy precludes the prosecution from retrying the defendant even if the ruling granting the acquittal was patently erroneous. (ABM at p.7-12.) Upon this point, the People agree.

However, Stern’s argument goes on to make the gargantuan leap that somehow, because the defense of double jeopardy bars the prosecution from retrying the defendant, that consequently, “if the trial court grants Mr. Stern’s renewed motion for new trial on remand, the case must be dismissed on double jeopardy grounds because otherwise Mr. Stern would be subjected to retrial.” (ABM at p. 2.)

This leap in fact begs the question: what about the constitutional defense of double jeopardy *compels or requires* the defendant be afforded a right to a new trial motion at all, much less, a *renewed* motion for new trial? The answer is quite simple—absolutely nothing. Nowhere in the Fifth Amendment to the United States Constitution, Article I, Section 15 of the California Constitution, or Penal

Code section 1016¹, does the *defense* of having been held once in jeopardy compel a separate and independent right to new trial. Based upon a double jeopardy analysis Stern was convicted by jury, thus his original jeopardy was terminated by that conviction. He was thereafter erroneously acquitted by the trial court. Once that erroneous order was reversed, Double Jeopardy alone precludes his retrial, and thus, his conviction by jury is reinstated.

A motion for new trial is distinct. It is an additional right enjoyed by citizens of this state, conferred upon a convicted defendant by the California Legislature as outlined in Penal Code² section 1181. (*Veitch v. Superior Court* (1979) 89 Cal.App.3d 722, 736 [“A motion for new trial is a legislatively established procedure which may be invoked by any convicted defendant. (*People v. Sarazzawski* (1945) 27 Cal.2d 7, 17.”].) By definition, every person who enjoys this right has been convicted. Thus, every person who may enjoy this right has been held in jeopardy which was terminated by conviction, and may not be retried. Consequently, every person who, despite their right against being retried, wishes to have the evidence evaluated by the trial court sitting as a 13th Juror, does so only after they impliedly waived their right against being

1. The Fifth Amendment to the United States Constitution states in pertinent part, “...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb....” Article I, § 15 of the California Constitution states in pertinent part, “Persons may not twice be put in jeopardy for the same offense...” Section 1016 states that there are six kinds of pleas to an indictment or information, two include, subdivision 4, “A former judgment of conviction or acquittal of the offense charged,” and subdivision 5, “Once in jeopardy.”

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

tried again. This rule is not a new one:

The Constitutional provision against double jeopardy was never intended to apply to cases in which a judgment of conviction was reversed in an appellate court and a new trial ordered. Moreover, it is the generally accepted doctrine that a defendant's successful effort to set aside a verdict and judgment by means of a motion for new trial or appeal is a waiver of his constitutional right to object to being placed again in jeopardy. In effect, he assents to all the consequences legitimately following such reversal, and consents to be tried anew.

(*People v. Sachau* (1926) 78 Cal. App. 702, 706, citing 7 Cal. Jur. P. 946, hearing denied by Supreme Court (1926.)) Waiver is the cost associated with the benefit of retrial. Stern's argument that this line of authority fails to consider "a situation where a trial court first granted an acquittal based on legal insufficiency, that acquittal got reversed on appeal, and the appellate court then remanded for new trial," is thus irrelevant. (ABM at p. 18.) This is because upon reversal of the trial court's erroneous acquittal, Stern is no different from every other defendant who has ever asked for a new trial. He stands convicted by jury with a right against being placed in jeopardy again. It does not stand to reason that somehow the double jeopardy clause requires Stern to enjoy an indemnified motion for new trial simply because a trial court erroneously acquitted him after he was convicted by a jury.

Without citing any authority or legal precedent and despite the fact that he may not be retried, Stern has been invited to renew his motion for new trial. The Court of Appeal not only makes this invitation, but compounds the problem by thereafter modifying the parameters of a motion for new trial for litigants across the state by holding that upon sitting as a 13th Juror, re-weighing the evidence, and finding that Stern

may be entitled to a new trial, the trial court would be required to *acquit Stern on double jeopardy grounds*. It is within this context that the People quite clearly chose to address the greater problem which threatens evisceration of a motion for new trial. (*Veitch v. Superior Court, supra*, 89 Cal.App.3d at p. 726 [“Respondent court, after examining the comprehensive nature of California’s statutory scheme relating to motions for judgment of acquittal and motions for new trial...concluded that motions for new trial (Pen. Code, § 1181, subd. 6) may not be equated with motions for judgment of acquittal (Pen. Code, § 1118.1) and that to so hold would render impotent a valuable judicial tool, enacted for the protection of the accused.”].) Thus, it is not only the People who recognize the “parade of horrors,” associated with undermining this motion. (ABM at p. 28.)

Additionally, Stern is mistaken in his assertion that the People “don’t really mean it” when they insist that the verdict must be reinstated, and that a motion for new trial should not allow acquittal. (ABM at p. 17.) The People have clearly maintained their disagreement with Stern being able to renew his motion for new trial and reconsideration of a section 1385 acquittal, but due to the clouded procedural history, have engaged in an effort to correct the greater legal issues presented.³ Pursuant to a section 1181 motion, it is not a new trial

3. Upon this point, Stern cites section 1260 and *People v. Braxton* (2004) 34 Cal.4th 798, 818-819 (hereafter *Braxton*), in support of his argument that “Appellant also does not challenge the authority cited in the Court of Appeal’s opinion authorizing a remand for the trial court to hear the unconsidered grounds from Stern’s new trial motion.” (ABM at p. 17, fn. 4.) As stated above, that has never been the People’s position. Furthermore, whether or not the Court of Appeal had the authority to order

that Stern seeks. Rather it is an acquittal. Nothing in the double jeopardy clause compels such an outcome.

ARGUMENT

I

THE DOUBLE JEOPARDY CLAUSE DOES NOT CREATE A RIGHT TO A MOTION FOR NEW TRIAL

The Double Jeopardy Clause of the United States Constitution “protects against a second prosecution for the same offense *after acquittal*. It protects against a second prosecution for the same offense *after conviction*. And it protects against multiple punishments for the same offense.” (*Brown v. Ohio* (1977) 432 U.S. 161, 165, 97 S. Ct. 221, 53 L. Ed. 2d 187, [citations omitted] (italics added).) The notion that there must have been a “termination of jeopardy” was discussed in the context of a mistrial after a hung jury in *Richardson*⁴. The court there recognized that “the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. [Citations.]” (*Richardson*, at p. 325.)

Here, original jeopardy was terminated at the time that the

(..continued)

a renewed motion for new trial was not a legal issue upon which review was granted. Finally, even assuming *arguendo* that it was, *Braxton* is not on point since that case involved a defendant who was not permitted to have his motion for new trial heard before sentencing *at all*, as opposed to the factual scenario presented here where Stern’s motion for new trial was heard, granted, and reversed on appeal. (*Id.* at pp. 805-806.)

4. *Richardson v. United States* (1984) 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242.

jury convicted Stern. Following that event, he was erroneously acquitted.

Stern argues that this erroneous acquittal nonetheless bars retrial. (ABM at pp. 13-14.) Despite Stern's repeated characterization of the People's argument as something contrary to this point, the People have repeatedly agreed that retrial is barred as it forms the basis of their argument that the only permissible remedy, therefore, is reinstatement of the verdict.⁵ (Opening Brief on the Merits, hereafter OMB, at pp. 18, 21, 22, 25, 27.)

However, Stern thereafter asserts that *Arizona v. Rumsey* (1984) 467 U.S. 203, 211, 104 S. Ct. 2305, 81 L. Ed. 2d 164 is "analytically akin" to this case due to the fact that the trial court here made a ruling amounting to an acquittal based on legally insufficient evidence, and that despite the erroneous nature of the trial court's acquittal, consistent with the United States Supreme Court's decision in *Rumsey*, that double jeopardy bars retrial after remand to the trial court. (ABM at p. 16.) Similarly, it was the People who originally cited *Rumsey* for the same proposition -- that "an acquittal on the merits bars retrial even if based on legal error." (OMB at pp. 23-24.) However, once again, Stern attempts to leap over the chasm in logic by arguing, "[t]hus, as indicated above, if the trial court grants Mr. Stern's renewed motion for new trial, the case must be dismissed on double jeopardy grounds." (*Ibid.*)

From Stern's conclusion, one may expect that the defendant

5. Stern also erroneously states that, "before this court, Appellant now argues for the first time that pursuant to *Porter*, "a court has no authority to grant an acquittal in connection with an 1181 motion.'" (ABM at p. 26, fn. 8; referring to *Porter v. Superior Court* (2009) 47 Cal.4th 125.) In fact, the People made the exact same argument in their Supplemental Letter Brief to the Court of Appeal dated March 4, 2013, at p. 11.

in *Rumsey* was thereafter released and the case against him dismissed on double jeopardy grounds. To the contrary, the original sentence imposed by the trial court, twenty-five to life, was thereafter imposed against *Rumsey* since the penalty phase of his death case could not be re-evaluated. (*Arizona v. Rumsey, supra*, 467 U.S. at pp. 208-209.) In other words, the original ‘verdict,’ or sentence as it were, was reinstated.

Here, Defendant’s Stern’s motion for new trial was heard, granted, and reversed. As a result of the trial court’s erroneous acquittal, the verdict must be reinstated. Nothing in the double jeopardy clause compels Defendant Stern’s motion for new trial to be renewed. This is especially true since the only outcome that may be sought by the new trial motion *is* barred by the double jeopardy clause. Thus, the only appropriate remedy is that the verdict be reinstated.

Finally, contrary to Defendant Stern’s repeated statements to the effect that, “[a]ppellant is displeased that the Double Jeopardy Clause acts to prevent it from retrying Mr. Stern,” the People reiterate again- it is not the People who seek to retry Stern. (ABM at pp. 22-23.) The People have already tried Defendant Stern, and a jury has already convicted him. The People’s position is that the subsequent and erroneous order of the trial court cannot subvert validly obtained guilty verdicts. The verdict should be reinstated. But if a court insists that Stern be permitted to renew his motion for new trial, neither double jeopardy, nor section 1181 bars retrial; nor does either call for dismissal.

//
//
//
//

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 verdict as to Stern be reinstated.

Respectfully submitted,

JACKIE LACEY
District Attorney of
Los Angeles County

By 

PHYLLIS C. ASAYAMA
Deputy District Attorney



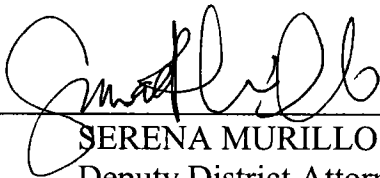
SERENA R. MURILLO
Deputy District Attorney

Attorneys for Plaintiff and Appellant

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 on The Merits**, is produced using 13-point Roman type including footnotes and contains approximately 1,694 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

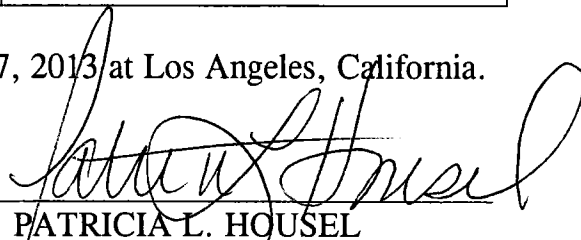
DECLARATION OF SERVICE BY MAIL

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

Executed on, September 17, 2013 at Los Angeles, California.



PATRICIA L. HOUSEL