LIU, J.

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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THE PEOPLE OF THE STATE OF CALIFORNIA,	Case No. **S198324**
Respondent,	Fourth District Court of Appeal Case Number D059013 {formerly E049081}
v.	
SERAFIN SANTANA,	Riverside County Superior Court Case No. RIF139207
Appellant.	

Answer to Petition for Review and Request for Enlargement of Issues, from the Decision of the Fourth District Court of Appeal, Division One, Aaron, J., filed October 26, 2011, on Appeal from the Judgment of the Riverside County Superior Court, the Honorable MARK E. JOHNSON, Judge Presiding, entered on August 14, 2009.

APPELLANT'S ANSWER TO PETITION FOR REVIEW
and
REQUEST FOR REVIEW OF ADDITIONAL ISSUE

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By appointment of the Court of Appeal under the Appellate Defenders' independent-case system

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v.	)	Case No. RIF139207
SERAFIN SANTANA,	)	**APPELLANT'S ANSWER TO PETITION FOR REVIEW and REQUEST FOR REVIEW OF ADDITIONAL ISSUE**
Appellant.	)	

TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES

OF THE SUPREME COURT OF CALIFORNIA:

SERAFIN SANTANA ("appellant"), answers the petition for review filed by respondent and requests that the petition be denied. However, in the event this Court grants review, appellant asks that the issues be enlarged to include the question of whether attempted battery with serious bodily injury is a lesser included offense of attempted mayhem.

ISSUE PRESENTED FOR REVIEW BY RESPONDENT

1. Does CALCRIM No. 801, which purports to define the crime of mayhem, incorrectly require that the prosecutor prove the additional element that a defendant caused "serious bodily injury?"

ADDITIONAL ISSUE PRESENTED FOR REVIEW BY APPELLANT

2. Is there such a crime as attempted battery with serious bodily injury and is it a necessarily lesser included offense of attempted mayhem, and was appellant prejudiced by the trial court's failure to give such instruction at his trial?

RESPONDENT HAS FAILED TO STATE A BASIS FOR REVIEW

Respondent seeks this Court's review of a published decision of the Court of Appeal, on the grounds that the jury instruction at issue, CALCRIM No. 801, is defective. However, this issue was briefed by the parties in the lower court, and, in any event, review is not appropriate.

Respondent asserts review is required because the lower court's decision bestows an (unwarranted) imprimatur upon the Judicial Council's wording of CALCRIM No. 801, defining the crime of mayhem. Respondent principally takes exception to the CALCRIM No. 801's requirement that the prosecution "prove that the defendant caused serious bodily injury." Respondent notes the

statutory language of section 203 requires only that there be a finding the defendant removed, disabled, disfigured, or otherwise rendered a body part useless; and the phrase "serious bodily injury" is entirely absent from the statutory language. (Petition for Review, pp. 5-7.) Respondent further notes the requirement of a "serious" bodily injury did not appear in the previous version of the pattern jury instructions. (*Id.*, at pp. 5-6.)

Respondent's petition does not merit this Court's review for multiple reasons. First, forfeiture in the court of appeal -- respondent simply failed to preserve the issue for review by this Court. Respondent's brief on the merits in the court of appeal failed to make any contention that the pattern instruction itself was defective. The first time that argument was presented was in respondent's recently filed petition for rehearing, and was thereby forfeited. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1092, abrogated on other grounds in *Martinez v. Combs* (2010) 49 Cal.4th 35, 66; *Nemo v. Farrington* (1908) 7 Cal.App. 443, 451 [issue neither raised in trial court or in briefing in court of appeal is forfeited].)

Secondly, forfeiture in the petition for review. Respondent's petition virtually ignores appellant's arguments in the court of appeal and the basis of the court of appeal's ruling, particularly, the published portion thereof. In the lower court appellant argued the

trial court improperly gave the jury a modified instruction based on CALCRIM No. 801 that was both legally incorrect (failed to define a disabling injury) and unfairly argumentative in that it highlighted the prosecution's evidence (the victim suffered a gunshot wound). Yet, respondent did not address appellant's claim of error from an argumentative instruction in respondent's briefing in the court of appeal; nor did respondent's correct that deficiency in respondent's petition for review.[1] But what is even more difficult to understand (and ultimately fatal to respondent's request for intervention by this Court) is the fact that respondent did not address the court of appeal's ruling in respondent's petition for review.

Instead of directly addressing the question of whether the court of appeal was correct in determining the trial court's modifications to CALCRIM No. 801 constituted an unfair and argumentative pinpoint instruction; respondent takes the circuitous route of instead arguing the issue in this appeal is not whether the trial court denied due process to appellant by providing the jury with an instruction that highlighted the prosecution's evidence, but instead argues the question of the modified instruction is moot

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[1] In appellant's reply brief he noted that after respondent summarized appellant's opening brief contentions, the word "pinpoint" did not reappear; and the word "argumentative" is entirely absent from the respondent's brief altogether. (A.R.B., p. 42.)

because the instruction itself is defective. Accordingly, the reasoning of the court of appeal is not being challenged in this petition and review is therefore unwarranted. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 20-21, conc. opn., Baxter, J. [this Court only reviews the decision of the court of appeal].)

Respondent contends it was the Judicial Council who committed error in the drafting of CALCRIM No. 801, and the modifications made by the trial court were therefore effectively superfluous. Respondent argues without the inclusion of "serious bodily injury" as an element of CALCRIM No. 801, the issue of how that element should be defined becomes moot. Respondent has not only failed to provide adequate briefing on the issues upon which review is sought; the argument is based upon insubstantial logic. Even if this Court were to conclude CALCRIM No. 801 should be amended to delete the enumeration of serious bodily injury as an element of mayhem, that does not cure the error created in the trial court when the judge gave an argumentative instruction to the jury; and the decision of the court of appeal necessarily requires affirmance regardless of whether CALCRIM No. 801 should be altered or not.

In sum, because respondent has not addressed the argumentative instruction issue, and has not discussed the

authorities cited by appellant (*People v. Mincey* (1992) 2 Cal.4th 408, 437), nor the court of appeal on this point (*People v. Panah* (2005) 35 Cal.4th 395, 486), respondent has not presented this Court with a pleading upon which any entitlement to review can be based.

ENLARGEMENT OF ISSUES FOR REVIEW

Alternatively, assuming this Court grants respondent's petition for review, appellant requests that this Court enlarge the issues upon which review is granted to include the question of whether attempted battery with serious bodily injury is a lesser included offense of attempted mayhem and whether appellant was prejudiced by the trial court's refusal to instruct on that offense. The court of appeal concluded there is no such crime as attempted battery with serious bodily injury, and no other published opinion has addressed the issue. The court of appeal was unable to cite any direct authority for its holding, and the decision is noteworthy for its brevity in the course of effecting a sweeping change of unsettled law, without finding it necessary to undertake a thorough analysis of well established principles surrounding this issue; including some that date back to the 1850. (See, *People v. Wright* (2002) 100 Cal.App.4th 703, 714-715 [noting the distinction between the definition of assault and attempted battery; and tracing the history of the statutory definition of assault back to 1850].)

Appellant submits this issue is one of great importance in this state and presents a question of law that requires guidance from this Court. Moreover, it would be a manifest injustice if the decision of the court of appeal were permitted to stand in light of the fact appellant is facing retrial and the issue will again be presented in his case in the lower court.

STATEMENT OF THE CASE and FACTS

Appellant did not file a petition for rehearing with the court of appeal, and appellant thereby defers to the statement of the case and facts as contained in the decision of the court appeal for the limited purpose of this answer to respondent's petition for review only, except as otherwise noted in argument.

ARGUMENT

I.

THIS COURT SHOULD REJECT RESPONDENT'S REQUEST FOR REVIEW OF AN ISSUE THAT WAS NOT RAISED IN THE COURT OF APPEAL AND FORFEITED BY THE FAILURE TO ADDRESS THE BASIS FOR THE COURT OF APPEAL'S DECISION.

It is the policy of this Court not to accept cases for review on issues which were not raised in the court of appeal. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6: "***[A]s a matter of policy we ordinarily exercise that power only with respect to issues raised in the Court of Appeal*** [Cal. Rules of Ct., rule 8.500(c)(1)]".) Respondent seeks review of the question of the correctness of bracketed language in CALCRIM No. 801, but never properly raised that issue in the court appeal. (See, Respondent's Brief, pp. 13-17.)

Moreover, the record on appeal does not reflect any objection was interposed by respondent to the trial court's decision to give the bracketed language of CALCRIM No. 801 and the issue should be deemed forfeited. (*People v. Mills* (2010) 48 Cal.4th 158, 209.)

A. Review Should Be Denied Because the Petition Does Not Address the Basis for the Court of Appeal's Opinion.

Further, respondent's petition for review mirrors the defect in respondent's appellate court brief which failed to address

appellant's argumentative instruction contention; and, fails to address the rationale of the court of appeal's favorable ruling on that claim. The court of appeal ruled favorably upon appellant's argument that the trial court erred in the manner in which it modified the bracketed language of CALCRIM No. 801 to produce a defective instruction on the crime of attempted mayhem; and the trial court compounded that error by crafting an instruction that was argumentative and unfairly directed the jury's attention to the prosecution's theory of the case. (See, A.O.B. filed 8/18/2010, pp. 41-59; Slip Opn. pp. 14-18.)

Appellant's reply brief specifically directed the court of appeal's attention to the fact respondent had failed to address this issue altogether. (A.R.B. filed 3/17/2011, pp. 41-50.)[2] Repeating that error in respondent's petition for review, respondent restricts its argument regarding harmless error to attempting to refute an appellate contention that was not specifically accepted or adopted by the court of appeal in its decision. Respondent thereby sets up a straw man by inferring the issue decided by the court of appeal was whether the modified instruction constituted a directed verdict; and

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[2] Indeed, the heading on a point in appellant's reply brief read: "RESPONDENT'S BRIEF IGNORES THE QUESTION OF WHETHER THE COURT'S INSTRUCTION WAS AN IMPROPER PINPOINT INSTRUCTION AND OFFERS THE UNTENABLE ASSERTION THE OMISSION OF A DEFINITION OF 'DISABLING INJURY' WAS HARMLESS."

respondent then proceeds to knock down that straw man by arguing the defective instruction did not "direct a verdict in favor of the prosecution." (Pet. for Rev., p. 9.) This is a moot point. Although appellant made that argument in his opening appellate brief (at pp. 50-59), the court of appeal did not adopt that argument in the written decision. Instead the court of appeal simply found the instruction was prejudicial because it unfairly invited the jury to focus on the prosecution's evidence. (Slip Opn. p. 16.)

II.

IF REVIEW IS GRANTED, THE GRANT OF REVIEW SHOULD INCLUDE THE IMPORTANT ISSUE OF WHETHER ATTEMPTED BATTERY WITH SERIOUS BODILY INJURY IS AN LIO OF ATTEMPTED MAYHEM.

In the court of appeal appellant argued the trial court erred in failing to instruct the jury on the LIO of attempted battery with serious bodily injury. (A.O.B., pp. 2-41.) Respondent's brief conceded appellant was correct in asserting this was an LIO of attempted mayhem. (Slip Opn. p. 20.) However, respondent appeared at oral argument (through a certified legal intern) and orally retracted the judicial admission (without advance notice of any kind to the court or counsel); and for the first time averred there is no such crime as attempted battery with serious bodily injury. (Slip Opn. pp. 20-21.)

After supplemental briefing on the point which the court of appeal limited to just five pages (Order filed 7/14/2011), the court of appeal held there is no crime of attempted battery with serious bodily injury and therefore on retrial appellant will not be entitled to such an instruction. (Slip Opn. p. 21.)[3] The court of appeal manifestly erred and appellant will suffer prejudice therefrom on retrial.[4] Accordingly, review on this issue is required to correct an error of law in the only published authority answering this question.

The court of appeal incorrectly relied upon this Court's decision in *People v. James* (1973) 9 Cal.3d 517 to come to its conclusion. The lower court erred because *James* did not purport to hold there was no crime of attempted simply battery; as the court of appeal inferred. Instead, *James* merely held there has to be a *present ability* to commit a battery before it can be attempted. (*Id.* at p. 522, italics added; see, Slip Opn. p. 21, quoting *James* and adding italics.) Indeed, this Court has acknowledged the theoretical existence of the crime of attempted battery, and the historical error in identifying an assault as an attempted battery.

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[3] Appellant submits the issue was sufficiently complex and important to warrant far more discussion than 5 pages of briefing.

[4] The court of appeal's ruling will be binding on the trial court under doctrines of both stare decisis (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and law of the case *People v. Mitchell* (2000) 81 Cal.App.4th 132, 144-145.)

(*People v. Colantuono* (1989) 7 Cal.4th 206, 216 [holding assault is not attempted battery and has distinct mental state].)

In ruling on the LIO issue the court of appeal did not acknowledge the well-settled principle that a completed battery with serious bodily injury is an LIO of a completed act of mayhem. (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 859, disapproved on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224, 1228 [accusatory pleadings test not applicable to improper multiple conviction analysis].) Nor did the court of appeal acknowledge the fact that virtually all crimes can be attempted: "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (Pen. Code, § 21a.) There is no authority from this Court nor any other court (until the lower court decision herein) to support the proposition that one cannot attempt to inflict serious bodily injury on another through a completed battery.

Ironically, one of the best analogies which supports appellant's contention (that attempted battery with serious bodily injury is an LIO of attempted mayhem) is the crime of attempted mayhem itself -- *the offense upon appellant's conviction in this case was based.* Appellant's conviction of that offense was based upon a completed battery of the victim (with a firearm); with disputed intent behind the completed battery. The majority in the court of

appeal rejected the position of the dissent that the mere shooting of a human being with a firearm carries the *ipso facto* inference of an attempt to inflict a disabling injury within the meaning of the crime of mayhem. (Slip Opn. p. 18.) Thus, the court of appeal accepted the premise that one can complete a battery and intend, but fail, to inflict a disabling injury. This is ironic because the court simultaneously rejected the concept that one could complete a battery and intend, but fail to inflict a serious (but not a disabling) injury. This is manifestly an incongruency that requires correction by this Court.

Respondent has acknowledged before this Court that case law has held serious bodily injury is a component of the crime of mayhem. (Pet. Rev., p. 7, citing *People v. Brown* (2001) 91 Cal.App.4th 256, 272 and other authorities.)[5] Therefore, if one can attempt the crime of mayhem via a completed battery, it necessarily follows that one can attempt the crime of battery with serious bodily injury via a completed battery. The only difference between the two offenses being the former requires the intent to inflict a serious bodily injury that is also disabling; whereas the latter requires only the intent to inflict a generic or undefined

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[5] Respondent distinguishes that line of authority as applicable only to sentencing issues, but not to elements of the substantive offense of mayhem. (Pet. Rev., pp. 7-8.)

serious bodily injury. (§§ 203; 243, subd. (d); see, CALCRIM No. 801.)

CONCLUSION

Based upon the foregoing, it is respectfully submitted respondent has failed to demonstrate appropriate grounds why review should be granted; and has failed to identify a basis for a departure from this Court's policy of only reviewing issues raised in the court of appeal. Alternatively, if review is granted, the issues should be enlarged to include the LIO question identified herein.

Respectfully submitted,

Dated: December 19, 2011 ***CARL FABIAN***
CARL FABIAN, Attorney for
Appellant SERAFIN SANTANA

CERTIFICATION OF WORD COUNT

The text of **APPELLANT'S ANSWER TO PETITION FOR REVIEW** consists of **2,593** words, according to the word processing program used to generate this document.

Dated: December 19, 2011 ***CARL FABIAN***
CARL FABIAN

PROOF OF SERVICE BY MAIL

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Title of Case: *People v. Santana*
Attorney for: Appellant
Case Number: **D059013 (old: E049081)**
Riverside County Superior Court
Case No. RIF139207

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOR THE FOURTH APPELLATE DISTRICT
Division One

I, the undersigned, declare that I am, and was at the time of the within - mentioned service by mail of the papers herein referred to, over the age of eighteen years of age, and not a party to the instant action. I am employed in the County of San Diego, which county the within - mentioned service by mail occurred. My business address is 3232 Fourth Avenue, San Diego, California 92103. I served the following documents: **APPELLANT'S ANSWER TO PETITION FOR REVIEW**; by placing a true copy thereof in a separate envelope to each addressee on December 19, 2011, named hereafter, as follows:

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I then sealed each envelope and with postage paid thereon, deposited into the United States mail at San Diego, California on December 19, 2011. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 19, 2011.

CARL FABIAN
CARL FABIAN