In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

SERAFIN SANTANA,

Defendant and Appellant.

Case No. S198324

Riverside County Superior Court, Case No. D059013
Fourth Appellate District, Division One, Case No. RIF139207
The Honorable Mark E. Johnson, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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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"?

INTRODUCTION

Serafin Santana shot a victim three times in the leg with a handgun at close range. At the time, the victim was lying on the ground after having been beaten by several of Santana's friends. Remarkably, the victim's wounds were through-and-through and they required no stitches. Relevant here, Santana was charged with attempted mayhem, in violation of Penal Code[1] sections 203 and 664, subdivision (a)(2). The jury was instructed on mayhem with CALCRIM No. 801, which, unlike its predecessor, and contrary to the statutory language, required the prosecution show that Santana had attempted to cause "serious bodily injury" as an additional element. The trial court modified the instruction by noting that a "serious bodily injury" may include a gunshot wound. The Court of Appeal reversed the conviction after concluding that the trial court's insertion of the phrase "a gunshot wound" into CALCRIM No. 801 as an example of what may constitute a "serious bodily injury" erroneously directed the jury to focus on the means by which Santana intended to inflict the wound, rather than the nature and severity of the wound.

The crime of mayhem has been in existence for centuries and has remained unchanged in the California Penal Code since 1874. The statute does not express that the injury inflicted must be a "serious bodily injury"; nor has it ever been necessary to modify the type of injury that must be sustained for purposes of this crime beyond the statutory requirements.

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[1] Unless otherwise specified, all statutory references are to the Penal Code.

Thus, CALCRIM No. 801, purporting to define the crime of mayhem, incorrectly requires that the prosecutor prove the additional element that a defendant caused "serious bodily injury." The instruction here required that the prosecutor prove Santana intended to cause "serious bodily injury," which was superfluous to the requirement that it must prove Santana intended to "maliciously disable[] or [make] useless part of someone's body and the disability was more than slight or temporary." Moreover, because proof of serious bodily injury is not a requirement of mayhem, Santana suffered no prejudice from the court's instruction in which it defined the term, even if incorrectly. Therefore, the Court of Appeal's opinion should be reversed and Santana's attempted mayhem conviction reinstated.

STATEMENT OF THE CASE

On the night of August 12, 2007, Juan Gomez, was having a party for his wife and kids at his Moreno Valley house. (2 RT 38, 40-41, 185.) Santana, Gomez's friend and coworker, whom Gomez knew as "Junior," was at the party with some younger people, whom Gomez did not know. (2 RT 185-187.)

At approximately 2:00 a.m., three doors down from Gomez's house, 15-year-old Bryan Vallejo and his friends, Andy Ortiz and "Vanessa," were in Vallejo's front yard, inhaling laughing gas through a balloon. (1 RT 39-40, 128-131.) Four or five Hispanic males, including a man subsequently identified as Santana, walked from Gomez's party to Vallejo and his friends. (1 RT 41-46, 131-133, 142.) Santana and his friends struck up a friendly conversation with Vallejo and Ortiz. (1 RT 46-47.) They indicated they were in a "party crew" from Rialto called "Fame." (1 RT 75.) Vallejo stated he was in party crew called "Rock Star." (1 RT 75-76.) One member of Santana's group then asked Vallejo if he could get marijuana. (1 RT 47.) Vallejo said he would try. (1 RT 47.) After he told

the men he was unable to procure the drugs, trash was thrown on Vallejo's grass, an argument ensued, and the taller of Santana's friends wanted to fight Vallejo. (1 RT 48-49, 136.) Santana said, "Lets see what you're made of" and told his friend and Vallejo to go up the street. (1 RT 49.) Santana's group and Vallejo and Ortiz walked up the street and Vallejo began to fight with the tall Hispanic male. (1 RT 51-53, 138, 141.)

During the fight, several of Santana's friends jumped in and also began to fight Vallejo. (1 RT 54, 144-145.) The men were hitting him in the stomach and ribs. (1 RT 55.) When Ortiz began to move towards his friend Vallejo, Santana pointed a gun at Ortiz's head and stated to his friends, "This bitch ain't gonna do nothing." (1 RT 147-147.) Santana then struck Ortiz with the gun on the back of the head and forehead. (1 RT 148.) As Santana ran towards Vallejo, Ortiz yelled, "He has a gun." (1 RT 55, 149.) Santana struck Vallejo on the head behind the ear with the gun, knocking Vallejo to the ground. (1 RT 55-56.) Vallejo curled up into a fetal position and the men continued to hit him. (1 RT 57.) Santana then said, "Let's go," to his friends. (1 RT 52, 57-58, 150.) Several of the men who were kicking Vallejo ran into a nearby Cadillac. (1 RT 58.) Santana, the only one of his group remaining at the scene, ran up to Vallejo and shot him three times in the leg from about three to four feet away with a small black revolver as Vallejo lay on the sidewalk. (1 RT 58-62, 68, 150-151.) Santana then ran across the street and got into a green or blue car and drove off. (1 RT 63, 151-152.)

Ortiz ran over to Vallejo, told him he had been shot, and helped him up. (1 RT 65-66, 153.) Vallejo was bleeding. (1 RT 153-154.) The two walked to Vallejo's house. (1 RT 154.) Someone ran into Gomez's backyard and stated that someone had been shot. (2 RT 193.) Vallejo described the shooter and his friends to Gomez and said they had come from Gomez's party. (1 RT 68-69, 193.) After hearing the description,

Gomez said that it was, "Junior." (1 RT 69; 2 RT 194.) At some point, Gomez also told Vallejo that he had seen Santana carrying a .38 caliber revolver in the past. (2 RT 337-338.) Gomez provided the name "Junior" to police and indicated he was a coworker in Rialto. (2 RT 199-200, 267.)

Vallejo was taken to the hospital where he was treated for his injuries. (1 RT 69-70.) He had been shot three times in the leg. (1 RT 70-71; 2 RT 265.) His wounds were through-and-through and they required no stitches. (1 RT 70-71; 2 RT 265.) After the shooting, Vallejo used a cane to walk and was unable to sit because of the exit wounds to his buttocks. (1 RT 72.) He continues to suffer pain in his leg and was unable to play football at school, where he had hoped to earn a scholarship. (1 RT 72, 74.)

Gomez spoke to Santana at work the following Monday. Santana denied shooting Vallejo. (2 RT 196.) Santana then spoke to police about the shooting. (2 RT 285, 289.) He admitted he had attended the party with his cousin, and stated he had heard about the shooting, but denied any involvement. (2 RT 290-292.)

On August 12, 2007, a search warrant was executed at Santana's residence in Rialto. (2 RT 296, 302-303.) A bag containing 50 live .38 caliber bullets was located in the garage of the house. (2 RT 298, 300.)

On September 28, 2007, Vallejo was asked by police to identify the shooter from a photographic lineup. (1 RT 76-77.) Vallejo identified Santana with 80% certainty. (1 RT 79-80.) Additionally, Ortiz was also shown a photographic lineup in which he identified Santana as the shooter. (1 RT 158, 161-162.)

After Santana was arrested, somebody approached Gomez while he was at work and told Gomez to tell Vallejo not to show up in court. (2 RT 248-249.) This scared Gomez, who thought that he might get shot, and caused Gomez to have second thoughts about his testimony. (2 RT 250.)

Santana was charged, in count 1, with attempted mayhem, in violation of sections 203 and 664, subdivision (a)(2). It was further alleged, as to count 1, that Santana personally used a firearm causing great bodily injury and personally inflicted great bodily injury.[2] (§§ 12022.53, subd. (d),12022.7.) (1 CT 93-95.)

At trial, the jury was instructed with a modified version of CALCRIM No. 460, in pertinent part, as follows:

> The defendant is charged in Count 1 with attempted mayhem.
>
> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant took a direct but ineffective step toward committing the crime of mayhem;
>
> AND
>
> 2. The defendant intended to commit mayhem.

(1 CT 213.)

Additionally, the trial court instructed the jury on the crime of mayhem with a modified version of CALCRIM No. 801 as follows:

> To prove that the defendant is guilty of mayhem, the People must prove that the defendant caused serious bodily injury when he unlawfully and maliciously disabled or made useless part of someone's body and the disability was more than slight or temporary.
>
> Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

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[2] Santana was additionally charged, in count 2, with assault with a firearm (§ 245, subd. (a)(2)). Count 3 also charged Santana with assault with a firearm arising from when Santana pistol whipped Ortiz.

A serious bodily injury means a serious impairment of physical condition. *Such an injury may include a gunshot wound.*

(1 CT 214, emphasis added.)[3]

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[3] The unmodified version of CALCRIM No. 801 states as follows:

The defendant is charged [in Count _____] with mayhem [in violation of Penal Code section 203]. [¶]To prove that the defendant is guilty of mayhem, *the People must prove that the defendant caused serious bodily injury* when (he/she) unlawfully and maliciously: [¶][1. Removed a part of someone's body(;/.)][¶] [OR] [¶][2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)][¶] [OR] [¶] [3. Permanently disfigured someone(;/.)][¶] [OR] [¶] [4. Cut or disabled someone's tongue(;/.)][¶]][OR] [¶] [5. Slit someone's (nose[,]/ear[,]/ [or] lip) (;/.)][¶] [OR] [¶] [6. Put out someone's eye or injured someone's eye in a way that so significantly reduced (his/her) ability to see that the eye was useless for the purpose of ordinary sight.]

Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

[A serious bodily injury means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[_____ <Insert description of injury when appropriate; see Bench Notes> is a serious bodily injury.]

[A disfiguring injury may be permanent even if it can be repaired by medical procedures.]

(CALCRIM No. 801, emphasis added.)

The jury convicted Santana of all charges and found all enhancements true. (1 CT 165-166.)

Santana argued on appeal that the trial court's modification of the mayhem instruction was argumentative and created an imbalance in the prosecution's favor by stating that a serious bodily injury "may include a gunshot wound." He further argued the instruction directed a verdict in favor of the prosecution by suggesting to the jury it needed to find only that Santana inflicted a gunshot wound in order to find him guilty of attempted mayhem.

In a partially-published decision issued October 26, 2011, the Court of Appeal concluded that the trial court's insertion of the phrase "a gunshot wound" as an example of what may constitute a serious bodily injury, directed the jury to focus on the means by which the defendant intended to inflict the wound, rather that the nature and severity of the wound, and provided a grossly misleading and argumentative instruction that favored the prosecution. (Slip Opn. at p. 13.) The Court of Appeal reversed the jury's finding of attempted mayhem. (Slip Opn. at pp. 3-20.) In dissent, Justice Benke concluded that the jury was properly instructed on attempted mayhem and, in any event, there was no probability that the instructional error identified by the majority influenced the jury's verdict. (Dissent at p. 1.)

Respondent filed a petition for rehearing, pointing out that the statutory definition of mayhem does not contain the additional element of serious bodily injury and therefore appellant could not have been prejudiced by the court's instruction. The majority denied the petition; in dissent, Justice Benke voted to grant it.

On February 22, 2012, this Court granted respondent's petition for review.

I. CALCRIM NO. 801, PURPORTING TO DEFINE THE CRIME OF MAYHEM, INCORRECTLY REQUIRES THAT THE PROSECUTOR PROVE THE ADDITIONAL ELEMENT THAT A DEFENDANT CAUSED SERIOUS BODILY INJURY

The Court of Appeal reversed Santana's attempted mayhem conviction after finding that the trial court erroneously instructed the jury that a gunshot wound could constitute "serious bodily injury" for purposes of mayhem. However, an examination of the history and development of the law of mayhem demonstrates that "serious bodily injury" is not a statutory element of mayhem that the prosecution must prove. Because there is no basis for such a requirement in either statutory or case law, the addition of a new element in CALCRIM No. 801 is unwarranted and as modified in the present case, a "serious bodily injury" was inherent in the requirement that the prosecution prove Santana attempted to disable or make useless a part of the victim's body. Additionally, requiring the proof of a "serious bodily injury" over and above the statutory language creates an increased burden on the prosecution and could lead to jury confusion and unintended consequences. By adding a new element, the instruction is likely to lead the jury astray and into believing the "serious bodily injury" requirement was not superfluous, and should be attributed greater significance. The additional element in CALCRIM No. 801 steps on the Legislature's prerogative and, as the last 135 years has shown, is completely unnecessary.

A. The Historical Development of the Mayhem Statute

The crime of mayhem has been in existence for centuries and has remained unchanged in the California Penal Code since 1874. Viewing the historical development of mayhem, it is apparent that the crime has been broadened and liberalized since early common law and through its statutory

enactment in California. Presently, mayhem is defined in Penal Code section 203 as follows:

> Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.

Mayhem has three elements: (1) an unlawful act by means of physical force; (2) resulting in an injury which "deprives a human being of a member of his body, or disables, disfigures or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip . . . ;" and (3) done "maliciously," defined as "an unlawful intent to vex, annoy, or injure another person." (*People v. Ausbie* (2004)123 Cal. App. 4th 855, 861 citing Pen. Code, § 203["The offense includes three elements..."].)

At common law, mayhem, an older form of the word "maim," was originally committable only by infliction of an injury which substantially reduced the victim's formidability in combat. (*Goodman v. Superior Court* (1978) 84 Cal.App.3d 621, 623-624.) The rationale behind the crime was to preserve the king's right to the military services of his subjects. (*People v. Keenan* (1991) 227 Cal. App. 3d 26, 33-34.) Over the years, this definition was liberalized and expanded to include "mere disfigurement without an attendant reduction in fighting ability" where the injury was permanent. (*Goodman, supra,* 84 Cal. App. 4th at p. 624; see also *People v. Green* (1976) 59 Cal.App.3d 1, 3 ["what is important now is not the victim's capacity for attack or defense, but the integrity of his person"].)

The court in *People v. Newble* (1981) 120 Cal. App. 3d 444 discussed the origins of the crime of mayhem and explained how the crime was broadened and evolved at common law:

> "To cut off, or permanently to cripple, a man's hand or finger, or to strike out his eye or foretooth, were all mayhems at common law, if done maliciously, because any such harm rendered the person less efficient as a fighting man (for the king's army). But

> an injury such as cutting off his ear or nose did not constitute mayhem, according to the English common law, because it did not result in permanent disablement, but merely disfigured the victim. This was corrected by an early English statute. It seems that an assault was made upon Sir John Coventry on the street by persons who waylaid him and slit his nose in revenge for obnoxious words uttered by him in Parliament. This emphasized the weakness of the law of mayhem, and the so-called 'Coventry Act' was passed. This provided the penalty of death for any one who should, with malice aforethought, 'cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject; with the intention in so doing to maim or disfigure him.' This statute did not displace the English common law of mayhem (malicious maiming) but provided an increased penalty for intentional maiming and for the first time extended the crime to include disfigurement (if intentional). Hence a true definition of the crime according to the English law must be in some such form as this: *Mayhem is malicious maiming or maliciously and intentionally disfiguring another.*" (Perkins on Criminal Law (2d ed. 1969) ch. 2, § 8, pp. 185-186; original italics; fns. omitted.)

(*People v. Newble, supra*, 120 Cal. App. 3d at 450-451.)

California's statutory development of the crime of mayhem commenced in 1850. (See *People v. Sekona* (1994) 27 Cal. App. 4th 443, 454-455 [delineating statutory history of section 203].) That year, the Legislature defined mayhem as follows:

> Mayhem consists in unlawfully depriving a human being of a member of his or her body, or disfiguring it or rendering it useless. If any person shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, ear, or lip, or disable any limb or member of another, or shall voluntarily and of purpose put out an eye or eyes, every such person shall be guilty of mayhem, and on conviction shall be punished by imprisonment in the State Prison . . . .

(Stats. 1850, ch. 99, § 46, pp. 233-234.)

After only one minor amendment in 1856, in 1872, as part of California's adoption of the Code Commission's proposed codification of

the Penal Code, mayhem was established as Penal Code section 203, defined as follows:

> Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures or renders it useless, or who cuts out or disables the tongue, puts out an eye, slits the nose, ear, or lip, is guilty of mayhem.

(1 Pen. Code, § 203 (1st ed. 1872, Haymond, Burch & McKune, commrs.) pp. 96-97.)

Only two years later, in 1874, the Legislature amended the mayhem statute to its current version, extending the offense to cover one who "cuts," instead of "cuts out" or disables the tongue, further liberalizing the common law requirements. (Cal. Code Amends. 1873-1874, ch. 614, § 17, p. 427.) The statute has not been substantively amended since.[4]

While section 203 contains "verbal vestiges" of common law and the Coventry Act, "the modern rationale of the crime may be said to be the preservation of the natural completeness and normal appearance of the human face and body, and not, as originally, the preservation of the sovereign's right to the effective military assistance of his subjects." (*People v. Newble, supra*, 120 Cal. App. 3d at p. 441, citing LaFave & Scott, Criminal Law (1972) ch. 7, § 83, pp. 614-615; see also Cal.Criminal Defense Practice (Matthew Bender 2011) ch. 142 § 142.16 ["[M]ayhem under Penal Code section 203 includes any act that violates the natural completeness and normal appearance of the human body, and is not restricted to those acts involving the most heinous disfiguring and disabling attacks."]; 2 Lafave, Substantive Criminal Law (2003) Physical Harm and Apprehension Thereof, § 16.5(b), p. 600 ["Thus the modern rationale of the

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[4] In 1989, section 203 was amended for "routine code maintenance," but there were no actual changes to the language of the statute. (Stats. 1989, ch. 1360, § 106, p. 5864.)

crime may be said to be the preservation of the natural completeness and normal appearance of the human face and body."]) The modern rationale for the crime of mayhem in California is to protect the integrity of the victim's person from disfigurement. (*People v. Ausbie, supra*, 123 Cal. App. 4th at p. 860; *People v. Keenan, supra*, 227 Cal. App. 3d at p. 34.) Thus, the crime has been liberalized and expanded since common law; what is important now is not the victim's capacity for attack or defense, but the integrity of his person. (*People v. Green, supra*, 59 Cal.App.3d at p. 3.)

Since the early common law was broadened to include a disfiguring injury, a conviction for mayhem requires that the disability or disfigurement be "permanent." (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1571; *People v. Newble, supra,* 120 Cal. App. 3d at p. 453 [trier of fact could reasonably conclude three inch permanent facial scar constituted disfigurement]; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2010) Crimes Against the Person, § 86.) Thus, "[t]o prove mayhem based on a disfiguring injury, the injury must be permanent," (*People v. Newby* (2008) 167 Cal. App. 4th 1341, 1346.) Permanence, however, may be inferred from an injury's long duration. (See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [broken ankle causing disability lasting over six months sufficient to support charge of mayhem], disapproved on other grounds by *People v. Kimble* (1988) 44 Cal.3d 480, 498.) Evidence the victim's injuries may be alleviated by modern medicine does not remove a permanent disfigurement from the operation of the statute. (E.g., *People v. Hill, supra*, 23 Cal.App.4th 1566, 1571-1575; *People v. Keenan* (1991) 227 Cal. App. 3d 26, 35-36 [scars from cigarette burns assumed to be permanent; medical possibility of removing scars insufficient to alleviate offense.)

B. The Crime of Mayhem Does Not Contain a Statutory Element of "Seriously Bodily Injury"; CALCRIM No. 801 Which Requires the People to Prove That the Defendant Caused "Serious Bodily Injury" is an Incorrect Statement of the Law

A detailed examination of section 203, a statute which has existed in its current form for more than 135 years, reveals that there are four separate types of qualifying injuries described as part of the second element, each with a specific verb or verbs modifying the particular injury identified by the statute: (1) depriving a human being of a member of his body, or disabling, disfiguring, or rendering the member of the body useless; (2) cutting or disabling the tongue; (3) putting out an eye; or (4) slitting the nose, ear, or lip. Noticeably absent, however, is any requirement of a "serious bodily injury" over and above the specific injuries that are part of the second statutory element. (C.f. § 206, torture ["Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, *inflicts great bodily injury as defined in Section 12022.7* upon the person of another, is guilty of torture"]; § 245, subd (a)(4), assault by means of force likely to produce great bodily injury "[Any person who commits an assault upon the person of another by any means of force likely to *produce great bodily injury* ..."]; § 243, subd. (d), battery causing serious bodily injury ["When a battery is committed against any person and *serious bodily injury is inflicted* on the person, ..."].)

Former CALJIC No. 9.30 defined the crime of mayhem consistent with the three statutory elements:

> [Defendant is accused [in Count[s]] of having committed the crime of mayhem, a violation of § 203 of the Penal Code.]

Every person who unlawfully and maliciously deprives a human being of a member of [his] [her] body, or disables, permanently disfigures, or renders it useless, or who cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of the crime of mayhem in violation of Penal Code § 203.

In order to prove this crime, each of the following elements must be proved:

1. One person unlawfully and by means of physical force [deprived a human being of a member of [his] [her] body or, disabled, permanently disfigured, or rendered it useless;] [or] [of a human being;] and

2. The person who committed the act causing the bodily harm, did so maliciously, that is, with an unlawful intent to vex, annoy, or injure another person.

[It is not a defense that a disfigurement has been or may be medically alleviated.]

Like its CALJIC predecessor, the first version of CALCRIM No. 801 (January 2006) also did not contain a "serious bodily injury" element. This version stated as follows:

The defendant is charged [in Count _____] with mayhem.

To prove that the defendant is guilty of mayhem, the People must prove that the defendant unlawfully and maliciously:

[1. Removed a part of someone's body(;/.)] [¶][OR] [¶][2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)][¶][OR] [¶][3. Permanently disfigured someone(;/.)][¶][OR] [¶][4. Cut or disabled someone's tongue(;/.)][¶][OR] [¶][5. Slit someone's (nose[,]/ear[,]/ [or] lip) (;/.)][¶][OR][6. Put out someone's eye or injured someone's eye in a way that so significantly reduced (his/her) ability to see that the eye was useless for the purpose of ordinary sight.]

Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

[A disfiguring injury may be permanent even if it can be repaired by medical procedures.]

However, the current CALCRIM No. 801, modified in August 2006, only a few months after the original CALCRIM instruction, requires as an additional and new element that the People prove the defendant caused "serious bodily injury":

> To prove that the defendant is guilty of mayhem, *the People must prove that the defendant caused serious bodily injury* when (he/she) unlawfully and maliciously: [¶][1. Removed a part of someone's body(;/.)][¶] [OR] [¶][2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)][¶] [OR] [¶] [3. Permanently disfigured someone(;/.)][¶] [OR] [¶] [4. Cut or disabled someone's tongue(;/.)[¶]][OR] [¶] [5. Slit someone's (nose[,]/ear[,]/ [or] lip) (;/.)][¶] [OR] [¶] [6. Put out someone's eye or injured someone's eye in a way that so significantly reduced (his/her) ability to see that the eye was useless for the purpose of ordinary sight.]
>
> "Serious bodily injury" is defined by the instruction as:
>
> A serious bodily injury means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement)

Thus, while the current CALCRIM instruction on mayhem requires the jury to find the defendant caused "serious bodily injury," its predecessors, CALJIC No. 9.30 and the initial version of CALCRIM No. 801, as noted above, contained no such instruction.

The mayhem statute, however, contains no such requirement that the defendant caused or even attempted to cause "serious bodily injury." (Pen. Code, § 203.) That is because any such requirement would be redundant. Depriving a human being of a body part; disabling, disfiguring or rendering useless a body part; cutting or disabling the tongue; putting out an eye; or slitting the ear, nose or lip are all actions that involve significant (or even

"serious" or "great") bodily injury. Specifically here, the instruction required that the prosecutor prove Santana intended to cause "serious bodily injury," which was superfluous to and inherent in the requirement that it must prove Santana intended to "maliciously disable[] or [make] useless part of someone's body and the disability was more than slight or temporary."[5] That the prosecution must additionally prove that the inflicted injury constitutes "serious bodily injury," over and above the definite injuries identified by the statue, is unnecessary. The parameters of the crime are defined by the statute and there is no need to expand the statute beyond its terms. In short, it is an exercise in redundancy for CALCRIM No. 801 to append an additional requirement of a serious bodily injury.

Respondent does not dispute that inflicting several of the statutorily qualifying injuries would, *ipso facto*, constitute "serious bodily injury" as defined in the instruction. Obviously, maliciously depriving a human being of a member of his body, or putting out an eye would be "serious bodily injury" under any definition. Further, in this case, Santana's disabling or making useless a part of the victim's body could certainly be deemed a serious injury. However, requiring the prosecution to *prove* such an additional element is not contemplated by the statute. What is required is that the prosecution proves that the defendant "unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits

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[5] As discussed below, a "serious bodily injury," as defined in CALCRIM No. 801, is not always inherent in the type of injury required by the mayhem statute. But it was inherent here where the judge modified the language of the instruction to omit the alternative types of injuries. In other cases, the "serious bodily injury" may not be superfluous, but it should not be given.

the nose, ear, or lip." The disfiguring injury inflicted must be permanent, which elevates the significance of the inflicted injury, and obviates the need for the prosecutor to prove the extra element of a "serious bodily injury." The fact that in many instances the injury inflicted would, in fact, fall under the specific definition of "serious bodily injury" provided by CALCRIM No. 801 does not give rise to the requirement that the prosecution prove such. It is for the Legislature to determine whether the crime of mayhem should require proof of a serious bodily injury. For the past 135 years, it has not. There is no reason for disregarding this expressed intent and impose and additional requirement.

Nor is there any reason to create a new element as a means of ensuring an injury is sufficiently substantial or severe because the statute itself dictates the limitations to the crime. The Legislature has already placed a threshold floor on the nature and severity of the injuries by virtue of identifying the type of injuries that will suffice. Additional limitations are unnecessary. Respondent recognizes that not any "slight cut on the tongue or an infinitesimal slit on the ear or lip" comes within the definition of mayhem. (*People v. Pitts, supra,* 223 Cal App. 3d at pp. 1559.) It is true that "not every visible scarring wound can be said to constitute the felony crime of mayhem.'" (*People v. Newble, supra*, 120 Cal.App.3d at p. 453.) However, as noted, the crime of mayhem has been liberalized and expanded since early common law and certain permanent facial injuries are, in fact, contemplated by the statute. When the statute was first was enacted in 1872, it required that the tongue be "cut out" or disabled. By eliminating the word "out" and extending the offense to cover one who "cuts" or disables the tongue, the Legislature undoubtedly intended to broaden and liberalize the offense.

Moreover, that the word "cuts" is in the same phrase as "disables" suggests that not any minor cut will suffice. The rule of construction

known as *ejusdem generis*, which is particularly applicable to criminal statutes, provides that where general words follow specific words in an enumeration, the general words are construed to embrace things similar in nature to those things enumerated by the preceding specific words. (*People v. Hernandez* (1978) 90 Cal.App.3d 309, 315) The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things. (*Nakamura v. Superior Court* (2000) 83 Cal.App.4th 825, 834.) *Ejusdem generis* applies whether specific words follow general words in a statute or vice versa. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.) Here, with regard to the injuries to the tongue that qualify as mayhem, the general word "cuts" is followed by the specific word "disables." Thus, under the doctrine of *ejusdem generis*, "cuts" must be construed together with "disables." This "'accomplishes the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.'" (2A Sutherland, Statutes and Statutory Construction (4th ed. 1984 rev.) § 47.17, at p. 166, fns. omitted, quoting *National Bank of Commerce v. Estate of Ripley* (1901) 161 Mo. 126, 131 [61 S.W. 587, 588].) It follows that a cut inflicted on the tongue resulting in a permanent injury, affecting the natural completeness of the victim, would be mayhem under California law.

Similarly, not any injury to the nose, ear, or lip will suffice to establish mayhem. The statute provides that mayhem occurs when those facial features are "slit." (§ 203.) A "slit" is defined as a "long, narrow cut or opening." (Webster's Third New International Dict. (2002) p. 2144; see also American Heritage College Dict. (4th Ed. 2007) ["a long, straight,

narrow cut or opening].) "In *Goodman* [*v. Superior Court* (1978) 84 Cal.App.3d 621], the court examined cases under statutes similar to our own and found that mere disfigurement constitutes mayhem 'only where the injury is permanent. Thus, the cutting of a lip requiring several stitches but which would heal without serious scarring was not mayhem. [Citation.]' [Citation.]" (*People v. Newble, supra,* 120 Cal.App.3d at p. 452.) As such, considering that the modern rationale of the crime of mayhem "may be said to be the preservation of the natural completeness and normal appearance of the human face and body," (*People v. Newble, supra*, 120 Cal.App.3d at p. 451; *People v. Keenan, supra*, 227 Cal. App. 3d at p. 24) even a relatively small slit to the nose, ear, or lip could, in fact, amount to the crime of mayhem should the victim suffer a permanent injury, such as scarring.

For example, in *People v. Caldwell* (1984) 153 Cal. App. 3d 947, the victim testified the defendant bit off half of her lower lip. Similarly, the victim's mother testified that "half of her bottom lip was hanging down, and a hole on the other side of it." (*Id.* at p. 952.) The victim's counselor testified that when she saw the victim three days after the assault the victim's lips were extremely swollen; there were puncture wounds in the victim's lip; the puncture wounds completely perforated the lower lip and the inside of the victim's lip was very inflamed. Her doctor testified there were lacerations to the lower lip; her wounds were in the process of healing. On appeal, the defendant argued that the evidence was insufficient to sustain his conviction of mayhem because the wound to the victim's lip was not disfiguring enough to constitute mayhem within the meaning of section 203 (*Ibid.*) The Court of Appeal rejected this claim, finding that the evidence concerning the injury to the victim's lower lip was consistent with defendant having slit that lip within the meaning of section 203. (*Ibid.*)

It should be emphasized, however, that the present case did not involve the alternate elements of cutting or slitting of the victim, giving rise to any possible ambiguity as to whether the injury Santana inflicted was, in fact, permanent or even serious. As instructed, the jury here was required to find that Santana's conduct in shooting the prone victim three times in the leg was an attempt to "unlawfully and maliciously disable[] or [make] useless part of someone's body and the disability was more than slight or temporary." Certainly the serious bodily injury concept was inherent in disabling or rendering a body part useless.

C. California Cases Holding that Mayhem Includes a "Great Bodily Injury" Element Arose in the Sentencing Context and Therefore Are Distinguishable; Additionally There is no Support for Inclusion of a "Serious Bodily Injury" Element in CALCRIM No. 801 in the Jurisprudence of Other States

In California, several sentencing cases apparently provided the genesis for the "serious bodily injury" element addition to CALCRIM No. 801. These lower court opinions have expressed that mayhem includes a "great bodily injury" component or "element" even though the statute does not contain this phrase. (See e.g. *People v. Brown* (2001) 91 Cal.App.4th 256, 272; *People v. Hill* (1994) 23 Cal.App.4th 1566, 1575; *People v. Keenan* (1991) 227 Cal.App.3d 26, 36; *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1559-1560.) However, these cases all arose in the context of sentencing, as explained below, and do not stand for the proposition that the jury must find as an additional element that the victim suffered a "serious bodily injury" to convict a defendant of mayhem.

In *People v. Pitts, supra*, 223 Cal App. 3d at pp. 1559-1560, the defendant slashed the victim several times on her chest with a box cutter, nearly severing her breast. (*Id.* at p. 1552.) The jury found that in committing mayhem, the defendant personally used a deadly and dangerous

weapon, a box cutter, and that he personally and intentionally inflicted great bodily injury on the victim. The trial court sentenced the defendant to the upper term of six years on the mayhem conviction and then enhanced that sentence by imposing a consecutive term of three years for personal and intentional infliction of great bodily injury (Pen. Code, § 12022.7) and a consecutive term of one year for personal use of a dangerous weapon (Pen. Code, § 12022, subd. (b)) (*Id* at p. 1558.)

The Court of Appeal recognized that section 12022.7 precludes a great bodily injury enhancement where "infliction of great bodily injury is an element of the offense" and, as used in section 12022.7 great bodily injury means "a significant or substantial physical injury." The court then held that the enhancement for great bodily injury was improperly imposed because great bodily injury was an element of mayhem. (*Id.* at pp. 1558-1559.) The court explained that it was, "beyond cavil that defendant committed mayhem on the victim in this case and inflicted great bodily injury. Defendant slashed the victim repeatedly with a box cutter, a razor-sharp instrument, and nearly severed her left breast." (*Id.* at p. 1559.)

The People, however, argued that a "slight cut on the tongue or an infinitesimal slit on the ear or lip" would come within the definition of mayhem but would not constitute a "significant or substantial physical injury" and therefore it would be possible in some cases to commit mayhem without inflicting great bodily injury. Thus, according to the People, great bodily injury is not an element of mayhem and the great bodily injury enhancement was applicable to this case. (*Id.*)

The court rejected this argument:

> The People cite no authority to support this argument and our research has disclosed none. On the contrary, our research discloses that from the early common law to modern California law, mayhem has been considered a cruel and savage crime. This history of the offense of mayhem is set forth in detail in

> *Goodman v. Superior Court*, supra, 84 Cal. App. 3d at pages 623-625 [148 Cal.Rptr. 799] and need not be repeated here. Suffice it to say the court's research amply supports its conclusion "not every visible scarring wound can be said to constitute the felony crime of mayhem." (*Id.* at p. 625.) Accordingly, we find great bodily injury as defined in Penal Code section 12022.7 is an element of mayhem and the enhancement for great bodily injury is inapplicable.

(*Id.* at pp. 1559-1560, footnote omitted.)

Further, in *People v. Hill, supra,* 23 Cal.App.4th 1566, the defendant stomped on and kicked the victim's face as he lay on the ground, apparently unconscious. The victim's orbital cavity and cheek bone were fractured. The middle third of his face was displaced and separated from the cranium, a condition classified as the most serious type of facial trauma. In surgery, metal plates and wires were implanted to hold the victim's facial bones together. A prosthetic device was initially implanted to hold his left eye in place. The left eye socket remained larger than the right, which caused the left eye to appear sunken and prevented proper focusing. The victim suffered double and triple vision and had nerve damage to his upper lip. (*Id.* at p. 1559.)

The trial court sentenced the defendant to the upper term of eight years on the mayhem conviction after finding as an aggravating factor that the crime involved great bodily harm (Cal. Rules of Court, former rule 421(a)(1)[6]). (*Id* at p. 1575.) On appeal, the defendant argued the court erred in imposing the aggravated sentence for mayhem based on the fact the victim suffered great bodily injury when great bodily injury is already an element of that offense. (*Ibid.*) After the Attorney General conceded error, the court stated:

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[6] Now rule 4.421(a)(1)

> Appellant is clearly correct. Great bodily injury is unquestionably an element of mayhem; it is therefore improper to use that factor to aggravate the sentence for that offense. (*People v. Pitts* (1990) 223 Cal.App.3d 1547, 1559-1560 [273 Cal.Rptr. 389]; *People v. Keenan, supra*, at p. 36, fn. 7; § 12022.7 [prohibiting use of great bodily injury enhancement where such injury is an element of the offense].) As the court clearly erred in relying on this factor to support the upper term for the mayhem conviction appellant is entitled to resentencing on this count.

(*People v. Hill, supra* 23 Cal. App. 4th at p. 1575; see also *People v. Keenan, supra*, 227 Cal.App.3d at p. 36, fn 7 ["Appellant relies on *Pitts* as support for his claim that mayhem requires proof of great bodily injury, which he claims is missing. Our decision today is not at all at odds with *Pitts*. We agree mayhem requires great bodily injury, but simply disagree with appellant's opinion that it is lacking in this case."] *People v. Brown, supra*, 91 Cal.App.4th at p. 272 ["Mayhem cannot be committed without the infliction of great bodily injury. The sentence prescribed for mayhem, therefore, necessarily includes consideration of the injury and it would be an application of double punishment to apply a great bodily injury enhancement to it."]

The aforementioned cases hold that for purposes of sentencing (and specifically the rule against double-counting sentencing factors) it is improper to add a great bodily injury enhancement to mayhem, because great bodily injury is inherent in mayhem. In other words, the cases do not hold that the People must *prove* great bodily injury to prove mayhem, but rather they hold that by proving mayhem, the People have necessarily proved great bodily injury, and therefore it is erroneous to impose an enhancement for great bodily injury under section 12022.7, or impose an aggravated sentence for bodily harm.

In a non-sentencing case, *People v. Ausbie, supra*, 123 Cal.App.4th 855, the Court of Appeal examined the elements of mayhem and incorrectly

held that those elements include "serious bodily injury." In *Ausbie, supra*, the defendant had been convicted of mayhem, assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)) and battery with serious bodily injury (Pen. Code, § 243, subd. (d)). Invoking the rule that a person cannot be validly convicted of both a greater and lesser included offense, the defendant argued that his convictions on the second and third counts should be reversed on the theory that the crimes at issue were lesser included offenses of mayhem. Significantly, the prosecution conceded the point with respect to battery with serious bodily injury, and the *Ausbie* court accepted the concession without adding any additional analysis. Most importantly, like *Pitts*, *Ausbie* did not purport to hold that "serious bodily injury" was an extra element that had to be proved above and beyond the requirements set forth in section 203. In fact, the court explicitly went out of its way to enumerate the elements of mayhem as follows:

> The offense includes three elements: (1) an unlawful act by means of physical force; (2) resulting in an injury which "deprives a human being of a member of his body, or disables, disfigures or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip . . ;" and (3) done "maliciously," defined as "an unlawful intent to vex, annoy, or injure another person."

(*People v. Ausbie, supra*, 123 Cal.App.4th 855, 861, citing Pen. Code, § 203.)

Conspicuously absent from that formulation, of course, is any mention of "serious bodily injury" or "great bodily injury." Moreover, *Ausbie* involve a conceded error on a count that was stayed by the trial court. Unlike the sentencing cases described above, *Ausbie* concerned the elements of mayhem and held that these elements included serious bodily injury. However, mayhem can in fact be committed without the infliction of "serious bodily injury" as defined by section 243, subdivision (f)(4). As explained in greater detail in section D, *infra*, it is possible that a slit on the

nose or a cut to the tongue may be permanent and disfiguring, but not be considered a "serious disfigurement" or a "wound requiring extensive suturing." While respondent does not dispute that inflicting several of the statutorily qualifying injuries do constitute "serious bodily injury," requiring proof of such an additional element is not contemplated by the statute. The fact that in many instances the injury inflicted would, in fact, fall under the specific definition of "serious bodily injury" provided by CALCRIM No. 801 does not give rise to the requirement that the prosecution prove such.[7]

Additionally, there is no support for the position taken by CALCRIM No. 801 in the jurisprudence of other states with similar mayhem statutes. While section 203 has existed unchanged in California since 1874, mayhem has been eliminated as a separate offense in the criminal codes of practically every jurisdiction, as well as under the Model Penal Code. (See 2 Wharton's Criminal Law (1994) § 204, p. 484; 2 Lafave, Substantive Criminal Law (2003) Physical Harm and Apprehension Thereof, § 16.5(b) at p. 599.) Instead, many of those jurisdictions have included the disablement and disfigurement elements in their pertinent assault and battery provisions. (*Ibid.*)

In some states, the mayhem statute is virtually identical to section 203. (See e.g. Idaho Code § 18-5001; Nev. Rev. Stat. Ann § 200.280; Utah Code Ann. § 76-5-105.) In Nevada, there is no requirement that the prosecutor additionally prove great or serious bodily injury. For example, in *Crawford v. State* (1984) 100 Nev. 617, the Nevada Supreme Court approved of the following instruction:

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[7] To the extent It holds mayhem requires infliction of "serious bodily injury" as defined by section 243, subdivision (f)(4), *Ausbie* should be disapproved.

> Every person who willfully, unlawfully and voluntarily and of purpose slits the ear of another, is guilty of the crime of mayhem.
>
> In order to find the Defendant guilty of the crime of mayhem, each of the following elements must be proved beyond a reasonable doubt:
>
> 1. That defendant willfully and unlawfully and by means of physical force slit the ear of another person, and
>
> 2. That defendant did so voluntarily and of purpose, that is, maliciously.
>
> The word "maliciously" means to wish to vex, annoy or injure another person, or an intent to do a wrongful act.

(*Id.*; see also ICJI 1222 MAYHEM [Idaho].)

In Wisconsin, however, mayhem is defined as follows: "Whoever, with intent to disable or disfigure another, cuts or mutilates the tongue, eye, ear, nose, lip, limb or other bodily member of another is guilty []." (Wis. Stat. § 940.21 .) In *Kirby v. State*, 86 Wis. 2d 292, 301 (Ct. App. 1978) the defendant was convicted of "injury by conduct regardless of life" (Wis. Stat. §. 940.23) as a lesser included offense of mayhem. That crime is defined as, "Whoever causes great bodily harm to another human being by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life is guilty . . ." On appeal, the defendant argued "great bodily harm" was not an element of mayhem and his conviction for injury by conduct regardless of life as a lesser offense should be reversed. The Wisconsin Court of Appeal concluded, however, that the term, "cuts or mutilates" as used in the Wisconsin statute requires "proof of an act of greater severity than a mere nick with a knife." The court held that "cutting or mutilation," a statutory element of mayhem, requires an injury that constitutes "great bodily harm." (*Ibid.*) In response to the opinion in *Kirby*,

in 1982, the Wisconsin Jury Instruction Committee revised the instruction on mayhem to state:

> To constitute mayhem, the State must show that the defendant had (1) the specific intent to disable or disfigure; (2) by cutting or mutilating the tongue, eye, ear, nose, lip, limb, or other bodily member; and (3) the cutting or mutilating produced great bodily harm.

(Wis JI--Criminal 1246.)

In *State v. Quintana* (2008) 308 Wis. 2d 615, 654, however, the Wisconsin Supreme Court recognized that the Jury Instruction Committee was "skeptical of [the] assertion" that mayhem requires great bodily injury, citing to the Committee's comments to Wis JI - - Criminal 1246. That comment explains that one district of the Wisconsin Court of Appeals disagreed with *Kirby*, however, "that disagreement did not manifest itself in a published opinion." (*Id.* at p. 654, fn. 34.) Therefore, the Committee noted that since *Kirby* was the only published opinion on this issue, it remains the law of the state and must be followed until it is officially overruled. (*Ibid.*) The *Quintana* court further observed that, "[w]hile the Jury Instruction Committee has expressed some concern over the great bodily harm requirement being read into the mayhem statute, the legislature has not acted to correct any possible misinterpretation that arose out of the 1978 *Kirby* decision or its progeny." (*Id.* at p. 656.)

The mayhem statute at issue here is dissimilar to the statute in Wisconsin and this Court should not follow the Wisconsin Court of Appeal's holding that mayhem contains a "great bodily harm" requirement beyond the words of the statute. As one court has noted, mayhem is "something of an anachronism in Wisconsin's criminal law, largely superseded by more 'modern' crimes" and rarely charged by prosecutors. (*Cole v. Young* (1987) 817 F.2d 412, 417.) Unlike the California statute, which has remained unchanged since 1874, the current Wisconsin statute

requires the specific intent to disable or disfigure a victim. In Wisconsin there is no requirement that actual disablement or disfigurement occurs, but rather there must be an act which would be expected to result in some disablement or disfigurement. In contrast, section 203 requires actual disability or disfigurement of a permanent nature. Moreover, Wisconsin utilizes the term "great bodily harm" in its instruction, while CALCRIM No. 801 contains the term "serious bodily injury." As discussed in detail in section D, *infra*, in California, "great bodily injury" and "serious bodily injury" have different statutory definitions. The statutory definition of "great bodily injury" is far more general and would be less difficult for the prosecution to prove in a mayhem case. As discussed below, even great bodily injury is an unnecessary addition to California's jury instruction.

Because there is no support for the position taken by CALCRIM No. 801 in the jurisprudence of other states with similar mayhem statutes, this Court should not require proof of "serious bodily injury" for purposes of mayhem.

D. Requiring Additional Proof of a Serious Bodily Injury Over and Above the Definite Injuries Identified by the Statue Creates an Increased Burden on the Prosecution and Could Lead to Juror Confusion and Unintended Consequences

The current version of CALCRIM No. 801 creates an increased burden on the prosecution because the definition of "serious bodily injury" contained in the instruction is more restrictive than what is required by the statute, and proof of serious bodily injury over and above the statutory language is contrary to precedent. Further, while the "serious bodily injury" language contained in CALCRIM No. 801 is proportedly derived from the *Pitts* line of cases, those cases actually utilize the term "great bodily injury" which has a more general statutory definition. Lastly, in the context of a jury instruction, requiring a jury to decide whether one of the

statutorily defined injuries suffered by a victim *additionally* constitutes "serious bodily injury," could lead to juror confusion and unintended consequences.

CALCRIM No. 801 provides that the People must prove the defendant caused "serious bodily injury," defined as:

> [A] serious impairment of physical condition. Such an injury may include[, but is not limited to]: (protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement)

This definition is more restrictive than what is required by the mayhem statute and requires that the prosecutor prove an additional element beyond the elements of the statute. For example, section 203 states that the crime of mayhem has been committed when a defendant "disfigures" a victim's member. CALCRIM No. 801, however, requires further proof of "serious disfigurement." Additionally, it could certainly be possible that a slit of the nose, ear, or lip results in permanent disfigurement, affecting the normal appearance of the human face, but does not require the "extensive suturing" or arguably does not rise to the level of "serious disfigurement" now necessitated by CALCRIM No. 801. (See *People v. Newble* (1981) 120 Cal. App. 3d 444, 452 [to disfigure is "to make less complete, perfect, or beautiful in appearance or character"].)

Several cases decided prior to the addition of a "serious bodily injury" requirement illustrate this point. In *People v. Page* (1980) 104 Cal.App.3d 569, the defendants held the victim down and gave her three tattoos, one on her left breast measuring four by two and one-half inches, one on her abdomen measuring one inch by eight to ten inches on her abdomen, and a third with the words "Mine Too," with an arrow, on the victim's left thigh. The Court of Appeal held that the tattoos to the victim's breasts and stomach, which left permanent scarring, were "clearly 'disfigurement'"

within the meaning of the mayhem statute, because the "law of mayhem as it has developed protects the integrity of the victim's person." (*Id.*)

In *Goodman v. Superior Court* (1978) 84 Cal.App.3d 621, the court held a facial scar of four to five inches long, extending from above the eyebrow to the cheek and with no functional impairment could reasonably be found by the trier of fact to be mayhem within section 203.

Additionally, a permanent three-inch scar on a victim's face caused by slashing with a sharp instrument has been held sufficient to constitute disfigurement for purposes of the crime of mayhem. (*People v. Newble, supra*, 120 Cal.App.3d at p. 453.)

It is certainly clear that victims' injuries in *Page, Goodman*, and *Newble* were disfiguring. However, had the current CALCRIM No. 801 been provided in these cases, the prosecution would have been required go beyond the words of the statute, which clearly states a defendant is guilty of mayhem if he "disfigures" a victim's member. Rather, the prosecution would have been required to prove the permanent tattoos and the facial scars were "serious disfigurement[s]" and these cases may have been decided differently. Are three tattoos a "serious disfigurement"? Or are these injuries properly characterized as mere "disfigurement"? What if the victim in *Page* was tattooed with a single tattoo measuring a square inch? Would that injury be deemed "serious disfigurement"? By requiring that the prosecution additionally prove that the injury which makes up the crime of mayhem is a "serious bodily injury," CALCRIM 801 improperly requires proof of an injury beyond the statutory language which could only work to a defendant's benefit.

That CALCRIM No. 801 employs the term "serious bodily injury" further complicates the problem with the instruction. As "Authority," the bench note to CALCRIM No. 801 states that "serious bodily injury" is "defined" in *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1559-1560.

However, as discussed above, *Pitts* concerned the term "great bodily injury" under section 12022.7, subdivision (f) and not "serious bodily injury," within the meaning of section 243, subdivision (f)(4).[8] Although several cases have held "great" bodily injury and "serious" bodily injury under section 243 are closely related (*People v. Burroughs* (1984) 35 Cal. 3d 824, 831, disapproved on another point in *People v. Blakeley* (2000) 23 Cal. 3d 82, 89 [the elements of serious bodily injury and great bodily injury are "essentially equivalent"] see also *People v. Beltran* (2000) 82 Cal. App. 4th 693, 696-697 ["[t]he terms 'serious bodily injury' in section 243 and 'great bodily injury' in section 12022.7 have substantially the same meaning"]), their statutory definitions are quite different and in the present context, those differences matter. As noted, CALCRIM No. 801 defines "serious bodily injury" as:

> [A] serious impairment of physical condition. Such an injury may include[, but is not limited to]: (protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

"Great bodily injury" is defined in section 12022.7, subdivision (f), as simply "a significant or substantial physical injury." While some courts have found these two terms have a similar meaning, the statutory definition of "great bodily injury" is far more general.

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[8] Section 243, subdivision (f)(4), from which the "serious bodily injury" definition of CALCRIM No. 801 derives, states:

> "Serious bodily injury" means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

Thus, the inclusion of a "serious bodily injury" requirement in CALCRIM No. 801 following the aforementioned sentencing cases is problematic. In *People v. Colantuono* (1994) 7 Cal.4th 206, this Court explained the dangers of crafting an instruction derived from appellate case law:

> "[T]his case illustrates the danger of assuming that a correct statement of substantive law will provide a sound basis for charging the jury. [Citations.] The discussion in an appellate decision is directed to the issue presented. The reviewing court generally does not contemplate a subsequent transmutation of its words into jury instructions and hence does not choose them with that end in mind. We therefore strongly caution that when evaluating special instructions, trial courts carefully consider whether such derivative application is consistent with their original usage."

(*Id.* at p. 222, fn. 13.)

Here, following the *Pitts* line of cases, the requirement that the prosecutor prove "serious bodily injury" was inserted into CALCRIM No. 801, notwithstanding the fact that these cases involved "great bodily injury," which, as described above, contains a more general statutory definition, and notwithstanding the limited sentencing context in which those cases arose. Respondent asserts that committing one of the statutorily qualifying injuries -- depriving a human being of a body part; disabling, disfiguring or rendering useless a body part; cutting or disabling the tongue; putting out an eye; or slitting the ear, nose or lip -- are all actions that would fall under the definition of "great bodily injury" in section 12022.7. These specific qualifying injuries, including the permanent facial injuries, are "significant or substantial." However, this is not so with "serious bodily injury," under section 243, subdivision (f)(4), which contains a more specific and detailed statutory definition, and is not a common law offense. By way of example, as previously explained, it is possible that a slit of the nose may be permanent and disfiguring, but not be considered a "serious

disfigurement" or a "wound requiring extensive suturing." Conversely, such a facial injury would be considered "significant" or "substantial" within the meaning of section 12022.7. Nevertheless, requiring the prosecution to prove the extra element of "serious bodily injury" (or even "great bodily injury") is misleading and increases the prosecution's burden of proof. This attempt to redefined mayhem and create a limit to a crime which has existed in its current form for over 135 years, should be rejected as an improper intrusion into the Legislature's prerogative.

Moreover, to additionally require a jury to determine whether one of the statutorily expressed injuries also constitutes a "serious bodily injury" could lead to juror confusion and unintended consequences. It is not enough now that a jury finds a defendant removed a part of someone's body, disabled or made useless a part of someone's body, permanently disfigured someone, cut or disabled someone's tongue, slit someone's nose, ear, or lip, or put out an eye, as required by the statute. CALCRIM No. 801 further requires that the jury determine whether this conduct caused "serious bodily injury" under the specific definition provided by the instruction. As shown above, it may be difficult for a jury to make this distinction. A jury could very well conclude that a defendant has disabled or disfigured a victim within the meaning of the statute. But then the same jury, faced with making the additional decision as to whether the injury meets the specific CALCRIM definition of "serious bodily injury," could be confused, believing the requirement is not simply superfluous. By way of example, a jury could find that a mark of Zorro on a victim's cheek, resulting in a permanent scar, is disfiguring, but not serious enough to constitute a "serious disfigurement" as required by the CALCRIM instruction. However, such a permanent injury would certainly affect the natural completeness and normal appearance the victim's face and body and should be deemed mayhem under the statute, which demonstrates a

liberalization of the crime since early common law. (*People v. Newble, supra*, 120 Cal.App.3d at p. 451; *People v. Keenan, supra*, 227 Cal. App. 3d at p. 24.) As this example illustrates, there is certainly a distinction between a sentencing judge making a determination that an injury sustained was inherently a "great bodily injury" under the provisions of the Penal Code, as in *Pitts*, and a lay juror tasked with making that determination after first deciding whether the specific statutory elements have been proven. The latter, requiring a jury to determine whether the injury additionally constitutes a "serious bodily injury" within the meaning of CALCRIM No. 801, creates the possibility of juror confusion.

Because "serious bodily injury" is inherently a part of the statutory definition in many instances, a jury is likely to question the requirement that it must make the additional finding and attribute a greater weight to the "serious bodily injury" finding. A jury is not likely to believe the requirement that it find a "serious bodily injury" to be superfluous; rather, it must now find an additional element, suggesting that the injury be serious over and above the statutory language. Thus, requiring the jury to take the additional step and determine whether one of the injuries identified by the statute is additionally a "serious bodily injury" could lead to juror confusion which could only benefit the defendant. Certainly here, the serious bodily injury concept was inherent in disabling or rendering a body part useless.

II. THERE IS NO REASONABLE LIKELIHOOD THAT THE JURY APPLIED THE INSTRUCTION ON MAYHEM AS SUGGESTING IT COULD FIND APPELLANT GUILTY IF HE MERELY INTENDED TO INFLICT A GUNSHOT WOUND

Contrary to the Court of Appeal's conclusion, there is no reasonable likelihood that the jury applied the instruction on mayhem as suggesting it could find appellant guilty if he merely intended to inflict a gunshot wound. The majority concluded that the trial court's instruction removed from the

jury's consideration the "key question" of whether Santana intended to inflict a wound that would seriously impair Vallejo's physical condition by disabling him. (Slip Opn. at p. 17.) Not so. The jury here was instructed that appellant had to intend to "unlawfully and maliciously disable[] or [make] useless part of someone's body and the disability was more than slight or temporary." The instruction that a serious bodily injury "may include a gunshot wound" did not obviate this requirement. Hence, here, regardless of whether a serious bodily injury is an additional requirement of mayhem, there was no reasonable likelihood of juror confusion.

The correctness of jury instructions is determined from the entire charge of the court, not from a consideration of parts of an instruction or from one particular instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

> "'In reviewing [a] purportedly erroneous instruction [], "we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.? [Citation.] In conducting this inquiry, we are mindful that " 'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' " [Citations.]' [Citation.] 'Additionally, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

(*People v. Castaneda* (2011) 51 Cal. 4th 1292, 1320-1321.)

Here, as explained above, CALCRIM No. 801 unnecessarily includes a "serious bodily injury" requirement. The instruction did not, however, inform the jury that it could find appellant guilty merely if he intended to inflict a gunshot wound. Nor is there a reasonable likelihood that the jury would have understood the instruction in such a manner. The instruction clearly required that the prosecution also prove appellant intended to "unlawfully and maliciously disable[] or [make] useless part of someone's

body and the disability was more than slight or temporary." This was all that was required under the terms of the statute. Although the instruction included the unnecessary requirement that the prosecution prove appellant attempted to commit serious bodily injury, viewing the instructions on attempted mayhem as a whole, there could be no confusion.

In any event, the language "Such an injury may include a gunshot wound" certainly did not focus the jury's attention on the manner in which the injury was inflicted rather than on the nature and severity of the injury appellant attempted to inflict. The trial court did not instruct the jury that a gunshot wound was, in fact, a serious bodily injury. Rather, as Justice Benke noted in her dissenting opinion, the jury was instructed that such an injury *may* include a gunshot wound, but it was up to the jury to make that determination. (See Dissent at 5.) The jury was still required to find that appellant's conduct in shooting the prone victim three times in the leg was an attempt to "unlawfully and maliciously disable[] or [make] useless part of someone's body and the disability was more than slight or temporary." Thus, even if serious bodily injury is a part of the statutory elements, there is no reasonable likelihood the jury misunderstood the charge, construed as a whole, because that concept is inherent in disabling or rendering a body part useless. The court's instruction that a serious bodily injury "may" include a gunshot wound did not direct a verdict in favor of the prosecution, nor did it relieve the prosecution of proving the nature and severity of the injury appellant attempted to inflict. That determination was clearly and unequivocally left purely within the jury's discretion.

Moreover, even if the trial court erred in instructing the jury, the error was harmless beyond a reasonable doubt. "An instructional error that improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or a partial verdict upon a particular element, generally is not a structural defect in the trial

mechanism that defies harmless error review," but "falls within the broad category of trial error subject to *Chapman* [*v. California* (1967) 386 U.S. 18 [17 L. Ed. 2d 705]] review." (*Flood, supra*, 18 Cal.4th at pp. 502-503.) Error is deemed harmless when the defendant effectively concedes the element or admits it by his testimony. (*United States v. Rogers* (11th Cir. 1996) 94 F.3d 1519, 1526-1527; *People v. Flood, supra*, 18 Cal.4th at pp. 504-505.)

Here, Santana's counsel never disputed that the victim suffered a serious bodily injury when he was shot three times in the leg. Rather, counsel's focus was on the issue of identity. (See defense closing argument; 2 RT 412-433.) In fact, defense counsel specifically argued, "I promise you this case is about . . . one question: Identity." [9] (2 RT 419.) Moreover, the jury found true the enhancements that, in count 1, appellant "personally inflicted great bodily injury" on the victim and appellant "personally and intentionally discharged a firearm and proximately caused great bodily injury to the victim." (1 CT 170-171.) For purposes of these enhancements, great bodily injury was defined as a "significant or substantial physical injury. It is an injury that is greater than minor or moderate harm." (1 CT 215, 221.) As previously noted, it is well settled that the terms "serious bodily injury" and "great bodily injury" have

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[9] The bench notes to CALCRIM No. 801 provide that if the parties stipulate that the injury suffered was a serious bodily injury, the following paragraph should be used:

> "[_____ <Insert description of injury when appropriate; see Bench Notes> is a serious bodily injury]

The fact that the jury was instructed without objection that a serious bodily injury "may include a gunshot wound" suggests that this was not some rogue inclusion by the trial judge, but rather that parties did not dispute the nature of the victim's injuries.

substantially the same meaning. (*People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1375; *People v. Burroughs* (1984) 35 Cal. 3d 824, 831.) Consequently, as Justice Benke recognized, because the jury found Santana caused and inflicted great bodily injury on the victim during the course of the attempted mayhem, it can be said that, even absent the modification to CALCRIM No, 801, the jury would have found that Santana attempted to cause serious bodily injury when he shot the victim three times in the leg at close range. (See Dissent at 8.) Notably, the case was charged as an attempted mayhem. Consequently, it did not matter whether the injury inflicted constituted mayhem. The question was one of intent to inflict such an injury. No one, including Santana, could have anticipated that the gunshot wounds to the leg at close range would not have resulted in a greater injury. In fact, the trial court questioned, "why this [case] wasn't filed as a completed mayhem." (2 RT 341.) It was completely fortuitous that a greater injury did not occur. Moreover, the evidence supporting Santana's conviction on count 1 for attempted mayhem was strong in light of the identifications made by the victim and his friend. Any error in the court's instruction was harmless beyond a reasonable doubt.

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CONCLUSION

For the foregoing reasons, respondent respectfully asks this Court to reverse the judgment of the Court of Appeal and reinstate the judgment of conviction against Santana.

Dated: April 18, 2012

Respectfully submitted,

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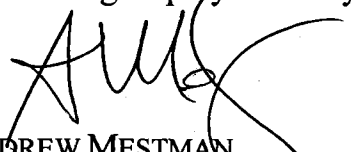

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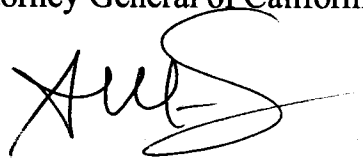
CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING **BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains **12,382** words.

Dated: April 18, 2012

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Santana** No.: **S198324**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On April 19, 2012, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 19, 2012, at San Diego, California.

D. Perez
Declarant

Signature

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