IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

On Review 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 BRIEF ON THE MERITS

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

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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.	)	

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THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. SERAFIN SANTANA, Appellant.	Case No. **S198324** Court of Appeal Case No. D059013 [4th Dist., Div. 1] Riverside County Superior Court Case No. RIF139207 **APPELLANT'S ANSWER BRIEF ON THE MERITS**

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Court's order granting respondent's petition for review limited the issue to that stated in respondent's petition for review. (Order filed Feb. 23, 2012.) The petition for review identified a lone issue upon which review was sought:

"Does CALCRIM No. 801, which purports to define the crime of mayhem, incorrectly require that the prosecution prove the additional element that a defendant caused 'serious bodily injury'?" (Respondent's Petition for Review, filed Dec. 1, 2011, p. 1.)

INTRODUCTION

In an unusual turn of events, both appellant and respondent contend the trial court gave an incorrect instruction to the jury on the law of attempted mayhem, but each party relies upon different reasons for error. Appellant argues the instruction was incomplete and argumentatively directed the jury to the prosecution's evidence. Advancing an issue not briefed nor addressed in the lower court, respondent argues the instruction improperly included language not contained within the statutory language of section 203, and therefore imposed an evidentiary burden on respondent not established by the Legislature. The Court of Appeal agreed with appellant and this Court granted review.

Appellant's conviction was reversed in the lower court on the ground the trial court's modified CALCRIM No. 801 instruction was both incomplete and argumentative. Respondent does not specifically address the doctrine of impartial jury instructions, but instead confines its argument to the contention appellant was not prejudiced by the court's modified instruction.

This case was tried on a theory appellant intended to inflict a disabling mayhem injury. Respondent does not dispute a disabling injury is both "a serious impairment of physical condition" as well as a "significant or substantial" injury. Nevertheless, respondent contends CALCRIM No. 801 incorrectly states the law on mayhem

and should be ordered amended by this Court to delete the serious bodily injury language which was added to the instruction in August of 2006 by the Judicial Council.

STATEMENT OF THE CASE

On March 9, 2009, appellant SERAFIN SANTANA ("appellant") was charged in a first amended information filed in the Riverside county Superior Court with three criminal violations arising from a fistfight that escalated into a shooting incident involving victims Bryan Vallejo and Andrew Ortiz. (C.T. pp. 93-95.)[1] Appellant was charged with attempted mayhem (Pen. Code,[2] §§ 664 / 203, count 1) and assault with a firearm upon Vallejo (§ 245, subd. (a)(2), count 2); and assault with a firearm upon Ortiz (§ 245, subd. (a)(2), count 3). Appellant was charged with firearm enhancements as to each count. The firearm enhancement attached to the attempted mayhem count was a mandatory consecutive 25 years to life (§ 12022.53, subd. (d)), while counts 2 and 3 involved determinate term firearm enhancements (§ 12022.5, subd. (a) [3, 4 or 10 year terms]). Appellant was also charged with inflicting great bodily injury upon Vallejo. (§ 12022.7

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[1] All references to the clerk's transcript shall be "C.T." and all references to the consecutively paginated reporter's transcript shall be "R.T."

[2] All references to statutory authority shall be to the Penal Code unless stated otherwise.

[3-year term].)[3]

Procedural Facts

Appellant was initially charged in a criminal complaint with premeditated attempted murder, attempted mayhem, and torture of Vallejo, and assault with a deadly weapon against Ortiz. (C.T. pp. 18-19.) At the preliminary hearing the magistrate discharged appellant on the attempted mayhem and torture counts based upon insufficient evidence. (C.T. p. 16.) The prosecution refiled the attempted mayhem count in superior court, but did not refile the torture count. (C.T. pp. 76-78.) The superior court subsequently dismissed the attempted murder count (count 1) on appellant's section 995 motion, but allowed the attempted mayhem count to go forward notwithstanding the magistrate's earlier ruling. (C.T. p. 89.)

Appellant's first trial ended in a hung jury, and a mistrial was declared. (C.T. p. 108.) This appeal was taken from guilt verdicts on all counts and true findings on all enhancements rendered at appellant's second jury trial. (C.T. pp. 167-174; 263.)

Appellant was sentenced to a total term of 29 years and four months to life in state prison [2 years for attempted mayhem + 25 years to life for firearm use + 2 years for ADW on Ortiz + 1 year

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[3] No offender or prior conviction enhancements were charged.

and 4 months for firearm use on Oritz]. (C.T. pp. 265-266 [abstract].)

Appellate Proceedings

Appellant raised several challenges to his conviction and sentence. The Court of Appeal rejected all but one claim. The Court of Appeal, in a majority decision, found the trial court had improperly crafted a modified version of CALCRIM No. 801 that constituted an argumentative and, therefore, improper instruction. The Court of Appeal reversed appellant's conviction for attempted mayhem. (Slip Opn. pp. 7-20.)

Respondent sought rehearing on the ground the pattern instruction unfairly burdened the prosecution with a description of mayhem that is not included within the statutory definition contained in section 203. After respondent's petition for rehearing was denied, this Court granted review.

STATEMENT OF THE FACTS

On August 12, 2007 at 2:00 a.m. Bryan Vallejo (who was then 15 years old) was using drugs[4] with Andrew Ortiz and another friend in front of his house while a party was going on three doors down at the house of another friend, Juan Gomez. Within 20 minutes of ingesting the drugs, Vallejo started up a conversation with four or five males who had come from the Gomez party. (R.T. pp. 42, 88.)

Vallejo identified appellant as the male with the Dodgers baseball cap. (R.T. p. 45.) At some point during their interaction the city of Rialto was mentioned. (R.T. p. 75.)[5]

Vallejo and the males talked casually for a short time before one of the males asked Vallejo if he had access to marijuana. (R.T. pp. 46-47.) An argument erupted over Vallejo's disputed ability to obtain marijuana. (R.T. p. 48.)

Vallejo and the taller of the males agreed to fight a short distance down the street. (R.T. p. 49.) After the two began to

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[4] Vallejo, Ortiz and another male were using a balloon as a delivery mechanism to ingest a drug referred to as "nox," which Vallejo alternately described as either "PCP" or "laughing gas." (R.T. p. 39.) According to a university website, the active compound of "nox" is nitrous oxide, which produces symptoms of relaxation, giddiness, skin sensitivity, loss of coordination and anesthesia. (www.harvarddapa.org/drug-ipedia/inhalants/nitrous-oxide/.)

[5] Juan Gomez later told police he believed appellant was involved because appellant was from Rialto. (R.T. p. 216.)

fight, two of the males, but not appellant, joined the fray. (R.T. pp. 53, 54.) After the fight became a one-on-three fight, Vallejo tried to cover up and protect himself when he heard Ortiz yell one of the males had a gun. (R.T. p. 55.) Immediately thereafter Vallejo felt as if he had been struck with an object behind his left ear. (R.T. pp. 55-56.) Vallejo speculated he was struck with a gun. (R.T. p. 56.)

He decided to get down on the ground in a fetal position to avoid serious injury. (R.T. pp. 56-57.) The males stopped hitting and kicking Vallejo, and one of them got into a white Cadillac after telling Vallejo that if he got up, he was going to kill him. (R.T. pp. 57-58.) The other males also got into the Cadillac, leaving just appellant and Vallejo in the street. (R.T. p. 58.)

Appellant ran over towards Vallejo, who was still lying on the sidewalk, and proceeded to shoot him in the lower extremity from a distance of just three to four feet. (R.T. pp. 59-60.) Although Vallejo was covering his head when he was lying on the sidewalk, he did not cover his eyes. Vallejo looked at appellant's face and then at the gun and then saw sparks and felt burning on his left side. (R.T. p. 62.) Vallejo was shot three times. (R.T. p. 62.)

Appellant quickly got into a car and left the scene. (R.T. pp. 63, 106.) The amount of time from when Vallejo was on the ground until the shooting occurred was 15 to 20 seconds. (R.T.

p. 106.)

Injuries

Vallejo did not realize he had been shot until Ortiz told him so, as he assisted Vallejo in getting to his feet. As he stood, Vallejo noticed his leg felt numb. He looked down and saw his ankle was bleeding. (R.T. pp. 65, 66.) The three bullet wounds were through and through wounds, in his buttock, thigh, and leg. (R.T. pp. 70-72.) He was taken by ambulance to the hospital where bandages were applied to the wounds. (R.T. p. 70.) No stitches were required. (R.T. p. 71.) With regard to the severity of the wounds, Vallejo reported he experienced pain over the course of the first month when he changed the bandages. (R.T. p. 72.) He used a cane when he went back to school and had to wear slippers for a period of time. He also experienced pain when he sat down. (R.T. p. 72.) The wounds interfered with his ability to try out for the football team, where he had hopes of receiving a scholarship. (R.T. p. 72.) Vallejo reported at the time of trial he still had occasional pain in the morning. (R.T. p. 73.)

ARGUMENT

I.

CALCRIM NO. 801 PROPERLY DESCRIBES A MAYHEM INJURY AS A 'SERIOUS IMPAIRMENT OF PHYSICAL CONDITION.'

The core of the issue upon which review was granted is the question of whether CALCRIM No. 801 correctly states the law of mayhem. More particularly, the issue is whether or not the Judicial Council was correct in incorporating the definition of a serious bodily injury from the statutory language of section 243, subdivision (f)(4) such that a jury is directed to consider whether the victim sustained "a serious impairment of physical condition" in deciding the question of whether a mayhem injury is shown by the evidence. The core of respondent's claim is that the imported language required the prosecution to prove a fact (serious bodily injury) which is not a statutory element of the offense of mayhem.

Appellant submits CALCRIM No. 801 correctly states the law of mayhem as currently constituted and no change in the instruction is required. Prior to respondent's petition for rehearing in the Court of Appeal, respondent had twice previously expressly conceded mayhem injuries include the elements of a serious bodily injury. The

concessions were given in the instant case and in *People v. Ausbie* (*Ausbie*) (2004) 123 Cal.App.4th 855. The lower court in this case accepted respondent's concession and followed *Ausbie* without discussion of the issue, just as the court in *Ausbie* had accepted respondent's concession in 2004. (Slip Opn. p. 14; *Ausbie, supra*, 123 Cal.App.4th at p. 859.)

Although respondent now takes the opposite position, respondent's reasoning is insubstantial and unsupported by authority. Respondent's argument is based upon respondent's *ad hoc* characterization of the serious bodily injury definition found in section 243, subdivision (f)(4) ("a serious impairment of physical condition"), as too "specific" to be encompassed by mayhem. (O.B.M. p. 32.)[6] Respondent asks this Court to speculate juries will be misled by this language and fail to render convictions when the evidence is otherwise sufficient to constitute a mayhem injury. (O.B.M. p. 33.)

In light of the history of mayhem as a cruel and savage crime; and, indeed, the most serious of the assaultive (non-sex) crimes, appellant submits this Court should concur with the (uncontested) holding of *Ausbie* that all mayhem injuries necessarily include "a serious impairment of physical condition," and conclude CALCRIM

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[6] Citations to respondent's opening brief on the merits shall be: "O.B.M."

No. 801 correctly describes mayhem. (*Ausbie, supra*, 123 Cal.App.4th at p. 859.) Accordingly, the judgment of the lower court should be affirmed.

Even if CALCRIM No. 801 should not have described a mayhem injury to the jury as "a serious impairment of physical condition," the rationale for the Court of Appeal's ruling is unaffected by this issue. The Court of Appeal found the trial court's modified mayhem instruction to be both incomplete in failing to explain the term "disabling injury," and to be a "grossly misleading and argumentative instruction that favored the prosecution." (Slip Opn. pp. 13-14.)

If this Court concludes CALCRIM No. 801 incorrectly described the law of mayhem to the jury, appellant requests this Court hold the ruling applies prospectively only. In light of the fact this instruction has been in use for six years, this case presents a proper circumstance where considerations of fairness and justice warrant prospective application only. (*People v. Mickle* (1991) 54 Cal.3d 140, 173.) If this Court rules CALCRIM No. 801 does not correctly state the law and that ruling applies to appellant's case, appellant requests this Court transfer this case back to the Court of Appeal for reconsideration of the issue of the argumentative instruction in light of this Court's decision in this case.

A. Respondent's Argument.

Respondent concedes "great bodily injury" is included within the elements of a mayhem injury, but maintains "serious bodily injury" is not. (O.B.M. p. 31.) Respondent acknowledges section 12022.7 has defined great bodily injury as "a significant or substantial physical injury" and offers the concession that all mayhem injuries are necessarily "significant or substantial" injuries. (O.B.M. p. 32.) This position is supported by caselaw. When respondent previously argued the contrary view--that great bodily injury was not encompassed within mayhem--that argument was soundly rejected by a court of review:

> The People contend 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. Therefore, the People reason, great bodily injury is not an element of mayhem and the great bodily injury enhancement is applicable to this case. [¶] 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.

(*People v. Pitts* (*Pitts*) (1990) 223 Cal.App.3d 1547, 1559; see, *People v. Keenan* (1991) 227 Cal.App.3d 26, 36, fn. 7: "We agree mayhem requires great bodily injury...")

While all mayhem injuries necessarily include great bodily

injury, not all injuries which are great bodily injury are mayhem injuries. (*People v. Escobar* (1992) 3 Cal.4th 740, 748-750 [An injury need not be "permanent," "prolonged," or "protracted" to be significant or substantial under section 12022.7].)

Despite the fact respondent concedes all mayhem injuries are necessarily "serious or substantial" (great bodily) injuries, respondent nevertheless maintains it would be improper to include such language in the pattern instruction for mayhem (CALCRIM No. 801). (O.B.M. p. 33.) Respondent contends the inclusion of "serious or substantial" injury language in CALCRIM No. 801 would be "misleading and increases the prosecution's burden of proof." (O.B.M. p. 33.)

In addition to agreeing great bodily injuries are included within the elements of mayhem, respondent further concedes legal authorities have frequently regarded the phrases "great bodily injury" and "serious bodily injury" as functionally synonymous. (O.B.M. pp. 31, 38, citing *People v. Burroughs* (1984) 35 Cal.3d 824, 831; *People v. Beltran* (2000) 82 Cal.App.4th 693, 696-697.) Respondent maintains, however, there is a definitional distinction between the two types of injuries that is crucial to resolution of the issue upon which review was granted.

Respondent parses the definitions of great and serious bodily injury after characterizing the latter as "specific" and the former as

"general." Citing to this *ad hoc* distinction of respondent's own creation, respondent asks this Court to overturn the decision of the Court of Appeal. (O.B.M. pp. 35-38.)

Respondent reasons as follows: section 12022.7's definition of "great bodily injury" as a "significant or substantial" injury is a "far more general" definition; hence it does not add any additional elements to the definition of a mayhem injury. In contrast, respondent argues, the definition of "serious bodily injury" as "a serious impairment of physical condition" is improperly included in CALCRIM No. 801 because it involves "a more specific and detailed statutory definition, and is not a common law offense." (O.B.M. p. 32.)

Appellant understands respondent to argue this "more specific" serious bodily language adds an element to the definition of the offense of mayhem that does not exist in the statutory language, and CALCRIM No. 801 thereby imports and imposes an additional evidentiary burden upon the prosecution and concomitantly bestows a "benefit" upon defendants on trial for mayhem. (O.B.M. p. 34.)

Respondent ties that "benefit" to appellant's trial in the instant case. Respondent argues that because the trial court's argumentative pinpoint instruction related only to the August 2006 modification to CALCRIM No. 801 (the "serious impairment of

physical condition" language), and because the language was not properly included in CALCRIM No. 801, appellant was not prejudiced by the argumentative pinpoint instruction highlighting the prosecution's evidence because the pinpoint language addressed a non-existent definition of mayhem, i.e., one that include serious bodily injury language. (O.B.M. pp. 34-38.)[7]

Finally, despite protesting the inclusion of serious bodily injury language in CALCRIM No. 801, respondent nevertheless concedes the prosecution was required to prove appellant intended to inflict a serious bodily injury upon Vallejo in the instant case:

> 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***.

(O.B.M. p. 8, emphasis added.) Respondent therefore concedes the serious bodily injury language in CALCRIM No. 801 did not increase its burden of proof with respect to appellant's trial.

Appellant contends the instruction is correct as written, and in any event the Court of Appeal ruled properly to protect appellant's right to impartial and accurate jury instructions.

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[7] Respondent does not address the Court of Appeal's conclusion the trial court's modified instruction was "grossly misleading." (Slip Opn. p. 13.)

1. Respondent's Intimation CALCRIM No. 801 Was Modified to Include "Serious Impairment of Physical Condition" Language Based Upon the Decision in *Pitts* Is Unsupported by History.

Respondent correctly notes that prior to August of 2006, the pattern instruction for mayhem (CALCRIM No. 801) did not include the "serious impairment of physical condition" language. (O.B.M. p. 15.) Respondent and appellant disagree on the likely origin of that language.

Respondent argues the language was added to CALCRIM No. 801 based upon the Court of Appeal's decision in *Pitts*: "[T]he 'serious bodily injury' language contained in CALCRIM No. 801 is purportedly derived from the *Pitts* line of cases . . . ." (O.B.M. p. 28.)

In *Pitts*, the Second District Court of Appeal held a defendant could not be sentenced both for mayhem and a great bodily injury enhancement under section 12022.7: "It is beyond cavil that defendant committed mayhem on the victim in this case and inflicted great bodily injury." (*Pitts, supra*, 223 Cal.App.3d at p. 1559.) The court in *Pitts* rejected respondent's argument 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 [under § 12022.7]." (*Ibid.*)

Seizing upon the fact that *Pitts* rejected respondent's argument and held one cannot commit mayhem without also inflicting a "significant or substantial" injury, i.e., a great bodily injury, respondent argues the Judicial Council must have misread *Pitts* and erroneously concluded *Pitts* also held one cannot commit mayhem without also inflicting a serious bodily injury:

> 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). [Footnote omitted.]

(O.B.M. pp. 30-31.) Thus, respondent's contention presumes the drafters waited 16 years to make a change in the pattern instruction for mayhem, and further presumes that even at that late date the Judicial Council did so only after misreading *Pitts*, i.e., neither the phrase "serious bodily injury" nor section 243 appear within the decision in *Pitts*.

Appellant submits a far more logical basis for the change to CALCRIM No. 801 was the uncontested holding in *Ausbie, supra*, 123 Cal.App.4th 855. *Ausbie* accepted and approved of respondent's concession in that case that the definition of mayhem *does* include all of the elements of a battery with serious bodily

injury and that remains a sound decision to the present date. (*Id.* at p. 859.)

2. Respondent's Current Position.

Subsequent to respondent's concession in the lower court that serious bodily injury is inherent in a mayhem injury, at oral argument in the Court of Appeal respondent withdrew that concession.[8] (Slip Opn. pp. 20-21; also see D059013, Order filed Jul. 14, 2011.)

Respondent's opening brief on the merits informs that those earlier (retracted) concessions are now replaced by a modified concession which allows that "several"--but not all--of the six enumerated types of mayhem injuries necessarily meet the definition of serious bodily injuries. (O.B.M. p. 16: "several of the statutorily qualifying [mayhem] injuries would, *ipso facto*, constitute 'serious bodily injury'. . . .") The current position of respondent also includes the concession that all mayhem injuries necessarily include great bodily injury. (O.B.M. p. 32.) Despite that concession respondent contends CALCRIM No. 801 should *not* include descriptive language illustrating neither great bodily injury nor

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[8] The withdrawal of that concession was based on a lesser-included-offense issue in the Court of Appeal and did not involve CALCRIM No. 801. (D059013, Respondent's Letter Brief, filed Jul. 21, 2011, pp. 1-2: "[I]f no completed battery and no serious bodily injury occur, then section 243 subdivision (d) is inapplicable, even if the perpetrator intended to commit serious bodily injury.")

serious bodily injury. (O.B.M. p. 33: "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.")

B. Mayhem Is the Most Serious Assaultive Crime Under California Law, and No Case Has Ever Held One Can Commit Mayhem Without Inflicting An Injury that is Both "A Serious Impairment of Physical Condition" and "Significant or Substantial."

Mayhem is both a very unique and a very serious assaultive crime, and is the highest degree of battery under California law. "[F]rom the early common law to modern California law, ***mayhem has been considered a cruel and savage crime.***" (*Pitts, supra*, 223 Cal.App.3d at p. 1559, emphasis added; see 4 Blackstone's Commentaries 205 ["Mayhem [is]...an atrocious breach of the king's peace..."]; also see Perkins & Boyce, Criminal Law (3d ed. 1982) Other Offenses Against the Person, § 8, p. 238 [" 'Maim' is the modern equivalent of the old word 'mayhem' "].)

Mayhem is one of a very small group of crimes that the legislature has designated as both serious and violent (§ 1192.7, subd. (c)(2), § 667.5, subd. (c)(2)), and can elevate a homicide to first degree murder when a death occurs during its commission. (§ 189; *People v. Jentry* (1977) 69 Cal.App.3d 615, 628). And when the crime is committed in conjunction with a murder, the offense qualifies as a special circumstance that can subject the

perpetrator to punishment by death. (§ 190.2, subd. (a)(17)(J).) Mayhem is the only assaultive crime to achieve inclusion in this notorious category of crimes.

The only other crimes the Legislature has included in all four of those categories are burglary, kidnapping, robbery, carjacking, arson and sex crimes (rape, sodomy, oral copulation and lewd and lascivious acts with a child under 14). (§§ 1192.7, subd. (c); 667.5. subd. (c); 189 and 190.2, subd. (a)(17).)

In English common law, the crime originally prohibited only the infliction of an injury that might diminish the fighting capabilities of the victim. (*Goodman v. Superior Court* (1978) 84 Cal.App.3d 621, 623-624; *People v. Keenan, supra*, 227 Cal.App.3d at p. 34.) "Mayhem was defined by Blackstone as violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself or to annoy his adversary.' (4 Blackstone Commentaries 205.)" (*People v. Sekona* (1994) 27 Cal.App.4th 443, 454-455.)

Subsequently, after an attack on a disrespectful member of Parliament by the king's son, the law was expanded in the Coventry

Act.[9] (4 Blackstone's Commentaries 205, 207; *Goodman v. Superior Court, supra,* 84 Cal.App.3d at p. 624.) In "An Act to Prevent Malicious Maiming and Wounding", the crime of mayhem

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[9] A colorful retelling of the events leading to the enactment of the Coventry Act of 1670 appears in a British historical work:

> The nation felt disgraced in its extravagant profligacy. Murmurs were heard even amongst the habitual supporters of the government. In a Committee of Ways and Means it was proposed in the Commons that a tax should be paid "by every one that resorts to any playhouses," of a shilling for a box-seat, sixpence for the pit, and threepence for other places. It was argued that the Players were the king's servants, "and a part of his pleasure." Sir John Coventry, member for Weymouth, asked "If the king's pleasure lay amongst the men or the women players?"[fn 1] The offence was visited with a very summary punishment, perpetrated under the orders of the duke of Monmouth, the king's son, and, as was universally believed, with the king's connivance. As sir John Coventry was passing through the Haymarket, he was set upon by Sandys, the lieutenant of Monmouth's troop, and a number of his men, and by these ruffians his nose was nearly cut off. ... A Bill was passed "to prevent malicious maiming and wounding." It recited the outrage upon sir John Coventry on the 21st of December; and, setting forth that sir John Sandys and three others, who bad been indicted for felony, had fled from justice, enacted that they should be banished for ever unless they surrendered by a given day.
>
> [Fn 1.] "Parliamentary History," vol. iv. col. 461.

(Knight, *The Popular History of England, An Illustrated History* (1858) Vol. IV, p. 313; see *Calder v. Bull* (1798) 3 U.S. 386, 389 [3 Dall. 386, 1 L.Ed. 648] [noting the Coventry Act, while legal under English law, would have constituted a prohibited bill of attainder under United States law].)

was expanded by Parliament to include disfigurement that did not result in reduced battle skills and defined mayhem as follows:

> By this statute it is enacted that if any person shall of malice aforethought, and by lying in wait, unlawfully 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 other person, *with intent to maim or disfigure him*, such person, his counselors, aiders, and abetters, shall be guilty of felony, without benefit of clergy.

(Coventry Act, 22 & 23 Car. II, ch. 1 (1670), quoted in 4 Blackstone, Commentaries 206-208, original emphasis; see Perkins & Boyce, Criminal Law (3d ed. 1982) Other Offenses Against the Person, § 8, p. 240 ["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)"], italics in original, footnotes omitted.)

California's initial version of mayhem was nearly identical to the Coventry Act: "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 for a term not less than one year, nor more than five years." (Stats. 1850, ch. 99, § 46, pp. 233-234.)

Since 1850 that definition has remained essentially unchanged, although the language has been simplified over the years, most recently in 1989. (*People v. Sekona, supra*, 27 Cal.App.4th at pp. 455-456.)

In its present form, mayhem is statutorily defined in section 203 as one of six types of assaultive acts: "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." (§ 203.) The current pattern jury instruction enumerates those six injuries as follows:

1. Removed a part of someone's body;

2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary;

3. Permanently disfigured someone;

4. Cut or disabled someone's tongue;

5. Slit someone's nose, ear, or lip;

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.

(CALCRIM No. 801 (August 2006).)

1. Caselaw Interpreting Section 203.

Over recent decades California courts "have expanded mayhem to include acts not within the original definition of the crime." (*People v. Keenan, supra*, 227 Cal.App.3d at p. 34.) Those courts have interpreted the law of mayhem to protect a person's appearance and functionality, observing that " `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 ' " (*People v. Newble* (1981) 120 Cal.App.3d 444, 451), and "[t]he law of mayhem as it has developed protects the integrity of the victim's person." (*People v. Page* (1980) 104 Cal.App.3d 569, 578.)

Despite the expanded definition of mayhem through caselaw, not all disfigurement constitutes mayhem: "***[N]ot every visible scarring wound can be said to constitute mayhem***." (*Ibid.*, emphasis added.) Similarly, not all disabling injuries constitute mayhem. (*People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [court assumed "***slight and temporary disability would not arise to the level of mayhem***"], disapproved on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 496, fn. 12]; 2 LaFave, Substantive Criminal Law (2d ed. 2003) Physical Harm & Apprehension, § 16.5(b), p. 600 ["A front tooth, but not a jaw tooth, is a bodily member within the definition of mayhem. . .. [M]ayhem now covers

the cutting off or slitting of the ear, nose or lips. On the other hand, it is not mayhem to cut a throat with a knife or to break a jaw or fracture a skull"], footnotes omitted.)

Caselaw has uniformly held that the infliction of a mayhem injury necessarily includes the infliction of an injury that is "significant or substantial," which is the statutory definition of great bodily injury. (*Pitts, supra*, 223 Cal.App.3d at p. 1559; § 12022.7.) Caselaw has also held a "serious" bodily injury and a "great" bodily injury are functional equivalents of each other. (*People v. Burroughs* (1984) 35 Cal.3d 824, 831 ; *People v. Beltran* (2000) 82 Cal.App.4th 693, 696-697, cf. *People v. Taylor* (2004) 118 Cal.App.4th 11, 24-25 [a guilt verdict of battery with serious bodily injury is not equivalent to a true finding of great bodily injury because of distinct injuries, such as a bone fracture, that come within the former but not necessarily within the latter].)

It is therefore a matter of syllogistic logic that all mayhem injuries necessarily include serious bodily injuries. (*Ausbie, supra*, 123 Cal.App.4th at p. 859.)

C. The Current Version of CALCRIM No. 801 Correctly Incorporates *Ausbie's* Holding that Mayhem Injuries Necessarily Include a "Serious Impairment of Physical Condition."

Beginning in August of 2006, CALCRIM No. 801 has included descriptive language to guide jurors in their duty to make a factual

finding of whether an injury constitutes mayhem or something lesser by describing the requisite degree of injury as an "impairment of physical condition." (CALCRIM No. 801 (August 2006).) Prior to the adoption of that language, earlier versions of the pattern instruction were refined to include descriptive words, designed to assist the jurors in their deliberative duties.

For example, going back decades, the pattern instructions for mayhem included descriptive language to aid the jury in making the determination of the meaning of " 'puts out the eye.' " (CALJIC No. 9.31 (1970).)

Later, CALJIC No. 9.30 described a disfiguring injury under mayhem, and included language directing the jury it was "not a defense that a disfigurement has been or may be medically alleviated." (CALJIC No. 9.30 (July 2004); *People v. Hill* (1994) 23 Cal.App.4th 1566, 1572 [noting the instructional language was based upon the court's decision in *People v. Keenan, supra*, 227 Cal.App.3d at p. 36, fn. 6]; see also *People v. Williams* (1996) 46 Cal.App.4th 1767, 1774.)

The word "permanent" does not appear in section 203 in relation to disfigurement, but caselaw determined an injury must meet this level of severity to constitute a mayhem injury. (*People v. Newby* (2008) 167 Cal.App.4th 1341, 1347 ["[S]uch requirement was grafted to section 203 by case law and incorporated into

section 205 by the Legislature"].)

In the initial version of CALCRIM No. 801, the issue of a disabling injury was addressed. Language was included which explained to the jury that a disabling injury must be "more than slight or temporary." (CALCRIM No. 801 (January 2006); see *People v. Thomas, supra*, 96 Cal.App.3d at p. 512 [court assumed "slight and temporary disability would not arise to the level of mayhem"].)

The Judicial Council's inclusion of the descriptive phrase "a serious impairment of physical condition" continued that same trend of providing additional guidance to jurors on the precise type of injury which constitutes mayhem. (CALCRIM No. 801 (August 2006)).

A look at cases discussing the severity of the various mayhem injuries at issue does not reveal a single case where the injury could not be regarded as "a serious impairment of physical condition." (*People v. Newby, supra*, 167 Cal.App.4th 1341 [nose pushed into nasal cavity, several facial bones broken, permanent facial scarring]; *People v. Sekona, supra*, 27 Cal.App.4th 443 [loss of vision in eye]; *People v. Hill, supra*, 23 Cal.App.4th 1566 [metal plates and wires permanently implanted in victim's head to hold facial bones in place, eye appeared sunken, double and triple vision, tear duct injury, loss of sensation in upper lip]; *People v. Keenan, supra*, 227

Cal.App.3d 26 [both breasts burned with cigarettes]; *Pitts, supra*, 223 Cal.App.3d 1547 [box cutter attack, nearly severed breast]; *People v. Newble, supra*, 120 Cal.App.3d 444 [three-inch permanent facial scar]; *People v. Page, supra*, 104 Cal.App.3d 569 [tattoos on breasts and abdomen]; *People v. Thomas, supra*, 96 Cal.App.3d 507 [broken ankle during rape with disability that lasted more than six months]; *Goodman v. Superior Court, supra,* 84 Cal.App.3d 621 [five-inch scar on face].)

In light of the absence of any mayhem case where the injury could not be said to constitute "a serious impairment of physical condition" there is no basis for respondent's contention that language improperly impedes a prosecution for a violation of section 203.

D. Respondent's Argument On the Elements of Mayhem Conflicts With Its Later Argument on Prejudice.

In addressing the issue of the degree of prejudice sustained by appellant from the trial court's misadventure in giving the jury an argumentative pinpoint instruction that highlighted the prosecution's evidence, respondent argues appellant was not harmed by the error. (O.B.M. pp. 34-38.) The argument is not surprising, but respondent's reasoning is noteworthy because it directly contradicts respondent's argument claiming a distinction between serious bodily injury and great bodily injury.

In direct contravention to respondent's earlier position, respondent argues appellant was not harmed by the instruction because, *inter alia*, serious bodily injury and great bodily injury "***have substantially the same meaning.***" (O.B.M. pp. 37-38, emphasis added.) Respondent continues: "[B]ecause 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." (O.B.M. p. 38.)

Because respondent's entire argument claiming a flaw in CALCRIM No. 801 is premised on the distinction between the definition of great bodily injury and serious bodily injury, respondent's argument asserting the contrary in the same brief should be disregarded. (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48 [judicial admission doctrine bars changes of position to detriment of opposing party].)

E. Mayhem Necessarily Includes "A Serious Impairment of Physical Condition."

Respondent's principal contention in this appeal is one can commit mayhem without inflicting an injury that constitutes "a serious impairment of physical condition." (O.B.M. pp. 28-34.) Respondent is unable to cite to any published decision with such a

holding; and indeed, does not cite to a single case where the court found an injury to be insufficient to constitute a mayhem injury in the first instance.

Instead, respondent cites to three cases upholding convictions for mayhem, and hypothesizes that those three cases might not result in mayhem convictions under the current definition in CALCRIM No. 801. (O.B.M. pp. 29-30.) The cases cited by respondent are *Goodman v. Superior Court, supra*, 84 Cal.App.3d 621, *People v. Page, supra*, 104 Cal.App.3d 569, and *People v. Newble, supra*, 120 Cal.App.3d 444. Those three cases do not support respondent's position.

In *Goodman* the Court of Appeal found: "The facts before us show a victim ***whose face is terribly marred***, probably for life, with all attendant emotional and even economic disabilities." (*Goodman v. Superior Court, supra,* 84 Cal.App.3d at p. 625, emphasis added.) The victim in *Goodman* suffered a four to five inch scar that ran down the side of her face and then turned, where it ran parallel with her mouth. The premise of respondent's argument is that the court in *Goodman* (decided on a pretrial writ -- not review of a final judgment) might not have concluded this was a "serious disfigurement" as is now required by CALCRIM No. 801. (O.B.M. pp. 29-30.) There is nothing in the facts of *Goodman* which remotely supports that contention. *Goodman* noted that not all

scars would constitute mayhem, but had no difficulty in concluding the injury in that case was "terribl[e]" and necessarily adequate to meet the definition. (*Goodman v. Superior Court, supra,* 84 Cal.App.3d at p. 625.)

In *Page*, the injuries were two separate tattoos; on the victim's breast and on her abdomen, consisting of letters and words. The Court of Appeal considered the trial court medical evidence to the effect the victim would have these tattoos for the rest of her life. Citing to that evidence the court summarily determined the injuries met the definition of a mayhem injury. (*People v. Page, supra*, 104 Cal.App.3d at pp. 577-578.) Noting that a mayhem injury of disfigurement is one which "leaves permanent scarring," the court concluded "the jury could hardly have reached any different conclusion." (*Id.* at p. 578.) Nothing in the language of *Page* remotely hints the court did not regard the disfigurement as "serious" or that the jury would not have found the injury serious if they had been presented with the current CALCRIM No. 801 language.

Finally, respondent cites to *Newble*. In *Newble* the victim sustained a three-inch scar that ran from the bottom of the left ear to just below the chin. (*People v. Newble, supra*, 120 Cal.App.3d at p. 447.) The defendant argued section 203 was void for vagueness because it did not provide adequate notice of the

conduct it prohibited by virtue of the amphorous meaning of the word "disfigure" and also argued a person's head was not a "member" of the body such that section 203 was not implicated by a head injury. (*Ibid.*) The court rejected both arguments. The Third District Court of Appeal found a facial scar came within the definition of a "member" of a person's body and the statute provided adequate notice of the prohibited conduct. (*Id.* at pp. 451, 452.)

In rejecting the argument that the head is not a "member" of the body the appellate court held: "In light of the stated rationale of the crime of mayhem we conclude there is no tenable reason for distinguishing prominent facial wounds to a nose, ear or lip, from comparable wounds which happen to miss one of those areas of the head specifically mentioned in section 203. The opposite conclusion would lead to a result which is undesirable, if not absurd." (*People v. Newble, supra*, 120 Cal.App.3d at p. 451.)

It is notable that the defendant in *Newble* did not argue the injury was not sufficiently serious or permanent to constitute mayhem, but instead relied upon a technical distinction of body parts. Hence, there is nothing in *Newble* which suggests it would be decided differently if the disfigurement was required to be found "serious."

As can be readily seen, respondent's claim that future

convictions, such as those discussed in these three cases, would be jeopardized by the continued use of serious bodily injury language in the pattern instruction is utterly unfounded.

1. Inclusion of the Qualitative Phrase "A Serious Impairment of Physical Condition" Properly Provides Essential Guidance and Assists the Jury In Determining Whether An Injury Constitutes a Mayhem Injury.

Mayhem contains both a list of specific injuries that constitute the offense, as well as other generalized descriptions that are not self-explanatory. The six injuries enumerated in section 203 are: 1) deprives a human being of a member of his body; 2) disables; 3) disfigures, or renders it useless; 4) cuts or disables the tongue; 5) puts out an eye; and, 6) slits the nose, ear, or lip. (§ 203.)

Prior to January 2006, CALJIC No. 9.30 stated the offense elements of mayhem in general statutory language. But even then it included a descriptive modifier that did not appear in the statute (§ 203), and required disfigurement to be "permanent." (CALJIC No. 9.30 (July 2004) ["In order to prove this crime, each of the following elements must be proved: [¶]One person unlawfully and by means of physical force . . . permanently disfigured. . .a human being"].) Section 203 does not include the word "permanently." (§ 203.)

Aside from the inclusion of the word "permanently" as a modifier of "disfigure" there was nothing in CALJIC No. 9.30 which

assisted the jury in determining the ***qualitative severity of the injury at issue***.

As a matter of commonsense and logic a jury would not need a great deal of additional jury instruction language to be guided on the question of whether the defendant had "removed a part of someone's body." It is a sufficiently black and white question for a reasonable juror to determine whether a body part has been removed or not. Similarly, the question of whether a victim has suffered the loss of the use of an eye is a relatively straight forward question; although even that type of mayhem injury has descriptive language in CALCRIM No. 801 to guide the jury. The jury is advised they must find the defendant "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." (CALCRIM No. 801 (August 2006).) That language was formerly a separate instruction. (CALJIC No. 9.31 (1970).)

However, the determination of the existence of the other four statutory mayhem injuries (disables; disfigures, cuts or disables the tongue; slits the nose, ear, or lip) is not a self-explanatory endeavor. ***Deciding the question of the infliction of these injuries requires more guidance than the statutory language allows***. Because not all degrees and occurrences of such injuries constitute mayhem, the

key question facing the jury is the degree of severity that must be present before an injury qualifies as a mayhem injury. For these injuries the pattern instruction guides the jury as follows:

> To prove that the defendant is guilty of mayhem, the People must prove that the defendant caused serious bodily injury . . . [¶] 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.

(CALCRIM No. 801 (August 2006), brackets and other punctuation deleted.)

In addition, as with description of an eye injury, there is specific guidance under the definition of a disabling injury to distinguish a qualifying mayhem injury from an injury that is not sufficiently serious to qualify as mayhem. A disabling injury is defined as one where "the disability was more than slight or temporary." (CALCRIM No. 801 (August 2006).) As noted *ante*, this language was added in the first version of the CALCRIM No. 801 instruction in January of 2006, before the "serious impairment of physical condition" language was added. Respondent does not voice any objection to that language.

In *Page* the court instructed the jury on the definition of disfigurement as follows: " 'that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which

renders unsightly, misshapen or imperfect or deforms in some manner.' " (*People v. Page, supra*, 104 Cal.App.3d at p. 577.) There was no discussion of a challenge to that special instruction in the *Page* decision.

Respondent does not take issue with a recognized principle established in caselaw that "[N]ot every visible scarring wound can be said to constitute mayhem." (*Goodman v. Superior Court, supra*, 84 Cal.App.3d at 625; cited with approval *People v. Pitts, supra* 223 Cal.App.3d at p. 1559.) If this is a correct statement of the law, it necessarily follows that the jury must be guided by jury instruction language beyond what is contained in section 203.

In the instant case appellant was tried on the theory he attempted to inflict a disabling injury. The determination of whether an injury is adequately disabling to constitute mayhem requires the jury to determine a term of art. As used in CALCRIM No. 801 the meaning of a "disabl[ing]" injury has a technical meaning that exceeds common parlance. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012-1013 ["distinctively marked" as used in statute has a technical meaning].)

Because the severity of the injuries is the key question to be determined in a prosecution for mayhem or attempted mayhem, the language included by the Judicial Council in CALCRIM No. 801 (e.g., "serious disfigurement" and "protracted loss or impairment of

function") properly aids the jury in their task.

2. Respondent Ignores the Fact All Previous Versions of the Mayhem Pattern Instruction Properly Incorporated Holdings From Caselaw to Guide the Jury On the Question of the Qualitative Severity of the Injury At Issue.

Respondent objects to the Judicial Council's modification of CALCRIM No. 801 to include descriptive language which incorporates the holding of *Ausbie* that all mayhem injuries necessarily encompass "a serious impairment of physical condition." But in doing so respondent slights the work that goes into the drafting of the pattern instructions. (See Cal. Rules of Ct., rule 2.1050; CALCRIM, Preface.)[10] Nor does respondent acknowledge the rule that when a trial court undertakes to modify or draft an instruction because the pattern instruction is inadequate, "the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument." (Cal. Rules of

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[10] "These instructions were prepared by a statewide committee of justices from the Court of Appeal, trial court judges, attorneys, academicians, and lay people. . . .The Rules of Court strongly encourage their use. [¶] Each instruction began with the preparation of an initial draft, followed by subcommittee review and full committee consideration. . . .The task force reviewed thousands of observations, and this final product reflects the input of judges and lawyers throughout California. . . . [¶][¶][¶][¶] ***Like the law on which they are based, these instructions will continue to change. This evolution will come not only through appellate decisions and legislation but also through the observations and comments of the legal community.*** . . ." (CALCRIM Preface, May 2005 comments of Corrigan, J., footnotes omitted, emphasis added.)

Ct., rule 2.1050(e); see *People v. Rolon* (2008) 160 Cal.App.4th 1206, 1221 [instruction should given "in a clear and impartial manner"]; *People v. Nottingham* (1985) 172 Cal.App.3d 484, 497 [even where an instruction is not required, it is error for court to give an instruction which is inaccurate; trial court has a duty when giving limiting instruction to tell the jury the precise manner in which evidence may be considered].)

Instead of acknowledging these well-settled principles regarding jury instructions, respondent advances a wholly non-sequitur argument based on inapposite authority. Respondent contends, as an abstract proposition, the incorporation of language from caselaw into jury instructions is a "problematic" proposition. (O.B.M. p. 32.) In support of that contention, respondent cites to a decision from this Court on a wholly disparate set of facts. (*People v. Colantuono* (1994) 7 Cal.4th 206, 222, fn. 13.)[11]

Colantuano has absolutely no bearing on the issue of whether

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[11] *Colantuano* is similar to the instant case in one respect--both cases involved a disputed jury instructed on the element of intent. In disapproving of the trial court's modified instruction on the intent for assault in that case this Court held:

> ***Since intent always remains an issue of fact*** [citations omitted], ***the jury must clearly understand its responsibility to resolve that question beyond a reasonable doubt, uninfluenced and unassisted by any other principle of law.***

(*People v. Colantuono, supra*, 7 Cal.4th at p. 221, emphasis added.)

CALCRIM No. 801 properly describes a mayhem injury as a serious injury. In that case the issue was whether the trial court properly augmented the pattern instruction for assault with a deadly weapon (CALJIC No. 9.02) by directing the jury " 'the intent to commit a battery is presumed' " under specified circumstances. (*Ibid.*) This Court noted such an instruction was technically correct, but should not have been given. (*Ibid.*)

As noted, *ante*, it is expressly contemplated that jury instructions will constantly be modified to include existing caselaw. *Colantuano* only speaks to that issue in the context of unnecessary, *ad hoc*, modifications.

More particularly, respondent does not address the fact that in the earlier versions of the pattern instruction for mayhem, CALJIC No. 9.30 (1970), CALJIC No. 9.30 (October 2005) and CALCRIM No. 9.30 (January 2006), each version included language incorporating caselaw holdings that were intended to guide juries on the qualitative aspects of the severity of the injury at issue.

CALJIC No. 9.30 included an optional paragraph which incorporated the holding from a case which held it was not a defense to mayhem if surgery could alleviate a disfiguring injury: "[It is not a defense that a disfigurement has been or may be medically alleviated.]" (CALJIC No. 9.30, optional paragraph.) The Use Note to CALJIC No. 9.30 directed: "Evidence of medical alleviation may

not be used in a mayhem trial to prove that an injury, permanent in nature, may be corrected by medical procedures." (CALJIC No. 9.30, Use Note, citing to *People v. Hill, supra*, 23 Cal.App.4th 1566, which in turn relied upon *People v. Keenan, supra*, 227 Cal.App.3d at p. 36, fn. 6.)

Germane to the issue at hand, the initial version of CALCRIM No. 801 (January 2006) also incorporated language from caselaw which defined a disabling injury. The first version of CALCRIM No. 801 directed the jury to consider whether a disabling injury "was more than slight or temporary." (CALCRIM No. 801 (January 2006).) This language did not appear in the previous version of CALJIC No. 9.30, but was added by the Judicial Council in the initial version of CALCRIM No. 801 (January 2006). Respondent does not complain about the descriptive definitions in either of these earlier versions of the pattern instruction.

There was been numerous modifications over the years to the pattern instruction on mayhem incorporating holdings of caselaw. There is no basis for singling out the modification implemented in CALCRIM No. 801 in August of 2006.

F. **Summary.**

The mayhem statutory language is extremely broad and not self-explanatory with respect to the requisite degree of severity of a mayhem injury. Accordingly, the statute has been frequently

interpreted by caselaw and the pattern jury instructions have properly incorporated many of those interpretations. The inclusion of language describing a mayhem injury as "a serious impairment of physical condition" is an entirely correct incorporation of a case holding and the language should be approved of by this Court.

II.

THE COURT OF APPEAL CORRECTLY DETERMINED APPELLANT WAS PREJUDICED BY THE TRIAL COURT'S ARGUMENTATIVE INSTRUCTION.

The Court of Appeal found the trial court's modified CALCRIM No. 801 instruction constituted an argumentative and therefore improper pinpoint instruction:

> The question with respect to an argumentative instruction is whether the instruction was " ` "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." ' [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395, 486.) ***In telling the jury that a serious bodily injury may include a gunshot wound--i.e., the type of wound that the victim suffered in this case--the trial court's instruction invited the jury to draw an inference favorable to the prosecution based on the evidence that Santana shot a gun at the victim.***

(Slip Opn. p. 16, emphasis added.)

Appellant maintains the question of whether appellant was denied his right to a fair trial through impartial jury instructions is entirely unrelated to the question of whether CALCRIM No. 801 should continue henceforward to describe a mayhem injury as "a serious impairment of physical condition." There is no ruling on that issue that cannot undo the vice of the jury sitting having sat in judgment of appellant and being unfairly directed to the prosecution's evidence in violation of appellant's right to fair and impartial jury instructions.

The Court of Appeal's ruling on this point of law is unassailable; and, indeed, there is nothing in respondent's brief to suggest the contrary. Respondent's brief utterly ignored the doctrine of argumentative pinpoint instructions. Respondent did not discuss, cite, nor so much as mention the word "pinpoint" in its opening brief on the merits. Respondent mentions the word "argumentative" but a single time -- in the statement of the case -- and the word "argumentative" does not appear thereafter. (O.B.M. p. 7.)

The Court of Appeal majority followed this Court's holdings in concluding the trial court's instruction was an improper pinpoint instruction and thus rests solidly upon a *stare decisis* foundation. (Slip Opn. pp. 15-16 [citing to *People v. Panah* (2005) 35 Cal.4th 395 and *People v. Mincey* (1992) 2 Cal.4th 408].)

Once the trial court undertook to modify CALCRIM No. 801, it was no longer important whether the point being instructed upon was "a redundancy" as respondent argues. (O.B.M. p. 16: "In short, it is an exercise in redundancy for CALCRIM No. 801 to append an additional requirement of a serious bodily injury.") When the trial court undertook to create a modification to the jury instruction, even if that instruction was not required, the court assumed a duty to properly instruct the jury with that modification. (*People v. Pearson* (2012) 53 Cal.4th 306, 325; *People v. Castillo*

(1997) 16 Cal.4th 1009, 1015.)

In light of respondent's decision not to address the basis for the lower court's decision (the giving of an argumentative pinpoint instruction), and in light of the correctness of the lower court's decision, that outcome should be affirmed by this Court.

In the event this Court concludes a change in CALCRIM No. 801 might have affected the lower court's ruling, appellant requests that this case be remanded to Division One of the Fourth Appellate District. The issue upon which review was granted was not decided in the lower court. Appellant requests the justices of that court be granted an opportunity to reconsider their decision in light of this Court's determination of the issue upon which review was granted.

A. The Modified Instruction Improperly Directed the Jury's Attention to the Prosecution Evidence of a Gunshot Wound Rather than the Severity of the Wound.

For count 1, the court gave the jury CALCRIM No. 801 defining mayhem, along with the instruction on attempt found in CALCRIM No. 460. (C.T. pp. 213, 214.) The gravamen of this offense is the nature of the injury sustained by the victim: "The statute itself does not define the nature of force required but focuses instead on the nature of the injuries inflicted." (*Ausbie, supra*, 123 Cal.App.4th at pp. 860-861.) The pattern instruction lists six different types of injuries upon which the jury can be

instructed to support a mayhem conviction. In appellant's case, the prosecution proceeded on a theory involving just one of the enumerated types of serious bodily injury -- a disabling injury. (C.T. p. 214.) The instruction given in this case correctly included the first two paragraphs exactly as they appear in CALCRIM No. 801:

> 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 a 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.

(C.T. p. 214.) However, from that point forward things went awry. The pattern instruction provides for two alternative paragraphs at the end; depending on whether there is a trial court stipulation or not that the claimed injury sustained was a serious bodily injury or not. If the degree of the injury is not stipulated to by the defendant (as in the present case) then the court is directed to give this concluding paragraph:

> [¶] 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).]

(CALCRIM No. 801, see Bench Notes, Instructional Duty: "The court has a sua sponte duty to give this instruction defining the

elements of the crime. [¶] Whether the complaining witness suffered a serious bodily injury is a question for the jury to determine. If the defendant disputes that the injury suffered was a serious bodily injury, use the first bracketed paragraph. If the parties stipulate that the injury suffered was a serious bodily injury, use the second bracketed paragraph.")[12]

This paragraph is given to guide the jury in determining how severe an injury must be before it can be classified as serious bodily injury for the purposes of mayhem or attempted mayhem. Under this instruction, the jury is entitled to consider the length of time an injury impairs functioning, the amount of medical treatment received, and the degree of disfigurement, if any.

But instead of giving that pattern instruction, the trial court undertook to fashion its own instruction for guiding the jury as to when an injury can properly be classified as constituting serious bodily injury for the purposes of mayhem. In so doing the trial court fashioned an instruction that did not employ any language regarding severity of the injury, i.e., the instruction omitted all mention of the facts found in CALCRIM No. 801 such as the duration of the recovery from the injury, the quantum of medical treatment received

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[12] The second paragraph referred to is a stipulation that an injury comes within § 203. (CALCRIM No. 801, second last paragraph: "____ is a serious bodily injury." Bracketed language omitted.)

or the resultant disfigurement. Instead of using these three guideposts from the pattern instruction, the trial court instead directed the jury they need only consider the ***type*** of injury inflicted:

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

(C.T. p. 214, emphasis added.) Thus, in this case the trial court directed the jury they could find appellant attempted to inflict serious bodily injury upon Vallejo (i.e., guilty of attempted mayhem) merely by finding he intended to inflict a gunshot wound upon Vallejo. This is not the law.

B. Regardless of Whether the Phrase 'A Serious Impairment of Physical Condition' was Properly Included in the Instructions, the Trial Court's Pinpoint Instruction Improperly Directed the Jury to the Prosecution's Evidence.

As previously discussed herein, the gravamen of the crime of mayhem is not the degree of force employed, but the nature of the injury inflicted. This is what distinguishes mayhem from battery with serious bodily injury. (§ 243, subd. (d); *Ausbie, supra*, 123 Cal.App.4th at p. 859.) Here, the trial court undertook to modify the Judicial Council pattern instruction on mayhem, CALCRIM No. 8.01, by inserting language into the instruction which directed the jury to focus its attention on the fact that a gunshot wound was the claimed injury: "A serious bodily injury means a serious impairment

of physical condition. ***Such an injury may include a gunshot wound.***" (C.T. p. 214, modified language emphasized.) This instruction was patently and indisputably improper in that it violated a well-settled principle of criminal jurisprudence which strictly forbids a pinpoint instruction which does no more than direct the jury to one party's evidence.

Instructions which are not strictly impartial as between the prosecution and defense are manifestly unfair and have been held to constitute reversible error. (*People v. Moore* (1954) 43 Cal.3d 517, 526-527 [murder conviction reversed where two instructions regarding law of self-defense were given which stated the law in the prosecution's favor; while two instructions which stated the law in the defense view were refused]; *People v. Roberts* (1898) 122 Cal. 377, 378 [larceny convictions reversed based upon improper special instruction on alibis that required the jury to find defendants' alibi true by a preponderance of the evidence].) This is so, even if the instructions state a correct principle of law. (*People v. Lyons* (1956) 47 Cal.2d 311, 323 [reversal ordered where judge added handwritten instruction to typewritten standard instruction which correctly stated the law but may have led jury to believe judge disbelieved defendant]; see, *People v. McNamara* (1892) 94 Cal. 509, 512-513 ["An instruction should contain a principle of law applicable to the case, expressed in plain language, ***indicating no***

opinion of the court as to any fact in issue"], emphasis added; also see 5 Witkin, Cal. Crim. Law (3d ed. 2000) Criminal Trial, § 625, p. 890; also see Cal. Rules of Ct., rule 2.1050(e) ["[W]hen a Judicial Council instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, ***impartial, and free from argument***"], emphasis added.)

Because the instruction at issue in this case both inadequately described the elements and misdirected the jury to the prosecution's evidence and thereby created an imbalance in the prosecution's favor, appellant was denied due process and the right to a fair trial and reversal is required. (U.S. Const., Amends. V, VI, XIV; Cal. Const. art. 1, § 16; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Huggins* (2006) 38 Cal.4th 175, 211-212 [instructional errors such as misdescriptions and presumptions are reviewed under *Chapman*].)[13]

No objection to the instruction was interposed by appellant and none was required. (§ 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7 [instructional error affecting the defendant's substantial rights may be reviewed on appeal in the absence of an objection].)

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[13] *Chapman v. California* (1967) 386 U.S. 18, 24.)

The error was neither harmless nor harmless beyond a reasonable doubt in light of the fact that the improper instruction went to the very heart of the weakest part of the prosecution's case (the degree of harm suffered by Vallejo), while simultaneously involving the most serious charge appellant was facing (i.e., the charge that would qualify appellant for an indeterminate life term with a 25-year minimum parole eligibility).

The instruction modification created an impermissible presumption in favor of guilt. (*Sandstrom v. Montana* (1979) 442 U.S. 510 [instruction violated defendant's right to due process where jury instruction indicated he was presumed to have acted with malice]; *Francis v. Franklin* (1985) 471 U.S. 307 [same with respect to presumption defendant acted with sound mind]; *Patterson v. Gomez* (9th Cir. 2000) 223 F.3d 959 [instruction that defendant presumed sane violated due process].)

C. Instructions Which Pinpoint One Party's Evidence Are Argumentative and Improper.

The law on pinpoint instructions is venerable, well-settled and frequently reiterated in cases decided by this Court. Essentially, a party is entitled to a pinpoint instruction on a *theory* of the case; but it is improper for the court to give a pinpoint instruction that highlights the *evidence* in the case. Under these circumstances the instruction is argumentative and therefore improper. (*People v.*

Hughes (2002) 27 Cal.4th 287, 361; *People v. Earp* (1999) 20 Cal.4th 826, 886; *People v. Roberts* (1992) 2 Cal.4th 271, 313-314; *People v. Wright* (1988) 45 Cal.3d 1126, 1137.) The rule applies equally to instructions which favor the prosecution as well as instructions which might favor the defense. (*Reagan v. United States* (1895) 157 U.S. 301, 310 ["The court should be impartial between the government and the defendant"]; *People v. Moore, supra*, 43 Cal.2d at pp. 526-527 ["There should be absolute impartiality as between the People and defendant in the matter of instructions"].)

In an oft-cited case for this principle of law this Court held when an instruction directs the jury to a party's evidence "i.e., it would invite the jury to draw inferences favorable to [a party] from specified items of evidence on a disputed question of fact, [it] therefore properly belongs not in instructions, but in the arguments of counsel to the jury." (*People v. Wright, supra*, 45 Cal.3d at p. 1135.) Neither party is entitled to an instruction "in any particular phraseology." (*People v. Hill* (1946) 76 Cal.App.2d 330, 344.)

A fairly recent example of a requested pinpoint instruction that involved an improper request to have the jury focus on evidence as opposed to a theory of the case was discussed by this Court:

> Nor did the court err in refusing an instruction that directed the jury to consider, for the purpose of determining whether there was reasonable doubt as to defendant's guilt, evidence that another person had the motive or opportunity to commit the crime. A defendant is entitled, upon request, to a nonargumentative instruction that pinpoints his or her theory of the case. (*People v. Wright, supra*, 45 Cal.3d 1126, 1135-1136.) ***An instruction that directs the jury to " 'consider' " certain evidence is properly refused as argumentative.*** (*Id.* at p. 1135.) "In a proper instruction, '[w]hat is pinpointed is not specific evidence as such, but the theory of the defendant's case.' " (Id. at p. 1137, quoting *People v. Adrian* (1982) 135 Cal.App.3d 335, 338.)

(*People v. Ledesma* (2006) 39 Cal.4th 641, 720, emphasis added.)

In the instant case the court's modification to CALCRIM No. 801 constituted just such an argumentative instruction modification and was, therefore, improper and denied appellant his right to due process and a fair trial.

D. The Inclusion of the Word "May" Did Not Remove the Argumentative Nature of the Instruction.

Respondent relies upon the permissive term "may" in the court's modified instruction as a basis for this Court to find it was not improper. But the word a permissive term does not cure the error of an argumentative instruction:

> ***Defendant's second proposed instruction*** lists certain specific items of evidence introduced at trial, and ***would advise the jury that it may "consider" such evidence in determining whether defendant is guilty beyond a reasonable doubt.*** [Footnote omitted.] The court refused to give this instruction because it is argumentative, i.e., ***it would invite the jury to draw inferences favorable to the defendant from specified items of evidence on a***

disputed question of fact, and therefore properly belongs not in instructions, but in the arguments of counsel to the jury.

(*People v. Wright, supra,* 45 Cal.3d at p. 1135, emphasis added.)

E. **Respondent Relies On Two Cases, *Castaneda* and *Musselwhite*, Which Do Not Address Argumentative Instructions.**

Respondent cites to *People v. Musselwhite* (1998) 17 Cal.4th 1216 and *People v. Castaneda* (2011) 51 Cal.4th 1292, to support the claim the court's argumentative instruction was not improper, or in any event, harmless error. (O.B.M. p. 35.) Neither case supports that position.

In *Musselwhite* the issue was whether the instructions adequately informed the jury Musselwhite's mental defect defense was applicable to negate premeditation for first degree murder. Musselwhite requested and was denied a special instruction that specifically told the jury his mental defect defense applied to premeditation; and argued the jury might have been misled by the instructions to conclude his mental defect defense applied only to malice aforethought, because that was the only mental state common to both the murder and attempted (non-premeditated) murder counts. This Court held the instructions, considered as a whole, adequately covered the defense theory by telling the jury the mental defect defense applied to both the murder and attempted murder counts, and clearly informed the jury the mental state at

issue was specific intent, and premeditation required specific intent. (*People v. Musselwhite, supra*, 17 Cal.4th at pp. 1248-1249.)

Respondent also cites to *Castaneda*. In that case the jury was given an inapplicable and therefore unnecessary instruction on implied malice. However, this Court found the instructions on the charged crimes correctly stated the law. Casetaneda was convicted of first degree murder during the commission of a felony, and there were no instructions which told the jury they could find first degree murder based upon implied malice. (*People v. Castaneda, supra*, 51 Cal.4th at pp. 1321-1322.)

More to the point, neither case involved the issue presented in this case -- an instruction which directed the jury to the prosecution's evidence on a key element of the offense.

F. The Argumentative Prosecution Pinpoint Instruction Also Misstated the Law.

As noted above, respondent initially acknowledged one of the questions presented is whether the trial court improperly focused the jury's attention on the prosecution's evidence. (O.B.M. p. 7.) After doing so however, the words "pinpoint" and "argumentative" do not appear nor reappear respectively in the respondent's brief on the merits; nor does any argument addressing the impropriety of an argumentative prosecution pinpoint instruction.

Instead, respondent confines argument on this issue to the

question of whether the argumentative instruction correctly stated the law and whether the jury was likely confused.

Misstatement of the law is not the test for determining whether an instruction is argumentative. On the contrary, it is not the incorrectness of the pinpoint instruction that violates fair play; it is the imbalance created by an instruction that directs the jury to one party's evidence over the other party's evidence:

> A jury instruction is argumentative when it is of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence. ***It unfairly highlights particular facts favorable to one side. The trial court should refuse to give a proposed a jury instruction that is argumentative***, as it tends to confuse the jury.

(21 Cal.Jur.3d (2012) Criminal Law: Trial § 335, footnotes omitted, emphasis added.) Here the court instructed the jury to determine whether appellant attempted to inflict a "serious" injury on Vallejo. In that instruction the court told the jury "a gunshot wound" may be included in the definition of a serious injury. (C.T. p. 214.) Instead of providing the jury with a content-neutral instruction which stated the law (i.e., the definition of a disabling injury under the law of mayhem), the instruction instead specifically directed the jury to consider the prosecution's evidence in deciding the crucial question of whether appellant attempted to inflict a disabling injury on Vallejo. This is precisely the vice which the argumentative

instruction prohibition was designed to avoid. An instruction that might constitute entirely appropriate closing argument by a party is nevertheless not automatically suitable for a jury instruction:

> In asking the trial court to emphasize to the jury the possibility that the beatings were a "misguided, irrational and totally unjustifiable attempt at discipline rather than torture," defendant sought to have the court invite the jury to infer the existence of his version of the facts, rather than his theory of defense. Because of the argumentative nature of the proposed instructions, the trial court properly refused to give them.)

(*People v. Mincey, supra,* 2 Cal.4th at p. 437.) The instant case is *Mincey* in the reverse. Here the court did not confine its pinpoint instruction to the definition of a disabling injury, and, in fact, eliminated that mandatory language from the pattern instruction given to the jury. Instead, the trial court not-too-subtly guided the jury to the prosecution's evidence (a gunshot wound) with a crafted instruction that was intended for cases where the parties have stipulated to the severity of the victim's injury. In doing so the court directed the jury to the *type* of injury sustained by Vallejo, and failed to provide the jury with the requisite guidance on the *severity* of the injury sustained--a key issue at trial.

By instructing the jury "a serious impairment of physical condition. . . may include ***a gunshot wound***" the court improperly directed the jury that if they found Vallejo sustained a gunshot wound, that was a sufficient basis for the jury to conclude Vallejo

sustained a mayhem injury. (*People v. Nava* (1989) 207 Cal.App.3d 1490, 1499 [court improperly instructed jury a bone fracture was a serious bodily injury as a matter of law].)

The court's action in this case is similar to *Nava*. Although bone fractures are listed as possible serious bodily injuries in section 243, subdivision (f)(4), the court in *Nava* held the examples listed in the statute were merely illustrative and did not necessarily comprise the definition of a serious bodily injury. (*Id.* at p. 1498.)

In the present case it cannot be disputed that one could suffer a mayhem qualifying injury through a wide variety of injury-producing mechanisms, such as a brick, a knife, fists, feet and, of course, a firearm. A reasonable jury would not need to be told a firearm can inflict a disabling injury.

Accordingly, by instructing the jury a gunshot injury may constitute a mayhem injury is effectively inviting the jury to conclude the court was directing the jury to find a mayhem injury by virtue of finding a firearm injury.

This court's instruction was wholly and utterly improper and reversal is required.

G. Appellant Did Not Stipulate Nor Concede Vallejo Sustained a Mayhem Injury and the Prosecution Was Not Relieved of Its Burden to Prove This Element of Count 1.

Respondent contends the court's argumentative instruction

was harmless error because appellant "never disputed that the victim suffered a serious bodily injury when he was shot three times in the leg." (O.B.M. p. 37.) This is a patently incorrect statement.

Contrary to the assertion appellant "never disputed" the extent of the injury at issue appellant availed himself of nearly every procedural vehicle to challenge the evidence on that issue at virtually every step in the criminal proceedings.

At appellant's preliminary hearing he successfully persuaded the magistrate to discharge appellant on the charge of attempted mayhem. (C.T. p. 16.) After the prosecution refiled the attempted mayhem count in superior court, appellant challenged that refiling via a section 995 motion. (C.T. p. 89.) After the close of the prosecution's evidence, appellant again challenged the severity of injury by making a motion for a judgment of acquittal under section 1118.1. The court agreed the evidence on the degree of injury sustained by Vallejo was very close and arguably would not have supported a completed mayhem, but denied the motion. (R.T. pp. 342-343.)

In sum, the mere fact that appellant did not devote a substantial amount of closing argument to this point cannot be correctly construed as any type of a concession.

1. The Lower Court Dissent's Assumption of Acquiescence Is Unsupported by the Evidence.

The dissent in the court of appeal concluded appellant did not object to the trial court's argumentative instruction "presumably because the sole defense offered was one of identity." (Slip Opn. dis., pp. 4; 8, fn. 3.) This assumption is without factual support in the record on appeal. The record reflects the trial court advised appellant of its intent to give CALCRIM No. 801 during the lunch break, but the record does not reflect counsel was given a copy of the modified argumentative instruction. (R.T. p. 344 [prosecutor acknowledges instructions have not yet been printed at time of discussion]: 361 [court refers to CALCRIM No. 801 by number].)

After the lunch break there was a second (brief) discussion regarding jury instructions, and particularly regarding instructions on lesser included offenses. (R.T. pp. 368-371.) The instructions were then read to the jury. (C.T. p. 160; R.T. p. 372, et seq.)

Contrary to the dissent's assumption that appellant's counsel did not object to the offending instruction because the degree of injury was not in dispute, the record is silent as to whether the court's modification to CALCRIM No. 801 was ever discussed with appellant's counsel privately or in open court.

Moreover, the assumption of the dissent is directly contradicted by appellant's motion for judgment of acquittal under

section 1118.1. In that motion appellant argued Vallejo's injury did not meet the test of a mayhem injury and the trial court found the argument meritorious: "I think, probably a pretty good argument here that [Vallejo] didn't suffer any permanent injury somehow." (R.T. p. 341; see also, p. 342 ["[I]n this case the perpetrator, in a sense, got lucky and managed to shoot and not cause serious injuries. . ."].)

H. The Error Was Not Harmless Beyond a Reasonable Doubt

The test is whether it can be shown that the error did not contribute to the verdict. (*People v. Flood* (1998) 18 Cal.4th 470, 489 [An instructional error that improperly describes or omits an element of an offense is reviewed under *Chapman*].) Here, the evidence on the question of whether Vallejo actually sustained a serious bodily injury was close. At the close of evidence appellant made a motion to dismiss count 1 under section 1118.1 and the trial court agreed that the evidence of Vallejo's injury was arguably inadequate to support a completed act of mayhem. (R.T. pp. 342-343.) The court noted that appellant had "...a pretty good argument here that [Vallejo] didn't suffer any permanent injury..." (R.T. pp. 342-343.)

Thus, the defective instruction undermined appellant's defense. The instruction gave the jury the direction that they

should focus on the fact that it was a gunshot wound Vallejo received and they need not consider the length of Vallejo's recovery, the amount of medical treatment received or whether he suffered any disfigurement--the three factors contained in CALCRIM No. 801. This necessarily allowed the jury to find appellant guilty of attempted mayhem without determining that he had the intent to inflict any particular type or degree of injury (i.e., a disabling bodily injury), other than the intent to inflict a gunshot wound. The court of appeal found this instruction to be an argumentative pinpoint instruction:

> The question with respect to an argumentative instruction is whether the instruction was " ` "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." ' [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395, 486.) ***In telling the jury that a serious bodily injury may include a gunshot wound--i.e., the type of wound that the victim suffered in this case--the trial court's instruction invited the jury to draw an inference favorable to the prosecution based on the evidence that Santana shot a gun at the victim.***

(Slip Opn. p. 16, emphasis added.) Under these circumstances, reversal is required.

CONCLUSION

Based upon the foregoing, it is respectfully submitted CALCRIM No. 801 correctly includes language defining a mayhem injury as "a serious impairment of a physical condition." In any event, resolution of that question does not undermine the Court of Appeal's conclusion appellant was denied complete and impartial jury instructions.

Respectfully submitted,

Dated: July 20, 2012

CARL FABIAN
CARL FABIAN, Attorney for
Appellant SERAFIN SANTANA

CERTIFICATION OF WORD COUNT

The text of **APPELLANT'S ANSWER BRIEF ON THE MERITS** consists of **12,800** words, according to the word processing program used to generate this document.

Dated: July 20, 2012

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Case Number: **S198324**
4th D.C.A. Case No. **D059013**
(formerly E049081)
Riverside County Superior Court
Case No. RIF139207

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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 BRIEF ON THE MERITS**; by placing a true copy thereof in a separate envelope to each addressee on July 20, 2012, 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 July 20, 2012. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 20, 2012.

CARL FABIAN
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