In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Appellant,** **v.** **SERAFIN SANTANA,** **Defendant and Appellant.**	Case No. S198324

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

RESPONDENT'S REPLY 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

In its opening brief on the merits, respondent explained that 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." However, "serious bodily injury" is not a statutory element of mayhem that the prosecution must prove. The instruction provided 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." In his answer, Santana disagrees. He argues that "serious bodily injury" is an element of the crime because mayhem necessarily involves "a serious impairment of physical condition." (AABM[1]9, 2, 29.) As will be shown below, Santana's position should be rejected because CALCRIM No. 801 does not simply instruct the jury that it must find the defendant caused "a serious impairment of physical condition." It also lists specific injuries that may be considered "a serious impairment of physical condition" which are beyond what is statutorily required to prove the crime.

In its opening brief, respondent further explained that 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

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[1] Appellant's Answer Brief on the Merits.

confusion and unintended consequences. In his answer, Santana disputes that CALCRIM No. 801 could lead to juror confusion, noting that there that there have been several modifications to the instructions on mayhem incorporating the holdings of caselaw which serve to guide the jury on the question of the severity of the injury at question. (AABM 37-39.) Santana's claim fails because the modification to the CALCRIM instruction, requiring the prosecution prove a "serious bodily injury" is an incorrect statement of law. Further, the instruction could lead to jury confusion as a jury could certainly conclude that a defendant has disabled or disfigured a victim within the meaning of the statute, but faced with making the additional decision as to whether the injury meets the specific CALCRIM definition of "serious bodily injury," the jury could be confused, believing the requirement is not simply superfluous.

Finally, even if error occurred, it was harmless. Notwithstanding the trial court's modification to the CALCRIM instruction telling the jury that "serious bodily injury "may include a gunshot," there was no reasonable likelihood that the jury applied the instruction on mayhem as suggesting it could find Santana guilty if he merely intended to inflict a gunshot wound regardless of the severity of the intended injury.

ARGUMENT

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

Mayhem is defined in Penal Code[2] section 203 as follows:

> Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or

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

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..."].)

The current CALCRIM instruction on mayhem, CALCRIM No. 801, however, requires the People to additionally 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)

Here, 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.

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

(1 CT 214.)

As respondent discussed in its opening brief, the requirement contained in CALCRIM No. 801 that the prosecution must prove Santana attempted to cause "serious bodily injury" 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." (1 CT 214.) That the prosecution must additionally prove that the inflicted injury constitutes "serious bodily injury," over and above the specific injuries identified by the statue, is unnecessary. The parameters of the crime are defined by the statute, which has existed for 135 years, and there is no need to expand the statute beyond its terms.

Santana argues that CALCRIM No. 801 correctly requires proof of "a serious impairment of physical condition" because mayhem is "both a very unique and a very serious assaultive crime, and is the highest degree of battery under California law." (AABM 19-20.) Respondent certainly agrees that mayhem is a significant crime. Respondent submits, however, that aggravated mayhem under section 205, which is punishable by imprisonment in the state prison for life with the possibility of parole is, by

definition, a more serious offense.[3] Notably, CALCRIM No. 800, which defines aggravated mayhem, does not require proof of "serious bodily injury":

> The defendant is charged [in Count _____] with aggravated mayhem [in violation of Penal Code section 205].
>
> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant unlawfully and maliciously (disabled or disfigured someone permanently/ [or] deprived someone else of a limb, organ, or part of (his/her) body);
>
> 2. When the defendant acted, (he/she) intended to (permanently disable or disfigure the other person/ [or] deprive the other person of a limb, organ, or part of (his/her) body);
>
> AND
>
> 3. Under the circumstances, the defendant's act showed extreme indifference to the physical or psychological well-being of the other person.
>
> 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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[3] Section 205 states:

> A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill. Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole.

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

[The People do not have to prove that the defendant intended to kill.]

It defies logic that the crime of simple mayhem under section 203 requires proof of "serious bodily injury," while the crime of aggravated mayhem, under section 205, does not.

Another crime which is arguably more egregious than simple mayhem, is torture under section 206, which is punishable by imprisonment in the state prison for life.[4] Unlike mayhem in section 203, which does not contain any requirement of a "serious bodily injury" or "great bodily injury" over and above the specific injuries that are part of the second statutory element, torture contains an express statutory requirement that a defendant must inflict "great bodily injury" to be convicted of the crime. (Pen. Code, § 206.) Thus, the Legislature is capable of defining a crime to include a great bodily injury requirement and 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 done so. There is no reason for disregarding this expressed intent and impose an additional requirement. The attempt to redefined mayhem and create a limit to a crime which has

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[4]Penal Code section 206 states:

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.

The crime of torture does not require any proof that the victim suffered pain.

existed in its current form for over 135 years, should be rejected as an improper intrusion into the Legislature's prerogative. The maxim of statutory construction *expressio unius est exclusio alterius* provides that to specify one thing in a statute is to impliedly exclude other things not specified. The mayhem statute expressly provides 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.

Part of the difficulty with Santana's argument is his abbreviated characterization of the disputed language contained in the CALCRIM instruction. Throughout his brief, Santana repeatedly argues that CALCRIM No. 801 is a correct jury instruction because it properly describes a mayhem injury as "a serious impairment of physical condition." (See e.g. AABM 9 ["CALCRIM No. 801 properly describes a mayhem injury as a 'serious impairment of physical condition"]; 10 [...all mayhem injuries necessarily include "a serious impairment of physical condition"]; 19 ["...no case has ever held one can commit mayhem without inflicting an injury that is []'a serious impairment of physical condition"] ;25 ["...mayhem injuries necessary include "a serious impairment of physical condition"]; 27 ["The Judicial Council's inclusion of the descriptive phase 'a serious impairment of physical condition'..."]; 28 ["In light of the absence of any mayhem case where the injury could not be said to constitute 'a serious impairment of physical condition'..."] ;29 ["Mayhem necessarily includes 'A serious impairment of physical condition"]; 33

["Inclusion of the qualitative phrase "a serious impairment of physical condition" properly provides essential guidance..."].) In that regard, Santana asserts that caselaw on the crime of mayhem "does not reveal a single case where the injury could not be regarded as 'a serious impairment of physical condition.'" (AABM 27.) Similarly, he argues that that mayhem necessarily includes "a serious impairment of physical condition." (AABM 29-32.)

Santana's argument, however, neglects the entirety of the erroneous language of the instruction about which respondent complains. In doing so, Santana ignores the rule that in determining the correctness of jury instructions, this Court considers the instructions as a whole. (*People v. Hughes* (2002) 27 Cal.4th 287, 360.) CALCRIM No. 801 does not simply instruct the jury that it must find the defendant caused "a serious impairment of physical condition." Rather, 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)

As respondent previously argued, this definition, which extends beyond simply "a serious impairment of physical condition," 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"].)

In its opening brief, respondent explained that 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 either of those phrases. (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.) Santana disagrees with respondent's claim that the *Pitts* line of cases provided the origin for the "serious bodily injury" language inclusion into CALCRIM No. 801. (AABM 16-17.) Instead, he submits that a "far more logical basis" for the inclusion of the "serious bodily injury" language was *People v. Ausbie* (2004) 123 Cal. App. 4th 855, a case in which the prosecution conceded that battery with serious bodily injury (Pen. Code, § 243, subd. (d)) was a lesser included offense of mayhem. (AABM)

Respondent disagrees. The bench note to CALCRIM No. 801 specifically cites as "Authority" that "serious bodily injury" is "defined" in *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1559-1560. As respondent noted in its opening brief, this reference is disconcerting because *Pitts* involved 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).[5] Although several cases have held "great" bodily injury

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

(continued...)

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." Thus, the statutory definition of "great bodily injury" is far more general. As respondent asserted in its opening brief, committing one of the statutorily qualifying injuries – i.e., 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,

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(...continued)

> "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.

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. 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 likely be considered "significant" or "substantial" within the meaning of section 12022.7.

Regardless of the exact genesis of the term "serious bodily injury" in CALCRIM No. 801, respondent submits that *People v. Ausbie* is incorrect and should be disapproved to the extent it holds that mayhem requires infliction of "serious bodily injury" as defined by section 243, subdivision (f)(4). 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. Important here, 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. Further, *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.)

Notably absent from that formulation 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.

Ausbie's conclusion is incorrect because, as explained, mayhem can in fact be committed without the infliction of "serious bodily injury" as defined by section 243, subdivision (f)(4). 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. Requiring proof of the extra element of "serious bodily injury" serves to increase the prosecution's burden of proof.

Respondent additionally argued in its opening brief that to 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. 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. Because "serious bodily injury" is inherently a part of the

statutory definition in *many, but not all,* 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. 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.

Santana disputes that CALCRIM No. 801 could lead to juror confusion, noting that there that there have been several modifications to the instructions on mayhem incorporating the holdings of caselaw which serve to guide the jury on the question of the severity of the injury at question. (AABM 37-39.) Santana is correct in recognizing that the current CALCRIM instruction contains language beyond the specific statutory language, including the requirement that disfigurement be "permanent," and a disability be "more than slight or temporary." However, respondent submits the addition of a requirement that the prosecution prove a "serious bodily injury," as specifically defined by CALCRIM No. 801, based, according to the use note, on *Pitts, supra,* sentencing cases, is erroneous because it is incorrect statement of law. Even if the language was added as a result of the *Ausbie* case, as Santana suggests, its inclusion was erroneous. As respondent previously explained, *Ausbie* incorrectly concluded, without reasoning, that mayhem necessarily involves "serious bodily injury." As previously shown, however, mayhem can in fact be committed without the infliction of "serious bodily injury" as defined by section 243, subdivision (f)(4). The circumstance 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.

Further, as argued in respondent's opening brief, requiring 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. 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.

In respondent's brief on the merits, respondent cited this Court's opinion in *People v. Colantuono* (1994) 7 Cal.4th 206, for its explanation of 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.)

Santana argues that *Colantuano* only speaks to the issue of "unnecessary, *ad hoc*, modifications" to jury instructions. (AABM 39.) However *Colantuano* accurately identifies the perils that can occur when an

instruction is crafted based on an appellate court decision. The "serious bodily injury" requirement here, which is based on an erroneous statement of law, demonstrates the "danger" about which *Colantuano* cautioned. The inclusion of a "serious bodily injury" element to CALCRIM No. 801 increases the prosecution's burden of proof, and could lead to possible juror confusion.

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

In its opening brief on the merits, respondent asserted that notwithstanding the trial court's modification to the CALCRIM instruction telling the jury that "serious bodily injury "may include a gunshot," there was no reasonable likelihood that the jury applied the instruction on mayhem as suggesting it could find Santana guilty if he merely intended to inflict a gunshot wound regardless of the severity of the intended injury. This is because the jury here was instructed that Santana 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." (1 CT 214.) 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.

Santana, however, maintains that the trial court's modification improperly directed the jury's attention to the prosecution evidence of a gunshot wound, rather than the severity of the wound, and directed the jury they could find Santana guilty merely by finding he intended to inflict a gunshot wound. (AABM 44-50.)

However, that the victim suffered a gunshot wound was not at issue. Consequently, it cannot be said the court's modification was impartial or

"manifestly unfair." (AAOB 48 citing *People v. Moore* (1954) 43 Cal. 3d 517, 526-527.) While the modification to the instruction did identify a piece of evidence from the trial, namely, that Vallejo was shot, that evidence was undisputed. No one doubted Vallejo was shot. Moreover, the court's modification was not argumentative whatsoever. The trial court's modification stated:

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

(1 CT 214, emphasis added.)

Contrary to the Court of Appeal's conclusion, it cannot be said that the court's modification was argumentative. 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 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."

Even if serious bodily injury is a part of the statutory elements, there is no reasonable likelihood the jury misunderstood the charge as given in the present case, construed as a whole. Under the modified instruction provided here (which did not concern the terms "cut" and "slit" and which omitted language from CALCRIM No. 801 concerning "extensive suturing" and "serious disfigurement"), the concept of serious bodily injury was inherent given the type of injury giving rise to the attempted mayhem charge. 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

Santana 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." (*People v. Flood* (1989) 18 Cal.4th 470, 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.)

In its opening brief, respondent argued that any error was harmless because Santana's counsel never disputed Santana suffered a serious bodily injury when he was shot three times in the leg. Santana suggests that because he challenged the attempted mayhem charge at the preliminary hearing, and via section 995 and 1118.1 motions, it cannot be said he conceded Vallejo sustained a mayhem injury. (AAOB 57-58.) Important here, however, is that the prosecution did not have to prove that Vallego sustained a mayhem injury, but rather, that Santana *intended* to inflict such an injury. 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.) He never addressed the elements of attempted mayhem during closing argument. In fact, defense counsel specifically

argued, "I promise you this case is about . . . one question: Identity. *Nothing else.*" [6] (2 RT 419, emphasis added.)

Additionally, in its opening brief, respondent argued any error was harmless because the jury found true the enhancements that, in count 1, Santana "personally inflicted great bodily injury" on the victim and Santana "personally and intentionally discharged a firearm and proximately caused great bodily injury to the victim." (1 CT 170-171.) Notably, the case was charged as an *attempted* mayhem. Consequently, it did not matter whether the injury inflicted actually 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. Thus, 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.

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[6] 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]

As respondent noted in the opening brief, 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.

(See Dissent at 8.) Any error in the court's instruction was harmless beyond a reasonable doubt.

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: August 23, 2012

Respectfully submitted,

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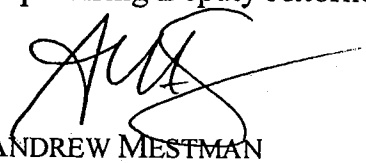

ANDREW MESTMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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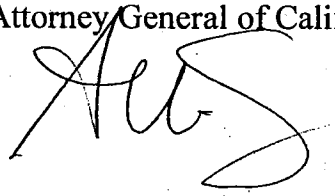
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains **5,574** words.

Dated: August 23, 2012

KAMALA D. HARRIS
Attorney General of California



ANDREW MESTMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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 August 24, 2012, I served the attached **RESPONDENT'S 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:

Carl Fabian
Attorney at Law
3232 Fourth Avenue
San Diego, CA 92103-5702
Attorney for Serafin Santana
(Two Copies)

Paul Zellerbach, District Attorney
Riverside County District Attorney's Office
3960 Orange Street
Riverside, CA 92501

Sherri R. Carter, Executive Officer
For the Honorable Mark E. Johnson
Riverside County Superior Court
4100 Main Street
Riverside, CA 92501

California Court of Appeal
Fourth Appellate District, Div. I
750 B Street, Suite 300
Riverside, CA 92101

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 August 24, 2012, at San Diego, California.

D. Perez
Declarant

Signature

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