# In the Supreme Court of the State of California



**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**VERONICA AGUAYO,**

**Defendant and Appellant.**

Case No. S254554

Appellate District Division One, Case No. SCS295489
San Diego County Superior Court, Case No. D073304
The Honorable Dwayne K. Moring, Judge

## RESPONDENT'S ANSWER BRIEF ON THE MERITS

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
MEREDITH S. WHITE
Deputy Attorney General
STEVE OETTING
Supervising Deputy Attorney General
State Bar No. 142868
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9207
Fax: (619) 645-2012
Email: Steve.Oetting@doj.ca.gov
*Attorneys for Plaintiff and Respondent*

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## QUESTIONS PRESENTED

Is assault by means of force likely to produce great bodily injury a lesser included offense of assault with a deadly weapon? If so, was defendant's conviction of assault by means of force likely to produce great bodily injury based on the same act or course of conduct as her assault with a deadly weapon?

## INTRODUCTION

Appellant Veronica Aguayo beat her elderly father repeatedly with a bicycle chain and lock because he had accidentally gotten her cell phone wet while watering his yard. She also bashed him on the head with part of a garden pot, striking him where he had previously had brain surgery. On appeal, she maintained that she should not have been convicted of both assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1) ("245(a)(1)"); all further statutory references are to the Penal Code) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4) ("245(a)(4)")) because the latter is a lesser-included offense of the former. The Court of Appeal correctly rejected this contention. In circumstances where a weapon is inherently deadly, an assault may be committed without the use of force likely to produce great bodily injury. Accordingly, neither offense is necessarily a lesser of the other, as this Court has long held.

In the event this Court chooses to overturn its prior precedent, appellant was nonetheless properly convicted of two offenses because the assault with a deadly weapon was already complete when appellant assaulted her father by means of force likely to produce great bodily injury.

## STATEMENT OF THE CASE

### A. Appellant Beats Her Father After He Accidentally Gets Her Phone Wet

Luis A., age 72, lived with his wife and other family members in a home in Chula Vista. (2RT 149, 155.) As a diabetic who had suffered through two prior brain surgeries, he sometimes walked with a cane. (2RT 150, 154, 161.) Appellant, his adult daughter, occasionally stayed at the house. (2RT 155.)

One afternoon in August 2017, Luis turned on the sprinklers to water his plants. (2RT 156.) At the time, appellant was in the backyard working on her bicycle. (2RT 157-158.) Appellant began yelling at her father, "You son of bitch, you ruined my phone. Look at it, look at it." (2RT 158-158; 287.) Luis turned off the sprinklers and told appellant not to call him names. (2RT 159, 282.) As he turned around to walk back towards the house, appellant hit him on the back with her bicycle chain and lock. (2RT 159, 236, 282, 292.)

Appellant proceeded to use the chain to strike her father 15 times on the arms, chest, and head. (2RT 159–160.) At some point, Luis was able to grab the chain before appellant could hit him again, and they struggled to gain control of it. (2RT 159, 194.) As they engaged in a tug of war, Luis slipped, letting go of the chain. (2RT 159, 239.) Having regained possession of the chain, appellant again proceeded to hit her father with it. (2RT 161.)

The fray moved towards a tree in the backyard. (2RT 163.) Luis again grabbed the chain. (2RT 161.) Appellant slipped, pulling her father down on top of her. (2RT 162-163, 241.) Appellant seized the top portion of a nearby ceramic pot, or chiminea, and threw it at her father while he was on both knees. (2RT 164, 206-207.) It hit him on the top of the head,

where he had previously had one of his two brain surgeries, and he collapsed on top of her. (2RT 165-166, 208, 245.)

Luis picked up a rock and considered "let[ting] her have it," but he thought better of it. He threw the rock away, but it nonetheless ricocheted off a nearby wall and hit appellant on the head. (2RT 166.)

Luis got up, and attempted to go back into the house. But as he walked away, appellant resumed striking him with the chain on his back and arms while they were in the carport. (2RT 167, 254.) Yet another struggle for the bicycle chain ensued. (2RT 167.) By this point, Margaret A., appellant's mother and Luis's wife, came outside and saw the struggle for the chain. (2RT 306.) Luis apparently gained possession of the chain. Appellant picked up a rock from the front yard and was going to hit Luis with it, but Margaret told her, "Don't do that." (2RT 168, 189.)

Appellant threw the rock away and demanded her chain back. (2RT 169, 309.) Luis tossed it to her, and appellant rode off on her bike. (2RT 169, 309–310.)

The entire episode lasted perhaps half an hour. (2RT 290.) In total, Luis was struck roughly 50 times with the bike chain and lock. (2RT 240, 247.) His T-shirt had grease marks on the stomach area where he had been hit by the chain. (2RT 183-184; trial exh. 6.) He felt dizzy after the attack, and was concerned that the blows to his head had caused internal bleeding where he had previously had surgery. (2RT 230.) Paramedics arrived and took him to the hospital. (2RT 170.)

Appellant testified on her own behalf at trial and claimed she had acted in self-defense. According to appellant, when her father got her phone wet, she called him a "fucking asshole." (3RT 456.) Luis turned and came at appellant aggressively as if he intended to hurt her. (3RT 457-458.) Appellant began whipping her bike chain around over her head, and told Luis to stay away from her. (3RT 459.) As Luis charged at appellant,

the bike chain struck him on the top of his head hard enough to leave a bump. (3RT 461, 462, 491.) Luis grabbed his head and called her a "bitch." (3RT 463.) He tried to grab her, so she hit him with the chain a second time. (3RT 464, 482.) After this second strike, Luis grabbed the chain and they began struggling over control of it. (3RT 464.)

Appellant testified she lost her balance during the struggle and fell backwards. (3RT 465.) As she lay on the ground, Luis began beating her with the chain. (3RT 466.) He then cast the chain aside, picked up the chiminea, held it over his head, and threw it down. (3RT 467.) Part of the chiminea made contact with appellant's head. (3RT 467.) As appellant lay in shock wondering whether she was dead, Luis picked up a rock and threw it at her head, narrowly missing her temple. (3RT 468.) Appellant denied ever throwing the chiminea or anything else at her father. (3RT 489-490.)

According to appellant, the entire episode lasted no more than ten minutes. (3RT 512.) Appellant left the house when ordered to do so by her mother, and police contacted her later that evening. (3RT 471.)

### B. A Jury Convicts Appellant of Two Separate Counts of Assault

A San Diego County jury found appellant guilty of assault with a deadly weapon other than a firearm (count 2; § 245(a)(1)), and found true that appellant personally used a dangerous and deadly weapon, namely a bicycle chain/lock (§ 1192.7, subd. (c)(23)). The jury also found appellant guilty of assault by means of force likely to produce great bodily injury (count 3; § 245(a)(4)). (CT 142-143.) The jury was unable to reach a unanimous verdict as to a charge of willful cruelty to an elder (count 1; § 368, subd. (b)(1)), and the court declared a mistrial as to that count. (CT 148-149.)

The trial court suspended imposition of sentence and placed appellant on formal probation with a variety of terms and conditions, including that

she spend 365 days in local custody. (5RT 693-694.) Although it suspended imposition of sentence, the court nonetheless stayed count 3 under section 654. (5RT 695.)

### C. The Court of Appeal Affirms Both Counts of Assault

On appeal, appellant claimed, inter alia, that her conviction for assault by means of force likely to produce great bodily injury under count 3 had to be reversed because it is a lesser-included offense of assault with a deadly weapon under count 2. The Court of Appeal rejected this argument, concluding that while assault with a deadly weapon will often involve force likely to produce great bodily injury, this is not invariably so. (Opinion at 9.) Relying largely on this Court's decision in *People v. Aguilar* (1997) 16 Cal.4th 1023, the Court of Appeal observed that assaults with deadly weapons may be based on either inherently deadly weapons, such as dirks and blackjacks, or on weapons that become deadly based on the manner in which they are used. (Opn. at 9-11.) Assaults based on inherently dangerous weapons are not necessarily likely to produce great bodily injury; therefore, assaults with deadly weapons can be committed without means of force likely to produce great bodily injury. (*Id.* at 11-12.) Nothing in the most recent amendment to the assault statute, which broke out the two types of assault into separate subdivisions, was intended to alter this conclusion. (*Id.* at 12.)

The Court of Appeal also rejected an alternative ground, raised for the first time in appellant's reply brief, that even if assault with force likely to produce great bodily injury is not a lesser offense, that conviction would still have to be vacated because it was based on the same act as the assault with a deadly weapon conviction. (Opn. at 15.) The court declined to consider the argument both because it was not raised in the opening brief and because it was not sufficiently developed. In any event, the court concluded that appellant's convictions were based on multiple acts of

hitting her father with the bicycle chain and lock, and also hitting him with the garden pot. (*Ibid.*)

After granting review, this Court ordered the parties to brief the two questions previously noted above. In doing so, this Court specifically asked the parties to address *People v. Aledamat* (2019) 8 Cal.5th 1, 16, footnote 5, when addressing the first issue regarding the lesser included offense.

## ARGUMENT

### I. ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY IS NOT A LESSER OFFENSE OF ASSAULT WITH A DEADLY WEAPON

An assault with a "deadly weapon or instrument other than a firearm" under section 245(a)(1) does not always require force likely to produce great bodily injury. When the weapon used is one specifically designed to be deadly, neither force nor a likelihood of great bodily injury is required. It follows a fortiori that section 245(a)(4) is not a lesser offense of section 245(a)(1), and the Legislature intended both crimes to be distinct and alternate forms of aggravated assault. This is best seen by examining the language of section 245(a)(1), which juxtaposes two separate disjunctive terms "weapon" and "instrument." Consistent with the Legislature's chosen language, this Court has long concluded that neither form of assault is a lesser offense of the other. That conclusion, which avoids treating either form of assault as superfluous, is well-grounded in the very essence of what distinguishes an aggravated assault from a simple assault. In dividing section 245(a)(1) into two separate subdivisions in 2011, the Legislature demonstrated its intent to continue this long tradition without substantive change.

Appellant's arguments to the contrary are not well taken, and are based in large part on a mistaken reading of this Court's precedent. Finally,

any policy reasons for abandoning the long tradition of what constitutes an assault with a deadly weapon should be left to the Legislature to consider.

### A. The Question Whether One Offense Is Necessarily Included in Another Must Be Examined in the Abstract Based on the Elements of the Offense

As a general rule, a defendant can be convicted of multiple charged offenses. (§ 954.) This Court has repeatedly held that the same act can support multiple charges and multiple convictions. (*People v. White* (2017) 2 Cal.5th 349, 353-354.) "Unless one offense is necessarily included in the other [citation], multiple convictions can be based upon a single criminal act or an indivisible course of criminal conduct (§ 954)." [Citation.]'" (*Ibid.*; see also *People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

In determining whether a defendant may be convicted of multiple charged offenses based on a single act or indivisible course of conduct, courts apply solely the statutory elements test. (*People v. Reed* (2006) 38 Cal.4th 1224, 1231.) Under this test, if the statutory elements of one offense include all of the statutory elements of another offense, the latter is necessarily included in the former. (*Id.* at p. 1227.) A reviewing court must consider the statutory provision describing the crime, not "the underlying facts of the case or the language of the accusatory pleading." (*People v. Sanders* (2012) 55 Cal.4th 731, 739.) The question must be examined in the abstract. (*Ibid.*) If a court can identify even one circumstance in which a person could violate one provision without also violating a second, the latter provision is not a necessarily included offense of the former. (*Id.* at p. 740; *People v. Milward* (2011) 52 Cal.4th 580, 586 ["a crime is a lesser offense necessarily included within a greater crime only if it is impossible to commit the greater crime without also committing the lesser"].)

### B. The Statutory Framework of Section 245 and Historical Development of That Provision Demonstrate a Legislative Intent to Create Distinct and Alternative Means of Committing an Aggravated Assault

Aggravated assault was first codified in section 245 in 1872. As originally enacted, that provision was limited to assaults committed "with a deadly weapon, instrument, or other thing." (1872 Pen. Code, § 245; see *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1030.) The following year, this Court reversed a conviction for assault with intent to commit murder because the indictment failed to allege the use of a deadly weapon. (*People v. Murat* (1873) 45 Cal. 281.) A year after this decision, the Legislature amended section 245 to expand aggravated assaults to include assaults "'with a deadly weapon or instrument or by any means of force likely to produce great bodily injury.'" (*People v. Emmons* (1882) 61 Cal. 487, 488 [quoting then-existing version of statute]; Code Amends. 1873-1874 (Pen. Code) ch. 614, § 22, p. 428.)

Importantly, if assault by means of force likely to produce great bodily injury were a lesser offense back when the two types of assault were first combined in a single offense as alternative elements in 1874, then assault with a deadly weapon would have become entirely redundant. That is, because they were combined in a single section it would *always* be the case that any aggravated assault would have required force likely to produce great bodily injury, and the additional element of a deadly weapon would have been surplusage. It is well accepted that reviewing courts should generally avoid reading a statute in a manner that would render a part of it superfluous. (See, e.g., *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1030.) Appropriately, this Court has never construed either form of assault as a lesser offense of the other.

In 1982, the crime of aggravated assault was first divided into separate subparagraphs: subdivision (a)(1) proscribed assault with a deadly weapon other than a firearm or by force likely to produce great bodily injury; and subdivision (a)(2) prohibited assault with a firearm. (Stats. 1982, ch. 136, § 1, p. 437.)

In 2000, Proposition 21 added section 1192.7, subdivision (c)(31), which created a new serious felony designation for assault with a deadly weapon or firearm. In the years immediately following this change, some courts concluded that an assault under section 245(a)(1), as it was then written, was not automatically a serious felony under section 1192.7, subdivision (c)(31), because former section 245(a)(1) could also be violated by means of force likely to produce great bodily injury. (See, e.g., *People v. Winters* (2001) 93 Cal.App.4th 273, 275.)

In order to prevent confusion as to which types of assault satisfied the new serious felony, in 2011 the Legislature amended section 245(a)(1) by removing the alternative means of committing an assault based on means of force likely to produce great bodily injury, and creating a new and separate subdivision (a)(4) for such assaults. (Stats. 2011, ch. 183, § 1.) "According to the Report of the Assembly Committee on Public Safety, the purpose of this change was to permit a more efficient assessment of a defendant's prior criminal history since an assault with a deadly weapon qualifies as a 'serious felony' (see Pen. Code, § 1192.7, subd. (c)(1)), while an assault by force likely to produce great bodily injury does not." (*People v. Brown* (2012) 210 Cal.App.4th 1, 5, fn. 1, citing Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 1026 (2011–2012 Reg. Sess.) as introduced Apr. 26, 2011.) Thus, the Legislature intended to make all violations of subdivision (a)(1) serious felonies. (*People v. Puerto* (2016) 248 Cal.App.4th 325, 331.)

### C. The Legislature's Use of Both the Words "Weapon" and "Instrument" Demonstrates an Intent to Distinguish Between Objects That Are Inherently Deadly and Those That Are Not

Since its inception, the language of section 245 has drawn a distinction between deadly weapons and instruments. The common understanding of these terms, and in particular the use of both together, demonstrates an intent to include both inherently and non-inherently deadly implements.

As with other questions of legislative intent, in addressing the question regarding the elements of an offense, a reviewing court begins "by examining the statute's words, giving them a plain and commonsense meaning." (*People v. Gonzalez* (2014) 60 Cal.4th 533, 537, internal quotation marks omitted.) A reviewing court must seek to harmonize "the various parts of a statutory enactment...by considering the particular clause or section in the context of the statutory framework as a whole." (*Ibid.*, internal quotes and citations omitted.)

A weapon is a "thing designed or used for inflicting bodily harm or physical damage." (Lexico Online Dictionary, <http://www.lexico.com/en/definition/weapon> (as of February 21, 2020); see also "deadly weapon" in The Law Dictionary, http://thelawdictionary.org/deadly-weapon (as of February 21, 2020) ["Such weapons or instruments as are made and designed for offensive or defensive purposes, or for the destruction of life or the infliction of injury"]; *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1029 ["Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; *the ordinary use for which they are designed establishes their character as such*," italics added]; cf. *id.* at pp. 1028-1029 [defining "weapon"], 1032 & fn. 5 & 6 [rejecting argument that "deadly weapon or instrument" should not be construed as a whole and providing additional

definitions of "weapon"].) As this definition suggests, a weapon can be both inherently deadly, when designed for inflicting harm, or it can be non-inherently deadly, as when it is used to inflict harm but is not specifically intended for this purpose. In contrast, an "instrument" is more broadly defined as a "tool or implement, especially one for delicate or scientific work." (Lexico Online Dictionary, <http://www.lexico.com/en/definition/instrument> (as of February 21, 2020).)

When the two terms are read together (see *Aguilar*, *supra*, 16 Cal.4th at p. 1032), it becomes evident that the Legislature must have intended "weapon" to include the more specific definition of an item *designed* for inflicting bodily harm. A deadly instrument already captures the use of an ordinary item, such as a rock or a hammer, to cause bodily harm. By adding the word "weapon," the Legislature meant to go further and address objects specifically designed to inflict harm. A weapon such as a firearm or sword could broadly and generically be referred to as a tool, implement, or instrument. But by including the word "weapon" together with "instrument," the Legislature signaled that it intended to go beyond the generalized meaning of any object used in a deadly manner to include the more particularized denotation of an object specifically designed to inflict harm.

If "weapon" means only any object used in a deadly manner, then that concept was already fully encompassed by the notion of a deadly instrument. Such a construction would not give meaning to every word in the statute, and would render the word "weapon" superfluous. (*In re C.H.* (2011) 53 Cal.4th 94, 103 ["courts should 'strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous'"].)

A weapon designed for a deadly use is an inherently deadly weapon. These are weapons "in the strict sense of the word" and in the "ordinary use for which they are designed." (*People v. Raleigh* (1932) 128 Cal.App. 105, 108.) As discussed below, because this Court has long concluded that inherently deadly weapons do not require a showing of force, assault with a deadly weapon can be committed without also committing assault by means of force likely to produce great bodily injury.

### D. This Court's Decisions Have Long Held That Assault with a Deadly Weapon and Assault by Means of Force Likely to Produce Great Bodily Injury Are Not Lesser Offenses of Each Other

Consistent with the language of section 245, both this Court and lower courts have historically recognized that there is a fundamental distinction between the two types of assault, and therefore neither form of assault was superfluous when the Legislature added assaults by means of force likely to produce great bodily injury in 1874. Namely, while both forms of assault may be committed with deadly weapons, an assault with an inherently deadly weapon does not require a showing of force likely to produce great bodily injury. For this reason, it is not "impossible to commit the greater crime without also committing the lesser." (*Milward*, *supra*, 52 Cal.4th at p. 586.)

The distinction between weapons that are inherently deadly, and those that are not, was recognized soon after the statute was first enacted. Two cases from this Court underscored that although some items could become deadly based on the manner in which they are used, certain other weapons do not depend on the manner of use and are always deadly. (See *People v. Fuqua* (1881) 58 Cal. 245, 247 [noting that *in some cases* the character of a weapon as deadly depends on the manner in which it is used]; *People v. Leyba* (1887) 74 Cal. 407, 408 [approving jury instruction that "there are cases where the character of the weapon, whether deadly or otherwise,

depends on the manner in which it is used"]; see *People v. Perez* (2018) 4 Cal.5th 1055, 1065 [noting that definition of deadly weapon used in *Leyba* and *Fuqua* was similar to that used in *Aguilar*].)

The foundation for the distinction between the types of deadly weapons was first thoroughly addressed in the context of first-degree robbery, which at the time proscribed robbery perpetrated by a person armed with "a deadly or dangerous weapon." (*People v. Raleigh*, *supra*, 128 Cal.App. at p. 107, quoting former § 211a.) Raleigh argued that he could not be convicted of first-degree robbery because there was no proof that the gun he used was loaded. The Court of Appeal rejected this contention by distinguishing between the two classes of deadly or dangerous weapons; namely, those weapons "in the strict sense of the word" and those instruments that may be used as weapons. (*Id.* at p. 108.) In the first class are weapons such as guns, dirks, and blackjacks, which are deadly or dangerous in the "ordinary use for which they are designed." (*Ibid.*) In the second class are items such as razors and hammers, which are not designed to be deadly or dangerous, but may be used in this manner. (*Ibid.*) The court held that whenever a person is armed with a weapon in the first class, a resulting robbery will be in the first degree as a matter of law; neither the intended use nor the present ability of the perpetrator need be shown. (*Id.* at p. 110.) Consequently, when a gun is used, it is immaterial whether it is loaded. (*Ibid.*)

In *People v. Petters* (1938) 29 Cal.App.2d 48, the Court of Appeal rejected an attempt to limit the definition of a deadly weapon or instrument under section 245 to those deadly weapons specifically listed in section 1168, which was added in 1927 and required minimum penalties for defendants armed with specified deadly weapons. As the court summarized, for purposes of section 245, "[a] deadly weapon is one likely to produce death or great bodily injury. The character of the weapon is ordinarily

pronounced by the law. There may, however, be cases in which its character, that is to say, whether deadly or otherwise, depends upon the manner in which it was used, or the part of the body upon which it was used, and therefore it becomes a mixed question of law and fact which the jury must determine under proper instructions.'" (*Id.* at p. 50; see 3 Cal. Jur. (1921) Assault and Battery, § 21, fn. 14, p. 206.) Because numerous instruments not specifically included in section 1168 may be used as deadly weapons, the court declined to interpret section 1168 as providing a definition for purposes of section 245. (*Ibid.*)

A few years later, in *People v. Cook* (1940) 15 Cal.2d 507, this Court took up the distinctions drawn by *Raleigh* and applied them in the specific context of an assault. Relying on *Raleigh*, this Court concluded that while a two-by-four piece of lumber is not an inherently deadly instrument when used to commit an assault, it could become a deadly weapon depending upon the manner in which it is used. (*Id.* at pp. 516-517; see also *People v. McCoy* (1944) 25 Cal.2d 177, 188-189 [again relying on *Raleigh* in an assault case]; *People v. Russell* (1943) 59 Cal.App.2d 660, 664-665.)

Implicitly recognizing these long-held distinctions, in *In re Mosley* (1970) 1 Cal.3d 913 this Court observed that "[t]he offense of assault by means of force likely to produce great bodily injury is not an offense separate from—*and certainly not an offense lesser than and included within*—the offense of assault with a deadly weapon." (*Id.* at p. 919, fn. 5, italics added.) In that case, the information had charged the defendant with assault with a deadly weapon, but the court found him guilty of assault by means of force likely to produce great bodily injury as a lesser included offense. (*Ibid.*) This Court specifically rejected that conclusion and noted that section 245, at that time, defined only one offense. (*Ibid.*)

Over a century after first recognizing the distinction between the two types of deadly weapons, this Court elaborated on, and explained the

significance of, that distinction in *People v. Aguilar*, *supra*, 16 Cal.4th 1023. There, the issue presented was whether hands and feet constitute deadly weapons under former section 245(a)(1). In concluding that they do not, the Court approved of the lower court reasoning that the Legislature had created a "meaningful difference" between the two types of assault, and that if hands and feet qualified as deadly weapons, then assault by means of force likely to produce great bodily injury would become "unnecessary." (*Id.* at p. 1030.)

To explain its holding, the *Aguilar* Court specifically distinguished inherently deadly weapons—i.e., those which are deadly per se, such as dirks and blackjacks—from other objects that may constitute deadly weapons under the statute based on their use. To qualify as a deadly weapon, the latter group must be used in a manner so as to be capable of producing and likely to produce death or great bodily injury, whereas per se deadly weapons do not require such use to trigger the statute. *Aguilar* observed:

> Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object *not inherently deadly or dangerous* is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]

(*Aguilar*, *supra*, 16 Cal.4th at pp. 1028-1029, italics added.)

Whereas weapons that are not per se deadly depend upon the manner of force used in order to qualify under the statute, the same is not true of inherently deadly weapons:

> Ultimately (*except in those cases involving an inherently dangerous weapon*), the jury's decision making process in an aggravated assault case under section 245, subdivision (a)(1), is

> functionally identical regardless of whether, in the particular case, the defendant employed a weapon alleged to be deadly as used or employed force likely to produce great bodily injury; in either instance, the decision turns on the nature of the force used.

(*Aguilar, supra*, 16 Cal.4th at p. 1035, italics added.)

For inherently deadly weapons, the key inquiry is not the actual use of the weapon in the particular case, but rather the designed use of the weapon—was the object designed to kill or inflict great bodily injury, such as a sword or dirk, without regard to whether it was actually used in a manner or with force likely to produce death or great bodily injury? (*Aguilar, supra*, 16 Cal.4th at p. 1037, fn. 10; accord, *People v. Brown, supra,* 210 Cal.App.4th at pp. 6–7.)

Justice Mosk, in his concurring opinion in *Aguilar*, clarified his understanding of the majority decision and reiterated these distinctions. As he concluded, former section 245(a)(1), which at the time still combined the two types of assault, "actually punishes an assault committed in any one of three ways: i.e., (1) with a weapon deadly per se, or (2) with an *object used* in a way likely to produce great bodily injury, or (3) by means of a *force* also likely to produce great bodily injury." (*Aguilar, supra,* 16 Cal.4th at p. 1038 (conc. opn. of Mosk, J.).)

Nothing in Justice Mosk's analysis, or in the majority opinion, suggests that assault by force likely to produce great bodily injury, i.e., the third way in which the assault could be committed, was viewed by the court as a lesser-included offense of the first two ways. To the contrary, the *Aguilar* majority specifically noted that the instructions in that case properly called upon the jury to find the defendant's conduct had the capability and probability of inflicting great bodily injury under either a "deadly weapon" theory or a "force likely" theory; and in either event, the jury's analytical process was the same in that particular case. (*Aguilar, supra*, 16 Cal.4th at p. 1037.) Having equated these two theories in that

particular case (involving the use of hands or feet), the *Aguilar* Court was quick to point out that this did not mean that the force likely clause rendered the deadly weapon clause mere surplusage: "There remain assaults involving weapons that are deadly per se, such as dirks and blackjacks, in which the prosecutor may argue for, and the jury convict of, aggravated assault based on the mere character of the weapon." (*Aguilar, supra*, 16 Cal.4th at p. 1037, fn. 10, citing *People v. Graham* (1969) 71 Cal.2d 303, 327.)

More recently, in *People v Perez, supra*, 4 Cal.5th at page 1065, this Court applied the *Aguilar* definition in the context of whether the defendant was armed with a deadly weapon under Proposition 36. The Court noted that its precedent "makes clear" this distinction between inherently deadly weapons and other implements used in a manner likely to produce death or great bodily injury. (*Ibid.*; see also *In re David V.* (2010) 48 Cal.4th 23, 30 fn. 5.)

Finally, and as discussed further below, in *People v. Aledamat, supra*, 8 Cal.5th at page 16, this Court once again recognized that "under current law" some objects are inherently deadly and therefore instructing the jury on that theory may be appropriate in some cases.

### E. The Distinction Between Inherently Deadly Weapons and Non-inherently Deadly Weapons Makes Ample Sense in Light of the Nature of What Constitutes an Assault

In order to better appreciate the differences drawn between inherently and non-inherently deadly weapons, it is useful to examine in turn the distinctions between simple assaults under section 240 and aggravated assaults under section 245.

An "assault" "is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) The mens rea required for an assault "is established upon proof the defendant

willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery." (*People v. Colantuono* (1994) 7 Cal.4th 206, 214.) "The evidence must only demonstrate that the defendant willfully or purposefully attempted a 'violent injury' or 'the least touching,' i.e., 'any wrongful act committed by means of physical force against the person of another.'" (*Id.* at p. 215, quoting *People v. McCoy*, *supra*, 25 Cal.2d at p. 191.) "Because the offensive or dangerous character of the defendant's conduct, by virtue of its nature, contemplates such injury, a general criminal intent to commit the act suffices to establish the requisite mental state." (*Ibid.*)

"The criminal law thus independently sanctions the initiation of force or violence—the 'assault'—because it directly and immediately culminates in injury—the 'battery.'" (*People v. Colantuono*, *supra*, 7 Cal.4th at p. 217.) "In this context, however, 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion." (*People v. Chance* (2008) 44 Cal.4th 1164, 1168; see also *id.* at p. 1172 ["There is no requirement that the injury would necessarily occur as the very next step in the sequence of events, or without any delay"].)

Since the early days of this State, this Court has held that an assault does not require that the defendant unsuccessfully attempt an act of violence. "Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So, any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault." (*People v. McMakin* (1857) 8 Cal. 547, 548.) For instance, it is sufficient if the defendant draws a pistol and simply points it at the ground rather than at the victim. (*Id.* at p. 549.) Even

grabbing the hilt of a dangerous weapon such as a sword can be sufficient (*People v. Chance*, *supra*, 44 Cal.4th at p. 1172, citing *Hays v. The People* (N.Y. Sup. Ct. 1841) 1 Hill 351, 353), as can merely reaching for a gun concealed in a sock (*People v. Chance*, *supra*, 44 Cal.4th at p. 1174, citing *People v. Hunter* (1925) 71 Cal.App. 315, 318-319.)

As such examples highlight, it is not necessary for the defendant to attempt to strike the victim. (See *People v. McCoy*, *supra*, 25 Cal.2d at p. 189 ["it was not necessary that the prosecution introduce evidence to show that the appellant actually made an attempt to strike or use the knife upon the person of the prosecutrix"].) "The drawing of a weapon is generally evidence of an intention to use it." (*Ibid.*; see also *People v. Chance*, *supra*, 44 Cal.4th at pp. 1170-1176 [sufficient evidence of assault where defendant pointed loaded firearm where he thought officer would appear].)

While it is true that a person who raises a fist in an angry manner and one who grabs for his sword both commit assaults, the person who grabs the sword is the more culpable of the two precisely because swords are inherently deadly. This maxim explains why the Legislature punishes simple assaults under section 240 separately from aggravated assaults under section 245.

And this same rationale also explains why assaults involving inherently deadly weapons deserve being treated as aggravated assaults as a matter of law, even when assaults with other types of weapons require consideration of the manner in which they are used. Deadly weapons tend not only to inflict deadly injuries, but as a result, they are also more likely to lead to escalations in the conflict and responses from the victims. A victim who sees his foe raise a sword may well seek to defend himself by, for instance, firing a gun, thereby killing the assailant (or, as is often the case, an innocent bystander) before the assailant can strike. Deadly weapons cause victims to react commensurately with the risk posed by the

weapon. (See, e.g., *People v. Hunter*, *supra*, 71 Cal.App. at p. 319 [victim jumped out of window when defendant attempted to draw gun from sock].) This risk of harm is elevated for all persons concerned whenever someone resorts to an inherently deadly weapon.

In order for a non-inherently deadly instrument to constitute a deadly weapon, it is necessary to see first how the weapon will ultimately be used, whereas this is not the case with an inherently deadly weapon. For example, a butter knife could constitute a deadly weapon if it were used, say, to inflict mayhem on a person's face; however, if it is merely used to stab at a person's blanket-covered legs, it would not be. (*In re B.M.* (2018) 6 Cal.5th 528, 535, 538.) Accordingly, it cannot be said that such an object is a deadly weapon without knowing how it is actually used. (*Id.* at p. 534, 539.)

In contrast, with inherently deadly weapons, it is not necessary to wait to see how the weapon is actually used. (See, e.g., *People v. Hunter*, *supra*, 71 Cal.App. at p. 319 [holding defendant properly convicted of assault with a deadly weapon after attempting to draw gun from sock, court noted, "[n]aturally [the victim] did not wait to see whether he succeeded in getting hold of the gun or whether he pointed it at her, and it is immaterial whether he did either"].) As this Court has explained, "[w]here a defendant uses a firearm with poor aim, lack of injury carries little weight not because it is appropriate to consider what injury could have resulted if the defendant had had better aim, but because in many circumstances using a firearm even with poor aim is likely to produce death or serious injury." (*In re B.M.*, *supra*, 6 Cal.5th at p. 537.) A firearm as used in this example is the prototypical example of a deadly weapon. The risk that someone will be injured increases as soon as it is drawn.

Yet, this does not mean that in any particular case an aggravated assault with an inherently deadly weapon will always include either force

or a likelihood of great bodily injury. In the examples noted above involving grabbing of the hilt of a sword, reaching for a gun in a sock, or pointing a gun at the ground, no force whatsoever has been employed against any victim. Although weapons have been drawn in such cases, it cannot necessarily be said that great bodily injury will always likely result in a particular case, even if this may be so as a general rule in the abstract.

Once a defendant resorts to employing deadly force, a victim is not required to stick around and see what will happen next before responding with deadly force. (See § 197, subd. (3) [lawful defense against commission of a felony or great bodily injury]; *People v. McMakin*, *supra*, 8 Cal. at p. 548 ["Suppose, in this case, the prosecutor had instantly killed the prisoner, would it have been justifiable homicide? The prisoner put himself in a position to use the weapon in an instant, having only to elevate the pistol and fire, at the same time declaring his intention to do so, unless the prosecutor would leave the ground. It is true the threat was conditional, but the condition was present, and not future, and the compliance demanded was immediate"].)

In contrast, deadly force may not be used against a person who picks up a rock or a clod of dirt. (*People v. Anderson* (1922) 57 Cal.App. 721, 726-727 ["A simple assault does not justify homicide"]; *People v. Quach* (2004) 116 Cal.App.4th 294, 301 ["'Where the original aggressor is not guilty of a deadly attack, but of a simple assault or trespass, the victim has no right to use deadly or other excessive force ...'"].) While the rock could be used in a deadly manner, it would first be necessary to see how the assailant actually uses that rock in order to determine whether the crime is an aggravated felony, and therefore the victim is entitled to employ deadly force.

As this Court summarized long ago in *McCoy*, the timeline for determining at what point an aggravated assault is committed depends on

the character of the weapon used: "[w]hether the instrument employed be inherently 'dangerous or deadly' as a matter of law or one that may assume such character depending upon the attendant circumstances, the principle as to the intent which may be implied from the manner of the defendant's use of the instrumentality involved would apply in either instance. [Citations.] *The distinction in the classification of weapons to establish commission of the offense within the meaning of section 245 of the Penal Code merely relates to the sufficiency of the evidence to support the charge.*" (*McCoy*, *supra*, 25 Cal.2d at p. 190, italics added.) Reaching for a gun in a sock or the hilt of a sword is sufficient without more because the character of the weapon leaves no reasonable doubt about the defendant's intention; grabbing an otherwise non-deadly object does not permit the same inference at the same point in time.

The distinction between inherently deadly weapons and non-inherently dangerous weapons is hence an important one because it bears upon what additional acts are required, if any, to elevate an assault into an aggravated assault; in turn, such designations also carry consequences that relate to the types of responses a victim may make.

### F. The 2011 Amendments to Section 245 Retained and Reinforced the Differences Between the Two Different Forms of Assault

The Legislature's creation of section 245(a)(4) in 2011 separated and divided what was formally one offense into two different provisions. Regardless of whether the Legislature thereby intended to create two separate offenses, this much is clear: In doing so, the Legislature maintained the distinction between the two forms of aggravated assault that previously existed, and which this Court had repeatedly referenced. There is no indication that the Legislature intended to change the elements of either alternative; to the contrary, "the Legislature made clear it was

making only 'technical, nonsubstantive changes' to section 245 (Legis. Counsel's Dig., Assem. Bill No. 1026 (2011–2012 Reg. Sess.)) to provide clarity for purposes of recidivist enhancements—it was not "creat[ing] any new felonies or expand[ing] the punishment for any existing felonies" (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1026 (2011-2012 Reg. Sess.) as introduced Feb. 18, 2011, p. 3)." (*People v. Brunton* (2018) 23 Cal.App.5th 1097, 1107.)

The Legislature's creation of separate provisions was intended to "'permit a more efficient assessment of a defendant's prior criminal history since an assault with a deadly weapon qualifies as a "serious felony" [citation], while an assault by force likely to produce great bodily injury does not. [Citation.]' [Citation.]" (*People v. Puerto*, *supra*, 248 Cal.App.4th at p. 330, fn. 8; see *People v. Brown*, *supra*, 210 Cal.App.4th at p. 5, fn. 1.) The Legislature did not change the elements of those offenses; it simply made two separate provisions where there was once one.

In light of this Court's long history of interpreting "assault with a deadly weapon or instrument" to include both assaults with inherently deadly weapons, and assaults with objects used in a deadly manner, the 2011 amendment to section 245 must be presumed to have adopted that construction because it retained that language in subdivision (a)(1). "Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction." (*People v. Harrison* (1989) 48 Cal.3d 321, 329; see also *People v. Overstreet* (1986) 42 Cal.3d 891, 897.)

### G. Appellant's Arguments for Interpreting Section 245(a)(4) as a Lesser Offense of Section 245(a)(1) Are Unpersuasive

Appellant offers four primary reasons for interpreting section 245(a)(4) as a lesser offense of section 245(a)(1). None has merit.

#### 1. The Plain Meaning of the Two Sections Reveals the Legislature Did Not Intend Either Type of Assault to Be a Lesser Offense

Appellant maintains that the plain wording of section 245(a)(1) demonstrates that the Legislature did not intend to draw a distinction between inherently and non-inherently dangerous weapons because there is supposedly no basis in the statutory language for treating classes of deadly weapons differently. (OBM 24-30.) Appellant is mistaken. First, she overlooks that part of the common definition of "weapon" includes objects designed for deadly purposes, and that by including the word "implement," the Legislature intended to include both meanings. While appellant is perhaps correct that section 245(a)(1) does not include the words "inherently deadly" (OBM 28; see *People v. Aledamat*, *supra*, 8 Cal.5th at p. 16, fn. 5), it is equally true that this provision also does not reference objects used in a manner "likely to produce great bodily injury." Both concepts, however, are included in the definition of "weapon" and "implement."

Second, the Legislature made its intent clear that neither of the two types of assault should be treated as a superfluous lesser-included offense of the other when it amended the statute in 1874 by adding assault by means of force likely to produce great bodily injury while retaining assault with a deadly weapon. Appellant apparently has no response as to why the Legislature would have retained two different ways of violating the statute if every assault necessarily required a showing of force likely to produce great bodily injury.

### 2. This Court Has Consistently Interpreted the Requirements for Assault with a Deadly Weapon

Appellant partially recounts the historical development of the aggravated assault statute, but reaches substantially different conclusions regarding the significance of some of this Court's decisions, which she accuses of "transmorgraf[ing]" the elements of the crime. (OBM 44.) Contrary to appellant's assertions, this Court's interpretation of the statutes has remained consistent.

Appellant does not refer to this Court's decision in *Mosely*, where this Court concluded that assault by means of force is not a lesser offense of assault with a deadly weapon. (*In re Mosely*, *supra*, 1 Cal.3d at p. 919.) She incorrectly labels as "dicta" this Court's explanation in *Aguilar* that its "holding" does not reduce the deadly weapon clause to surplusage. (OBM 35, citing *Aguilar*, *supra*, 16 Cal.4th at p. 1037, fn. 10; see *People v. Vang* (2011) 52 Cal.4th 1038, 1047, fn. 3 [comment used to explain why argument lacked merit is not dictum].) She claims that in *B.M.* this Court determined that *all* aggravated assaults without exception are based on the force likely to be applied (OBM 46-47), but this Court specifically stated "'except in those cases involving an inherently dangerous weapon.'" (*In re B.M.*, *supra*, 6 Cal.5th at p. 535, quoting *Aguilar*, *supra*, 16 Cal.4th at p. 1035.)

Most significantly, appellant reads *McCoy* as standing for the proposition that "the manner of use applies, whether the weapon is inherently deadly or not." (OBM 33.) This Court made no such statement. Instead, this Court simply said that the "intent which may be implied" from the manner of use is the same with either type of assault. (*McCoy*, *supra*, 25 Cal.2d at p. 190.) This principle is true beyond dispute. Whether a defendant uses a sword or a rock, the manner of use can be helpful in showing the defendant's intent to commit an assault. This does not mean,

however, that a defendant who grabs a sword must engage in an act of force. In fact, in the very next sentence, which appellant omits, the *McCoy* Court specifically noted that "[t]he distinction in the classification of weapons...merely relates to the sufficiency of the evidence to support the charge." (*Ibid.*)

### 3. Defining "Weapon" as Including Inherently Deadly Weapons Does Not Create an Unconstitutional Presumption

Appellant maintains that interpreting section 245(a)(1) as applying to two classes of deadly weapons creates an unconstitutional irrebuttable presumption. (OBM 46-49; *Vlandis v. Kline* (1973) 412 U.S. 441, 446.) It does not. Assault with an inherently deadly weapon does not presume the use of force likely to produce great bodily injury; instead, the substantive offense is defined such that force and the likelihood of great bodily injury are not required elements when an inherently deadly weapon is used. (See *People v. McCall* (2004) 32 Cal.4th 175, 179 [Health & Saf. Code, § 11383, subd. (f), did not create a presumption, but was a valid exercise of Legislature's power to define substantive law]; *id.* at p. 185 ["our court has repeatedly rejected defendants' attempts to invoke the term conclusive presumption as a means to challenge the constitutionality of criminal law statutes"]; *People v. Bransford* (1994) 8 Cal.4th 885, 892-893 [Veh. Code, § 23152, subd. (b), does not presume driver is intoxicated; instead it defines the substantive offense of driving with a specified concentration of alcohol]; *People v. Dillon* (1983) 34 Cal.3d 441, 472-476 [§ 189 does not presume malice; it defines first-degree felony murder as an offense in which malice is not an element].) Contrary to appellant's view, this does not result in an expansion of the scope of the criminal statute beyond the Legislature's intent (OBM 49); as previously addressed, assaults by inherently deadly weapons are consistent with the Legislature's intent, have long been a part

of the statute, and fall within the Legislature's broad authority to define substantive criminal offenses.

#### 4. Appellant's Reliance on *Jonathan R.* Is misplaced

Appellant urges this Court to adopt the reasoning of *In re Jonathan R.* (2016) 3 Cal.App.5th 963. (OBM 53-55.) But that decision only serves to underscore the flaws in her position. There, the First District Court of Appeal concluded that assault by force likely to produce great bodily injury, under section 245(a)(4), is necessarily included within assault with a deadly weapon other than a firearm under section 245(a)(1). (*Jonathan R.*, *supra*, 3 Cal.App.5th at p. 972.) Interpreting *Aguilar*, the court stated that both section 245(a)(1) and section 245(a)(4) "require the use or attempted use of force likely to produce great bodily injury"; therefore, "the trier of fact necessarily must have concluded the defendant used or attempted to use force likely to produce great bodily injury since that likelihood is what makes a weapon or instrument 'deadly.'" (*Id.* at p. 973.)

But the court's analysis was too quick. When an inherently deadly weapon is used, section 245(a)(1) does not require the use or attempted use of force likely to produce great bodily injury. The *Jonathan R.* court had two responses to this argument, but neither is correct. First, in a footnote, the court asserted that because they are inherently dangerous, the "[u]se of these weapons necessarily involves the use of force likely to produce death or serious injury." (*Id.* at p. 974, fn. 5.) However, simply because such weapons are dangerous in their ordinary use, it does not follow that the use of such weapons always and necessarily involves the application of deadly force in every particular instance. The *Jonathan R.* court committed the logical fallacy of attempting to substitute a universal or categorical statement for a property that only sometimes exists.

The *Jonathan R.* court acknowledged this Court's ruling in *Mosley*, but reasoned that *Mosley*'s conclusion was "based on the structure of the

statute, which specified use of a deadly weapon and use of force likely to produce great bodily injury as alternative means to commit the same offense, aggravated assault." (*Jonathan R., supra*, 3 Cal.App.5th at p. 975.) The court in *Jonathan R.* concluded that "the logic of *Mosley* no longer holds" because "the Legislature separated these provisions into different subdivisions." (*Ibid.*)

Adopting the reasoning in *Jonathan R.* would require this Court to draw one of two possible conclusions: Either (i) assault by force likely to produce great bodily injury was always a lesser means of committing assault with a deadly weapon even when the two forms of assault were combined in a single subdivision; or (ii) the Legislature changed the elements of assault by means of force likely to produce great bodily injury when it separated the two offenses into different subdivisions. The first possibility is not only expressly foreclosed by *Mosley*, which determined that assault by means of force likely to produce great bodily injury was not a lesser offense at that time, but also by well-accepted principles, discussed above, of interpreting statutes so as to avoid superfluity.

The second potential consequence of the *Jonathan R.* reasoning is equally untenable. Neither appellant nor the *Jonathan R.* court has pointed to any difference in the elements in the crime of assault by means of force likely to produce great bodily injury under section 245(a)(4) that was not required under former section 245(a)(1). In fact, the contrary is true. (*People v. Brunton, supra*, 23 Cal.App.5th at p. 1107.)

As a fallback position, the *Jonathan R.* court posited that it is possible to commit an assault under both theories (i.e., deadly weapon and force likely) without making any physical contact with the victim. By way of example, the court pointed to a powerful punch that misses its mark as theoretically being sufficient to constitute an assault by means of force likely to produce great bodily injury. (*Jonathan R., supra*, 3 Cal.App.5th at

p. 974.) But this response is not sufficient to show that the two theories are equivalent. The example of the missed forceful punch still involves the use of force, albeit force that is misdirected. In contrast, such force is not required with the use of an inherently dangerous weapon. It would be inaccurate, for example, to characterize a person who grabs the hilt of a sword and conditionally threatens violence as employing force likely to produce great bodily injury.

### H. Any Policy Reasons for Abandoning the Long-held Distinction Between Assault with a Deadly Weapon and Assault by Means of Force Likely to Produce Great Bodily Injury Should Be Left for the Legislature to Consider

In *Aledamat*, this Court observed that the standard instructions on assault with a deadly weapon are "problematic," among other reasons, because they do not define what is an inherently deadly weapon, and because, unless modified, they instruct the jury on the inherently deadly theory even in those cases in which the weapon is not inherently deadly as a matter of law. (*Aledamat*, *supra*, 8 Cal.5th at p. 15.) In most cases, as this Court noted, the inherently deadly language is inapplicable because most objects are not inherently deadly. (*Ibid.*) This Court further pointed out that "[t]he inherently deadly language is also *generally* unnecessary." (*Id.* at p. 16, italics added.) This is because, "[*f*]*or the most part*, those objects that are designed for use as a deadly weapon will also be used in a way that makes them deadly weapons." (*Ibid.*, italics added.) Based on this observation, this Court offered the following comment in a footnote:

> In light of this, it may be asked whether a policy exists for treating inherently deadly weapons differently from other objects capable of being used as a deadly weapon, particularly since the distinction is not reflected in the text of section 245. Because the facts and arguments of this case do not present the question, we leave it for another day.

(*Id.* at p. 16 fn. 5.) Nonetheless, this Court recognized that "because, under current law, some objects, such as dirks and blackjacks, *are* inherently deadly, instructing on that theory might be appropriate in some cases." (*Id.* at p. 16.)

While this Court expressed frustration with the existing instructions on assault with a deadly weapon, neither that difficulty in crafting instructions, nor any "policy" concerns regarding the basis for distinguishing the two types of assault, is an appropriate basis for rewriting the assault statute or overturning what has been the existing law of this State for nearly 150 years.

In the end, the question of how a crime should be defined is one of legislative intent. "'In California all crimes are statutory and there are no common law crimes. Only the Legislature and not the courts may make conduct criminal.'" (*People v. Gonzalez, supra*, 60 Cal.4th at p. 537, quoting *In re Brown* (1973) 9 Cal.3d 612, 624.) "It follows that the determination whether subdivisions [(a)(1) and (a)(4)] of section [245] define different offenses or merely describe different ways of committing the same offense properly turns on the Legislature's intent in enacting these provisions, and if the Legislature meant to define only one offense, we may not turn it into two." (*Ibid.*) It is equally true that if the Legislature meant to create two alternative means of committing an assault, neither of which is a lesser offense of the other, this Court may not condense them into one. (See *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 516 ["'the power to define crimes and fix penalties is vested exclusively in the legislative branch'"]; *People v. Harrison, supra,* 48 Cal.3d at p. 332 [the "court is not to sit as a 'super-legislature' altering criminal definitions"]; *In re Lynch* (1972) 8 Cal.3d 410, 414.)

The "policy" that this Court mentioned in its footnote in *Aledamat* as a potential reason for treating inherently dangerous weapons differently

from other objects capable of being used as a deadly weapon is perhaps a matter that the Legislature may wish to consider in deciding whether to amend section 245 in the future. (*In re Christian S.* (1994) 7 Cal.4th 768, 782 ["The question before us is, of course, one of statutory construction and we do not decide whether the Legislature in 1981 should have eliminated imperfect self-defense or whether it should do so now. That is a public policy issue properly left to the Legislature"].) It is not, however, an appropriate basis for overturning past decisions in this arena.

First, as previously discussed, this Court's decisions are a simple reflection of what the statute necessarily included since the time it was originally enacted: If every assault with a deadly weapon required an assault by means of force likely to produce great bodily injury, then there would have been no need to include assault with a deadly weapon when the Legislature first amended the statute in 1874 because it would have been surplusage. Hence, this is not a situation involving a non-statutory interpretation of a purely judicial doctrine—a matter primarily left to the courts to correct. (Cf. *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 21 [because prior case "extended a judicial doctrine, and did not interpret a statute, it is primarily up to the courts to reconsider its correctness"].) Instead, this is a question of what the Legislature has intended since 1874, and whether the 2011 amendments altered that intent.

Second, the Legislature has relied on this Court's existing interpretation. The Legislature and electorate have amended section 245 no less than 26 times.[1] The vast majority of these amendments occurred after

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[1] Stats. 1921, ch. 89, p. 86, § 1; Stats. 1933, ch. 847, p. 2216, § 1; Stats. 1961, ch. 802, p. 2067, § 1; Stats. 1965, ch. 1271, p. 3145, § 3; Stats. 1965, ch. 1985, p. 4510, § 2; Stats. 1966, 1st Ex.Sess., ch. 21, p. 308, § 4, eff. April 18, 1966; Stats. 1968, ch. 1222, p. 2321, § 57; Stats. 1970, ch. 796, p. 1510, § 1; Stats. 1972, ch. 618, p. 1138, § 114; Stats. 1976, ch. 420, (continued...)

this Court issued decisions specifically explaining the distinctions between inherently and non-inherently dangerous weapons.

Given the well-developed body of law and the multiple amendments of the statute, it is reasonable to infer that the Legislature agreed with this Court's reasoning. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1156 ["it may sometimes be true that legislative inaction signals acquiescence when there exists both a well-developed body of law interpreting a statutory provision and numerous amendments to a statute without altering the interpreted provision ..."].) The difficulty in crafting appropriate jury instructions to reflect the distinctions between inherently deadly and non-inherently deadly weapons is as old as the statute itself. (See, e.g., *People v. Leyba*, *supra*, 74 Cal. at p. 408; *People v. Fuqua*, *supra*, 58 Cal. at p. 247.) Nonetheless, the Legislature has declined to abandon this distinction.

Appellant counters that the Legislature should not be seen as having acquiesced in this Court's longstanding interpretations, both because the Legislature's failure to act may simply be a reflection that other matters were more pressing, and because the characterization of a weapon as

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(...continued)
p. 1018, § 3; Stats. 1976, ch. 1126, p. 5042, § 7; Stats. 1976, ch. 1138, p. 5058, § 5; Stats. 1976, ch. 1139, p. 5105, § 152.5, operative July 1, 1977; Stats. 1980, ch. 1340, p. 4719, § 3.2, eff. Sept. 30, 1980; Stats. 1982, ch. 136, p. 437, § 1, eff. March 26, 1982, operative April 25, 1982; Stats. 1982, ch. 142, p. 469, § 1.2; Stats. 1983, ch. 1092, § 253, eff. Sept. 27, 1983, operative Jan. 1, 1984; Stats. 1989, ch. 18, § 1; Stats. 1989, ch. 1167, § 1; Stats. 1993, ch. 369 (A.B.1344), § 1; Stats. 1999, ch. 129 (S.B.23), § 1; Stats. 2004, ch. 494 (A.B.50), § 1; Stats. 2010, ch. 178 (S.B.1115), § 53, operative Jan. 1, 2012; Stats. 2011, ch. 15 (A.B.109), § 298, eff. April 4, 2011, operative Jan. 1, 2012; Stats. 2011, ch. 39 (A.B.117), § 11, eff. June 30, 2011, operative Jan. 1, 2012; Stats. 2011, ch. 183 (A.B.1026), § 1.

inherently dangerous is rarely applicable and generally unnecessary. (OBM 30.)

But appellant overlooks the significance of the Legislature's amendments, beginning with the very first amendment that added the alternative language of assaults by means of force likely to produce great bodily injury. The 1874 amendment was meant to overturn the result in *People v. Murat*, *supra*, 45 Cal. at page 284, that aggravated assault required the pleading of a deadly weapon. (*Aguilar*, *supra*, 16 Cal.4th at p. 1030.) In adding the alternative language, the Legislature necessarily considered what a deadly weapon entails. This Court's and the lower appellate courts' consistent interpretation of deadly weapon beginning in 1882 in *Fuqua* and extending for over a century in cases such as *Aguilar* confirmed this interpretation.

The Legislature must have considered the meaning of the deadly weapon language once again in 1982, when the statute was, for the first time, broken out into separate types of offenses. This amendment, which occurred after this Court's decision in *Mosley*, specifically separated out one type of deadly weapon—firearms—for special treatment, yet chose to leave untouched all other types of deadly weapons and never sought to make assault by means of force likely to produce great bodily injury a lesser offense.

The electorate also believed there was a meaningful difference between assaults with deadly weapons and assaults by means of force likely to produce great bodily injury. In 2000, when it added the new serious felony definition for assaults with deadly weapons and firearms (§ 1192.7, subd. (c)(31)), the electorate did not include all aggravated assaults. Given that even some footwear is capable of constituting a deadly weapon (*Aguilar*, *supra*, 16 Cal.4th at pp. 1034-1035), only a few types of aggravated assaults were excluded—that is, assaults with hands or feet

likely to produce great bodily injury, in which the defendant does not actually or personally cause great bodily injury. (See § 1192.7, subd. (c)(8).) At a minimum, the drafters must have considered what a deadly weapon encompassed under this Court's jurisprudence.

In 2011, when the Legislature broke out subdivisions (a)(1) and (a)(4), the Legislature specifically disclaimed any suggestion that it intended to make substantive changes to the offenses. (*People v. Brunton*, *supra*, 23 Cal.App.5th at p. 1107.) Once again, the Legislature must necessarily have considered the elements of the two offenses.

Appellant counters that although the statute has been amended 19 times[2] over the past sesquicentury, the Legislature has never added language to specifically include "inherently" dangerous as a qualifier. (OBM 51.) But there was no reason for the Legislature to amend the statute simply to agree with what has been the law of the state for a century and a half, particularly in light of the presumption that the Legislature was aware of the courts' statutory construction, and amended the statute in that light. (*People v. Overstreet*, *supra*, 42 Cal.3d at p. 897.).

Third, the suggestion in *Aledamat* that it might be appropriate to do away with the notion of inherently dangerous weapons was premised on a generalization based on the specific instructional issue faced in that case. This Court stated that it is "generally" unnecessary to include inherently dangerous language and that "[f]or the most part" inherently dangerous weapons will be used in a way that makes them deadly weapons. (*Aledamat*, *supra*, 8 Cal.5th at p. 16.) In the context of addressing standardized instructions, these broad characterizations are perhaps correct. However, as this quoted language itself indicates, these generalizations are not universally true.

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[2] In fact, it has been 26 times after 1874, as noted above.

As previously discussed, an inherently dangerous weapon can affect the type of actus reus that is required for an aggravated assault. Merely placing a hand on the hilt of a sword, for instance, can be sufficient to constitute an assault. It is not necessary that the sword be drawn or brandished, let alone that a strike be attempted. In contrast, simply placing one's hand on a rock would not be sufficient, at least not for an aggravated assault, because it would first be necessary to see what the assailant intended to do with the rock.

If this distinction were eliminated, then it would not be sufficient to show that the assailant committed an assault and that he or she did so with a deadly weapon; instead, as in the case of a non-inherently deadly weapon, the People would also have to prove that there was an act of force and that this act made great bodily injury likely. It would seem, contrary to longstanding law, that merely grabbing the hilt of a sword would no longer be enough, at least not for an aggravated assault; the assailant would now have to take a swing at the victim. As previously discussed, such additional actions should not be required in the case of inherently deadly weapons both because the assailant's intent is clear based on the character of the weapon, and because the victim should not be required to wait to take defensive actions in such cases.

Any questions regarding the adequacy of existing instructions should be raised in a case that presents those concerns. It would seem that either defining "inherently deadly weapon" or deleting that term from instructions in appropriate cases would resolve any problem. (See *People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318-319.)

Fourth, contrary to appellant's assertions (OBM 52-53), it does not follow that assault with a deadly weapon is a less serious offense than assault by means of force likely to produce great bodily injury. The Legislature was well justified in concluding that an assault with an item

such as a dirk or dagger will often either escalate conflicts or lead to serious injuries, even if no force is employed. In contrast, an assault by means of hands or feet, for example, even if done in a manner likely to produce great bodily injury, does not pose the same risk of escalation or harm to third parties.

## II. APPELLANT MAY PROPERLY BE CONVICTED OF BOTH ASSAULT WITH A DEADLY WEAPON AND ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY EVEN IF THE LATTER CONVICTION IS A LESSER-INCLUDED OFFENSE

The issues raised by this Court's briefing order do not question whether the two different subdivisions define different offenses rather than different ways of committing the same offense. (See generally, *People v. Vidana* (2016) 1 Cal.5th 632, 650; cf. *People v. Brunton*, *supra*, 23 Cal.App.5th at p. 1107 [§§ 245(a)(2) and (a)(4) are different statements of the same offense].)[3] This issue was raised for the first time in appellant's reply brief, and the Court of Appeal appropriately determined it was not adequately preserved. (Opn. at 15.)

Appellant nonetheless reads this Court's briefing order as suggesting that the parties should also address whether the two subdivisions are different statements of the same offense. (OBM 56, 62-66.) This reading is incorrect. The order clearly specifies that the issues to be briefed are limited to whether section 245(a)(4) is a lesser offense of subdivision (a)(1), and "*[i]f so*," then whether the two convictions were based on the "same act

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[3] Contrary to *Brunton*, there are good reasons for concluding that the Legislature sought to create two offenses where there was formerly only one—most notably, the fact that the two provisions differ in their elements (as argued above) and were separated in order to attach different punishment consequences to them. (See generally, *People v. White*, *supra*, 2 Cal.5th at pp. 351-352, 354.) Again, however, this issue has not been raised and so respondent does not brief it.

or course of conduct." (Nov. 20, 2019 Order, italics added.) This Court did not order briefing on any further consequences if subdivision (a)(4) is *not* a lesser offense, including issues not properly raised on direct appeal. Consequently, if this Court agrees that assault by means likely to produce great bodily injury is not a lesser offense, the Court need go no further in its analysis.

If, on the other hand, this Court concludes that assault likely to produce great bodily injury is a lesser offense of assault with a deadly weapon, then under *existing* law it is necessary to decide whether the convictions arose out of "the same act or course of conduct." (*People v. Sanders, supra,* 55 Cal.4th at p. 736; *People v. Vidana, supra,* 1 Cal.5th at p. 650.)

Respondent respectfully submits that the appropriate test is not whether the two acts arose during a single course of conduct, but rather whether the greater offense was completed before the lesser offense was committed. Here, appellant completed her assault with a deadly weapon before committing an assault by means of force likely to produce great bodily injury. Accordingly, even assuming the latter is a lesser offense of the former, appellant may appropriately be convicted of both.

### A. A Defendant May Properly Be Convicted of a Lesser-included Offense After a Separate Greater Offense Has Been Completed, Regardless of Whether the Two Acts Comprised a Single Course of Conduct

The origins of the rule prohibiting multiple convictions where a lesser offense arises out of the same course of conduct are murky. As this Court has noted, the precise reasons for the long-held, judicially created prohibition of multiple conviction based on necessarily-included offenses are "unclear." (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) The rule, however, is "logical." (*People v. Ortega* (1998) 19 Cal.4th 636, 705 (dis. opn. of Chin, J.).) "If a defendant cannot commit the greater offense

without committing the lesser, conviction of the greater is also conviction of the lesser. To permit conviction of both the greater and the lesser offense ""'would be to convict twice of the lesser."" (*Ibid*, quoting *People v. Fields* (1996) 13 Cal.4th 289, 306.) Respondent does not generally challenge this rule—only its extension to multiple acts arising out of a single course of conduct.

In *People v. Greer* (1947) 30 Cal.2d 589, overruled on other grounds in *People v. Fields, supra*, 13 Cal.4th at page 289, this Court expressly recognized that a defendant could be convicted of both a greater and a lesser offense—there, contributing to the delinquency of a minor as a lesser offense of both statutory rape and lewd and lascivious conduct—"if separate acts served as the basis of each count." (*Id.* at p. 600.) As the Court reasoned, "[i]ndeed, defendant can be convicted more than once under the same statute, so long as he is prosecuted for separate acts. The doctrine of included offenses is applicable only when the same act is relied upon for more than one conviction." (*Ibid.*)

Given the sexual nature of the counts at issue, and because the divisibility of acts in such cases was not, at least at the time, susceptible of exact definition, the *Greer* Court went on to provide guidance to trial courts: "if the touching of the prosecutrix's body charged in the first information was essentially such touching as would be considered a part of the rape itself, it could not serve as a basis for a separate conviction. If, on the other hand, it was clearly not a part of the rape, but a *part of a separate course of conduct*, it could be held a separate offense." (*Ibid.*, italics added.)

It is not entirely clear when it occurred, but at some point the *Greer* holding that the prohibition on conviction of lesser offenses applies "only when the same act is relied upon for more than one conviction" expanded. In *People v. Nor Woods* (1951) 37 Cal.2d 584, the defendant took money and a car at the same time. This Court held that there was only a single

transaction and therefore only one theft—a correct result, since the defendant had not completed either theft offense by reaching a place of temporary safety. (*Id.* at pp. 586-587.)

In *People v. Milward, supra,* 52 Cal.4th at page 580, the Court described the rule as prohibiting "simultaneous convictions for both a greater offense and a lesser offense necessarily included within it, when based on the same conduct." (*Id.* at p. 589.) There, two life inmates attacked a third prisoner, inflicting slash and puncture wounds. The Court held that the conviction for aggravated assault had to be reversed because it was a lesser-included offense of aggravated assault by a life prisoner. (*Id.* at p. 583.) In reaching this conclusion, however, the Court did not examine whether the two crimes were based on the same acts, or whether instead they were based on a single *course of* conduct; instead, the Court said simply it was "based on the same conduct." (*Id.* at p. 589.)

A year later, this Court summarized the rule as applying when the lesser offense arises "out of the same act or course of conduct." (*Sanders, supra*, 55 Cal.4th at p. 736, citing *People v. Moran* (1970) 1 Cal.3d 755, 763, *Milward, supra*, 52 Cal.4th at p. 589, and *People v. Medina* (2007) 41 Cal.4th 685, 701-702.) None of the three cited decisions, however, supported a separate disjunctive for offenses arising out of the same course of conduct in addition to those offenses arising from the same act.

Respondent urges this Court to reconsider the extension of the prohibition regarding lesser-included offenses to offenses arising out of the same course of conduct. The restriction makes sense where the lesser offense is committed in the course of committing the greater offense. A person who raises his fist (a simple assault) and then proceeds to strike a victim (a battery) could not be convicted of both offenses. (See, e.g., *People v. Greer, supra*, 30 Cal.2d at p. 597 ["An assault is a necessary element of battery, and it is impossible to commit battery without assaulting

the victim"]; *People v. McDaniels* (1902) 137 Cal. 192, 194 ["there can be no battery without an assault"].) On the other hand, where the greater offense has been completed, there should be no bar to conviction of a subsequent lesser offense. Thus, in the example above, if the defendant strikes a victim, and thereafter raises his fist to threaten a separate assault, there should be no reason why the defendant could not be charged with both offenses.

This Court has applied the same completed act test in the context of multiple convictions involving the same offense. In *People v. Harrison, supra,* 48 Cal.3d 321, for instance, the Court held that the defendant could be convicted of multiple digital penetrations of a victim committed during the course of a continuous 10-minute assault on a victim. The Court concluded that the proper analysis involves a determination of when the charged crime is completed: "that a *new and separate* violation of section 289 is 'completed' each time a *new and separate* 'penetration, however slight' occurs." (*Id.* at p. 329.) Because the defendant had penetrated the victim three separate times, he completed three separate violations. (*Id.* at p. 334.)

Cases applying the *Harrison* completed-act rule have concluded, for example, that a defendant may be convicted of three violations of inflicting a corporal injury on a cohabitant (§ 273.5) arising out of the same course of conduct because the crime was complete upon the willful and direct application of physical force resulting in a wound or injury. (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1477.) Likewise, another court has held that a defendant could be separately punished for firing three shots at a police officer. (*People v. Trotter* (1992) 7 Cal.App.4th 363, 366-368.) And one court has specifically held that a defendant could be convicted of separate counts of assault with a deadly weapon and assault by means of force likely to produce great bodily injury based on separate acts arising out

of the same course of conduct. (*People v. Kopp* (2019) 38 Cal.App.5th 47, 61-63.)[4]

No different rule should apply to a lesser-included offense committed after the completion of a greater offense. Indeed, in concluding in *Greer* that the defendant could be convicted of a lesser offense if it constituted a separate act, this Court specifically relied on the fact that a defendant could be convicted more than once under the same statute so long as he is prosecuted for separate acts. (*Greer*, *supra*, 30 Cal.2d at p. 600.)

The question whether a person may be convicted of more than one offense is, of course, separate from the question whether the defendant may be punished for both. (§§ 654, 954; see, e.g., *People Harrison*, *supra*, 48 Cal.3d at p. 334.) Whether two crimes were committed as a part of a single continuous course of conduct is an appropriate consideration for determining punishment under section 654 (see *People v. Corpening* (2016) 2 Cal.5th 307, 311); it may also be appropriate for considering whether there may be more than one conviction where acts were in preparation or completion of a greater offense. But once the greater act has been completed, subsequent acts may properly form the basis for a separate conviction, even if part of an indivisible course of conduct. Just as a person who commits two completed violations of the same statute is more culpable than a person who commits only one (see *People v. Correa* (2012) 54 Cal.4th 331, 342), so too is a person who commits a greater offense and

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[4] On November 13, 2019, this Court granted review of the *Kopp* decision, but limited the issues to be briefed and argued to those relating to a court's duty to consider the defendant's ability to pay fines or fees. (*People v. Kopp*, case no. S257844.)

then a subsequent lesser offense more culpable than a person who stops after completing the greater offense.[5]

### B. Appellant's Admission to Striking Her Father Twice with the Chain Provided Ample Evidence to Support Two Separate Counts

In the present case, the multiple assaults occurred during a single course of conduct, as the trial court implicitly concluded in staying punishment for count 3. (5RT 695.) Appellant argues that the prosecutor made no election regarding the act that formed the basis for count 3 as distinct from count 2, that the trial court failed to instruct the jury to make findings necessary to show two separate assaults, and that it is therefore "impossible for this Court to determine that the jury's verdict on the (a)(4) assault was not based on the same evidence as the (a)(1) assault." (OBM 60.)

This Court should reject appellant's limitation that the necessary facts to support two separate counts must be revealed by the jury's verdicts. (See generally, *People v. Aledamat*, *supra*, 8 Cal.5th at p. 13 ["In determining this impossibility or, more generally, whether the error was harmless, the reviewing court is not limited to a review of the verdict itself"].) As shown below, given appellant's admissions while testifying, there were two separate acts under any possible standard of review.

The assault with a deadly weapon, which the jury found was committed with the bicycle chain (CT 142), was complete when appellant first struck her father with that chain. There was also substantial evidence that appellant went on to strike Luis multiple more times with the chain

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[5] Culpability aside, a rule prohibiting multiple convictions arising out of the same course of conduct could potentially result in an unanticipated windfall as where a jury hangs on a greater offense, but returns a verdict on a lesser charged offense resulting from a single course of conduct. (See *People v. Fields*, *supra*, 13 Cal.4th at p. 305; § 1023.)

(2RT 159–160), and hit him on the head with the chiminea (2RT 165–166, 206–208, 241, 245). While appellant disputed this latter evidence, even under her version of events, she admittedly went on to strike her father a second time with the chain. (3RT 464, 482.) That second, subsequent act constituted ample evidence of an assault by means of force likely to produce great bodily injury. (See *People v. Hahn* (1956) 147 Cal.App.2d 308, 310-312 [evidence of attack with a beer can sufficient to show assault by means of force likely to produce great bodily injury].)

Based on appellant's admissions of two separate strikes with the chain, the jury would have concluded that two separate aggravated assaults occurred. Appellant argued that she committed these acts in self-defense. (3RT 459.) The jury, however, rejected this defense when it found her guilty. In doing so, it had no basis to distinguish between the two acts she specifically admitted. As appellant acknowledged, at the time she struck him twice, her father had no weapon and had not yet struck her with anything. (3RT 485.) The second strike occurred soon after the first (3RT 464, 482), and the jury's rejection of appellant's claim of self-defense applied with equal measure to this second strike.

Given her testimony and admissions, it can be said under any possible standard that two separate acts supported the two separate counts. (See, e.g., *People v. Webb* (2018) 25 Cal.App.5th 901, 907 [relying on defendant's admissions to find him guilty of felony murder even without unanimity instruction]; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 188 [once jury rejected defendant's unitary defense, it would have found him guilty based on his admissions even without a unanimity instruction]; *People v. Curry* (2007) 158 Cal.App.4th 766, 783-784 ["'Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various

offenses shown by the evidence, the failure to give the unanimity instruction is harmless'"].)

Hence, even if section (a)(4) is a lesser offense of (a)(1), appellant was properly convicted of both based on her separate acts.

## CONCLUSION

Accordingly, for the reasons stated above, respondent respectfully requests this Court affirm the judgment.

Dated: March 10, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
MEREDITH S. WHITE
Deputy Attorney General

STEVE OETTING
Supervising Deputy Attorney General
*Attorneys for Plaintiff and Respondent*

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## CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 13,927 words.

Dated: March 10, 2020

XAVIER BECERRA
Attorney General of California

STEVE OETTING
Supervising Deputy Attorney General
*Attorneys for Plaintiff and Respondent*

**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL**

Case Name: **People v. Veronica Aguayo**
No.: **S254554**

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. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On March 11, 2020, I electronically served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on March 11, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

**Via TrueFiling**
Linnéa M. Johnson
Attorney for Defendant and Appellant

**Via TrueFiling**
Eservice, ADI
eservice-court@adi-sandiego.com

**Via TrueFiling**
District Attorney, *San Diego*
da.appellate@sdcda.org

**Via TrueFiling**
Superior Court, *San Diego*
Appeals.Central@SDCourt.ca.gov

**Via U.S. Mail**
Court of Appeal
4th District Division 1
750 B Street, Suite 300
San Diego, 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 March 11, 2020, at San Diego, California.

E. Blanco-Wilkins
Declarant

Signature

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