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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. ALFREDO PEREZ, JR., Defendant and Respondent.	S238354

Court of Appeal, Fifth Appellate District, No. F069020
Fresno County Superior Court No. CF94509578

Hon. Jonathan Conklin, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. ALFREDO PEREZ, JR., Defendant and Respondent.	S238354 F069020 Fresno County Superior Court No. CF94509578

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ARGUMENT

I.

THE COURT OF APPEAL ERRED IN FINDING THAT COMMISSION OF AGGRAVATED ASSAULT INVOLVING A VEHICLE NECESSARILY INCLUDES USE OF A DEADLY WEAPON

The People argue that the jury necessarily found that Respondent personally and willfully used a vehicle in a manner likely to result in great bodily injury, and that any reasonable person would have known that such use would result in great bodily injury. (Appellant's Answer Brief on the Merits[1], p. 13.) The People further argue that no "specific intent" is required for the findings at issue in this case. (AABM, p. 14.)

[1]Hereinafter, AABM.

The People misstate what the jury was asked to determine in this case, and thus what the jury necessarily found. Moreover, the People are simply incorrect as to the law of assault with a non-inherently dangerous weapon. The facts and instructions in this case permitted the jury to find Respondent guilty of assault by means of force likely to result in great bodily injury even absent proof that he was subjectively aware of the facts that made great bodily injury a natural and probable result of his intentional actions. (See *People v. Williams* (2001) 26 Cal.4th 779, 790; see also *People v. Wright* (2002) 100 Cal.App.4th 703, 706.) Moreover, where the alleged weapon is one that is not inherently deadly or dangerous, courts look to the manner in which the weapon was used in order to determine whether the defendant intended to employ it as a deadly weapon. (See, e.g., *In re B.M.* (2017) 10 Cal.App.5th 1292, 1299.)

The jury verdict did not encompass the issue of whether Respondent was armed with a deadly or dangerous weapon in the commission of the offense, and thus the Court of Appeal erred in finding that he had been so armed as a matter of law.

A. The Jury Instructions Permitted the Jury to Convict Respondent of Assault Based upon a Theory of Recklessness or Even Simple Negligence, and Permitted a Conviction Based on Facts That Respondent Did Not Know but Should Have Known.

The jury in this case was instructed with the 1994 version of CALJIC 9.00. (See *People v. Perez* (2016) 3 Cal.App.5th 812, 819.) This instruction, the same instruction considered by this court in

People v. Williams, supra, 26 Cal.4th 779, stated in pertinent part that an assault required proof that:

1. A person willfully committed an act that by its nature would probably and directly result in the application of physical force on another person; and
2. At the time the act was committed, such person had the present ability to apply physical force to the person of another.

(CALJIC 9.00 (1994 rev.); *People v. Perez, supra,* 3 Cal.App.5th at 819.) An analysis of this instruction in its historical context may be useful in assessing what was encompassed by the jury verdict in this case.

Historically, this court has held that assault with a deadly weapon, like simple assault, is a general intent crime, and that the necessary intent is "intent to commit a battery." (*People v. Rocha* (1971) 3 Cal.3d 893, 899.) In *Rocha*, the court held that the necessary criminal intent required for assault with a deadly weapon "is the general intent to wilfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another." (*Ibid.*) No intent to cause an injury is required. (*Ibid.*)

In *People v. Colantuono* (1994) 7 Cal.4th 206, this court reexamined the mental state necessary for assault with a deadly weapon in a case involving the discharge of a firearm, which the defendant had believed was unloaded. (*Id.* at 211.) The jury was instructed that "the requisite intent for the commission of an assault with a deadly weapon is the intent to commit a battery."

(*Id.* at pp. 211.) This instruction specified that reckless conduct alone would not suffice, but that when "an act inherently dangerous to others is committed with a conscious disregard of human life and safety, the act transcends recklessness, and the intent to commit a battery is presumed." (*Id.* at pp. 211-212.)

The defendant claimed that the instruction removed the element of intent from the jury's consideration. (*People v. Colantuono, supra*, 7 Cal.4th at 212.) In upholding the conviction, this court held that the disputed instruction merely allowed the jury to presume that the defendant intended the natural and probable consequences of his actions. (*Id.* at 219.)

This court revisited the issue in *People v. Williams, supra*, 26 Cal.4th 779, a case in which the court reviewed the same jury instruction given in the instant case, the 1994 revision to CALJIC 9.00. Under this instruction, a jury could convict a defendant of assault if it found that he "willfully and deliberately committed an act that by its nature would probably and directly result in the application of physical force being applied to the person of another." (*People v. Williams, supra*, 26 Cal.4th at 783; see also CALJIC 9.00 (1994 rev.).) The lower court in *Williams,* observing that this instruction would permit a conviction for assault in cases in which the defendant's conduct amounted to mere negligence, had ruled that the crime of assault required either a *desire* to cause the application of physical force, or *substantial certainty* that such application would result from the defendant's actions. (*Id.* at 784.)

This court rejected the lower court holding and held that a conviction for assault requires neither specific intent to cause injury nor subjective awareness of the risk that injury might occur. (*People v. Williams, supra*, 26 Cal.4th at 782.) The crime of assault requires only an intentional act and actual knowledge of facts sufficient to establish that that act, by its nature, would probably and directly result in the application of physical force against another. (*Ibid.*)

Referencing the original 1872 definition of "attempt," this court held that "a defendant is only guilty of assault if he intends to commit an act 'which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences.'" (*People v. Williams, supra,* 26 Cal.4th at 787 [citation omitted].) The court observed that "a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery." (*Id.* at pp. 787-788, citation omitted.) In other words, to be guilty of assault, a defendant must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his actions. "He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*Id.* at 788.)

The *Williams* court found the instruction given in that case – which, again, was identical to the instruction given in the

instant case – to be deficient and "potentially ambiguous." (*People v. Williams, supra,* 26 Cal.4th at 790.) "[U]nder the instruction given, a jury could conceivably convict a defendant for assault even if he did not actually know the facts sufficient to establish that his act by its nature would probably and directly result in a battery." (*Ibid.*) The court opined that "any instructional error is largely technical and is unlikely to affect the outcome of most assault cases, because a defendant's knowledge of the relevant factual circumstances is rarely in dispute." (*Ibid.*)

This court found the error harmless under the facts at issue in *Williams,* in which the defendant had loaded a shotgun and knowingly fired it in the direction of several people. (*People v. Williams, supra,* 26 Cal.4th at 790.) The defendant in *Williams* had admitted firing a warning shot from a shotgun at a truck even though he knew the victim was in the near vicinity. The shot hit the rear tire of the truck, but not the victim. This court affirmed the conviction of assault with a deadly weapon, saying: "In light of these admissions, defendant undoubtedly knew those facts establishing that his act by its nature would directly, naturally and probably result in a battery." (*Id.* at 790.)

Because the jury in this case was given the same instruction criticized by this court in *Williams* but found harmless on the facts of that case, several possibilities emerge for the instant case. The jury here could have believed that, in driving away while the store clerk had his arm trapped in the car by the passenger, Respondent intended to apply force sufficient to result in great bodily injury.

Alternatively, the jury could have believed that Respondent was aware of facts that meant that his conduct in driving the vehicle would naturally and probably result in force likely to result in great bodily injury, even if he lacked the intention to inflict such injury. Or the jury could have believed that Respondent was *not* aware of those facts, but convicted him regardless, because the instruction as given did not include a knowledge requirement. The jury, as instructed, was not asked to clarify these matters.

The *Williams* decision was criticized by the Third Appellate District in *People v. Wright*, *supra*, 100 Cal.App.4th 703, a case involving the same 1994 instruction at issue in this case. (*People v. Wright, supra,* 100 Cal.App.4th at 705.) In *Wright,* the defendant had argued that his act of driving his truck close to two people in an attempt to frighten them amounted only to reckless driving, not assault with a deadly weapon. (*Id.* at 705.) Prior to *Williams,* the Court of Appeal had held that the 1994 version of CALJIC 9.00 improperly encompassed a negligence standard. (*People v. Wright, supra*, 100 Cal.App.4th at 705.) On remand following the *Williams* decision, the court applied the *Williams* holding and upheld the conviction. (*Id.* at 724.)

The Third District observed that the court in *Williams* had rejected the view that assault requires an intent to commit a battery, and had instead adopted an objective test under which the defendant "need not be subjectively aware of the risk that a battery might occur." (*People v. Wright, supra*, 100 Cal.App.4th at 706, citing *People v. Williams, supra,* 26 Cal.4th at 788, fn.

omitted.) The court noted that, in spite of this court's insistence that simple negligence or recklessness would not suffice for an assault conviction, under *Williams* the mental state for assault is "a species of negligent conduct, a negligent assault." (*People v. Wright, supra,* 100 Cal.App.4th at 706.) The court warned: "Where the negligent conduct involves the use of a deadly weapon, here a vehicle, the offense is assault with a deadly weapon. Thus, any operation of a vehicle by a person knowing facts that would lead a reasonable person to realize a battery will probably and directly result may be charged as an assault with a deadly weapon." (*Ibid.*)

The context of the above quote makes it clear that this is a *warning* regarding the potential consequences of the standard adopted in *Williams.* (*People v. Wright, supra*, 100 Cal.App.4th at pp. 706.) Moreover, the *Wright* court is speaking prospectively here, warning of the consequences of the standard articulated in *Williams*. The conviction in the instant case, of course, was entered prior to this court's opinion in *Williams,* and resulted from the same jury instruction disapproved in *Williams*. In other words, the instant case permitted a conviction even if Respondent lacked actual knowledge of facts that would lead a reasonable person to believe that a battery would result from his actions.

The court in *Wright* considered the impact of the faulty 1994 instruction as it applied to the defendant in that case, noting that the instruction permitted the jury to convict defendant of assault if it determined, under an objective view of the facts, that an application of physical force on another person was reasonably

foreseeable, even if the defendant lacked actual knowledge of the fact his conduct would probably and directly result in the application of physical force to the victims. (*People v. Wright*, *supra*, 100 Cal.App.4th at pp. 724-725.) The court found the error in omitting the actual knowledge requirement harmless, however, because the defendant had admitted that his intent was to scare the victims by driving close to them, and had further admitted that this conduct could be viewed as reckless driving. (*Id.* at 725.) "Since the recklessness required for reckless driving is a higher standard than negligence, it subsumes negligence." (*Ibid.*) The court also found substantial evidence to support the required jury finding that the defendant's conduct would probably and directly result in the application of physical force upon the victims. (*Ibid.*)

The Third District recently revisited its earlier criticism of *Williams* in a case procedurally similar to the instant case, *People v. Oehmigen* (2014) 232 Cal.App.4th 1. *Oehmigen*, like the case at bar, concerned a petition for recall of sentence under Penal Code section 1170.126, and also like the case at bar, involved a conviction under Penal Code section 245, subdivision (a)(1), under a theory of assault by means of force likely to produce great bodily injury. Further, in that case the alleged deadly weapon cited as an exclusionary factor for purposes of the Reform Act was also an automobile. (*People v. Oehmigen, supra*, 232 Cal.App.4th at 4.)

The factual basis in *Oehmigen* revealed that the petitioner had stolen a car, driven it in a reckless manner for several miles with police in pursuit, and at the end of the pursuit had turned

the car around and driven it one of the police cars, which had to make evasive maneuvers to avoid a collision. (*People v. Oehmigen, supra,* 232 Cal.App.4th at 5.) The Court of Appeal emphasized that neither defense counsel nor the petitioner had objected to the factual basis at the time that it was recited, and that in stating that factual basis, the prosecutor had described the personal use of a car – which can, under the law, be used in a dangerous or deadly fashion – to commit an assault. (*Id.* at 10.) The defense made no indication that the petitioner's actions had been "inadvertent." (*Ibid.*)

Notably, the Court of Appeal cited its prior holding in *Wright* in which it criticized the *Williams* opinion for making negligence the minimum standard for assault. (*People v. Oehmigen, supra,* 232 Cal.App.4th at 10, citing *People v. Wright, supra*, 100 Cal.App.4th at 706, and *People v. Williams, supra,* 26 Cal.4th 779.) The court rejected the petitioner's argument that "the facts recited do not establish an intent to inflict great bodily injury as opposed to reckless indifference to that outcome," noting that the record conclusively established that the petitioner in that case was "irrefutably armed with a car and us[ed] it purposefully in a dangerous fashion (with whatever intent defendant may have had)." (*People v. Oehmigen, supra,* 232 Cal.App.4th at 10.)

Division Six of the Second Appellate District addressed a post-*Williams* instruction in *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, a street-racing case in which the defendant was convicted of assault with a deadly weapon after driving through

an intersection at high speed and colliding with another car. (*People v. Aznavoleh, supra*, 210 Cal.App.4th at pp. 1183-1184.) The evidence in *Aznavoleh* showed that the defendant had deliberately run a red light while racing another vehicle on a busy city street. His passengers repeatedly told him to slow down, and one of them screamed at him that the light was red. The defendant acknowledged that he saw another car turning left as he was approaching the intersection, but he made no effort to stop, slow down, or otherwise avoid a collision. (*Id.* at 1189.)

The trial court, believing that the version of CALJIC 9.00 given in that case was the same version criticized by this court in *Williams,* attempted to correct it with a supplemental instruction to the jury that "the People have to prove the defendant intended to drive through the red light knowing his action would result in injury to another." (*Ibid.*) In fact, the version of CALJIC 9.00 given in that case was the instruction as amended after the *Williams* decision. (*Ibid.*) The appellate court concluded that the evidence supported a jury finding that an objectively reasonable person with knowledge of the facts would have appreciated that an injurious collision, i.e., a battery, would directly and probably have resulted from his actions. *People v. Aznavoleh, supra*, 210 Cal.App.4th at 1189.)

Unlike the jury in *Aznavoleh*, however, the jury here was instructed with the faulty instruction from *Williams* that permitted a conviction even in the absence of knowledge of the facts that made a battery a natural and probable result of his

actions. Reviewing the instruction from this case in context, it is clear based on both the facts of the case and the flawed instruction provided to the jury that the original trier of fact here did not necessarily find that Respondent used the car with actual knowledge of facts that would lead a reasonable person to believe that great bodily injury would naturally and probably result from his actions.

B. California Case Law Has Historically Considered a Defendant's Intent in Determining Whether a Non-inherently Dangerous Item Is Being Used as a Weapon.

The People argue that Respondent "conflates the element in assault of a willful or intentional act with the 'manner of use' inquiry in determining the character of an object. In so doing, Perez concludes that the eligibility inquiry requires a specific intent to use or actual use of the instrument as a deadly or dangerous weapon." (AABM, p. 21.) In fact, a defendant's intent in using a non-inherently deadly weapon has been a part of the inquiry for as long as the courts of this state have distinguished between inherently and non-inherently dangerous weapons.

That distinction appears to have been drawn for the first time in *People v. Raleigh* (1932) 128 Cal.App. 105, a case involving a since-amended first degree robbery statute that required that a defendant be "armed with a dangerous or deadly weapon" in the commission of the offense. (Pen. Code, § 211a (rep. 1986).) The court in *Raleigh* delineated between "those instrumentalities which are weapons in the strict sense of the word, and, second,

those instrumentalities which are not weapons in the strict sense of the word, but which may be used as such." (*People v. Raleigh, supra*, 128 Cal.App. at 108.) The former, including guns, dirks, and blackjacks, "may be said as a matter of law to be 'dangerous or deadly weapons,'" because "the ordinary use for which they are designed establishes their character as such." (*Ibid.*)

As to the second class of item, the court explained that when an instrument that is not inherently deadly or dangerous is capable of being used in a dangerous or deadly' manner, and it may be inferred from the evidence that its possessor *intended* on a particular occasion to use it as a weapon should the circumstances require, "its character as a 'dangerous or deadly weapon' may be thus established." (*People v. Raleigh, supra*, 128 Cal.App. at pp. 108-109.) Thus, from the very beginning, the perpetrator's intent to employ a non-inherently dangerous item as a weapon was included in the inquiry.

Although the People argue that the intent required under *Raleigh* is replaced by the element of "present ability" in the case of assault (AABM, p. 23), this court explicitly applied the *Raleigh* standard to the crime of assault with a deadly weapon in *People v. McCoy* (1944) 25 Cal.2d 177. There, the defendant used a knife to threaten the victim, but did not actually strike or injure her with the knife. This court noted that the trial court had properly rejected the defendant's requested instruction requiring a finding that he actually struck or attempted to strike the victim with the knife. (*People v. McCoy, supra*, 25 Cal.2d at 189.) In discussing the

deadly or dangerous character of the knife, this court quoted *Raleigh* at length, and concluded:

> Whether 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.

(*People v. McCoy, supra,* 25 Cal.2d at 190, citations omitted, emphasis in original.)

In *People v. Graham* (1969) 71 Cal.2d 303 (disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 32), again addressing arming for purposes of the old first degree robbery statute, this court clarified the standard set out in *Raleigh.* As noted, Penal Code section 211a at that time required that a defendant be armed with a dangerous or deadly weapon. The weapon at issue in *Graham* was a shod foot. (*People v. Graham, supra*, 71 Cal.2d at 327.) Because a shod foot is not an inherently dangerous or deadly weapon, this court held that although "the shod foot may be used in such a manner and *with such intent* as to constitute a dangerous or a deadly weapon, the jury must so find." (*Ibid.*, emphasis added.) This court noted that when the alleged weapon is not one that is designed to be used as a weapon, "the issue then turns on whether the instrumentality was one which, under the control of the perpetrator of the robbery, could be used in a dangerous or deadly manner and *whether the perpetrator intended to use it as a weapon.*" (*Id.* at 329, emphasis added.)

This court emphasized that the crux of the matter was the perpetrator's intent. "Although the manner of the use of an object does not automatically determine whether a defendant was 'armed with a dangerous or deadly weapon,' the method of use may be evidence of the intent of its possessor." (*People v. Graham, supra*, 71 Cal.2d at 327.)

At some point during the development of the case law regarding deadly weapons, courts began to define non-inherently deadly weapons by the *manner in which they were used* rather than by the defendant's *intent* in employing those objects. In *In re Jose R.* (1982) 137 Cal.App.3d 269, for instance, the court observed that a deadly weapon for purposes of Penal Code section 245, subdivision (a), is "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." (*In re Jose R., supra,* 137 Cal.App.3d at pp. 275-276.) When the object in question is not inherently deadly or dangerous, "the trier of fact may look to the nature of the weapon, the manner of its use, and all other factors that are relevant to this issued." (*Id.* at 276.)

Notably, though, *In re Jose R.* was decided prior to this court's decisions in *People v. Williams* and *People v. Colantuono.* In fact, the court in *Jose R.* observed that the intent required for assault with a deadly weapon was "an attempt to commit a violent injury upon the person of another." (*In re Jose R., supra,* 137 Cal.App.3d at 275.) More plainly stated, "The requisite intent for the commission of an assault with a deadly weapon is the intent to

commit a battery." (*Ibid.*) This court later clarified, of course, that such intent was not necessary. (See *People v. Williams, supra*, 26 Cal.4th at pp. 787-788; *People v. Colantuono, supra,* 7 Cal.4th at 219.)

Thus, *In re Jose R.* was decided at a time when a defendant's intention to employ an item as a deadly or dangerous weapon would not have been in question, because a conviction for assault required an intent to commit a battery. In other words, the scenario in the instant case – a negligent or reckless assault – would not have led to a conviction for assault with a deadly weapon.

The gravamen of the People's argument is that because the jury found that Respondent committed an assault by means of force likely to result in great bodily injury, it necessarily found that he employed the automobile as a deadly weapon. (AABM, p. 28.) And it is true that courts have conflated these concepts in the past. For instance, this court held in *People v. Aguilar* (1997) 16 Cal.4th 1023 that hands and feet were not "deadly weapons" for purposes of former Penal Code section 245, subdivision (a)(1), because "deadly weapons" include only items extrinsic to the body. (*Id.* at 1034.) This court held, however, that under the facts of that case, the error was harmless, because except in cases involving inherently dangerous weapons, the jury's decision-making process under Penal Code section 245, subdivision (a)(1), is functionally identical regardless of whether the defendant employed a weapon alleged to be deadly, or employed force likely to produce great

bodily injury. (*Id.* at 1035.) In either case, the matter turns on the force used. (*Ibid.*)

More recent decisions, however, have made it clear that the defendant's intent is still relevant to the question of whether a non-inherently deadly or dangerous weapon is employed as a deadly weapon for purposes of assault with a deadly weapon. In *People v. Page* (2004) 123 Cal.App.4th 1466, the Court of Appeal considered the sufficiency of the evidence to sustain a conviction for assault with a deadly weapon where the weapon in question was a sharpened pencil held to the victim's neck. (*People v. Page, supra,* 123 Cal.App.4th at 1468.) The court began by quoting *Aguilar* and *Jose R.* to the effect that the crucial question in determining the deadly character of the pencil was the manner in which it was used. (*People v. Page, supra,* 123 Cal.App.4th at 1470, citing *People v. Aguilar, supra,* 16 Cal.4th at pp. 1028-1029; *In re Jose R., supra,* 137 Cal.App.3d at pp. 275-276.) The court went on, though, to cite the language from *People v. Graham* focusing the inquiry on the *intent* to use the item as a deadly weapon. (*People v. Page, supra,* 123 Cal.App.4th at 1471, citing *People v. Graham, supra,* 71 Cal.2d at 328.)

The court in *Page* distinguished between the mental state necessary for the crime of assault and the mental state necessary to transform a non-inherently deadly object into a deadly weapon. (*People v. Page, supra,* 123 Cal.App.4th at pp. 1472-1473.) Under the facts of that case, the court found that the pencil was a deadly weapon as a matter of law, because it was used as a deadly

weapon by the codefendant who wielded it: "[S]he was threatening to stab him with it. She viewed it, at that moment, as an instrument of great bodily injury or death." (*People v. Page, supra,* 123 Cal.App.4th at 1473.)

Courts have focused on the intent element for non-inherently deadly weapons in other contexts, as well. This court observed, in construing former Penal Code section 12020, which criminalized the possession of deadly or dangerous weapons, that an item commonly used for a nonviolent purpose, such as a baseball bat or a table leg, could qualify as a dangerous or deadly weapon only when the attendant circumstances, including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicate that the possessor would use the object for a dangerous rather than harmless purpose. (*People v. King* (2006) 38 Cal.4th 617, 624.)

In *In re Kevin F.* (2015) 239 Cal.App.4th 351 (overruled on other grounds by *People v. Hall* (2017) 2 Cal.5th 494, 504), the court modified a probation condition prohibiting possession of a deadly or dangerous weapon to include an intent requirement. The court held that the condition was not unconstitutionally vague, because it invoked the long-established *Raleigh* dichotomy for inherently versus non-inherently deadly or dangerous weapons. (*In re Kevin F., supra,* 239 Cal.App.4th at 359.)

The court modified the condition, however, because "as worded, the condition is broad enough to include any object that could injure someone, even an ordinary household object,

regardless of Minor's intent in possessing it." (*In re Kevin F., supra,* 239 Cal.App.4th at 360.) The court found that intent is "essential to *Raleigh*'s second category – that of de facto weapons." (*Id.* at 361.) "[W]hat is and what is not a de facto weapon turns in part on intent to use the item for a dangerous or deadly purpose." (*Ibid.*)

The court in *In re R.P.* (2009) 176 Cal.App.4th 562 also considered a vagueness challenge to a similar condition, and held that "dangerous or deadly weapon" had a clearly established and sufficiently precise definition to allow the minor to comply with the condition. (*In re R.P., supra,* 176 Cal.App.4th at 568.) In so holding, the court noted that the legal definition of possession of "dangerous or deadly weapon" included the user's unlawful intent in possessing the object. (*Ibid.*)

The *R.P.* court looked to a variety of sources in assessing whether "dangerous or deadly weapon" had a clear and commonsense meaning, including statutory and case law, particularly the *Aguilar* and *Page* decisions. (*In re R.P., supra,* 176 Cal.App.4th at 568.) The court also consulted relevant jury instructions. (*In re R.P.,* supra, 176 Cal.App.4th at 568, citing CALJIC No. 17.16 [dangerous or deadly weapon means any instrument capable of being used to inflict great bodily injury or death, where it can be inferred from the evidence that the possessor intended to use it as a weapon should circumstances so require].)

The Court of Appeal below relied on *In re D.T.* (2015) 237 Cal.App.4th 693, a case involving an adjudication for assault with a deadly weapon. The court there held that the People did not need to prove that the minor intended to use a knife as a deadly weapon because the necessary intent for assault was intent to commit a battery. (*In re D.T., supra*, 237 Cal.App.4th at pp. 701-702.) However, the crux of the matter in that case was the object's *deadliness*. In other words, there was no credible claim in *D.T.* that the minor had not intended to use the knife as an instrument, where the evidence showed that he had intentionally used it to poke the victim. (*Id.* at pp. 696-697.) Rather, the court considered whether the minor intended to use the knife as a *deadly* weapon. The court invoked the *Colantuono* standard, in which this court held that the intent required for an assault with a deadly weapon is the intent to commit a battery. (*Id.* at 702, citing *People v. Colantuono, supra*, 7 Cal.4th at 214.) In other words, the minor did not need to employ the knife with the intention of inflicting serious bodily injury or death; an intent to employ it to commit a battery was sufficient. (*In re D.T., supra,* 237 Cal.App.4th at 702.) Notably, the minor in that case did not claim that the battery was unintentional.

Similarly, the court in *People v. Russell* (2005) 129 Cal.App.4th 776, focused on the defendant's intention to employ a weapon as distinct from his intention to commit an assault. In that case, the defendant had deliberately pushed the victim into the path of an oncoming car, and was convicted of a violation of

former Penal Code section 245, subdivision (a)(1). The jury instructions had included both assault with a deadly weapon and assault by means of force likely to produce great bodily injury, and the jury had not indicated which theory formed the basis for the conviction. (*People v. Russell, supra,* 129 Cal.App.4th at pp. 780-781.) The appellate court found substantial evidence to support a conviction under either a theory. (*Id.* at 781.) The court rejected the defendant's claim that there was not sufficient evidence to establish assault with a deadly weapon because he did not "use" the car as an instrument. (*Id.* at 786.) So long as the defendant intentionally pushed the victim into the oncoming car, the evidence was sufficient to establish that he had "used" the car as a weapon. (*Ibid.*)

The court in *Russell* focused on the defendant's intention to push the victim *in front of the car* rather than simply his intention to push the victim. (*Id.* at pp. 786-787.) The requisite intent was not simply defendant's intentional pushing of the victim, although certainly that would have constituted an assault. The court found the evidence sufficient to support a finding that the defendant had *used the car as a deadly weapon* "if he intentionally pushed the victim into the oncoming car." (*Id.* at 786.)

Most recently, another court held that an assault with a deadly weapon is complete when a minor, with the requisite intent, uses an object in a manner which is capable of producing great bodily injury upon the victim. (*In re B.M., supra*, 10 Cal.App.5th at 1295.) There, the minor attacked her sister's face

with a butter knife, while her sister escaped injury by fending the minor off and protecting her face with a blanket. (*In re B.M., supra,* 10 Cal.App.5th at pp. 1295-1296.) Citing *Aguilar*, the court found sufficient evidence to support the finding that the minor had committed assault with a deadly weapon where the minor had used the butter knife in such a manner as to be capable of producing and likely to produce death or great bodily injury. (*In re B.M., supra,* 10 Cal.App.5th at pp. 1298-1299, citing *People v. Aguilar, supra,* 16 Cal.4th at pp. 1028-1029.) The court also cited language from *Raleigh, Graham,* and *McCoy* to the effect that an object's character as a deadly or dangerous weapon is established when it is capable of being used in a deadly or dangerous manner, and it appears from the evidence that the perpetrator *intended* to so use it. (*In re B.M., supra,* 10 Cal.App.5th at 1299, citing *People v. Graham, supra,* 71 Cal.2d at 328; *People v. McCoy, supra*, 25 Cal.2d 177; *People v. Raleigh, supra*, 128 Cal.App. at pp. 108-109.)

Thus, while the laws of this state permit a conviction for assault with a deadly weapon upon a theory of recklessness or even simple negligence, no authority appears to permit such a conviction where the weapon in question is one that is not inherently deadly or dangerous, and the facts and circumstances do not demonstrate that the defendant intended to use that object as a weapon. While the defendant in such a case may be convicted of assault by means of force likely to produce great bodily injury, he may not be said to have used a deadly weapon unless the

manner in which he used the object demonstrated his intent to use it as a weapon.

C. Distinctions between Assault with a Deadly Weapon and Assault By Means of Force Likely to Produce Great Bodily Injury Have Assumed Greater Importance Under the Three Strikes Law and the Reform Act.

As noted above, this court observed in *People v. Aguilar*, *supra*, 16 Cal.4th 1023, that except in cases involving inherently dangerous weapons, the jury's decision-making process under Penal Code section 245, subdivision (a)(1), is functionally identical regardless of whether the defendant employed a weapon alleged to be deadly, or employed force likely to produce great bodily injury. (*Id.* at 1035.) In either case, the court held, the matter turns on the force used. (*Ibid.*)

The problem with the *Aguilar* framework in the present context is that, while the court in *Aguilar* took the view that it was relatively unimportant for a court to distinguish between an assault with a deadly weapon and an assault by means of force likely to produce great bodily injury, this distinction becomes vitally important in the context of the Three Strikes Law and the Reform Act. A conviction under the former theory is a serious felony within the meaning of the Three Strikes Law; a conviction under the latter is not. (Pen. Code, § 1197.2, subd. (c)(31); *People v. Fox* (2014) 224 Cal.App.4th 424, 434, fn. 8; *People v. Haykel* (2002) 96 Cal.App.4th 146, 148–149; *People v. Winters* (2001) 93 Cal.App.4th 273, 280; *Williams v. Superior Court, supra*, 92

Cal.App.4th at pp. 622–624.) Similarly, a conviction for assault with a deadly weapon is an excludable offense under the Three Strikes Reform Act, and a conviction for assault by means of force likely, standing alone, is not. (Pen. Code, § 667, subd. (e)(2)(iii); Pen. Code § 1170.12, subd. (c)(2)(C)(iii); *People v. Feyrer* (2010) 48 Cal.4th 426, 442, fn. 8; *People v. Nguyen* (2009) 46 Cal.4th 1007, 1029, fn. 1.)

Courts have recognized that an assault in which the defendant intentionally arms himself with a weapon is more serious than an assault committed via other means. As the court in *In re B.M.* observed, "Why does a person who assaults another person pick up an object to do so? The answer is apparent: to do greater harm than can be done with fists or feet. The victim of an assault with an object apprehends a greater degree of danger than a victim who is not assaulted with an object. The use of an object in an assault increases the likelihood of great bodily injury." (*In re B.M., supra,* 10 Cal.App.5th at 1299.)

The Legislature's recent amendments to section 245 emphasize the distinction between assault with a deadly weapon and assault by means of force likely to produce great bodily injury. (Pen. Code, § 245 (Stats. 2011, ch. 183, § 1).) According to the bill's author, the purpose of this amendment was to make it easier to determine whether a defendant's past aggravated assault conviction involved the use of a weapon when examining a defendant's criminal history. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1026 (2011–2012 Reg. Sess.) Apr. 26,

2011, pp. 1–2.) Previously, criminal history citations to section 245, subdivision (a)(1), were often ambiguous in this respect prior to the amendment. (See Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1026 (2011–2012 Reg. Sess.) Apr. 26, 2011, p. 2.)

The First Appellate District has held that the newly amended section 245, subdivisions (a)(1) and (a)(4), now describe distinct crimes, with subdivision (a)(4) being a lesser included offense of the former. (*In re Jonathan R.* (2016) 3 Cal.App.5th 963, 972.) The court noted that the two provisions are overlapping, rather than mutually exclusive, because while an assault under subdivision (a)(1) can be carried out only by means of a deadly weapon, an assault under subdivision (a)(4) can be carried out either by means of a deadly weapon *or* by other means. (*In re Jonathan R., supra,* 3 Cal.App.5th at 974.)

Thus, the conflation of the two crimes in *Aguilar* no longer makes sense. One of these offenses will subject a defendant to life in prison; the other, standing alone, will not. The force employed is no longer the prime consideration. (See *People v. Aguilar, supra,* 16 Cal.4th at 1035.) Assault by means of force likely to produce great bodily injury requires, as the court in *Aguilar* observed, the same force as an assault with a deadly weapon. (*Ibid.*) What distinguishes these offenses, and makes the latter worthy of a life sentence while the former remains a simple wobbler, is the defendant intentionally choosing to arm himself with a weapon. (See *In re B.M., supra,* 10 Cal.App.5th at 1299.) When he arms himself with a weapon that is inherently deadly or dangerous, it is

a serious felony or an excludable offense as a matter of law. When the object is not inherently deadly or dangerous, the People must prove that the defendant intended to use it as a deadly weapon. (Cf. *People v. Graham, supra*, 71 Cal.2d at pp. 327-329; *People v. Raleigh, supra*, 128 Cal.App. at pp. 108-109.)

Thus the Court of Appeal erred in finding that, as a matter of law, a person who uses a vehicle in the commission of an aggravated assault has necessarily used a deadly weapon.

II.

THE COURT OF APPEAL INCORRECTLY APPLIED THE STANDARD OF REVIEW AND FAILED TO ACCORD PROPER DEFERENCE TO THE FINDINGS OF THE TRIAL COURT

Respondent asked this court to reverse the Court of Appeal holding because the Court of Appeal failed to accord proper deference to the factual findings of the trial court. (ROBM, pp. 29 et seq.) The People counter by urging this court to adopt a de novo standard for eligibility determinations under the Reform Act. (AABM, pp. 37 et seq.) The People's argument is without merit.

A. The Reviewing Court Defers to Factual Findings So Long as They Are Supported By Substantial Evidence

Respondent does not disagree that the legal question in Part I of this brief is reviewed de novo by the reviewing court. (See *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332; *Southern California Edison Co. v. State Board of Equalization* (1972) 7 Cal.3d 652, 659, fn. 8; see *People v. Cromer* (2001) 24 Cal.4th 889, 894.) Where an issue concerns the interpretation of a statute and its applicability to a given situation, this is a question of law that the reviewing court considers independently. (*Goodman v. Lozano, supra,* 47 Cal.4th at 1332.)

The People argue that this same de novo standard should apply to the trial court's factual conclusions as well as to its legal conclusions. (AABM, p. 40.) The People's suggestion would upend decades of precedent and impose a large burden on the Courts of

Appeal, and the People have not suggested what the benefit would be to the criminal justice system as a whole.

Under California law, where the mere fact that a prior conviction occurred under a specified statute does not prove the serious felony allegation, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue. (*People v. Guerrero* (1988) 44 Cal.3d 343, 355.) This standard has also been adopted for courts making a preliminary eligibility determination under the Reform Act. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063.) "By referring to those facts attendant to commission of the actual offense, the express statutory language requires the trial court to make a factual determination that is not limited by a review of the particular statutory offenses and enhancements of which petitioner was convicted." (*People v. Arevalo* (2016) 244 Cal.App.4th 836, 848, citing *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.)

The *Guerrero* line of cases permits the court, in determining the nature of a prior conviction, to look to the entire record of the conviction, including an appellate opinion, to determine whether the prior conviction qualifies as a serious felony under the three strikes law. (*People v. Woodell* (1998) 17 Cal.4th 448, 450-451.) Courts interpreting the fact-finding required under the first prong of the Reform Act have likewise turned to appellate opinions as part of the relevant record of conviction. (See, e.g., *People v. Bradford, supra,* 227 Cal.App.4th at 1339.)

Under the *Guerrero* framework as applied to the context of the Reform Act, the trial court sits as trier of fact. (See, e.g., *People v. Hicks, supra*, 231 Cal.App.4th at 286; *People v. Bradford, supra*, 227 Cal.App.4th at pp. 1331-1334; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040.) This fact-finding is done by trial courts as a matter of routine: "California courts have routinely determined that prior convictions constitute serious or violent felonies by looking to 'the substance of a prior conviction, i.e., the nature and circumstances of the underlying conduct.'" (*People v. Manning* (2014) 226 Cal.App.4th 1133, 1141, citing *People v. Martinez* (2000) 22 Cal.4th 106, 117, and *People v. Gomez* (1994) 24 Cal.App.4th 22, 31.)

Although the factual findings are limited to the record of conviction, they are, like other findings of fact, reviewed for substantial evidence. (*People v. Hicks, supra*, 231 Cal.App.4th at 286, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *People v. Guilford* (2014) 228 Cal.App.4th 651, 661; *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1133.) This is a well-established principle of law.

The People propose that this court adopt a de novo standard for eligibility findings under the Reform Act, a proposal which would require appellate courts to conduct de novo review of not only cases such as the instant case, but also every case in which the petitioner has been found not eligible for relief based on his current or prior convictions. Trial courts can and do conduct this review on a routine basis, and reviewing courts traditionally defer

to the fact finding of trial courts in this regard, while reviewing de novo any attendant statutory or other legal interpretation. The People have provided no compelling reason for this court to upend longstanding precedent to place this additional burden on the Courts of Appeal.

The People's argument appears to rest on the different standards articulated by the Third District Court of Appeal in *People v. Oehmigen, supra,* 232 Cal.App.4th at 7, and *People v. Bradford, supra,* 227 Cal.App.4th at pp. 1336-1337.) But the language the People quote from *Oehmigen* is taken out of context. The petitioner in that case was convicted by a guilty plea, and the eligibility determination was based on the factual basis stated for the plea; no facts were in dispute. The petitioner argued that he was entitled to an evidentiary hearing. (*People v. Oehmigen, supra,* 232 Cal.App.4th at 6.) The court restated the standard from *Guerrero*: "The facts are limited to the record of conviction underlying a defendant's commitment offense; the statute neither contemplates an evidentiary hearing to establish these facts, nor any other procedure for receiving new evidence beyond the record of conviction." (*People v. Oehmigen, supra,* 232 Cal.App.4th at 7.)

The People provide no further support for their suggestion that this court should review the factual basis for the eligibility determination de novo. This court should reaffirm that a factual finding is reviewed for substantial evidence.

B. The Trial Court's Factual Findings Were Supported By Substantial Evidence

The trial court here found that Respondent was not ineligible for relief under the reform act due to the "method in which the motor vehicle was used." (CT 967, RT 26.) The court also found his use of the vehicle to be "incidental" and concluded that Respondent's intent in using the car was to escape. (RT 12, 17, 22.) As has already been discussed at length in Part I of this brief, this was precisely the correct legal focus for the court to employ in determining whether the automobile was a deadly weapon within the meaning of the Reform Act: the court appropriately focused on the *manner in which the object was used* and what that use revealed about Respondent's *intent.* (See, e.g., *People v. Oehmigen, supra,* 232 Cal.App.4th at 10; *People v. Page, supra*, 123 Cal.App.4th at pp. 1470-1471.)

As to the court's factual findings, these were supported by substantial evidence and should be upheld on appeal. As the dissenting justice below stated, there was evidence in the record of conviction to support a finding that Respondent attempted to make a low-speed escape from the parking lot, and that this factual scenario was consistent with the trial court's finding that Respondent had used the vehicle in a manner showing his intent to escape, rather than an intent to employ the vehicle as a weapon. (*People v. Perez, supra,* 3 Cal.App.5th at 836, dis. opn. of Franson, J.) The Court of Appeal should have deferred to the lower court's findings, as those findings were supported by substantial evidence.

III.

HAD THE COURT FOUND RESPONDENT INELIGIBLE FOR RELIEF BASED ON FACTS NOT FOUND TRUE BY THE JURY, IT WOULD HAVE DEPRIVED HIM OF HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The People argue that, in finding Respondent ineligible for relief and vacating the order granting his petition for resentencing, the Court of Appeal did not violate his right to trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution, because a prisoner has no Sixth Amendment right to a jury determination of the facts rendering him ineligible for relief under the Reform Act. (AABM, p. 49.)

Respondent acknowledges that the courts of this state have thus far held that the Sixth Amendment does not require a jury finding as to the factors rendering a prisoner ineligible for relief under the Reform Act. (E.g., *People v. Bradford, supra*, 227 ca at pp. 1334-1336; *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1304.) These courts have so held based on the United States Supreme Court ruling in *Dillon v. United States* (2010) 560 U.S. 817 [130 S.Ct. 2683; 177 L. Ed. 2d 271], already discussed at length in the Opening Brief on the Merits. (See ROBM, pp. 44 et seq.)

For reasons already stated in the Opening Brief on the Merits, Respondent submits that these decisions are incorrect insofar as they find no Sixth Amendment right to a jury determination of eligibility factors under the first prong of the Reform Act. (Cf. *People v. Arevalo, supra*, 244 Cal.App.4th at 853;

see also *People v. Frierson* (2016) 1 Cal.App.5th 788, review granted 10/19/2016 (S236728/B260774) [presenting issue of appropriate standard of proof at eligibility hearing].) Where a court, absent proof beyond a reasonable doubt that a prisoner is not eligible for relief, "shall" resentence the prisoner in accordance with the reform act, it is difficult to square this proscriptive language with the type of statute at issue in *Dillon*, even given the "unreasonable risk of danger" secondary consideration. As to the first prong, where it involves facts beyond the record of conviction, that determination should be made by a jury.

This case illustrates the substantial rights affected by the Sixth Amendment violation involved in having courts comb cold records to make determinations of facts that were never placed at issue before the jury. The question of whether Respondent will return to prison to complete his life sentence ought to have been determined by a jury, not by a panel of appellate justices. This court should reverse the holding of the Court of Appeal and reinstate the order granting Respondent's petition to recall his sentence.

CONCLUSION

Respondent respectfully requests that this court reverse the Court of Appeal and reinstate the order recalling his sentence.

Dated: July 5, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

As required by California Rules of Court, Rule 8.520(c), I certify that this petition contains 8,396 words, as determined by the word processing program used to create it.

Elizabeth Campbell
Attorney at Law

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a member of the State Bar of California and a citizen of the United States. I am over the age of 18 years and not a party to the within-entitled cause; my business address is PMB 334, 3104 O Street, Sacramento, California, 95816.

On July 5, 2017, I served the attached

RESPONDENT'S REPLY BRIEF ON THE MERITS

(by mail) - by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

Alfredo Perez, Jr. Respondent 843 12th Street Sanger, CA 93657	Fresno County Superior Court 1100 Van Ness Avenue Fresno, CA 93724

(by electronic transmission) - I am personally and readily familiar with the preparation of and process of documents in portable document format (PDF) for e-mailing, and I caused said document(s) to be prepared in PDF and then served by electronic mail to the party listed below, by close of business on the date listed above:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 5, 2017, in Sacramento, California.

_____

DECLARANT