IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF AND RESPONDENT, V. VERONICA AGUAYO, DEFENDANT AND APPELLANT.	CASE NO. S254554

ON REVIEW OF A PARTIALLY PUBLISHED DECISION OF
THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

APPELLANT'S REPLY BRIEF ON THE MERITS

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BY APPOINTMENT OF THE
CALIFORNIA SUPREME COURT
UNDER THE APPELLATE DEFENDERS,
INC. INDEPENDENT CASE SYSTEM

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VERONICA AGUAYO, Defendant and Appellant.	Case No. S254554 Fourth Appellate District, Division One No. D073304 San Diego County Superior Court No. SCS295489

APPELLANT'S REPLY BRIEF ON THE MERITS

Introduction

In analyzing whether assault with use of force likely to produce great bodily injury (FLPGBI) under Penal Code section 245, subdivision (a)(4),[1] is a lesser included offense (LIO) of assault with a deadly weapon (ADW) under subdivision (a)(1), this Court must determine whether the Legislature intended to create two classes of weapons for purposes of proving an (a)(1) assault, and if so, whether the Legislature also intended that the use of an "inherently deadly" weapon would satisfy (a)(1), without also showing the "inherently deadly" weapon was used in a manner likely to produce great

[1] All subsequent statutory references will be to the Penal Code unless otherwise designated. All subsequent references to subdivisions (a)(1) and (a)(4) refer section 245.

bodily injury or death.

The parties agree that the statutory elements test controls on whether (a)(4) is an LIO of (a)(1). (RBM p. 19.) For this purpose, the parties also agree that the elements must be examined in the abstract, rather than on the facts of this case. (*Ibid*.)

At no time has the Legislature created two classes of deadly weapons in the assault statute. Instead, the California courts have done so through the case law, as interpreted and memorialized in jury instructions. From 1948-2006, CALJIC No. 9.02, and its predecessor instruction, CALJIC No. 6.04, correctly defined "deadly weapon" as "*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 the transition from CALJIC to CALCRIM in 2006, a different definition of "deadly weapon" was adopted. It is the confusion arising out of footnote 10 in *People v. Aguilar* (1997) 16 Cal.4th 1023 (*Aguilar*) that appears to have prompted the change in definition of "deadly weapon." Under the new definition, the state asserts that the use of an inherently deadly weapon under (a)(1) does not require a showing of force likely to produce great bodily injury (FLPGBI) otherwise required under (a)(4); accordingly, the state reasons an actor can violate (a)(1) without also violating (a)(4), and therefore (a)(4) cannot be an LIO of (a)(1). (*Ibid*.)

(Ms. Aguayo had initially intended to reply the state's "course of conduct" argument and to address *People v. Vidana* (2016) 1 Cal.5th 632 further in this reply, but given this Court's request for supplemental briefing, she shall defer such discussion to the supplemental briefing.)

ARGUMENT

I. Under the Elements Test, Assault with the Use of Force Likely to Produce Great Bodily Injury Is a Lesser-Included Offense of Assault with a Deadly Weapon

In her opening brief on the merits, Ms. Aguayo argued that under the elements test, assault by means of force likely to produce great bodily injury under (a)(4) is an LIO of (a)(1), assault with a deadly weapon. Because the greater (a)(1) offense cannot be committed without also necessarily committing the lesser offense, (a)(4) is a mere subset of (a)(1). As long as some additional evidence is required to support a conviction for the greater offense, the lesser offense is a lesser included offense. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65 (*Fontenot*.). Here, the additional evidence of the greater (a)(1) offense is the specific use of force with a deadly weapon, rather than the unspecified use of force.

The elements of the offenses set forth in the statute, as interpreted and applied through the jury instructions, show that (a)(4) is a lesser included offense of (a)(1). The difference between (a)(1) and (a)(4) offenses is not in the use of force. Force is included in both offenses in the first,

third and fourth elements. Because (a)(1) involves use of a deadly weapon, in finding the weapon to be deadly, the trier of fact will have found force likely to produce great bodily injury:

	Elements, (a)(1)		Elements, (a)(4)
1.	The defendant did an act **(with a deadly weapon)** that by its nature would directly and probably result in the application of force to a person;	1.	The defendant did an act that by its nature would directly and probably result in the application of force to a person **and the force used was likely to produce great bodily injury**;
2.	Same;	2.	Same;
3.	Same;	3.	Same;
4.	When the defendant acted, (he/she) had the present ability to apply force **(with a deadly weapon other than a firearm to a person;)**	4.	When the defendant acted (he/she) had the present ability to apply force **likely to produce great bodily injury;**
5.	Same.	5.	Same.

(CALCRIM Nos. 875 and 915 (April 2020).)

If the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) In *In re Jonathan R.* (2016) 3 Cal.App.5th 963 (*Jonathan R.*), the court concluded

that an assault with a deadly weapon under subdivision (a)(1) necessarily includes an assault by means of force likely to produce great bodily injury, because finding a weapon to be deadly necessarily means that it is likely to produce great bodily injury.

> Because both subdivisions require the use or attempted use of force likely to produce great bodily injury, subdivision (a)(4) does not "differ in [its] necessary elements" from subdivision (a)(1), and subdivision (a)(4) is "included within" subdivision (a)(1). [citations omitted]

(*In re Jonathan R., supra,* 3 Cal.App.5th at pp. 973-974.)

The most recent revision of CALCRIM No. 875 includes two additional instructions that apply when a deadly weapon is used in an assault:

> [A deadly weapon other than a firearm is any object, instrument, or weapon [that is inherently deadly or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]
>
> [An object is inherently deadly if it is deadly or dangerous in the ordinary use for which it was designed.]

(CALCRIM No. 875 (April 2020).)

Where a weapon is inherently deadly, the instruction may be interpreted to imply that no separate showing of FLPGBI is necessary; this, in turn, leads the state to conclude that (a)(4) is not an LIO of (a)(1) because of the absence of FLPGBI under the inherently deadly weapon theory.

But the state also claims that under *Jonathan R.* there would be no difference in the elements under (a)(4) that were not also required under (a)(1). (RBM p. 40.) But (a)(1) requires the use of force by employing an object, instrument or weapon that is deadly, while (a)(4) requires force, which could be from an instrument that is not found to be deadly, or by the use of hands or feet (*Aguilar, supra*). Because (a)(1) includes a specific use of force with a deadly weapon it is an additional element that (a)(4) does not include, making (a)(4) a subset of (a)(1). (*Fontenot, supra,* 8 Cal.5th at p. 65.)

The state has asserted that when the weapon used is one specifically designed to be deadly, "neither force nor a likelihood of great bodily injury is required." CALCRIM No. 875 shows the use of force is required, and, as the *Jonathan R*. court held, the likelihood of great bodily injury is included in element (3). "When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone. (CALCRIM No. 875 (April 2020).)

The state then declares that it follows, "a fortiori" that force likely under (a)(4) is not an LIO of (a)(1). The state asserts that the Legislature intended both crimes to be distinct and alternative forms of aggravated assault. (RBM, p. 18.) The state includes no authority that so holds based

on the 2011 revision of section 245.

The state also relies on *In re Mosley* (1970) 1 Cal.3d 913 (*Mosley*) as holding that assault by means of FLPGBI is not an LIO of ADW. (RBM p. 26.)[2] The court in *Jonathan R*. found the logic of *Mosley* no longer holds because the assault statute was revised post-*Mosley*, and Ms. Aguayo agrees. Moreover, this Court's decision in *People v. Gonzalez* (2014) 60 Cal.4th 533, 539 (*Gonzalez*) explained why the Legislature's reorganization of the statute mandates a result different from the *Mosely* holding – "[t]hat [because]each subdivision of section 288a was drafted to be self-contained . . . each describes an independent offense, and therefore section 954 is no impediment to a defendant's conviction under more than one such subdivision for a single act." (*Gonzalez, supra*, 60 Cal.4th at p. 539.)

Relying on *Gonzalez*, the *Jonathan R.* court concluded that once the Legislature separated the section 245 provisions into different subdivisions, the logic of *Mosley* no longer held true; under the reasoning of *Gonzalez*, the separation of the two aspects of aggravated assault into separate, self-contained subdivisions created two offenses where formerly there was one. (*In re Jonathan R., supra,* 3 Cal.App.5th at p. 975.) Considered as

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[2] The state suggests that this court "concluded" that assault by FLPGBI is not LIO of ADW. (*Mosely, supra*, p. 919, fn. 5.) It is more accurate to say that in this habeas based on ineffective assistance of counsel, this Court assumed that "conclusion" in footnote dicta correcting the trial judge, who recited it was an LIO.

separate offenses, (a)(4) is a LIO of (a)(1). (*Ibid.*)

A. The Legislative History of the Assault Statute Does Not Support the State's Assertion that the Terms "Weapon" and "Instrument" Are Proxies for "Inherently Deadly" and "Noninherently Deadly" Respectively

The state points to the Legislature's use of "weapon" and "instrument" in the assault statute as demonstrating an intent to distinguish between objects that are inherently deadly and those that are not. The state further claims that since its inception, the assault statute has drawn a distinction between deadly weapons and instruments. (RBM p.22.)

However, in addition to the fact that no ratio decidendi supports this claim, the state has not fully disclosed the language in the original statute to show how the use of these terms has evolved. As a starting point, this Court has emphasized that the Legislature's intent is to be determined as of the time "*when it enacted the statute*." (*In re Pedro T.* (1994) 8 Cal.34th 1041, 1048, italics original.) "It is axiomatic that in assessing the import of a statute, we must concern ourselves with the Legislature's purpose *at the time of the enactment*." (*Ibid.*, italics added.)

The original assault statute, enacted in 1850, included a list, consisting of "deadly weapon, instrument, or other thing."[3] This list

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[3] In 1850 the Legislature adopted "An Act Concerning Crimes and Punishment." Section 50 thereof which concerned assault with a deadly weapon read in relevant part: "An

evinces the Legislature's intent to include in the statute anything that could be used as a deadly weapon. In 1874, "other thing" no longer appeared in the statute and the "force likely" clause was introduced. (Code Am. 1873-187, ch. 614, p. 428, § 22.)

In the 2006 version of CALCRIM No. 875, the instruction's authors inserted the "inherently deadly" language and returned to including the list:

> [A *deadly weapon other than a firearm* is any object, instrument or weapon [that is inherently deadly or one] that is used in such a way that it is capable causing and likely to cause death or great bodily injury.

(CALCRIM No. 875 (2006), italics in original.)

From these actions, this Court can reasonably infer that the Legislature's intent in the original statute was to include anything that could be used as a deadly weapon. This Court could further reasonably infer that the Legislature eliminated the term "other thing," because it determined it to

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> assault with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears or where the circumstances of the assault show an abandoned and malignant heart shall subject the offender to imprisonment. . . ." The essential elements of the offense were incorporated into the definition of the crime as contained in the 1872 version of the Penal Code.

(*People v. Rocha* (1971) 3 Cal.3d 893, 898, fn. 3.

be unnecessary and redundant. The terms "deadly weapon" and "instrument" were sufficient to include any object or item that could be used as a deadly weapon. The addition of the "inherently deadly" language and return to using the list did not displace any item in the list; moreover, it refutes the state's claim that the Legislature's use of "weapon" and "instrument" represented a binary view and an intent to distinguish between objects that are inherently deadly and those that are not.

The listing of "deadly weapon," "instrument," and "other thing" in the statute provides a basis for ascertaining the legislative intent and giving effect to the Legislature's purpose:

> That a statute contains a list of terms does not necessarily mean that the included words or phrases have a common meaning; rather, we view that list as a "guide[]" that can in many circumstances help us ascertain the meaning of particular words it contains. [Citation.] Canons of construction – such as the noscitur a sociis canon underscoring the value of considering terms in a list in their statutory context – are not mechanical devices, but instead tools that can help us do what we always aspire to do when construing a statute: avoid redundancies, reach a reasonable conclusion about the meaning of terms, and give effect to the Legislature's purpose.

(*People v. Garcia* (2016) 62 Cal.4th 1116.)

Accordingly, the legislative intent is evidenced in a complete disclosure of the list of terms included in the original statute. The state's

reliance on dictionary definitions, however, fails to supply evidence of a different legislative intent.

First, the dictionary definitions do not support the state's claim that the definitions show a distinction between inherently deadly and noninherently deadly. (RBM p. 22.) A weapon, defined as a "thing" designed or used for inflicting bodily injury simply recognizes that ordinary "things" can be used to inflict bodily injury, while some other "things" can be designed for that purpose.

Second, although the state claims that, since its inception, the assault statute has drawn a distinction between deadly weapons and instruments, i.e., "[S]uch weapons or instruments as are made and designed for offensive or defensive purposes . . . ." (RBM p. 22), the state's dictionary definition imparts no such distinction.

While some courts view the dictionary as a starting point for finding the ordinary meaning of statutory language, for this approach to be valid, the dictionary definitions must be contemporaneous to the statute's enactment:

> "The dictionary is a proper source to determine the usual and ordinary meaning of words in a statute." [Citation.] As we have explained in a prior case, relevant dictionary definitions are
>
> those extant *before or at least near in time* to the statutory or contractual usage. [Citation.]

(*Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 433-434, emphasis added.)

Here, the state cites to internet dictionaries without establishing that the definitions are contemporaneous with the original enactment of the statute in 1850, or that the intended usage of these terms in the statute have evolved to mean what a contemporary dictionary reports. But even if these definitions were contemporaneous, the state still fails to show that these definitions were how the Legislature intended the terms "instrument" and "deadly weapon" to be understood:

> And a dictionary definition, though always a good starting point, does not necessarily settle how the Legislature meant a term to be understood within a statutory scheme.

(*Handyman Connection of Sacramento, Inc. v. Sands* (2004) 123 Cal.App.4th 867, 894-895.)

This is especially true when interpreting in 2020 the meaning of terms in a statute enacted in 1850. (See pp. 15-16, *ante*.)

The state also has failed to show how these definitions would be reliable indicators of the legislative intent. The state simply has advanced no basis for favoring binary interpretation of "deadly weapon" and "instrument" as inherently deadly and non-inherently deadly, respectively. Thus, "[c]ourts must exercise 'great caution' when relying on a dictionary

definition of a common term to determine statutory meaning because a dictionary '"is a museum of words, an historical catalog rather than a means to decode the work of legislatures."' [Citation.] '"[I]t makes no sense to declare a unitary meaning that 'the dictionary' assigns to a term." (*Stennett v. Miller* (2019) 34 Cal.App.5th 284, 293, fn. 4.) The plain meaning of the assault statute should not be interpreted without reference to the purpose that can be inferred from context:

> "The idea that semantically unambiguous sentences – sentences clear 'on their face' – sentences whose meaning is 'plain' – can be interpreted without reference to purpose inferred from context is fallacious. Take that clearest of directives: 'Keep off the grass.' Read literally it forbids the groundskeeper to mow the grass. No one would read it literally." (*Marozsan v. United States* (7th Cir. 1988) 852 F.2d 1469, 1482 (conc. opn. of Posner, J.).)

(*Ibid*.)

Context favors finding the Legislature's intent to capture in the assault statute anything that could be used as a deadly weapon. Creating a binary distinction between "inherently deadly" and "deadly" serves no purpose.

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1. This Court Has Not Yet Decided Whether (a)(4) Is an LIO of (a)(1) Under the 2011 Revision of section 245

The state also claims 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. Most, if not all of the cases on which the state relies were decided under an earlier version of the statute. Before 2011, (a)(1) and (a)(4) were included in the same subdivision and simply described two alternative ways of violating the statute. In *People v. Milward* (2011) 52 Cal.4th 580, 586, this Court considered the version of section 245 in effect before the statute was revised in 2011. This Court found ADW and FLPGBI to be one offense, and concluded former (a)(1) was an LIO of aggravated assault by a life prisoner under section 4500. After the 2011 revision, section 245 was modified such that "force likely" became a separate subdivision of section 245; the inference was that the modification was necessary to easily distinguish aggravated assaults involving the use of a weapon extrinsic to the assailant's body from those involving only FLPGBI. (*Aguilar, supra,* 16 Cal.4th at p. 1031.) The term weapon is not rendered superfluous because the term instrument would suffice, as the state asserts. (RBM p. 23.) Instead, the use of both of these terms conveys that assaults that use anything extrinsic to the body that could be used as a deadly weapon, are

assaults with a deadly weapon.

2. The Case Law that Predates the 2011 Revision of section 245 Is Distinguishable, Often Relies on Dicta, and Is Not Precedential

Ms. Aguayo and the state have each reviewed the case law involving the assault statute in detail and it need not be repeated here. (AOBM pp. 31-36; RBM pp. 42-49.) However, from those exhaustive explanations, this Court should appreciate three important facts: first, any citation to a case decided in 2011 or earlier will be distinguishable because the 2011 revision had not yet been made; second, for purposes of the LIO issue here, none of those cases upheld a conviction for ADW based on an inherently deadly weapon theory, so their references to inherently deadly weapons were simply dicta; and third, some of these cases apply deadly weapon definitions from other statutory schemes to assaults, while other cases take the deadly weapon definition from the assault context, and apply it to other offenses. (AOBM pp. 37-41.) In so doing, the courts have presaged exactly what has happened here: the CALCRIM instructions now use the same definitions of deadly weapon and inherently deadly weapon for almost all of the statutes that involve a deadly or dangerous weapon.[4]

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[4] See CALCRIM Nos. 511, 524, 860, 862, 863, 875, 982, 983, 2503, 2720, 2721, 3130 and 3145, in which the same definition of a deadly weapon has been included for a wide variety of crimes. (CALCRIM. No. 875, April 2020.) These instructions have also added the term "dangerous."

This Court's decision in *Mosely,* for example, was not based on the assault statute revised in 2011. It was based on the version of the assault statute in which ADW and FLPGBI were included in the same subdivision and were alternative ways of violating the statute. When the state asserts that an assault with an inherently deadly weapon does not require a showing of FLPGBI injury, it relies exclusively on dicta. It has to do so, because there appear to be no published opinions in which a reviewing court has upheld a conviction for ADW based on the use of an inherently deadly weapon.

This Court has decided that the meaning of "deadly weapon" under the assault statute also should be used to determine whether an individual was "armed with a … deadly weapon" for purposes of section 1170.12, subdivision (c)(2)(C) (iii). (*People v. Perez* (2018) 4 Cal.5th 1055, 1065 (*Perez*).) In *Perez*, this Court echoed the dicta from *Aguilar*'s footnote 10. (*Ibid*.) "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." (*Perez*, *citing Aguilar, supra*, 16 Cal.4th at p. 1037, fn. 10). It was dicta in *Perez* as well, because the convictions were sustained based on FLPGBI and not based on having used weapons alleged to be deadly per se or inherently deadly. (*Perez, supra,* 4 Cal.5th at p. 1067.)

The *Perez* court noted, citing *People v. Leyba* (1887) 74 Cal. 407, 408, and *People v. Fuqua* (1881) 58 Cal. 245, 247 [defining a "deadly weapon" as "one likely to produce death or great bodily injury"]) that a similar definition of "deadly weapon" long predated *Aguilar*. (*People v. Perez, supra,* 4 Cal.5th at p. 1065.) In referencing *Fuqua, supra,* and *People v. Leyba, supra,* this Court again relied on dicta as well, as neither was decided based on an assault with an inherently deadly weapon. *Leyba* involved an assault with a large knife, and the trial court correctly instructed the jury to decide whether the weapon was likely to produce death or great bodily injury. *Fuqua* involved an assault with a pick handle, and the trial court instructed the jury that whether it was a deadly weapon was for the jury to decide. None of these three cases involved an assault committed with an "inherently deadly" weapon.

Moreover, *Aguilar* was based on *People v. Graham* (1969) 71 Cal.2d 303, which in turn was based on *People v. Raleigh* (1932) 128 Cal.App. 105. Both cases involved first degree robbery convictions. *Graham* did not involve an inherently deadly weapon – the weapon was a shoe. In *Raleigh*, the defendant was armed with a gun. This is the only case in which the weapon used was arguably dangerous per se. (*Id*. at p. 110.) But the *Raleigh* court nonetheless explained why the definition of deadly weapon for purposes of the *robbery* statute differs, and, hence, should differ, from

the deadly weapon required for an assault where the "intended use of the instrumentality and the 'present ability' of the perpetrator of the robbery are of importance in establishing the character of the instrumentality as a 'dangerous or deadly weapon' . . . ." (*Raleigh, supra,* 128 Cal.App. at p. 110; see also AOBM pp. 32-34.) It is the present ability of the possessor of the instrumentality to use it that is essential in cases involving ADW, but which is not essential in the robbery context. In the robbery context, whether the weapon is used, or even exposed to view, was immaterial. (*Id*. at 109.) And yet, despite, this critical difference, the "robbery" definition was lifted and grafted on to the wholly different assault jurisprudence. Similarly, in *People v. Petters* (1938) 29 Cal.App.2d 48, 50, the court cautioned against using the definition of "deadly weapon" included in section 1168 for any other purpose.

The case law has used the term "inherently deadly" for decades, but only as an abstract concept. It is still abstract today as no reported case appears to have upheld a conviction of (a)(1) based on a weapon found to be "inherently deadly." Understandably then, it also appears that there is no published case in which a conviction under (a)(1) involving a so-called inherently deadly weapon was obtained other than in a manner likely to produce great bodily injury. The state has identified no such case. Despite the distinctions between the deadly weapon element as used in the

former first degree robbery statute and the assault statute, the CALCRIM authors have included in the 2020 revision the same definition of deadly weapon that appears in the instruction on the assault statute in numerous other statutes that include a deadly weapon element.[5] The court in *People v. Brown* (2012) 210 Cal.App.4th 1, 9, fn. 4 (*Brown*) found including the "inherently dangerous" weapon from section 12022 in section 245 was incorrect, and recommended eliminating it from CALCRIM No. 875. Instead, that language remains in CALCRIM No. 875, and others.[6]

B. The Legislature Has Never Included a Definition of "Deadly Weapon" in the Assault Statute and Has Delegated the Task of Defining this Term to the Courts

The legislative history shows that the term "inherently deadly" has never been incorporated into the assault statute. In fact, the legislative history fails to show that the Legislature has ever made any attempt to define "deadly weapon" or to create two classes of weapons. Instead, the courts have unilaterally undertaken to define "deadly weapon" in the context of (a)(1). The state argues that because there is a "well-developed body of law" and multiple amendments of the statute, it is reasonable to infer that the Legislature has agreed with the courts' reasoning. (RBM p. 44.)

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[5] See footnote 4, page 22, *ante*.

[6] See footnote 4, page 22, *ante*.

This "well-developed" body of law to which the state refers is based on dicta, and there appear to be no published cases in which an inherently deadly weapon was the basis for an assault conviction. Moreover, as this Court recently observed, the characterization of a weapon as "inherently deadly" is rarely applicable and "generally unnecessary." (*People v. Aledamat* (2019) 8 Cal.5th 1, 15-16 (*Aledamat*).) Failing to enact legislation on an issue that has rarely arisen and which would be generally unnecessary is not a basis from which this Court should infer legislative acquiescence. Legislative inaction, in this context, is not particularly telling, and certainly does not signal agreement with the creation of two classes of deadly weapon, one of which is "inherently deadly. Moreover, this Court has found similar claims of legislative acquiescence unpersuasive in *People v. Blakeley* (2000) 23 Cal.4th 82, 90. Here, as in *Blakeley*, the language in question, with limited exceptions, has remained fundamentally unchanged since 1874.[7] This Court should not view the Legislature's other non-relevant amendments as persuasive evidence that the Legislature intended to acquiesce in judicial decisions misconstruing this and other courts misinterpretation of the statute. (*Id.* at p. 90.)

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[7] In one substantive amendment, firearms were removed to a separate subdivision, and in 2011 (a)(4) was split off from (a)(1), to make ADW Strike offenses more easily identifiable. (AOBM pp. 64-65.)

Prior to 2006, CALJIC No. 9.02 defining deadly weapon did not include the "inherently deadly" language, even though that term had appeared somewhat inconsistently in the case law:

> "*A deadly weapon 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*." (See CALJIC No. 9.02, italics added.)

(*Aguilar, supra,* 16 Cal.4th at p. 1037.)[8]

It was not until 2006, when the transition from CALJIC to the CALCRIM jury instructions was complete, that the "inherently deadly or dangerous" language appeared. And it was not until CALCRIM No. 875 was recently revised that a definition of "inherently deadly" first appeared: "[An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]" (CALCRIM No. 875 (April 2020).)

When the statute is read with its historical origins in mind, CALJIC No. 9.02 correctly instructs that "a deadly weapon is an object, instrument or weapon which is used in such a manner as to be capable of producing

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[8] CALJIC was first published in 1946. An early citation to the predecessor of CAJIC No. 9.02, namely, CALJIC No. 6.04, appears in *People v. Simpson* (1948) 87 Cal.App.2d 359, 362–363: "'A deadly weapon is any object, instrument or weapon which, used in the manner *in which it appears to have been used*, is capable of producing, and is likely to produce, death or great bodily injury.'" (Italics added.) In the 1958 revision of CALJIC, the italicized language was removed. The 1958 revision remained essentially the same as CALJIC No. 9.02 until CALJIC No. 9.02 was replaced by CALCRIM No. 875.

death or great bodily injury," rather than making a binary distinction between an "instrument" and an "inherently deadly" weapon. In other words, whatever the item used in the assault – even if it is a so-called "inherently deadly" weapon – it *must* be used in such a manner as to be capable of producing death or great bodily injury.

But in 2006, with the adoption of CALCRIM No. 875 in lieu of CALJIC No. 9.02 and its inclusion of "inherently deadly" language based on *Aguilar*, decided nine years prior, the courts' transmogrification of the statute (via the jury instruction) was further augmented by the 2020 modification of the instruction adding the definition of "inherently deadly" weapon which includes an "inherently dangerous" weapon:

> [*A deadly weapon other than a firearm* is any object, instrument, or weapon [that is inherently deadly or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]
>
> [An object is *inherently deadly* if it is deadly or dangerous in the ordinary use for which it was designed.]

(CALCRIM No. 875 (April 2020, original italics.)

This instruction incorporates "inherently deadly" into the statute and expands its reach to include dangerous weapons, although that term does not appear in the assault statute. The instruction also prompts the question as to how "ordinary use" is to be used. Is the trier of fact required to find

that the inherently deadly weapon was employed in its "ordinary use?" This Court in *Graham* concluded for purposes of the armed robbery statute that "guns, dirks and blackjacks, which are weapons in the strict sense of the word and are 'dangerous or deadly' to others in the ordinary use for which they are designed, may be said as a matter of law to be 'dangerous or deadly weapons.'" (*Graham*, *supra,* 71 Cal.2d at p. 327.)[9] But for purposes of the assault statute, does the trier of fact have to find the "inherently deadly" weapon was used for the purpose for which it was designed?

C. Binding Precedent Appears in the Ratio Decidendi, Not in Dicta

In *People v. Brown*, *supra*, 210 Cal.App.4th at p.10, the court, citing *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620,[10] cautioned against relying on dicta in *Aguilar*, specifically, language in reference to an "inherently dangerous weapon." Similarly, footnote 10 in *Aguilar* is not binding precedent. First, the *Aguilar* court did not consider or decide that "inherently dangerous weapons" are synonymous with, or should be included as deadly weapons for purposes of the assault statute. Second, the

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[9] The other category recognized in *Graham* includes, without limitation, "pocket-knives, . . . , hatchets and other sharp or heavy objects, which are not weapons in the strict sense of the word and are not 'dangerous or deadly' to others in the ordinary use for which they are designed." (*Graham, supra,* 71 Cal.2d. at pp. 327-328; see also p. 30, *post.*)

[10] "An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' [Citations.]"

Aguilar court simply reiterated the dual categories of deadly weapons recognized in *Graham.* (*Brown,* at p. 10.)

Here is the fallacy of the state's reasoning: if an assault with a weapon characterized as an inherently deadly one still can be used in a non-deadly way, the "inherently" deadly designation truly serves no purpose, and this binary approach is simply tautological.

This Court has already recognized that the term "inherently deadly weapon" does not appear in the assault statute. (*Aledamat, supra,* 8 Cal.5th 1, 16, fn. 5.) Instead, the term "inherently deadly weapon" has been taken from dicta in the case law decided by this Court and the appellate courts and incorporated into the jury instructions. However, the "inherently deadly weapon" designation did not appear in the definition of deadly weapon included in the jury instructions until 2006, approximately 9 years after this Court included the term in the footnote dicta in *Aguilar*. (AOBM pp. 35-36, fn. 3.) The jury instructions did not even define "inherently deadly" weapon until it revised them in September of 2019, and again in April of 2020.

The state asserts that the common understanding of the terms "deadly weapon" and "instrument" evinces the Legislature's intent to include both inherently and noninherently deadly weapons. (RBM p. 22.) The argument lacks support. In the statute the terms appear as "deadly

weapon or instrument." Ms. Aguayo maintains that "deadly" modifies both weapon and instrument. If both terms were not employed, a clever 19th century defense counsel arguing that a rock was not a weapon like a sword (if "instrument" had not been used), or to the contrary, sword was not a simple instrument, having been especially designed as a 19th Century weapon (if "weapon" had not been used).

The state also asserts that "it becomes evident that the Legislature must have intended 'weapon' to include the more specific definition of an item designed for inflicting bodily harm." (RBM p. 23.) It is not, however, uncommon for the Legislature to use catch-all inclusive terminology where, out of an abundance of caution, it wants to cover all bases. (E.g., § 466 [listing 16+ specific burglary tools/instruments "or other instrument or tool" to convey that the list is not exhaustive]; see also §§ 330, 330a, 466, 480.)

The state concludes that "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." (RBM p. 24.)

As all references to "inherently deadly" weapons are dicta, and there appear to be no reported cases involving assault convictions based on the use of an inherently deadly weapon, this Court has reached no such conclusion.

II. The State's New Hypothetical, Offered to Show an (a)(1) Assault Can Be Committed Without Also Committing an (a)(4) Assault, Fails to Accomplish This Objective

The state posed to the appellate court below an abstract hypothetical of the wayward barber, who employed a dirk or dagger to cut a single hair from the head of the sleeping victim without any context. The state argued this constitutes an (a)(1) assault, but does not constitute an (a)(4) assault. The appellate court adopted the example, including it in its opinion below. (*People v. Aguayo*, (2019) 31 Cal.App.5th 758, 766.)

The state no longer champions that hypothetical and instead repeatedly relies on a hypothetical taken from the common law, where the actor who raises a fist in an angry manner or places his hand on the hilt of a sword, commits an assault. (RBM pp. 30-31.) The state cites *People v. Chance* (2008) 44 Cal.4th 1164, 1172, which, in turn, cited *People v. McMakin* (1857) 8 Cal. 547, 548 (*Makin*), and *Hays v. The People* (N.Y. Sup.Ct.1841) 1 Hill 351, 353, a case which drew upon common law, e.g., Buller, J., on Nisi Prius (see *ibid*.).[11] (RBM p. 31.) But it was this Court's decision in *McMakin* that gleaned intent from the actus reus of an assault.

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[11] Also, in Buller, from where the hand-on-hilt example referenced in *Hays, supra*, and *McMakin*, is taken, the example is set forth in a discussion re "words alone," i.e.: "if a man were to lay his hand upon his sword, and say 'if it were not assize time, he would not take such language:' These words would prevent the action from being construed as an assault, because they [show] he had no intent him any corporal hurt at that time." (Buller, J, on Nisi Prius (1790 ed.), p. 15.)

This Court recognized the drawing of a sword as a simple assault. But this Court did not follow the common law and find that the placing of a hand on the hilt of a sword would be a sufficient actus reus. Instead, this Court, recognized that context is important:

> As to what shall constitute evidence of such intention, is the question arising in this case. The ability to commit the offense was clear. 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.

(McMakin, supra, 8 Cal. 547, 548.)

Here, the state portends that the actor grabbing for a sword is more culpable than the actor who raises a fist in an angry manner, without offering any facts showing the context; the state then characterizes this culpability as a "maxim" explaining why the Legislature has punished simple assault separately from aggravated assaults. The state does so without attribution.

The state then represents that the "rationale" for distinguishing between simple assaults and aggravated assaults also explains why assaults with inherently deadly weapons "deserve to be treated as aggravated assaults, as a matter of law, even when other types of weapons require

consideration of the manner in which they are used." This conclusion simply does not follow.

The state asserts that deadly weapons tend to inflict deadly injuries, and are more likely to lead to escalations in the conflict. Here, the state relies on *People v. Hunter* (1925) 71 Cal.App. 315, 319. (RBM p. 31.) But escalation is not what happened in *Hunter*. When the husband attempted to draw a firearm from his ankle, his wife climbed out a window and dropped to the ground to avoid being shot. Because this was the opposite of an escalation, if the "maxim" is that the use of an inherently weapon is more likely to lead to an escalation of the conflict, *Hunter* does not support the claim. The state's assertion is otherwise unsupported, but raises the following question: if a blackjack is an inherently deadly weapon, is there any difference in escalation or deadliness when the actor commits an assault with a Louisville Slugger baseball bat instead of a blackjack?

Referring to *People v. McCoy* (1944) 25 Cal.2d 177, the state argues "the timeline for determining at what point an aggravated assault is committed depends on the character of the weapon used: . . . ." (RBM pp. 33-34) Ms. Aguayo suggests that a more logical reading would be "instrument" or "object" rather than "weapon." The remainder of the ellipses is a quotation from *McCoy*: "[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 . . . merely relates to the sufficiency of the evidence to support the charge." (*McCoy, supra*, 25 Cal.2d at p. 190.)

Ms. Aguayo has argued that the dichotomy between inherently and non-inherently deadly weaponry is artificial, not born in statutory legitimacy, but in a transmogrification of dicta into jury instructions. Is a knife an inherently deadly weapon today? A bowie-knife was specifically included in the original 1855 "brandishing" statute among deadly weapons (see p. 29, *ante*), but *McCoy* has held that a knife is *not* an "inherently deadly or dangerous" weapon as a matter of law (*McCoy, supra*, 25 Cal.2d at p. 188). The state has not listed weapons that are inherently deadly, other than those identified in case law, such as in the *Aguilar* dicta.

If this artificial dichotomy of weaponry is permitted to continue in the assault jurisprudence, more absurd results will emerge from including "inherently deadly or dangerous" weapons that are not used in a deadly manner.

/ / /

III. Creating Two Classes of Deadly Weapons Furthers No Policy Interests, But Does Raise Constitutional Concerns

The state has acknowledged the concerns this Court voiced in *Aledamat* about the jury instructions defining a deadly weapon. (RBM p. 41.) In finding the jury instructions "problematic," this Court noted that the instructions do not define "inherently deadly."[12] Yet those instructions include an instruction on that theory even though in most cases the weapon is not inherently deadly as a matter of law and that portion of the instruction is therefore generally unnecessary. (*Aledamat*, 8 Cal.5th at pp. 15-16.)

The state then contends that any policy concerns regarding the basis for distinguishing between two types of assault should be addressed by the Legislature in drafting a new assault statute. (RBM p. 42.) Ms. Aguayo agrees that it is the Legislature's prerogative to define the elements of a crime and to specify the punishment for the offense. (RBM p. 42.) But while the courts may interpret the Legislature's intent in order to define terms used in the statute, the courts may not usurp the Legislature's authority or contravene the Legislative intent. Thus, when the courts created two classes of weapons and, under the state's interpretation, would eliminate the force element of the offense for the "inherently deadly" class of weapons, the courts would have gone too far:

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[12] The newest versions of CALCRIM (September of 2019 and April of 2020) do define inherently deadly.

> We repeatedly have observed that " ' "the power to define crimes and fix penalties is vested exclusively in the legislative branch." [Citations.] The courts may not expand the Legislature's definition of a crime [citation], nor may they narrow a clear and specific definition.

(*People v. Farley* (2009) 46 Cal.4th 1053, 1119.)

If the state is correct, and the case law excuses the prosecution from proving any force element of the offense if the weapon is "inherently deadly" (see, e.g., RBM p. 38), the courts will have impermissibly expanded the scope of criminal liability for assault with a deadly weapon. Alternatively, if this Court views the inherently deadly weapon designation as proof sufficient to satisfy the force requirement, then the Court will have created an irrebuttable presumption that excuses the prosecution from proving up the elements of assault with a deadly weapon and will have thereby lessened the state's burden of proof. The former approach encroaches on the legislative function. The latter approach implicates due process under the state and federal constitutions. (U.S. Const. amend XIV; Cal. Const. art. I, § 7.) (See AOBM pp. 46-49.)

This Court has recognized its duty to exercise judicial restraint, and where possible, to construe a statute in a way that avoids constitutional problems. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190.) Accordingly, this court should eliminate the "inherently deadly " classification, and construe the aggravated assault

statute to require that any weapon, instrument or object be used in a manner likely to produce great bodily injury in order to be "deadly" within the meaning of the statute, and thereby avoid the constitutional problems.

The state has identified, as the policy interests that justify treating "inherently deadly" weapons separately, preventing the escalation of a conflict. (RBM p. 31.) However, in justifying the policy interests related to finding a weapon to be inherently deadly, the state's showing must be made at the margin: that is, the difference in the escalation and deadliness that can be attributed to the inherently deadly weapon must be shown to be significantly more than could be attributed to a an instrument, object or weapon used in a deadly manner. The state has not made that showing. Instead, the state merely asserts that a person who grabs a sword is more culpable than a person who raises a fist in any angry manner and that justifies treating simple and aggravated assaults differently. The state labels this culpability assertion a "maxim." (*Ibid*.)

The state then argues that 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. (RBM p. 36.) There is no definition of deadly weapon in the statute, and the state has failed to identify the statute to which it refers. Moreover, the use of the term "implement" is puzzling. Does the state mean "instrument,"

or is it borrowing "implement" from another statutory scheme?

As to the second claim, the state asserts that the interpretation Ms. Aguayo advocates would render the amendment adding assault by means of FLPGBI, while retaining ADW, superfluous. The state further predicts Ms. Aguayo will have no response as to ". . . why the Legislature would have retained two different ways of violating the statute if every assault required a showing of force likely to produce great bodily injury." (RBM p. 36.)

Ms. Aguayo does have a response. The purpose is clear: (a)(1) requires the use of something extrinsic to the body to qualify as a deadly weapon. It was conclusively decided in *Aguilar* that hands and feet are not deadly weapons, and that the use of force by body parts must be an (a)(4) and not an (a)(1).

There is no superfluity.

There is also no sound policy for treating inherently deadly weapons and deadly weapons differently. As explained in the opening brief, (a)(1) is a serious felony and a strike, while (a)(4) (i.e., sans infliction of actual serious bodily injury, § 12022.7) is not. If an (a)(1) offense could be shown by touching the hilt of a sword, or even drawing a sword, it would be a serious felony and a strike, while a martial arts expert who assaulted another with hands and feet, would not be guilty of a serious felony or a strike.

This Court has recognized that legislative intent can be misconstrued, and, indeed, this Court has corrected such misconstructions, even after decades of misuse. In *People v. Lasko* (2000) 23 Cal.4th 101 this Court noted that over a span of many decades, it was "true that some of our decisions appear[ed] to [have held] to the contrary." (*Id*. at p. 110.) This Court then held that voluntary manslaughter did not require an intent to kill, contrary to established CALJIC instructions. (*Ibid*.) This Court took this action, noting the prior erroneous jurisprudence was "deeply seated in the case law without thoughtful examination, as a result of the offhand misreading [of an earlier case]." (*Id*. at pp. 106-107.)

This is precisely what has occurred in the ADW jurisprudence, based on footnote 10 in *Aguilar*.

Conclusion

For the foregoing reasons, this Court should find that the Legislature has never intended to create two classes of deadly weapons. This Court should adopt the constitutional interpretation, finding that the prosecution must prove that the any weapon, including an inherently deadly weapon, must be used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury. In the alternative, this Court should delete the "inherently deadly" qualification in its definition of deadly weapon. In so doing, this Court should reject the hypothetical approved by the appellate court and reverse the appellate court's decision, holding that under the elements test, that (a)(4) is an LIO of (a)(1). This Court should then remand to the trial court with direction to vacate Ms. Aguayo's (a)(4) conviction as an LIO, an exception to section 954.

Dated: April 21, 2020

/s/ Linnéa M. Johnson

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Dated: April 30, 2020

/s/ Linnéa M. Johnson
Linnéa M. Johnson
Attorney for Appellant

Re: *The People v. Aguayo,* Case No. S254554

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I certify that the foregoing is true and correct. Executed on **May 1, 2020**, at Auburn, California.

/s/ *Linnéa M. Johnson*

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