In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **VERONICA AGUAYO,** Defendant and Appellant.	Case No. S254554

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

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

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ISSUES PRESENTED

This Court requested the parties file supplemental briefing on the following issues:

Are Penal Code section 245, subdivision (a)(1) and section 245, subdivision (a)(4) merely different statements of the same offense for purposes of section 954? If so, must one of defendant's convictions be vacated?

INTRODUCTION

For more than a century, assault with a deadly weapon or instrument and assault by means of force likely to produce great bodily injury were combined within a single subdivision of the Penal Code as alternative means of committing the same offense of aggravated assault. Beginning in 1982, however, the Legislature started dividing the otherwise unified offense of aggravated assault. In that year, the Legislature broke off assaults with firearms for separate treatment under Penal Code section 245, subdivision (a)(2). [1] Seven years later, in 1989, the Legislature similarly severed off assaults with machineguns and assault weapons for separate treatment under section 245, subdivision (a)(3). Subsequently, the electorate designated assaults with deadly weapons to be strikes, but did not otherwise include assaults by means of force likely to cause great bodily injury. In response to this new increase in recidivist punishment for only one of these alternatives, in 2011 the Legislature detached assaults by means of force likely to produce great bodily

[1] All further statutory references are to the Penal Code.

injury into a new separate subparagraph of section 245, subdivision (a)(4). In creating this division, the Legislature did not change any of the elements of assault by means of force likely to produce great bodily injury. Still, the Legislature signaled with this amendment that henceforth such assaults are separate offenses subject to separate punishment. As a result of this separate treatment, the two subparagraphs should no longer be considered different statements of the same offense for purposes of section 954.

In the event this Court disagrees, it is nonetheless unnecessary to vacate one of appellant's two assault convictions because they were based on separate acts.

ARGUMENT

I. THE LEGISLATURE INTENDED TO TREAT DEADLY-WEAPON ASSAULT AND FORCE-LIKELY ASSAULT AS DIFFERENT OFFENSES BY SEPARATING THEM INTO THEIR OWN SUBPARAGRAPHS, CONTINUING TO DEFINE THEM BY UNIQUE ELEMENTS, AND PUNISHING THEM DIFFERENTLY

In determining whether the Legislature intended two separate Penal Code provisions to state separate offenses, it is appropriate to examine the text, structure, and penal consequences of the two different provisions. Where, as here, the Legislature took specific action to separate out what was formerly a single offense of aggravated assault and divide that offense into multiple different subdivisions with different penal consequences attached to each, the intent to create separate offenses is clear. Treatment of the remaining subparagraphs of section 245, subdivision (a)—that is, subdivisions (a)(2) and (a)(3) regarding

assaults by firearm and machineguns, respectively—confirms this interpretation.

While some courts have looked to the legislative history behind the most recent amendments from 2011 that gave rise to the separate subparagraph of section 245, subdivision (a)(4), that approach is unnecessary given the clear language and structure of section 245. In any event, this legislative history reveals an intent to treat subdivisions (a)(1) and (a)(4) as distinct offenses, and this intent is once again wholly consistent with a desire to create different offenses of assault with a deadly weapon or instrument and assault by means of force likely to produce great bodily injury. Indeed, if this were not the intent, then the very purpose the 2011 amendments sought to achieve—that is, to better reveal which cases are based on assaults with deadly weapons so as to make them subject to greater penalties—would have been for naught as a charging instrument would not have to specify which subparagraph was violated.

A. Whether Two Crimes Are Different Statements of the Same Offense Depends on Legislative Intent, Which Can Be Discerned by the Structure, Elements, and Punishment

Section 954 provides, in relevant part, that a defendant may be charged with "different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . but may [not] be convicted of any number of the offenses charged." This Court has interpreted this language as permitting multiple convictions for different or distinct offenses, but not "multiple convictions for a different

statement of the same offense when it is based on the same act or course of conduct." (*People v. Vidana* (2016) 1 Cal.5th 632, 650.)

Whether a statute defines different offenses or merely different ways of committing the same offense "properly turns on the Legislature's intent in enacting these provisions." (*People v. Gonzalez* (*Ramon*) (2014) 60 Cal.4th 533, 537.) If the Legislature "meant to define only one offense, we may not turn it into two." (*Ibid.*) To discern the Legislature's intent, this Court has instructed appellate courts to examine the elements of the offenses, the text and structure of the statutes, and the difference in punishment across the various provisions. (*People v. White* (2017) 2 Cal.5th 349, 359; *Gonzalez*, *supra*, 60 Cal.4th at p. 536.)

Gonzalez is illustrative. The defendant in *Gonzalez* sexually assaulted a woman who had been rendered unconscious by intoxication. This Court concluded that he could properly be convicted of both oral copulation of an unconscious person under section 288a, subdivision (f), and oral copulation of an intoxicated person under section 288a, subdivision (i). (*Gonzalez*, *supra*, 60 Cal.4th at p. 536.) Although both of these offenses fell within two subdivisions of the very same Penal Code statute, the Court nonetheless concluded the Legislature intended to create two separate offenses. In reaching this conclusion, the Court first looked to the structure of section 288a, which defined oral copulation in general terms in subdivision (a), while the remaining subdivisions defined the myriad ways in which oral copulation would constitute a criminal act. (*Id.* at p. 539.) The Court further noted that "[e]ach subdivision sets forth all the

elements of a crime, and each prescribes a specific punishment," some of which were different. (*Ibid.*) The Court concluded that the fact that "each subdivision of section 288a was drafted to be self-contained supports the view that each describes an independent offense," and thus, the defendant could be convicted under more than one subdivision for a single act. (*Ibid.*)

In *White*, the Court extended the reasoning of *Gonzalez* to the statute defining rape and upheld dual convictions of rape of an intoxicated person and rape of an unconscious person under section 261, subdivisions (a)(3) and (a)(4). (*White*, *supra*, 2 Cal.5th at p. 357.) Unlike the situation in *Gonzalez*, in which the different crimes were contained in separate subdivisions, the crimes at issue in *White* were (as in the present case) contained in different subparagraphs of the same subdivision. The Court acknowledged structural differences between section 261 and section 288a, the oral copulation statute analyzed in *Gonzalez*, but nonetheless concluded that the rape statute was substantively parallel. (*White*, *supra*, 2 Cal.5th at p. 359.) "We see no suggestion that the Legislature intended, and no reason it might have intended, a different rule for rape than exists for oral copulation[.]" (*Id.* at p. 357.) In so ruling, the Court overruled its prior decision in *People v. Craig* (1941) 17 Cal.2d 453, 455, to the extent it held that the separate subdivisions of section 261 do not create separate offenses of rape. (*White*, *supra*, 2 Cal.5th at p. 359.)

In contrast to *White* and *Gonzalez*, in *Vidana* this Court determined that the Legislature sought to create a single offense

in the context of grand theft by larceny (§ 484, subd. (a)) and grand theft by embezzlement (§ 503). (*Vidana*, *supra*, 1 Cal.5th at p. 648.) Historically, embezzlement and larceny were long considered two separate offenses. This treatment changed in 1927 when the Legislature passed numerous and lengthy bills updating the criminal justice system, including amendments to sections 484, 487, and 952, and the enactment of section 490a. (*Id*. at p. 640, citing Stats. 1927, ch. 612, § 1, p. 1043, and Stats. 1927, ch. 619, §§ 1, 4, 7, pp. 1046-1047.) In addressing the effect of these amendments, this Court noted that the two crimes have different elements, neither is a lesser offense of the other, and they are contained in separate Penal Code provisions. (*Id*. at p. 648.) Nonetheless, these facts were not dispositive. Instead, the Court looked to the legislative history to the 1927 amendments, which revealed an intent to consolidate the two forms of theft, as well as the fact that both types of theft generally shared the same punishment. (*Id*. at pp. 648-649.)

Hence, in *Vidana* the Legislature sought to join crimes that were previously separate. In *White*, on the other hand, the Legislature intended to separate that which was formerly interpreted as being one crime.

Previously, before the above trifecta of cases was decided and before section 245 subdivision (a)(1) was parsed into two subdivisions for deadly-weapon and force-likely assaults, this Court declined to determine whether section 245, subdivisions (a)(1) and (a)(2) stated a single offense. (*People v. Milward* (2011) 52 Cal.4th 580, 586.) In *Milward*, the defendant was charged

with assault by a correctional inmate (§ 4500) and aggravated assault under former section 245, subdivision (a)(1). The Court of Appeal rejected the argument that aggravated assault is a lesser offense of assault by an inmate, reasoning that the latter crime could be committed by use of a firearm whereas former section 245, subdivision (a)(1), applied only to assaults with a deadly weapon "other than a firearm"; a prisoner could therefore violate section 4500 by using a firearm, without committing aggravated assault. (*Id*. at p. 584.) This Court reversed. Without reaching the defendant's contention that section 245 subdivision (a)(1) and the assault with a firearm provision of subdivision (a)(2) state a single offense, this Court held that subdivision (a)(1) is a lesser offense of section 4500. (*Id*. at p. 586.) The Court reasoned that the phrase "other than a firearm" contained in section (a)(1) is not an element, and therefore under the elements test that offense is a lesser included offense. (*Ibid*.) In large part, this conclusion was based on the perceived need to avoid the untenable situation in which juries would be unable to convict a defendant under either subdivision (a)(1) or (a)(2) if there was a reasonable doubt as to whether a weapon was a firearm. (*Id*. at pp. 587-588.)

B. The Legislature Intended Assault with a Deadly Weapon to Be Separate From Assault by Means of Force Likely to Produce Great Bodily Injury

Applying the holdings of *Gonzalez*, *White*, and *Vidana* leads to the conclusion that in amending section 245 in 2011, the Legislature demonstrated its intent that assault with a deadly

weapon and assault by means of force likely to produce great bodily injury should henceforth be treated as distinct offenses. The two assault provisions are defined by different elements, listed in different self-contained subparagraphs, punished differently, and found together in a subdivision that includes other assault crimes with separate elements and different punishments.

1. The Two Crimes Have Different Elements

As an initial matter, the two assault offenses in subdivisions (a)(1) and (a)(4) are defined by different elements. As respondent has previously argued in its Answer Brief on the Merits, above all else the statutory framework and historical development of section 245 demonstrate the two types of assault were always intended to have separate elements. (ABM 20-21.) Namely, assault by means of force likely to cause great bodily injury was not originally included in the aggravated assault law, and was only added in 1874 in response to a case in which this Court reversed a murder conviction because the indictment failed to specify a deadly weapon. (ABM 20.) As amended, an aggravated assault could be committed either "'with a deadly weapon or instrument or by any means of force likely to produce great bodily injury.'" (ABM 20; *People v. Emmons* (1882) 61 Cal. 487, 488 [quoting then-existing version of statute]; Code Amends. 1873-1874 (Pen. Code) ch. 614, § 22, p. 428.) If assault by means of force likely to produce great bodily injury were a necessarily included offense back when the two types of assault were first combined in a single offense as alternative elements in 1874, *then*

assault with a deadly weapon would have become entirely redundant. It is axiomatic that the Legislature would not have left assaults with a deadly weapon or instrument in the statute as an alternative means of committing an assault if these concepts were fully contained in the notion of assault by means of force likely to cause great bodily injury.

There are a variety of additional indicia of the Legislature's intent to maintain two separate and alternative types of assault: (1) The Legislature's use of both the words "weapon" and "instrument" reveals an intent to distinguish between inherently and non-inherently deadly items; (2) this Court's decisions have long recognized the distinction between inherently and non-inherently deadly weapons (see *People v. Fuqua* (1881) 58 Cal. 245, 247; *People v. Leyba* (1887) 74 Cal. 407, 408; *People v. Cook* (1940) 15 Cal.2d 507, 516-517; *People v. McCoy* (1944) 25 Cal.2d 177, 188-189; *In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-29; *People v. Perez* (2018) 4 Cal.5th 1055, 1065)—a distinction that reveals the Legislature has created a "meaningful difference" between the two alternative types of assault (*People v. Aguilar*, *supra*, 16 Cal.4th at p. 1030); and (3) this distinction between the two types of assault makes ample sense in light of the nature of what constitutes an assault as well as limitations on a victim's right to respond with deadly force. (ABM 21-33.)

Respondent predicted that appellant would have no response to the elephant in the room—that is, why the Legislature would have retained two different ways of violating the statute when it

amended the provision in 1874 if every assault necessarily required a showing of force likely to produce great bodily injury. (ABM 36.) In her Reply Brief, appellant attempts to take up the challenge:

> 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.

(RBM 40.)

Appellant misses the mark. If the Legislature were writing on a blank slate, her response might provide some rationalization for why the Legislature could choose to have two separate provisions, with assault by means of force likely to cause great bodily injury serving as a lesser offense where there is no extrinsic weapon used, as in *Aguilar*. But of course the Legislature was not writing on a blank slate. The question posed is why the Legislature in 1874 created two alternative means of assault and placed them in the very same statute with the very same punishment if one form of assault was a lesser offense and would swallow the greater in every instance. As to this question, appellant has no response.

This Court's precedent comports with this fundamental principle that the two forms of assault have always included distinct elements. Indeed, *in In re Mosely, supra,* 1 Cal.3d 913, the Court concluded this principle was self-evident and beyond dispute: "The offense of assault by means of force likely to

produce great bodily injury is not an offense separate from—*and certainly not an offense lesser than and included within*—the offense of assault with a deadly weapon." (*Id*. at p. 919, fn. 5, italics added.) Later, in *Aguilar*, this Court explained the reason for this certain and indisputable proposition: "There remain assaults involving weapons that are deadly per se, such as dirks and blackjacks, in which the prosecutor may argue for, and the jury convict of, aggravated assault based on the mere character of the weapon." (*People v. Aguilar*, *supra*, 16 Cal.4th at p. 1037, fn. 10.)

Appellant generally dismisses the significance of this Court's precedent. She claims throughout her Reply Brief on the Merits that this Court's decisions are distinguishable, often rely on dicta, and are not precedential. (E.g., RBM 22.)

Appellant is mistaken. Respondent has previously explained why this Court's multiple statements in *Aguilar* regarding inherently deadly weapons were essential parts of the holding in that case. (ABM 26-28, 37.) Regardless, the question is ultimately one of legislative intent. This Court's consistent pronouncements since 1881 are useful in discerning that intent—irrespective of whether those decisions were based on dicta or were wrongly decided in appellant's view. When the Legislature amended the statutory language 26 times (see ABM 43, fn. 1), and most recently did so in dividing one subparagraph into two in 2011, it must be presumed to have adopted this Court's longstanding construction because the Legislature retained the deadly weapon or instrument language in subdivision (a)(1)

without change. "Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction." (*People v. Harrison* (1989) 48 Cal.3d 321, 329.)

While appellant criticizes this Court's decision in *Aguilar* for improperly relying on cases construing the former robbery statute (ABM 24-25), apparently the Legislature did not share appellant's view; otherwise, it would have altered the deadly weapon or instrument language when it split the crime in two.

Notwithstanding the 26 amendments to the statute, appellant rejoins that that the language has remained "fundamentally unchanged" since 1874 (ABM 27); in a footnote, however, she acknowledges two substantive changes in 1982 and 2011, in which the Legislature split off firearms and assaults by means of force likely to cause great bodily injury (ABM 27, fn. 7). She omits the 1989 amendments, when the Legislature created a separate subdivision for machineguns and assault weapons (discussed further below). In any event, the 2011 amendment, which occurred after *Aguilar*, is sufficient by itself to demonstrate the Legislature's intent to retain the accepted meaning of the now-separate offenses.

As for the principle that *Mosley* found to be so "certainly" true (i.e., that assault by means of force likely to cause great bodily injury was not a lesser offense under the former unified provision), appellant counters by pointing to the decision in *In re Jonathan R.* (2016) 3 Cal.App.5th 963, 975. There, the court

concluded that once the Legislature divided the two types of assault into separate provisions, the reasoning of *Mosley* no longer holds true because the separation created two distinct types of assault. (RBM 14.)

As discussed further below, respondent agrees with *Jonathan R.'s* conclusion that the Legislature created two separate offenses when it moved assault by force likely to cause great bodily injury to subdivision (a)(4). However, as respondent has previously explained (ABM 38-41), nothing in the structure of separating the two alternative assaults into two distinct subdivisions revealed the Legislature sought to alter the elements of either type of assault. To the contrary, retaining those distinctions is wholly consistent with the intent to create two distinct offenses. If the Legislature had intended to alter the elements of assault with a deadly weapon after well over one hundred years, it certainly would have done so expressly. Not only did the Legislature decline to make any textual change in the language of either offense, but the legislative history reveals it specifically did not intend to make any substantive change in the elements. (ABM 34-35.)

Appellant challenges respondent's argument that the use of two distinct terms—"weapons" and "instruments"—provides a textual basis for distinguishing between inherently and non-inherently deadly weapons. Without contesting the current definitions of the terms, she argues that there is no proof these were the same definitions used in the 1800s. (RBM 19.) It is no doubt true that "[w]ords are the product of history and their

meaning may change with time, place and social group." (*Pearson v. State Social Welfare Bd*. (1960) 54 Cal.2d 184, 195.) But it is not enough to note this truism without providing any support that the word "weapon" has evolved or altered, either in denotation or connotation. Weapons have been around since Cain first struck down Abel. There is no reason to believe our view of the word has changed. (See Webster's 1828 Dictionary <http://webstersdictionary1828.com/Dictionary/weapon> [as of May 8, 2020] [defining "weapon" as "Any instrument of offense; any thing used *or designed to be used in destroying or annoying an enemy*. The weapons of rude nations are clubs, stones and bows and arrows. Modern weapons of war are swords, muskets, pistols, cannon and the like"; italics added].)

Finally, the fundamental purpose in distinguishing between inherently and non-inherently deadly weapons lies in defining the point in the continuum of events that will support an assault charge. (*People v. McCoy, supra,* 25 Cal.2d at p. 190 ["The distinction in the classification of weapons to establish commission of the offense within the meaning of section 245 of the Penal Code merely relates to the sufficiency of the evidence to support the charge"].) As respondent has explained, the distinction between inherently deadly weapons and non-inherently dangerous weapons is an important one because it bears upon what additional acts are required, if any, to elevate an assault into an aggravated assault. (ABM 34.)

Appellant questions whether the use of a non-inherently deadly Louisville Slugger should invoke any different treatment

than an inherently deadly blackjack. (RBM 35.) To be sure, there is any number of household items that can be extraordinarily lethal—from chainsaws to icepicks. The difference is that while these instruments may be used in an assaultive manner, there are also benign uses for them as well. In contrast, when a person employs a blackjack or other inherently deadly weapon, there is no innocent explanation; the defendant's intent is clear from the moment the defendant first lays a hand on it. Although appellant regards the distinction as "artificial" (ABM 36), the designation carries significant consequences that relate to the types of responses a victim may make in self-defense. (ABM 34.) The notion that certain types of weapons can affect the determination of when an assault may be said to occur is as correct as it is venerable. (See *People* v. *McCoy*, *supra*, 25 Cal.2d at p. 190.)

This Court has recently recognized that "under current law, some objects, such as dirks and blackjacks, *are* inherently deadly." (*People v. Aledamat* (2019) 8 Cal.5th 1, 16.) In determining the Legislature's intent in splitting off assaults by means of force likely to produce great bodily injury, this correct statement of the law should be dispositive. Under current law, the Legislature had every reason to believe that the elements of the two types of assault are different and that this has long been the case. While this Court went on in *Aledamat* to question as a matter of policy whether this should continue to be the law (*id*. at p. 16, fn. 5), the answer to that as yet unresolved question could not have influenced the Legislature's action in 2011 or its intent

to make two separate offenses. In any event, as respondent has explained (ABM 41-48), to the extent there is any force behind such policy concerns, those are matters best left to the Legislature to decide.

Hence, both types of assault under section 245, subdivisions (a)(1) and (a)(4) have different elements and neither is a lesser offense of the other. Consequently, as in *Gonzalez* and *White*, there is no impediment to concluding that they state different offenses.

2. The Text, Context, and Structure of the Two Provisions Shows an Intent to Differentiate Them

The text, context, and structure of section 245, as it stands today, further signal the Legislature's intent to treat the two provisions as separate offenses.[2] Since 2011, deadly-weapon

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[2] Section 245, subdivision (a) currently reads as follows:

> "(a)(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.
>
> "(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.

(continued…)

assault and force-likely assault have been housed in different self-contained subdivisions among other aggravated assault offenses. As respondent explained in the Answer Brief on the Merits (ABM 20-21), while the Legislature originally enacted a single, unified aggravated assault statute in 1872, in 1982 the Legislature first divided former section 245, subdivision (a), into separate subparagraphs: Subdivision (a)(1) proscribed assault with a deadly weapon other than a firearm or by force likely to produce great bodily injury, while subdivision (a)(2) prohibited assault with a firearm. (Stats. 1982, ch. 136, § 1, at p. 437.) In 1989, the Legislature divided subdivision (a)(1) further, adding subdivision (a)(3), which covered assault with a machinegun or assault weapon. (Stats. 1989, ch. 18, § 1.)

In 2000, Proposition 21 added section 1192.7, subdivision (c)(31), which designated assault with a deadly weapon as a "serious felony" for the purposes of recidivist sentence

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(…continued)

> "(3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 16880, or an assault weapon, as defined in Section 30510 or 30515, or a .50 BMG rifle, as defined in Section 30530, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.
>
> "(4) Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment."

enhancements. (Initiative Measure, Prop. 21, § 17, approved March 7, 2000.) As a result, a prior conviction of assault with a deadly weapon could result in a doubled sentence or an indeterminate term of 25 years to life, in addition to an enhancement of five years. (See § 667, subds. (a), (b)–(i).) By contrast, force-likely assault remained—and still remains—a non-serious felony without any of those weighty potential penal consequences.[3]

After Proposition 21, our courts struggled to ascertain whether a defendant's violation of former section 245, subdivision (a)(1), counted as a serious felony, since that subdivision encompassed both assault with a deadly weapon and force-likely assault. (See, e.g., *People v. Winters* (2001) 93 Cal.App.4th 273, 275.) In 2011, our Legislature solved this problem by removing assault "by means of force likely to produce great bodily injury" from subdivision (a)(1) and instead creating a new and separate subdivision (a)(4) for such assaults. (Stats. 2011, ch. 183, § 1.) The express "purpose of this change was to permit a more efficient assessment of a defendant's prior criminal history since an assault with a deadly weapon qualifies as a 'serious felony'. . . , while an assault by force likely to produce great bodily injury does not." (*People v. Brown* (2012) 210 Cal.App.4th 1, 5, fn. 1,

[3] A section 245, subdivision (a)(4), conviction could constitute a serious felony if a defendant *actually* inflicted great bodily injury in the course of committing his offense. (See § 1192.7, subd. (c)(8).)

citing Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 1026 (2011–2012 Reg. Sess.) as introduced Apr. 26, 2011.)

Thus, since 2011, section 245, subdivision (a), has included four distinct assault offenses in four separate subdivisions. Subdivision (a) as it now reads stands in contrast to subdivision (c) of section 245, which continues to proscribe aggravated assaults on peace officers in a single, undifferentiated subdivision. (See *In re C.D.* (2017) 18 Cal.App.5th 1021, 2029 [noting there was no need to similarly amend § 245, subd. (c), because an aggravated assault against a peace officer is a serious felony and qualifies as a "strike" regardless of whether a deadly weapon was used under section § 1192.7, subd. (c)(31)].)

3. The Two Crimes Have Differing Punishments

Third, deadly-weapon assault and force-likely assault carry varying punishments. Most notably, a felonious assault with a deadly weapon is a "serious" offense under section 1192.7, subdivision (c)(31), while force-likely assault is excluded from the same recidivist sentencing scheme. It would thus offend both the anti-absurdity maxim of statutory construction and common sense to conclude that the Legislature viewed two offenses as one and the same, while simultaneously labeling one as "serious"—with a host of penal consequences—and another as a standard felony devoid of those consequences. (See *White, supra,* 2 Cal.5th at p. 358 [in holding Legislature intended to create separate rape offenses, Court noted different punishments for different provisions].)

4. The Remaining Subdivisions of Section 245 Also Have Different Elements and Punishments

Fourth, the remaining subparagraphs of subdivision (a)—subdivisions (a)(2) and (a)(3)—are likewise self-contained crimes with separate punishments and elements.

a. Assault with a Firearm Is Not a Greater Offense of Assault with a Deadly Weapon

As this Court concluded in *Milward*, the very reason that the Legislature amended the aggravated assault statute in 1982 to create subdivision (a)(2) was to require a minimum punishment of six months' imprisonment in county jail for aggravated assaults committed with a firearm (§ 245, subd. (a)(2)), but not for aggravated assaults committed by other means (§ 245, subd. (a)(1)). (*Milward*, *supra*, 52 Cal.4th at p. 585.)

While it is true that firearms can be considered a type of deadly weapon (see *Milward*, *supra*, 52 Cal.4th at p. 584), it does not follow that assaults with a firearm under subdivision (a)(2) are greater included offenses of assaults with a deadly weapon or instrument under subdivision (a)(1).[4] Indeed, this was the very question the Court specifically declined to answer in *Milward* even after holding that assaults with deadly weapons include firearms and the phrase "other than a firearm" is not an element

[4] Nor could assaults with firearms be said to be lesser offenses. It would have been odd for the Legislature to have created a lesser offense that was purposefully designed to have a *more severe* punishment than the putative greater offense.

of subdivision (a)(1). (*Milward*, *supra*, 52 Cal.4th at p. 586.) And appropriately so.

In determining whether one offense is a lesser offense of another, the question is examined in the abstract. (ABM 19.) For instance, in *People v. Montoya* (2004) 33 Cal.4th 1031, the Court relied on the following hypothetical to show that unlawfully taking a vehicle (Veh. Code, § 10851) was not a lesser offense of carjacking (§ 215):

> Joe knows that his neighbor Mary's car has been stolen and that she is offering a reward for its return. If Joe spots an unfamiliar person driving Mary's car and orders that person out at gunpoint and then drives off, intending to return the car to Mary and secure the reward, he would be guilty of carjacking but not of an unlawful taking of a vehicle. Although Joe had the intent to deprive the *driver* of possession, as required for carjacking (§ 215), he lacked the intent to deprive the *owner* of title or possession, as required for unlawful taking of a vehicle (Veh. Code, § 10851).

(*Id.* at p. 1035.) The likelihood or frequency of such a scenario was never in question in *Montoya*. Instead, the question of whether one offense is a lesser included offense of another is examined as an abstract proposition and a matter of logical possibility.

When a firearm is used as an instrument to fire a projectile, it is of course a deadly weapon. It is, however, an open question whether firearms may be considered inherently deadly—that is deadly under "the ordinary use for which they are designed." (*People v. Aguilar, supra,* 16 Cal.4th at p. 1029.) Clearly, they may be used for non-deadly pursuits, such as skeet shooting or biathlon skiing—both Olympic sports. Accordingly, at least one

early appellate decision concluded it is necessary to look to the manner in which the gun is used, rather than rely on its inherently dangerous character as a matter of law. (See *People v. Simpson* (1933) 134 Cal.App. 646, 651 ["Ordinarily the manner in which a rifle is used determines whether it is a deadly weapon in the accomplishment of an assault. Usually it becomes a mixed question of law and fact to be decided by the jury under proper instructions"].) Other courts and commentators, perhaps focusing on the realities of gun violence in America, have concluded that "'[f]irearms used as such are obviously or inherently deadly weapons.'" (See *People v. Mosqueda* (1970) 5 Cal.App.3d 540, 544, fn. 1, quoting 1 Witkin, Cal. Crimes (1963), § 266, pp. 251-252; cf. *People v. Graham* (1969) 71 Cal.2d 303, 327 [concluding 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" for purposes of former robbery statute]; *People v. Dixon* (2007) 153 Cal.App.4th 985, 1002 [interpreting § 12022, court concluded, "One cannot commit an offense by personally using a firearm and not at the same time commit an offense by personally using a deadly weapon"].)

Regardless of whether a firearm is considered inherently deadly, this is not the case if the firearm is inoperable or unloaded. The very design of a firearm requires it to be operational by firing a projectile when a trigger is pulled. Where it is not operational, either because it is broken, jammed, or otherwise defective, it no longer functions according to design and

is no longer necessarily deadly as a matter of law. (*People v. Mosqueda, supra*, 5 Cal.App.3d at p. 544, fn. 1 ["unloaded firearms cannot be used as such and arguably are not inherently deadly weapons"]; *People v. Brookins* (1989) 215 Cal.App.3d 1297, 1307 ["an unloaded firearm not used as a bludgeon meets neither definition and hence is not a deadly weapon"].) Consistent with this conclusion, courts of this State have long held that pointing an unloaded firearm at someone, without more, does not constitute an assault. (See, e.g., *People v. Penunuri* (2018) 5 Cal.5th 126, 147 ["'A long line of California decisions holds that an assault is not committed by a person's merely pointing an (unloaded) gun in a threatening matter at another person'"]; *People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6; *People v. Lee Kong* (1892) 95 Cal. 666, 669.) Although these decisions often focus on the lack of a present ability to commit an assault (§ 240; see *People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Sylva* (1904) 143 Cal. 62, 64; *People v. Lee Kong*, *supra*, 95 Cal. at p. 669), the principle nonetheless remains that a firearm is not deadly under these circumstances.

Even when unloaded, a firearm can still constitute a deadly weapon depending upon the manner and circumstances in which it is used, as for example where it is used as a bludgeon to pistol whip someone. (*People v. Fain*, *supra*, 34 Cal.3d at p. 357, fn. 6; *People v. Miceli* (2002) 104 Cal.App.4th 256, 270; *People v. Mosqueda*, *supra*, 5 Cal.App.3d at p. 544.) When it is used as a non-inherently deadly striking instrument rather than a gun, its character as a deadly weapon will appropriately depend on "the

nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*People v. Aguilar, supra,* 16 Cal.4th 1023, 1029.) If an unloaded or nonfunctional firearm is used to poke or strike someone on the legs, rather than as a bludgeon, then it would not be a deadly weapon. (See *In re B.M.* (2018) 6 Cal.5th 528, 530 [to qualify as a deadly weapon based on how it was used, the defendant "must have used the object in a manner not only capable of producing but also *likely to produce* death or great bodily injury"]; *People v. Orr* (1974) 43 Cal.App.3d 666, 672 [pointing an unloaded firearm at someone without attempting to use it as a bludgeon is not an assault with a deadly weapon].)

Although not a deadly weapon if used in this manner, a firearm would, however, continue to be a firearm. (*People v. Steele* (1991) 235 Cal.App.3d 788, 794 ["A firearm does not cease to be a firearm when it is unloaded or inoperable"]; *People v. Miceli*, *supra*, 104 Cal.App.4th at p. 270 ["When a clip is removed from a semiautomatic firearm, the firearm does not suddenly become a billy club, a stick, or a duck"]; cf. *People v. Nelums* (1982) 31 Cal.3d 355, 360 [inoperable firearm may be sufficient for firearm enhancement under section 12022, subdivision (a), if the weapon was designed to shoot and gave the reasonable appearance of a shooting capability].) Accordingly, even a less-than-deadly touching such as a poke on the legs with a non-loaded or non-functioning gun would constitute an assault with a firearm under subdivision (a)(2), even if it would not be an assault with a deadly weapon under subdivision (a)(1) or an

assault by means of force likely to produce great bodily injury under subdivision (a)(4).

The longstanding rule that a firearm must be loaded and functioning in order for there to be a present ability to commit an assault has been subject to criticism. (*People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 542, fn. 10 ["This 'operability' requirement is an anachronism which is incompatible with the realities of a society in which the unlawful use of guns is a major and continuing problem, and in light of the fact . . . that both replica guns and real but unloaded or otherwise inoperable guns pose to those threatened with them . . . an identical sense of dread as does a loaded gun, as well as raising an identical likelihood of a deadly response . . . ."]; see *Rodriguez*, *supra*, 20 Cal.4th at p. 11 fn. 3 [finding it unnecessary to address the continuing vitality of the rule].)

To the extent that the rule survives, the Legislature's amendments in 1982 to add assault with a firearm as a separate offense may be seen as an effort to mitigate the effects of this rule by providing that otherwise simple assaults would count as aggravated assaults when committed with firearms, even if those firearms are unloaded or nonworking. This would comport with the unassailable truth that firearms, even when they do not constitute deadly weapons, may still cause both increased fear and an escalation of reactions by the assaulted victim, including resorting to using deadly weapons in self-defense. (See ABM 33 [noting limitations on the use of deadly force in self-defense].) It would also avoid the potential specter of redundancy between

assaults with deadly weapons and assaults with firearms. (*People v. Aguilar*, *supra*, 16 Cal.4th at p. 1023 ["if 'deadly weapon' is separated from 'other than a firearm,' then the weapon clause of section 245, subdivision (a)(1), would include assault with a firearm and thus render subdivision (a)(2) of section 245 a redundancy, a result we strive to avoid under recognized canons of construction"].) Even if not a deadly weapon either by use or design, an assault with a non-loaded or non-functioning firearm remains worthy of increased punishment. (See generally *People v. Nelums*, *supra*, 31 Cal.3d at p. 360 [interpreting firearm enhancement under § 12022, subd. (a), as not requiring an operable firearm, Court reasoned that "Similar and substantial risks of harm by a resisting victim or third person exist whether or not the offender's firearm is operable"].) To the extent this Court concludes that assault with a deadly weapon or instrument is a lesser offense of assault with a firearm, it should only do so if the Court also reevaluates the longstanding rule that assault with a firearm requires a loaded and functioning weapon. Any other conclusion would be at odds with the dangers posed by firearms and the Legislature's purpose in separating such assaults for increased punishment.

b. Assault with a Machinegun or Assault Weapon Is Not a Greater Offense of Assault with a Firearm or Assault with a Deadly Weapon

A similar analysis applies to the creation of the separate provision for assault with a machinegun or assault weapon under subdivision (a)(3). Assaults with either of these weapons increase

the punishment from 2, 3, or 4 years, to 4, 8, or 12 years. (§ 245, subd. (a)(3).) At first blush, it might appear that an assault with a firearm under (a)(2) would be a lesser offense, because every machinegun or assault weapon would certainly seem to be a type of firearm. But the Legislature chose its definitions very carefully and did so by incorporating specific Penal Code provisions, including section 16880, into the definition of weapons subject to subdivision (a)(3). Naturally, a machinegun includes "any weapon that shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." (§ 16880, subd. (a).) This definition is what normally comes to mind when one thinks of that term.

But the legal definition is also broader. The term "also includes the frame or receiver of any weapon described in subdivision (a), any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if those parts are in the possession or under the control of a person." (*Ibid.*, subd. (b).) Under this expanded definition, even a part of a machinegun is considered a machinegun. (See generally *People v. Tallmadge* (1980) 103 Cal.App.3d 980, 987-988 [machinegun receiver qualified as a machinegun, as did M14 rifle even though it was disassembled].) Thus, it would be possible to assault someone with a firing pin or machinegun frame, and such an assault would violate subdivision (a)(3). On

the other hand, a mere part of a machinegun would not constitute a firearm, which has no similar expanded legal definition under subdivision (a)(2).

Thus, each subparagraph of section 245 "sets forth all the elements of a crime" and "each prescribes a specific punishment," which is not always the same. (*Gonzalez*, *supra*, 60 Cal.4th at p. 539; see also *White*, *supra*, 2 Cal.5th at p. 354.) Given that all of the different forms of assault under section 245, subdivision (a), are now contained in separate provisions, it follows that they state different offenses. Any other conclusion would fail to give adequate meaning to the Legislature's act of separating out the alternative forms of assault contained in former subdivision (a)(1). Even when the deadly-weapon and force-likely alternatives were combined in a single provision as one offense, this Court not only allowed, but encouraged lower courts to designate which theory was the basis for a conviction. (*In re Mosley*, *supra*, 1 Cal.3d at p. 919, fn. 5 ["This is not to say, of course, that a judgment may not properly specify which of the two categories of conduct prohibited by section 245 (i.e., assault (1) with a deadly weapon or instrument, or (2) by means of force likely to produce great bodily injury) was involved in the particular case. We believe that such a finding should be made for the benefit of probation and correction officials who may, as the instant case tends to indicate . . . , attach significance thereto"].) By placing them in separate provisions, the Legislature went a step further and signaled its intent to make them separate offenses.

C. This Court Need Not Examine the Legislative History Behind the 2011 Amendments, Which, in Any Event, Demonstrates an Intent to Create "Distinct" and Separate Offenses

Because the statutory structure and language of section 245 is clear, it is unnecessary to resort to legislative history to determine whether the four separate subparagraphs of section 245, subdivision (a), were intended to be four separate offenses. To the extent it is appropriate to turn to historical materials, such a review should not be confined to the 2011 amendments, but should extend as well to the very first division of the subdivision in 1982. Finally, while the legislative history behind the 2011 amendments is ambiguous, it nonetheless reveals a clear intent to make "distinct" assault provisions, which is the essence of an intent to create separate offenses under section 954.

1. It Is Not Necessary to Turn to Legislative History

As the *Jonathan R.* court summarized, the change in the statute's structure demonstrates that "section 245 now specifies four different crimes, each with its own elements and range of punishments." (*Jonathan R.*, *supra*, 3 Cal.App.5th at p. 968.) In reaching this conclusion, the *Jonathan R.* court relied largely on this Court's decision in *Gonzalez*, which based its decision on the facts that each of the subdivisions of section 288a differ in their necessary elements, each subdivision is self-contained, and each prescribes different punishment. (*Id.* at p. 970, citing *Gonzalez*, *supra*, 60 Cal.4th at p. 539.) The *Jonathan R.* court determined that section 245 is indistinguishable from the structure of section

288a, and therefore *Gonzalez* compelled the conclusion that each subdivision stated a different offense. (*Id*. at p. 970.) Having reached this conclusion, the court declined to consider the minor's argument that the legislative history behind the 2011 amendments to section 245 evinced a contrary intent. As the court reasoned, consideration of such extrinsic evidence was inappropriate where the language of the statute was clear:

> Under *Gonzalez*, this statutory structure was held to be an element of the plain language of the statute, and that language was held to be unambiguous in creating separately convictable offenses. Given the absence of ambiguity, expressions of intent in a statute's legislative history are irrelevant to its interpretation.

(*Id*. at p. 971.)

Some lower courts have reached a contrary result, concluding that assault with a deadly weapon and assault by means of force likely to produce great bodily injury continue to state a single offense even though they are now codified in different subdivisions. (See *People v. Brunton* (2018) 23 Cal.App.5th 1097, 1106-1107; *People v. Cota* (2020) 44 Cal.App.5th 720, 729, rev. granted & held pending present case, April 22, 2020, case no. S261120.) In *Brunton*, the court disagreed with the emphasis *Jonathan R.* placed on the statutory structure. Relying on the intervening decision in *Vidana*, the *Brunton* court concluded it was appropriate to consider the legislative history when interpreting whether the Legislature intended to create two offenses where there was formerly only one. That legislative history, according to the *Brunton* court, demonstrated that the Legislature did not intend to overturn the

longstanding judicial construction that the two alternatives made only one offense: "the Legislature made clear it was making only 'technical, nonsubstantive changes' to section 245 (Legis. Counsel's Dig., Assem. Bill No. 1026 (2011–2012 Reg. Sess.)) to provide clarity for purposes of recidivist enhancements—it was not 'creat[ing] any new felonies or expand[ing] the punishment for any existing felonies' (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1026 (2011-2012 Reg. Sess.) as introduced Feb. 18, 2011, p. 3)." (*Brunton*, *supra*, at p. 1107.)

As an initial matter, the *Jonathan R.* court was correct that there is no need to go beyond the structure of section 245 and look to outside resources such as legislative history where the very reason for the restructuring of the statute demonstrates an intent to create two separate offenses. While it is true that in *Vidana* this Court found it appropriate to look to the legislative history of the 1927 amendments in construing the Legislature's intent to consolidate the various forms of theft, the circumstances of the two cases are readily distinguishable. The statutory structure defining the theft offenses in *Vidana* was admittedly abstruse, justifying the exploration of the legislative materials there. For example, larceny and embezzlement existed in different parts of the Penal Code, but were also combined into one subsection elsewhere in the Penal Code (see *Vidana*, *supra*, 1 Cal.5th at pp. 644-647); moreover, a literal application of one provision, section 490a, would have rendered "many statutes nonsensical" (*id.* at p. 647). Here, no such uncertainty exists. Unlike the circumstances before this Court in *Vidana*, nothing in

the language or structure of the Penal Code suggests that after the 2011 amendments these two assault crimes constitute the same offense. On the contrary, the corresponding sentencing statutes indicate an unequivocal intent to treat these two types of assaults as different and distinct crimes.

Resort to legislative history as an aid in ascertaining legislative intent is appropriate only if the statutory language is susceptible of more than one reasonable construction. (*Gonzalez*, *supra*, 60 Cal.4th at pp. 537-538; *People v. Robles* (2000) 23 Cal.4th 1106, 1111.) In *Gonzalez*, this Court did not find it necessary to rely on legislative history, and instead based its holding solely on the text and structure of section 288a. (*Gonzalez*, *supra*, 60 Cal.4th at p. 539.) So, too, here, based on the structure of section 245 there is nothing ambiguous with whether the separate subdivisions establish separate offenses. Accordingly, it is unnecessary to turn to extrinsic interpretive aids.

2. Any Resort to Legislative History Should Begin with the 1982 Amendments

It is important to construe section 245, subdivision (a), together as a whole. After all, it would be remarkable if the Legislature intended some of the subparagraphs in that provision to constitute separate offenses, while allowing other seemingly equal subparagraphs to stand as different statements of the same offense. Hence, to the extent it is appropriate to review legislative materials, any such review should include the early history behind the first amendments in 1982.

An Assembly Committee bill analysis of A.B. 846, which added the 1982 amendments to section 245, provides unmistakably that the act would create a "new crime," which would "no longer be a lesser included offense" of the aggravated assault provision of former unified subdivision (a). (Ass. Comm. on Criminal Justice Bill Analysis of A.B. 846 (4/27/1981) at p. 3.)[5] As a result, the report went on to question whether this amendment could result in unnecessary dismissals where proof of the use of a firearm is lacking. (*Ibid.*)

The Legislature was somewhat less certain regarding the effect of the 1989 amendments, which added subdivision (a)(3) to separate out assaults by machineguns and assault weapons. According to the Legislative Counsel's Digest, "To the extent that the bill would create a new crime, the bill would impose a state-mandated local program." (Legis. Counsel's Dig. S.B. 292, Stats. 1989 Summary Dig., p. 17; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1129, fn. 4 [summary digests of Legislative Counsel are properly considered by an appellate court without need for judicial notice].) This uncertainty, however, reflects nothing more than the reality that "[t]he courts, not the Legislature, have generally interpreted, applied, and reconciled sections 654 and 954." (*White*, *supra*, 2 Cal.5th at p. 360.) Consequently, "[l]egislative inaction in this regard most likely indicates a willingness to let the courts continue to do so." (*Ibid.*)

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[5] Respondent will file a separate request for judicial notice of the 1982 legislative history.

3. The 2011 Amendments Demonstrate an Intent to Create Distinct Offenses

Contrary to the conclusion reached in *Brunton*, the legislative committee materials from 2011 do not evince an intent to treat the two assault subdivisions of (a)(1) and (a)(4) as being different statements of a single offense. To the contrary, those materials reveal the Legislature intended that the amendments would split "an ambiguous code section into two *distinct* parts." (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1026 (2011-2012 Reg. Sess.) as introduced Feb. 18, 2011, p. 3, italics added, quoted in *Brunton*, *supra*, 23 Cal.App.5th at p. 1105.) While the *Brunton* court underscored other statements that the amendments made only "'technical, nonsubstantive changes' to section 245" and that they were not "'creat[ing] any new felonies or expand[ing] the punishment for any existing felonies'" (*Brunton*, *supra*, at p. 1107), none of these statements is contrary to an intent to create separate criminal offenses.

Indeed, this Court employed similar language when rejecting the defendant's argument in *White* that the rule of lenity required the Court to adopt an interpretation of the statute most favorable to the defendant: "But our interpretation of section 261 'defines neither a crime nor punishment.'" (*White*, *supra*, 2 Cal.5th at p. 360; see also *ibid*. ["our construction of section 261 has no ex post facto effect. It neither makes criminal an act innocent when committed nor increases the punishment for that act"].)

These considerations apply with particular force in the context of interpreting the aggravated assault statute. The

changes effected by the 2011 amendments did not criminalize any new conduct; assault by means of force likely to produce great bodily injury had already been a felony in this State for well over 100 years. All that the amendment did was make this existing felony separate from the related felony of assault with a deadly weapon—that is, it made the offense "distinct".

Without question, there are few areas of the law that are more technical and opaque than whether two provisions state but a single offense. As explained above, the 2011 statutory amendment did not substantively change the elements of the provisions; it merely reorganized the provisions to more clearly reflect the fact that they were "two distinct parts" that triggered different punishments after Proposition 21. Such changes lie at the very heart of what it means to create separate offenses.

Thus, the statements in the 2011 legislative history are at best ambiguous and stand in sharp contrast to the legislative history this Court found compelling in *Vidana*. The legislative history in *Vidana* expressly confirmed that the amendment there "'consolidate[d] the present crimes known as larceny, embezzlement and obtaining property under false pretenses, *into one crime*, designated as theft.'" (*Vidana*, *supra*, 1 Cal.5th at p. 648, quoting legislative history, italics added.) Here, the 2011 legislative history not only lacks such an explicit statement, it reveals the Legislature's desire to identify the different provisions as *distinct* offenses.

In *White*, this Court observed that the legislative history did not reveal that the Legislature specifically addressed the

question of multiple convictions. (See *White*, *supra*, 2 Cal.5th at p. 358 [noting nothing in the legislative history revealed Legislature ever considered, or expressed an intent regarding, whether a person may suffer multiple convictions of the separate subdivisions of the various sex offenses].) Nonetheless, this Court found an overarching intent to treat the major sex offenses—rape, oral copulation, sodomy, and foreign object rape—the same. Based on that intent to achieve conformity among these sex offenses, this Court discerned a legislative intent to treat rape cases in a similar fashion to the oral copulation statutes considered in *Gonzalez* notwithstanding some differences in the structure of the two provisions. (*Ibid.*)

So, too, here, it is appropriate for the Court to look to the Legislature's overarching intent in creating four separate subdivisions for aggravated assault. While section 245 does not have any parallel or analogue crimes as in the case of rape, the Legislature's actions in 1982, 1989, and 2011 in breaking the aggravated assault offense into four different subdivisions is entirely consistent with an intent to create four separate crimes that are subject to different penalties. It would be wholly inconsistent to conclude that the Legislature intended to create a separate offense of assault with a firearm, and later assault with a machinegun when it broke out separate subdivisions to cover each, but that the Legislature intended to keep subdivision (a)(4) as a subpart of subdivision (a)(1). If that were the intent, presumably the Legislature would instead have retained

subdivision (a)(1), but divided it into two further subparts—(a)(1)(A) and (a)(1)(B).

Likewise, there would have been no point in breaking aggravated assault into four subdivisions with different punishments if the intent was not to create four separate crimes. The Legislature could have retained a single crime of aggravated assault that would be subject to differing punishments dependent on the circumstances. But if that had been the intent, the statute would have been written substantially differently. The Legislature presumably would have written the statute such that the differences in the assault would be included as either sentence enhancements (as in the case of firearm use enhancements under sections 12022.5 and 12022.53), or perhaps as factors that give rise to alternative sentencing triads (e.g. § 273.5, subd. (f) [increasing sentencing range for persons previously convicted of prior offenses of domestic violence]).

The fact that aggravated assault was a single offense for roughly a century should not be cast lightly aside. The Legislature took affirmative action at three separate times to break that single crime into four separate subparts. These affirmative acts speak for themselves. They are effectively the exact opposite of the Legislature's act of combining the many forms of theft into one crime of larceny, which this Court construed in *Vidana*. In essence, the Legislature changed the *e pluribus unum* situation this Court confronted in *Vidana* into a situation of *ex uno plura*. The very purpose of this change was to create distinct and separate offenses where there was once one.

D. Categorizing the Two Subdivisions as Part of a Single Offense Would Undermine the Very Purpose Behind Separating Them Into Two Distinct Provisions

Concluding that the two assault crimes in section 245, subdivision (a)(1) and (a)(4) are different statements of the same offense would be directly antithetical to the very point in separating them out into distinct subdivisions. As this Court reasoned in *White*, "A jury verdict finding a defendant guilty of a single umbrella crime of rape under section 261 would not include a finding regarding which form of rape was involved. Because of this, providing differing sentencing consequences for some, but not all, of the forms of rape suggests they state different offenses." (*White*, *supra*, 2 Cal.5th at p. 358.) In other words, if the two subdivisions were simply different ways of expressing the same offense, then it would not be necessary to plead the violation of either; it would be enough to allege a violation of section 245, subdivision (a). But this would defeat the very reason for having separate subparagraphs so that the strike consequences could be easily determined at a later date.

This is not to say that determining the subparagraphs of section 245, subdivision (a), to be separate offenses will be free of potentially negative consequences. Because the offenses are not included in each other, it would not be possible to instruct on any uncharged subdivision without amending the pleadings. This consequence, however, flows from the fact that the crimes are not lesser offenses based on the distinct elements of each provision as

they have been defined, rather than as a result of those provisions being labelled as separate offenses.

Second, defendants who violate more than one provision as a result of a single act would potentially receive multiple convictions for the same act. A defendant who, for instance, shoots someone with an assault weapon could potentially be charged and convicted of all four subdivisions. This Court, however, addressed similar concerns in both *White* and *Gonzalez*. While courts were formerly concerned that multiple convictions for a single criminal act would result in multiple punishment, under the modern legal landscape, the question of punishment is addressed under section 654, not under section 954. (See *White*, *supra*, 2 Cal.5th at p. 356 ["when section 654 bars multiple punishment, but section 954 permits multiple convictions, rather than reverse the additional conviction, courts simply stay the punishment for that conviction"]; *ibid*. [citing holding in *Gonzalez*]; see also *People v. Pearson* (1986) 42 Cal.3d 351, 360.) Indeed, it is likely often the case that sexual assault victims who are unconscious will also be drugged or intoxicated. While it is of course possible that a victim will be rendered unconscious through other means (such as a blow to the head), the likelihood of such a scenario does not properly enter into an analysis of whether the two offenses are separate. The question of whether separate convictions are permissible is entirely distinct from whether they are separately punishable.

Nonetheless, the ability to convict a defendant of multiple offenses is grounded in a number of weighty policy concerns.

First, it is important that the defendant's convictions accurately reflect her conduct. Convictions may later be overturned on appeal based on insufficient evidence (such as, perhaps a determination that the defendant did not use a deadly weapon or instrument); or the Legislature may enact laws that retroactively ameliorate punishment. In either situation, the existence of an alternative conviction may prevent the defendant from otherwise escaping justice. (See *People v. Gonzalez* (*Silvestre*) (2008) 43 Cal.4th 1118, 1128-1129 [§ 654 stay procedure "preserv[es] the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence"]; *People v. Niles* (1964) 227 Cal.App.2d 749, 756 [if the trial court "dismisses the count carrying the lesser penalty, and the conviction on the remaining count should be reversed on appeal, the defendant would stand with no conviction at all," which would "risk [] letting a defendant escape altogether"]; *In re Wright* (1967) 65 Cal.2d 650, 655, fn. 4.)

Second, once two provisions are determined to be different statements of the same offense, the jury would be unable to convict the defendant of both. (CALCRIM No. 3516; *Vidana, supra,* 1 Cal.5th at p. 649 [§ 954 does not permit multiple convictions for different statements of the same offense]; see generally, *People v. Allen* (1999) 21 Cal.4th 846, 851; *People v. Jaramillo* (1976) 16 Cal.3d 752, 758-759.) But this creates a particular difficulty where, as here, one of the provisions carries increased punishment potential in the future as a strike. The jury, of course, may not consider punishment. Hence, the jury

would need to be instructed at the outset that if the defendant committed both offenses, then the jury should only return a guilty verdict for the assault with a deadly weapon. The standardized instructions (CALCRIM No. 3516) would have to be modified to reflect these distinctions in potential punishment, otherwise the jury might convict a defendant of only the less serious offense.[6] (See generally § 654; *People v. Kramer* (2002) 29 Cal.4th 720, 723 [court must impose sentence on the count with the longest potential term of punishment, which includes enhancements].)

II. EVEN IF THE TWO SUBDIVISIONS STATE A SINGLE OFFENSE, IT IS NOT NECESSARY TO OVERTURN ONE OF THE CONVICTIONS WHERE APPELLANT COMMITTED TWO SEPARATE ACTS

Even assuming, arguendo, that subdivisions (a)(1) and (a)(4) state a single offense, it is not necessary to reverse one of appellant's convictions. Here, as respondent previously argued in the Answer Brief on the Merits, appellant admitted she committed two separate acts of hitting her father with the bicycle chain. (ABM 54-55.) Accordingly, just as she could have been convicted of two separate counts of either subdivision, so too

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[6] Alternatively, and perhaps more simply, the jury could be allowed to return verdicts on both counts, and the trial court would then be able to determine which count to strike. However, this has not been the existing practice. (See, e.g., *People v. Garza* (2005) 35 Cal.4th 866, 891 [sua sponte duty to instruct jury that it cannot convict defendant of both theft and receiving the same stolen property].) Accordingly, it would be appropriate for this Court to provide guidance so that the standardized instructions may be revised.

could she be convicted of one count of each. It does not matter for purposes of section 954 that she may have committed both assaults pursuant to a single objective and intent. (*Gonzalez*, *supra*, 60 Cal.4th at p. 540.)

Respondent acknowledges that the jury was not given a unanimity instruction. Nonetheless, because there was no reason for the jury to distinguish between the two acts that appellant admitted while testifying, any error was harmless under any possible standard. (ABM 55, citing *People v. Webb* (2018) 25 Cal.App.5th 901, 907; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 188; *People v. Curry* (2007) 158 Cal.App.4th 766, 783-784.)

CONCLUSION

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

Dated: May 22, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 10,763 words.

Dated: May 22, 2020

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/s/ Steve Oetting

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

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 22, 2020, at San Diego, California.

E. Blanco-Wilkins
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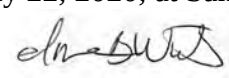

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Oetting, Steve (142868)

Last Name, First Name (PNum)

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