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In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **YAZAN ALEDAMAT,** **Defendant and Appellant.**	Case No.

Second Appellate District Division Two, Case No. B282911
Los Angeles County Superior Court, Case No. BA451225
The Honorable Stephen A. Marcus, Judge

PETITION FOR REVIEW

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
MICHAEL R. JOHNSEN
Deputy Solicitor General
TIMOTHY L. O'HAIR
Deputy Attorney General
State Bar No. 309517
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6119
Fax: (213) 897-2806
Email: DocketingLAAWT@doj.ca.gov
Timothy.OHair@doj.ca.gov
Attorneys for Plaintiff and Respondent

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PETITION FOR REVIEW

The People of the State of California respectfully petition for review of the decision by the Court of Appeal, Second Appellate District, Division Two, filed on March 1, 2018, in *People v. Aledamat* (B282911), reversing defendant Yazan Aledamat's conviction on the basis of instructional error that it determined to be prejudicial. (Cal. Rules of Court, rule 8.500; see Exh. A, Typed Opn.)

ISSUE PRESENTED FOR REVIEW

Is an error in instructing the jury on both a legally correct theory of guilt and a legally incorrect one harmless if an examination of the record permits a reviewing court to conclude beyond a reasonable doubt that the jury based its verdict on the valid theory, as held in *People v. Brown* (2012) 210 Cal.App.4th 1 and other cases, or is the error harmless only if the record affirmatively demonstrates that the jury actually rested its verdict on the legally correct theory, as other courts, including the Court of Appeal in this case, have held?

INTRODUCTION

In *People v. Guiton* (1993) 4 Cal.4th 1116, this Court reserved the question of what standard of harmlessness applies where a jury has been instructed alternatively on legally correct and legally incorrect theories of guilt. (*Id*. at p. 1130.) It observed that "[s]ometimes it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory," but also noted that "[t]here may be additional ways by which a court can determine that error in [this] situation is harmless. We leave the question to future cases." (*Ibid*; see also *People v. Chun* (2009) 45 Cal.4th 1172, 1203-1205 [noting reservation of the issue

and applying a slightly different standard but again declining to hold "that this is the only way to find error harmless"].)

In this case, the Court of Appeal determined in its published decision that the trial court instructed the jury on both a legally correct theory of guilt and a legally incorrect one—a determination respondent accepts for present purposes. (Opn. at pp. 4-6.) It went on to hold that "we must vacate the assault conviction because there is no basis in the record for concluding that the jury relied on the" legally correct theory. (Opn. at p. 6.) The court interpreted that standard to require an affirmative indication that the jury actually employed the valid theory in reaching its verdict, which is absent in this case. (Opn. at pp. 5-6.) The court noted, however, that such an approach is "arguably in tension with more recent cases" that have declined to employ stringent harmlessness standards and have instead tested for prejudice by looking to the whole record—and the court acknowledged that such a test "would certainly be satisfied here" since the valid theory was not in dispute and the evidence overwhelmingly supported it. (Opn. at pp. 6-7.) But, the court concluded, "[a]ny revisiting or reconsideration of [the appropriate standard] is for our Supreme Court, not us." (Opn. at p. 7.)

Other Courts of Appeal have reached a similar conclusion regarding the harmlessness standard to be applied where a legally incorrect alternative theory of guilt is proffered to the jury. (See *People v. Sanchez* (2001) 86 Cal.App.4th 970, 981-982; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1239.) But some courts have reached a different conclusion, affirming where the record as a whole leaves no reasonable doubt that the jury relied on the valid theory. (See *People v. Flores* (2016) 2 Cal.App.5th 855, 879-882; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1245-1246; *People v. Brown* (2012) 210 Cal.App.4th 1, 11-14.) Squarely in conflict with the decision below is *People v. Brown*, in which the Court of Appeal found the

same type of alternative-legal-theory error but affirmed because the strength of the evidence and the arguments of counsel showed beyond a reasonable doubt that the jury based its verdict on the valid theory. (*Brown*, *supra*, 210 Cal.App.4th at pp. 11-13.)

As the court below noted, the more stringent harmless error approach it took—requiring an affirmative showing that the jury actually relied on the valid theory—may be in tension with cases decided since *Guiton* that have abandoned such inflexible standards. In *People v. Merritt* (2017) 2 Cal.5th 819, for example, this Court recently overruled prior precedent in holding that the failure to instruct entirely on any elements of the charged offense was amenable to harmlessness review based on an examination of the whole record. (*Id*. at pp. 825-833; see also *People v. Breverman* (1998) 19 Cal.4th 142, 164-178 [abandoning former rule of near-automatic reversal, like the one employed in *Guiton*, for failure to give lesser-included offense instructions].) It would be, at the least, anomalous to treat the type of error in this case, where the jury was correctly instructed on the charged offense but also given an incorrect alternative theory, more harshly than the serious type of error at issue in *Merritt*, where the only theory of guilt put to the jury was legally defective. (See *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 61 [finding alternative-legal-theory error non-structural and noting that a contrary approach "reduces to the strange claim that, because the jury received both a 'good' charge and a 'bad' charge on the issue, the error was somehow more pernicious than where the only charge on the critical issue was a mistaken one" (quotation marks, ellipses, and citations omitted)].)

The Court should grant review to settle this important question of law that has produced conflicting results in the Courts of Appeal.

STATEMENT OF THE CASE

Yuridia Gonzalez and her husband Francisco Baez Bautista worked at a lunch truck. (RT 326, 334.) Prior to October 22, 2016, defendant Yazan Aledamat had stopped by the lunch truck three to four times. On one occasion, he told Gonzalez that she was attractive. Two days later, defendant asked for her phone number. Gonzalez told him that she was married and had kids. He told her that he did not care. (RT 327-329.)

On October 22, 2016, only Bautista was at the lunch truck. (RT 331-332.) Defendant approached him and asked for Gonzalez. (RT 336.) Bautista asked why he was looking for her, and defendant responded, "she had a big ass" and he "wanted to . . . fuck her." (RT 337, 352.) Bautista, surprised by what defendant said about his wife, turned around and took off his apron. (RT 340, 353.) Suddenly, defendant pulled a box cutter knife from his right pocket. (RT 340-341, 370.) The blade of the knife was out. (RT 384.) From three or four feet away, defendant thrust the knife straight out. (RT 341-342.) He told Bautista, "I'm going to kill you." (RT 360, 382.) Bautista was afraid. (RT 344.)

The Los Angeles County District Attorney charged defendant with assault with a deadly weapon (Pen. Code, § 245, subd. (a)) and criminal threats (Pen. Code, § 422, subd. (a)) and further alleged that he used a deadly and dangerous weapon in the commission of both offenses (§ 12022, subd. (b)(1)). (CT 20-24.) At defendant's trial, the court instructed the jury on the elements of assault with a deadly weapon (Pen. Code, § 245, subd. (a)). (RT 632-635; CT 58.) Among other things, the court informed the jury, "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." (RT 634-635.) The court gave a similar instruction for the weapon enhancement: "A deadly or dangerous weapon is any object, instrument, or

weapon that is inherently … dangerous, or one that is used in such a way that it is capable of causing or likely to cause death or great bod[il]y injury." (RT 637; CT 59-60.)

In her argument to the jury, the prosecutor classified the box cutter as a deadly weapon:

> Ladies and gentlemen, you wouldn't want your children using a box cutter, would you? This is a deadly weapon. If used in a way to cause harm, it would cause harm. It's not whether he did cause harm; it's could he; could he have caused harm with that box cutter? The answer: absolutely.

(RT 640-641.) During her rebuttal argument, the prosecutor stated, "As I said before, you wouldn't want your children playing with this (indicating). It's inherently a deadly weapon. It's by definition the reason this law was created." (RT 662.)

The jury convicted defendant as charged. (CT 68-69.)

On appeal, defendant argued that the trial court had wrongly instructed the jury that a "deadly weapon" includes an "inherently deadly" weapon because a box cutter is not an inherently deadly weapon as a matter of law. (Opn. at p. 2; see *People v. McCoy* (1944) 25 Cal.2d 177, 188.) In a published opinion, the Court of Appeal agreed that this was a legally invalid alternative theory of guilt. (Opn. at pp. 5-6.) It further concluded that the error compelled reversal, despite "overwhelming" and "uncontested" evidence in support of the legally valid theory, "because there is no basis in the record for concluding that the jury relied on the alternative definition of 'deadly weapon' (that is, the definition looking to how a non-inherently dangerous weapon was actually used)." (Opn. at p. 6.) The court construed this harmlessness standard to mean that the necessary basis in the record to support affirmance "exists only when the jury has *actually* relied upon the valid theory even if the evidence

supporting the valid theory was overwhelming." (Opn. at p. 5, quotation marks and citations omitted.)

The court observed that this strict approach to harmlessness appeared to be "in tension" with recent precedent finding harmless error where a trial court entirely failed to instruct on the elements of the crime but the evidence supporting the omitted elements was "uncontested" and "overwhelming"—an approach in which the harmlessness test "would certainly be satisfied here" in light of the overwhelming evidence on the valid theory of guilt. (Opn. at p. 6, citing *People v. Merritt*, *supra*, 2 Cal.5th 819.) Nevertheless, the court concluded it was bound by the more rigid harmless error test as it understood it and that "[a]ny revisiting or reconsideration of this case law is for our Supreme Court, not us." (Opn. at pp. 6-7.)

REASONS FOR GRANTING REVIEW

REVIEW IS NEEDED TO RESOLVE A QUESTION THAT THIS COURT HAS LEFT OPEN AND THAT HAS LED TO CONFLICTING DECISIONS IN THE COURTS OF APPEAL CONCERNING HOW HARMLESSNESS SHOULD BE ASSESSED WHERE A JURY HAS BEEN INSTRUCTED ON BOTH A LEGALLY CORRECT THEORY OF GUILT AND A LEGALLY INCORRECT ONE

Review should be granted to address what the proper harmlessness analysis should be where a jury is instructed alternatively on legally valid and legally invalid theories of guilt. The question is an important and recurring one that remains unresolved by this Court's precedents and that has led to conflicting decisions in the Courts of Appeal. This case squarely presents the issue and demonstrates the ill consequences of the restrictive harmless error approach that the Court of Appeal below felt bound to take.

A. This Court's cases have not reached any firm conclusion about the appropriate harmless error analysis

In *People v. Green* (1980) 27 Cal.3d 1, this Court held that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*Id*. at p. 69.) After reviewing the record, the Court in *Green* reversed because "[w]e simply cannot tell from this record which theory the jury in fact adopted." (*Id*. at pp. 71-74.) Subsequently, in *People v. Guiton* (1993) 4 Cal.4th 1116, the Court made a distinction between cases in which the incorrect alternative theory is factual in nature and those in which it is legal in nature, holding that where the incorrect theory is a factual one, as it was in that case, the harmlessness of the error is assessed by looking to the entire record, including "the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict." (*Id*. at pp. 1128-1130.) The Court went on to observe that, in cases involving a legally incorrect alternative theory,

> the general rule has been to reverse the conviction because the appellate court is unable to determine which of the prosecution's theories served as the basis for the jury's verdict. But even this rule has not been universal. One way of finding this kind of error harmless has long been recognized. Sometimes it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on the proper theory. [¶] There may be additional ways by which a court can determine that error in the *Green* situation is harmless. We leave the question to future cases.

(*Id*. at pp. 1130-1131, quotation marks and citations omitted.)

More recent erroneous-alternative-legal-theory cases have not firmly settled on a particular analysis. In *People v. Chun* (2009) 45 Cal.4th 1172,

the Court recognized that *Guiton* had reserved the question of the proper harmlessness standard for *Green* error and that "this case only now presents that issue." (*Id*. at p. 1203.) There, the Court employed a harmlessness test derived from *California v. Roy* (1996) 519 U.S. 2, which it determined was well suited to the particular situation in that case and was "adaptable to the reasonable doubt standard of direct review." (*Chun*, *supra*, 45 Cal.4th at p. 1204.) The test deemed the error harmless '"only if the jury verdict on other points effectively embraces this one or if its is impossible, upon the evidence, to have found what the verdict did find without finding this point as well.'" (*Id*., citing *Roy*, *supra*, 519 U.S. at p. 7.) Articulating the inquiry another way, the Court stated that "if other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary for [the valid theory], the erroneous … instruction was harmless." (*Id*. at p. 1205.) But the Court was careful to note that it used that test "without holding that this is the only way to find error harmless." (*Id*. at p. 1204.)

In *People v. Chiu* (2014) 59 Cal.4th 155, the Court observed that an erroneous alternative legal theory requires reversal "unless there is a basis in the record to find that the verdict was based on a valid ground." (*Id*. at p. 167.) Thus, "[d]efendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Ibid*.) The Court reversed, observing that the jury asked questions during deliberations that suggested it may have focused on the legally invalid theory and that there was "no basis in the record to conclude that the verdict was based on the legally valid theory." (*Id*. at pp. 167-168.)

And in *In re Martinez* (2017) 3 Cal.5th 1216, the Court invoked *Chun*'s formulation of the harmlessness standard, focusing on "other

aspects of the verdict or the evidence," and reversed, holding that "the evidence in this case does not compel the conclusion that the jury must have relied on a direct aider and abettor theory." (*Id*. at p. 1226.) In reaching that conclusion, the Court looked to the trial evidence, the arguments of counsel, and the jury's questions during deliberations. (*Id*. at pp. 1226-1227.)

These more recent decisions suggest that a harmlessness analysis looking to the whole record, including the evidence, to determine whether it appears beyond a reasonable doubt that the jury based its verdict on the valid theory would be appropriate. But they do not firmly disavow that the record must demonstrate the jury's actual reliance on the valid theory, as the Court of Appeal below thought necessary.

B. There is no consensus, and indeed there is a square conflict, in the lower appellate courts about the appropriate harmless error analysis

Lower court decisions reflect uncertainty about the proper harmlessness analysis in these circumstances. The Court of Appeal in this case, for example, determined that it could affirm only if there was a basis in the record to show that the jury actually relied on the valid theory. (Opn. at p. 5.) In doing so, it cited *People v. Smith*, *supra*, 62 Cal.App.4th at p. 1239. (Opn. at p. 6.) There, the Court of Appeal reversed because, while the evidence was sufficient to support the valid theory, it could not determine "that the jury must have" relied on that theory. (*Smith*, *supra*, 62 Cal.App.4th at p. 1239.) The court below also cited *People v. Sanchez*, *supra*, 86 Cal.App.4th 970, which reversed for alternative-legal-theory error, despite "overwhelming evidence" in support of the legally valid theory, because "there simply is no legitimate basis in the record" to conclude that the verdict was actually based on the legally correct theory and it was "conceivable" that the jury might have relied on the incorrect

theory. (*Id*. at p. 981.) Other courts appear to have endorsed similar analyses. (See, e.g., *People v. Dominguez* (2008) 166 Cal.App.4th 858, 869-870; see also *People v. Calderon* (2005) 129 Cal.App.4th 1301, 1307, fn. 5 [criticizing argument against "correct reliance" standard but declining to decide which standard applies].)

On the other hand, some appellate courts have simply looked to the whole record, including the trial evidence, to determine whether there was any reasonable doubt that the jury's verdict rested on the legally correct theory. For example, in *People v. Brown* (2012) 210 Cal.App.4th 1, the court addressed the harmlessness standard to be applied where, similarly to this case, the trial court had erroneously instructed the jury that a BB gun was an inherently dangerous weapon. (*Id*. at pp. 11-12.) The court observed that *Guiton* had articulated only a "general rule" that an erroneous alternative legal theory requires reversal if the court is unable to determine which of the prosecution's theories served as the basis for the jury's verdict. (*Id*. at p. 12.) It further observed that, in *Chun*, this Court suggested that such error may be found harmless in appropriate cases where "'other aspects of the verdict or sentence leave no reasonable doubt that the jury'" relied on the valid theory. (*Ibid*., quoting *Chun*, *supra*, 45 Cal.4th at p. 1205.) The Court of Appeal affirmed, reasoning that the "ample evidence" produced at trial in favor of the valid theory, along with the arguments of counsel, left no reasonable doubt that the jury found the defendant guilty on the valid theory. (*Id*. at p. 13.) Other courts have endorsed the same approach. (See, e.g., *People v. Flores* (2016) 2 Cal.App.5th 855; *People v. Falaniko* (2016) 1 Cal.App.5th 1234.)

The harmlessness analyses in this case and in *Brown* are in square conflict and exemplify the broader lack of consensus on the question among the lower appellate courts.

C. The more restrictive harmlessness approach espoused by some decisions is in tension with other harmless error precedent, as the court below observed

As the Court of Appeal below acknowledged, the more restrictive harmlessness approach it employed may be in tension with other harmless error precedent that has emerged since *Green* and *Guiton*. (Opn. at pp. 6-7.) In *People v. Breverman* (1998) 19 Cal.4th 142, for example, this Court reconsidered and rejected, in the context of lesser-included-offense instructional error, application of a harmlessness standard similar to the one the Court of Appeal below used—a standard that prohibited affirmance unless the factual question posed by the omitted instruction was "necessarily resolved" by the jury under other, proper instructions. (*Id*. at pp. 164-178, discussing test of *People v. Sedeno* (1974) 10 Cal.3d 703; see also *Guiton*, *supra*, 4 Cal.4th at p. 1130 [noting similarity of *Sedeno* test to its formulation of the harmlessness standard governing *Green* error].) The Court found that standard, which it called a "test of near-automatic reversal," inappropriate in light of various considerations, including the state-law nature of the error and California's constitutional requirement that, before reversing a judgment, a reviewing court must find a miscarriage of justice upon examination of the entire case. (*Ibid*.)

More recently, in *People v. Merritt*, *supra*, 2 Cal.5th 819, this Court concluded that a failure to instruct the jury on any elements of the charged offense was amenable to harmless error review, and it overruled a prior decision that had deemed similar error to be structural. (*Id*. at pp. 825-831.) The Court based that decision primarily on intervening precedent making clear that automatic reversal should be limited to only those situations that "'defy' harmless error analysis." (*Id*. at pp. 825-831, quoting *Neder v. United States* (1999) 527 U.S. 1, 7.) Looking to the entire record in the case, including the trial evidence, the arguments of counsel, and the

verdicts, the Court held that the failure to instruct on the elements of the offense was harmless because "it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error," given that identity was the only contested issue at the trial. (*Id.* at pp. 831-833.)

The rule of near-automatic reversal that the Court of Appeal used here, and that some other courts have used, is difficult to square with *Merritt*'s reasoning and result. The error is this case is readily amenable to the kind of harmlessness analysis employed in *Merritt*, asking whether it appears beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error. And using the stricter approach would result unnecessarily in an anomaly. As the United States Supreme Court has recognized, "drawing a distinction between alternative-theory error and the instructional errors in [other kinds of cases] would be 'patently illogical,' given that such a distinction 'reduces to the strange claim that, because the jury received both a "good" charge and a "bad" charge on the issue, the error was somehow more pernicious than where the *only* charge on the critical issue was a mistaken one.'" (*Hedgpeth v. Pulido* (2008) 555 U.S. 57, 61 [concluding that alternative-legal-theory error is not structural], ellipses omitted, original emphasis.)

This case shows clearly the ill effects of employing a rule of near-automatic-reversal. The Court of Appeal below acknowledged that the ordinary harmlessness test "would certainly be satisfied here" in light of the overwhelming evidence in support of the valid legal theory. (Opn. at pp. 6-7.) But the court thought it was bound to reverse, potentially requiring an entirely new trial, even though the issue upon which the reversal turned was "never disputed." (Opn. at p. 7.) As this Court observed in *Merritt*, harmless error review "serves a very useful purpose insofar as it blocks setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." (*Merritt, supra*, 2

Cal.5th at p. 828, quotation marks, alterations, and citations omitted; see also *People v. Harris* (1994) 9 Cal.4th 407, 431 ["harmless-error analysis addresses what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, *but in practice clearly had no effect on the outcome*," quotation marks, ellipsis, and citation omitted, original italics].) The outcome here does little to advance the proper function of appellate review or to serve the interests of justice.

CONCLUSION

The petition for review should be granted.

Dated: April 9, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
MICHAEL R. JOHNSEN
Deputy Solicitor General

TIMOTHY O'HAIR
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3.925 words.

Dated: April 9, 2018

XAVIER BECERRA
Attorney Generalof California

MICHAEL R. JOHNSEN
Deputy Solicitor General
Attorneys for Plaintiff and Respondent

Filed 3/1/18

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

YAZAN ALEDAMAT,

Defendant and Appellant.

B282911

(Los Angeles County
Super. Ct. No. BA451225)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Affirmed in part, reversed in part, and remanded.

Andrea S. Bitar, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steve Mercer, Timothy L. O'Hair and Viet H. Nguyen Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Yazan Aledamat (defendant) thrust the exposed blade of a box-cutter toward a man while threatening, "I'll kill you." A jury convicted him of assault with a deadly weapon and making criminal threats. Defendant argues that the assault conviction is invalid because the trial court wrongly instructed the jury that a "deadly weapon" includes an "inherently deadly" weapon when a box cutter is not an inherently deadly weapon as a matter of law. (See *People v. McCoy* (1944) 25 Cal.2d 177, 188 (*McCoy*).) Defendant is correct. Further, because this error placed a legally invalid theory before the jury, we are compelled to reverse this conviction as well as the enhancement for personal use of a deadly weapon, which used the same inapplicable definition of "deadly weapon."

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In October 2016, defendant approached a woman working at a lunch truck parked in downtown Los Angeles. He told her that he found her attractive and asked her for her phone number; she declined, explaining that she was married with children. On October 22, 2016, defendant approached the woman's husband, who owned the food truck. Defendant asked, "Where's your wife?" Defendant then told the man that he wanted to "fuck" his wife because she was "very hot" and "had a big ass and all of that." When the man turned away to remove his apron, defendant pulled a box cutter out of his pocket and extended the blade; from three or four feet away, defendant thrust the blade at the man at waist level, saying "I'll kill you." Two nearby police officers on horses intervened and arrested defendant.

II. Procedural Background

The People charged defendant with (1) assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[1] and (2) making a criminal threat (§ 422). The People further alleged that defendant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)). Additionally, the People alleged defendant's 2014 robbery conviction constituted a prior "strike" within the meaning of our Three Strikes Law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(j)) and a prior serious felony (§ 667, subd. (a)(1)).

The matter proceeded to a jury trial. When instructing the jury on assault with a deadly weapon and on the personal use enhancement, the trial court defined "a deadly weapon" as "any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing or likely to cause death or great bodily injury."

During the prosecutor's initial closing argument, he told the jury that a "box cutter" was a "deadly weapon" because "[i]f [it is] used in a way to cause harm, it would cause harm." During his rebuttal argument, he asserted that the box-cutter was an "inherently deadly weapon" because "you wouldn't want your children playing with" it.

The jury returned guilty verdicts on both counts, and found the enhancement allegation to be true. After defendant admitted his prior conviction, the trial court sentenced defendant to 12 years in prison on the criminal threats count, comprised of a base sentence of six years (three years, doubled due to the prior

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

strike), plus five years for the prior serious felony, plus one year for the personal use of a deadly weapon. The court imposed a concurrent, six-year sentence on the assault count, comprised of a base sentence of six years (three years, doubled due to the prior strike).

Defendant filed a timely notice of appeal.

DISCUSSION

For purposes of both assault with a deadly weapon and the enhancement for personal use of a deadly weapon, an object or instrument can be a "deadly weapon" if it is either (1) "inherently deadly" (or "deadly per se" or a "deadly weapon[] as a matter of law") because it is ""dangerous or deadly" to others in the ordinary use for which [it is] designed,'" or (2) "used . . . in a manner" "capable of" and "likely to produce[] death or great bodily injury," taking into account "the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029 (*Aguilar*); *People v. Graham* (1969) 71 Cal.2d 303, 327-328; *In re Jose R.* (1982) 137 Cal.App.3d 269, 275-276; CALCRIM Nos. 875, 3130)].) A box cutter is a type of knife, and "a knife"—because it is designed to cut things and not people—"is not an inherently dangerous or deadly instrument as a matter of law." (*McCoy*, *supra*, 25 Cal.2d at p. 188.)

Against the backdrop of this law, defendant argues that the trial court erred in instructing the jury that it could find the box cutter to be an "inherently deadly" weapon. Although the instruction the trial court gave is correct in the abstract (*People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176), the People agree that it was inapplicable here, where the weapon was a box cutter.

Employing de novo review (*People v. Manriquez* (2005) 37 Cal.4th 547, 581), we also agree it was error to give this instruction.

The remaining issue is whether this instructional error was prejudicial. This issue turns on whether the error involves the presentation of a *legally* invalid theory to the jury or the presentation of a *factually* invalid theory.

When an appellate court determines that a trial court has presented a jury with two theories supporting a conviction—one *legally* valid and one *legally* invalid—the conviction must be reversed "absent a basis in the record to find that the verdict was actually based on the valid ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1122, 1129.) That basis exists only when the jury has "*actually*" relied upon the valid theory (*Aguilar, supra,* 16 Cal.4th at p. 1034; *People v. Swain* (1996) 12 Cal.4th 593, 607); absent such proof, the conviction must be overturned—even if the evidence supporting the valid theory was overwhelming (*People v. Sanchez* (2001) 86 Cal.App.4th 970, 981-982). By contrast, when an appellate court determines that a trial court has presented a jury with two legally valid theories supporting a conviction—one *factually* valid (because it is supported by sufficient evidence) and one *factually* invalid (because it is not)—the conviction must be affirmed unless the "record affirmatively demonstrates . . . that the jury did in fact rely on the [factually] unsupported ground." (*Guiton*, at p. 1129.) These different tests reflect the view that jurors are "well equipped" to sort *factually* valid from invalid theories, but ill equipped to sort *legally* valid from invalid theories. (*Id.* at p. 1126.)

We conclude that the trial court's instruction defining a "dangerous weapon" to include an "inherently dangerous" object entails the presentation of a *legally* (rather than *factually*)

invalid theory. There was no failure of proof—that is, a failure to show through evidence that the box cutter is an "inherently dangerous" weapon. Instead, a box cutter cannot be an inherently deadly weapon "as a matter of law." (*McCoy*, *supra*, 25 Cal.2d at p. 188.) This is functionally indistinguishable from the situation in which a jury is instructed that a particular felony can be a predicate for felony murder when, as a matter of law, it cannot be. Because this latter situation involves the presentation of a legally invalid theory (*People v. Smith* (1984) 35 Cal.3d 798, 808), so does this case.

Further, we must vacate the assault conviction because there is no basis in the record for concluding that the jury relied on the alternative definition of "deadly weapon" (that is, the definition looking to how a non-inherently dangerous weapon was actually used). (*People v. Smith* (1998) 62 Cal.App.4th 1233, 1239 [reversal required where appellate court "cannot discern from the record which theory provided the basis for the jury's determination of guilt"].) Indeed, the prosecutor in his rebuttal argument affirmatively urged the jury to rely on the legally invalid theory when he called the box cutter an "inherently deadly weapon." And because the trial court used the same definition of "deadly weapon" for both the assault charge and the personal use enhancement, both suffer from the same defect, and both must be vacated.

We recognize that the rules regarding prejudice that we apply in this case are arguably in tension with more recent cases, such as *People v. Merritt* (2017) 2 Cal.5th 819, providing that the failure to instruct on the elements of a crime does not require reversal if those omitted elements are "uncontested" and supported by "overwhelming evidence." (*Id.* at p. 821-822, 830-

832; *Neder v. United States* (1999) 527 U.S. 1, 17-18.) That test would certainly be satisfied here, where defendant never disputed that the box cutter was being used as a deadly weapon and where the evidence of such use is overwhelming. However, the case law we cite in this case is directly on point and remains binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) Any revisiting or reconsideration of this case law is for our Supreme Court, not us.

DISPOSITION

Defendant's convictions for assault with a deadly weapon, and the one-year enhancement for personal use of a deadly weapon applied to the criminal threats sentence, are vacated. Otherwise, the criminal threats conviction and sentence are affirmed. We remand to the trial court for the People to determine whether to retry the defendant on the vacated crime and enhancement.

CERTIFIED FOR PUBLICATION.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST

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

Case Name: **People v. Yazan Aledamat** No.: **S_____**

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 that is submitted electronically is transmitted using the Court's TrueFiling system. Participants who are registered with TrueFiling will be served electronically. Participants who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On April 9, 2018, I caused the attached **PETITION FOR REVIEW** to be electronically served by transmitting a true copy via this Court's TrueFiling system to:

Andrea S. Bitar, andreabitar@bidrocklaw.com (Attorney for Appellant)

I also caused the attached **PETITION FOR REVIEW** to be electronically served to the California Court of Appeal by transmitting a true copy via the Court's TrueFiling system.

Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on April 9, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Hon. Stephen A. Marcus, Judge
Los Angeles County Superior Court
C.S. Foltz Criminal Justice Center
210 West Temple Street, Dept. 102
Los Angeles, CA 90012-3210

I also served the attached **PETITION FOR REVIEW** by transmitting a true copy via electronic mail to:

Jeffrey Boxer, Deputy District Attorney

One copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 9, 2018, at Los Angeles, California.

K. Amioka
Declarant

Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Petition for Review**
Case Number: **TEMP-VO9LZZVM**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **timothy.ohair@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

--
Date

/s/Timothy O'Hair
Signature

O'Hair, Timothy (309517)
Last Name, First Name (PNum)

CA Attorney General's Office - Los Angeles
Law Firm