S254554

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VERONICA AGUAYO, Defendant and Appellant.	D073304 San Diego County Superior Court No. SCS295489

On Appeal from the Judgment and Order of the Superior Court of California, San Diego County
Honorable Dwayne K. Moring, Judge

PETITION FOR REVIEW TO GRANT OR GRANT AND HOLD
(Related to *People v. Aledamat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, S248105)

After the Partially Published Decision of the Court of Appeal, Fourth Appellate District, Division One, On Rehearing, Partially Affirming the Judgment of Conviction

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VERONICA AGUAYO, Defendant and Appellant.	D073304 San Diego County Superior Court No. SCS295489

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

This petition for review follows the partially published decision of the Court of Appeal, Fourth Appellate District, Division One, opinion on rehearing, filed on January 28, 2019. A copy of the opinion is attached to this petition as Appendix A.

ISSUE PRESENTED

Under the elements test, is assault with force likely to produce great bodily injury or death, in violation of Penal Code section 245, subdivision (a)(4), a lesser included offense of assault with a deadly weapon in violation of section 245, subdivision (a)(1), thereby preventing a conviction of both subdivisions when based on the same conduct?

NECESSITY FOR REVIEW

Review should be granted for three reasons.

First, this issue is directly related to an issue on review in *People v. Aledamat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, S248105. This Court expanded the issues on review and directed the parties to address an additional issue:

> Could the jury, in this case, have concluded that defendant used an inherently deadly weapon in committing the assault without also concluding that defendant used a weapon in a manner that presents a risk of death or great bodily injury?

(*People v. Aledamat* (Aug. 22, 2018, No. S248105) ___Cal.5th___ [2018 Cal. LEXIS 6314, at *1].)

This expanded review issue appears to address, albeit in a different context, the ratio decidendi of the appellate court's decision here where the appellate court determined an assault with a deadly weapon could be committed without committing a "force-likely" assault (an assault with force likely to produce great bodily injury) if the assault was committed with an inherently deadly weapon used in a non-deadly way:

> . . . [F]orce-likely assault is not a lesser included offense of assault with a deadly weapon because, although every force-likely assault must be committed in a way that is likely to produce great bodily injury (either with or without a deadly weapon), there is a subset of assaults with deadly

> weapons—those committed with inherently deadly weapons—that are not necessarily likely to produce great bodily injury.

(*People v. Aguayo* (2019) 31 Cal.App.5th 758, 766, Appendix A, p. 30.)

The context, however, distinguishes the issue here from *Aledamat.* In *Aledamat*, the issue is a question of whether the jury could have concluded that the defendant there used an inherently deadly weapon in committing the assault without also concluding that defendant used a weapon in a manner that presents a risk of death or great bodily injury. Here, the inquiry is based on the application of the elements test, rather than on the specific facts of the case.

If this Court views the fact-bound context as critical to its analysis, and the inquiry under the elements test as distinguishing the question here from the *Aledamat* question, it should grant review. If the question is essentially the same, in either context, it should grant review and hold the case pending disposition in *Aledamat*.

Second, there is conflict between the appellate courts on this issue. Division One of the Fourth District Court of Appeal openly disagreed with Division One of the First District Court of Appeal in *In re Jonathan R*. (2016) 3 Cal.App.5th 963 (*Jonathan R.*), on precisely the same issue.

Third, the appellate court's holding, that Penal Code section 245,

subdivision (a)(4)[1] is not a lesser included offense (LIO) of subdivision (a)(1), is neither required by, nor in synchrony with, statutory and decisional law. Accordingly, respondent's clever, but inaccurate, tour de force (the hypothetical of the assaultive barber cutting a straggling hair with a dirk/dagger) lead the appellate court astray.

For each of these reasons, review should be granted, or granted and held pending decision in *Aledamat*.

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[1] All further undesignated statutory references shall be to the Penal Code; all further undesignated references to subdivisions shall be to those in section 245.

ARGUMENT

I. Under the Elements Analysis, Penal Code section 245, subdivision (a)(4), Assault with the Use of Force Likely to Produce Great Bodily Injury Is a Lesser-Included Offense of section 245, subdivision (a)(1), Assault with a Deadly Weapon

In concluding that subdivision (a)(4) is not a lesser included offense of subdivision (a)(1) of Penal Code section 245 under an elements analysis, the Court of Appeal identified, as the dispositive factor, that an assault with an inherently deadly weapon, under subdivision (a)(1), does not require the use of an inherently deadly weapon in a way that is likely to produce great bodily injury; accordingly because (a)(4) requires the use of force likely to produce great bodily injury, (a)(4) cannot be an LIO of (a)(1):

> Force-likely assault, then, is only a lesser included offense of assault with a deadly weapon if every assault with a deadly weapon requires that the defendant use the weapon in a way that is likely to produce great bodily injury. Although that will often be the case, it is not necessarily so.

(*People v. Aguayo, supra,* 31 Cal.App.5th 758, 764-765, Appendix A, p. 29.)

A. This Issue Is Closely Related to the Expanded Review Granted in *People v. Aledamat*

This issue would appear to be closely related to the issue currently on review in this Court in *People v. Aldemat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018 (S248105/B282911). In *Aldemat*, this Court originally granted review to address:

> Is 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, or is the error harmless only if the record affirmatively demonstrates that the jury actually rested its verdict on the legally correct theory?

(*People v. Aldemat* (2018) 20 Cal.App.5th 1149, review granted 7/5/2018 (S248105/B282911).)

This Court then expanded the issue on which review was granted to include the following issue:

> Could the jury, in this case, have concluded that defendant used an inherently deadly weapon in committing the assault without also concluding that defendant used a weapon in a manner that presents a risk of death or great bodily injury?

(*People v. Aledamat* (Aug. 22, 2018, No. S248105) ___Cal.5th___ [2018 Cal. LEXIS 6314, at *1].)

This Court's resolution of the expanded issue in *Aledamat* will either resolve the issue upon which review is sought in this case, or will significantly impact whether, under the elements test, an assault with an inherently deadly weapon can be committed without producing a risk of great bodily injury.

The appellate court illustrated this possibility with the hypothetical posed by the state, i.e. where an individual uses a dirk/dagger, that is, an inherently deadly weapon in a nondeadly way, to cut a single hair from a

sleeping person. (*People v. Aguayo, supra,* 31 Cal.App.5th at p. 766, Appendix A, p. 30.) So the analysis goes, this is an application of force sufficient to constitute an assault, but does not involve a reasonable probability that this act would produce great bodily injury.

The source for this hypothetical is the decision in *People v. Aguilar* (1997) 16 Cal.4th 1023, in which this Court recognized that there are a few weapons that are deadly per se, and when those weapons are involved, the assault can be proved based on the mere character of the weapon:

> 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. (See *People v. Graham, supra,* 71 Cal.2d at p. 327, disapproved on other grounds in *People v. Ray, supra*, 14 Cal.3d at p. 32.)

(*People v. Aguilar, supra,* 16 Cal.4th 1023, 1037, fn. 10.)

B. The Appellate Court's Reliance on Dicta in *Aguilar* Is Neither Persuasive Nor Apt

There are a number of reasons why the appellate court's reliance on the hypothetical and the decision in *Aguilar* has lead it to the wrong conclusion and the rejection of the better-reasoned decision *In re Jonathan R., supra,* 3 Cal.App.5th 963.

First, the language in *Aguilar* cannot and should not be read out of

context. The text of the opinion reads, with emphasis added:

> As used in section 245, subdivision (a)(1), a "deadly weapon" is "any object, instrument, or weapon which is used in *such a manner* as to be capable of producing and likely to produce, death or great bodily injury." (*In re Jose D.R.* (1982) 137 Cal.App.3d 269, 275–276.) Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the *ordinary use* for which they are designed establishes their character as such. (*People v. Graham* (1969) 71 Cal.2d 303, 327, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 32.)

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

The question which arises in this case, therefore, is what outcome the Legislature intended where a so-called "inherently deadly weapon" is not used in the ordinary manner for which it was designed? Or what if the legislative definition of a "deadly weapon" was to change?

This Court should examine the state's tour de force, or perhaps more aptly, detour de force, in the use of a dirk or dagger in a nondeadly way: the undesired barbering of the single, straggling strand of wispy hair. What is the current[2] definition of a dirk/dagger in the context of the assault statute? While

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[2] The legislative definition of dirks/ daggers, was adopted in 1993, revised in 1995, and again in 1997, for purposes of what was then a statute prohibiting possession of certain weapons. (Former § 12020, subd. (c)(24). These definitions were adopted after the *Graham* cases in which dirks and daggers were found to be per se deadly. For purposes of the assault statute, however, dirks/daggers have been acknowledged to simply be types of knives. (*People v. Mowatt* (1997) 56 Cal.App.4th 713, 719.) (See discussion, *post* pp. 17-19)

one may imagine an assassin's stiletto, what is actually California's legal definition? In criminalizing the concealed possession of a weapon that is otherwise legal to possess, section 16470 provides: "As used in this part, 'dirk' or 'dagger' means a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. . . ."

In qualifying this definition with the prefatory language, "As used in this part," the Legislature expressed its intent to limit its application. The application of this definition beyond the Legislatively expressed limitation illustrates why this limitation exists.

The definition of a deadly weapon, limited to the concealed possession context, defines the physical characteristics of an instrument – it does NOT define a weapon that is an "inherently deadly" (or dangerous) weapon, for two reasons. First, the definition differs in no remarkable manner from a steak knife, Bowie or Buck knife (or other "hunting" knife available at sporting goods store), or a common awl. As it may be with or without a handguard, that characteristic is meaningless. It is its ready use for stabbing that the vast number of assaults with deadly weapons perpetrated by knives – non-inherently deadly weapons – are accomplished.

> In assault with a deadly weapon, the character of the particular agency employed is the substance of the offense. While a knife is not an inherently

> dangerous or deadly instrument as a matter of law, it may assume such characteristics, depending upon the manner in which it was used, and there arises a mixed question of law and fact which the jury must determine under proper instructions from the trial court. (3 Cal.Jur. § 21, pp. 205-206; *People v. Valliere*, 123 Cal. 576 579 [56 P. 433]; *People v. Cook*, 15 Cal.2d 507, 516-517 [102 P.2d 752]; *People v. Petters*, 29 Cal.App.2d 48, 50-51 [84 P.2d 54].)

(*People v. McCoy* (1944) 25 Cal.2d 177, 188.)

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 for purposes of the assault statute. The additional requirement that the weapon "may inflict great bodily injury or death" is essential, because if the knife or other instrumentality is not capable of infliction of great bodily injury or death, there would be no reason to criminalize its use under subdivision (a)(1).

But the criminalization of the dirk/dagger/stabbing knife, is not simply in its characteristics or even in its possession. Rather, criminalization results from sections 16590, subdivision (I) and 21310, with the former declaring a dirk/dagger a "generally prohibited weapon" if "concealed . . . as prohibited by Section 21310." And the latter, in essence, only proscribes those dirks/daggers concealed "upon the person." If the dirk/dagger – say, potentially, a letter opener – lay in open sight on a desk or out of sight in a drawer, would any violation occur? No. In fact, "upon the person" does not

even include carrying an otherwise dirk/dagger in a parcel such as a purse, backpack.[3] If one never had concealed the "dirk/dagger" upon one's person before cutting that nagging, straggling strand of hair, would the "dirk/dagger" have been an inherently deadly weapon under the concealed possession statute? No.

This analysis illustrates that the definitions of dangerous weapons are employed for one purpose, but that the utility of that purpose will lose its efficacy when the employment of the instrument is not for the ordinary use for

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[3]

> The Assembly Committee on Public Safety unanimously approved Assembly Bill No. 78, as amended March 20, 1997, and the bill analysis for the third reading in the Assembly repeated that the amendment regarding a dirk or dagger carried in a container "[c]odifies case law that a dirk or dagger is not concealed upon the person where the dirk or dagger that [sic] is carried in a backpack, tool belt, tackle box, briefcase, purse, or similar container that is used to carry or transport possessions." (Office of Assem. Floor Analyses, 3d reading analysis of Assem. Bill No. 78 (1997–1998 Reg. Sess.) as amended Mar. 20, 1997, p. 1, italics added.) The Assembly unanimously passed Assembly Bill No. 78, as amended March 20, 1997.

(*People v. Pellecer* (2013) 215 Cal.App.4th 508, 514, disapproved by the California Supreme Court when applied to firearms and therefore distinguished in *People v. Wade* (2016) 63 Cal.4th 137.)

which is the instrument was designed. as a prohibited weapon, e.g., infliction of great bodily injury or death.

A second reason why *Aguilar's* footnote 10 should not be a basis for this Court's holding, as the appellate court did acknowledge, the footnote is not binding precedent. (*People v. Aguayo, supra*, 31 Cal.App.5th at p. 767; Appendix A, p. 30.) And the danger of relying on dicta, rather than the ratio decidendi, is that dicta is not essential to the holding and therefore may not reflect a full consideration of the ramifications of subsequently applying the dicta as the ratio decidendi, but in a different context.

Further, the appellate court here found the dicta in *Aguilar* to be persuasive on the issue here when it is not. The *Aguilar* dicta relies on *People v. Graham* (1969) 71 Cal.2d 303, 327-328. But *Graham* is wholly based on a distinction drawn by an intermediate appellate court in *People v. Raleigh* (1932) 128 Cal.App. 105, 108, and that distinction was based on a reading of unidentified cases that persuaded that court: ". . . that a distinction should be made between two classes of "dangerous or deadly weapons."

Raleigh appears to be the point of origin for making this distinction between weapons that are "inherently dangerous" and those can simply be used in a dangerous or deadly manner. For purposes of this petition, the essential point with respect to the class of "inherently dangerous" weapons is that:

> The instrumentalities falling in the first class [i.e., inherently dangerous], such as guns, dirks and blackjacks, which are weapons in the strict sense of the word and are "dangerous or deadly" to others *in the ordinary use for which they are designed,* may be said as a matter of law to be "dangerous or deadly weapons." This is true as the ordinary use for which they are designed establishes their character as such.

(*People v. Raleigh, supra,* 128 Cal.App. at pp. 108-109, as cited verbatim in *People v. Graham*, *supra,* 71 Cal.2d at pp. 327-328.)

Several lessons can be drawn from this Court's reliance on *Raleigh* in its decision in *Graham*. First, despite *Raleigh*'s inclusion of "guns" for purposes of assault with a deadly weapon, firearms are not deemed inherently dangerous per se, but are dangerous only if loaded or used as a bludgeon. More importantly, the "ordinary use" criterion is paramount. Just as a non-inherently deadly/dangerous object or instrument may become a "deadly/dangerous" weapon based on the manner on which it is wielded, the flip side of the same coin should be that an otherwise "generally" prohibited weapon may not be the basis of an assault with a deadly weapon if it is not used in the manner of the ordinary use for which it was designed and for which its character was established.

But what should be "ordinary use" and "ordinary character" for *one offense* may be different for *another* offense. Indeed, as noted above, an unloaded firearm not used as a bludgeon cannot be the premise for assault

with a firearm (subd. (a)(2), formerly a violation of subd. (a)(1)). But in *Raleigh,* the issue was whether the evidence was sufficient to sustain the conviction for attempted robbery under former section 211a, which defined first degree robbery as: "All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree." The question was whether a failure to prove that the gun was loaded rendered the evidence insufficient. The court concluded that the present ability of the possessor of the instrumentality that had been deemed essential in cases involving assault with a deadly weapon was not essential in the robbery context – and, hence, sprung the dichotomy between the inherently and non-inherently deadly and dangerous weapons. (*People v. Raleigh, supra,* 128 Cal.App. at pp. 109-110.)

Graham also involved an armed robbery prosecution, in which the designation of the deadly weapon turned on the weapon itself, and not on its use. Creating a category of "inherently dangerous" weapons for purposes of the arming requirement makes sense, because, like a statute that bans the possession of certain weapons, possessing or arming with a certain weapon determined by the legislature to be inherently dangerous, does not turn on the actor's use of the weapon. It is presumed based on the purpose for which the inherently deadly weapon was made. *That concept does not transfer to the assault context, where it is how the weapon is used that is dispositive.*

The designation of weapons that fit in the "inherently deadly weapon" category, which the *Aguilar* court appears to have incorporated into its dicta in footnote 10, appear to have been imported from former section 12020, subdivision (a):

> Section 12020, subdivision (a) proscribes the possession of a concealed dirk or dagger, not its use. The rationale of the cases holding the possessor's intent irrelevant in prosecutions for carrying a concealed "dirk or dagger" as defined by case law applies with greater force in prosecutions governed by the 1994-1995 statute, which treats dirks and daggers as inherently dangerous weapons regardless of the circumstances in which they are carried.

(*People v. Mowatt*, *supra*, 56 Cal.App.4th 713, 721.)

For purposes of a statute categorizing possession or concealment of certain types of weapons, the designation of "inherently dangerous" weapons makes sense, because the possessor's intent is irrelevant to the offense of illegal possession (unless perhaps the possessor was immediately disposing of same). But incorporating that designation into the "deadly weapon" *element of assault* does not make sense, because it is the actor's utilization of the weapon toward the victim that is relevant.

The question is, when the *Aguilar* Court's footnote-dicta that some weapons could be "deadly per se," which the appellate court unnecessarily and inaccurately incorporated and broadened from the possession/concealment

statutes into the assault statute, did it lessen the prosecution's burden of proof by eliminating the requirement that to be deadly, a weapon must be used in a way that is likely to produce great bodily injury? Or does the statute still require a weapon that is deadly per se be used in a way that is still likely to produce death or great bodily injury? Or does subdivision (a)(1) simply punish the possession of an "inherently deadly weapon" even if it is used in a way that is far unlikely to produce great bodily injury? These are the critical questions for this Court to address.[4]

While classifying a weapon as "inherently deadly weapon" works for possession and arming statutes, which punish their possession or concealed possession rather than their use, that is not the function the designation must

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[4]

CALJIC and CALCRIM differ remarkably on this issue. CALJIC No. 9.02 without differentiating between inherently deadly/non-inherently deadly weapons provides in pertinent part, "[A "deadly weapon" is any object, instrument, or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.]" CALCRIM No. 875 apparently uses the disjunctive, "[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.]"

Ms. Aguayo is cognizant of California Rules of Court, rule 2.1050 (b), which provides, "The Judicial Council endorses these [CALJIC] instructions for use and makes every effort to ensure that they accurately state existing law. . . ." The ellipses, however, also provide, "The articulation and interpretation of California law, however, remains within the purview of the Legislature and the courts of review." (*Ibid.*)

serve in the interpretation and application of the assault statute, where it is the actual use of the weapon that should control, and not the possession or the intent.[5]

The appellate court should not have been persuaded by dicta importing the "inherently dangerous" weapons designation, for purposes of a statute prohibiting possession or arming with certain weapons, into the assault statute.

C. *Jonathan R.* Reflects A Correct Interpretation of the Assault Statute

The appellate court declined to follow *Jonathan R.* for three reasons. First, the appellate court found the *Jonathan R.* decision focused exclusively on noninherently deadly weapons, and criticized that reliance because it posited that an inherently deadly weapon can be used in a nondeadly way,

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[5] For example, this Court has held that for the crime of carrying a concealed dirk or dagger, intent is irrelevant. It has held that a . . defendant's intended use of the instrument is neither an element of the offense nor a defense. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 334.) This was based, in part, on the legislative intent:

> Thus, the legislative history is clear and unequivocal: the intent to use the concealed instrument as a stabbing instrument is not an element of the crime of carrying a concealed dirk or dagger. Indeed, the offense has never had such an intent requirement, and we find nothing suggesting an intent by the Legislature to alter this established rule.

(*People v. Rubalcava, supra,* 23 Cal.4th at p. 331.)

without losing its character as an inherently deadly weapon. To support this proposition, this court relied on *People v. Miceli* (2002) 104 Cal.App.4th 256, 270.) (*People v. Aguayo, supra*, 31 Cal.App.5th at p. 767, fn 6; Appendix A, p. 30.) *Miceli* interpreted and applied Penal Code section 245, subdivision (b), which specifically addresses assaults with semiautomatic firearms, and whether an unloaded firearm is still a firearm under the statute. *Miceli* did not hold that an unloaded semiautomatic weapon is still an inherently dangerous weapon under section 245, subdivision (a)(1). Instead, it held:

> "A firearm does not cease to be a firearm when it is unloaded or inoperable." (*People v. Steele* (1991) 235 Cal.App.3d 788, 794 [286 Cal.Rptr. 887].) This applies to semiautomatic firearms as well as any other kind. When a clip is removed from a semiautomatic firearm, the firearm does not suddenly become a billy club, a stick, or a duck.

(*People v. Miceli, supra,* 104 Cal.App.4th at p. 270.)

The *Miceli* court also recognized that the Legislature could have included the requirement that the semiautomatic weapon be loaded, but it did not. The Legislature also did not require the weapon be fired to be a semiautomatic weapon; therefore, even when used as a bludgeon, the assault was still committed with a semiautomatic weapon. Because the court interpreted a different statute, this court's reliance on *Miceli*, to reject the reasoning of *Jonathan R.*, is mistaken.

/ / /

Conclusion

For the foregoing reasons, Ms. Aguayo requests that this Court grant review, or grant review and hold pending its decision in *Aledamat*.

Dated: March 8, 2019

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Certificate of Word Count

I, Linnéa M. Johnson, appointed counsel for Ms. Aguayo, certify pursuant to rule 8.204 of the California Rules of Court, that I prepared this Petition for Rehearing on behalf of my client, and that the word count for this brief is 4,215 words.

I certify that I prepared this document in WordPerfect and that this is the word count generated for this document.

Dated: March 8, 2019

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

APPENDIX A

(Opinion of the Court of Appeal, Fourth Appellate District, Division One, on Rehearing in *People v. Aguayo*, D073304, Filed January 28, 2019)

APPENDIX A: *People v. Aguayo*, Decision of the Court of Appeal, Fourth Appellate District, Division One, on Rehearing
Filed January 28, 2019

People v. Aguayo

Court of Appeal of California, Fourth Appellate District, Division One

January 28, 2019, Opinion Filed

D073304

Reporter
31 Cal. App. 5th 758 *; 2019 Cal. App. LEXIS 73 **; 2019 WL 336870

THE PEOPLE, Plaintiff and Respondent, v. VERONICA AGUAYO, Defendant and Appellant.

Notice: CERTIFIED FOR PARTIAL PUBLICATION*

Prior History: [1]** APPEAL from a judgment of the Superior Court of San Diego County, No. SCS295489, Dwayne K. Moring, Judge.

People v. Aguayo, 26 Cal. App. 5th 714, 237 Cal. Rptr. 3d 338, 2018 Cal. App. LEXIS 761 (Aug. 24, 2018)

Disposition: Conditionally reversed, with directions.

Counsel: Linnéa M. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Warren Williams and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Haller, Acting P. J., with Irion and Dato, JJ., concurring.

Opinion by: Haller, Acting P. J.

Opinion

[*760]

HALLER, Acting P. J.—Veronica Aguayo hit her elderly father about 50 times with a bicycle lock and chain, then threw a ceramic pot on his head. A jury found her guilty of assault with a deadly weapon other than a firearm (Pen. Code, § 245, subd. (a)(1)) and assault by means of force likely to produce great bodily injury (force-likely assault) (Pen. Code, § 245, subd. (a)(4)).[1] The trial court placed her on probation. Aguayo appealed.

This is our second opinion in this appeal. In our original opinion, we rejected the sole issue Aguayo initially asserted: that we must vacate her conviction for force-likely assault because it is a lesser included offense of assault with a deadly weapon. Aguayo **[**2]** then filed a petition for rehearing in which she challenged the reasoning of our original opinion and asserted a new argument based on legislation enacted while this appeal was pending. Specifically, she argued that newly enacted sections 1001.35 and 1001.36, which grant trial courts the discretion to place defendants with mental disorders into pretrial diversion, apply retroactively to her case. We granted Aguayo's petition on the newly asserted issue and received supplemental briefing from the parties.

In this opinion, we once again reject the lesser included offense argument Aguayo originally raised. The portions of this opinion addressing that issue are substantively identical to our original opinion. As to the new issue, which is now pending before the California Supreme Court on its own motion (see *People v. Frahs* (2018) 27 Cal.App.5th 784, 791 [238 Cal. Rptr. 3d 483] [finding the statutes retroactive], review granted Dec. 27, 2018, S252220), we conclude the mental health diversion legislation applies retroactively. We further conclude Aguayo has made a showing of potential eligibility sufficient to warrant a remand for further proceedings. Accordingly, we conditionally reverse the judgment for the limited purposes specified in the disposition.

FACTUAL AND PROCEDURAL **[**3]** BACKGROUND

On the afternoon of August 8, 2017, 43-year-old Veronica Aguayo was working on her bicycle in her parents' yard. Her 72-year-old father (Father) turned on the sprinklers to water the plants, accidentally wetting

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part II. of the Discussion.

[1] Statutory references are to the Penal Code unless otherwise noted. For convenience, we will use the phrase "deadly weapon" to refer to a deadly weapon *other than a firearm*, unless otherwise noted.

Aguayo's cell phone charger. Aguayo began yelling expletives and insults at Father, who turned around to go back inside because he "didn't want to hear her mouth calling [him] names."
[*761]

As Father turned, Aguayo hit him on the back with her bicycle lock and chain. Father grabbed the lock to prevent Aguayo from hitting him again, but as they struggled over the lock, Father slipped and let go of the chain. Aguayo then hit Father with the chain and lock about 15 times on the arms, chest, and head. Father again grabbed the lock, and during a struggle for possession, Aguayo fell to the ground, pulling Father with her.

On the ground, Aguayo began "hollering" for her mother (Mother) inside. Aguayo then grabbed a small ceramic pot and threw it at Father, striking his head exactly where he had previously had two brain surgeries. Father fell on top of Aguayo, grabbed a rock to hit her with, but thought better of it and threw the rock away. However, the rock ricocheted off the house **[**4]** and hit Aguayo.

Father got up to go back in the house, and another struggle ensued for possession of the chain and lock, which Father apparently won. As Aguayo picked up a rock to hit Father, Mother emerged from the front door and warned, "Don't do that." Aguayo discarded the rock, and Father tossed the chain and lock toward her. Aguayo picked up the chain and lock, and rode off on her bicycle. The whole encounter lasted between five minutes (according to Mother) and 30 minutes (according to Father), during which Father estimated he was hit about 50 times.

Mother called 911, and police and paramedics responded. Father was evaluated at the hospital and released with only minor treatment. Police apprehended Aguayo a few hours later during an unrelated traffic stop.

Aguayo was charged with three offenses: (1) elder abuse, with deadly-weapon and great-bodily-injury enhancement allegations (§§ 368, subd. (b)(1), 1192.7, subd. (c)(23), 12022, subd. (b)(1); count 1); (2) assault with a deadly weapon, with an enhancement allegation that she "personally used a dangerous and deadly weapon, to wit: bicycle chain/lock" (§§ 245, subd. (a)(1), 1192.7, subd. (c)(23); count 2); and (3) force-likely assault (§ 245, subd. (a)(4); count 3). After deliberating less than two hours, the jury found Aguayo guilty on both assault **[**5]** counts, and found true the deadly-weapon-use allegation attached to count 2. The jury was unable to reach a verdict on the elder abuse count, which the court ultimately dismissed at the prosecutor's request.

Although Aguayo was presumptively ineligible for probation, the court found she had untreated mental health issues that constituted unusual circumstances warranting probation. Accordingly, the court suspended imposition of sentence and placed Aguayo on three years' formal probation with a variety of terms and conditions, including that she spend 365 days in local custody. **[*762]** Despite having suspended imposition of sentence, the court sentenced Aguayo concurrently on counts 2 and 3, but stayed the sentence on count 3 under section 654.

Aguayo appeals.

DISCUSSION

I. *Aguayo's Lesser Included Offense Challenge*

Aguayo contends we must vacate her conviction for force-likely assault because it is a lesser included offense of assault with a deadly weapon. We disagree.

(1) "In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct." (*People v. Reed* (2006) 38 Cal.4th 1224, 1226 [45 Cal. Rptr. 3d 353, 137 P.3d 184] (*Reed*); see §§ 954,[2] 654;[3] *People v. Sanders* (2012) 55 Cal.4th 731, 736 [149 Cal. Rptr. 3d 26, 288 P.3d 83] (*Sanders*); *People v. Cady* (2016) 7 Cal.App.5th 134, 139 [212 Cal. Rptr. 3d 319] (*Cady*).) "However, a 'judicially created exception to this rule

[2] Section 954, which addresses multiple convictions, states in part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts … . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court … ."

[3] Section 654, subdivision (a), which prohibits multiple punishments, states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

prohibits **[**6]** multiple convictions based on necessarily included offenses.'" (*Sanders*, at p. 736; see *Reed, supra*, 38 Cal.4th at p. 1227; *Cady*, at p. 139.) "When a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed." (*Sanders*, at p. 736; see *Cady*, at p. 139.) "If neither offense is necessarily included in the other, the defendant may be convicted of both, 'even though under section 654 he or she could not be punished for more than one offense arising from the single act or indivisible course of conduct.'" (*Sanders*, at p. 736.)

The courts "have established two tests for whether a crime is a lesser included offense of a greater offense: the elements test and the accusatory **[*763]** pleading test." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 197 [233 Cal. Rptr. 3d 791, 418 P.3d 841].) The parties agree that "[i]n deciding whether multiple convictions are barred because one offense is a lesser included offense of the other, we apply the 'elements' test." (*Cady, supra*, 7 Cal.App.5th at p. 140; see *Reed*, *supra*, 38 Cal.4th at p. 1229.) "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*Reed*, at p. 1227; see *Sanders, supra*, 55 Cal.4th at p. 737.) "In other words, '"[i]f a crime **[**7]** cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former."'" (*Sanders*, at p. 737; see *Reed*, at p. 1227.) We apply the elements test "in the abstract," without regard to the "evidence introduced at trial." (*People v. Chaney* (2005) 131 Cal.App.4th 253, 256 [31 Cal. Rptr. 3d 714] (*Chaney*).)

Simple assault "is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Section 245 enumerates several forms of aggravated assault. We are concerned here with two of the forms specified in section 245, subdivision (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 … . [¶] … [¶]

"(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 … ."

Using CALCRIM No. 875, the trial court instructed the jury regarding the elements of assault with a deadly weapon and force-likely assault. As instructed, the elements of assault with a deadly weapon are:

"1. The defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person;

"2. The defendant did that **[**8]** act willfully;

"3. When the defendant acted, she was aware of facts that would lead a reasonable person to realize that her act by its nature would directly and probably result in the application of force to someone;

"4. When the defendant acted, she had the present ability to apply force with a deadly weapon other than a firearm[;] [¶] AND
[*764]

"5. The defendant did not act in self-defense."[4]

The elements of force-likely assault are:

"1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and

"2. The force used was likely to produce great bodily injury;

"3. The defendant did that act willfully;

"4. When the defendant acted, she was aware of facts that would lead a reasonable person to realize that her act by its nature would directly and probably result in the application of force to someone;

"5. When the defendant acted, she had the present ability to apply force likely to produce great bodily injury to a person. [¶] AND

"6. The defendant did not act in self-defense."

As to both offenses, the jury was instructed with CALCRIM No. 875 regarding the meaning of "force": "The terms *application of force* and *apply force* mean to touch in a harmful or offensive **[**9]** manner. The slightest touching can be enough if it is done in a rude

[4] The court included this optional self-defense element because Aguayo testified she struck her father with the chain and lock only because he lunged at her while she was swinging the chain defensively.

or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind. [¶] … [¶] The People are not required to prove that the defendant actually touched someone. [¶] The People are not required to prove that the defendant actually intended to use force against someone when she acted. [¶] No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault, and if so, what kind of assault it was."

The elements of both offenses are, thus, substantially similar *except for* the first element of assault with a deadly weapon (doing an act with a deadly weapon), and the first and second elements of force-likely assault (doing an act that would probably result in the application of force to a person where the force is "likely to produce great bodily injury"). Force-likely assault, then, is only a lesser included offense of assault with a deadly weapon if every assault with a deadly weapon requires **[**10]** that the defendant use the weapon in a **[*765]** way that is likely to produce great bodily injury. Although that will *often* be the case, it is not *necessarily* so.

In *People v. Aguilar* (1997) 16 Cal.4th 1023 [68 Cal. Rptr. 2d 655, 945 P.2d 1204] (*Aguilar*), the California Supreme Court addressed whether hands and feet can constitute deadly weapons under section 245. (*Aguilar*, at p. 1026.) In doing so, the court explored the meaning of "deadly weapon" as used in section 245: "[A] 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*Aguilar*, at pp. 1028–1029.)

In light of this definition, the court explained that, "Ultimately (*except in those cases involving an inherently* ***[**11]*** *dangerous weapon*), the jury's decisionmaking process in an aggravated assault case under section 245, subdivision (a)(1),[5] is functionally identical regardless of whether, in the particular case, the defendant employed a weapon alleged to be deadly *as used* or employed force likely to produce great bodily injury; in either instance, the decision turns on the nature of the force used." (*Aguilar, supra*, 16 Cal.4th at p. 1035, italics added.) Thus, although the court concluded "a 'deadly weapon' within the meaning of section 245 must be an object extrinsic to the human body" (*Aguilar*, at p. 1034), the court found the prosecutor's contrary closing argument was harmless because the jury necessarily engaged in the same analysis under either theory because the alleged weapons (hands and feet) were not inherently deadly and, thus, their deadly nature turned on the manner of their use. (*Id.* at p. 1036 ["Regardless … of which path the jury took, the same finding was necessary to a verdict of guilt."].)

But the *Aguilar* court explained that its reasoning equating assault with a deadly weapon and force-likely assault does not apply in the context of an *inherently deadly weapon*: "We observe that, despite the identity of the jury's **[*766]** reasoning processes under either the 'deadly weapon' clause or **[**12]** the 'force likely' clause in this case, our holding does not reduce the former clause to surplusage. *There remain assaults involving weapons that are deadly per se, such as dirks and blackjacks, in which the prosecutor may argue for, and the jury convict of, aggravated assault based on the mere character of the weapon*." (*Aguilar, supra*, 16 Cal.4th at p. 1037, fn. 10, italics added.)

Justice Mosk wrote a concurring opinion synthesizing the *Aguilar* majority's reasoning: "[Section 245] punishes an assault committed either (1) with a 'deadly weapon or instrument' other than a firearm or (2) by means of any 'force likely to produce great bodily injury.' [¶] In turn, a 'deadly weapon or instrument' is either (1) a weapon that is deadly per se (e.g., a dagger) or (2) any 'object, instrument, or weapon' that is *used* in a way likely to produce death or great bodily injury (e.g., a

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[5] When *Aguilar* was decided, assault with a deadly weapon and force-likely assault were both contained in subdivision (a)(1) of former section 245. (*Aguilar, supra*, 16 Cal.4th at p. 1028.) The Legislature subsequently split them into subdivisions (a)(1) and (a)(4), respectively. (Stats. 2011, ch. 183, § 1; see *People v. Brunton* (2018) 23 Cal.App.5th 1097, 1104 [233 Cal. Rptr. 3d 686], rehg. den. June 11, 2018, petn. for review pending, petn. filed July 5, 2018 (*Brunton*).) As we explain below, this legislative amendment does not alter our analysis.

hammer). [Citations.] [¶] Reading this definition back into the statute, we find that section 245 … thus actually punishes an assault committed in any one of three ways: i.e., (1) with a weapon deadly per se, or (2) with an *object used* in a way likely to produce great bodily injury, or (3) by means of a *force* also likely to produce great bodily injury." (*Aguilar, supra*, 16 Cal.4th at p. 1038 (conc. opn. of Mosk, J.).) **[**13]**

Aguilar's distinction between inherently and noninherently deadly weapons is reflected in CALCRIM No. 875's definition of "deadly weapon," which states: "A *deadly weapon other than a firearm* is any object, instrument, or weapon that is [1] inherently deadly or [2] one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

Applying these principles, we conclude force-likely assault is not a lesser included offense of assault with a deadly weapon because, although every force-likely assault must be committed in a way that is likely to produce great bodily injury (either with or without a deadly weapon), there is a subset of assaults with deadly weapons—those committed with inherently deadly weapons—that are not necessarily likely to produce great bodily injury. The Attorney General posits the following illustration: "For example, if a defendant cuts a single strand of a sleeping person's hair with an inherently dangerous weapon such as a dagger, he will have committed assault with a deadly weapon even if no evidence shows he used the dagger in a manner capable of causing or likely to cause death or great bodily injury. Although a defendant must do an **[**14]** act 'that by its nature would directly and probably result in the application of force to a person' (CALCRIM [No.] 875), the 'terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way.' (*Ibid.*) Moreover, the 'People are not required to prove that the defendant actually touched someone.' (*Ibid.*)" (Italics added.)
[*767]

(2) Aguayo maintains we are not bound by *Aguilar* because its discussion of inherently deadly weapons is merely dicta and it addressed an earlier version of section 245. We agree *Aguilar* is not *binding*, but we find its analysis highly persuasive because of the depth in which the court analyzed the interplay between deadly weapons and the use of force likely to produce great bodily injury. (See *People v. Brown* (2000) 77 Cal.App.4th 1324, 1336 [92 Cal. Rptr. 2d 433] ["even dictum from our Supreme Court is considered 'highly persuasive'"].) And although section 245 was amended post-*Aguilar* to separate assault with a deadly weapon and force-likely assault into separate subdivisions, our court previously explained that "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.)) **[**15]** to provide clarity for purposes of recidivist enhancements … ." (*Brunton, supra*, 23 Cal.App.5th at p. 1107.)

Aguayo relies heavily on *In re Jonathan R*. (2016) 3 Cal.App.5th 963 [208 Cal. Rptr. 3d 159], which concluded force-likely assault *is* a lesser included offense of assault with a deadly weapon. (*Id.* at pp. 971–972.) We decline to follow *Jonathan R*. First, it focuses primarily on noninherently deadly weapons, relegating to a single footnote its discussion of *Aguilar*'s recognition of inherently deadly weapons. (*Jonathan R.*, at pp. 971–974 & fn. 5.) In that footnote, the *Jonathan R.* court concludes that the use of inherently deadly weapons "necessarily involves the use of force likely to produce death or serious injury" because they "'are "dangerous or deadly" to others in the *ordinary use* for which they are designed.'" (*Id.* at pp. 973–974, fn. 5, italics added.) But as the Attorney General's example illustrates, there are *nonordinary uses* to which one can put an inherently deadly weapon (e.g., cutting a single strand of hair) without altering the weapon's inherently deadly character.[6] Second, as our court previously explained in *Brunton*, due to intervening California Supreme Court authority, we place less weight on the intervening amendment to section 245 than did the *Jonathan R*. court. (See *Brunton, supra*, 23 Cal.App.5th at pp. 1106–1107.)

Aguayo argues we should follow *Jonathan R*. here because a different **[**16]** panel of our court applied it in an admittedly different context in *In re Jose S*. (2017) 12 Cal.App.5th 1107 [219 Cal. Rptr. 3d 801]. We are not persuaded. In *Jose S.*, a former ward of the juvenile court sought to seal his juvenile criminal record, which included an admission of assault with a deadly weapon (a knife). (*Id.* at p. 1112.) The juvenile court concluded his record was ineligible for sealing because his assault conviction was a disqualifying offense under the statutory sealing scheme. (*Id.* at pp. 1112–1113.) On appeal, **[*768]** the appellant argued (for the first time)

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[6] By analogy, an individual can commit an assault with a semiautomatic firearm (§ 245, subd. (b)) even if the firearm is unloaded and used as a mere bludgeon. (See *People v. Miceli* (2002) 104 Cal.App.4th 256, 270 [127 Cal. Rptr. 2d 888].)

his assault conviction was not disqualifying because the sealing statute enumerated assault with a firearm and force-likely assault, but not assault with a deadly weapon (the offense he admitted). (*Id.* at p. 1121.) In rejecting this argument, our court noted the juvenile court was authorized to consider not only the allegations of the charging document, but also the facts and circumstances of the actual offense. (*Id.* at p. 1122.) In that light, our court concluded the juvenile court was justified in concluding the defendant's assault with a deadly weapon "amounted to" and "encompasse[d]" force-likely assault because the evidence supported the factual finding that "[t]he knife used by [the minor] was capable of causing, and did cause, great **[**17]** bodily injury." (*Id.* at p. 1122.) In that sense, the manner in which the minor committed the assault with a deadly weapon was also likely to produce great bodily injury and, thus, was tantamount to a force-likely assault.

Here, unlike in *Jose S.*, we are not authorized to consider the facts and circumstances of the offense. Rather, we must apply the elements test "in the abstract," without regard to the "evidence introduced at trial." (*Chaney, supra*, 131 Cal.App.4th at p. 256.) Thus, *Jose S.* is inapposite.

(3) In sum, because an assault can be committed with an inherently deadly weapon without necessarily using force likely to produce great bodily injury, force-likely assault is not a lesser included offense of assault with a deadly weapon.

In her reply brief, Aguayo raises for the first time the alternative argument that even if we conclude (as we have) that force-likely assault is not a lesser included offense of assault with a deadly weapon, we must nonetheless vacate her conviction for force-likely assault because it is based on the same act as the assault with a deadly weapon conviction. This argument fails for several reasons. First, "[o]rdinarily, we do not consider arguments raised for the first time in a reply brief." (*People v. Mickel* (2016) 2 Cal.5th 181, 197 [211 Cal. Rptr. 3d 601, 385 P.3d 796].) Aguayo has **[**18]** given us no reason to depart from this practice. Second, Aguayo has not sufficiently developed the argument or supported it with citations to supporting legal authority. (See *In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 690, fn. 18 [64 Cal. Rptr. 3d 827] [failure to develop an argument or cite any authority in support of a contention results in the forfeiture of the issue on appeal].) Finally, the only case Aguayo cites in support of her argument, *Brunton, supra*, 23 Cal.App.5th 1097, is readily distinguishable. There, our court concluded convictions for force-likely assault and assault with a deadly weapon were impermissibly duplicative because they were both based on the defendant's *single act*—"choking his cellmate with a tightly rolled towel." (*Id.* at p. 1099.) Here, however, Aguayo's convictions are based on *multiple acts*—hitting her father with the bicycle chain and lock, and hitting him with the ceramic pot.

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II. *Retroactivity of the Mental Health Diversion Statutes*[*] [NOT CERTIFIED FOR PUBLICATION]

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court **[**19]** with directions to conduct a diversion eligibility hearing under section 1001.36.

If the trial court determines Aguayo is not eligible for diversion, then the court shall reinstate the judgment.

If the trial court determines Aguayo is eligible for diversion but, in exercising its discretion, the court further determines diversion is not appropriate under the circumstances, then the court shall reinstate the judgment.

If the trial court determines Aguayo is eligible for diversion and, in exercising its discretion, the court further determines diversion is appropriate under the circumstances, then the court may grant diversion. If Aguayo successfully completes diversion, the court shall dismiss the charges in accordance with section 1001.36, subdivision (e). However, if Aguayo does not successfully complete diversion, then the trial court shall reinstate the judgment.

Irion, J., and Dato, J., concurred.

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[*] See footnote, *ante*, page 758.

Re: *The People v. Aguayo,* Case No. D073304

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I certify that the foregoing is true and correct. Executed on **March 8, 2019**, at Auburn, California.

/s/ *Linnéa M. Johnson*
Linnéa M. Johnson

STATE OF CALIFORNIA
Supreme Court of California

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