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IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF AND RESPONDENT, V. VERONICA AGUAYO, DEFENDANT AND APPELLANT.	Supreme Court No. S254554 Court of Appeal No. D073304

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

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY
HON. DWAYNE K. MORING, JUDGE

APPELLANT'S SUPPLEMENTAL BRIEF ON NEW AUTHORITIES (CAL. RULES OF COURT, RULE 8.520(d))

ORAL ARGUMENT: JUNE 8, 2022

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IN THE SUPREME COURT OF CALIFORNIA

People Of The State Of California, Plaintiff and Respondent, v. Veronica Aguayo, Defendant and Appellant.	Supreme Court No. S255214 Court of Appeal No. D073304

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

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY
HON. DWAYNE K. MORING, JUDGE

APPELLANT'S SUPPLEMENTAL BRIEF ON NEW AUTHORITIES (CAL. RULES OF COURT, RULE 8.520(d))
Oral argument: June 8, 2022

Appellant's Supplemental Brief on New Authorities

Relevant opinions have been issued since the filing of the last brief on August 3, 2020. (See Cal. Rules of Court, rule 8.520(d).) Also, present counsel was only appointed on March 16, 2022.

Introduction

Recent case law further demonstrates why Penal Code[1] 245, subdivisions (a)(1) and (a)(4) are merely different statements of the same offense when an assault is committed in a single course of conduct. On the other hand, other recent case law again shows, in the realm of "inherently" deadly weapons, dictum dies hard. Appellant recognizes the reality that in explaining its reasoning, a court may delve into dictum. But when erroneous dictum repeatedly misguides posterity, a correction in course becomes necessary.

I.
The Conviction of Both Assault Offenses Violates Section 954, Because Subdivisions (a)(1) and (a)(4) Are Different Statements of the Same Offense.

In *Lawson v. PPG Architectural Finishes, Inc*. (2022) 12 Cal.5th 703, 713, citing *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169, this Court noted that the Legislative Counsel's Digest is "'printed as a preface to every bill considered by the Legislature'" to "'assist the Legislature in its consideration of pending legislation.'" Thus,

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1 All further references shall be to the Penal Code and undesignated subdivisions shall be to those in section 245.

as to the *Vidana* issue,[2] the Digest of Assembly Bill 1026 (A.B. 1026) that "This bill would make *technical, nonsubstantive* changes to these provisions [i.e., Pen. Code, § 245]," (Legis. Counsel's Dig., A.B. No. 1026 (2011–2012 Reg. Sess., emphasis added) would have informed the legislators — no substantive change was being made by separating assault-with-force-likely-to-produce-great-bodily-injury (FLPGBI) into a new subdivision ((a)(4)) from assault-with-deadly-weapon (ADW) ((a)(1)). The People may not convert into substantively separate offenses what the Legislature intended as only nonsubstantive changes.

Recent published cases shall be explored below, but one crucial determinant hinted at in prior briefing must be made more specific. While briefing noted that the information was amended on the eve of trial to add the (a)(4) count based on "same date/time [and location] (CT 21) and "same offense . . . occurring at the same time – same conduct" (RT 106-107), newly appointed counsel has noted the People's proffer was even more specific. The People's trial brief expressly stated that the new count alleged the (a)(4) offense was "***based on facts that came out at preliminary examination***." (C.T. 21, emphasis added.) At the preliminary hearing there

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2 The term "*Vidana* issue" shall refer to the impermissibility of multiple convictions for a different statement of the same offense when it is based on the same act or course of conduct. (*People v. Vidana* (2016) 1 Cal.5th 632, 650 (*Vidana*).)

was evidence *only* of the bicycle *lock* as the instrument.[3] (The ceramic pot was discovered only days before trial, leading to the amended information.) The People's trial brief in its statement of facts referred to the lock with no mention of the pot. (CT 22.) To add an (a)(4) count based on different conduct, i.e., a different object not proffered at the prelim, would have butted unsuccessfully against section 1009.[4]

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3 At the prelim, father-victim testified that he had picked up a rock and thrown it; it then ricocheted and hit appellant. (PHT 21, 33-35.) Both father-victim and Margaret noted dirt, tar, gravel, "black stuff," "gritty things," on him (PHT 23, 49, 50, 54-55), which both attributed to the bike lock. (PHT 23, 55 [Margaret: "I am pretty sure they came from the bicycle chain because there was nothing else around that he could have gotten it from]".)

Also, in discussing the (a)(1) weapon, the following dialogue occurred:

> [Defense counsel: And also the rock isn't the two-way in the 245. It's the bike chain.
> [Prosecutor]: I understand.

(PHT 58 – *note*: whether "two-way" is a mistranscription or otherwise cannot be determined.)

During trial, however, notwithstanding her representation to the court as to the (a)(4) count being premised on the evidence at the prelim, the prosecutor introduced evidence through Margaret of the pot, implying it had been used to strike the victim. (2RT 311-314). On re-direct, Margaret again stated her recollection the "gritty bits" came from the bike chain. (3RT 361.)

4 Notwithstanding that the amendment was based solely on preliminary hearing evidence, i.e., the lock, the opinion below was premised on the (a)(1) count being the lock and the (a)(4) count being the pot. (See *People v. Aguayo* (2019) 31 Cal.App.5th 758, 768 (*Aguayo I*)).

Two recent published opinions address the *Vidana* issue, one for which review has been granted-and-held behind this case, and one for which review was not sought: the former, *People v. Waxlax* (2021) 72 Cal.App.5th 579, review granted February 23, 2022, S272695 (*Waxlax*); the latter, *In re L.J.* (2021) 72 Cal.App.5th 37 (*L.J.*). *L.J.* shall be discussed in greater detail in the section to follow, relative to "inherently" deadly weapons. Its discussion of the *Vidana* issue is inapposite here, as it dealt with whether subdivision (a)(4) was a different-statement of *subdivision (c)*, ADW on a *peace officer* (*id.* at p. 51). The legislative intent motivating A.B. 1026 was not at issue in *L.J.*.

More apposite is *Waxlax*, *supra*, 72 Cal.App.5th 579, where the defendant committed one assault with a knife on one victim on one occasion. "The test for whether a statute defines different offenses or merely different ways of committing the same offense turns on legislative intent. '"[I]f the Legislature meant to define only one offense, we may not turn it into two."' ([*Vidana, supra*] at p. 637." (*Id.* at p. 586.) Again, here, the legislative intent could hardly be clearer.

II.
This Court Must Distinguish Between When Characterization of a Weapon Is at Issue (e.g., Possession) From *How Any Object Is Actually Used,* i.e., Assault. Dictum and Imprecise Language Has Blurred Assault Jurisprudence. This Court Should Correct the Dictum and Hold Manner of Use Controls, Regardless of Instrument.

L.J. supra, 72 Cal.App.5th 37, perpetuates ill-conceived dictum on two scores: first, it follows (with due respect to this Court) the unnecessary dictum in lengthy footnote 5 in *In re Mosley* (1970) 1 Cal.3d 913, 919 (*Mosley*); and second, without analysis, it merely reverberates dictum in *Aguayo I* – which *Aguayo I* had itself echoed – thus just continuing to prompt the question of the propriety of that dictum. Appellant will examine *L.J.*'s treatment of these rationales in reverse order.

The *L.J.* court replayed this dictum:

> As [*Aguayo I*] pointed out, [*People v. Aguilar* (1997) 16 Cal.4th 1023][(*Aguilar*)] recognized this exception because "there are nonordinary uses to which one can put an inherently deadly weapon . . . without altering the weapon's inherently deadly character." [Citation to *Aguayo* I.] In a hypothetical described in [*Aguayo I*], which the Attorney General repeats here, " 'a defendant cuts a single strand of a sleeping person's hair with an inherently dangerous weapon such as a dagger.' " [Citation.] A dagger is capable of producing great bodily injury, and thus a defendant's use of it in this scenario would prove deadly weapon assault (assuming the other elements were met). But because the defendant did not use the dagger in a manner likely to cause great bodily injury, the defendant would not have committed force-likely assault. [Citation.] Thus, because force-likely assault's element of use of force likely to cause great bodily injury is

> not necessarily included within deadly weapon assault, the former is not a lesser included offense of the latter.

(*L.J., supra*, 72 Cal.App.5th at p. 50.)

But though the Attorney General employed the dirk/dagger-wielding barber analogy in *L.J.* (adopted by *L.J.* court in November 2021), the Attorney General *here* had abandoned such analogy in its answer brief 18 months earlier.[5] While "*inherently* dangerous/deadly" is not a statutory term, but a judicial invention (cf. *People v. Aledamat* (2019) 8 Cal.5th 1, 16, fn. 5 ["distinction [between weaponry] not reflected in text of § 245"], the Attorney General in the course of briefing here has attempted to shift the attention to the hand-on-hilt (of a sword) analogy. But that just prompts the question whether a sword (in this states's/Nation's *modern* culture) is an "inherently" deadly weapon, or more important, whether, for purposes of subdivision (a)(1), any purpose is served by categorizing *any* object by its characteristics rather than *how* it was *actually used* for assault purposes.

Much has been argued in prior briefing in regard to what constitutes a "weapon," not to be repeated here. But one point does bear repetition. Respondent relied (Resp.Supp.Brf., 5/22/20, p. 24, emphasis added) upon Webster's American Dictionary of the English Language (1828) definition

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5 To constitute a "generally prohibited weapon," a dirk/dagger must be concealed upon the person, a concealment which would render barbering difficult.

of "weapon": "1. Any instrument of offense; any thing used or designed to be used in destroying or annoying an enemy. The weapons of *rude* nations are clubs, stones and bows and arrows. *Modern* weapons of war are swords, muskets, pistols, cannon and the like. . . ." Even more telling is respondent's follow-on conclusion:

> To be sure, there is any number of household items that can be extraordinarily lethal—from chainsaws to icepicks. The difference is that while these instruments may be used in an assaultive manner, there are *also benign uses for them as well*. In contrast, when a person employs a blackjack or other inherently deadly weapon, there is no innocent explanation; the defendant's intent is clear from the moment the defendant first lays a hand on it.

(Resp.Supp.Brf., 5/22/20, p. 25, emphasis added.)

Two rejoinders are in order. First, the most common occasions of ADW ((a)(1)) most likely occur with a knife. Yet, a knife (whatever its type) is not an "inherently" deadly weapon. (*People v. McCoy* (1944) 25 Cal.2d 177, 188.) But while a sword was a common weapon of war in the past, ADW with a sword would today be a rarity indeed. Uses of swords in our society now are largely limited to ceremonies such military weddings (<https://www.youtube.com/watch?v=6pvzGh3Lv04 (***see time*** 1:40)>), drill teams (<https://www.youtube.com/watch?v=ntP5kjYAfbQ>), changes of military commands, etc., i.e., certainly benign occasions. But what if, in a wedding, the new spouse took the slightest affront to it? Assuming

nonconsensual contact could be an assault/battery (§§ 240, 242), since accomplished by a saber, would/should this be an ADW? Common sense, sound policy, as well as the lack of any legislative command, dictate otherwise.

Second, in respondent's erstwhile barber-analogy (if the implement were an a dagger) or, hypothetically, if a sword were an "inherently" dangerous weapon, then, when used in a military wedding, to mirror respondent's words, there would well be an innocent explanation, and a defendant's supposedly unlawful intent is not at all clear from the moment the defendant first lays a hand on such saber.

What should be dispositive is manner of use. For an "instrument" or "object," the jury is instructed that a "deadly weapon" is "one" "that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." (CALCRIM No. 875; compare CALJIC No. 9.02, 3d ¶ ("*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," emphasis added.) But if the way/manner of use is the determinant in deciding whether an instrument – baseball bat, knife, etc. – *has been* employed as a deadly weapon, then manner of use should likewise determine when objects, such as those "generally prohibited" based on their

characteristics (e.g., those described in § 16590), have *not been used* in a dangerous manner. When not so used, this Court should conclude, no ADW has occurred. Again, the manner of *use* of ***any*** instrument should be the essence. (CALJIC No. 9.02, 3d ¶.)

The *L.J.* court (72 Cal.App.5th at p. 48) similarly favored the dictum in footnote 5 in *Mosley, supra*, 1 Cal.3d at page 919. The precise issue before the *Mosley* court was the propriety of submitting a preliminary hearing transcript as the sole evidence in a particular court trial. But in footnote 5, this Court took exception to the trial court having found defendant guilty of FLPGBI (as an LIO) rather than ADW. The rationale in the footnote was, "[former] Section 245 . . . define[d] only one offense, to wit, '[ADW] or [FLPGBI] * * *.' The offense of [FLPGBI] is not an offense separate from – and certainly not an offense lesser than and included within – the offense of [ADW]."[6]

All courts have recognized the statement is dictum. Some errors in the *Mosley, supra,* dictum have been briefed earlier (e.g., App.Reply, 5/1/20, pp. 14-15.) In addition, to the extent *Mosley* suggests that no single statute may contain both a greater and lesser offense, the suggestion is contradicted on several scores. First, given the case was decided in 1970,

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6 The remainder of the footnote was, however, prescient of A.B. 1026, and the need to distinguish between the two varieties.

well prior to the enactment of serious felony consequences in 1982, let alone the inception of the Strikes legislation in 1994, there was, at the time of *Mosley*, little to distinguish ADW and FLPGBI. Second, to the extent the passage implies that greater and lesser offenses cannot coexist within the same subdivision, the implication is inconsistent with other statutes.[7] Third, *Mosley, supra*, pre-dated *Aguilar*, supra, 16 Cal.4th 1023, and the latter's distinction between assault accomplished via bare hands or feet from those objects extrinsic to the body.

Also, notwithstanding *Aguilar*'s unnecessary repetition of the "'inherently' dangerous" dictum (*Aguilar*, *supra*, 16 Cal.4th at p. 1029), with its distinction between (1) hands-arms-feet and (2) objects extrinsic to the body, questions arise in regard to the issue of a lesser included offense. If hobnailed or steel-toed boots may constitute weapons within the meaning (a)(1) (*id*. at p. 1035), by necessary implication, some footwear far less hardened would *not*, and especially if the offender did not so intend to use (*People v. Graham* (1969) 71 Cal.2d 303, 327). But if the force was still

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7 (E.g., Health & Saf. Code, § 11352, proscribing selling or offering to sell, the latter of which is an LIO of the former (*Valenzuela v. Superior Court* (1995) 33 Cal.App.4th 1445, 1451); also offenses where statutory language proscribes X "or attempting X," i.e., the attempt is an LIO of completed offense, e.g., §§ 288.3 (contacting minor with intent) and 423.2 (interfering with access to a clinic).)

sufficient to be FLPGBI, it would only be of the (a)(4) category. Another scenario to consider would be where hands-arms-legs were used with sufficient force to constitute FLPGBI, but a further issue litigated was *whether* the force *also* extended sufficiently toward "using" an instrumentality – e.g., pushing into a vehicle, a plate glass window, etc. (*People v. Russell* (2005) 129 Cal.App.4th 776,778).

If the prosecutor alleged an (a)(1) offense, proffered instruction upon, and argued for (a)(1) seeking a serious felony/Strike conviction based upon, say, a hardened shoe, then defense counsel, seeking to avoid the more severe penal consequences, would argue that a mid-spectrum shoe (or other attending circumstances) did not constitute an (a)(1) instrument; hence, no "extrinsic object" being used, the offense would be, at worst, an (a)(4) assault. Thus, (a)(1) would be characterized as an aggravated form of (a)(4) – greater and lesser offenses.

In *Aguilar*, this court sustained the conviction because at that time, 1997, both ADW and FLPGBI, fell within the same subdivision. (*Aguilar*, supra, 16 Cal.4th at pp. 1037-1038.) But now, should the prosecutor only allege an (a)(1) offense where the assailant uses a "medium" shoe, the prosecutor would risk acquittal. But if the prosecutor only alleges an (a)(4) offense, a jury, even though it could have concluded (if asked) the

"medium" shoe was "hard" enough to constitute an extrinsic object to be a deadly weapon, would be limited to returning a FLPGBI verdict. The reasonable practical solution, again, would be to construe (a)(4) as an LIO of (a)(1).

This Court has not hesitated to redirect the misguided from a long history of incorrect dictum. (E.g., *People v. Lasko* (2000) 23 Cal.4th 101, 110-111.) Dictum heaped upon dictum have led our courts astray on various bearings; this Court should now correct course.

CONCLUSION

The "inherently" deadly weapon dictum should be abandoned. Subdivision (a)(4) is an LIO of (a)(1) or, in the alternative, a different statement of the same offense.

Dated: May 26, 2022

Howard C. Cohen
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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify this Appellant's Supplemental Brief On New Authorities contains 2,763 words, excluding the Table of Contents and Table of Authorities, according to the WordPerfect X7 word-processing program which generated this Appellant's Supplemental Brief On New Authorities.

Date: May 26, 2022

/s/ Howard C. Cohen

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Court of Appeal No.: **D073304**
Superior Court No.: **SCS295489**

I, Freida Aguilar, declare that I am over 18 years of age, employed in the County of San Diego, and not a party to the instant action. My business address is 555 West Beech Street, Suite 300, San Diego, California 92101-2939. My email address is fxa@adi-sandiego.com.

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This declaration was executed at San Diego, California, on May 26, 2022.

/s/ Freida Aguilar

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