IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE
OF CALIFORNIA,

PLAINTIFF AND RESPONDENT,

v.

VERONICA AGUAYO,

DEFENDANT AND APPELLANT.

CASE NO. S254554

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

APPELLANT'S OPENING BRIEF ON THE MERITS

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

TABLE OF CONTENTS

TABLE OF CONTENTS CONT'D.

TABLE OF CONTENTS CONT'D.

TABLE OF AUTHORITIES

U.S. CONSTITUTION

FEDERAL CASES

CALIFORNIA CONSTITUTION

STATE CASES

TABLE OF AUTHORITIES CONT'D.

TABLE OF AUTHORITIES CONT'D.

TABLE OF AUTHORITIES CONT'D.

STATE STATUTES

TABLE OF AUTHORITIES CONT'D.

Jury Instructions

TABLE OF AUTHORITIES CONT'D.

Miscellaneous

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

Is assault by means of force likely to produce great bodily injury a lesser included offense of assault with a deadly weapon?

If not, does a policy "exist for treating inherently deadly weapons differently from other objects capable of being used as a deadly weapon, particularly since the distinction is not reflected in the text of section 245?"

If so, was defendant's conviction of assault by means of force likely to produce great bodily injury based on the same act or course of conduct as her conviction of assault with a deadly weapon?

Statement of the Case

On October 20, 2017, a jury convicted Veronica Aguayo of assault with a deadly weapon (count two) and a separate count of assault by means

likely to produce great bodily injury (count three), in violation of Penal Code section 245, subdivisions (a)(1) and (a)(4) respectively.[1] The jury was unable to reach a verdict as to count one, elder abuse, and returned a verdict as to the lesser included offense of willful cruelty to an elder. The trial court declared a mistrial on count one, and declared the guilty verdict on the willful cruelty verdict to be invalid because the jury was unable to reach a verdict on the elder abuse charge. (1 C.T. pp. 141,145; 4 R.T. pp. 666-670, 676.)

On November 27, 2017, the court suspended imposition of sentence for three years and placed Ms. Aguayo on probation, on the condition that she serve 365 days in jail. (1 C.T. p. 111; 5 R.T. p. 693.)

On December 22, 2017, Ms. Aguayo timely filed a notice of appeal. (1 C.T. p. 116.) On January 28, 2019, the appellate court affirmed Ms. Aguayo's convictions under Penal Code section 245, subdivisions (a)(1) and (a)(4), finding under the elements test, (a)(4) is not a lesser included offense of (a)(1). The appellate court also found that the (a)(1) offense was committed with the bicycle chain/lock, and the (a)(4) offense was committed with the chiminea. (*People v. Aguayo* (2019) 31 Cal.App.5th 758, 760, 764-

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[1] All subsequent undesignated statutory citations are to the Penal Code, and all future references to section 245, subdivisions (a)(1) and (a)(2) will be to "subdivision (a)(1)" and "subdivision (a)(4), or simply "(a)(1)" and "(a)(4.)"

765 (*Aguayo*).).

On March 8, 2019, Ms. Aguayo timely filed a petition for review. On May 1, 2019, this Court granted Ms. Aguayo's petition for review, but suspended briefing pending its decision in *People v. Aledamat* (2019) 8 Cal.5th 1 (*Aledamat*), which was filed on August 26, 2019. On November 20, 2019, this Court directed the parties to file briefs.

Statement of Facts

On August 8, 2017, at approximately 4 p.m., then 43-year old Veronica Aguayo (Ms. Aguayo) was working on her bicycle outside her parents' home. (1 C.T. p. 93; 2 R.T. pp. 232, 234.) Ms. Aguayo's mother, Margaret Aguayo (Mrs. Aguayo), asked her husband (Veronica's father), Luis Aguayo, (Mr. Aguayo) to go outside and water the yard. Mrs. Aguayo heard her husband turn the sprinklers on. He was outside for five to eight minutes before Mrs. Aguayo heard her daughter, Ms. Aguayo, yelling. (3 R.T. pp. 339-340.)

The only people who witnessed the entire altercation were the participants, Ms. Aguayo and her father. Ms. Aguayo and her father each testified to what had happened before any of their family members came to the door to see what the ruckus was about. Ms. Aguayo and her father agreed that when Mr. Aguayo turned on the sprinklers, Ms. Aguayo's cell

phone or charger got wet, causing them to start arguing. (2 R.T. pp. 261, 3 R.T. pp. 395, 452-453.)

According to Ms. Aguayo, she confronted her father about her phone charger getting wet, to which he responded: "This is my house. I do what I want because this is my house." (3 R.T. pp. 452-453.) Ms. Aguayo called him a name and Mr. Aguayo came at her, but she did not "go at him" and did not start hitting him. (3 R.T. pp. 455, 457.)

According to Mr. Aguayo, however, he told his daughter not to call him names, and that is when she "came at him" with her bike lock and chain. Mr. Aguayo described the bike lock and chain as coated with a plastic or rubber lining. He said Ms. Aguayo hit him in the back with it. (2 R.T. p. 159, 172.) Then they struggled over control of it. Mr. Aguayo slipped and let go of the lock, and that is when Ms. Aguayo hit him with the bike lock in the head and on his arms and chest. When he tried to regain control of the bike lock, Ms. Aguayo would not let go. (2 R.T. pp. 159-160.)

According to Mr. Aguayo, his daughter struck him about 15 times on the chest and arms, three times on his back, and a total of 50 times altogether. (2 R.T. pp. 160-161, 240, 245; 3 R.T. p. 396.) When Ms. Aguayo slipped and fell, Mr. Aguayo fell on top of her, and she began yelling "Mom," and grabbed the chiminea (the ceramic pot) and threw it at Mr. Aguayo (2 R.T. pp. 162-165.) Then Mr. Aguayo grabbed a rock. (2

R.T. p. 164.) But Jesus Christ told Mr. Aguayo not to throw it at his daughter, so he tossed it against the wall; however, the rock ricocheted off the wall and hit Ms. Aguayo in the side of the head. At this point, Mr. Aguayo was lying on top of his daughter and he was in pain. (2 R.T. p. 166.) But according to Ms. Aguayo, her father grabbed the chiminea and it ricocheted off the wall and hit her in the head, after which he picked up a rock and threw it at her head. (3 R.T. pp. 467-468.)

After Mr. Aguayo got up, Mrs. Aguayo saw what was going on. (2 R.T. p. 167.) Mrs. Aguayo and the husband of Veronica's sister, Derek Scott, witnessed the end of the altercation, but neither of them saw Ms. Aguayo strike her father. (2 R.T. pp. 134; 3 R.T. pp. 355-356, 374-375.)

Mrs. Aguayo testified that when she heard her husband calling for her, she went to the door and she saw Ms. Aguayo and her husband in front of the gate, having a tug-o-war over the bike chain and lock. Mr. Scott heard Mr. Aguayo yelling at Ms. Aguayo to get out, and saw she had a rock in her hand, like she was going to throw it at her father. Mr. Scott thought Mr. Aguayo had the bicycle chain. (3 R.T. pp. 370-371.) Mr. Scott did not see Ms. Aguayo swing the bicycle chain or throw the rock at her father. (2 R.T. pp. 374-375.)

Mrs. Aguayo testified that from the door she hollered to her husband to get back in the house. (2 R.T. pp. 306-307.) Either Mr. Aguayo won the

tug-o-war, or Ms. Aguayo let go of the chain and lock, because he had it in his hand when he starting walking to the house. (2 R.T. p. 307.) Mrs. Aguayo also saw her daughter with a rock in her hand, although it did not look to her like she was going to throw it. (2 R.T. p. 308.) In fact, she saw Ms. Aguayo drop the rock, and ask for her bike chain back from her father. Mrs. Aguayo saw her husband throw the chain back to Ms. Aguayo. (2 R.T. p. 309; 3 R.T. p. 425.)

Morgan Byers, the lead officer, contacted Mr. Aguayo and described him as incoherent and "out of it," but she did not interview him or document his injuries (3 R.T. pp. 405, 421-422.) Mr. Aguayo reported that his daughter had left on a bicycle. (3 R.T. pp. 405-406.) Almost five hours later, Officer Byers stopped Ms. Aguayo for running a red light on her bicycle. (3 R.T. p. 406.) Before booking Ms. Aguayo into the jail, Officer Byers took her to the hospital for a medical clearance. (3 R.T. p. 407.) She testified that she did this because Ms. Aguayo complained that she was struck with a 50-pound rock or boulder, which Ms. Aguayo later explained was the chiminea. (3 R.T. pp. 407, 490.)

Mr. Aguayo's testimony at trial was inconsistent with some of what he had reported to Officer Leo Benales, the investigating officer who conducted a brief five-to-ten minute interview with Mr. Aguayo in Spanish. During this interview Mr. Aguayo failed to mention that Ms. Aguayo hit him

on the head with the chiminea, also referred to as a ceramic pot. At the preliminary examination, Mr. Aguayo also failed to relate that this had happened. (2 R.T. pp. 261-262, 268; 3 R.T. pp. 387, 394, 398-399.) Mr. Aguayo also failed to mention to Officer Benales that he had thrown a rock that hit his daughter in the head. (3 R.T. p. 399.)

Mr. Aguayo also told Officer Benales that he was not struck on the back or buttocks. (3 R.T. p. 397.) Mr. Aguayo complained his head and knee hurt and that he hurt all over. (3 R.T. p. 357.) Officer Benales thought Mr. Aguayo appeared dazed and disoriented. (3 R.T. p. 399.) Mr. Aguayo again confirmed to Officer Benales that he had been struck about 50 times in the legs, arms, chest, and on the back of his head. (3 R.T. pp. 401-402.) Officer Benales noticed what he described as a two-inch gash or scrape on Mr. Aguayo's right arm, and some smeared blood on the stomach area. (3 R.T. pp. 382, 384-385.) Mrs. Aguayo, however, described a scratch on one of her husband's arms, and a little bit of blood. She noticed no injuries to his head other than a bump where he had had prior surgeries. (2 R.T. p. 310-311.)

The hospital took ex-rays and performed a CT scan of Mr. Aguayo, and cleared and released him within a couple hours. He had no internal bleeding, no broken bones, and no lacerations on his head. (2 R.T. pp. 245-246.)

Introduction to the Argument

The appellate court below concluded that an actor could violate (a)(1) by committing an assault with a "inherently deadly" weapon even though the assault was not by means of force likely to produce great bodily injury (a)(4)). That lead the appellate court to conclude that (a)(4) is not a lesser-included offense (LIO) of (a)(1) under the elements test. (*Aguayo, supra*, 31 Cal.App.5th at p. 766.) This conclusion was based on dicta from this Court that has been included in CALCRIM No. 875. (*Ibid.*)

But the assault statute evidences no legislative intent to create two classes of deadly weapons. Moreover, the appellate court's interpretation of "inherently deadly" weapon lessens the prosecution's burden of proof by creating a irrebuttable presumption that an "inherently deadly" weapon will always be used in a manner likely to produce great bodily harm or death. It was the grafting of inapposite robbery-arming jurisprudence onto the assault jurisprudence that lead to this constitutionally questionable interpretation. For purposes of the elements analysis (a)(1) should be interpreted as requiring proof that a deadly weapon was used in such a way that it was capable of causing and likely to cause death or great bodily injury. The implication is that if an instrument was *not* used in such a way that it is capable of causing and likely to cause death or great bodily injury, then no violation of subdivision (a)(1) or (a)(4) has occurred, and by further

implication, (a)(4) would be a LIO of (a)(1).

In this case, the LIO issue arises in the context of multiple assault convictions based on the same conduct. If (a)(4) is found to be an LIO of (a)(1), it is an exception to section 954, and the conviction must be vacated. For making this LIO determination, only the elements test applies. (*People v. Sanders* (2012) 55 Cal.4th 731, 737.) Analogizing the elements test to set theory in mathematics, this Court has explained that the test requires a determination of whether one crime's elements are a subset of another crime's elements, and if that is so, the subset is an LIO of the greater offense. (*People v. Fontenot* (2019) 8 Cal.5th 57, 65.)

Section 16590, the successor statute to section 12020, sets forth a list of items that are "generally prohibited" to possess, and includes exceptions to both the general prohibition, as well as specific prohibitions referenced in each listed item. A dirk or dagger is on the generally prohibited list in section 16590, but only when concealed on one's person. (§ 2130.)

The purpose of listing prohibited weapons is prophylactic, aimed at preventing harm before it happens by banning certain types of possession. The assault statute, in contrast, criminalizes conduct causing harm through the deadly use of a weapon. It is for that reason that the "generally prohibited" list of weapons should not be used to define an "inherently deadly" weapon for purposes of the assault statute. Moreover, because the

weapon is actually used, rather than merely possessed, a conviction of an (a)(1) assault is a serious prior and therefore a strike.

A so-called "inherently deadly" weapon used in its ordinarily intended manner, by definition, will have been used with force likely to have caused great bodily injury/death. But when an "inherently deadly" weapon is not employed for its ordinary intended use, it loses its "inherently dangerous" character, just as the actor in the state's hypothetical did not use the dirk or dagger for its ordinarily intended purposes; accordingly, the dagger or dirk should not be considered to be an "inherently deadly" weapon that requires no showing of use capable of causing and likely to cause death or great bodily injury.

In making the suggestion to delete the "inherently deadly weapon" language from the jury instruction in the usual case, this Court also questioned ". . . whether a policy exists for treating inherently deadly weapons differently from other objects capable of being used as a deadly weapon, particularly since the distinction is not reflected in the text of section 245." (*Aledamat*, 8 Cal.5th at p. 16, fn. 5.) Because the facts in *Aledamat* did not present that question, this Court explicitly left the consideration of this issue "for another day." (*Ibid.*)

Today is that day.

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ARGUMENT

I. 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 Penal Code Section 245, Subdivision (a)(1), Assault with a Deadly Weapon, Under the Elements Test

When the appellate court below concluded that (a)(4), is not an LIO of (a)(1) under the elements test, it identified the dispositive factor: whether an assault with a deadly weapon, when such weapons are "inherently deadly," still requires a manner of use that is likely to produce great bodily injury or death. According to the appellate court here, as (a)(4) requires the use of force likely to produce great bodily injury, (a)(4) cannot be an LIO of (a)(1) because (a)(1) permits the use of the purported "inherently deadly" weapon in a way that is not likely to produce great bodily injury. The appellate court recognized that:

> 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.

(*Aguayo, supra,* 31 Cal.App.5th at pp. 764-765.)

To reach this conclusion, the appellate court relied on *People v. Aguilar* (1997) 16 Cal.4th 1023 (*Aguilar*) and was persuaded by the state's hypothetical in which it posited that an actor could violate (a)(1), without

violating (a)(4). In this scenario, the actor employed a dagger to cut a single hair from a sleeping victim's head. The state posited that a dagger is an inherently deadly weapon, and the force used to cut the single strand of hair was sufficient to prove an assault. Because the dagger used was "inherently deadly," the actor violated (a)(1), even though the dagger was not employed in a deadly manner or for a deadly purpose and therefore could not have applied force likely to produce great bodily injury in violation of (a)(4). (*Aguayo, supra*, 31 Cal.App.5th at p. 766.)

In *Aledamat, supra*, 8 Cal.5th at p. 3, the trial court had erroneously permitted the jury to consider a box cutter as an inherently deadly weapon when it instructed the jury with two possible theories of guilt: (1) that the box cutter was inherently deadly, and (2) that defendant used the box cutter in a deadly way. As a box cutter is not an inherently deadly weapon, this Court found that theory to be erroneous under the facts, but found that the second theory was correct. (*Ibid.*) In finding this error harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, this Court recognized that CALCRIM Nos. 875 and 3145, which use the term "inherently deadly weapon," failed to include any definition of "inherently deadly." This Court further observed that this term still is provided to the jury in the majority of cases, even though the weapon used was not inherently deadly as a matter of law. (*Aledamat, supra*, 8 Cal.5th at pp. 3-4,

15-16.) This Court then suggested that the inherently deadly language is unnecessary, because *an object that is designed for use as a deadly weapon "will be also used in a way that makes it a deadly weapon."* (*Id.* at p. 16, emphasis added.) This Court concluded that " . . . the standard instruction might be improved by simply deleting any reference in the usual case to inherently deadly weapons." (*Ibid.*) This suggestion was limited to the "usual" case, because the Court observed that under current law, some objects are inherently deadly and in those cases, including the "inherently deadly" weapons in the instruction might be appropriate. (*Ibid.*)

The term "inherently deadly" appears nowhere in the statute itself. If this Court were to adopt the appellate court's view of this hypothetical violation of (a)(1) in which the actor uses a dirk or dagger to cut a single hair of a sleeping person, this interpretation will have eliminated an element of the offense, by creating an irrebuttable presumption and thereby lessening the prosecution's burden of proof. Before deciding how to interpret "deadly weapon" as used in the assault statute, this Court should first look to the wording of the statute and its plain meaning.

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A. The Plain Meaning of the Assault Statute Evidences the Legislature's Intent to Criminalize the Actions of One Who Uses An Object or Instrument in a Way That Is Likely to Produce Great Bodily Injury

The first step in discovering the legislative intent of a statute is to read the statute. "'We begin with the text of the statute as the best indicator of legislative intent.' (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836.)" (*San Diegans for Open Government v. Public Facilities Financing Authority of the City of San Diego* (2019) 8 Cal.5th 733, 740.) If there is no ambiguity in the statute, the reviewing court may presume the Legislature meant what it said. In that context, the plain meaning of the statute governs. (*Ceja v. Rudolph & Sletten, Inc.* (2013) 56 Cal.4th 1113, 119.)

If, on the other hand, the language of a statute is ambiguous, a court will consult other indicia of the Legislature's intent, such as extrinsic aids, including legislative history and public policy. Ambiguity exists when the statutory language is susceptible to more than one reasonable meaning. To determine whether the statutory language is susceptible of more than one reasonable meaning, the court construes the words in their usual and ordinary meaning, and considers that language in the context of the entire statute. (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1184.) If any such ambiguity exists, it should be construed in favor of Ms. Aguayo under the rule of lenity, which applies

where the two interpretations of the statute are reasonable and stand in "relative equipoise." (*People v. Scott* (2014) 58 Cal.4th 1415, 1426.)

1. The Plain Meaning of (a)(1) Does Not Now, and Never Has, Required Any Weapons to be Designated as "Inherently Deadly"

The plain meaning of (a)(1) and (a)(4) of the assault statute is two-fold: first, the Legislature intended to criminalize two kinds of assaults: one with an instrument or object used in a deadly manner, and the other involving the use of force likely to produce great bodily injury, with or without employing an instrument extrinsic to the body. As to the (a)(1) offense, this Court has recognized that while hands and feet can be deadly, the term weapons, as used in the statute, requires use of an object extrinsic to the body. so that the assault committed with hands and feet would be an (a)(4) assault by means of force likely to produce great bodily injury or death. (*Aguilar, supra,* 16 Cal. 4th at pp. 1026-1027.)

In *Aguilar*, this Court did not view the addition of the "inherently deadly weapon" term as arising due to any ambiguity in the statute. In fact, in deciding whether a deadly weapon must be extrinsic to the human body, this Court followed the procedure for construing a statute where there is no ambiguity, and reviewed the statute as a whole, in a commonsense manner that avoided rendering any part of the statute superfluous. (*Aguilar, supra,* 16 Cal.4th at p. 1034.)

This Court has also recognized how the assault statute has evolved from its initial enactment in eliminating the intent and lack of provocation elements, and adding the "force likely" alternative to the "deadly weapon" clause:

> When first enacted in 1872, section 245 read as follows: "Every person who, with intent to do bodily harm, and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned and malignant heart, commits an assault upon the person of another with a deadly weapon, instrument, or other thing, is punishable by imprisonment in the State Prison not exceeding two years, or by fine not exceeding five thousand dollars, or by both." (1872 Pen. Code, § 245.) Section 245 was amended two years later, in 1874; as relevant here, the amendments eliminated the intent and lack-of-provocation elements and added the "force likely" clause as an alternative to the "deadly weapon" clause. (Code Amends. 1873-1874 (Pen. Code) ch. 614, § 22, p. 428.)

(*Aguilar, supra,* 16 Cal.4th at p. 1030.)

The next amendment of section 245, of significance to this case, became effective in 2012. The Law Revision Commission described this amendment in its comment as nonsubstantive: "Section 245 is amended to reflect nonsubstantive reorganization of the statutes governing control of deadly weapons." (Legis. Counsel's Dig., Assem. Bill No. 1026 (2011–2012

Reg. Sess.).[2]) Instead of leaving the "force likely" and the "deadly weapon" terms in the same subdivision, the Legislature separated them into different subdivisions. The reason for this is clear.

Assault with a deadly weapon is a serious felony. (§ 1192.7, subd. (c)(31).) Serious felonies also include all those "in which the defendant personally inflicts great bodily injury on any person." (*Id.*, subd. (c)(8).) Assault by means likely to produce great bodily injury, without the additional element of personal infliction, is not a serious felony. (*People v. Gallardo* (2017) 4 Cal.5th 120, 125 (*Gallardo*).)

Separating (a)(1) from (a)(4) reduced the necessity for litigation to establish whether the conviction was for a form of assault that is a serious felony, or for a form of assault that was not a serious felony.

Under a plain meaning interpretation of section 245, subdivision (a)(1), there is no basis in the statute for treating classes of deadly weapons differently, or for creating a new class of "inherently deadly weapons." This Court has acknowledged that the "inherently deadly" language does not apply in most cases. (*Aledamat, supra*, 8 Cal.5th at p. 15.) But this Court did so without defining the meaning of "inherently deadly," instead tasking

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[2] The legislature was not "creat[ing] any new felonies or expand[ing] the punishment for any existing felonies" (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1026 (2011-2012 Reg. Sess.) as introduced Feb. 18, 2011, p. 3).

any trial court to do so any time it gives the instruction with the "inherently deadly" language included. (*Id.* at p. 16.)

As this Court also noted in *Aledamat*, the term "inherently deadly weapon" does not now, and never has, appeared in the assault statute. (*Aledamat, supra,* 8 Cal.5th at p. 16, fn. 5.) The Legislature has consistently retained and used the simple term "deadly weapon" in the assault statute. This Court has defined a "deadly weapon" as "'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.'" (E.g., *Aguilar, supra,* 16 Cal.4th at pp. 1028–1029.)

Defining the meaning of a term used in a statute that is not otherwise defined in a statute itself is an appropriate exercise of the judicial function. But in so doing, this Court has cautioned that: "We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*California Federal Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.) The creation of two classes of deadly weapons, as construed by the appellate court here, has done exactly that, usurping the legislative prerogative and distorting the meaning of section 245. (See see I. A .3., *post*, pages 30-35.)

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2. The Assault Statute Does Not Now, and Never Has, Included the Term "Inherently Deadly" Weapon

As this Court noted in *Aledamat*, the term "inherently deadly weapon" does not appear in the assault statute. (*Aledamat, supra,* 8 Cal.5th at p. 16, fn. 5.) In (a)(1), the Legislature defined the offense of assault with a deadly weapon or instrument as requiring the use of deadly weapon or instrument, other than a firearm, but without using the modifying terms "inherently"and/or "as a matter of law:" (§ 245, subd. (a)(1).)

The Legislature has consistently retained and used the term "deadly weapon" in the assault statute, and has consistently relied on the definition of "'"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."'" (*Aguilar,* 16 Cal.4th at pp. 1028–1029.) But relying on *People v. Graham* (1969) 71 Cal.2d 303, 327 (*Graham*), decided long before *Aguilar*, this Court allowed for some weapons to be "inherently deadly" where the use for which they were designed establishes that they are deadly:

> 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.

(*Aguilar, supra,* 16 Cal.4th at p. 1029.)

There is nothing in the plain meaning of the statute, or in its legislative history, to indicate that the Legislature intended to create two

classes of deadly weapons, the proof of which would be less for weapons determined to be "inherently deadly." The creation of two classes of deadly weapons, interpreted as the appellate court construed these two classes here, gives "deadly weapon" an effect different from the plain and direct import of the terms used in the assault statute.

While the Legislature has not addressed the judicial definition of "deadly weapon" in its numerous modifications of the assault statute, this should not be viewed as a form of legislative acquiescence for two reasons. As this Court has previously explained, claims of legislative inaction alone are not particularly telling because the inaction could simply be a matter of the press of other more important business. (*Scher v. Burke* (2017) 3 Cal.5th 136, 148.)

Legislative acquiescence to this Court's creating two classes of deadly weapons by including the term "inherently deadly" in its definition of "deadly weapon," is even less telling here. As this Court has observed, the characterization is rarely applicable, and "generally unnecessary" for purposes of the assault statute. (*Aledamat, supra*, 8 Cal.5th at pp. 15-16.) Under these conditions, failing to address this rarely arising issue in its revisions of the assault statute simply is not evidence of a Legislative intent to create two classes of deadly weapons. That would be inconsistent with the plain meaning of the assault statute.

Penal Code section 245 was originally enacted in 1872, and the Legislature has now revised this statute 19 times over the last 148 years. None of these revisions involved adding "inherently" as a qualifier to the "deadly weapon" element of the crime of assault.

3. Despite Its Absence From the Statute, this Court Has Created Two Classes of Weapons: Deadly Weapons and "Inherently Deadly" Weapons

The definition of a deadly weapon recited in *Aguilar* has evolved through 148 years of this Court's jurisprudence dealing with deadly weapons in the context of an assault charge. This Court recognized in *People v. Perez* (2018) 4 Cal.5th 1055, 1065 (*Perez*), that it had used a similar definition of "deadly weapon" long before it decided *Aguilar*.

The first two published decisions involving the "deadly weapon" element involved jury instructions. In the first case, the jury asked for a definition of a deadly weapon, and the trial court refused the request. This Court reversed, finding that the character of the weapon is "ordinarily pronounced by law" but that there may be cases where its character as a deadly weapon depends upon the manner in which it was used. This Court concluded this was a mixed question of law and fact for the jury, and must be left to the jury with proper instructions from the trial court. (*People v. Fuqua* (1881) 58 Cal. 245, 247.)

Six years later, in *People v. Leyba* (1887) 74 Cal. 407, 408, the trial

court charged the jury that a deadly weapon was one likely to produce death or great bodily injury; that there are cases where the character of the weapon, whether deadly or otherwise, depends on the manner in which it is used; and, in effect, that it was for the jury to decide whether a weapon was used, and after considering the evidence as to the manner of its use, whether it was a deadly weapon. This Court thought the charge correct, in view of the conflicting testimony (but if not strictly correct, was favorable to the defendant). (*Ibid.*)

At this juncture, an historical detour must be taken. A half-century ago an appellate court decided *People v. Raleigh* (1932) 128 Cal.App. 105 (*Raleigh*), a case involving first degree robbery, which turned on the question of "being armed with a dangerous or deadly weapon." (*Id.* at p. 107.) The issue was whether a failure to prove that a gun was loaded rendered the evidence insufficient. The appellate court concluded that the present ability of the possessor of the instrumentality to use it, essential in cases involving assault with a deadly weapon, was *not essential* in the *robbery context*. In other words, the court said " . . . it is immaterial whether such weapon is used or even exposed to view. [Citation.]" (*Raleigh, supra*, 128 Cal.App. at p. 109.)

For purposes of the arming requirement in the then-robbery statute, which is akin to today's possession offenses, use of the weapon was

immaterial. But under the assault statute, it *is* the manner of its *use* that is dispositive. The interplay between the inherently and non-inherently deadly weapons was born in this context. (*People v. Raleigh, supra,* 128 Cal.App. at pp. 109-110.)

Within a decade, this Court, in a capital case, *People v. Cook* (1940) 15 Cal.2d 507 (*Cook*) unnecessarily borrowed language from *Raleigh*. In *Cook*, the defendant dealt the fatal blow to the back of the decedent's head with a wooden two-by-four, two feet in length. The defendant contended that the choice of this object somehow negated an intent to kill. (*Id.* at p. 516.) There was no necessity to revert to *Raleigh* to decide this case. But this Court applied the definition of "armed," which should have been limited to robbery cases, to this assault, where the lumber used was not an "inherently dangerous" weapon.

Four years later, in *People v. McCoy* (1944) 25 Cal.2d 177 (*McCoy*), this Court considered an assault committed with a knife and declared that a knife is not an inherently dangerous or deadly instrument as a matter of law. (*Id.* at p. 188.) This Court again echoed the *Raleigh* "arming" definition. But what is most important to the instant discussion, is that this Court added a critically important nuance: that the manner of use applies, whether the weapon is inherently deadly or not.

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> Whether the instrument employed be inherently "dangerous or deadly" as a matter of law or one that may assume such character depending upon the attendant circumstances, the principle as to *the intent which may be implied from the manner of the defendant's use of the instrumentality involved would apply* ***in either instance.*** [Citations.]

(*McCoy, supra,* 25 Cal.2d at p. 190, emphasis added.)

A quarter-century later, in a robbery felony-murder capital case, *People v. Graham, supra,* 71 Cal.2d at pp. 310-311, 327 et seq.,disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, this Court reversed the judgment of both the murder and first degree robbery, the latter because the instruction that the perpetrator was "armed with a dangerous or deadly weapon" was inadequate. The defendant kicked the victim with his shoe. (*Id.* at p. 327) In this case of an assaultive nature (murder), on the specific issue of the degree of robbery requiring a dangerous or deadly weapon, this Court applied the *Raleigh* rationale. (*Id.* at pp. 327-329.)

The metamorphosis of the "inherently dangerous" denomination from a characteristic of an object in an armed (first degree) robbery to a definition of a weapon in an assault culminated in *Aguilar, supra,* 16 Cal.4th 1023. Again, no "inherently dangerous" weapon was at issue. This Court "granted review to determine whether hands or feet can constitute 'deadly weapons' . . . . That hands and feet may be capable of inflicting deadly force, . . . , is not

in question. We conclude, however, that the term 'weapon,' as used in the statute, implies an object extrinsic to the body." (*Id.* at pp. 1026–1027.) But in dicta, this Court went further in citing to *Graham*, which had been pertinent to the "armed robbery" issue, and included in its text: "*(except in those cases involving an inherently dangerous weapon*), the jury's decisionmaking process in an aggravated assault case . . . 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." (*Id.* at pp. 1029, 1035, emphasis added). This Court again cited to *Graham*, and recognized that "inherently deadly weapons" exist and that a jury can convict based on the mere character of the weapon:

> We observe that, despite the identity of the jury's reasoning processes under either the "deadly weapon" clause or 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. [Citation omitted.]

(*Id.* at p. 1037, fn. 10.)

In the transition from CALJIC to CALCRIM, this dicta appears to

have been adopted by the latter.[3]

Nearly nine decades ago, in a case involving the arming aspect of then-first degree robbery, the concept of "inherently dangerous" was introduced and over time engrafted onto section 245. The statutory classification of "inherently deadly" weapons was transformed. But the

> . . . *Aguilar* court did not consider, much less determine, that inherently dangerous weapons are either synonymous with, or are to be included as, deadly weapons under section 245 regardless of the manner in which they are used. [Citations.]

(*Brown, supra*, 210 Cal.App.4th at p. 10 .)

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[3] CALJIC No. 604, the predecessor to what ultimately became CALCRIM No. 875, did not include "inherently deadly" in its definition of a deadly weapon. (See e.g., *People v. Rocha* (1971) 3 Cal.3d 893, 900, fn. 13, quoting CALJIC No. 604 [". . . Any object, instrument or weapon, when used in a manner capable of producing and likely to produce death or great bodily injury, is then a deadly weapon. . . ." (CALJIC 604, rev. ed. 1958).) Then, CALJIC No. 9.02 (5th ed. 1988) became the instruction in which the elements of assault with a deadly weapon were set forth and it still did not include "inherently deadly." (See, e.g., *People v. Brown,* (2012) 210 Cal.App.4th 1, 10 (*Brown*), fn. 8, quoting CALJIC 9.02 [an "object, instrument, or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury"].) In the fall of 2006, during the transition from CALJIC to CALCRIM, CALJIC No. 9.02 (Fall, 2006 ed.) remained the same. "Inherently deadly"first appears in the jury instructions in 2006 in CALCRIM No. 875 (Fall 2006 ed.).

Although rule 2.1050 (b) of the California Rules of Court provides, "The Judicial Council endorses these [CALCRIM] instructions for use and makes every effort to ensure that they accurately state existing law. . . ." the rule also recognizes that "[t]he articulation and interpretation of California law, however, remains within the purview of the Legislature and the courts of review." (*Ibid.*)

4. This Court Should Not Import Deadly Weapon Characterizations From Dissimilar Statutes Into Its Jurisprudence Interpreting the Assault Statute

In drafting the California assault statute, the Legislature has not employed the "deadly weapon" characterization by referencing other statutes. But other statutes prohibiting possession of certain items do reference other statutes. For example, a dagger is only a generally prohibited weapon when it is concealed on the person. (§§ 16590, subd. (i) and 23210.) If a dirk/dagger, such as a letter opener, lay in open sight on a desk or out of sight in a drawer, this would not violate the possession statute. In fact, "upon the person" does not even include carrying an otherwise dirk/dagger in a parcel such as a purse, backpack.[4] If the actor never had concealed the "dirk/dagger" upon his or her person before cutting that single

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[4] 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 this Court when applied to firearms and therefore distinguished in *People v. Wade* (2016) 63 Cal.4th 137.)

strand of hair, the "dirk/dagger" would not have been an "inherently deadly" weapon – even under the concealed possession statute. The list of "generally prohibited" weapons in section 16590 focuses on possession rather than use, recognizes some exceptions, and conveys the intent of the Legislature that the definitions of generally prohibited weapons be limited to certain applications.

For example, 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. . . ." The Legislature qualified this definition with prefatory language, limiting that definition to that portion of the statute with the phrase: "[a]s used in this part." The use of the list of "generally prohibited" weapons to declare some weapons "inherently deadly" for purposes of the assault statute does precisely what the Legislature prohibited. The Legislature had a good reason for prohibiting this kind of transference. A statute that lists items that are "generally prohibited" to possess, should not be used to declare a weapon to be "inherently deadly" under the assault statute. The definition of a deadly weapon, limited to the concealed possession context, defines the physical characteristics of an instrument, rather than how it is used. (*People v. McCoy*, *supra*, 25 Cal.2d at p. 188.)

In section 16590, when the Legislature enacted a "generally

prohibited" list of weapons, it determined that because these weapons present such a risk of harm, their possession should be banned. The purpose was prophylactic, prohibiting possession rather than use. But there are even exceptions in the "generally prohibited" list. The designation of weapons that fit in the "inherently deadly" weapon category, which the *Aguilar* Court incorporated into its dicta in footnote 10, appears to have been imported from former section 12020, subdivision (a),[5] 16590's predecessor statute:

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[5] Section 16590's predecessor statute, section 12020, is derived from section 1 of the deadly weapon law of 1923 (Stats. 1923, ch. 339; amended Stats. 1925, ch. 323) which stated in part:

> "... every person who within the State of California... keeps for sale, or offers or exposes for sale... any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy. .. shall be guilty of a felony. ..."
>
> Clearly the legislative intent is to prohibit possession of objects whose likely criminal use appears from the character of the weapon alone. (See *People v. Grubb* (1965) 63 Cal.2d 614, 620 where the court said, "The Legislature obviously sought to condemn weapons common to the criminal's arsenal.") As said in *People v. Satchell* (1971) 6 Cal.3d 28, 41, 42. . . "[R]ather than simply proscribing the use of such instruments, the Legislature has sought to prevent such use by proscribing their mere possession. In order to insure the intended prophylactic effect, the intent or propensity for violence has been rendered irrelevant."

(*People v. Favalora* (1974) 42 Cal.App.3d 988, 993.)

> 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* (1997) 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.[6] 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.

Based on the *Aguilar* Court's footnote dicta, that some weapons could be "deadly per se," the appellate court incorporated the characterization from the possession/concealment statutes into the assault statute. In so doing, it lessened the prosecution's burden of proof by eliminating the requirement

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[6] 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* case in which dirks and daggers were found to be per se deadly for purposes of the arming requirement under the robbery statute. For purposes of the assault statute, however, dirks/daggers have been acknowledged to simply be types of knives. (*People v. Mowatt*, *supra*, 56 Cal.App.4th at p. 719.)

that to be deadly, a weapon must be used in a way that is likely to produce great bodily injury. There is nothing to suggest the Legislature intended this. The legislative intent in determining what constitutes a deadly weapon for purposes of the assault statute is not the same as the prophylactic intent of the Legislature in enacting the possession and arming statutes.

5. The Hypothetical Proposed by the State and Adopted by the Court of Appeal Produced an Absurd Result

The plain meaning of the term "inherently" illustrates the fallacy and concomitant absurdity in the prosecution's hypothetical in which the actor cuts a single strand of hair from a sleeping victim with a dagger. If a purported "inherently deadly" weapon can be employed in a nondeadly manner, why should this conduct be criminalized as an ADW, which is both a serious felony and a strike?

The state's hypothetical is both absurd and tautological. It is tautological in two respects. First, the hypothetical proceeds from the point that a dagger is an inherently dangerous weapon for purposes of the assault statute, when it is not. (See I.A.4., pp. 36-40, *ante*.) This Court in *McCoy* cautioned that knives are not inherently deadly or dangerous for purposes of the assault statute because this depends on how they are used. (*McCoy*, *supra*, 25 Cal.2d at p. 188.) A dagger is not even an "inherently dangerous" weapon under the statutes prohibiting possession, such as former section

12020, the predecessor to 16590. (*People v. Mowatt, supra*, 56 Cal.App.4th at p. 722.) Moreover, under the successor statute to section 12020, a dagger is only a generally prohibited weapon when it is concealed on the person. (§§ 16590, subd. (i) and 23210.) In the state's hypothetical, which persuaded the appellate court, this fact is absent.

The hypothetical is tautological in another respect: it presumes that an "inherently deadly" weapon can be used in a non-deadly way, and still be considered deadly under the assault statute. It cannot. The hypothetical illustrates the point. The cutting of a single hair from the sleeping victim's head with a dagger does not involve the attendant circumstances from which the character of the dagger as a deadly weapon could be implied, even if it were an "inherently deadly" weapon as a matter of law. This Court made it clear in *McCoy* that the determination regarding the intended use of the weapon must be made, whether it is deadly as used, or inherently deadly as a matter of law. (*McCoy, supra*, 25 Cal.2d at p. 190.)

The hypothetical is absurd because it results in a serious felony, and a strike, from the use of an inherently deadly weapon in a manner that is not likely to produce great bodily injury or death. But courts are to interpret statutes according to their plain meaning unless such an interpretation would result in a consequence the Legislature did not intend. (*Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 856.) Here, the appellate

court, on the state's urging, adopted an interpretation contrary to the plain meaning of the statute, and that interpretation results in a consequence the Legislature did not intend: the barber would be guilty of a strike prior for cutting a single hair from a sleeping person's head.

The use of the term "inherently deadly" is also problematical because, as this Court advised in *Aledamat*, if the characterization of "inherently deadly" is to be used in the definition of a deadly weapon in the jury instruction, it must be defined. (*Aledamat, supra,* 8 Cal.5th at p. 16; *Perez, supra*, 4 Cal.5th at p. 1065.) There is no legal definition of "inherently deadly weapon" in the statute or in the jury instruction. (§ 245; *Aledamat, supra,* 8 Cal.5th at p. 15.) Without benefit of a definition of "inherently deadly," the state's hypothetical relied on the use of an instrument that is not inherently deadly (or even "generally prohibited.") (*Aledamat, supra*, 8 Cal.5th at p. 6.)

The state's hypothetical fails to make the point it asserts: that an "inherently" deadly weapon can be used in a nondeadly way, but can still constitute an assault with an "inherently deadly" weapon. To interpret the assault statute in such a way as to produce an absurd result would violate the prime directive:

> In the end, a court must adopt the construction most consistent with the apparent legislative intent and most likely to promote rather than defeat the legislative purpose and to

avoid absurd consequences. [Citations]

(*In re J. W.* (2002) 29 Cal.4th 200, 213.)

This Court should distinguish *McCoy* from *Graham,* and find *McCoy* to be binding precedent here, and that decisions finding a weapon to be "inherently deadly" for purposes of the arming element of the then-robbery statute, do not apply to the determination of whether a weapon is "inherently deadly" under the assault statute.

B. The Jurisprudence of this Court, Reflected in the Jury Instructions Defining "Deadly Weapon" for Purposes of the Assault Statute, Has "Transmogrified" the Offense

Whether the jury is instructed with a pinpoint instruction, or with a CALCRIM or CALJIC pattern instruction, the instructions are sometimes based on a misreading or misinterpretation of the case law or statute. Under these circumstances, the outcome is the same: the offense is transmogrified.[7]

The appellate courts have applied this concept where the instruction the trial court used failed to accurately instruct the jury on a material matter. For example, in *People v. Quach* (2004) 116 Cal.App.4th 294, the court noted that the instructional manifestation of section 197 in CALJIC No. 556,

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[7] "Transmogrify" means "[t]o change into a different shape or form, especially one that is fantastic or bizarre." *The American Heritage College Dictionary* 1347 (3d ed. 2000).

(*Cal. Pro-Life Council, Inc. v. Randolph* (9th Cir. 2007) 507 F.3d 1172, 1180, fn. 10.)

transmogrified the requirement of a good faith endeavor to decline further combat into requiring a categorical denial of the defense to anyone who has not succeeded in clearly informing his opponent that he is no longer fighting and wishes to stop." (*Id.* at p. 301.) The court "[could not] find such a rule in . . . section 197." (*Ibid.*)

The Legislature left it to the courts to define the meaning of "deadly weapon" as used in the assault statute. In 2006, CALCRIM No. 875 added the term "inherently deadly" to its definition of "deadly weapon." The use notes to the jury instruction refer to the footnote dicta in *Aguilar* as the source of this definition, which includes "inherently deadly." (*Aguilar*, 16 Cal.4th at p. 1037, fn. 10.)

But in *Aledamat,* this Court recognized little utility in including "inherently deadly" in its definition of deadly weapons, and without defining "inherently deadly." This Court suggested the term be eliminated from the instruction. (*Aledamat*, 8 Cal.5th at pp. 15-16.)

Ms. Aguayo asks this Court to hold that the use of the term "deadly weapon" in (a)(1) must include language recognizing that all instruments or objects that are deadly weapons must have been used in such a manner as likely to produce great bodily injury or death. If this Court does not so hold, and allows a conviction under (a)(1) for the use of an "inherently deadly" weapon that is not used in a manner likely to produce great bodily injury or

death, it will have given its imprimatur to CALCRIM No. 875, and will have transmogrified the "deadly weapon" requirement in the assault statute to recognize two classes of weapons, one of which will require a lesser burden of proof through the use of an irrebuttable presumption that a weapon designed for its use as a weapon, will always have been used in a manner likely to produce great bodily injury or death.

C. The Appellate Court's Interpretation of an "Inherently Deadly" Weapon Is An Unconstitutional Interpretation of the Assault Statute

1. In Creating Two Classes of Deadly Weapons, the Appellate Court Created an Irrebuttable Presumption that Lessens the Prosecution's Burden of Proof in Violation of the Due Process Clauses

This Court's definition of a deadly weapon, adopted and expressed in CALCRIM No. 875, includes two options for defining "deadly weapon." The first option is ". . . any object, instrument, or weapon that is inherently deadly or dangerous. . . ." The second is an object, instrument or weapon ". . .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.)

This Court has clarified that to qualify as a deadly weapon based on how it was used, the defendant must have used the object in a manner both capable of producing and likely to produce death or great bodily injury. (*In re B.M.* (2018) 6 Cal.5th 528, 544.) Relying on *Aguilar*, and without excepting "inherently deadly" weapons, this Court found all aggravated

assaults are based on the force likely to be applied:

> ". . . except in those cases involving an inherently dangerous weapon[,] the jury's decisionmaking process in an aggravated assault case ... is functionally identical regardless of whether ... 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; see *ibid.* ["'[A]ll aggravated assaults are ultimately determined based on the force likely to be applied against a person.'"].)

(*In re B.M., supra,* 6 Cal.5th at p. 535.)

As the weapons in *Aguilar* were hands and feet, and the weapon in *In re B.M.* was a butter knife, neither involved a weapon alleged to be "inherently deadly."

Here, this Court will decide whether, in adding "inherently deadly" to its definition of "deadly weapon" as reflected in CALCRIM No. 875, based on the footnote dicta in *Aguilar*, and lessening the prosecution's burden of proof, this court will be expanding the scope of conduct prohibited by the statute in a way that the Legislature never intended.

2. The "Inherently Deadly" Language Included in this Court's Definition of Deadly Weapon, and Applied through CALCRIM No. 875, Is An Unconstitutional Expression of the Statutory Elements of (a)(1)

The addition of the "inherently deadly" term to the judicially determined definition of "deadly weapon" and incorporated into CALCRIM

No. 875, interpreted as the appellate court did here, creates an irrebuttable presumption that every "inherently deadly" weapon will always be used in a manner likely to produce great bodily injury or death. "Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." (*Vlandis v. Kline* (1973) 412 U.S. 441, 446.; U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)

The interpretation advocated by the state and adopted by the appellate court has expanded the scope of the crime defined in (a)(1). By adding the term "inherently deadly" to the definition of a deadly weapon, and interpreting it as requiring no showing that the weapon was used in a way that is likely to produce great bodily injury, this Court's judicial definition, included in the jury instruction, will have expanded the scope of the statute and lessened the state's burden of proof, to make the use of an "inherently deadly" weapon in a non-deadly way a violation of (a)(1) and a serious felony.

> We repeatedly have observed that " ' "the power to define crimes and fix penalties is vested exclusively in the legislative branch." (*Keeler v. Superior Court*[(1970)] 2 Cal.3d 619, 631 [87 Cal.Rptr. 481, 470 P.2d 617] ... ; [citations].)' " (*Chun, supra*, 45 Cal.3d at p. 1183.) The courts may not expand the Legislature's definition of a crime (*Keeler v. Superior Court, supra*, 2 Cal.3d at p. 632), nor may they narrow a clear and specific definition.

(*People v. Farley* (2009) 46 Cal.4th 1053, 1119, and cited for this point again in *People v. Powell* (2018) 5 Cal.5th 921, 943.)

If this Court finds that the appellate court's interpretation of "inherently deadly" under the assault statute is correct, there will be two classes of deadly weapons, in which the proof required for "inherently deadly" weapons is less than is required for the remainder of weapons used in a deadly fashion. In so doing, it will have expanded the scope of this criminal statute beyond the Legislature's intent, and will have intruded into the legislative arena. But if this Court adheres to the *McCoy* view and finds that an "inherently deadly" weapon still must be shown to have been used in a manner likely to produce great bodily injury or death, the addition of the "inherently deadly" characterization will have no constitutional consequences. Accordingly, this is the interpretation this Court should adopt, because when more than one reasonable interpretation of a statute is possible, and one of those interpretations renders the statute unconstitutional, this Court is to adopt the constitutional interpretation. Constitutional considerations should inform this Court's interpretation. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.)

3. The Footnote Dicta in *Aguilar* Does Not Compel this Court to Adopt its Interpretation of (a)(1)

There are a number of reasons why *Aguilar* does not compel this Court to adopt the meaning of "inherently deadly" expressed in its footnote

dicta, and why *In re Jonathan R.* (2016) 3 Cal.App.5th 963 includes better reasoning that this Court should adopt.

First, the Legislature did not intend to create two classes of deadly weapons, one of which is where a so-called "inherently deadly" weapon is used, but not in the ordinary manner for which it was designed. This Court should not adopt *Aguilar's* footnote dicta as a basis for this Court's holding as the appellate court did because it is dicta, ultimately based on an appellate case construing the arming requirement for robbery, rather than assault. (*Aguayo, supra,* 31 Cal.App.5th at p. 767.) This Court has recognized that dicta in appellate opinions is not authority for anything:

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

(*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.)

Moreover, in none of the robbery or assault statutes has this Court found the deadly weapon used to be "inherently deadly" as a matter of law. Accordingly, the inclusion of this term is also dicta.

Aguilar failed to include this Court's own precedent that was actually decided under the assault statute. In *McCoy*, this Court had already resolved this issue, finding that the instrument must be used in a deadly manner, even if it is "inherently deadly." (*McCoy, supra,* 25 Cal.3d at p. 190.)

Finally, *Aguilar's* reliance on *Graham* was based on a distinction

drawn by an intermediate appellate court in *Raleigh,* that was largely unexplained. *Raleigh* was persuaded ". . .[T]hat a distinction should be made between two classes of "dangerous or deadly weapons." (*Raleigh, supra*, 128 Cal.App. at p. 108.) However, it reached that conclusion without any discussion of the factors prompting that distinction. But the *Raleigh* court did make it clear it was not applying this rationale to the assault statute, when it found whether the weapon was used or even exposed to view was immaterial. (*Id.* at p. 109.)

Even if this Court were tempted to apply *Raleigh* outside of the arming element, its rationale should not be overlooked:

> 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.

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

More important, the "ordinary use" criterion is preeminent. Just as a non-inherently deadly/dangerous object or instrument may become a "deadly/dangerous" weapon based on the manner in which it is wielded, the flip side of the same coin is that an otherwise "generally prohibited" weapon

need not be used in the manner of the ordinary use for which it was designed and for which its character was established. When this is the case, if a simple assault occurs, conviction of an assault with a deadly weapon cannot be countenanced.

Serious felony and strike consequences can be severe, and although the electorate and the Legislature have potentially ameliorated the effect of serious felonies and strikes in recent years by giving trial courts greater discretion, still, it remains within the Legislature's purview in the first instance to set forth the definition and punishment of crime. The Legislature has not defined an ADW as any simple assault accomplished by a "generally prohibited" weapon, and it violates the state Constitution for this Court or any other to do so in the Legislature's stead.

4. No Sound Policy Exists for Treating "Inherently Deadly" Weapons Differently From Other Objects Capable of Use as a Deadly Weapon in the Assault Statute

There is a difference between the consequences of a conviction under (a)(1) and (a)(4), as the former is a serious felony and a strike, while the latter is not. Adopting an interpretation of (a)(1) that makes a less serious offense a serious felony and a strike, while a more serious offense under (a)(4) is not, does not reflect a sound policy. By lessening the burden of proof through the creation of an irrebuttable presumption that allows the actor who cuts a single hair from the head of sleeping person with a dagger

to violate (a)(1) as a strike, sound policy is undermined. "It is both the prerogative and the duty of the Legislature to define degrees of culpability and punishment, and to distinguish between crimes in this regard." (*People v. Turnage* (2012) 55 Cal.4th 62, 74.) "As stated in *People v. Flores* [1986] 178 Cal.App.3d 74, [88]: 'The decision of how long a particular term of punishment should be is left properly to the Legislature. The Legislature is responsible for determining which class of crimes deserves certain punishments and which crimes should be distinguished from others. . . .'" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 840.)

While the case law has acknowledged the possibility of an "inherently deadly" weapon, there may actually be no such thing under the assault statute if the term is defined by the way it is used. (*Brown, supra*, 210 Cal.App.4th at p. 11, fn. 9.) The inability to identify any published case in which an ADW conviction under (a)(1), was based on a weapon found to be "inherently deadly" simply illustrates yet another reason why the addition of the term to the deadly weapon definition was and is unnecessary.

D. This Court Should Adopt the Reasoning in *Jonathan R.* As A Correct Interpretation of the Assault Statute

In a juvenile case involving a stabbing in which the court found the jurisdictional allegation to be true based on both an (a)(1) and (a)(4) , the First District Court of Appeal, relying on *Aguilar*, found (a)(4) to be an LIO of an (a)(1), and made two important findings. First, a weapon can be

considered deadly only if the instrument is used in a manner likely to produce death or great bodily injury. (*Jonathan R., supra,* 3 Cal.App.5th at pp. 973-974.) If the instrument was not used in a manner likely to produce great bodily injury, then the conduct does not satisfy (a)(1). (*Ibid.*)

> Because both subdivisions require the use or attempted use of force likely to produce great bodily injury, subdivision (a)(4) does not "differ in [its] necessary elements" from subdivision (a)(1), and subdivision (a)(4) is "included within" subdivision (a)(1). [Citations.] A defendant who has been convicted of a violation of subdivision (a)(1) therefore cannot also suffer a conviction under subdivision (a)(4) based on the same assault.

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

The appellate court here found the *Jonathan R.* decision focused exclusively on noninherently deadly weapons, and it criticized that reliance because it posited that an inherently deadly weapon can be used in a nondeadly way, without losing its character as an inherently deadly weapon. To support this proposition, the appellate court relied on *People v. Miceli* (2002) 104 Cal.App.4th 256, 270.) (*Aguayo, supra,* 31 Cal.App.5th at p. 767, fn 6.) *Miceli* interpreted and applied subdivision (b) of section 245, 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 (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 in *Miceli* interpreted a different statute, the appellate court's reliance on *Miceli*, to reject the reasoning of *Jonathan R.*, is mistaken. Nonetheless, by parity of reasoning, the Legislature could have, but did not, enact an assault statute creating two classes of weapons, one of which would not require that the "inherently deadly" weapon be used in a manner likely to produce great bodily injury or death.

II. Ms. Aguayo's Assault Convictions Under (a)(1) and (a)(4) Were Based on the Same Conduct and Were An Exception to Penal Code section 954

This Court requested briefing, addressing whether Ms. Aguayo's conviction of assault by means of force likely to produce great bodily injury was based on the same act or course of conduct as her conviction for assault

with a deadly weapon. This suggests that counsel are to address both exceptions to the multiple conviction rule stated in section 954. The first exception to the rule permitting multiple convictions is for LIOs. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) The second exception is a judicial one, prohibiting multiple convictions based on the same conduct.

A. Under the Facts of This Case, Count Three Was an LIO of Count Two

Under the elements test and based on the evidence the prosecution presented, count three was an LIO of count two, and nothing said during the summations, and nothing included in the jury instructions and verdict forms, permits this Court to reach any other conclusion. And although it was error for the trial court to fail to instruct the jury that count three was a LIO of count two, because the jury convicted Ms. Aguayo of both counts, the remedy here is to vacate the conviction of the LIO. (*In re Jonathan R., supra,* 3 Cal.App.5th at p. 974.)

The complaint originally charged one count of elder abuse, and one count of assault with a deadly weapon. While the assault charge did not identify the instrument used, the personal use enhancement attached to it under 1192.7, subdivision (c)(23), alleged that a bicycle chain was the weapon used. (P.X.R.T. p. 7.) During the preliminary examination, Mr. Aguayo had described the entire incident as lasting two to three minutes, during which Ms. Aguayo had hit him on the head, in addition to other

places on his body. He did not identify the instrument or body part used on his head. (P.X.R.T. pp. 17, 29-30.) Mr. Aguayo's wife also described the bump on her husband's head, but did not identify the instrument used to produce the bump. (P.X.R.T. p. 56.)

Before trial began, the prosecutor moved to amend the information to add count three, an assault by force likely to produce great bodily injury under (a)(4). The amended information still alleged, in the personal use enhancement to count two, the (a)(1) count, that the dangerous and deadly weapon was a bicycle chain/lock. (1 R.T. pp. 103, 106, 114; 1 C.T. p. 29.) Before trial, for purposes of calculating Ms. Aguayo's potential maximum sentence, the trial court explicitly found that counts two and three were the same offense. (1 R.T. p. 106.) The trial court found all three counts occurred at the same time and were based on the same conduct, and that counts two and three would be stayed under section 654. (1 R.T. pp. 106-107.)

At trial, the prosecution's proof of the assault against Mr. Aguayo under count two, the (a)(1) offense, and under count three, the (a)(4) lesser included, was based on the same evidence of the altercation between Ms. Aguayo and her father. Mr. Aguayo testified that his daughter struck him with a bicycle lock and chain in the back, chest, arms, and head. (2 R.T. pp. 159.) Mr. Aguayo tried to grab the lock and chain, and they both tugged on it. Ms. Aguayo then fell down, with her father falling on top of her. Mr.

Aguayo testified that his daughter threw a ceramic planter pot (chiminea) at him and it hit him in the head, although he later clarified that the planter was pushed over onto his head. (2 R.T. pp. 162, 164-165, 280.)

The prosecution did not present this proof of the assault with the bike chain/lock, or the assault with the ceramic pot/chimenea, as specific to or limited to any one of the three counts. In fact, in her summation, the prosecutor relied on the evidence of assault with both of these objects as proof of elder abuse. (4 R.T. pp. 578, 581, 594.) The prosecutor relied on the use of the bike chain and lock as a deadly weapon to support the (a)(1) assault. (4 R.T. p. 597.) For the (a)(4) assault, the prosecutor relied on the lump on Mr. Aguayo's head, without identifying the instrument used to strike him in the head, which, according to Mr. Aguayo at trial, was caused by being hit with the pot and the bike chain and lock. (2 R.T. pp. 159, 166; 4 R.T. pp. 606, 608.)

This left the jury free to return its verdict on the (a)(4) assault based on either or both of the instruments involved in the altercation. There is no way, however, for this Court to determine whether the jury's verdict under (a)(4) was based on the assault with the pot/chiminea and/or the assault with the bicycle chain/lock, or both.

In her opening summation, the prosecutor argued Ms. Aguayo had struck her father in the head with the bicycle lock, and had done so hard

enough to leave a bump. (4 R.T. p. 583.) The prosecutor presented the assault with the bicycle chain/lock and with the chiminea in support of the elder abuse claim. (4 R.T. pp. 594-594.) For the (a)(1) charged as count two, the prosecutor relied on the bicycle chain/lock as the deadly weapon, conceding that it was "probably not" inherently dangerous. (4 R.T. p. 597.) For the (a)(4) charge, the prosecutor argued the application of force as beating Mr. Aguayo over the head, without stating whether she was relying on the bicycle chain/lock, or the chiminea. (4 R.T. pp. 604-606.) However, Mr. Aguayo had testified that he was hit on the head with both items. (2 R.T. pp. 159, 165.) There does not appear to have been any force applied to Mr. Aguayo other than through the application of the chiminea and bicycle chain/lock.

In her rebuttal summation, the prosecutor relied on both the bicycle chain/ lock, and the ceramic pot/chiminea, as instruments of the assault. (4 R.T. pp. 641, 648.) The elder abuse count and the serious felony enhancement allegation attached to it and to the (a)(1) count each identified the bike chain/lock as the deadly and dangerous weapon used in the abuse and the assault with a deadly weapon. Yet the prosecutor also proved and relied on evidence that Ms. Aguayo struck her father with a chiminea/ ceramic pot, to prove all counts. In so doing, she made it clear that all counts were based on the same conduct, and were not limited to the use of

the bike chain/lock. (4 R.T. p. 648.)

The trial court's instructions to the jury did not remedy the problem. The court did not instruct the jury that count three was a lesser included of count two. The court instructed the jury that these were two separate offenses, each with its own lessers. (4 R.T. pp. 654-655.) Even though the court instructed the jury that it could not find Ms. Aguayo guilty of both a greater and a lesser offense, in its identification of the lesser included offenses subject to this limitation, the court did not instruct the jury that count three was a lesser to count two. (4 R.T. pp. 654-657.)

The jury instructions also failed to identify the deadly weapon or force used in any of the three counts, or in any of the lesser included offenses. (4 R.T. pp. 566-574.) This also makes it impossible for this Court to determine that the jury's verdict on the (a)(4) assault was not based on the same evidence as the (a)(1) assault.

In order to show that these were two separate assaults in which two separate instruments were used, the prosecution should have pleaded and proved that the deadly weapon used in count two was the bike chain/lock, and that the show of force in count three did not involve the bike lock, but was based on the force exclusively used in conjunction with the pot/chiminea, which is what the appellate court found. Nonetheless, the appellate court upheld both convictions here because it found that both

assault convictions were based on the "multiple acts" of striking Mr. Aguayo with the chiminea, and with the bicycle chain/lock. (*Aguayo*, 31 Cal.App.5th at p. 768.)

The prosecutor failed to plead and prove two separate assaults.

The prosecutor failed to offer, and the court failed to give, jury instructions directing the jury to make the findings necessary to prove two separate assaults.

The prosecutor failed to offer, and the trial court failed to provide, jury verdict forms reflecting that the jury made the findings necessary to support two separate assaults.

The jury would not, therefore, have understood that these two verdicts were for two separate offenses other than the fact that they were pleaded as two separate counts. The jury also would not have understood that the assault by force likely to produce great bodily injury was a lesser included offense of assault with a deadly weapon, so that it should follow CALCRIM No. 3517. (1 C.T. pp. 88-89.)

After the trial, the court necessarily found, as it had before the trial when it granted the motion to amend the information to add (a)(4) as count three, this was the same course of conduct and stayed the sentence for the

(a)(4) offense under Penal Code section 654.[8] (5 R.T. pp. 694-695.)

B. In the Alternative, Ms. Aguayo's Assault Convictions Under (a)(1) and (a)(4) Were Based on the Same Conduct, Are Different Statements of the Same Offense, and Also Present An Exception to Section 954

If this Court were to find (a)(4) is not an LIO of (a)(1), one of Ms. Aguayo's conviction must still be vacated under section 954 as dual convictions for the same offense. Section 954 does not authorize multiple convictions for different statements of the same offense:

> The most reasonable construction of the language in section 954 is that the statute authorizes multiple convictions for different or distinct offenses, but does not permit multiple convictions for a different statement of the same offense when it is based on the same act or course of conduct." (See *People v. Coyle* (2009) 178 Cal.App.4th 209, 211, 217–218 [defendant improperly convicted of three counts of murder for killing one person].)
>
> Our conclusion is consistent with the "judicially created exception to the general rule permitting multiple conviction [that] 'prohibits multiple convictions based on necessarily included offenses.'" (*Reed, supra*, 38 Cal.4th at p. 1227.) As defendant asserts, "[i]t logically follows that if a defendant cannot be convicted of a greater and a lesser included offense based on the same act or course of conduct, dual convictions for the

---

[8] The trial court suspended imposition of sentence and placed Ms. Aguayo on probation. Although that suspension necessarily applied to all counts of conviction, the trial court also stayed the sentence for the (a)(1) conviction under Penal Code section 654. That means the trial court necessarily found (a)(1) and (a)(4) were part of one course of conduct.

> same offense based on alternate legal theories would necessarily be prohibited."

(*People v. Vidana* (2016) 1 Cal.5th 632, 650.)

If the trial court had instructed the jury that these were alternative charges for the same offense, the jury could have chosen the count under which Ms. Aguayo could have been convicted:

> The proper result could have been achieved, for example, by instructing the jury with CALCRIM No. 3516 ("Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited"), which provides in part: "The defendant is charged in Count ___ with ___ <insert name of alleged offense> and in Count ___ with ___ <insert name of alleged offense>. These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both." (Italics omitted.)

(*People v. Brunton* (2018) 23 Cal.App.5th 1097, 1106, fn. 8.)

The appellate courts in *People v. Brunton, supra,* 23 Cal.App.5th at p. 1104 and *People v. Cota* (Jan. 27, 2020, No. G056850) ___Cal.App.5th___ [2020 Cal. App. LEXIS 67], have reached the same conclusions about (a)(1) and (a)(4) in the multiple conviction context. These courts found the separate counts were different statements of the same aggravated assault offense. In so doing, they declined to follow *Jonathan R.* on that issue:

> Based on the structure of section 245, subdivision (a), the *Jonathan R.* court concluded the Legislature intended to create two separate

> assault offenses when it amended section 245, subdivision (a)(1) and moved assault with force likely to cause great bodily injury to subdivision (a)(4). (*Jonathan R.*, at pp. 970–971.) Our colleagues in Division One of this district, however, reached a different conclusion in *Brunton, supra*, 23 Cal.App.5th 1097, after considering the legislative history of AB 1026. *Brunton* concluded assault with a deadly weapon and assault with force likely to cause great bodily injury are different statements of the same aggravated assault offense, and, therefore, dual convictions are prohibited under section 954. (*Brunton*, at pp. 1106–1107.) We conclude *Brunton's* analysis is more persuasive.

(*People v. Cota, supra*, [2020 Cal. App. LEXIS 67, at *9-10].)

These two forms of aggravated assault were originally included as alternative ways of violating the same statute. In order to avoid the litigation that ensued in which the court had to determine whether the section 245 prior was for a strike, the Legislature separated the alternative means into two distinct parts in 2011:

> AB 1026 amends existing Penal Code Section 245(a)(1) by deleting the words, "or by means of force likely to produce great bodily injury" and placing the deleted words in a new subdivision (Penal Code Section 245(a)(4)) so that in the future it will be clear what type of an assault occurred.
>
> AB 1026 will allow for a more efficient assessment of a defendant's prior criminal history and would lead to a more accurate and earlier disposition of criminal cases. AB 1026 does not create any new felonies or expand the

> punishment for any existing felonies. It merely splits an ambiguous code section into two distinct parts.

(A.B. 1026, Bill Analysis, Senate Rules Committee, June 14, 2011, and enacted on on 8/5/2011. <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201120120AB1026> as of Feb. 10, 2020, emphasis added.)

In splitting these alternative means of committing an assault into two separate code sections, the Legislature also presciently provided a means for the jury to make the findings on which a strike prior could be alleged and proved, thereby addressing the Sixth Amendment requirements declared in the subsequent U.S. Supreme Court decisions in *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*) and *Mathis v. United States* (2016) 579 U.S. ___, which require the jury to make this determination. (*Gallardo, supra,* 4 Cal.5th at p. 124.)

When a prosecutor does seek a dual conviction where the (a)(1) and the (a)(4) offenses are both based on the same act or course of conduct, as here, then both counts are different statements of the same offense, requiring one conviction to be vacated. The remedy, however, is less clear. In *Brunton*, the court remanded to the trial court to strike one of the duplicative convictions. (*Brunton, supra*, 23 Cal.App.5th at p. 1100.) In *Cota*, the court vacated the (a)(4) conviction.

Ms. Aguayo seeks a remand, to permit the trial court to determine whether to strike the (a)(1) or (a)(4) conviction as a different statement of the same offense and an exception to section 954.

Conclusion

For the foregoing reasons, Ms. Aguayo requests that this Court find that the Legislature did not intend to create two classes of deadly weapons. This Court should adopt the constitutional interpretation, finding that the prosecution must prove that the deadly weapon was used in a manner likely to produce great bodily injury or death, even if it was alleged to be inherently deadly. In the alternative, this Court should delete the "inherently deadly" qualification in its definition of deadly weapon, and urge that the jury instruction be modified accordingly. In so doing, this Court should reject the hypothetical approved by the appellate court and reverse the appellate court's decision, holding that under the elements test, that (a)(4) is an LIO of (a)(1). This Court should then remand to the trial court to strike vacate either of Ms. Aguayo's convictions as a different statement of the same offense, or vacate the (a)(4) conviction as an LIO, either of which is an exception to section 954.

Dated: February 16, 2020

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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 Opening Brief on the Merits on behalf of my client, and that the word count for this brief is 13,808 words.

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

Dated: February 16, 2020

/s/ Linnéa M. Johnson
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Attorney for Appellant

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

CERTIFICATE OF ELECTRONIC SERVICE AND SERVICE BY DEPOSIT IN MAIL AT U.S. POST OFFICE (Code Civ. Proc., § 1013a, subd. (2); Cal. Rules of Court, rules 8.71(f) and 8.77)

I, *Linnéa M. Johnson*, declare as follows:
I am, and was at the time of the service mentioned in this declaration, an active member of the State Bar of California over the age of 18 years and not a party to the cause. My electronic service address is lmjlaw2@att.net, and my business address is 100 El Dorado Street, Suite C, Auburn, CA 95603, in Placer County, Ca. I served the persons and/or entities listed below by the method set forth and at the time set forth. For those "Served Electronically," I transmitted a PDF version of **APPELLANT'S OPENING BRIEF ON THE MERITS** by by e-mail to the e-mail service address(es) provided below. For those served by mail, I enclosed a copy of the document identified above in an envelope or envelopes, addressed as provided below, and placed the envelope(s) for collection and mailing on the date and at the place shown below, at the U.S. Post Office, 371 Nevada Street, Auburn, California 95603, with postage fully prepaid.

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I certify that the foregoing is true and correct. Executed on **February 17, 2020**, at Auburn, California.

/s/ Linnéa M. Johnson