S182263 SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GEORGE MILWARD,

Defendant and Appellant.

S _____

Third Appellate District, No. C058326
Sacramento County Superior Court No. 02F05876
The Honorable Patricia C. Esgro, Judge

PETITION FOR REVIEW

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Court of Appeal

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TO THE HONORABLE RONALD M. GEORGE, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rules 8.500 and 8.504 of the California Rules of Court, appellant respectfully requests that this Honorable Court review the published decision of the Court of Appeal, Third Appellate District, which affirmed the judgment of the superior court. A copy of the opinion filed on March 22, 2010, is attached hereto as Appendix "A."

MEMORANDUM IN SUPPORT OF THE PETITION

STATEMENT OF THE ISSUES

1. Does a District Court of Appeal in the State of California act in excess of its jurisdiction when it reexamines a rule set forth in a California Supreme Court opinion, and the opinion was published prior to an amendment to the statute the rule interprets, or does the doctrine of stare decisis require the District Court to follow the rule unless or until the California Supreme Court or the United States Supreme Court addresses the issue and overrules the prior California Supreme Court case?

2. Is the offense of assault with a deadly weapon or by means of force likely to produce great bodily injury (Pen. Code § 245, subd. (a)(1)[1]), a statutorily lesser included offense of aggravated assault by a life prisoner (§ 4500)?

3. Is assault with a deadly weapon or by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), a separate offense from assault with a firearm (§ 245, subd. (a)(2)), or are they merely two separate ways to commit the same offense?

4. Did the 1982 amendment to section 245 abrogate the holding in *People v. Noah* (1971) 5 Cal.3d 469, 477, 479, that an aggravated assault (that was then defined in § 245, subd. (a), as an "assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury") is a lesser included offense of an aggravated assault by a non-life prisoner (Pen. Code §

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

4501)?

5. Does that fact that section 245 now distinguishes an assault with a deadly weapon (or by means of force likely to produce great bodily injury), from an assault with a firearm in separate subdivisions of the statute with greater punishment for an assault with a firearm, make it possible for a person to commit an aggravated assault by a life prisoner in violation of section 4500, without necessarily committing a lesser included aggravated assault, because by using a firearm the prisoner would also be violating section 245, subdivision (a)(2), but not section 245, subdivision (a)(1)?

6. When a person commits the offense of aggravated assault by a life prisoner (§ 4500), does the fact that he also thereby commits an aggravated assault either in violation of section 245, subdivision (a)(1) or (a)(2), render section 245, subdivision (a), a lesser included offense of section 4500?

NECESSITY FOR REVIEW

Review of this case is required to secure uniformity of decision and settle the following two important and recurring questions of law: (1) whether a California District Court of Appeal is bound under the doctrine of stare decisis to follow a rule set forth in a California Supreme Court case that is based on a statute that has since been amended; and (2) whether the offense of aggravated assault in violation of section 245, subdivision (a)(1), is a statutorily lesser included offense of aggravated assault by a life prisoner (§ 4500). (Cal Rules of Court, rule 8.500 (b)(1)).

In the subject case, appellant was convicted of one count of assault by a life prisoner with a deadly weapon and by means of force likely to produce great bodily injury (§ 4500), and one count of assault with a deadly weapon and by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). In his appeal, he argued that his conviction for violating section 245, subdivision (a)(1) must be reversed, because it is a statutorily lesser included offense of aggravated assault by a life prisoner (§ 4500). In a one page argument, respondent conceded the issue, cited both statutes and *People v. Noah, supra*, 5 Cal.3d 469, and noted that all of the statutory elements of a section 245, subdivision (a)(1) offense are included in section 4500.

This court, in *People v. Noah, supra*, 5 Cal.3d at p. 477, held that under the statutes that existed at the time the offenses were committed in April of 1962, the offense of assault by means of force likely to produce great bodily injury in violation of section 245, subdivision (a), is a lesser included offense of an aggravated assault by a prisoner not serving a life sentence (§ 4501.) It also held that because a conviction for violating section 4501 requires a finding that the defendant was not serving a life sentence, a section 4501 assault is not a lesser included offense of an aggravated assault by a life prisoner in violation of section 4500. (*Id.* at p. 476.)

In appellant's case, the Court of Appeal recognized that "*Noah* applies to section 4500 equally as it applies to section 4501; that is, *Noah* compels the conclusion that aggravated assault by a life prisoner could not be committed without committing aggravated assault as then proscribed by section 245, subdivision (a)." (Slip opn. p. 5.) However,

in its published decision, the Court of Appeal rejected respondent's concession, and this court's precedent in *Noah*, finding that under the current version of the statutes, a life prisoner could violate section 4500 without also violating section 245, subdivision (a)(1). (Slip opn. pp. 2, 9.) It pointed out that subsequent to *Noah*, section 245 was amended, and the Legislature divided section 245, subdivision (a) into two sections, whereby subdivision (a)(2) is applicable to an assault committed with a firearm, and it carries a greater punishment than for a violation of section 245, subdivision (a)(1). (Slip opn. pp. 6-7.) The Court of Appeal viewed a section 245, subdivision (a)(1) assault as a distinct offense from a section 245, subdivision (a)(2) assault, and concluded that a section 245, subdivision (a)(1) assault is not a lesser included offense of section 4500, because "if a life prisoner committed an assault with a firearm, she or he would violate section 4500, but would not violate section 245, subdivision (a)(1)." (Slip opn. p. 8.) In a footnote, the court acknowledged the holding in *People v. McDaniel* (2008) 159 Cal.App.4th 736, 749, wherein the Sixth District Court of Appeal held that a section 245, subdivision (a)(1) aggravated assault is a lesser included offense of a section 4501 aggravated assault by a state prisoner, because a person can not commit a violation of section 4501 without also violating section 245 subdivision (a)(1). However, the court found that *McDaniel* was not persuasive authority, because it does not include a discussion of the "relevant statutory elements."[2] (Slip opn. p. 9, fn. 6.)

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[2] The docket reflects that a Petition for Review was not filed in *McDaniel*.

The Court of Appeal in appellant's case acknowledged that it is bound by opinions of the California Supreme Court. (Slip opn. p. 8, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Nevertheless, it held that "where a California Supreme Court opinion states a rule based on a statute that has been materially amended, we are not bound." (Slip opn. pp. 8-9.) The only authority cited by the court to support this finding was its prior opinion in *People v. Bobb* (1989) 207 Cal.App.3d 88. It noted that in *Bobb*, it had concluded that "despite prior California Supreme Court precedent, statutory amendments . . . effectively uncoupled the lesser offense as necessarily included in the greater." (Slip opn. p. 9, citing *Id.* at pp. 93, 91-96.) However, this Court has never held that a District Court of Appeal can reject a holding of this court merely because a statute has been amended.[3] Appellant submits that *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d 450, "dictates unequivocally" that a California District Court of Appeal must follow a rule "enunciated by the high court." (*Civil Service Commission v. Superior Court* (1976) 63 Cal. App. 3d 627, 631.) "There is no exception in *Auto Equity Sales* for Supreme Court cases of ancient vintage." (*Ibid.*) This court should therefore grant review to address the important question of whether a District Court of Appeal has the authority to reject a holding of the

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[3] Although on 3-30-89 this court denied review in *People v. Bobb*, "a denial of review is not to be regarded as expressing approval of the propositions of law set forth in an opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of [the Supreme Court] [citations]." (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 178.)

California Supreme Court merely because of a statutory amendment.

In holding that a section 245, subdivision (a)(1) aggravated assault is not a lesser included offense of a section 4500 aggravated assault by a life prisoner, the Court of Appeal interpreted section 245, subdivision (a)(1), as setting forth a offense separate from that in section 245, subdivision (a)(2). Appellant submits that this analysis is wrong, and that the statute does not create two separate offenses, but instead it merely designates two categories of conduct prohibited by section 245, subdivision (a), that carry different punishments. (See *In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5 ["The offense of assault by means of force likely to produce great bodily injury is not an offense separate from -- and certainly not an offense lesser than and included within -- the offense of assault with a deadly weapon. This is not to say, of course, that a judgment may not properly specify which of the two categories of conduct prohibited by section 245 (i.e., assault (1) with a deadly weapon or instrument, or (2) by means of force likely to produce great bodily injury) was involved in the particular case."]; see also *People v. Marshall* (1958) 48 Cal.2d 394, 401-402 ["Where a single act of intercourse is committed in such circumstances that more than one subdivision of section 261 is violated, there is but one offense of rape, 'for the proof, though dual in character, necessarily crystallizes into one "included" or identical offense.'"].)

In discussing the 1982 amendment to section 245, subdivision (a), the Court of Appeal noted that there was an urgency provision that stated, "'In order to alter the increasing incidence of violence with firearms and to protect the [P]eople of the State of California from such

violence it is necessary that this act take effect immediately.'" (Slip opn. p. 6, fn. 3.) The opinion also states, "Nothing in the amendment suggests it was designed to alter the relationships between sections 245, 4500 and 4501, as those relationships had been analyzed by the California Supreme Court in *Noah, supra*, 5 Cal.3d 469." (Slip opn. p. 6, fn. 3.) This fact actually supports appellant's position that section 245, subdivisions (a)(1) and (a)(2) define only one offense that can be committed in various ways. This court should grant review and determine whether section 245, subdivision (a)(1) and (a)(2) define separate offenses, or whether they are merely alternate ways of committing the same offense so a life prisoner who commits an aggravated assault in violation of section 4500, would also necessarily commit an aggravated assault in violation of section 245, subdivision (a)(1) or (a)(2).

STATEMENT OF THE CASE

Following a bifurcated jury trial, appellant George Milward was convicted of one count of assault by a life prisoner with a deadly weapon and by means of force likely to produce great bodily injury (§ 4500); and one count of assault with a deadly weapon and by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). (2CT 426, 429, 442, 455; 3RT 734.) In a second phase of the trial, the jury found true allegations that appellant had suffered two prior felony convictions that constituted two prior "strike" convictions (§§ 667, subds. (b)-(i) and 1170.12), and one prior serious felony conviction (§ 667, subd. (a)). (2CT 457-458, 462-463.)

On February 22, 2008, appellant was sentenced to state prison for life without the possibility of parole for 27 years (§ 4500/667, subd. (e)(2)(a)(1)), and a consecutive term of 5 years (§ 667, subd. (a)), consecutive to the life term appellant was already serving.[4] The court imposed a $40.00 security fee (§ 1465.6), a $200.00 restitution fine (§ 1204.5, subd. (b)), and a $200.00 restitution fine was suspended unless parole is revoked (§ 1202.45, subd. (b)). (1CT 16; 2CT 511-512; 3RT 870-873.) Appellant filed a timely notice of appeal. (2CT 513-514.)

On May 22, 2010, in a published opinion, the Court of Appeal affirmed the judgment of the superior court. (Slip opn. pp. 1, 11.) Appellant did not file a Petition for Rehearing.

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[4] The life term was imposed on Count 1. The court imposed a third strike sentence of 25 years-to-life on Count 3, and stayed the sentence pursuant to section 654. (1CT 16; 2CT 511; 3RT 871.)

STATEMENT OF FACTS

In 2001, Correctional Officer Donald Jones worked at California State Prison Sacramento as a relief yard gun officer. He was assigned to Facility A, Administration Segregation ("Ad Seg") Housing Unit 6, in New Folsom. (1RT 125-128.) The unit had an intensified level of security. Jones worked inside an elevated control booth which overlooked the Ad Seg exercise yard. The booth contained everything needed to run the housing unit, and to control all movement within the unit. (1RT 130-131, 135.) There was a closed-circuit television camera on each end of the yard, a monitor in the control room, and a VCR that recorded the activity on the monitor. (1RT 140-141.)

In the 6 Block yard observation post in the control booth, the yard gunner sits on a seat located on the grill on the floor on the lower part of the window ledge, where he is able to observe the entire yard.[5] (1RT 134, 136.) The observation window is about 15 feet high. (1RT 142.) There is a lower gun port window in the area, where a weapon can be deployed into the holding cell, or sally port area. The sally port area is a "safe haven" that is a secured area with a chain link fence and constantina wire. It is a space used to prepared inmates to go out into the yard without handcuffs.[6] (1RT 137, 143.) There is a floor trap in the control booth that is another gun port. The control booth also has

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[5] The exercise yard is a concrete pad about 60 or 70 feet long, 30 feet wide, and it has concrete walls on all four sides. (2RT 303.)

[6] The sally port has locked gates on each end. After one gate is opened an inmate is placed inside, the gate is closed and locked, and the inmate's handcuffs are removed. The other gate is then opened, and the inmate is free to walk out into the open yard. (1RT 137.)

windows that allow the officers to look at the cell doors in the C Section. (1RT 141.)

The normal routine is for the inmates to come out into the yard around 7:00 a.m., where they engage in a regimen of calisthenics. Afterwards they break off individually, or go into small groups for grooming, to play handball, and to socialize. (1RT 156, 175.)

On the morning of June 16, 2001, Jones was on duty as the 6 Block yard gun officer. He knew the names and faces of the inmates that came onto the yard, and he recognized appellant and Torres that morning.[7] Ricardo Gonzales was a new inmate on the yard that day. (1RT 153-154, 178, 248.) Jones was monitoring the yard, but only one of the cameras on the yard was working. (1RT 155-156.) Officer Garcia was in charge of the control room that morning. (1RT 269-270; 2RT 306-307.)

Around 8:37 a.m. as Jones was watching the closed circuit television, he noticed some unusual inmate body movement including flailing of hands and people moving very quickly and abnormally. It appeared that a fight was occurring, so Jones activated his alarm, retrieved a weapon, and went to the window and began yelling, "Get down, get down."[8] (1RT 156-157.) Jones saw three inmates involved in a fight. Appellant and Torres were advancing towards Gonzales and

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[7] The parties stipulated that appellant was undergoing a life sentences in the California State Prison on June 16, 2001. (2RT 571-572, 578.)

[8] During Jones's testimony, the prosecution played portions of the video taken from camera 1 on the day of the incident. (1RT 175, 180, 194; Exh. 4A.)

attempting to hit him, as Gonzales was backing up while fighting back. (2RT 158.) The other inmates were moving away from the area, going up against the wall and sitting down. (2RT 333.) Jones yelled at the inmates to get down and stop their fighting, but they did not follow his direction. (1RT 158.) He saw what appeared to be blood, and in an extremely loud voice he yelled, "Get down." (1RT 159-161.) Other inmates complied, but appellant and Torres continued to advance on Gonzales and they tried to hit him. Jones drew his weapon to his shoulder, aimed, and fired one nonlethal round.[9] (1RT 159-160, 162.)

Appellant and Torres continued to advance on Gonzales, who was still backing up and fighting back. Gonzales had his hands up, fists clenched, and as he was moving backwards he tried to block the attempted blows by appellant and Torres. Jones could not tell whether appellant or Torres were armed.[10] He fired another round towards the inmates. (1RT 162-164.) Torres and appellant continued to advance towards Gonzales, so Jones fired a third round. (1RT 164-166.) Torres stopped fighting, and laid face down on the ground next to the wall. Gonzales moved his attention towards appellant who was continuing to advance on him as he kept backing up with his hands clenched and arms up. Jones yelled several times for appellant to get down. He then fired

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[9] Jones used a L8 Multiple Baton Launcher with a 264R rubber round, that is a large shell with four rubber projectiles inside. It is fired so that it skips off the ground or object without a direct impact, and the four rounds glance off the ground or wherever it hit, and then scatter. (1RT 162.)

[10] All of the inmates were strip searched and wanded for metal objects before they went out onto the yard. (2RT 351-352.)

a round towards appellant, and it appeared that one of the rubber rounds struck appellant in the lower left leg. Appellant flinched and started backing away from Gonzales towards the back wall. He then turned his back to Jones, walked towards the back wall, and attempted to throw something over it. The object went up, hit the constantina wire, and fell back into the yard. Appellant then laid down on the ground. (1RT 166-167; 2RT 336-337.)

Other officers responded to the alarm and entered the yard. (1RT 168.) When correctional officer Joe Stewart arrived, he saw Gonzales sitting in the center of the yard facing the other inmates. (2RT 368, 370.) Gonzales was bleeding profusely from the back and neck area. (1RT 163, 169.) The officers called for Gonzales to come off the yard first. When Gonzales came over to the gate Stewart placed him in handcuffs and escorted him out of the block, and took him to the emergency room for medical treatment. (2RT 370-371.)

When correctional Sergeant John Lynch responded to the alarm, he saw there were a number of inmates on the yard. Gonzales was in the strip-out area, being processed off the yard to be taken to the medical facility. Gonzales had two very large vertical slashes from his upper back to almost to his lower back. The alarm was still sounding, so Lynch walked back into the rotunda into the officer's office, put his keys on a chain, and passed them up to the control booth officer so he could turn off the alarm. (2RT 379-383.)

Correctional officer Mark Nielson arrived as Gonzales was being escorted out of the yard. Gonzales had observable injuries to his back, and there was a lot of blood. Nielson helped escort Gonzales to medical

in the "A" facility. Gonzales had multiple injuries, consisting of two types of wounds. He had slashing type wounds consistent with a razor blade, as well as puncture type wounds. (2RT 404-406.)

After the alarm was turned off the keys were passed back down to Lynch. (2RT 384.) He proceeded back to the exercise yard. Torres was still in the area, wiping blood off of his upper body with a T-Shirt. (2RT 385.) Jones ordered Torres off the yard, and he complied. Torres did not appear to be bleeding or injured. (1RT 169.)

Appellant was the next inmate who was announced to get up. He stood up, and then he bent down, retrieved the item off the ground that he had previously tried to throw over the wall, and he threw it over the west side wall of the exercise yard into a secured area between Housing Unit 6 and 7. (1RT 133-134; 169-170; 2RT 386.) The wall had razor-like barbed wire on top. (2RT 392-393.) There was no observable blood on appellant. (1RT 292; 2RT 372, 387.) Appellant had superficial injuries comprised of abrasions and contusions. (2RT 486, 489.)

Jones entered the secured area where the item had been thrown, and looked for an item capable of inflicting some of the injuries Gonzales had sustained. He easily found the item on the dirt area immediately adjacent to the Ad Seg 6 Yard in the A Facility. Jones was wearing rubber gloves, and he retrieved the object.[11] (1RT 170-172, 286.) He placed it in a biohazard tube, sealed and marked it, and placed

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[11] Photographs were taken of the area where the item was located, and of Jones holding the item. (1RT 171-173; Exhs. 27A-27I.)

it in a sealed envelope.[12] On the envelope he wrote the following description, "One inmate-manufactured razor-type weapon with partial razor blade exposed." (1RT 173-175; Exhs. 28, 28A.) The object was consistent with the razor type of weapon made inside the prison. (2RT 351.) The rest of the secured area was searched before Jones left the area. (1RT 288.)

Based on the injuries sustained by Gonzales, Nielson believed that two weapons had been used. Around 10:00 a.m. he was informed a slashing type weapon had been found, and he went out to the yard to attempt to find a second weapon. (2RT 410-414.) Lynch entered the grass area that was straight out from 7 Block, and he found a stabbing type weapon in the grass area a few feet from the driving track.[13] (2RT 415, 418; Exh. 57A.) Lynch described the weapon as having one end that was cylindrical and sharpened, like an ice pick. The length of the entire object was approximately four inches, and the blade portion was about an inch long. (2RT 434.) It did not have any blood on it. (2RT 429.) The two weapons were processed for latent impressions, but no prints were obtained from either weapon. (2RT 460-465, 468-469; Exhs. 28A, 28B, 57.)

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[12] Jones testified that the item marked Exh. 28A appeared to be the item he found, but it was missing the cloth handle that had been on it. (2RT 301, 349.)

[13] Inmates have access to this area when they are being escorted by correctional officers, and when they are on the yard doing maintenance. (2RT 430.)

ARGUMENT

I.

APPELLANT'S CONVICTION FOR ASSAULT WITH A DEADLY WEAPON OR BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY MUST BE REVERSED BECAUSE IT IS A STATUTORILY LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT BY A LIFE PRISONER

A. Introduction

In Count 1 appellant was convicted of aggravated assault by a life prisoner (§ 4500), and in Count 3 he was convicted of assault with a deadly weapon or by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). (2CT 429, 455.) As discussed below, appellant's conviction in Count 3 must be reversed, because assault with a deadly weapon or by means of force likely to produce great bodily injury is a statutorily lesser included offense of aggravated assault by a life prisoner.

B. A Defendant Cannot Be Convicted of Both a Greater and a Statutorily Lesser Included Offense

Section 954 provides in pertinent part:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, . . .

It is axiomatic that "a defendant may be convicted of two separate

offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included within the other." (*People v. Venable* (1938) 25 Cal.App.2d 73, 74 [Citations]; *People v. Craig* (1941) 17 Cal.2d 453; *People v. Hoyt* (1942) 20 Cal.2d 306.) However, a defendant may not be convicted of both a greater and lesser offense. (*People v. Ortega* (1998) 19 Cal.4th 686, 696; *People v. Gamble* (1994) 22 Cal.App.4th 446, 450.)

Section 1023 provides:

> When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading.

Where the validity of multiple convictions is at issue, the statutory elements test is used to determine whether an offense is necessarily included in another. (*People v. Reed* (2006) 38 Cal.4th 1224, 1231.) Under this test, "if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*Id.* at p. 1227.)

The determination of what is a necessarily included offense is a question of law. The elements of the offense are to be considered in the abstract without any reference to the actual evidence introduced at trial. The test is whether the offenses under consideration are related such that the greater offense cannot be committed without also necessarily committing the lesser offense. (*People v. Pearson* (1986) 42 Cal.3d

351, 355; *People v. Steele* (2000) 83 Cal.App.4th 212, 218.)

If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed." (*People v. Moran* (1970) 1 Cal.3d 755, 763.)

C. Assault With a Deadly Weapon or By Means of Force Likely to Produce Great Bodily Injury is a Statutorily Lesser Included Offense of Aggravated Assault By a Life Prison and Therefore Appellant's Conviction in Count 3 Must Be Reversed

Section 4500 establishes the felony offense of aggravated assault by a life prisoner. The statute provides in pertinent part:

> Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole.

Section 245 establishes various aggravated assault felonies committed by nonprisoners. Subdivision (a)(1) of the statute provides:

> Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

Subdivision (a)(2) of section 245 provides:

> Any person who commits an assault upon the person

> of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.

In appellant's case, the jury was instructed with CALCRIM No. 2720 on the offense of aggravated assault by a life prisoner. As given, the instruction states that in order to prove that appellant is guilty of the offense, the prosecution is required to prove the following elements:

> 1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;
>
> OR
>
> 1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury.
>
> AND
>
> 2. The defendant did that act willfully;
>
> 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;
>
> 4. When the defendant acted, he had the present ability to apply force likely to produce great bodily injury or with a deadly weapon to a person;
>
> 5. The defendant acted with malice aforethought;
>
> AND
>
> 6. When he acted, the defendant had been sentenced to a maximum term of life in state prison in California.

(2CT 381-382; 2RT 590.)

The jury was also instructed with CALCRIM No. 875 on the assault offense charged in Count 3. As given the instruction states that to prove appellant guilty of the offense, the prosecution is required to prove the following elements:

> 1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;
>
> OR
>
> 1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and
>
> 1B. The force used was likely to produce great bodily injury
>
> 2. The defendant did that act willfully;
>
> 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;
>
> 4. When the defendant acted, he had the present ability to apply force likely to produce great bodily injury or with a deadly weapon.[14]

(2CT 397; 2RT 599-600.)

All of the statutory elements of an assault in violation of section 245, subdivision (a)(1), are also elements of aggravated assault by a life prisoner in violation of section 4500. Further, if a life prisoner committed an aggravated assault with a firearm, he would not only violate section 4500, but he would also section 245, subdivision (a)(2).

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[14] The instruction given in appellant's case inexplicably omits "to a person" at the end of element 4. (2CT 397.)

Since section 245, subdivision (a)(1) and (a)(2) are alternate ways of committing an aggravated assault, regardless of the type of deadly weapon used in the aggravated assault, or whether the assault is simply committed by means of force likely to produce great bodily injury, the life prisoner would violate both section 4500, and section 245, subdivision (a), regardless of whether he commits an assault in violation of section 245, subdivision (a)(1)or an (a)(2) (See *In re Mosley, supra*, 1 Cal.3d at p. 919, fn. 5; see also *People v. Marshall, supra*, 48 Cal.2d 394, 401-402.) Therefore an aggravated assault in violation of section 245, subdivsion (a)(1) or (a)(2), is a statutorily included offense of an assault in violation of section 4500. (See e.g., *People v. Oppenheimer* (1909) 156 Cal. 733, 745; Cf. *People v. Noah, supra*, 5 Cal.3d 469, 477, [§ 245, subd. (a) is lesser included offense of § 4501, assault by non-life inmate].)

When a defendant is convicted of a greater and a lesser included offense, the conviction for the lesser offense must be reversed. (*People v. Pearson, supra*, 42 Cal.3d at p. 355; *People v. Moran, supra*, 1 Cal.3d at p. 763.) A court is required to dismiss, rather than stay, the sentence for a necessarily included offense. (*People v. Pearson, supra* at p. 355; *People v. Contreras* (1997) 55 Cal.App.4th 760, 765.)

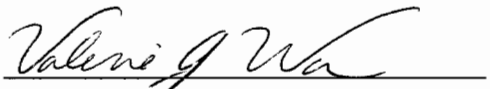
Here the trial court improperly stayed the sentence on Count 3 for the lesser included assault offense. Accordingly, this court should reverse appellant's conviction in Count 3, and reduce the court security fee from $40.00 to $20.00. The trial court should be directed to prepare an amended abstract of judgment that omits any reference to Count 3, and that reflects that the court security fee is $20.00.

CONCLUSION

Based on all of the foregoing reasons, appellant respectfully requests this Honorable Court to grant review in this matter.

DATED: April 26, 2010

Respectfully submitted,



Valerie G. Wass
Attorney for Appellant
George Milward

CERTIFICATE OF APPELLATE COUNSEL PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.504 (d)(1)

I, Valerie G. Wass, appointed counsel for George Milward, hereby certify, pursuant to California Rules of Court, rule 8.504 (d)(1), that I prepared the foregoing Petition for Review on behalf of my client in Word Perfect 8.0, and the word count generated for this brief is 5,629, which does not include the cover, tables, appendix or this certificate.

Dated: April 26, 2010

Valerie G. Wass

APPENDIX "A"

Filed 3/22/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GEORGE MILWARD, Defendant and Appellant.	C058326 (Super. Ct. No. 02F05876)

APPEAL from a judgment of the Superior Court of Sacramento County, Patricia C. Esgro, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant George Milward of assault with a deadly weapon and assault by a life prisoner with a deadly weapon. (Pen. Code, §§ 245, subd. (a)(1), 4500.)[1] The jury also

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[1] Undesignated statutory references are to the Penal Code.

found defendant had two strike convictions (for murder and attempted murder, arising out of the same case), one of which was also charged as a serious felony. (§§ 667, subds. (a), (b)-(i), 1170.12.)

The trial court sentenced defendant to state prison for life without parole for 27 years for assault by a life prisoner (nine years tripled per § 667, subd. (e)(2)(A)(i)), consecutive to a five-year term for a prior serious felony, consecutive to defendant's current sentence (Super. Ct., Riverside County, 1993, No. ICR17175),[2] and imposed but stayed (§ 654) a 25-year-to-life sentence for assault with a deadly weapon.

Defendant timely appealed. Defendant contends that the elements of an assault with a deadly weapon (§ 245, subd. (a)(1)) are included within an assault by a life prisoner with a deadly weapon (§ 4500), and therefore the lesser charge must be reversed. The Attorney General concedes this point, asserting it is controlled by a California Supreme Court case, *People v. Noah* (1971) 5 Cal.3d 469 (*Noah*).

We reject the concession. Under the current statutes, a life prisoner can commit an assault with a deadly weapon in violation of section 4500 without committing an assault with a deadly weapon in violation of section 245, subdivision (a)(1). The latter is not included within the former. We publish this case to explain why *Noah* is no longer controlling authority, and

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[2] See footnote 8, *post*.

to explain that the pattern jury instruction, CALCRIM No. 875, is incomplete and should be clarified. We shall affirm the judgment.

FACTUAL BACKGROUND

Evidence was presented from which the jury could find that on June 16, 2001, defendant and another inmate attacked a third inmate, who was stabbed with one or more prison-made sharp weapons. The parties stipulated defendant was serving a life sentence.

In a bifurcated proceeding, the jury received evidence showing defendant's prior strike convictions and the prior serious felony conviction allegation.

DISCUSSION

A defendant may not be convicted of an offense that is included within another offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227 (*Reed*).)

"[I]f the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*Reed, supra*, 38 Cal.4th at p. 1227.) The manner in which a crime has been pleaded is not relevant when assessing whether one offense is included within another offense; the pleadings are relevant when and only when the question is whether a defendant may be convicted of an *uncharged* crime. (*Id.* at pp. 1228-1231.)

An assault is an "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) A number of statutes refer to assaults with "a deadly weapon" or by means of force "likely to produce great bodily injury" to define a crime or enhance punishment. (See, e.g., Pen. Code, §§ 245, subd. (a)(1), 245.2, 245.3, 245.5, 653f, subd. (a), 1170.8, 4500, 4501; Welf. & Inst. Code, § 1768.8, subd. (b).) Such assaults are commonly referred to as "aggravated" assaults. (See, e.g., *Noah*, *supra*, 5 Cal.3d at p. 472; *People v. Murray* (2008) 167 Cal.App.4th 1133, 1139.) But, as we shall see, not all aggravated assaults are aggravated in the same way.

Noah in part discussed the crimes of aggravated assault by a life prisoner (§ 4500) and aggravated assault by a prisoner "except one undergoing a life sentence." (Former § 4501; Stats. 1963, ch. 2027, § 1, p. 4168; *Noah*, *supra*, 5 Cal.3d at pp. 475, 476.) The jury had been instructed that the latter offense was included in the former, but the court held that because a section 4501 conviction requires a finding "that the defendant is *not* serving a life sentence, the section cannot be considered a lesser degree of the offense set forth in section 4500." (*Noah*, *supra*, 5 Cal.3d at p. 476; see *id.* at pp. 474-477.)

Noah also held that aggravated assault, *as then defined* by section 245, subdivision (a), was a lesser included offense of aggravated assault by a non-life prisoner, as defined by section 4501: "The elements of the offenses set forth in sections 4501

and 245, subdivision (a), are identical in all respects except that section 4501 requires, as an additional element, that the defendant be a prisoner confined in a state prison." (*Noah*, *supra*, 5 Cal.3d at p. 479; see *id.* at p. 477.)

We accept the Attorney General's view that *Noah* applies to section 4500 equally as it applies to section 4501; that is, *Noah* compels the conclusion that aggravated assault by a life prisoner could not be committed without committing aggravated assault *as then proscribed* by section 245, subdivision (a).

The crime in *Noah* occurred on April 30, 1967. (*Noah*, *supra*, 3 Cal.3d at p. 473; see *People v. Chacon* (1968) 69 Cal.2d 765, 770 [prior appeal].) At that time, section 245, subdivision (a) proscribed an "assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury." (Stats. 1966, 1st Ex. Sess., ch. 21, § 4, p. 308; see *Noah*, *supra*, 5 Cal.3d at p. 477, fn. 6.)

After *Noah* was decided, though not in response thereto, the Legislature materially rewrote section 245.

Generally speaking, a firearm can be a deadly weapon, even if unloaded, when used as a bludgeon. (See *People v. Orr* (1974) 43 Cal.App.3d 666, 672; *People v. White* (1953) 115 Cal.App.2d 828, 832, disapproved on another point by *People v. McFarland* (1962) 58 Cal.2d 748, 762.) In 1982, the Legislature decided to treat assaults with firearms more harshly than assaults with other kinds of deadly weapons. (See fn. 3, *post*.) What had

been subdivision (a) of section 245 was divided into two subdivisions to create separate crimes. Subdivision (a) was amended to read substantially as it reads today, with subdivision (a)(1) applicable to assaults with a deadly weapon *other than a firearm* or by means likely to cause great bodily injury, and subdivision (a)(2) applicable to assaults *with a firearm*, and providing greater punishment for the latter offense. (Stats. 1982, ch. 136, § 1, p. 437.)[3]

It now is possible to violate section 4500 without violating section 245, subdivision (a)(1). To show why, we set out relevant parts of both statutes, as they read now:

Section 4500 provides in relevant part:

"Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another *with a deadly weapon or instrument*, or by any means of force likely to produce great bodily injury is punishable with

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[3] An urgency provision stated, in pertinent part: "In order to alter the increasing incidence of violence with firearms and to protect the [P]eople of the State of California from such violence it is necessary that this act take effect immediately." (Stats. 1982, ch. 136, § 14, p. 455.) Another provision delayed the operative date for 30 days. (*Id.*, § 15.)

Thus, the 1982 amendment had the explicit purpose of reducing firearm violence. Nothing in the amendment suggests it was designed to alter the relationships between sections 245, 4500 and 4501, as those relationships had been analyzed by the California Supreme Court in *Noah*, *supra*, 5 Cal.3d 469.

death or [life without parole]." (Stats. 1986, ch. 1445, § 1, p. 5166, italics added.)

Section 245, subdivision (a) provides, in relevant part:

"(1) Any person who commits an assault upon the person of another *with a deadly weapon or instrument other than a firearm* or by any means of force likely to produce great bodily injury shall be punished by imprisonment [for two, three, or four years, or jail time].

"(2) Any person who commits an assault upon the person of another *with a firearm* shall be punished [also for two, three, or four years, but with a minimum of six months in jail]." (Stats. 2004, ch. 494, § 1.)[4]

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[4] Section 245, subdivision (a) has been slightly amended since the time of defendant's crime, to add a reference to a particular kind of firearm, but that change is not material to this case. At the time of the crimes, it read in full:

"(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

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

"(3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 12200, or an assault weapon, as defined in Section 12276 or 12276.1, shall be

Thus, aggravated assault as provided by section 245, subdivision (a)(1) *cannot* be committed with a firearm, because assaults with firearms are explicitly excluded from that offense. However, aggravated assault by a life prisoner as provided by section 4500 *can* be committed with a firearm, a type of deadly weapon. Therefore, if a life prisoner committed an assault *with a firearm*, she or he would violate section 4500, but would *not violate* section 245, subdivision (a)(1). Therefore, the latter is not included within the former. (See *Reed, supra*, 38 Cal.4th at pp. 1227-1231.)[5]

We are, of course, bound by California Supreme Court opinions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) However, where a California Supreme Court

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punished by imprisonment in the state prison for 4, 8, or 12 years." (Stats. 1999, ch. 129, § 1.)

After these crimes, a ".50[-caliber Browning Machine Gun] BMG rifle, as defined in Section 12278" was added to the types of firearms covered by subdivisions (a)(3) and (d)(3) of section 245. (Stats. 2004, ch. 494, § 1.)

Section 245, subdivision (b) provides greater punishment for assaults with semiautomatic firearms; subdivisions (c) and (d) provide greater punishment when the perpetrator knows the victim is a peace officer or firefighter; subdivision (e) provides for confiscation and disposal of certain firearms; and subdivision (f) defines peace officers as used in this statute.

[5] The information alleged that a sharp instrument was used to commit the section 245, subdivision (a)(1) offense, not a firearm. As stated above, we do not consider the pleadings in determining whether one offense is included within another. (*Reed, supra*, 38 Cal.4th at pp. 1228-1231.) Therefore, it is irrelevant that the hypothetical case showing that the one offense is not included within the other does not match the circumstances of this particular case.

opinion states a rule based on a statute that has been materially amended, we are not bound. We have faced a similar circumstance before, when we concluded that despite prior California Supreme Court precedent, statutory amendments meant that contributing to the delinquency of a minor (§ 272) was *no longer included* within unlawful sexual intercourse (§ 261.5). We stated the statutory changes "effectively uncoupled the lesser offense as necessarily included in the greater." (*People v. Bobb* (1989) 207 Cal.App.3d 88, 93, 91-96, disapproved on another point in *People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7.)

The same is true here. The version of section 245, subdivision (a) addressed by *Noah* has been materially changed and *Noah* no longer provides a binding interpretation.[6]

Accordingly, defendant was properly convicted of both offenses. As stated earlier, *punishment* for one count was imposed and then stayed pursuant to section 654.

In reviewing this record we discovered a related problem that should be addressed. The jury was not correctly instructed

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[6] *People v. McDaniel* (2008) 159 Cal.App.4th 736 states: "[B]oth sections 245, subdivision (a)(1) and 4501 proscribe the commission of an assault with a deadly weapon or by any means of force likely to produce great bodily injury. Section 4501 adds one more element: the perpetrator must be a person incarcerated in state prison. Thus, a violation of section 245, subdivision (a)(1) is necessarily included in section 4501 because one cannot commit the latter offense without also committing the former." (*Id.* at p. 749.) Because *McDaniel* does not discuss the relevant statutory elements, it is not persuasive.

on the definition of section 245, subdivision (a)(1). The jury was instructed with CALCRIM No. 875, now the approved pattern instruction. That instruction is incomplete.

CALCRIM No. 875 is a lengthy instruction that attempts to encompass all possible violations of section 245, subdivisions (a) and (b) by giving the trial court a series of choices about what language to use, depending on the particular case. It defines a deadly weapon as "any object, instrument, or weapon that is inherently deadly or dangerous or 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.) It does not offer language accurately defining the offense stated by section 245, subdivision (a)(1), that is, excluding firearms from its ambit.

In contrast, the analogous CALJIC instruction, which covers section 245, subdivision (a), subparts (1) and (2), rather than all of subdivisions (a) and (b), offers optional language describing section 245, subdivision (a)(1) as an assault "with a deadly weapon or instrument, other than a firearm." (CALJIC No. 9.02 (Fall 2009) pp. 527-528.)

CALCRIM No. 875 should be rewritten to fix this problem.[7]

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[7] CALJIC provides a separate instruction--CALJIC No. 9.02.1--to cover charges of violating section 245, subdivisions (a)(3) and (b), and two separate instructions--CALJIC Nos. 9.20 and 9.20.1--to cover charges of violating section 245, subdivisions (c) and (d). CALCRIM No. 875 spans nearly three full pages, and may be too ambitious in its scope.

DISPOSITION

The judgment is affirmed.[8] (***CERTIFIED FOR PUBLICATION.***)

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.

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[8] As defendant notes, the abstract misidentifies his Riverside County case. The correct case number is ICR17175. The trial court is directed to prepare and forward a corrected abstract to the California Department of Corrections and Rehabilitation. (See fn. 3, *ante*.)

PROOF OF SERVICE BY MAIL

I, Valerie G. Wass, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is 556 S. Fair Oaks Ave., Suite 9, Pasadena, California 91105. I served a copy of the attached: APPELLANT'S PETITION FOR REVIEW, on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Pasadena, California, addressed as follows:

Central Calif. Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816

Office of the Attorney General
Post Office Box 944255
Sacramento, CA 94244-2550

Sacramento County Superior Court
Honorable Patricia C. Esgro
720 Ninth Street
Sacramento, CA 95814-1398

David Brown
Deputy District Attorney
901 G Street
Sacramento, CA 95814-1858

George Milward, H-95502
C.S.P. - Sacramento
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Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Flr.
Sacramento, CA 95814

Each said envelope was then, on April 27, 2010, sealed and deposited in the United States mail at Pasadena, California, in the County of Los Angeles in which I am employed. I declare, under penalty of perjury of the laws of the State of California, that the foregoing is true and correct, and that this Declaration was executed this 27th day of April, 2010, at Pasadena, California.

Valerie G. Wass

VALERIE G. WASS