IN THE SUPREME COURT OF THE STATE CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **GEORGE MILWARD,** Defendant and Appellant.	S182263

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

APPELLANT'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

This case presents the following four issues:

(1) Whether the offense of assault with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury (Pen. Code § 245, subd. (a)(1))[1], is a separate offense from assault with a firearm (§ 245, subd. (a)(2)), or whether they are merely two different ways to commit an aggravated assault;

[1] All further nondesignated statutory references are to the California Penal Code.

(2) Whether the offense of assault with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), is a statutorily lesser included offense of aggravated malicious assault by a life prisoner (§ 4500);

(3) Whether a lower court acts in excess of its jurisdiction when it relies on subsequent legislation to depart from precedent set by the California Supreme Court; and,

(4) Whether the 1982 amendment to section 245, abrogated the holding in *People v. Noah* (1971) 5 Cal.3d 469, 477, 479, that an aggravated assault in violation of section 245, subdivision (a), is a lesser included offense of an aggravated malicious assault by a non-life prisoner (§ 4501).

STATEMENT OF THE CASE

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

On February 22, 2008, appellant was sentenced to state prison for a term of life with the possibility of parole, with parole ineligibility for 27 years (Count 1 - § 4500/667, subd. (e)(2)(a)(1)). A consecutive determinate term of 5 years was imposed for the prior serious felony enhancement (§ 667, subd. (a)). A 25 year-to-life term was imposed on Count 3, and stayed pursuant to section 654. The entire sentence was imposed consecutive to the life term appellant was already serving. (1CT 16; 2CT 511-512; 3RT 870-873.)

Appellant filed a timely notice of appeal. (2CT 513-514.) In his appeal appellant argued that reversal of his conviction for aggravated assault (§ 245, subd. (a)(1)) was required, because it is a statutorily lesser included offense of malicious aggravated assault by a life prisoner (§ 4500). Although

respondent conceded the issue, the Court of Appeal rejected the concession, and in a published opinion filed on May 22, 2010, it affirmed the judgment of the superior court. (Slip opn. pp. 1-2, 11.) Appellant filed a petition for review. This court granted review on July 14, 2010.

STATEMENT OF FACTS

On the morning of June 16, 2001, Correctional Officer Donald Jones was on duty as the 6 Block yard gun officer in New Folsom Prison. He knew the names and faces of the inmates that came onto the yard, and that morning he recognized appellant and Ernesto Torres.[2] (1RT 125-126, 153-154, 248.) Ricardo Gonzales was a new inmate on the yard that day. (1RT 154, 178.)

Around 8:37 a.m., as Jones was watching the closed circuit television, he noticed some unusual inmate body movement and people moving very quickly. 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." (1RT 156-157.) Jones saw that three inmates were involved in a fight. Appellant and Torres were advancing towards Gonzales, and attempting to hit him, as Gonzales was backing up while fighting back. (2RT 158.) Jones yelled at the inmates to get down and stop their fighting. (1RT 158., 159-161.) Other inmates complied, but appellant and Torres continued to advance on Gonzales. Jones drew his weapon, aimed, and fired one nonlethal rubber round. (1RT 159-160, 162; 2RT 333.)

Appellant and Torres continued to advance on Gonzales, who was still backing up, and attempting to block attempted blows by appellant and Torres.

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

Jones could not tell whether appellant or Torres were armed, and he fired another round towards them. (1RT 162-164.) Torres and appellant continued to advance towards Gonzales, so Jones fired a third round. (1RT 164-166.) Torres stopped fighting, and he 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 a round towards appellant, and it appeared that appellant was struck in the lower left leg. Appellant flinched and started backing away from Gonzales. 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 wire above the wall, 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.) Gonzales was bleeding profusely from the back and neck area. (1RT 163, 169.) He had two very large vertical slashes from his upper back to almost to his lower back, that were consistent with wounds from a razor blade. Gonzales also had puncture wounds on his back, neck, chest, and abdominal area. (2RT 249-250, 383, 404-406, 445-446.)

When appellant was instructed to get up, he stood up, then bent down and retrieved the item off the ground that he had previously tried to throw

over the wall. He threw the object 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.) Jones found the item on the dirt area immediately adjacent to the Ad Seg 6 Yard in the A Facility. (1RT 170-172, 286.) The object was consistent with a razor type of weapon made inside the prison. (2RT 351.)

Based on the injuries sustained by Gonzales, Officer Mark Nielson believed that two weapons had been used. (2RT 411.) He entered the grass area that was straight out from 7 Block, and found a stabbing type weapon in the grass area a few feet from the driving track. (2RT 415, 418; Exh. 57A.) One end of the weapon 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.)

Both recovered weapons were processed for latent impressions, but no prints were obtained. (2RT 460-465, 468-469.)

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 & Summary of Argument

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)).[3] (2CT 429, 455.) The court imposed a life term on Count 1, and imposed and stayed the sentence on Count 3. (1CT 16; 2CT 511-512; 3RT 870-873.) On appeal appellant argued that his conviction in Count 3 must be reversed, because a section 245, subdivision (a)(1) assault is a statutorily lesser included offense of a section 4500 assault. Respondent conceded the issue, and argued it was controlled by the precedent established

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[3] The language in the verdict for Count 1 states that the jury found that appellant did "unlawfully and with malice aforethought assault Ricardo Gonzales with a deadly weapon or by means of force likely to produce great bodily injury while undergoing a life sentence in the California State Prison, Sacramento." (2CT 455.) The verdict for Count 3 describes the offense as "an assault upon Ricardo Gonzales, with a deadly weapon, to wit, a sharp instrument or by means of force likely to produce great bodily injury." (2CT 429.)

by this court in 1967 in *People v. Noah, supra*, 5 Cal.3d 469 (*Noah*). The Court of Appeal rejected the concession, and affirmed the judgment. (Slip opn. pp. 1-2, 11.) It pointed out that after the *Noah* opinion, section 245 was amended, and because section 245, subdivision (a)(1) now applies to assaults committed with a deadly weapon or instrument *other than a firearm*, and section 4500 applies to assaults with a deadly weapon or instrument, a person could violate section 4500 by committing an assault with a firearm, and by doing so they would not have violated section 245, subdivision (a)(1). (Slip opn. pp. 5-8.)

It is appellant's position that the Court of Appeal improperly analyzed the issue and reached an erroneous conclusion. As illustrated below, section 245 proscribes only a single offense of aggravated assault, and it sets forth different circumstances under which such an assault can be committed. A section 245, subdivision (a)(1) assault is a statutorily lesser included offense of a section 4500 assault, because the latter includes all the necessary elements of the former. Further, the Court of Appeal was required to follow this court's precedent in *Noah*, because the 1982 legislative amendments to section 245, subdivision (a) did not constitute a fundamental revision to the statute, and as such they, they did not abrogate the holding in *Noah*. Appellant's conviction in Count 3 must be reversed, because a section 245, subdivision (a)(1) assault is a statutorily lesser included offense of a section 4500 assault.

B. The California Penal Code Incorporated the Common Law of Misdemeanor Assault and Created the Felony of Aggravated Assault

The California Penal Code incorporated the common law of assault. (*People v. Yslas* (1865) 27 Cal. 630, 633; *People v. Wright* (2002) 100 Cal.App.4th 703, 706.) Section 240 defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." This statute has not changed since it was enacted in 1872. (*People v. Williams* (2001) 26 Cal.4th 779, 784.)

At common law, all assaults were misdemeanors. The felony of aggravated assault for more serious types of assaults was created by modern statutes. (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 27, p. 653.) Simple assault constitutes a misdemeanor (§ 241). Assaults committed with deadly weapons, or by means of force likely to produce great bodily injury, are punishable as felonies (§ 245, 245.2, 245.3, 245.5, 4500, 4501), and they are often referred to as "aggravated assaults." (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1139.)

The punishment for a common law assault was left to the discretion of the court. In *Rell v. State* (1939) 9 A.2d 129, 136 Me. 322, the Supreme Judicial Court of Maine explained:

> At common law, there were no degrees of the offenses of assault or assault and battery, and the term aggravated assault had no technical and definite meaning. The punishment varied according to the discretion of the court, but the grade of the

> offense was the same. II Wharton's Criminal Law (11th Ed.), Sec. 838; 6 C. J. S., 915. As to aggravated assaults and batteries, Mr. Bishop, in his work on Criminal Law, Ninth Edition, Vol. 2, page 32, says: "Strictly, an aggravation of an offence is some act or intent not required to constitute it, but made by law a ground for a higher or increased punishment. Thereupon the offence thus aggravated is often, yet not always or necessarily, called by another name. Still, from early times, when misdemeanors were punished by whatever fine or imprisonment the judge might deem it right to impose, it has been the judicial habit to look upon assaults as more or less aggravated by such attendant facts as appealed to the discretion for a heavy penalty. So that in practical language we speak of assault as aggravated in the latter circumstances the same as in the former." See Cornelison v. Com., 84 Ky. 583, 600, 2 S.W. 235.

(9 A.2d at p. 130.)

Prior to 1982, assaults committed with firearms were included in section 245, subdivision (a), which was the general aggravated assault statute. It proscribed assaults committed "with a deadly weapon and by means of force likely to produce great bodily injury."[4] (See *People v. Moore* (1986) 178 Cal.App.3d 898, disapproved on other grounds in *People v. Ledesma* (1997) 16 Cal.4th 90, 101; *In re Jose R.* (1982) 137 Cal.App.3d 269, 275.) At that time there were two categories of felonious assaults: those committed upon a civilian (§ 245, subd. (a)), and those committed upon a firefighter or peace

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[4] Section 245, subdivision (a), then provided, "Every person who 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 by imprisonment in the state prison for two, three or four years, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars ($ 5,000), or by both such fine and imprisonment . . . ."

officer (§ 245, subd. (b)). (*People v. Hill* (1989) 207 Cal.App.3d 1574, 1578; *People v. Martinez* (1987) 194 Cal.App.3d 15, 19.)

Section 245 was amended in 1982, and the amendments resulted in the creation of "four discrete categories of felonious assault."[5] (*People v. Harper* (2000) 82 Cal.App.4th 1413, 1418; *People v. Martinez, supra*, 194 Cal.App.3d at p. 20.) The amendments "bifurcated the statute to separately punish assaults with a firearm, apart from assaults with other deadly weapons or instruments, or by means of force likely to produce great bodily injury. (*People v. Martinez, supra*, at p. 20.) The purpose of the amendments was explained by the Fifth District Court of Appeal in *People v. Glover* (1985) 171 Cal.App.3d 496.

> A review of the Legislative Counsel's Digest to both Assembly Bill No. 846, 1981-1982 Regular Session, section 1, and Senate Bill No. 561, 1981-1982 Regular Session, section 1.2, leaves no doubt that the purpose of the amendment was to insure some period of incarceration, even if a minimal one, for persons who assaulted with, brandished, or committed various other offenses involving firearms. The underlying offense of assault with a deadly weapon seems in essence to have remained unchanged, although the amendment imposed certain minimum punishment when such an assault was committed with a firearm as opposed to other types of deadly weapons.

(*People v. Glover, supra*, at p. 503, fn. 4.)

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[5] Section 245 was amended by Statutes of 1982, chapter 136, section 1, page 437, urgency legislation, effective March 26, 1982, operative April 25, 1982, and by Statutes of 1982, chapter 142, section 1.2, page 469, effective January 1, 1983.

Section 245, subdivision (a), now provides:

> (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, or a.50 BMG rifle, as defined in Section 12278, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.[6]

Other categories of aggravated assault included in section 245 are assault with a semiautomatic firearm (§ 245, subd. (b)); assault with a deadly weapon or instrument other than a firearm or by means of force likely to produce great bodily injury on a peace officer or firefighter (§ 245, subd. (c)); assault with a firearm on a peace officer or firefighter (§ 245, subd. (d)(1)); assault with a semiautomatic firearm on a peace officer or firefighter (§ 245, subd. (d)(2)); and assault with a machinegun or an assault weapon on a peace

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[6] As noted in the Court of Appeal's opinion, subsequent to the time of the charged crimes, section 245, subdivision (a) was amended slightly (in 2004), to add a reference to a particular type of firearm, but that amendment is not material to this case. (Slip opn. p. 7, fn. 4.)

officer or firefighter (§ 245, subd. (d)(3)).

C. An Aggravated Assault Committed With a Firearm in Violation of Section 245, Subdivision (a)(2) Is Not A Separate Offense From an Aggravated Assault in Violation of Section 245, Subdivision (a)(1)

It is well established that an "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." (*People v. Mosley* (1970) 1 Cal.3d 913, 919, fn. 5; accord, *People v. Aguilar* (1997) 16 Cal.4th 1023, 1036-1037.) "Section 245, subdivision (a)(1) defines only one offense." (*People v. McGee* (1993) 15 Cal.App.4th 107, 110.)

The various categories of assault included in section 245 are not separate offenses; rather, they merely describe different ways to commit an aggravated assault. This distinction is illustrated by cases discussing theft, rape, insurance fraud, and forgery statutes that provide multiple ways to commit a single offense.

The crime of theft is defined in section 484. There are two degrees of theft - grand theft and petty theft. (§ 486.) Grand theft is defined in section 487 as theft of property exceeding the value of $400, or theft of particular kinds of property. It includes various other categories of grand theft including theft when property is taken from a person (§ 487, subd. (c)), theft of an

automobile (§ 487, subd. (d)(1)), and theft of a firearm (§ 487, subd. (d)(2)). Additional types of grand theft are set forth in sections 487a, 487b, 487d, 487e, 487g, and 487h. Theft in other types of cases constitutes petty theft. (§ 488.)

In *People v. Ortega* (1998) 19 Cal.4th 686, 699-700, this court held that the defendants could not be convicted of both robbery and grand theft, because both offenses were based on the same conduct, which was the forcible theft of a van. It noted that there are two degrees of theft - grand theft and petty theft, and it held that, "Grand theft, therefore, is not a separate offense, but simply the higher degree of the crime of theft." (*Id.* at p. 696.) This court explained that at common law, there was only one offense of larceny, and although larceny was divided into two grades - petit and grand larceny, both were felonies and only their punishment differed. (*Id.* at p. 694.) It rejected the concept that factors relating to the degree of an offense would necessarily destroy its character as a lesser included offense. This court stated, "Focusing upon whether a particular form of theft necessarily is included within the offense of robbery misses the point, recognized in our early case law, that the crime of theft, in one form or another, always is included within robbery." (*Id.* at p. 697.) It pointed out that the theft of an automobile is simply one of the many forms of grand theft. (*Id.* at p. 698.) This court concluded that regardless of its form, theft is always a lesser

included offense of robbery. (*Ibid.*)

Section 261, subdivision (a), defines the crime of rape as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator," when it occurs under any of the circumstances set forth in subdivisions (a)(1) through (a)(7). In *People v. Maury* (2003) 30 Cal.4th 342, the defendant was charged with forcible rape in violation of section 261, subdivision (a)(2). The amended information specifically alleged that appellant "committed the willful and unlawful act of sexual intercourse 'by means of force and fear of immediate and unlawful bodily injury.'" (*Id.* at pp. 426-427.) The court instructed the jury that it could find the defendant guilty of rape if it determined that "he had accomplished the act of sexual intercourse 'by means of force, violence, or fear of immediate and unlawful bodily injury.'" (*Id.* at p. 427.) On appeal, the defendant argued that his constitutional rights to notice and due process were violated, because he may have been convicted of the uncharged crime of rape by means of violence. This court disagreed, finding that "rape by means of violence is not a different offense from rape by means of force or fear; these terms merely describe different circumstances under which an act of intercourse may constitute the crime of rape.[7] (*Ibid.*)

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[7] Section 261, subd. (a)(2), sets forth the following circumstance under which rape can be committed, "Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of

In *People v. Craig* (1941) 17 Cal.2d 453, 455, this court explained that under section 261, "but one punishable offense of rape results from a single act of intercourse, although that act may be accomplished under more than one of the conditions or circumstances specified in the foregoing subdivisions." This court in *People v. Collins* (1960) 54 Cal.2d 57, 59, reiterated that, "The subdivisions of section 261 do not state different offenses but merely define the different circumstances under which an act of intercourse constitutes the crime of rape." Further, when rape is accomplished under more than one of the circumstances set forth in the various subdivisions of the statute, there is only one punishable rape offense. (*People v. Scott* (1944) 24 Cal.2d 774, 777.)

Section 550, subdivision (a), is the statute proscribing insurance fraud. As noted by the court in *People v. Zanoletti* (2009) 173 Cal.App.4th 547, 556, the statute "includes nine enumerated acts that constitute violations." The court found that the various paragraphs of subdivision (a), "simply describe different means of committing the single crime of insurance fraud." (*Id.* at p. 556, fn. 3.)

Subdivisions (a) through (d) of section 470 set forth various acts

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immediate and unlawful bodily injury on the person or another."

constituting forgery. In *People v. Ryan* (2006) 138 Cal.App.4th 360, the defendant was charged with violating section 470, subdivision (a), and section 470, subdivision (d), for her act of signing another person's name to a check and using it to make a purchase at a store. She was also charged with the same two forgery violations for signing the same person's name to a check, and attempting to use it at another store. On appeal the defendant argued that she could not be convicted of the section 470, subdivision (a) forgeries, because the offense was a lesser included offense of a section 470, subdivision (d) forgery. (*Id.* at pp. 363-364.) The Court of Appeal held that "the various subdivisions of section 470 do not set out greater and lesser included offenses, but different ways of committing a single offense, i.e., forgery." (*Id.* at p. 364.) It noted that when initially enacted, there were no subdivisions in section 470. (*Ibid.*) The court concluded that, "Since the commission of any one or more of the acts enumerated in section 470, in reference to the same instrument, constitutes but one offense of forgery," the defendant, under section 954, could be charged with multiple counts of forgery with regard to each incident, but she could only be convicted of one count as to each incident. It thereafter vacated the two section 470, subdivision (a) convictions. (*Id.* at p. 371.)

Like the statutes proscribing forgery, insurance fraud, theft, and rape, section 245 must be construed as proscribing a single offense, which merely

enumerates different ways to commit an aggravated assault. The statute incorporates common law assault, as well as various aggravating circumstances that are relied upon to impose greater punishment. Prior to its 1982 amendment, section 245, subdivision (a) did not contain any subsections. Regardless of the manner in which a section 245 assault is committed, or whether the victim is a civilian or a peace officer or firefighter, the perpetrator has still committed the crime of aggravated assault.

The fact that in 1982, section 245, subdivision (a) was amended to add subsections (a)(1) and (a)(2), does not serve to create a separate offense. As noted by this court in *Estate of Bull* (1908) 153 Cal. 715, 717, "The numbering of sections in statutes is a purely artificial and unessential arrangement resorted to for purposes of convenience only, and can never be allowed to hinder a correct construction of the entire act." Further, the sections of a statute "are to be considered together." (*Candlestick Properties, Inc. v. San Francisco. Bay Conservation etc. Com.* (1970) 11 Cal.App.3d 557, 569; *Renken v. Compton City School Dist.* (1962) 207 Cal.App.2d 106, 118.)

As previously discussed in section II-B, *ante*, the purpose of the 1982 amendments to section 245 was to separately punish assaults committed with a firearm, from those committed with another type of deadly weapon or instrument, or by means of force likely to produce great bodily injury, and to insure at least a minimal period of incarceration for such offenders. Section

245 originally proscribed a single crime with differing factors underlying punishment. All that the Legislature did in amending section 245 in 1982, was to add additional factors underlying punishment for different species of the crime. Since the amendments did not change the nature of the crime, the amendments cannot be construed to have changed the essential nature of the offense or its elements. (See Gov. Code § 9605; *Barber v. Palo Verde Mutual Water Co.* (1926) 198 Cal. 649, 651-652 ["The rule is, however, that a clause in a statute will be given no different meaning after an amendment than it had before, if the amendment relates to other matters, and was obviously not designed to affect its meaning."],)

To construe section 245 as proscribing different offenses, in the way the Court of Appeal did in the instant case, would lead to absurd results, which must be avoided. (*People v. Wagner* (2009) 45 Cal.4th 1039, 1057; *People v. Loeun* (1997) 17 Cal.4th 1, 9.) For example, in a case where the defendant had assaulted the victim by shooting a firearm, the defendant could be charged with and convicted of both assault with a firearm (§ 245, subd. (a)(2)), and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), despite the fact that he had committed just one assault against the same victim. Additionally, in a case where the defendant was charged with one count of assault with a firearm (§ 245, subd. (a)(2)), and the evidence at trial failed to establish beyond a reasonable doubt that the

instrument he or she used was a firearm, the jury could not be given the option of finding the defendant guilty of a section 245, subdivision (a)(1) assault, because it was an uncharged offense. If however, the statute is construed as proscribing only a single offense, the court could also instruct the jury on a section 245, subdivision (a)(1) aggravated assault.

D. Assault With a Deadly Weapon or By Means of Force Likely to Produce Great Bodily Injury is a Statutorily Lesser Included Offense of Aggravated Malicious Assault By a Life Prisoner

Section 4500 establishes the felony offense of aggravated assault by a life prisoner. It 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.

The elements of a section 4500 assault are set forth in the statute. They are: (1) an aggravated assault; (2) committed with malice aforethought; (3) by a state prisoner; (4) who is serving a life term. (*People v. Noah, supra*, 5 Cal.3d 469, 477; *People v. Staples* (1988) 204 Cal.App.3d 272, 276; *People v. Superior Court (Gaulden)* (1977) 66 Cal.App.3d 773, 778, disapproved on other grounds in *People v. Sumstine* (1984) 36 Cal.3d 909, 919, fn. 6.) The offense can be committed in two different ways: "with a deadly weapon or

instrument," or "by any means of force likely to produce great bodily injury." (§ 4500.) The purpose of section 4500 is to protect prison officials and inmates (*Turk v. White* (9th Cir. 1997) 116 F.3d 1264, 1268), and it carries a greater punishment than an aggravated assault committed in violation of section 245, subdivision (a)(1) or (a)(2).

As discussed in section B, *ante*, section 245 proscribes the offense of aggravated assault, and its subdivisions set forth different categories of such assaults, based on the way they are committed, and whether the victim is a civilian, or a peace officer or firefighter. CALCRIM No. 875 is the standard instruction on a section 245, subdivision (a) aggravated assault. It states that in order to prove the offense, the prosecution must prove the following elements:

> 1. The defendant did an act with (a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon/a .50 BMG rifle) 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/she) was aware of facts that would lead a reasonable person to realize that (his/her) act

by its nature would directly and probably result in the application of force to someone;

[AND]

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon/with a firearm/with a semiautomatic firearm/with a machine gun/with an assault weapon/with a .50 BMG rifle) to a person.)

Section 4500 includes language identical to that in section 245, subdivision (a)(1). Both statutes proscribe assaults committed "with a deadly weapon or instrument," "or by any means of force likely to produce great bodily injury." Since an assault committed by means of force likely to produce great bodily injury is not a separate offense from an assault with a deadly weapon (*People v. Aguilar, supra*, 16 Cal.4th 1023, 1036-1037; *People v. Mosley, supra*, 1 Cal.3d 913, 919, fn. 5; *People v. McGee, supra*, 15 Cal.App.4th 107, 110), it is evident that section 4500 also defines only a single offense for malicious aggravated assault by a life prisoner.

All of the statutory elements of an assault in violation of section 245, subdivision (a)(1), are also elements of an aggravated assault by a life prisoner in violation of section 4500. Therefore a section 245, subdivision (a)(1) assault 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]; *People v. McDaniel* (1998) 159 Cal.App.4th 736, 749 [same].)

E. The Court of Appeal Applied an Erroneous Analysis In Concluding That a Section 245, Subdivision (a)(1) Assault is Not a Lesser Included Offense of a Section 4500 Assault

The Court of Appeal concluded that a section 245, subdivision (a)(1) assault is not a lesser included offense of a section 4500 assault, because based on "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). (Slip opn. p. 2.) The court pointed out that prior to the 1982 amendment to section 245, subdivision (a), the statute "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.'" (Slip opn. p. 5.) It stated that the 1982 amendment "divided" former subdivision (a) of the statute "into two subdivisions to create separate crimes." (Slip opn. pp. 5-6.) The court noted that subdivision (a)(1) is applicable "to assaults with a deadly weapon *other than a firearm* or by means likely to cause great bodily injury," and that subdivision (a)(2) applies to assaults committed "*with a firearm.*" (Slip opn p. 6 [emphasis in original].) It explained the basis for its holding as follows:

> 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 [*People v.*] *Reed, supra*, [(2006)] 38 Cal.4th [1224] at pp. 1227-1231.) [Fn.]

(Slip opn. p. 8 [emphasis in original.)

The court's analysis is erroneous for various reasons. As discussed in section C, *ante*, section 245 proscribes only a single offense for aggravated assault, and its subdivisions merely delineate various ways in which the offense can be committed. Although a section 4500 assault can be committed with a firearm, the use of a firearm is not a statutory element of the offense. Focusing on the particular way that the assault was committed ignores the fact that an aggravated assault in violation of section 245, subdivision (a), regardless of its form, is always a necessarily lesser included offense of an aggravated assault by a life prisoner. Additionally, as illustrated below, firearms are only excluded from the deadly weapon or instrument portion of subdivision (a)(1), and an assault with a firearm necessarily constitutes an assault by means of force likely to produce great bodily injury. Finally, under this same analysis, even if this court were to find that subdivisions (a)(1) and (a)(2) of section 245 proscribe separate offenses, then an assault by means of force likely to produce great bodily injury would be a statutorily lesser

included offense of an assault with a firearm. As such, a section 245, subdivision (a)(1) assault would be a statutorily lesser included offense of a section 4500 assault.

In *People v. Moore, supra*, 178 Cal.App.3d 898, the Fifth District Court of Appeal held that the prosecution can charge an assault with a firearm under either subdivision (a)(1) or (a)(2) of section 245. It explained:

> An assault with a firearm necessarily satisfies the additional requirement of paragraph (1) that it constitute an assault by means of force likely to cause great bodily injury. (Cf. *People v. Claborn, supra*, [(1964)] 224 Cal.App.2d [38] at p. 42.) Moreover, our review of the legislative history of the 1982 amendment to section 245 convinces us the purpose of the amendment was to make it possible for the prosecutor to assure that a defendant would be imprisoned for at least six months if he charged the defendant with an assault with a firearm and obtained a conviction. No other substantive changes were intended.
>
> Additionally, the punctuation the Legislature used in subdivision (b) of section 245 [fn. omitted] -- a comma before and after the limiting language "other than a firearm" -- indicates an intent to limit both "deadly weapon" and "instrument."[8] Something less must have been intended by the adoption of the same limiting language in paragraph (1) of subdivision (a) without the use of a comma before and after it. In our view, the Legislature intended that the limiting language apply only to "instrument," the word it immediately follows without intervening punctuation. In so doing it expressed an intent to proscribe an assault with a firearm under the provisions of both paragraph (1) and paragraph (2) of subdivision (a) of section 245.

(178 Cal.App.3d at p. 904.)

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[8] In 1989, section 245 was further amended, and former subdivision (b) was redesignated subdivision (c).

This court, in *People v. Aguilar, supra*, 16 Cal.4th 1023, 1033 (*Aguilar*), found that the phrase "other than a firearm," as used in section 245, subdivision (a)(1), applied to both the "instrument" and "deadly weapon" portions of the subdivision. It stated:

> . . . if "deadly weapon" is separated from "other than a firearm," then the weapon portion of section 245, subdivision (a)(1), would include assault with a firearm and thus render subdivision (a)(2) of section 245, a redundancy, a result we strive to avoid under recognized canons of construction. [fn.]

(16 Cal.4th at p. 1033, citing *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1058-1059.)

The *Aguilar* court held that a person's bare hands and feet do not constitute a deadly weapon within the meaning of section 245, subdivision (a)(1). (16 Cal.4th at p. 1034.) Even though the prosecutor's argument had suggested an erroneous theory (that the defendant's use of his bare hands and feet constituted use of a deadly weapon), this court found that reversal was not required, because in determining whether a section 245, subdivision (a)(1) assault occurred, "the decision turns on the nature of the force used." (*Id.* at p. 1035.) This court explained:

> Ultimately (except in those cases involving an inherently dangerous weapon), the jury's decisionmaking process in an aggravated assault case under section 245, subdivision (a)(1), 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. As the Court of Appeal reasoned in [*People v.*] *Davis*,

> *supra*, [(1996)] 42 Cal.App.4th 806, "[A]ll aggravated assaults are ultimately determined based on the force likely to be applied against a person." (*Id.* at pp. 814-815.)

(16 Cal.4th at p. 1035.)

In *People v. Davis, supra*, 42 Cal.App.4th at pp. 814-815, the Second District Court of Appeal noted:

> . . . the felonious assault statute alleges all aggravated assaults in one statute prohibiting both assault with "a deadly weapon or instrument" or "by means of force likely to produce great bodily injury." The courts simply have had no need to make a distinction between the two clauses since all aggravated assaults are ultimately determined based on the force likely to be applied against a person. [fn.] (*In re Moseley* [sic] (1970) 1 Cal.3d 913, 919, fn. 5 [83 Cal.Rptr. 809, 464 P.2d 473]; *People v. McGee* (1993) 15 Cal.App.4th 107, 117 [19 Cal.Rptr.2d 12]; see *People v. Colantuono* (1994) 7 Cal.4th 206, 215 [26 Cal.Rptr.2d 908, 865 P.2d 704].)

CALCRIM No. 875, the standard instruction on aggravated assault, 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." The instruction also states that one of the elements of an aggravated assault with a deadly weapon is that, "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." A firearm is an inherently dangerous weapon. (*People v. Graham* (1969) 71 Cal.2d 303, 327, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 32.) Thus whenever a person commits an assault with

a firearm, regardless of the manner in which he or she uses the weapon, he or she also necessarily commits an assault by means of force likely to produce great bodily injury. This is because if a person uses a firearm in a manner "that by its nature would directly and probably result in the application of force to a person," then based on the nature of a firearm, the act would necessarily entail force likely to produce great bodily injury. Therefore an assault committed with a firearm that constitutes a violation of section 4500, would also encompass all of statutory elements of a section 245, subdivision (a)(1) assault. Accordingly, a section 245, subdivision (a)(1) assault is a statutorily lesser included offense of a section 4500 assault.

F. California Supreme Court Precedent Must Be Followed by Lower Courts Unless Subsequent Legislative Enactment Fundamentally Changes the Rules Under Which The Prior Case Was Decided or the United States Supreme Court Has Decided the Issue Differently

"Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Decisions of the California Supreme Court "are binding upon and must be followed by all the state courts of California." (*Ibid.*)

The highest court in a jurisdiction may overrule a prior decision when subsequent legislation has impacted the issue of law the court interpreted.

(See e.g., *People v. Valentine* (1946) 28 Cal.2d 121, 144 [the California Supreme Court relied on the 1872 revamping of penal law to support its rejection of previous cases on the issue of provocation sufficient to reduce an intentional homicide from murder to manslaughter].) As noted by the Fourth District Court of Appeal in *People v. Eastman* (1993) 13 Cal.App.4th 668, 674:

> It is a closer question whether a lower court can rely on the legislation to authorize departure from precedent established by a higher court. In some cases, of course, the altered intent of the Legislature is so clear that the lower court cannot reasonably cling to precedents based on statutes which have been completely rewritten. (See *Lane & Pyron, Inc. v. Gibbs* (1968) 266 Cal.App.2d 61, 66 [71 Cal.Rptr. 817].)

In *People v. Savala* (1981) 116 Cal.App.3d 41, the Court of Appeal was compelled to rely on California Supreme Court precedent, even though the Legislature subsequently passed new legislation that "has more than hinted that its intent has been judicially misconstrued." (*Id.* at p. 58.) The court explained:

> A subsequent expression of the Legislature as to the intent of a prior statute is not binding on the court, though it may properly be used in determining the effect of a prior act. (See *California Emp. etc. Com v. Payne* (1947) 31 Cal.2d 210, 213-214 [187 P.2d 702].) The Supreme Court may now deem it appropriate to reconsider its prior interpretation of legislative intent, but we do not perceive it appropriate for an intermediate court of review to peremptorily assume this function of the Supreme Court.
>
> Stare decisis is grounded upon the need for stability,

> consistency and predictability within the judiciary. Notwithstanding the doctrine of stare decisis, our decision herein is compelled by a further policy concern on the separation of powers.

(116 Cal.App.3d at pp. 59-60.)

Based upon the foregoing authority, it is evident that a decision of the California Supreme Court must be followed by all California courts of inferior jurisdiction, unless a statute has been completely rewritten or fundamentally altered by the Legislature.

G. The 1982 Amendments to Section 245 Did Not Abrogate the Holding in *People v. Noah* That a Section 245, Subdivision (a) Aggravated Assault is Lesser Included Offense of a Section 4501 Aggravated Assault

In *People v. Noah, supra*, 5 Cal.3d 469, the defendant was convicted of aggravated assault by a prisoner serving a less than life sentence, in violation of section 4501.[9] (*Id.* at p. 472.) The high court noted that an aggravated assault, as then defined in section 245, subdivision (a), was a necessarily lesser included offense of a section 4501 aggravated assault. (*Id.*

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[9] Section 4501 provides: "Except as provided in Section 4500, every person confined in a state prison of this state who 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, shall be guilty of a felony and shall be imprisoned in the state prison for two, four, or six years to be served consecutively."

at p. 469.) It pointed out that both statutes "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." (*Id.* at p. 479.)

In the subject case, the Court of Appeal found that *Noah* also applied to section 4500, and that the case "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 [emphasis in original].) Nevertheless, it concluded that subsequent to *Noah*, section 245, subdivision (a), was "materially changed," so that *Noah* is no longer a "binding interpretation" of the statute. (Slip opn. p. 9.)

In 2008, the Sixth District Court of Appeal in *People v. McDaniel*, *supra*, 159 Cal.App.4th 736, 749, held that "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." In appellant's case, the Court of Appeal acknowledged the holding in *McDaniel*, but found that because the case "does not discuss the relevant statutory elements, it is not persuasive." (Slip opn. p. 9.) However, the opinion does include a discussion of some of the statutory elements of both offenses. The *McDaniel* court stated:

> Here, both 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.

(159 Cal.App.4th at p. 749.)

Contrary to the opinion of the Court of Appeal in the subject case, the 1982 amendment to section 245 did not substantially alter the statute. Rather, as discussed in section B, *ante*, its purpose was to provide a mandatory period of incarceration for persons who committed an assault with a firearm. (*People v. Glover, supra*, 171 Cal.App.3d 496, 503, fn. 4.) Here the Court of Appeal found that "the 1982 amendment had the explicit purpose of reducing firearm violence." (Slip opn. p. 6, fn. 3.) It even acknowledged that, "Nothing in the amendment suggests that 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." (*Ibid.*) Since the 1982 amendment to section 245, subdivision (a) did not completely rewrite or fundamentally change the statute, the Court of Appeal exceeded its jurisdiction by refusing to follow the precedent set by this court in *Noah*.

H. 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, supra*, 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 included offense. (*People v. Ortega, supra*, 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 resulting from multiple charged crimes is at issue, the statutory elements test is used to determine whether an offense is necessarily included in another. (*People v. Sloan* (2007) 42 Cal.4th 110, 118; *People v. Reed, supra*, 38 Cal.4th 1224, 1231.) Under this test, the specific facts of the case are not to be considered. (*People v. Ramirez* (2009) 45 Cal.4th 980, 985.) Rather, "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." (*People v. Reed, supra*, at p. 1227.) "In other words, if a crime cannot be committed without also committing a lesser offense, the latter is a necessarily included offense." (*People v. Ramirez, supra*, at p. 985, citing *People v. Montoya* (2004) 33 Cal.4th 1031, 1034; and *People v. Lopez* (1998) 19 Cal.4th 282, 288.)

"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.) A court is required to dismiss, rather than stay, the sentence for a necessarily included offense. (*People v. Pearson* (1986) 42 Cal.3d 351, 355; *People v. Contreras* (1997) 55 Cal.App.4th 760, 765.)

As demonstrated in section D, *ante*, a section 245, subdivision (a)(1) assault is a statutorily lesser included offense of a section 4500 assault. Here appellant was convicted of both offenses, and the trial court imposed sentence on both counts, but stayed the punishment on the section 245, subdivision (a)(1) assault. Accordingly, appellant's conviction for aggravated assault in violation of section 245, subdivision (a)(1) must be reversed, and the sentence imposed thereon must be dismissed.

CONCLUSION

Based on the foregoing argument and authority, appellant respectfully requests this court to reverse the decision of the Court of Appeal. Specifically, appellant urges this court to declare that section 245 proscribes only a single offense of aggravated assault, and that an assault committed in violation of section 4500 also constitutes a violation of section 245, subdivision (a)(1). Further, this court should also find that the 1982 amendments did not materially alter section 245, subdivision (a), and that the Court of Appeal acted in excess of its jurisdiction by declining to follow this court's precedent in *Noah*.

DATED: November 22, 2010

Respectfully submitted,

Valerie G. Wass
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George Milward

CERTIFICATE OF APPELLATE COUNSEL PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.360 (b)

I, Valerie G. Wass, hereby certify, pursuant to California Rules of Court, rule 8.520 (c), that I prepared the foregoing brief, that it uses a 13 point Times New Roman font, and that it contains 8,647 words, which does not include the cover, tables, proof of service, or this certificate. I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 22, 2010

Valerie G. Wass

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 OPENING BRIEF ON THE MERITS in *People v. George Milward*, S182263, 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:

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Each said envelope was then, on November 24 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 24th day of November, 2010, at Pasadena, California.

Valerie G. Wass