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.

Case No. S182263

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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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This case presents the following issues:

(1) Is assault with a deadly weapon (Pen. Code § 245, subd. (a)(1)1) a necessarily included offense of assault by a life prisoner with a deadly weapon (§ 4500)?

(2) Was *People v. Noah* (1971) 5 Cal.3d 469 binding on the Court of Appeal unless and until overruled by this Court?

INTRODUCTION

In this prisoner-assault case, appellant attacked a fellow inmate with a hand-made weapon. At trial, appellant was convicted of both aggravated assault and aggravated assault by a life prisoner. Appellant appealed, claiming the doctrine of lesser included offenses prohibited conviction of both. The Court of Appeal upheld both convictions, finding that, under a strict application of the elements test, section 245, subdivision (a)(1), is not included in section 4500.

STATEMENT OF THE CASE

On June 16, 2001, appellant George Milward, while serving a life sentence, attacked Ricardo Gonzales in the exercise yard at California State Prison Sacramento with an inmate-manufactured stabbing weapon. (1 RT 153, 172-173.) Gonzales suffered bruises to his head, lacerations to both sides of his lower neck and his left arm, stab wounds to his chest, and a long, deep laceration from his upper to lower back. (1 RT 249-250.)

On April 24, 2007, the Sacramento District Attorney charged appellant with assault with a deadly weapon or by means of force likely to produce great bodily injury while serving a life sentence (count 1; § 4500), possession of a sharp instrument in a penal institution (count 2; § 4502,

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[1] All further statutory references are to the California Penal Code unless otherwise specified.

subd. (a)), and assault with a deadly weapon or by means of force likely to produce great bodily injury (count 3; § 245, subd. (a)(1)). (1 CT 238-239.)

The jury convicted appellant on counts 1 and 3. (2 CT 426, 442.) The trial court sentenced appellant to 27 years to life on count 1, 25 years to life on count 3, which was stayed pursuant to section 654, and 5 years for a prior serious felony conviction. (2 CT 511-512.) All sentences were consecutive to appellant's current life term. (*Ibid.*)

On appeal, appellant argued that his aggravated assault conviction (§ 245, subd. (a)(1)) was a lesser included offense of his aggravated assault by a life prisoner conviction (§ 4500). (Slip opn. at 2.) On May 22, 2010, the Third District Court of Appeal rejected appellant's argument and published an opinion affirming the judgment. (*Id.* at 1-2, 11.) The Court of Appeal held that because it is possible to violate section 4500 without violating section 245, subdivision (a)(1), the latter is not necessarily included in the former. (*Id.* at 6-7.) This Court granted appellant's Petition for Review on July 14, 2010.

SUMMARY OF ARGUMENT

Section 245, subdivision (a)(1), is not necessarily included in section 4500. Whether an offense is necessarily included in another offense is determined by the elements test, which states that the statutory elements of the greater offense shall include all of the elements of the lesser offense. (*People v. Reed* (2006) 38 Cal.4th 1124, 1229.) Here, section 245, subdivision (a)(1), requires the deadly weapon used in the assault to be a weapon other than a firearm. But section 4500, as the greater offense, has no such limitation. Therefore, an assault by a life prisoner committed with a firearm could result in a conviction of section 4500, but not section 245, subdivision (a)(1). As a result, section 245, subdivision (a)(1), is not included in section 4500.

True, this Court held in *People v. Noah* (1971) 5 Cal.3d 469 that former section 245, subdivision (a), was included in section 4501, the sister statute to 4500. But the Legislature amended the aggravated assault statute to explicitly require that the weapon used in a section 245, subdivision (a)(1), be a weapon other than a firearm. This amendment fundamentally altered the reasoning of *Noah*, and the Court of Appeal was proper in deviating from its holding.

ARGUMENT

I. PENAL CODE SECTION 245, SUBDIVISION (A)(1), IS NOT NECESSARILY INCLUDED IN PENAL CODE SECTION 4500

Appellant claims that his assault with a deadly weapon conviction (§ 245, subd. (a)(1)) must be reversed because it is statutorily included in his aggravated assault by a life prisoner conviction (§ 4500). (AOB 8.) Respondent disagrees. Section 245, subdivision (a)(1), cannot be included in section 4500 because it is possible to commit section 4500 without necessarily committing section 245, subdivision (a)(1).

A. Discussion

A defendant can be convicted of multiple offenses based on a single act or indivisible course of conduct. (§ 954; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) But a defendant suffering multiple convictions from the same course of conduct shall only be punished under one offense. (§ 654.) Nonetheless, "a judicially created exception to section 954 prohibits multiple convictions based on necessarily included offenses." (*People v. Montoya, supra*, 33 Cal.4th at 1034, citing *People v. Ortega* (1998) 19 Cal.4th 686, 692.)

The reason for recognizing lesser included offenses is twofold.[2] First, a defendant can be convicted of an uncharged crime only if it is included in a greater charged offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) "Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (*Ibid*, quoting *People v. Lohbeauer* (1981) 29 Cal.3d 364, 368.) Second, the rule prevents double convictions of the lesser offense. "If a defendant cannot commit the greater offense without committing the lesser, conviction of the greater is *also* conviction of the lesser. To permit conviction of both the greater and the lesser offense 'would be to convict twice of the lesser.' " (*People v. Ortega, supra,* 19 Cal.4th at 705 (conc. and dis. opn. of Chin, J.), original emphasis, quoting *People v. Fields* (1996) 13 Cal.4th 289, 306.)

Whether an offense is necessarily included in another offense is determined solely by the elements test. (*People v. Reed, supra,* 38 Cal.4th at 1229, distinguishing in part *People v Ortega, supra,* 19 Cal.4th 686.) The accusatory-pleadings test is no longer valid.[3] (*Ibid.*) "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*Ibid.*) In other words, "if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser

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[2] This Court has questioned the purpose of lesser included offenses. "Although the reason for the rule is unclear, this court has long held that multiple convictions may not be based on necessarily included offenses." (*People v. Pearson* (1986) 42 Cal.3d 351, 355.)

[3] "Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter in necessarily included in the former." (*People v. Reed, supra,* 38 Cal.4th at 1229.)

included offense within the former." (*People v. Montoya, supra,* 33 Cal.4th at 1034, quoting *People v. Lopez* (1998) 19 Cal.4th 282, 288.) A statute is viewed in the abstract, rather than through the facts of the case, to determine whether one can commit the greater offense without also, and necessarily, committing the lesser. (*Ibid; In re Daniel R.* (1993) 20 Cal.App.4th 239, 243.)

A. Analysis

In this case, appellant was convicted of assault with a deadly weapon or by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) and aggravated assault by a life prisoner (§ 4500). Section 245, subdivision (a)(1), states:

> 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.

(§ 245, subd. (a)(1), emphasis added.)[4]

The elements of this offense are (1) the commission of an assault upon the person of another, (2) with a deadly weapon or instrument *other than a firearm*, and (3) or by any means of force likely to produce great bodily injury.

Section 4500 states 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

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[4] Section 245, subdivision (a)(2), requires mandatory jail time while subdivision (a)(1) can be punished by a fine only. (§ 245, subds. (a)(1), (a)(2).)

> likely to produce great bodily injury is punishable with death or life imprisonment without the possibility of parole.

(§ 4500.)

The elements of this offense are (1) commission of an assault upon the person of another, (2) with malice aforethought, (3) with a deadly weapon or instrument, (4) or by any means of force likely to produce great bodily injury, and (5) by a person undergoing a life sentence in state prison. Section 4500 is the greater offense because it has more elements. (*People v. Montoya, supra,* 33 Cal.4th at 1034.)

But the lesser offense is not included in the greater because section 4500 can be committed without also, and necessarily, committing section 245, subdivision (a)(1). The latter offense requires that the deadly weapon or instrument used in the assault be a weapon other than a firearm. Section 4500 has no such requirement. Therefore, a life prisoner who commits an assault with a firearm could be convicted of section 4500 but not section 245, subdivision (a)(1).

Granted, it is possible, as illustrated by the facts of this case, for a single act to satisfy the elements of both crimes. But that is not the proper inquiry. Instead, the offenses are to be viewed in the abstract to determine whether commission of the greater offense necessarily includes a conviction of the lesser. (*People v. Montoya, supra,* 33 Cal.4th at 1034; *In re Daniel R., supra,* 20 Cal.App.4th at 243.) And the simple hypothetical above demonstrates that section 4500 does not necessarily include section 245, subdivision (a)(1).

This is the same analysis applied by the Court of Appeal:

> 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 with the former.

(Slip opn. at 8, original emphasis, citations omitted.)

Additionally, other cases have also applied this analysis. For example, in *Montoya*, this Court found that the crime of unlawfully taking a vehicle was not included in carjacking. (*People v. Montoya, supra,* 33 Cal.4th at 1035.) Just like the Court of Appeal, the *Montoya* Court used the elements test to illustrate that a person could hypothetically commit the greater offense without necessarily committing the lesser:

> Applying the elements test to the two offenses here, the crime of unlawfully taking a vehicle is not a lesser included offense of carjacking because a person can commit a carjacking without necessarily committing an unlawful taking of a vehicle.
>
> The following example illustrates that point: Joe knows that his neighbor Mary's car has been stolen and that she is offering a reward for its return. If Joe spots an unfamiliar person driving Mary's car and orders that person out at gunpoint and then drives off, intending to return the car to Mary and secure the reward, he would be guilty of carjacking but not of an unlawful taking of a vehicle. Although Joe had the intent to deprive the driver of possession, as required for carjacking (§ 215), he lacked the intent to deprive the owner of title or possession, as required for unlawful taking of a vehicle (Veh. Code, § 10851).

(*Ibid.*)

Similarly, in *People v. Wolcott*, this Court found assault not necessarily included in robbery:

> Thus we must inquire in the present case whether robbery, the greater offense, can be committed without necessarily committing an assault. If it can, assault is not a lesser included offense in robbery.
>
> Penal Code section 240 defines assault as "[a]n unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another...."

> Neither an attempt to inflict violent injury, nor the present ability to do so, is required for the crime of robbery. That offense is defined by statute as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." ... Although a threat to injure the victim personally may involve an assault, a threat to injure his relatives, family members, or companions would not necessarily take that form. And it is clear that a threat to damage the victim's property, or the property of a relative, family member, or companion, would not come within the statutory definition of assault.
>
> The threat to inflict injury required for a robbery, moreover, need not be accompanied by the present ability to carry it out. Thus, the use of an unloaded gun is sufficient if it causes the victim to part with his property.
>
> In short, because a defendant can commit robbery without attempting to inflict violent injury, and without the present ability to do so, robbery does not include assault as a lesser offense. The addition of an allegation that defendant used a firearm within the meaning of Penal Code section 12022.5 does not alter this conclusion.

(*People v. Wolcott* (1983) 34 Cal.3d 92, 99-102, citations omitted.)

Lower appellate courts have also followed this analysis. In *In re Daniel R.,* the Second District Court of Appeal was tasked with determining whether assault with a deadly weapon (§ 245, subd. (a)(1)) is a lesser and necessarily included offense of willfully and maliciously discharging a firearm at an occupied vehicle (§ 246). (*In re Daniel R., supra,* 20 Cal.App.4th 239, 240-241.) In ruling that section 245, subdivision (a)(1), was not a lesser included offense of section 246, the court stated:

> Based on the statutory definitions of the two crimes, it is apparent one can commit a violation of section 246 without committing an assault. A defendant may violate section 246 by discharging a firearm into an inhabited, but temporarily unoccupied dwelling. In that circumstance, there is no person present to be the target of the unlawful attack and the threat of

> injury or risk to human health and safety is lacking. Thus, while the gravamen of the crime of assault is the potential injury to the victim, not all violations of section 246 require persons or victims even be physically present. Consequently, under the statutory definitions assault with a deadly weapon is not a lesser and necessarily included offense of a violation of section 246.

(*Id.* at 244, citations omitted.)

Finally, in *People v. Nazary*, the Fourth District Court of Appeal used the same elements-based test to find that grand theft by an employee is independent of embezzlement:

> Nazary argues that based upon the merger of the theft offenses in section 484, he can only be convicted of one act of theft, and embezzlement is merely another theory of theft and not an independent offense. His argument is meritless because the elements of embezzlement and grand theft by an employee, and the distinction between them, continue to exist.

(*People v. Nazary* (2010) 191 Cal.App.4th 727, *9, citations omitted.)

These cases take the same analytical approach as the Court of Appeal in this case. First the court looks at the elements of each crime. Then applying the elements test, it determines whether, in the abstract, it is hypothetically possible to commit the greater offense without committing the lesser offense. If yes, then the lesser offense is not included in the greater. Here, the Court of Appeal laid out the elements of section 245, subdivision (a)(1), and section 4500. (Slip opn. at 6-7.) It then applied the elements test and found it hypothetically possible for a life prisoner to commit section 4500 without committing section 245, subdivision (a)(1). (*Id.* at 8.) Just as in the above cases, the Court of Appeal's analysis and holding were sound. Because section 4500 can be committed without necessarily committing section 245, subdivision (a)(1), the lesser is not included in the greater.

In contrast, appellant argues that section 245 proscribes a single offense, and that section 245, subdivision (a)(1), is merely one of many

degrees of aggravated assault. (AOB 18-19.) "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." (AOB 19.) As a result, the argument goes, all subdivisions of section 245 are included in section 4500.

To make this point, appellant primarily relies on *People v. Ortega*. In that case, this Court found both petty theft and grand theft necessarily included in robbery, despite the fact that robbery can be committed without committing grand theft. Although *Ortega* shares similarities with the present case, they can be distinguished.

In ruling that theft and grand theft are varying degrees of the same crime, this Court relied on the statutory interpretation of theft. First, section 486 explicitly states that, "Theft is divided into two degrees, the first of which is termed grand theft; the second, petty theft." (§ 416.) And section 952 states, "In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another. (§ 952.) "It is not required that the charging document specify whether the alleged crime constitutes grand theft or petty theft." (*People v. Ortega, supra,* 19 Cal. 4th at 696.) Thus, the Legislature explicitly declared petty theft and grand theft varying degrees of the same crime. And the holding in *Ortega* reflects this clear legislative intent. But unlike theft, the Legislature has not explicitly defined the degrees of aggravated assault. Finding the subdivisions of section 245 to be separate offenses will not run contrary to the Legislature's explicit intent. In that regard, this case is fundamentally different than *Ortega*.

Furthermore, as Justice Chin illustrates in his *Ortega* dissent, expanding the doctrine of included offenses to cover lesser offenses that do not share every element with the greater offense can create practical due process problems. (*People v. Ortega, supra,* 19 Cal.4th 686 (conc. and dis.

opn. of Chin, J.).) The California Penal Code requires the charging allegation to provide notice to the defendant of which he is accused. (§ 952.) And a defendant can only be convicted of a charged offense or a lesser included offense of a charged offense. (§ 1159.) "These statutory provisions, and the defendant's due process right to notice of the charges may be reconciled if, but only if, the lesser offense is truly included in the greater, i.e., if charging the greater charges all the elements of the lesser." (*People v. Ortega, supra,* 19 Cal. 4th at 711 (conc. and dis. opn. of Chin, J.), citations omitted.)

In this case, if all subdivisions of section 245 are considered included in section 4500, a defendant only charged with section 4500 could instead be convicted of any subdivision of section 245. But the elements of section 4500 provide no actual notice of the additional elements of the subdivisions of section 245. For example, the subdivision at issue in this case specially refers to a deadly weapon other than a firearm. Section 245, subdivision (a)(3), covers assaults with machineguns, assault weapons, or .50 BMG rifles. Section 245, subdivision (b), addresses semiautomatic weapons. And section 245, subdivision (c), requires the victim of the assault to be a peace officer or firefighter. But the type of weapon used in the assault, or the classification of the firearm, or the occupation of the victim are irrelevant to the elements of section 4500. Therefore the accused would not be on notice of these additional elements simply by being charged with section 4500. The charged defendant could not be expected to properly defend against elements that are not part of the charged crime.

Justice Chin addresses similarly troubling results in the event of a reduced conviction. (*People v. Ortega, supra,* 19 Cal.4th at 712 (conc. and dis. opn. of Chin, J.).) Both a trial court and an appellate court may reduce a conviction to a lesser included offense. (§§ 1181, subd. (6), 1260; *People v. Kelly* (1992) 1 Cal.4th 495, 528.) Under appellant's logic, a court could

reduce a section 4500 conviction to any of the subdivisions of section 245 as lesser included offenses. But a jury convicting a defendant of section 4500 would not necessarily have determined whether the defendant used a firearm, or the type of firearm, or whether the victim was a peace officer or firefighter because, again, such facts are not relevant to the elements of section 4500. Therefore, a defendant could end up convicted of a crime in which the jury did not determine the existence of all elements beyond a reasonable doubt. A strict application of the elements test avoids these due process issues. If the greater offense can be committed without necessarily committing the lesser, the lesser should not be considered included in the greater.

In sum, appellant was properly convicted of both section 245, subdivision (a)(1), and section 4500. It is inescapable that a person could commit the greater offense without committing the lesser if the perpetrator used a firearm in commission of the assault. Under a strict application of the elements test, the two offense are not included. As shown, an alternative interpretation could create unnecessary due process issues. Further, section 954 permits separate convictions of both offenses for the same act while section 654 limits the punishments. Treating the two offenses as necessarily included is contrary to this legislative intent. Therefore, Section 245, subdivision (a)(1), is not necessarily included in section 4500. Instead, they are separate offenses, of which a person can be convicted of both for the same conduct.

II. THE COURT OF APPEAL WAS NOT BOUND BY *PEOPLE V. NOAH* BECAUSE THE 1982 AMENDMENT TO FORMER SECTION 245, SUBDIVISION (A), ALTERED THE REASONING OF THE OPINION

In 1971, this Court ruled in *People v. Noah* that former section 245, subdivision (a), was necessarily included in section 4501, aggravated assault by a non-life prisoner. (*People v. Noah* (1971) 5 Cal.3d 469.)

Because the only difference between sections 4501 and 4500 is the length of the offender's prison sentence, *Noah* logically applies to section 4500. But since *Noah* was decided, the Legislature amended former section 245, subdivision (a), to separate assaults committed with firearms from assaults committed with deadly weapons other than firearms. Because this amendment made it possible for a person to violate section 4500 without necessarily violating section 245, subdivision (a)(1), the two offenses were no longer necessarily included.

A. Discussion

Generally, the California District Court of Appeal is bound by California Supreme Court opinions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

> Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.

(*Ibid.*)

But the Legislature may amend a statute to overrule a decision. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 473-474.) "... Although the Legislature may amend a statute to overrule a judicial decision, doing so *changes* the law." (*Ibid,* original italics; *People v. Wolcott* (1983) 34 Cal.3d 92, 104, fn. 4.; *People v. Cuevas* (1980) 111 Cal.App.3d 189, 198-200.)

Specifically, California appellate courts have followed legislative amendments over otherwise binding opinions to effectively "uncouple" a lesser and greater offense. (*People v. Bobb* (1989) 207 Cal.App.3d 88, 91-96, disapproved of on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 198 fn. 7; *People v. Vincze* (1992) 8 Cal.App.4th 1159, 1163.) In *Bobb*, the defendant cited *People v. Greer* (1947) 30 Cal.3d 589 from this Court as authority for his argument that he could not be convicted of both contributing to the delinquency of a minor (§ 272) and unlawful sexual intercourse (§ 261.5) because the former was necessarily included in the latter. Despite *Greer's* explicit holding that the lesser offense was included in the greater, the Third District Court of Appeal declined to follow the case. Instead, the court determined that a "1975 amendment to section 601 has changed the definition of contributing so that it no longer is a necessarily lesser included offense within unlawful sexual intercourse." (*People v. Bobb, supra,* 297 Cal.App.3d at 96.)

For the same reasons, the Fourth District Court of Appeal also declined to follow *Greer*. (*People v. Vincze, supra,* 8 Cal.App.4th at 1163.) Despite this Court's explicit holding in *Greer*, *Vincze* found that contributing to the delinquency of a minor is no longer a lesser included offense of lewd and lascivious conduct. (*Ibid.*)

> Recently, the Third Appellate District declined to follow *Greer*, concluding that its reasoning is no longer valid after the 1975 amendment to section 601. In a case involving the greater offense of unlawful sexual intercourse, *Bobb* found that the amendment "effectively uncoupled the lesser offense as necessarily included in the greater. ... After the 1975 amendment to section 601, none of the acts remaining as bases for juvenile court jurisdiction in that section is so closely related to the elements of unlawful sexual intercourse that it is necessarily implicated in the commission of the latter offense."

(*Ibid*, citations omitted.)

B. Analysis

Here, the 1982 amendment to section 245 effectively uncoupled the offense from section 4500 and fundamentally altered the reasoning of *Noah*. In *Noah*, this Court held that aggravated assault, as defined by section 245 at the time, was a lesser included offense of section 4501, aggravated assault by a prisoner not serving a life sentence. (*People v. Noah, supra,* 5 Cal.3d at 479.) Former section 245, subdivision (a), defined 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.)

Fifteen years later, the Legislature amended former section 245, subdivision (a), to punish assaults with firearms more severely. Subdivision (a) was broken into subdivision (a)(1), which applied to assaults with deadly weapons, other than a firearm, and subdivision (a)(2), which applied to assaults with a firearm. (Stats. 1982, ch. 136, § 1, p. 437.)

Therefore, when *Noah* was decided, it was not possible to violate section 4501 or 4500 without also violating former section 245, subdivision (a). Accordingly, this Court found former section 245, subdivision (a), included in section 4501, and by logical extension, to section 4500. But the 1982 amendment to section 245 made it possible to violate section 4501 or 4500 without necessarily violating section 245, subdivision (a)(1). Therefore, just as in *Bobb* and *Vincze*, the reasoning of this Court was fundamentally altered, and the amendment to the statute effectively uncoupled the two offenses. Now, under a strict application of the elements test, section 245, subdivision(a)(1), is no longer necessarily included in section 4500. And the Court of Appeal was proper in deviating from *Noah*.

CONCLUSION

For the reasons stated above, Respondent respectfully requests this Court to affirm the judgment.

Dated: February 22, 2011

Respectfully submitted,

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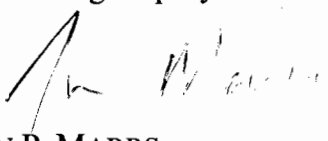

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 4,595 words.

Dated: February 22, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: People v. George Milward
No.: **C058326 / S182263**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 22, 2011, I served the attached **Respondent's Answer Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 22, 2011, at Sacramento, California.

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