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 REPLY BRIEF ON THE MERITS

Valerie G. Wass
Attorney at Law
State Bar No. 100445
vgwassatty@charter.net
556 S. Fair Oaks Ave., Suite 9
Pasadena, CA 91105
(626) 797-1099

Counsel for Appellant
George Milward
By Appointment of the
California Supreme Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

TABLE OF AUTHORITIES

Cases **Pages**

Misc.

Statutes

TABLE OF AUTHORITIES

Statutes **Pages**

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.	S182263

APPELLANT'S REPLY BRIEF ON THE MERITS

Appellant George Milward submits the following Reply Brief on the Merits. Although this brief focuses on points raised in Respondent's Brief on the Merits, appellant continues to rely on the argument and authority presented in his Opening Brief on the Merits.

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

As set forth in his opening brief on the merits, appellant contends that a Penal Code section 245, subdivision (a)(1) aggravated assault is a statutorily lesser included offense of a Penal Code section 4500 aggravated assault by a life prisoner.[1] Respondent disagrees, on the basis of its assertion that the latter offense can be committed with firearm, while the former mandates that the deadly weapon used be one other than a firearm. (RB 2, 5-12.) Additionally, respondent disagrees with appellant's position that *People v. Noah* (1971) 5 Cal.3d 469, was binding on the Court of Appeal, on the basis that the 1982 amendment to section 245, "fundamentally altered" this court's reasoning in *Noah*. (RB 15.) As illustrated below, respondent's analysis is flawed, and its argument fails to address key points raised in appellant's argument.

---

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

B. Assault With a Deadly Weapon or By 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)

Respondent asserts that a section 245, subdivision (a)(1) aggravated assault is not a necessarily lesser included offense of a section 4500 aggravated assault. He contends that a life prisoner who commits an assault with a firearm can be convicted of section 4500, but not section 245, subdivision (a)(1), because the latter offense requires that the deadly weapon or instrument used in the assault be one other than a firearm. (RB 6.) In support of it position, respondent relies on the following four cases in which the reviewing court applied the elements test, and determined that one offense was not necessarily included in the other: *People v. Montoya* (2004) 33 Cal.4th 1031, 1034; *People v. Wolcott* (1983) 34 Cal.3d 92; *In re Daniel R.* (1993) 20 Cal.App.4th 239; and *People v. Nazary* (2010) 191 Cal.App.4th 727.) (RB 6-9.) These cases are distinguishable from the instant case, because in each the court was analyzing the relationship between two different statutes. This authority fail to support respondent's position, because none of cases addressed the key issue present in appellant's case, which is whether different subdivisions of a statute constitute separate offenses, or merely

different ways to commit the same offense.[2]

In *People v. Montoya, supra*, 33 Cal.4th 1031, 1035, this court held that the offense of unlawfully taking a vehicle (Veh. Code § 10851) is not a lesser included offense of carjacking (§ 215), because a person can commit a carjacking without possessing the intent required to unlawfully take a vehicle, which is to deprive the owner of title or possession of the vehicle. Similarly in *People v. Wolcott, supra*, 34 Cal.3d 92, 99-100, this court found that an assault (§ 240) is not a lesser included offense of robbery (§ 211), because a person can commit a robbery without attempting to inflict violent injury, and without having the present ability to do so, which are both statutory elements of an assault.

Applying the elements test in *In re Daniel R., supra*, 20 Cal.App.4th 239, the Second District Court of Appeal held that an assault with a deadly weapon (§ 245, subd. (a)(1)) is not a lesser included offense of willfully and maliciously discharging a firearm at an occupied vehicle (§ 246). The court's analysis was based on the fact that a person can violate section 246 not only by discharging a firearm at an occupied vehicle, but also by discharging a firearm at an inhabited dwelling house. It reasoned that in the second

---

[2] The issue in the present case is not whether the elements test is the proper way to determine if a section 245, subdivision (a)(1) assault is a lesser included offense of a section 4500 assault. As illustrated in appellant's opening brief, the elements test must be applied, and the result is that the former offense is a statutorily lesser included offense of the latter.

instance, if the house was not occupied at the time of the offense, the perpetrator would not have thereby committed an assault. (20 Cal.App.4th at pp. 242-244.)

In *People v. Nazary, supra*, 191 Cal.App.4th 727, Division One of the Fourth District Court of Appeal found that the defendant was properly convicted of both embezzlement by an employee (§ 508), and grand theft by an employee (§ 487, subd. (b)(3)). It pointed out that in order to convict the defendant of both offenses, the jury had to find different elements, and therefore neither was a statutorily lesser included offense of the other. (191 Cal.App.4th at pp. 743-744.)

It is respondent's position that in appellant's case, the analytical approach taken by the Court of Appeal was proper, as was its conclusion that a life prisoner can violate section 4500 without violating section 245, subdivision (a)(1)). (RB 9.) Respondent represents that appellant argued "that section 245, subdivision (a)(1), is merely one of many *degrees* of aggravated assault." (RB 9-10 [emphasis added].) However, appellant did *not* represent that there were various degrees of an aggravated assault. Rather, he pointed out that the 1982 statutory amendments to section 245 created four distinct "*categories*" of assault. (AOB 12, citing *People v. Harper* (2000) 82 Cal.App.4th 1413, 1418; *People v. Martinez* (1987) 194 Cal.App.3d 15, 20.) The premise of appellant's argument is that section 245 must be construed as

proscribing a single offense of aggravated assault, and that the various subdivisions in the statute merely set forth different ways the offense can be committed. (AOB 18-21.)

In support of his position, appellant cited cases interpreting theft, rape, insurance fraud, and forgery statutes, wherein the reviewing court found that the subdivisions or paragraphs of a single statute merely described different circumstances, acts, or ways to commit the same offense. (AOB 15-18, citing *People v. Ortega* (1998) 19 Cal.4th 686 ("*Ortega*"); *People v. Maury* (2003) 30 Cal.4th 342; *People v. Craig* (1941) 17 Cal.2d 453; *People v. Collins* (1960) 54 Cal.2d 57; *People v. Scott* (1944) 24 Cal.2d 774; *People v. Zanoletti* (2009) 173 Cal.App.4th 547; and *People v. Ryan* (2006) 138 Cal.App.4th 360.) Notably absent from respondent's argument is any discussion, or even an acknowledgment, of most of this authority.

Respondent only addresses *Ortega*, which it attempts to distinguish. (RB 10-12.) It points out that section 486 explicitly divides theft into two degrees. Respondent asserts that because "the Legislature explicitly declared petty theft and grand theft varying degrees of the same crime," this court's "holding in *Ortega* reflects this clear legislative intent." (RB 10.) Respondent argues that appellant's case is "fundamentally different," because the legislature has not divided aggravated assault into varying degrees of the same crime, and therefore to construe the various subdivisions of section 245 as

separate offenses would not be contrary to the explicit intent of the Legislature. (*Ibid.*)

Appellant submits that his case is not rendered fundamentally different from *Ortega* merely because the Legislature has not designated or statutorily created different *degrees* of assault. As noted in appellant's argument, like theft, at common law there were no degrees of assault. (AOB 10-11.) Further, this court in *Ortega* rejected the concept that factors relating to the degree of an offense would necessarily destroy its character as a lesser included offense. (19 Cal.4th 686 at pp. 697-698.) Respondent does not address the crux of appellant's argument, which is supported by *Ortega*, that regardless of the manner in which a section 245 assault is committed, or the type of victim of the assault, the perpetrator will still have committed an aggravated assault.

Construing the various subdivisions of section 245 to be separate offenses would be contrary to the Legislative intent. As discussed in appellant's opening brief, the purpose of the 1982 statutory amendment to section 245 was to punish assaults committed with firearms separately from those committed with other weapons, and to require a mandatory period of incarceration for persons who committed an assault with a firearm. (*People v. Martinez, supra*, 194 Cal.App.3d 15, 20; *People v. Glover* (1985) 171 Cal.App.3d 496, 503, fn. 4.) The amendment was an attempt to reduce

firearm violence. (Stats. 1982, ch. 136, § 14, p. 455.) The Court of Appeal in the instant case noted, "Nothing in the [1982] amendment [to section 245] 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.) Since this court in *Noah* held that a section 245, subdivision (a) assault was a lesser included offense of a section 4501 assault by a prisoner, and the 1982 amendment to section 245 did not fundamentally change the statute, construing the subdivisions of section 245 as separate offenses would be contrary to the Legislative intent.

To support its argument, respondent relies solely on Justice Chin's dissenting opinion in *Ortega*. There, Justice Chin pointed out that a defendant can commit a robbery without committing a *grand* theft, and on that basis, disagreed with the majority's finding that the defendant could not be properly convicted of both grand theft and robbery. It is respondent's position that expanding the concept of a lesser included offense to include an offense that does not share every element with the greater offense will result in due process problems. (RB 10-12.) He cites a portion of Justice Chin's opinion, wherein the justice stated that sections 952 and 1159, "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 of the elements of the lesser." (*Ortega, supra*, 19 Cal.4th at p. 711 (conc. and dis. opn. of Chin, J.,) citations omitted.)" (RB 11.) Respondent further argues:

> 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.... 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.

(RB 11.)

In *People v. Reed* (2006) 38 Cal.4th 1224, this court noted that in determining whether a defendant can be convicted of an uncharged crime, both the accusatory pleading and statutory elements tests apply. However, it held that in determining whether a defendant can be properly convicted of multiple charged offenses, only the statutory elements test applies. (*Id.* at p. 1232.) Justice Chin, writing for the majority, explained:

> The accusatory pleading test arose to ensure that defendants receive notice before they can be convicted of an uncharged crime. "As to a lesser included offense, the required notice is given when the specific language of the accusatory pleading adequately warns the defendant that the People will seek to prove the elements of the lesser offense." (*People v. Lohbauer,* [(1984)] *supra*, 29 Cal.3d [364] at pp. 368-369.) "Because a defendant is entitled to notice of the

> charges, it makes sense to look to the accusatory pleading (as well as the elements of the crimes) in deciding whether a defendant had adequate notice of an uncharged lesser offense so as to permit conviction of that uncharged offense." (*People v. Montoya, supra*, 33 Cal.4th at p. 1039 (conc. opn. of Chin, J.).) But this purpose has no relevance to deciding whether a defendant may be convicted of multiple charged offenses. "[I]t makes no sense to look to the pleading, rather than just the legal elements, in deciding whether conviction of two charged offenses is proper. *Concerns about notice are irrelevant when both offenses are separately charged ... .*" (*Ibid.*)

(38 Cal.4th 1229-1230 [emphasis added].)

Since this court has concluded that there are no due process concerns regarding the right to notice when a defendant is charged with both a greater and lesser offense, respondent's argument on this point lacks merit.

Respondent cites an additional portion of Justice Chin's dissent in *Ortega*, wherein he discussed problems that might occur when a court deems a verdict contrary to the evidence or the law, and reduces it to a lesser included offense pursuant to section 1181, subdivision 6.[3] (RB 11, citing *People v. Ortega, supra*, 19 Cal.4th at p. 712.) Justice Chin wrote:

---

[3] Section 1181, subdivision 6 provides:

> When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed;

> . . ., the majority has decreed that a jury may not convict of both robbery and grand theft because grand theft is necessarily included in robbery. Accordingly, sections 1181, subdivision 6, and 1260 would seem to allow a trial or appellate court to reduce a robbery conviction to grand theft. But a jury finding of robbery does not necessarily find all the elements of grand theft. If, on the other hand, the majority should find it improper to reduce robbery to grand theft (because grand theft is not *really* included in robbery), that would mean a court could only reduce robbery to simple theft, even if the jury would have found the defendant guilty of grand theft if given the option.

(19 Cal.4th at p. 712 [emphasis in original].)

Relying on the above-cited portion of Justice Chin's dissent, respondent argues that under appellant's interpretation, which is that section 245 proscribes only a single offense of aggravated assault, a trial court could reduce a section 4500 aggravated assault conviction to a conviction under any of the subdivisions of section 245. Respondent asserts that this could be a problem, because "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 a firefighter because, again, such facts are not relevant to the elements beyond a reasonable doubt." (RB 11-2.) Appellant disagrees. If the situation involved an uncharged lesser offense, the accusatory pleading test would be applicable, and if the evidence did not establish the particular form of the aggravated assault, the court could reduce the offense to a section 240 simple assault. In a case where the lesser offense was charged, the jury's verdict would necessarily determine which

subdivision of section 245 would apply. Thus there would be no danger of the court reducing the offense to an inapplicable form of aggravated assault.

In Argument I-E of his opening brief, appellant explained why the Court of Appeal applied an erroneous analysis in concluding 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. (AOB 24-29.) He reiterated his conclusion that section 245 only proscribes a single offense of aggravated assault. (AOB 25.) Appellant also noted that firearms are only excluded from the deadly weapon or instrument portion of subdivision (a)(1), and he established that an assault with a firearm necessarily constitutes an assault by means of force likely to produce great bodily injury. Additionally, appellant demonstrated that even if this court were to find that section 245, subdivision (a)(2) proscribes a separate offense from section 245, subdivision (a)(1), 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. Respondent does not address these additional portions of appellant's argument. Based on the foregoing discussion, as well as on the argument presented in appellant's opening brief, this court should find that a section 245, subdivision (a)(1) assault is a statutorily lesser included offense of a section 4500 assault.

C. The Court of Appeal Was Bound By the Holding in *People v. Noah* Because the 1982 Amendments to Section 245 Did Not Fundamentally Alter the Statute

Respondent acknowledges that pursuant to the doctrine of stare decisis, decisions of the California Supreme Court must generally be followed by courts exercising inferior jurisdiction. (RB 13, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In his opening brief, appellant noted that while this court can overrule a prior decision when there has been later legislation that impacted the issue addressed in that decision, lower courts can only do so when the statute upon which the decision was based has subsequently been completely rewritten. (AOB 29-30.)

As pointed out by respondent, a statute may be amended by the Legislature to overrule a judicial decision, but doing so results in a change of the law. (RB 13, citing *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 473-474; *People v. Wolcott, supra*, 34 Cal.3d 92, 104, fn. 3; *People v. Cuevas* (1980) 111 Cal.App.3d 189, 198-200.) As previously discussed herein and in appellant's opening brief, the 1982 amendment to section 245 was an attempt to curb firearm violence, by mandating a minimal period of incarceration for persons who commit assaults with firearms, as opposed to other forms or aggravated assault. The purpose behind the statutory amendment was not to overrule a prior judicial decision.

Respondent argues that California Courts of Appeal "have followed

legislative amendments over otherwise binding opinions to effectively 'uncouple' a lesser and greater offense." (RB 14, citing *People v. Bobb* (1989) 207 Cal.App.3d 88, 91 ("*Bobb*"), and *People v. Vincze* (1992) 8 Cal.App.4th 1159, 1163 ("*Vincze*").) In both cases cited by respondent, the reviewing court declined to follow this court's holding in *People v. Greer* (1947) 30 Cal.3d 589, that the offense of contributing to the delinquency of a minor (§ 272) was a necessarily included offense of unlawful sexual intercourse (§ 261.5). The *Bobb* court found that a 1975 amendment to Welfare and Institutions Code section 601, which deleted language that referred to a minor "in danger of leading an idle, dissolute, lewd or immoral life," "effectively uncoupled the lesser offense as necessarily included in the greater." (207 Cal.App.3d at p. 93.) It explained that "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.*) Subsequently the court in *Vincze*, applied the same reasoning as *Bobb*, and concluded that the offense of contributing to the delinquency of a minor (§ 272) was not a lesser included offense of lewd and lascivious conduct (§ 288, subd. (a)). (8 Cal.App.4th at pp. 1162-1164.)

Relying on *Bobb and Vincze*, respondent argues that "the 1982 amendment to section 245 effectively uncoupled the offense from section

4500 and fundamentally altered the reasoning of *Noah*." (RB. 15.) As illustrated in appellant's argument, both herein and in his opening brief, unlike the 1975 amendment to Welfare and Institutions Code section 601, the amendment to section 245 did not substantially alter the statute. Instead, it created four categories of aggravated assault, and mandated minimal incarceration for a defendant who used a firearm to commit an assault.

Section 4500 states 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. [Emphasis added.]

Since section 245 proscribes only a single offense of aggravated assault, which can be committed in a variety of ways, any violation of section 4500 necessarily encompasses the elements of a section 245 aggravated assault. Therefore the court's reasoning in *People v. Noah, supra*, 5 Cal.3d 469, has not been substantially altered. Accordingly, the Third District Court of Appeal exceeded its jurisdiction by declining to follow *Noah.*

CONCLUSION

Based on the foregoing argument and authority, as well as on that presented in appellant's Opening Brief on the Merits, appellant respectfully requests this court to reverse the decision of the Court of Appeal. This court should find that section 245 proscribes only a single offense of aggravated assault, and that an assault committed in violation of section 245, subdivision (a)(1) is a statutorily lesser included offense of a section 4500 assault. Additionally, this court should find that the 1982 amendment to section 245 did not materially alter the statute, and thus the Court of Appeal acted in excess of its jurisdiction by declining to follow this court's precedent in *Noah*.

DATED: April 4, 2011

Respectfully submitted,

Valerie G. Wass

Valerie G. Wass
Attorney for Appellant
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 3,650 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: April 3, 2011

Valerie G. Wass

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 REPLY 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:

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

George Milward, H-95502
C. S. P. Sacramento
Post Office Box 290066
Represa, CA 95671

Kevin McCormick
Deputy District Attorney
901 G. Street
Sacramento, CA 95814-1858

Jay Greiner
Attorney at Law
555 University Ave #290
Sacramento, CA 95825

Ivan P. Marrs
Deputy Attorney General
Post Office Box 944255
Sacramento, CA 94244-2550

Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Flr
Sacramento, CA 95814

Clerk's Office
Sacramento County Superior Ct.
720 Ninth Street
Sacramento, CA 95814-1398
For Delivery to the Honorable
Patricia C. Esgro

Each of the above-said envelopes was then, on April , 2011, 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 ___ day of April, 2011, at Pasadena, California.

Valerie G. Wass