SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE
OF CALIFORNIA,

PLAINTIFF AND RESPONDENT,

v.

VERONICA AGUAYO,

DEFENDANT AND APPELLANT.

CASE NO. S254554

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

APPELLANT'S OPENING BRIEF ON THE MERITS

LINNÉA M. JOHNSON
STATE BAR NO. 093387
100 EL DORADO STREET, SUITE C
AUBURN, CA 95603
TEL: 916.850.5818
EMAIL: LMJLAW2@ATT.NET
ATTORNEY FOR APPELLANT

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

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

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

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

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

Statement of the Case

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

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

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

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

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

765 (*Aguayo*).).

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

Statement of Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Introduction to the Argument

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

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

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

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

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

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

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

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

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

Today is that day.

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ARGUMENT

I. Penal Code Section 245, Subdivision (a)(4), Assault with the Use of Force Likely to Produce Great Bodily Injury, Is a Lesser-Included Offense of Penal Code Section 245, Subdivision (a)(1), Assault with a Deadly Weapon, Under the Elements Test

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

> Force-likely assault, then, is only a lesser included offense of assault with a deadly weapon if every assault with a deadly weapon requires that the defendant use the weapon in a way that is likely to produce great bodily injury. Although that will often be the case, it is not necessarily so.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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