In the Supreme Court of the State of California

In re B.M., a Person Coming Under the Juvenile Court Law. **THE PEOPLE OF THE STATE OF CALIFORNIA,** Plaintiff and Respondent, **v.** **B.M.,** Defendant and Appellant.	Case No. S242153

Second Appellate District, Division Six, Case No. B277076
Ventura County Superior Court, Case No. 2016025026
The Honorable Brian J. Back, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Can a butter knife with a rounded end and a serrated edge qualify as a deadly or dangerous weapon under Penal Code section 245, subdivision (a)(1)?

INTRODUCTION

A butter knife may qualify as a deadly weapon because it can cause, and actually has caused in other cases, great bodily injury and even death. The knife used in this case qualified as a deadly weapon because the nature of the object, the manner in which it was used, and other relevant facts show that it was capable of producing and likely to produce, death or great bodily injury.

Appellant B.M., angry that she was being deliberately kept out of her family home, climbed through a window, and yelled at her sister before pulling her hair and throwing a phone. B.M. then went to the kitchen, retrieved a six-inch, all-metal, serrated knife, and attempted to stab her sister with the knife. The sister successfully covered herself with a blanket that thwarted any injury. The juvenile court sustained a petition for assault with a deadly weapon. (CT 1, 90-95.)[1] Based on these facts, the Court of Appeal properly concluded that there was sufficient evidence the knife used in this case was a deadly weapon.

STATEMENT OF THE CASE

The locks on seventeen-year-old B.M.'s family home were changed to keep her from entering the home with her boyfriend. When B.M. returned home after staying out all night and discovered that her key no longer worked, she became furious at her twin sister Sophia, and entered Sophia's

[1] There is only one volume of the clerk's and reporter's transcripts.

bedroom through a window. Sophia, who had just come out of the shower in a bath towel, was in the room with her 17-year-old stepsister Natalie. B.M. yelled at Sophia, tried to pull her hair out, and threw a telephone at her. (CT 42; RT 10, 13-17, 26-27, 31, 37, 59.)

When her efforts to hurt Sophia with the telephone failed, B.M. left the room to find a more effective weapon, and returned in less than a minute brandishing a knife. B.M. testified that she grabbed the knife from the kitchen downstairs because "it was just the heat of the moment" and "it's just the first thing that caught my eye." (RT 75.) Sophia described the knife as six-inches long and all-metal, and estimated that the blade made up about half of the overall length. (RT 28-29.) The blade was not sharp, but had small ridges or serrations along one side. It was "[t]he type of knife that you would use to butter a piece of toast." (RT 14-16, 29.) B.M. later described it as "a standard kitchen butter knife, all silver, about six inches in length" (RT 62), which could be used to "cut stuff like -- toast and stuff" (RT 80).[2]

Sophia was lying in bed, on her back, still in just a towel, when B.M. attacked her with the knife. Sophia pulled a blanket over her body for protection. (RT 16-17, 59.) B.M. made "slicing" motions at Sophia, and motions "like if you're trying to stab someone." (RT 19, 34.) The knife hit the blanket near Sophia's legs a few times, and Sophia felt pressure from the blade that she described as "five or six" on a scale of one to ten. B.M.

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[2] The knife was not admitted into evidence. However, it is doubtful that it was a true "butter knife," a term that typically refers to a short, *non*-serrated table knife, used only to serve out pats of butter from a butter dish to a diner's plate. (See https://en.wikipedia.org/wiki/Butter_knife.) The knife here (six or seven inches, all metal, with a serrated edge designed to "cut stuff") (RT 28-29, 62, 80) would be more aptly described as a stainless steel "dinner knife" or "table knife." (See https://en.wikipedia.org/wiki/Table_knife.)

was "furious," "yelling," and trying to hurt Sophia with the knife. Sophia was terrified by the attack, and she screamed in fear. (RT 23-25, 28, 33-34.) B.M left the bedroom room, and Sophia called 911. B.M. continued to argue with Natalie, and she punched Natalie, giving her a bloody nose. (RT 26-27.)

When police arrived, B.M. admitted she had been "very upset" and had "grabbed . . . what she described as a butter knife off the kitchen counter" and returned to the room "to confront her sister." B.M. said she made "downward stabbing motions" at the blanket that Sophia had pulled over her. (RT 59-60.) B.M. later claimed that she only wanted to "scare" her sister with the knife, and that the part of the knife that touched the blanket was the blade - "[t]he part where you would . . . cut . . . toast and stuff." (RT 75-76, 80.)

B.M. was arrested after the attack. Following a juvenile wardship proceeding in which she and Sophia testified, the juvenile court found that she committed an assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1).[3] After explaining how each element had been established beyond a reasonable doubt, the juvenile court acknowledged that it was unusual for a felony charge to result from "just a butter knife," but concluded that that the circumstances of the attack "make it a felony." (RT 89.) The court further found that "we're lucky, in that hot anger that there were no injuries that had to be addressed." (RT 89.)

B.M. appealed, arguing that there was insufficient evidence to support the finding that the butter knife was a deadly weapon under section 245, subdivision (a)(1). In a unanimous published opinion, Division Six of the Second Appellate District rejected the claim. (*In re B.M* (2017) 10 Cal.App.5th 1292, 1298-1299.) In holding that a reasonable trier of fact

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[3] All further statutory references are to the Penal Code.

could sustain the allegation, the appellate court recognized that objects that are not deadly per se may, under certain circumstances, be used to kill or inflict great bodily injury. (*Id.* at p. 1298.) And on that point, the court agreed with the juvenile court that the six-inch, metal, serrated knife could be used as a weapon to slice or stab someone, even though it was not designed for that purpose. (*Id.* at p. 1299.)

The appellate court also agreed that, under the circumstances of the attack, B.M. had used the knife "'in such a manner as to be capable of producing and likely to produce, death or great bodily injury.'" (*B.M.*, *supra*, 10 Cal.App.5th at pp. 1298-1299, quoting *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) The court noted that Sophia's ability to avoid injury did not negate the offense, explaining, "It matters not that the victim was able to fend off great bodily injury with her blanket." (*Id.* at p. 1299.) "Similarly," the court continued, "that [B.M.] was not adept at using a knife does not inure to her benefit. She could have easily inflicted great bodily injury with this metal butter knife and just as easily have committed mayhem upon the victim's face." (*Ibid.*) The Court of Appeal credited the trial court's express finding that it was only "lucky" that Sophia was not injured. (*Ibid.*)

The Court of Appeal also parted ways with their colleagues in Division One, which reached a different result in a case where a defendant slashed at the victim's face and neck with a butter knife, but the knife had broken against the skin without resulting in significant injury. (See *B.M.*, *supra*, 10 Cal.App. at p. 1295 ["To the extent that *In re Brandon T.* (2011) 191 Cal.App.4th 1491 holds to the contrary, we respectfully disagree"].) Finding that *Brandon T.* was "wrongly decided," the court explained, "Even from the bare recital of facts, it is apparent that the butter knife [in *Brandon T.*] was 'used in a manner so as to be capable' of producing great bodily injury. That it broke during the assault preventing further stabbing

should not inure to the defendant's benefit. The brutality of the attack in *In re Brandon T.* should not be minimized with hindsight." (*Id.* at p. 1300.)

ARGUMENT

A BUTTER KNIFE WITH A ROUNDED END AND A SERRATED EDGE CAN QUALIFY AS A DEADLY OR DANGEROUS WEAPON UNDER SECTION 245, SUBDIVISION (A)(1), AS IT DID IN THIS CASE

Not all "butter knives" are equal, and every assault is different. But there can be little doubt that some butter knives, if wielded against a victim in a violent attack, may produce and are likely to produce, death or great bodily injury. If the evidence bears this out, then a trier of fact is entitled to reach the commonsense conclusion that a butter knife can indeed "qualify" as a deadly or dangerous weapon under section 245, subdivision (a)(1). And the lower courts were certainly entitled to reach that conclusion in this case, in which B.M. "could have easily inflicted great bodily injury" (*B.M.*, 10 Cal.App.5th at p. 1298), when she violently "stabbed" and "sliced" at her sister with a six-inch, all-metal, serrated knife.[4]

A. Principles Governing Whether An Object Is A Deadly Weapon Under Section 245

Section 245, subdivision (a)(1) provides that "[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the

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[4] The object described in the issue presented is a knife with a "rounded end," and respondent answers the question as it is worded. But there was no evidence the knife in this case had a "rounded end." It was never described that way in either the reporter's transcript or the appellate opinion. Rather, the knife was simply described as six inches, all metal, "not sharp," with a serrated edge designed to "cut stuff like – toast and stuff." (RT 28-29, 62, 80.)

state prison . . . ." Under this section, a "'deadly weapon' is 'any object, instrument, or weapon that is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.'" (*People v. Aguilar*, *supra*, 16 Cal.4th at pp. 1028-1029.) "Great bodily injury, as used in section 245, means significant or substantial injury. [Citation.] Because the statute speaks to the capability of inflicting significant injury, neither physical contact nor actual injury is required to support a conviction." (*Ibid.*)

This Court has explained section 245 contemplates two categories of deadly weapons. In the first category are objects that are "deadly weapons as a matter of law" such as dirks and blackjacks because "the ordinary use for which they are designed establishes their character as such. [Citation.]" (*Aguilar*, *supra*, 16 Cal.4th at pp. 1028-1029.) But other objects, while not deadly per se, "may be used, under certain circumstances, in a manner likely to produce death or great bodily injury." (*Ibid.*; accord, *In re David V.* (2010) 48 Cal.4th 23, 30, fn. 5; see also *Aguilar*, at p. 1030 ["deadly weapons or instruments not inherently deadly are defined by their use in a manner capable of producing great bodily injury"]; see also *People v. Graham* (1969) 71 Cal.2d 303, 328 ["When it appears . . . that an instrumentality . . . is capable of being used in a 'dangerous or deadly' manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, we believe that its character as a 'dangerous or deadly weapon' may be thus established, at least for the purposes of that occasion"]; *In re D.T.* (2015) 237 Cal.App.4th 693, 698-699; *People v. Brown* (2012) 210 Cal.App.4th 1, 6-7; see *People v. McCoy* (1944) 25 Cal.2d 177, 188 ["a knife is not an inherently dangerous or deadly instrument as a matter of law"].)

When deciding whether an object that is not inherently deadly—such as a knife—is nonetheless a "deadly weapon" under section 245, "the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]" (*Aguilar*, *supra*, 16 Cal.4th at p. 1029.) A bottle or a pencil, for example, may be a deadly weapon within the meaning of section 245, subdivision (a)(1), "when used in a manner capable of producing and likely to produce great bodily injury." (*Brown*, *supra*, 210 Cal.App.4th at pp. 6-7.) And an object can be a deadly weapon even if there is no contact or injury, and "'even if it is not actually used with deadly force.'" (*D.T.*, *supra*, 237 Cal.App.4th at p. 699, quoting *People v. Page* (2004) 123 Cal.App.4th 1466, 1472.) California courts thus routinely affirm convictions under section 245, subdivision (a)(1), when the deadly weapon used was "some hard, sharp, pointy thing," even when the object was used "only to threaten, and not actually used to stab." (*Ibid.*)

For example, in *People v. Simons* (1996) 42 Cal.App.4th 1100, the defendant held several armed police officers at bay with a screwdriver, an object the *Simons* court described as "not an inherently deadly weapon." (*Id.* at p. 1107.) Although instructed to drop the tool, the defendant flailed it around and urged the officers to shoot him. On these facts, the Court of Appeal upheld a conviction for exhibiting a deadly weapon to prevent arrest, finding "[t]he evidence clearly demonstrated that the screwdriver was capable of being used as a deadly weapon and that defendant intended to use it as such if the circumstances required." (*Ibid.*)

Applying these settled rules, the California courts, including this one, have found all sorts of everyday objects can qualify as deadly weapons—even a pillow—depending on the manner in which they are used. (See, e.g., *People v. Zermeno* (1999) 21 Cal.4th 927, 931 [beer bottle]; *People v. Graham*, *supra*, 71 Cal.2d 303, 327-328 [shoe]; *Page*, *supra*, 123

Cal.App.4th at p. 1472 [pencil]; *People v. Montes* (1999) 74 Cal.App.4th 1050 [chain]; *In re Jose R.* (1982) 137 Cal.App.3d 269 [apple, with an embedded pin]; *People v. Helms* (1966) 242 Cal.App.2d 476 [pillow]; *People v. Claborn* (1964) 224 Cal.App.2d 38 [automobile]; *People v. Herd* (1963) 220 Cal.App.2d 847 [knife]; *People v. White* (1963) 212 Cal.App.2d 464 [large rock]; *People v. Richardson* (1960) 176 Cal.App.2d 238 [razor blade]; *People v. Russell* (1943) 59 Cal.App.2d 660 [fingernail file]; *People v. Lee* (1937) 23 Cal.App.2d 168 [iron bar]; *People v. Nealis* (1991) 232 Cal.App.3d Supp. 1, 4 [dog].)

If a pillow or shoe can be employed as a "deadly weapon," then so can a serrated metal knife. Indeed, given this backdrop, and as explained in more detail below, there is no logical reason to categorically exclude serrated "butter knives" as objects that can qualify as deadly or dangerous weapons.

B. Because "Butter Knives" Have Been Used To Murder And Maim, They Can Certainly "Qualify" As A Deadly Or Dangerous Weapon, As Other Jurisdictions Have Concluded

A serrated metal "butter knife" with a rounded end—regardless of length or sharpness—is not a deadly weapon "as a matter of law" because it was not designed to produce death or great bodily injury in ordinary use. (*McCoy*, *supra*, 25 Cal.2d at p. 188 ["a knife is not an inherently dangerous or deadly instrument as a matter of law"].) But it is still a knife with a metal blade and a serrated edge that can be used as a weapon to cut and stab. Under the settled principles stated above, and in light of the findings by California courts that numerous everyday objects may be "deadly objects"—including pillows and shoes—such a knife most certainly can "qualify" as a deadly weapon depending on the nature of the attack. B.M. does not argue otherwise, and never directly answers the question

presented. Rather, appellant focuses on her own conduct, and limits her argument to whether the evidence presented about *her use* of the knife in this case supports her conviction. (AOB 12-22.)

It was prudent for B.M. not to contest that a knife described in the question presented can qualify as a deadly weapon. Indeed, because butter knives have metal blades, it is hardly surprising that attackers have, in fact, used them to kill. Anthony Baxter is currently facing murder charges in California for stabbing a couple to death with a butter knife in 2016. (Schultz, *Man Can't Escape Trouble* (June 9, 2016) 2016 WLNR 17637726.) The defendant in *Wallace v. United States* (D.C. 2007) 936 A.2d 757, 760, 776, killed his victim by stabbing him in the neck with a butter knife. The defendant in *State v. Wooden* (La.App.1st Cir. 1990) 572 So.2d 1156, killed his victim by stabbing him in the neck with a butter knife and hitting him with a brick. The defendant in *Funmaker v. Litscher* (W.D.Wis. Sept. 20, 2001) No. 00-C-625-C, 2001 WL 34377571, at *2 killed his brother by stabbing him in the abdomen and chest with a butter knife, puncturing the aorta. These cases show that a butter knife can be an effective murder weapon.

Similarly, it is no surprise that butter knives have also been employed to inflict serious and substantial injuries. For example, during a fight in 2017, a New Orleans man used a butter knife to stab a victim, who was hospitalized for the stab wound. (Lipinski, *Two In New Orleans Stabbed With Butter Knife, Box Cutter In Separate Attacks* (Mar. 28, 2017) 2017 WLNR 9579522.) On Christmas Eve in 2016, a New York man "stabbed another man in the head with a butter knife" and was charged with aggravated assault. Police found the victim holding towels to his head. (Czech, *Man Held After Butter Knife Stabbing In Local Diner* (Dec. 27, 2016) 2016 WLNR 39560140.) The defendant in *Harrell v. State* (Tex.Ct.App. 2012), No. 05-10-01322-CR, 2012 WL 171861, at *3,

stabbed his wife in the leg with a butter knife. In 2013, a jury convicted a North Dakota man of assault with a dangerous weapon after he cut a tribal officer's cheek with a butter knife. (Assoc. Press, *Belcourt Man Found Guilty In Butter Knife Attack*, 2013 WLNR 34437283.) That same year, a psychiatric patient in New York stabbed a staff member in the face with a butter knife, puncturing the cheek. (*SLPC Attack Alleged*, 2013 WLNR 17345622.) And NBC News reported in 2011 that a man attacked his wife with a butter knife, resulting in the knife becoming "lodged in her skull." (See NBC 6 South Florida, *Wife's Skull Cracked by Hubby in Butter Knife Attack* <https://www.nbcmiami.com/news/local/Wife's-Skull-Cracked-By-Hubby-in-Butter-Knife-Attack-124795794.html> (as of Mar. 7, 2018).)

Indeed, a butter knife can even cause great bodily injury by accident. A four-year-old boy who fell while holding a butter knife suffered blindness and severe injuries when the knife penetrated his eye socket. (See Kitakami et al., *Transorbital-transpetrosal Penetrating Cerebellar Injury-Case Report*-(1999) 39 Neurologia medico-chirurgica 150-152 <https://www.jstage.jst.go.jp/article/nmc1959/39/2/39_2_150/_article> (as of Mar. 7, 2018).) Thus, by its very nature *as a knife*, a butter knife is potentially more dangerous some other types of objects that have been deemed to be "deadly." (See *Helms*, *supra*, 242 Cal.App.2d 476 [pillow]; *Zermeno*, *supra*, 21 Cal.4th at p. 931 [bottle]; *Page*, 123 Cal.App.4th at p. 1472 [pencil]; *Montes*, *supra*, 74 Cal.App.4th 1050 [chain].)

Because butter knives clearly can be used to cause significant harm, other jurisdictions have found them to be "deadly or dangerous weapons" for the purpose of assault crimes and sentencing enhancements. (See, e.g., *Johnson v. State* (Tex.Crim.App. 2017) 509 S.W.3d 320, 324 [butter knife waved in a threatening manner during a robbery, but without injuring any victim, held to be a deadly weapon]; *Harrell*, *supra*, 2012 WL 171861, at *3 [butter knife used to stab the victim's leg was a deadly weapon]; *State v.*

Rollins (La.Ct.App. 2011) 2010-0977, 2011 WL 9160375, at *4 [sufficient evidence that defendant armed himself with a "dangerous weapon" when he entered the victim's home, threatened her, and grabbed a butter knife]; *State v. Aceves* (Ariz.Ct.App. 2009, No. 2 CA-CR 2007-0182) 2009 WL 33478, at *4 [jury entitled to find plastic knife was a dangerous weapon]; *United States v. Mathijssen* (8th Cir. 2005) 406 F.3d 496, 499 [dull, small (1½ to 2 inches) knife was considered a dangerous weapon for purposes of a sentence enhancement]; *State v. Franklin* (La.Ct.App. 2001) 803 So.2d 1057, 1063 [defendant's use of butter knife in commission of rape constituted the use of a dangerous weapon]; *State v. Tankins* (Mo.Ct.App. 1993) 865 S.W.2d 848, 851-852 [defendant characterized a knife as a "butter knife" but the court disagreed because it had serrated edges; even assuming it was a dull butter knife, it was used as a threat to produce harm and was considered a dangerous instrument]; *Williams v. State* (Tex. App. 1987) 732 S.W.2d 777, 778-780 [butter knife with a rounded tip qualified as a deadly weapon because defendant grabbed victim's face and threatened her with the knife]; *Porreca v. State* (1983) 56 Md.App. 63, 68-69 [466 A.2d 550] ["butter or kitchen knife," described as a "standard eating utensil-type knife," tied to probationer's pants was a dangerous weapon].)

Because it is possible to wield a butter knife with a rounded end and a serrated edge in a manner that is capable of producing and likely to produce death or great bodily injury, a reasonable fact-finder can infer that such an object qualifies as a deadly or dangerous weapon under section 245, subdivision (a)(1).

C. B.M. Committed An Assault With A Deadly Weapon In This Case By Wielding The Knife In A Manner Capable Of Producing, And Likely To Produce, Great Bodily Injury

As to the particular knife attack in this case, the Court of Appeal correctly held that "a reasonable trier of fact could and did make the requisite finding" that B.M. "used the butter knife 'in such a manner as to be capable of producing and likely to produce, death or great bodily injury.'" (*B.M.*, *supra*, 10 Cal.App.5th at pp. 1298-1299, quoting *Aguilar*, *supra*, 16 Cal.4th at pp. 1028-1029.)

"The same standard governs review of the sufficiency of evidence in adult criminal cases and juvenile cases . . . ." (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) "[T]he power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact . . . . Where there is more than one inference which can reasonably be deduced from the facts, the appellate court is without power to substitute its deductions for those of the trier of fact. [Citation.]" (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547; accord *People v. Maury* (2003) 30 Cal.4th 342, 396.)

Here, substantial evidence was presented in the juvenile court that B.M. committed an assault with a deadly weapon in light of the relevant considerations set forth by this Court in *Aguilar*, namely: "the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (16 Cal.4th at p. 1029.)

As to the "nature of object" used in the assault, Sophia described it as a six-inch, all-metal, serrated knife. The juvenile court was entitled to conclude that such a knife could qualify as a "deadly weapon" as discussed in detail above.

Concerning the "manner" in which the knife was used, substantial evidence supports the finding that B.M. wielded it in a way that could produce, and was likely to produce, great bodily injury. At first, B.M. tried but failed to hurt Sophia by pulling her hair and by hurling a telephone, before leaving briefly to retrieve a weapon. When B.M. reentered the bedroom, she had armed herself with the six-inch serrated knife, which she promptly used to stab and cut at her near-naked sister. Sophia was undressed, wrapped in a towel, and lying on her back on the bed when B.M. attacked her with the knife, and Sophia covered herself with a blanket to protect herself. (RT 14-17.) That the assault did not actually produce great bodily injury was not for lack of force or effort. B.M. was "yelling" and "furious," and her arm movements were forceful and violent, or in Sophia's words: "like someone trying to stab someone." (RT 19, 31.) She later repeated that "[B.M.] tried stabbing me with [the] knife" (RT 24), and also made a "slicing" motion (RT 34). B.M. later told police that she made "downward stabbing motions" with the knife. (RT 59-60.) To Sophia, it was obvious that B.M. was "trying to just hurt me," and Sophia felt the significant pressure of the knife blows through the blanket (five or six on a scale of one to ten). Sophia was "screaming" and terrified that "[B.M.] could really . . . hurt me." (RT 25, 28, 34.)

Other "facts relevant to the issue" further support the juvenile court's finding. The testimony showed that B.M. had overcome the efforts of her family to keep her out of the house, and that she was extremely angry when she confronted Sophia after entering the locked house though a window. And just before attacking Sophia with the knife, she had tried to hurt Sophia by hurling a telephone. The Court of Appeal aptly recognized that this uncharged assault was also indicative of B.M.'s intent to do serious harm. "[It] shows that [B.M.] intended to use any object available to harm her sister. In theory, throwing a telephone at another person with the

requisite intent can be an assault with a deadly weapon. (See *People v. Cordero* (1949) 92 Cal.App.2d 196, 199 [beer bottle as a club or a missile].)" (*B.M., supra*, 10 Cal.App.5th at p. 1299, fn. 1 [also noting that just after the attack, B.M. continued to be violent; she punched her step-sister Natalie, giving her a bloody nose].) Only when B.M.'s efforts to harm Sophia with the telephone failed did she leave the room briefly to find a more effective weapon.

When considering other "facts relevant to the issue," the Court of Appeal was also correct in stating, "[T]hat [B.M.] was not adept at using a knife does not inure to her benefit. She could have easily inflicted great bodily injury with this metal butter knife and just as easily have committed mayhem upon the victim's face." (*B.M., supra*, 10 Cal.App.5th at p. 1229.)

In short, B.M.'s did not use the knife in jest or to merely "scare" her sister; this was a serious and substantial attack with a weapon, carried out by a "furious" assailant in a continued attack. Pursuant to the case law above, B.M.'s actions satisfied the elements of section 245, subdivision (a)(1), and nothing more was required.

B.M. alleges that in resolving this matter against her, Court of Appeal "ignored" part of the definition of a deadly weapon. (AOB 18.) She asserts that the court only discussed whether she used the knife in a manner that was "capable" of causing great bodily injury, while failing to consider a second requirement: whether it was also "likely" to do so. (AOB 18.) Not so. At the outset, the Court of Appeal defined the issue as whether a reasonable trier of fact could find that B.M. used the butter knife "'in such a manner as to be capable of producing *and likely* to produce, death or great bodily injury.'" (*B.M., supra*, 10 Cal.App.5th at p. 1298, italics added.) The analysis that follows explained how the use of an object in an assault, such as B.M.'s knife, "increases the likelihood of great bodily injury." (*Id.* at p. 1299.) And the Court of Appeal ultimately concluded that under the

circumstances, "a reasonable trier of fact could and did make the requisite finding" that B.M. "used the butter knife 'in such a manner as to be capable of producing *and likely* to produce, death or great bodily injury.'" (*Id.* at pp. 1298-1299, italics added, quoting *Aguilar*, *supra*, 16 Cal.4th at pp. 1028-1029.)

Even so, an argument analogous to B.M.'s complaint was raised and rejected in *D.T.*, *supra*, 237 Cal.App.4th at page 700, in which the minor argued that the trial court erroneously looked at the "possibility" that death or great bodily injury could have occurred, and failed to consider the "likelihood" that such harms would occur. The Court of Appeal in *D.T.* found this to be mostly a distinction without a difference, noting, "[the] minor proposes no articulable standard differentiating 'likelihood' from 'possibility.'" (*Ibid.*) Here, there is nothing defective in the Court of Appeal's analysis or holding that the knife, as used, was capable of producing, and likely to produce, great bodily injury or death, and the court's conclusions are supported by the testimony cited above.

In arguing that insufficient evidence supports the judgment, B.M. downplays several aspects of her attack. She asserts, for example, that the knife she used was a "typical dull, rounded butter knife, designed for spreading soft substances, as opposed to cutting or stabbing." (AOB 13.) But a knife that is serrated *is* designed for cutting—that is why it is serrated.

B.M. also argues that she "did not poke or stab the knife." (AOB 13.) But Sophia repeatedly testified otherwise, describing B.M.'s arm movements "like someone *trying to stab* someone" (RT 19, italics added),

and that "[B.M.] *tried stabbing me* with [the] knife" (RT 24, italics added).[5] Even B.M. described her own arm movements to police as "*downward stabbing motions*" at the blanket that Sophia had pulled over her. (RT 59-60, italics added.)

B.M. further alleges that she "did not attempt to make contact with [Sophia's] skin." That seems to be a highly unlikely and self-serving inference in light of: (1) B.M.'s rage; (2) her preceding uncharged assault; (3) B.M.'s "downward stabbing motions" at the blanket that Sophia had pulled over her; and (4) Sophia's testimony that she could feel the knife pressing against her through the blanket. If not for the blanket, the knife clearly would have made "contact with [Sophia's] skin." On this record, therefore, a reasonable trier of fact could certainly conclude that B.M. did, in fact, attempt to stab Sophia's "skin" with the knife.

And although Sophia managed to keep the blade away from her bare skin, it was only her quick-thinking and the presence of a blanket nearby that saved her from physical harm. That defensive act, however, did not mean that B.M. failed to use the knife in a manner that was capable of, and likely to produce, great bodily injury. To the contrary, the juvenile court found that under the circumstances of B.M.'s anger-fueled knife attack, "we're lucky, in that hot anger that there were no injuries that had to be addressed." (RT 89.) The Court of Appeal expressly agreed with that finding, and further noted that Sophia's ability to "fend off great bodily injury with her blanket" "matters not." (*B.M.*, *supra*, 10 Cal.App.5th at p. 1229.) The appellate court rightly observed that "[t]his self defense does not negate [B.M.]'s assault." (*Ibid.*; see also, e.g., *McCoy*, *supra*, 25 Cal.2d

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[5] When Sophia was asked, "Did she ever poke you with the knife?," she answered, "Yeah." (RT 33.) But she soon seemed to clarify that point, stating, "She didn't poke," but rather made a "slicing motion."

at pp. 190-191 [the fact that the appellant was thwarted in his use of a knife and did not inflict serious injury "did not render his conduct any the less criminal"]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 758-759 [attack on two officers by swinging a metal coin changer constituted assault even though the officers successfully dodged the blows].)

B.M. also minimizes the force of her attack by stating she applied only "a little" pressure with the knife. (See, e.g., AOB 6, 19, 25.) It is true that Sophia, when first asked whether she could feel the knife against her through the blanket, answered, "A little." (RT 25.) But on redirect examination, she was asked to "describe how much pressure [B.M.] used if one is the least amount of pressure and ten is the most pressure?" (RT 34.) Sophia estimated, "Maybe a five or a six." (RT 34.) On that 10-point scale, the amount of pressure from the knife blows was substantial—especially since she felt the pressure through a blanket. Further, the "five or six" level of pressure must be considered along with Sophia's other testimony that B.M. was trying to hurt her and stab her with the knife (RT 17, 19, 23) and that Sophia was "screaming" and terrified that "[B.M.] could really . . . hurt me." (RT 25, 28, 34.) When the evidence is considered as a whole and with all inferences drawn in favor of the judgment, as it must be, a trier of fact could find that B.M. used the knife with substantial force.

B.M. also likens her case to *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086, which overturned a conviction for assault with a deadly weapon in which the victim was hit in the arms and shoulders with a broomstick. (AOB 13-14.) The court in *Beasley* concluded that the mild bruises on victim's shoulders and arms, without any evidence as to the nature of broomstick and whether it was solid wood, plastic, or some other material, was insufficient to show Beasley wielded broomstick as a deadly weapon. (*Beasley*, at p. 1088.) The "composition, weight, and rigidity" of

the broomstick "would necessarily affect the probability and likelihood that it could cause great bodily injury." (*Id.* at pp. 1087-1088.) Beasley's jury, therefore, "had before it no facts from which it could assess the severity of the impact between the stick and [the victim's] body." (*Ibid.*) Nor was there any evidence that the victim suffered substantial injuries, that the attack was directed at her head, or that the victim was a child or frail. (*Ibid.*)

Here, in contrast, Sophia described in detail the knife, the manner that B.M. used and attempted to use the knife, and the force that B.M. applied on a 10-point scale. And while Sophia was not a small child or frail, she was certainly vulnerable in that she was undressed (wearing only a bath towel) and lying on her back. This was evidence the factfinder could consider to assess whether the knife was used in a manner that was capable of producing, or likely to produce, great bodily injury or death. *Beasley* fails to demonstrate that the butter knife that B.M. used was not a deadly or dangerous weapon.

B.M. also asserts that she directed the attack toward her sister's legs, and did not strike her face, eyes, or neck. (AOB 14, 25.) That the knife hit Sophia's legs because she tried to take cover was immaterial because the assault was complete when B.M. directed the knife toward her sister's body. (*B.M.*, *supra*, 10 Cal.App.5th at p. 1229; see also *Aguilar*, *supra*, 16 Cal.4th at p. 1036, fn. 9 [assault may be committed without making actual physical contact, because the statute focuses on *use* of a deadly weapon or instrument, or on force *likely* to produce great bodily injury; whether the victim suffers harm is immaterial].) Even so, while B.M. posits that a butter knife could not cause serious injury because it was used against Sophia's legs (AOB 13), a stab to the leg with a butter knife could, in fact, have deadly consequences. (See, e.g., *Harrell*, *supra*, 2012 WL 171861, at *3 [reflecting that a butter knife can cause a stab wound to the leg]; *Morrell*

v. State (Alaska Ct.App. 2009) 216 P.3d 574, 576 [stab wound to leg could have been fatal because "it nicked the popliteal artery, an extension of the femoral artery"].) And from her position above Sophia's torso, B.M.'s knife jabs could have also stabbed Sophia in the chest or abdomen, likewise resulting in great bodily injury or death. (See *Funmaker*, *supra*, 2001 WL 34377571, at *2 [defendant stabbed brother in chest and abdomen with butter knife, piercing the aorta and causing the victim's death].)

B.M. also analogizes this case to *In re Brandon T.* (2011) 191 Cal.App.4th 1491, and disagrees with the Court of Appeal's opinion that *Brandon T.* was wrongly decided. (See AOB 22-25.) In that case, the court found that insufficient evidence supported a finding that a minor had used a deadly weapon when he tried to cut a classmate's face with a butter knife. (*In re Brandon T.*, *supra*, 191 Cal.App.4th at pp. 1494-1498.) *In re Brandon T.* is inapposite because there, "despite [the minor's] efforts, the knife would not cut . . . ." (*Id.* at p. 1497.) In fact, the knife broke at the handle when the minor pressed it against the victim. (*Id.* at pp. 1497-1498.) In other words, "the knife failed and was not capable of use as obviously intended." (*Id.* at p. 1498.)

Here, in contrast, the knife was made entirely of metal (without a handle made of other material) and had a serrated blade, and B.M. used the knife with forceful "stabbing" and "slicing" motions. (RT 24, 34, 60.) Unlike *Brandon T.*, this knife did not break or otherwise "fail." There is no evidence that it was incapable of producing great bodily injury, particularly if Sophia had been stabbed in the eye or throat while her head was protruding from the blanket. And if the blanket had shifted, or B.M. had better aim, Sophia could have been stabbed in the chest, abdomen, or soft tissue. Unlike in *Brandon T.*, it was Sophia's defensive maneuvers—not a knife incapable of being used as intended—that prevented the infliction of injury. The juvenile court noted, "Yeah, we're talking a butter knife.

We're also talking a knife." (RT 88.) B.M. even admitted that the knife was capable of cutting things, "like toast and stuff." (RT 80.) Thus, as the juvenile and appellate courts agreed, Sophia was "lucky" she escaped without injury. *In re Brandon T.* is therefore distinguishable because in that case, the knife simply was not capable of cutting or stabbing. (*Brandon T.*, *supra*, 191 Cal.App.4th at p. 1498.) Even so, respondent agrees with the Court of Appeal that *Brandon T.* was wrongly decided because the opinion impermissibly reweighed the evidence and "drew inferences away from the factual finding under review." (*In re B.M.*, *supra*, 10 Cal.App.5th at p. 1300.)

This Court's decision in *People v. McCoy*, which the Court of Appeal below relied on for guidance below, illustrates why the judgment should be affirmed. In that case, the defendant knocked the victim to the ground, stood over her in a bent position, and placed a knife several inches from her face. He threated to use the knife if she was not quiet. The victim kicked the defendant in the groin, and he ran away. (*McCoy*, *supra*, 25 Cal.2d at p. 182.). This Court explained that is not necessary for the defendant to even attempt to use the knife because the assault is committed when the defendant completes an overt act toward the commission of the battery. (*Id.* at pp. 189-193.) Again, assault criminalizes conduct "based on what *might* have happened—and not what *actually* happened . . . ." (*People v. Williams* (2001) 26 Cal.4th 779, 787.) And here, as the Court of Appeal recognized, B.M. "could have easily inflicted great bodily injury with this metal butter knife and just as easily have committed mayhem upon the victim's face." (*B.M.*, *supra*, 10 Cal.App.5th at p. 1299.) And although Sophia was "lucky" that B.M.'s efforts to hurt her fell short, B.M. still wielded the knife in a way that was "capable of producing and likely to produce, great bodily injury." (*Aguilar*, *supra*, 16 Cal.4th at pp. 1028-

1029.) Because substantial evidence supports finding that B.M. committed an assault with a deadly weapon, the judgment should be affirmed.

CONCLUSION

The Court of Appeal's judgment should be affirmed.

Dated: March 8, 2018

Respectfully submitted,

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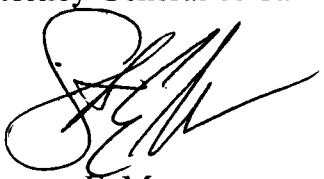
CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 6,607 words.

Dated: March 8, 2018

XAVIER BECERRA
Attorney General of California



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DECLARATION OF SERVICE

Case Name: ***People v. B.M.*** No.: **S242153**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On March 8, 2018, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On March 8, 2018, I caused eight (8) copies of the **ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, Room 1295, San Francisco, CA 94102 by Golden State Overnight, Tracking # GSOAB108559235.

On March 8, 2018, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

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 March 8, 2018, at Los Angeles, California.

Frances Conroy
Declarant

Signature

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