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, vs. B.M., a minor, Defendant and Appellant.	Supreme Court No. S242153 2d. Crim. B277076 Sup. Ct. No. 2016025026

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

For a dull butter knife to be a deadly weapon, it must be used in a particularly forceful and dangerous manner. In other words, it must be used in a way that is both capable and likely to cause great bodily injury. Not only does the law direct this, but common sense does as well. It is also not a coincidence that in cases where everyday instruments are found to be deadly, the objects are often sharp and/or pointed, and being directed at someone's throat, head, or face. Yet this case presents no such circumstances. Indeed, the ultimate question presented here is: Did a 17-year-old girl use a deadly weapon to assault her sister when she swiped a standard, rounded butter knife toward her legs that were under a blanket, resulting in no injury? The only reasonable answer to this question, given the facts presented and the law that applies, is no.

Respondent spends much time in the answer brief asserting that a butter knife *can qualify* as a deadly weapon, without any reference to the underlying facts of this case. (AB 15-17.)[1] To address the issue presented in such a limited manner, however, is not very helpful. For virtually *any* object *can* be a deadly weapon in California because the very definition of the term turns on considerations apart from the object itself, including the manner in which it was used. As defined, even objects as benign as a toothpick or spoon *can* be deadly weapons if they were to be used in a very violent way (for example, if either was inserted with significant force into someone's eye socket). Indeed, because the *circumstances* of the assault are inextricably woven into the definition of a deadly weapon, it is difficult to imagine any object that would be considered a *non-deadly* instrument as a matter of law, and such consideration is not the crux of the question presented here.

Rather, what is important here, and in all cases involving non-deadly instruments alleged to be used as deadly weapons, are the facts surrounding the assault at issue, which are considered in conjunction with the nature of the object used. As will be addressed in detail herein, respondent has exaggerated the facts of this case to overstate the nature of the altercation that occurred. Respondent has also improperly discounted the likelihood requirement under California's deadly weapon definition by incorrectly asserting that a "likelihood" is no different than a "possibility," while also failing to demonstrate that a likeliness of injury was supported in this case. In addition, by focusing solely on certain distinguishing facts found in

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[1] "AB" refers to the respondent's Answer Brief on the Merits. "OBM" refers to Appellant's Opening Brief on the Merits. "CT" and "RT" refer respectively to the Clerk's and Reporter's Transcripts of proceedings conducted in this case. All statutory references are to the Penal Code.

People v. Beasley (2003) 105 Cal.App.4th 1078 ("*Beasley*") and *In re Brandon T.* (2011) 191 Cal.App.4th 1491 ("*Brandon T.*"), respondent has largely overlooked the significance of those decisions. Both cases support reversal here based on the facts of the assault that transpired, and they both reject the drawing of speculative inferences like those on which respondent and the Court of Appeal have relied.

Lastly, when asserting that a butter knife *can* be a deadly weapon, respondent relies on a number of highly distinguishable examples of assault set forth in several brief news articles and cases from jurisdictions outside California. Not only do these examples hold no authoritative value, but many contain inadequate facts and little to no legal analysis of the issue presented. Moreover, those cases that do contain legal analysis are based on very different legal standards and definitions. Because the above-mentioned articles and cases hold no authoritative value and very little, if any, persuasive sway, they are addressed at the end of the brief.

ARGUMENT

I. RESPONDENT EMBELLISHES THE FACTS OF THE ALTERCATION INVOLVING THE BUTTER KNIFE, THEREBY PORTRAYING DETAILS OF AN ASSAULT THAT ARE NOT SUPPORTED BY THE RECORD

By embellishing the facts of this case, respondent attempts to paint a picture of an exceedingly violent assault with a dangerous instrument that is simply not supported by the evidence. Importantly, the altercation between appellant and Sophia led to no injury at all, and the lack of injury was not because Sophia narrowly escaped harm, but because harm was never likely in light of the little force employed and the dull instrument appellant used. To misconstrue the facts as respondent does is especially problematic in a case such as this, which concerns a mixed question of law and fact, and where an accurate assessment of the facts is critical to determining the ultimate issue presented. As set forth below, the true facts of this record

demonstrate a complete lack of evidence supporting a felony assault with a deadly weapon adjudication, and at best set forth a simple assault.

First, respondent states several times that appellant was trying but failed to hurt Sophia when she initially threw, or "hurled," a phone at her, even referring to the incident as a "preceding uncharged assault," and asserting that it was only when appellant's "efforts to harm Sophia with the telephone failed did she leave the room briefly to find a more effective weapon." (AB 8, 19-20.) These assertions are based on one sentence in the record, where Sophia stated that appellant "[t]hrew my little sister's phone at me and then she took off . . . ." (RT 15.) There are no other facts about this occurrence. The record does not indicate where specifically the phone was thrown, nor how hard it was tossed. Indeed, for all the record shows, the phone was tossed downward at the space before Sophia's feet. Yet respondent claims the phone was "hurled" and from that "hurling" infers an intent to injure. This is a clear exaggeration that is not supported by the record.[2]

In addition, respondent's assertion that appellant "tried but failed to hurt Sophia by pulling her hair . . . before leaving briefly to retrieve a weapon" is also not supported. (AB 19; see also AB 8.) The reference to appellant pulling Sophia's hair is from the 911 call. During the call, Sophia stated that at that moment appellant was "trying to pull my hair out."

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[2] For the same reasons, the Court of Appeal's footnote that appellant's throwing of a phone "shows that [B.M.] intended to use any object available to harm her sister" is not supported either. (*In re B.M.*, *supra*, 10 Cal.App.5th at p. 1299, fn. 1.) The single sentence in the record regarding the phone does not show any intent to injure, and the Court of Appeal's note that "[*i*]*n theory*, throwing a telephone at another person with the requisite intent can be an assault with a deadly weapon" is irrelevant given the limited facts in the record here. (*Ibid.*, emphasis added.)

(Exhibit 1-B, at p. 2, line 21.) However, the record is clear that the 911 call occurred *after* the altercation with the butter knife, and the alleged hair pulling was happening in real time during the call. (RT 27; see also Exhibit 1-B.) The evidence therefore directly contradicts respondent's assertions that appellant resorted to a butter knife because her alleged prior attempts to hurt Sophia had failed. Moreover, the fact that appellant discarded the butter knife prior to allegedly trying to pull Sophia's hair demonstrates that appellant made a conscious choice to cease using the instrument in the middle of the altercation, which contradicts respondent's narrative that appellant was continuously escalating the encounter.[3]

Respondent also includes the following description of events regarding the use of the butter knife:

> When [appellant] 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.

(AB 19.) This excerpt is exaggerated in a number of ways.

First, respondent's assertion that appellant immediately came at Sophia with the butter knife leading Sophia to cover herself with the blanket is not supported by the record. (AB 8, 19.) As noted in the opening brief, pursuant to Sophia's own testimony, appellant was just holding the knife in her hand when she first entered the room and did not

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[3] Respondent also alleges that appellant punched her other sister, Natalie, in the nose, which is not only irrelevant to the question presented, but also not supported by the record, since Sophia did not see this occur and no evidence discloses exactly how Natalie was injured. (AB 9, 20; RT 26-27.)

make any motion toward Sophia with it until after Sophia was already covered with the bedding. (RT 16-17, 20.) This distinction is important because it shows appellant did not aim the knife at Sophia's skin, and only ever directed it toward Sophia's legs when they were under a comforter, which greatly diminished any chance of injury given the dullness of the instrument, and the little force that was used.[4] (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-29.)

Respondent's statement in the excerpt that appellant used the butter knife to "stab and cut at" her sister is similarly embellished. Not once did Sophia assert that appellant was trying to "cut" her, and Sophia stated that appellant did *not* come right at her lunging with the knife. (RT 20-21.) Sophia did state that appellant "tried to stab" her (RT 33), but when asked to explain this statement, she clarified that appellant remained three feet away from her, that she never climbed over her, and she "didn't poke" her, but instead made a "slicing" motion with the butter knife only while Sophia's legs were covered with the comforter. (RT 34; see also RT 24, 33.)

In addition, respondent's assertion that the lack of injury "was not for lack of force or effort" is entirely unsupported – a lack of force and effort is precisely why no injury resulted. In Sophia's own words, she felt

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[4] Respondent cites to other alleged facts in an attempt to support an inference that appellant intended to hit Sophia's skin with the butter knife, but none of the cited facts offer such support. For example, respondent cites to appellant's "'downward stabbing motions' *at the blanket*" as well as "Sophia's testimony that she could feel the knife pressing against her *through the blanket*" – but all these facts demonstrate is that the knife was not directed toward Sophia's bare skin. (AB 22, emphasis added.) Moreover, these statements are consistent with appellant's assertions that she only intended to scare Sophia by making motions with the butter knife toward the bedding. (RT 60.)

only "a little" pressure from the butter knife, and after appellant swiped it a few times, she stopped. This demonstrates both a lack of force and a lack of effort.

Respondent asserts further that appellant is minimizing the force used by stating that it caused only "a little" pressure. (AB 23.) But here appellant is directly quoting the victim's testimony. (RT 25.) On redirect, after stating that she could feel only "a little" pressure through the blanket, Sophia also measured the force to be "maybe a five or six" out of ten, but that does not change her characterization of it as "a little." In addition, when stating that it was a little, Sophia was describing what she actually felt, as opposed to giving some estimation of how much appellant was exerting herself. Moreover, the indisputable fact that Sophia suffered no injury from the altercation corroborates the only reasonable conclusion that the force exerted was minimal. (See *People v. McDaniel* (2008) 159 Cal.App.4th 736, 748 [lack of injury is probative of force used].) While respondent repeatedly refers to the force used as "substantial" and describes "significant pressure of the knife blows through the blanket," Sophia never used any of those words.[5] (AB 19, 23.)

Respondent likewise cites and relies on the Court of Appeal's conclusion that it was Sophia's ability to "fend off great bodily injury with her blanket" that kept her safe. (AB 22; *In re B.M.* (2017) 10 Cal.App.5th

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[5] Respondent also asserts that the level of pressure must be considered along with Sophia's testimony that she was fearful that appellant was trying to hurt her and that Sophia was screaming. But Sophia's fear does not establish the force exerted, especially here, where Sophia only testified generally to her fear of what appellant might do. (RT 28.) The evidence of the force that was applied in this case is the total lack of injury, and Sophia's description of the force itself, which respondent cannot dispute entailed the words "a little." (AB 23; RT 25.)

1292, 1299; see also AB 26.) This statement is also unsupported by the record. It ignores reason to infer that Sophia's use of the blanket "fended off" appellant's actions. (AB 22.) For if it was appellant's true intention to continue her attack and to seriously hurt Sophia with a butter knife, why would a blanket stop her? Rather, what the record reflects is that appellant *chose to stop* using the butter knife on her own accord. According to Sophia, after appellant sliced the knife a few times, she began arguing with Natalie and then left the room, and she discarded the knife on her own. (See RT 25, 26, 60.) Moreover, if covering oneself with a blanket is enough to "fend off" an assault with a butter knife, then it can show only that such assault was done with very little force in the first place, and there was no likelihood of causing any real injury at all.[6]

Respondent also takes some liberties in describing the altercation generally, stating more than once that Sophia was "terrified" that appellant could hurt her. (AB 9, 19.) The record paints a less dramatic and more equivocal response, when Sophia was specifically asked to describe the extent of her fear, and she replied, "I don't know. I was pretty scared."

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[6] Regarding the nature of the instrument at issue, respondent asserts that it was not a "true" butter knife, while also noting that not all butter knives are equal. (AB 8, n. 2; 11.) Respondent also asserts that the record does not expressly state the knife was rounded. (AB 11, n. 4.) Regardless of what a "true" butter knife is, this Court is bound by the witnesses' depictions in the record. The rounded nature of the knife is evident from those descriptions, which noted that the knife was not sharp, and none of which referred to a pointed end. In addition, a rounded end is consistent with respondent's assertion that the proper label of the instrument at issue is a "table knife," since "[t]he distinguishing feature of a table knife is a blunt or rounded end." (See AB 8, n. 2, citing https://en.wikipedia.org/wiki/Table_knife.) Lastly, it was the prosecution's burden to prove the nature of the instrument in connection with its burden of proving that the instrument used was a deadly one, and it was certainly never proven that the butter knife used in this case had a pointed tip.

(RT 28.) Fear alone, however, does not transform an object into a deadly weapon if the manner of its use does not align with that fear, and where the definition requires not just the *capability* of *any* injury, but rather a *likelihood* of *serious injury or death.* Lastly, respondent states that appellant's arm movements were "forceful and violent" (AB 19), yet the record shows that Sophia could not recall the arm movements appellant made. (RT 20-21.)

In sum, the discussion above explains the true details of the butter knife altercation, and to paint it, as respondent does, as an extremely violent and calculated attack intended to cause great pain and injury is simply not supported by the record. Appellant does not dispute that she assaulted her sister, but the question this case poses is whether she did so *with a deadly weapon.* In this respect, it is of utmost importance to consider the facts of the assault in the context of the applicable standard. The question is not: *Could* the butter knife have been used in a way that would render it *capable* of causing *any injury.* Rather, the question is: Was the butter knife *actually used* in such a way that it was *both capable* of causing *and likely* to cause *death or great bodily injury.* (*People v. Aguilar, supra,* 16 Cal.4th at pp. 1028-29.) When analyzing the *supported* facts under the proper standard, the only reasonable answer to the inquiry is no.

II. THE LIKELIHOOD REQUIREMENT FOUND IN THE CALIFORNIA DEFINITION OF A DEADLY WEAPON REQUIRES THAT THE PROBABILITY OF HARM BE HIGH, HAS BEEN IMPROPERLY OVERLOOKED BY BOTH RESPONDENT AND THE COURT OF APPEAL, AND IS NOT SUPPORTED BY SUFFICIENT EVIDENCE IN THIS CASE

Respondent does not dispute that California's deadly weapon definition requires that the instrument be used in a manner "likely" to produce death or great bodily injury. However, respondent appears to contend that the term "likely" adds nothing to the definition because there

is no discernible difference between a likelihood and a possibility (or, a capability). (AB 21.) This, however, is not so.

CALCRIM 821 provides that "[t]he phrase likely to produce great bodily harm or death means the probability of great bodily harm or death is high." This definition appears in the context of the felony child abuse statute set forth in Penal Code section 273a. To be convicted under that code section, the jury must find that the defendant inflicted pain or suffering on a child under circumstances or conditions "likely to produce great bodily harm or death." The "likely to produce" language contained therein is therefore identical to that found in the definition of a deadly weapon for the purposes of section 245, subdivision (a)(1).

Several cases have similarly held that the phrase "likely to produce great bodily harm or death" means " 'the probability of serious injury is great.' " (See *People v. Sargent* (1999) 19 Cal.4th 1206, 1223, quoting *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835; *People v. Cockburn* (2003) 109 Cal.App.4th 1151, 1160; *People v. Cline* (1982) 135 Cal.App.3d 943, 948; *People v. Northrop* (1982) 132 Cal.App.3d 1027, 1036; *People v. Hernandez* (1980) 111 Cal.App.3d 888, 895.) In *People v. Valdez* (2002) 27 Cal.4th 778, this Court reiterated that definition. (*Id.* at p. 784.) In addition, non-legal dictionaries contain very similar language, defining "likely" as "having a high probability of occurring or being true; very probable" (see Miriam-Webster Online Edition, available at https://www.merriam-webster.com/dictionary/likely>), and "expected to happen; probable." (See also Cambridge English Dictionary Online Edition, available at <https://dictionary.cambridge.org/us/dictionary/english/likely>.)

These definitions are also consistent with the language set forth in cases addressing assaults committed with force "likely" to cause great bodily injury, in which courts consider the "natural and *probable*

consequences" of the assault at issue. (*People v. Williams* (2001) 26 Cal.4th 779, 787, emphasis added; Pen. Code, § 245, subd. (a)(4).) Moreover, case law has held that assault with force likely to cause great bodily injury is a necessarily included offense of assault with a deadly weapon. (See *In re Jonathan R.* (2016) 3 Cal.App.5th 963, 973-74.) In so holding, the *In re Jonathan R.* court discussed the interplay of these two offenses and stressed the likelihood aspect of each as they applied to the force that was used, stating that

> [w]hen a defendant commits an assault using an instrument other than a firearm, the instrument is considered to be a "deadly weapon," and therefore to qualify under section 245, subdivision (a)(1), only if the instrument is used in a manner *likely* to produce death or great bodily injury. For that reason, when assault with a deadly weapon other than a firearm is found to have occurred, the trier of fact necessarily must have concluded the defendant used or attempted to use force likely to produce great bodily injury, *since that likelihood is what makes a weapon or instrument "deadly."* If the use of the instrument was not likely to produce great bodily injury, the defendant's conduct could not satisfy subdivision (a)(1).

(*Id.* at p. 973, emphasis added.)

Accordingly, the term "likely" does have its own meaning and significance in this context, and it is quite different from that of "capable," which is defined as being merely "susceptible," or "having attributes . . . required for performance or accomplishment." (See Miriam-Webster Online Edition, available at < https://www.merriam-webster.com/dictionary/capable>; see also Cambridge English Dictionary Online Edition, available at

<https://dictionary.cambridge.org/us/dictionary/english/capable > [defining capable as "having the skill or ability or strength to do something"].)[7]

In addition, the term "great bodily injury" is defined as "significant or substantial physical injury," and "it does not refer to trivial or insignificant injury or moderate harm." (*People v. Clark* (1997) 55 Cal.App.4th 709, 714; see also Pen. Code, § 12022.7, subd. (f); CALCRIM 875.) Therefore, to be considered deadly, an instrument must be used in such a way and with such force that there is a *high or great* probability of causing an injury that is *more than minor or moderate*.

Evidence that there was a high or great probability of death or great bodily injury in this case is nonexistent. Indeed, all of the evidence in this record demonstrates that the risk of *any* injury was slight at best. The dull and rounded nature of the instrument, the fact that it was directed solely in the direction of Sophia's covered legs, and the small amount of force that was employed, all show that the probability of an injury amounting to more than moderate harm was extremely low, meaning no rational trier of fact could find such a likelihood.[8]

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[7] In one case, *People v. Wilson* (2006) 138 Cal.App.4th 1197, the Court of Appeal arrived at a different definition of "likely" for purposes of section 273a, relying on the definition supplied by this Court in *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888. In *Ghilotti*, the court addressed the term "likely" as it appears in the Sexually Violent Predators Act ("SVPA"), and held that it meant "a substantial danger – that is, a serious and well-founded risk." (*Ghilotti, supra*, 27 Cal.4th at p. 895, italics omitted.) *Wilson*'s reliance on *Ghilotti* and departure from the above-cited case law has been questioned, particularly because *Ghilotti* was decided in such a specific context under the SVPA. (See *People v. Chaffin* (2009) 173 Cal.App.4th 1348, 1351.) In any event, even under this alternative definition, "a substantial danger" or "well-founded risk" is also clearly more than a mere possibility.

[8] This is further demonstrated by the Court of Appeal's need to make the unsupported leap that appellant *could have* committed mayhem upon

Respondent also asserts that appellant's argument concerning the likelihood requirement was rejected by the court in *In re D.T.* (2015) Cal.App.4th 693, but this is not so. In *In re D.T.*, the subject minor poked the victim multiple times in the back with a "sharp" and "pointy" pocketknife that had a two-and-a-half-inch blade. (*Id.* at pp. 696-97.) The minor argued that the court improperly failed to consider the likelihood of injury. The court first stated that the minor proposed no articulable standard differentiating "likelihood" from "possibility." (*Id.* at p. 700.) Notably, appellant is articulating such a standard here, as set forth above.

In addition, the *In re D.T.* court went on to state that it would be "hard pressed to see why common sense could not properly lead a finder of fact to conclude that *pressing a sharp knife against a victim's back was likely* to cause a serious bodily injury." (*Id.* at p. 700, emphasis added.) The court also stated that "[b]ecause the knife was sharp, and because minor held it against the victim in such a way that a sudden distraction or misstep could have resulted in a serious puncture wound," the knife had met "the *Aguilar* standard for likelihood." (*Id.* at p. 701.) Indeed, the court in *In re D.T.* focused greatly on the facts surrounding the type of weapon used and its manner of use throughout the opinion, referring multiple times to the "sharp" and "pointy" nature of the knife, and to the fact that it was poked into the victim's back, i.e., a highly vulnerable "area of her body she could not even see, let alone control." (*Id.* at pp. 700, 701.) In addition,

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Sophia's face; the actual actions appellant took had no likelihood of significant injury, so the court needed to speculate regarding entirely different actions to create a risk that did not exist in the record, which is addressed in greater detail in Section III, herein. Moreover, given appellant's positioning only near Sophia's feet and the lack of any evidence demonstrating that she ever moved any closer, there was certainly not a *likelihood* that appellant would commit any injury upon Sophia's face.

when distinguishing both *In re Brandon T.* and *People v. Beasley*, the court again focused on the fact that the knife *D.T.* used was "sharp" and "pointy." (*Id.* at p. 701.)

Accordingly, *In re D.T.* did not reject appellant's argument, but rather expressly found, based on the facts of the assault and the nature of the weapon used, a likelihood of injury. Moreover, because *In re D.T.* involved an intrinsically dangerous instrument being placed in direct contact with a particularly vulnerable area of the body, the facts of that case supported the court's inference of likeliness. Here, on the other hand, no such facts exist, and no such inference is supported.[9]

In sum, respondent's assertion that the term "likely" has no meaning or application when it expressly appears in the definition of a deadly weapon and has been defined in the context of the Penal Code is without merit. In addition, respondent fails to rebut the fact that the record of this

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[9] Notably, respondent has not pointed to any part of the Court of Appeal's opinion in which it analyzed the likelihood of injury in this case, instead pointing only to general recitations of the standard. (See AB 20-21.) For example, respondent cites to the Court of Appeal's assertion that "[t]he use of an object in an assault increases the likelihood of great bodily injury." (See AB 20, quoting *In re B.M.*, *supra*, 10 Cal.App.5th at p. 1299.) When viewing this statement in context, however, one sees that the court was not addressing the likelihood of injury in this case, but instead was noting generally why the law provides for greater punishment when an object is used to commit an assault. Moreover, even this general statement is questionable, considering an aggravated assault that is committed without a weapon but with force likely to cause great bodily injury or death is addressed in the same fashion as when a deadly weapon is used. (See *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1035 ("Ultimately . . ., the jury's decisionmaking process in an aggravated assault case under section 245, subdivision (a)(1), is functionally identical regardless of whether, in the particular case, the defendant employed a weapon alleged to be deadly as used or employed force likely to produce great bodily injury; in either instance, the decision turns on the nature of the force used.")

case does not contain any facts indicating that any injury was likely, much less serious injury or death. Given the dull nature of the instrument and the circumstances of the altercation at issue here, no rational trier of fact could have found a "great" or "high" risk of injury, and therefore this adjudication cannot stand. (*People v. Aguilar, supra,* 16 Cal.4th at pp. 1028-29.)

III. BECAUSE *PEOPLE V. BEASLEY* (2003) 105 CAL.APP.4TH 1078 AND *IN RE BRANDON T.* (2011) 191 CAL.APP.4TH 1491 CORRECTLY DEMONSTRATE THAT ANALYSIS OF A DEADLY WEAPON REQUIRES EXAMINATION OF THE ACTUAL ASSAULT THAT OCCURRED, AS OPPOSED TO SPECULATIVE AND UNSUPPORTED INFERENCES OF WHAT COULD HAVE OCCURRED THAT HAVE NO SUPPORT IN THE RECORD, THIS COURT SHOULD FOLLOW THESE CASES AND REVERSE APPELLANT'S ADJUDICATION

A. The Analysis in *Beasley* Supports Reversal Of Appellant's Adjudication And Proscribes Relying On Speculative Inferences With No Support In The Record

Respondent seeks to distinguish *Beasley* on the basis that the court there found insufficient evidence of a deadly weapon in part because the material of the broomstick used to commit the assault was unknown. (AB 23-24.) In doing so, respondent ignores very important aspects of the *Beasley* decision.

To quickly summarize, the evidence in *Beasley* showed that the defendant hit the victim on the arms and shoulders with a broomstick, causing bruises. In finding insufficient evidence that the broomstick was used as a deadly weapon, the court stated that it could not be sure whether the nature of the broomstick was such that it could have caused great bodily injury, and the court also expressly noted that Beasley did *not* strike the victim's head or face with the instrument. (*Beasley, supra,* 105 Cal.App.4th at pp. 1087-88.) What is significant here is that the *Beasley* court properly limited its analysis to the facts of the assault that occurred and inferences reasonably drawn therefrom. The court did not find that the

defendant *could have* struck the victim's face or *could have* jammed the end of the broomstick in her eye, because nothing in the record supported such inferences. The court thereby focused on what the evidence of the assault *actually showed* – i.e., that the attack was only upon the arms and shoulders and not upon the face, and therefore neither death nor great bodily injury were likely.

This demonstrates that when deciding whether an instrument has been used in a deadly manner, the court must look to the facts of the assault as set forth in evidence, as opposed to unsupported speculation as to how the assault *could have* gone, with no basis in the record. This is very different from what the Court of Appeal did here, when it speculated far beyond what the evidence presented, stating that appellant "could have easily inflicted great bodily injury with this metal butter knife and just as easily have committed mayhem upon the victim's face." (*In re B.M., supra,* 10 Cal.App.5th at p. 1299.)

Respondent asserts that the undisputed facts showing that appellant directed the butter knife only toward her sister's legs and not toward her face, eyes, or neck are "immaterial" because the assault was complete when appellant directed the knife toward her sister's body. (AB 24.) *Beasley,* however, says otherwise. There was no question in that case that an assault with a broomstick occurred and that the instrument was directed toward the victim's body – but that was not enough. The court also expressly considered where the instrument was aimed, because a mere assault with an instrument is not sufficient to conclude that it was used as a deadly weapon.

Moreover, this was not just because the *Beasley* court did not know the material of the broomstick, since, in reality, *any* type of broomstick *could* cause injury if it was directed towards someone's face or eye. This is why the court expressly noted that the record did not demonstrate that the broomstick was so directed, and this shows why such a fact is not

"immaterial." Put another way, *Beasley* provides that hitting someone in a less vulnerable part of the body with an object that could conceivably be used as a deadly weapon is not sufficient to find that the instrument was used in a deadly manner, because the simple fact that it *could have* been directed at someone's face is not enough when the evidence clearly shows that it was *not* so directed. The same concept must apply here.

Respondent also asserts that "from her position above Sophia's torso, [appellant's] knife jabs could have also stabbed Sophia in the chest or abdomen, likewise resulting in great bodily injury or death." (AB 25.) Here it is unclear what portion of the record respondent is referring to, as nothing indicates that appellant was positioned near Sophia's torso, and no evidence shows that she ever directed the butter knife toward Sophia's chest or abdomen. This is therefore another example of unsupported speculation that cannot support a deadly weapon finding.[10]

This point is further supported by case law addressing the offense of assault with force likely to cause great bodily injury. When analyzing such alleged assaults, the courts focus on the force *actually used* during the assault, and not the force that *could have* been used to inflict harm. (See *People v. Duke* (1985) 174 Cal.App.3d 296, 302.)

For example, in *People v. Duke*, the defendant held the victim in a headlock. (*Ibid.*) "The headlock made her feel 'choked' but did not cut off her breathing" and her "only actual injury was a laceration to her ear lobe caused by her earring being pushed against her ear." (*Ibid.*) The

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[10] Respondent also notes, in the context of *Beasley*, that here we know the force that was used, which was not known there. However, we know that the force used in *Beasley* was enough to cause bruising, while here it did not cause any injury, and therefore this fact does not change the analysis. (AB 23-24.)

defendant's hold on her was "firm," but he did not tighten his grip. (*Ibid.*) In finding insufficient evidence to support an assault with force likely to cause great bodily injury conviction, the court stated that

> we look to the force *actually used* by the appellant to determine if it was likely to cause great bodily injury to the victim. We do not consider the force that the appellant *could* have used against the victim. For example, the fact that appellant could have easily broken [the victim's] neck or could have choked her to the point of cutting off her breathing by exerting greater pressure on her neck or windpipe will not support the conviction of felony assault. This would involve gross speculation on the part of the jury as to what the appellant would have done if he had not stopped of his own accord or had been stopped by outside forces.

(*Id.* at p. 303, emphasis in original.) The impermissible speculation described in *Duke* is exactly what respondent is engaging in here. The record shows that appellant stopped the altercation on her own accord after exerting a small amount of force and causing no injury. These are the facts that must be evaluated when determining whether the instrument was used in a deadly manner. What appellant *could have* done but *didn't do* is irrelevant to the issue presented.

Moreover, in arguing that it is irrelevant that appellant never aimed the knife in the direction of a highly vulnerable part of the body, respondent also argues generally that a butter knife directed at someone's legs could have "deadly consequences." (AB 24.) In doing so, however, respondent relies on two completely distinguishable cases. The first is *Harrell v. State* (Tex.Ct.App. 2012), No. 05-10-01322-CR, 2012 WL 171861, in which the defendant's wife awoke to him punching her, kicking her, and hitting her with an exercise weight. Then he retrieved a butter knife, grabbed his wife with one hand and used his other hand to stab repeatedly at her torso while she struggled, until he eventually stabbed the back of her leg. (*Id.* at p. *1.)

Harrell does not directly demonstrate that a butter knife to the leg could have deadly consequences, and its facts are so completely different from the current case that they lend little if any support for even a more general analogy of dangerousness. In *Harrell,* the instrument was being aimed toward a far more vulnerable part of the body, namely, the front torso, and the defendant was physically restraining the victim while he repeatedly stabbed her at close range until he made contact hitting her leg; this stands in stark contrast to the facts and circumstances of the current case. In addition, the facts of *Harrell* do not indicate whether the knife used was pointed, nor do they provide a measure of the force that was used, or any details regarding the injury sustained. (*Id.* at p. *3.)

Respondent cited *Harrell* in conjunction with another case, *Morrell v. State* (Alaska Ct.App. 2009) 216 P.3d 574, as an example of when a stab wound to the leg could potentially be fatal. (AB 25.) *Morrell*, however, did not involve a butter knife. The weapon used in that case was a sharp folding knife, employed in the midst of a fight. (*Id.* at p. 575.) There, "[t]he witnesses at the scene and the autopsy evidence established that [the defendant] stabbed [the victim] repeatedly with a folding knife, an instrument *defined by statute as a deadly weapon.*" (*Id.* at p. 577, emphasis added.) The victim "died from multiple stab wounds," including several to his legs. (*Ibid.*) The capability and likelihood of injury caused by a sharp, pointed folding knife – indeed, an inherently deadly weapon – being stabbed repeatedly at someone during a violent altercation simply has no bearing on this case, and certainly does not demonstrate the potentially deadly nature of a dull butter knife directed with little force in the direction

of a person's covered legs.[11] (*People v. Aguilar*, *supra*, 16 Cal.4th at pp. 1028-29.)

In sum, *Beasley* demonstrates that when analyzing whether an instrument was used in a manner likely to cause great injury or death, the area where the instrument was directed and the limited capability of the instrument itself are material considerations, while pure conjecture as to how the instrument could have been used is not.

B. *Brandon T.* Also Directly Supports Reversal Of Appellant's Adjudication And Further Demonstrates The Impropriety Of Relying On Unsubstantiated Speculation

Respondent next argues that *In re Brandon T.*, *supra*, is inapposite because in that case the knife broke and was therefore "not capable of use as obviously intended," while here "there is no evidence that [the butter knife] 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." (AB 25, citing *In re Brandon T.*, *supra*, 191 Cal.App.4th at p. 1498.) Again, respondent is reading the case in far too limited a fashion and ignoring the import of the court's ruling, while also improperly relying on speculation instead of the record.

In *Brandon T.*, the minor attempted to cut the victim's face, but the butter knife did not produce anything beyond minor scraping, and then it broke. Based on this, the court found the instrument incapable of causing great bodily injury. What the court in *Brandon T.* did *not do* is speculate beyond the facts of the assault that occurred about how the minor *could*

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[11] It is also notable that respondent relies on the juvenile court's statement that, "Yeah, we're talking a butter knife. We're also talking a knife." (AB 25-26, citing RT 88.) In actuality, however, we *are* talking about a *butter knife*, and its rounded edge and dull nature cannot be overlooked when analyzing the likelihood of injury – or lack thereof.

have used the utensil in a different way to produce great bodily injury (for example, the minor *could have* picked up one of the broken pieces of the knife and stabbed it in the victim's eye, but he did not). Rather, the court limited its analysis to the evidence of the assault *as it occurred* and *reasonable* inferences drawn therefrom. It was during the scraping of the victim's cheek that the knife failed, and then the assault was over. Based on this the court rightly concluded that the instrument was "not capable of use *as obviously intended*." (AB 25, citing *In re Brandon T.*, *supra*, 191 Cal.App.4th at p. 1498, emphasis added.)

The same concepts apply here. Appellant *could* have continued attacking Sophia, aiming the knife at her eye or throat, but she did not. Rather, she chose to halt the assault and walk out of the room. The "ifs" respondent invokes simply have no support in the record.

Respondent goes on to assert that "if the blanket had shifted, or B.M. had better aim, Sophia could have been stabbed in the chest, abdomen, or soft tissue." (AB 25.) But once again, the record belies any such "ifs" and any such inferences. As stated above, the evidence shows that appellant remained three feet away from Sophia, she did not climb over her, she was positioned near Sophia's feet as opposed to her midsection, she only ever aimed the butter knife in the direction of Sophia's blanket-covered legs, and after a few swipes she halted the altercation. (RT 24, 32-33.) Based on this record, any inference drawn as to how Sophia could have been hit in the chest or abdomen "would involve gross speculation on the part of the [fact-finder] as to what . . . appellant would have done if [she] had not stopped of [her] own accord," and such speculation cannot constitute substantial evidence supporting an adjudication. (*People v. Duke*, *supra*, 174

Cal.App.3d at p. 303; see also *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)[12]

Moreover, respondent's repeated assertion in this context that it was Sophia's "defensive maneuvers" that prevented the infliction of injury is simply not supported and is not a reasonable way to view this evidence. As discussed above, the blanket did not thwart appellant, appellant chose to halt the assault and put the butter knife down. This case is therefore not like *People v. McCoy* (1944) 25 Cal.2d 177, where the victim was being held on the ground at knife-point and then she kicked the defendant in the groin and got away. (*Id.* at p. 192.) *There* the inference that the victim thwarted the assailant was reasonable, but no similar event occurred here.

Respondent wraps up its argument regarding *In re Brandon T.* by stating that the case is distinguishable because there "the knife simply was not capable of cutting or stabbing." (AB 26.) But the true takeaway from *In re Brandon T.* is that the knife was not capable of cutting or stabbing *in the way that it was used* – i.e., to scrape the victim's face. Again, even a broken part of a knife could still be stabbed into someone's eye, but such an inference was not considered by the court because there was nothing in the record to support it, and the court correctly limited its analysis to the assault as it occurred.[13]

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[12] Respondent's citation to *Funmaker v. Litscher* (W.D. Wis. Sept. 20, 2001) No. 00-C-625-C, 2001 WL 34377571 in this context to assert that a butter knife can cause great bodily injury if directed toward an abdomen is inapposite. The facts of that case portrayed a drunken brawl in which the assailant first tackled the victim and then stabbed him twice directly in the abdomen and chest. This is highly distinguishable from what occurred in the current case. In addition, *Funmaker* did not include any details regarding the characteristics of the knife or the force that was used.

[13] Respondent does not provide any analysis regarding the Court of Appeal's rejection of *In re Brandon T.*, apart from noting that it agrees with

In sum, *In re Brandon T.*, in addition to *Beasley*, demonstrate that the Court is bound by the facts of the assault as it transpired, and hypothetical inferences regarding mayhem upon a victim's face that find no support in the record cannot be relied upon to sustain an adjudication for assault with a deadly weapon. (*In re Brandon T.*, *supra*, 191 Cal.App.4th at p. 1498; *Beasley*, *supra*, 105 Cal.App.4th at pp. 1087-88; see also *People v. Duke*, *supra*, 174 Cal.App.3d at p. 303; *People v. Marshall*, *supra*, 15 Cal.4th at pp. 34-35.) Given the dull nature of the instrument and its limited use in this case, no rational trier of fact could find that great injury was likely or maybe even possible, and therefore reversal of the felony conviction is required.

C. Respondent's Reliance On *People v. McCoy* As Supporting Appellant's Adjudication Is Misplaced

People v. McCoy does not support affirmance in this case. In *McCoy*, where an assault with a deadly weapon charge was sustained, the defendant "knocked the victim to the ground, stood over her in a bent position, . . . placed a knife several inches from her face," and then "threated [sic] to use the knife if she was not quiet." (AB 26, citing *McCoy*, *supra*, 25 Cal.2d at p. 182.) Respondent argues, based on that case, that it 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." (AB 26.) This assertion, however, focuses too much on whether *any assault* occurred, and too little on the requirements for finding an assault with a deadly weapon, which are set forth in *People v. Aguilar*, and which were clearly present in *McCoy*.

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the court's holding. As set forth in the opening brief, the Court of Appeal's rejection of *In re Brandon T.* was improper. (OBM 22-24.)

Again, when considering whether an object used in an assault has morphed into a deadly weapon, the nature of the instrument and the facts surrounding the assault must be taken into account to determine whether the object was both capable of causing and likely to cause death or great bodily injury, *as used.* In *McCoy*, the findings of capability and likelihood of injury were supported by the far more dangerous nature of the regular, sharp knife that was employed, its placement right near the victim's face after she had been knocked to the ground, and the threatening language that accompanied its use. Respondent's assertion that *McCoy* directs affirmance here ignores that such facts stand in stark contrast to the instrument and assault that are at issue in the current case, and that the court in *McCoy* relied directly on those facts when conducting its analysis. (*McCoy*, *supra*, 25 Cal.2d at pp. 191-92.)

Respondent then goes on to argue that "assault criminalizes conduct " 'based on what *might* have happened – and not what *actually* happened . . . .'" (AB 26, quoting *People v. Williams*, *supra*, 26 Cal.4th at p. 787.) But again, the current case involves not only an assault, but an alleged assault *with a deadly weapon* where the instrument used was not inherently deadly. The latter requires a finding as to how that instrument *was in fact used.* Notably, *Williams* concerned an assault with a firearm – an inherently deadly weapon – meaning no additional finding as to the instrument at issue was necessary in that case. (*Id.* at pp. 782-83.) *Williams* also made clear than when considering what might have happened in connection with an assault, the inquiry is based on discerning the "*direct, natural* and *probable* consequences" of the assault that actually occurred, as opposed to broad potentialities without any foundation in the facts. (*Id.* at p. 787, emphasis added.) In this respect, *Williams* must be read in conjunction with *People v. Duke*, which held that when analyzing whether an assault was likely to

cause great bodily injury, pure speculation as to what force *could have* been used is not proper. (*People v. Duke*, *supra*, 174 Cal.App.3d at p. 303.)

Accordingly, while some consideration of what *might* have happened is necessary when considering whether a non-deadly instrument, as used, was capable of causing and likely to cause great injury, the court's conclusions in that regard must be grounded in the record and not based on pure conjecture. To hold otherwise would effectively be to hold that *any use* of a potentially deadly object during an assault would automatically be considered an assault with a deadly weapon merely because it always *could* be used to cause significant injury, and clearly that is not the standard.

In conclusion, both *Beasley* and *Brandon T.* demonstrate the impropriety of unsupported speculation when considering whether an instrument was used as a deadly weapon in the commission of an assault, and *McCoy* does not direct otherwise. Both *Beasley* and *Brandon T.* also clearly establish the improper nature of the speculation in which both respondent and the Court of Appeal have engaged in this case. It is notable that neither respondent nor the Court of Appeal ever directly assert that the way in which the butter knife was in fact used – which involved slicing the blunt knife toward blanket-covered legs with too little force to even leave a mark – was both capable of causing and likely to cause serious injury. Instead, they are left to speculate regarding other actions taken toward far more vulnerable body parts, which have no basis in the record at all. This is because when properly considering the facts surrounding the assault that did occur, and limiting inferences to those that have actual support in the record, it becomes clear that no rational trier of fact would conclude that the butter knife was used as a deadly weapon, meaning appellant's felony assault adjudication cannot stand.

IV. RESPONDENT'S EXAMPLES OF "BUTTER KNIVES" BEING USED IN DANGEROUS FASHIONS TAKEN FROM NEWSPAPER ARTICLES AND CASES FROM OTHER JURISDICTIONS ARE SO LACKING IN FACTS AND/OR ARISE FROM SUCH HIGHLY DISTINGUISHABLE CIRCUMSTANCES THAT THEY LEND NO PERSUASIVE SUPPORT TO THE ADJUDICATION IN THIS CASE

Respondent relies very little on the articles and out-of-state cases it cites when addressing the specific legal and factual issues presented in this case, and any such direct reliance has been addressed in the preceding sections. Respondent instead cites to these sources more generally, to argue that butter knives theoretically "can" be, and in some jurisdictions have been found to be used as, deadly weapons. The limited reliance on these sources is likely because the news articles do not contain nearly enough facts to be probative, and in the out-of-state-cases the legal standards and factual scenarios differ so significantly from the current case that their persuasive value is slim to none. For these reasons, appellant addresses these articles and cases only briefly.

First, with respect to the news articles, it should be noted that none of them contain any details regarding the knives used apart from describing them generically as "butter knives," and, as respondent points out "not all 'butter knifes' are equal." (AB 11.) For example, in *Man Can't Escape Trouble*, a local paper reported that a man was accused of stabbing a couple to death with a butter knife. The article contains only unproven allegations, and does not provide any details of the knife that was used. In addition, this article does not set forth the circumstances under which the stabbing occurred. With so few details, the relevance and weight of this example are virtually nonexistent. (AB 15, citing Schultz, *Man Can't Escape Trouble* (June 9, 2016) 2016 WLNR 17637726.)

When discussing *Two In New Orleans Stabbed With Butter Knife, Box Cutter In Separate Attacks*, respondent simply got the facts wrong.

Respondent described this article as stating that "a New Orleans man used a butter knife to stab a victim, who was hospitalized for the stab wound." (AB 15.) The article provides that during a fight a man stabbed another man with a butter knife, and was later arrested. Then the article discusses a separate altercation, during which a man stabbed his mother with a box cutter, after which she was taken to a local hospital. It was the box cutter incident that led to a hospitalization – not the use of a butter knife. (Lipinski, *Two In New Orleans Stabbed With Butter Knife, Box Cutter In Separate Attacks* (Mar. 28, 2017) 2017 WLNR 9579522.)

In the remainder of the articles, each alleged assault was directly aimed at the victim's head or face, no details are given regarding the knife that was used, and all but one concern mere allegations as opposed to convictions. (See Czech, *Man Held After Butter Knife Stabbing In Local Diner* Dec. 27, 2016) 2016 WLNR 39560140 [victim allegedly stabbed in the head]; Assoc. Press, *Belcourt Man Found Guilty In Butter Knife Attack*, 2013 WLNR 34437283 [cut to the victim's face]; (*SLPC Attack Alleged*, 2013 WLNR 17345622 [patient allegedly stabbed staff employee in the cheek]; NBC 6 South Florida, *Wife's Skull Cracked by Hubby in Butter Knife Attack* <https://www.nbcmiami.com/news/local/Wifes-Skull-Cracked-By-Hubby-in-Butter-Knife-Attack-124795794.html> [husband threw knife directly at wife's face with such force that it became stuck in her skull].[14])

Lastly, respondent cites to an article discussing injuries suffered by a child when he fell down the stairs holding a butter knife and it accidentally became lodged in his eye. Once again, the article provides no descriptive

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[14] Note that respondent's citation to the website address for this source was slightly incorrect. The citation included herein is accurate.

details of the knife, and all it demonstrates is that a butter knife jammed with force at very close range into someone's eye socket can cause injury, which has no bearing on the very different facts presented in this case. (See AB 16, citing Kitakami et al., *Transorbital-transpetrosal Penetrating Cerebellar Injury-Case Report*-(1999) 39 Neurologia medico-chirurgica 150-152[15].)

Some of the cases respondent cites from other jurisdictions are similarly lacking in facts and analysis. For example, in *Wallace v. United States* (D.C. 2007) 936 A.2d 757, 760, the facts provide only that the defendant stabbed the victim in the neck, and the sole issue in the case was competency. The only mention of a "butter knife" was in a colloquy between the court and the defendant, in which the defendant stated he used a butter knife, which prompted the court to ask, "Well, then how did it stab his neck?" The defendant replied, "That's what I wanted to know . . . ." (*Id.* at p. 776.) Given that the type of weapon used was not at issue, and the only details about the knife came from a defendant whose competence was in question, this source simply does not have any persuasive sway in the current case.

Respondent also exaggerates the facts of *State v. Wooden* (La.App.1st Cir. 1990) 572 So.2d 1156 when asserting that in that case the defendant "killed his victim by stabbing him in the neck with a butter knife and hitting him with a brick." (AB 15.) In *Wooden*, defendant struck the victim on the side of the head with a brick multiple times and then grabbed a butter knife and stabbed him in the neck. (*Id.* at pp. 1158-59.) The autopsy revealed that the victim's death was caused by blunt trauma to the

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[15] Available at <https://www.jstage.jst.go.jp/article/nmc1959/39/2/39_2_150/_article>.

side of the head – not the stab wounds – and again, there were no details regarding the knife that was used. (*Id.* at p. 1159.)

Respondent does cite to certain cases from other jurisdictions where the legal question of a deadly weapon was at issue. In some of these cases, however, the applicable legal standards were so different from California's that they provide no persuasive weight at all. For example, respondent cites to *United States v. Mathijssen* (8th Cir. 2005) 406 F.3d 496 for the proposition that a "dull, small (1½ to 2 inches) knife was considered a dangerous weapon for purposes of a sentence enhancement." (AB 17.) The applicable sentencing guideline in *Mathijssen* defined a "dangerous weapon" as:

> (i) an instrument capable of inflicting death or serious bodily injury; *or*
>
> (ii) an object that *is not an instrument capable of inflicting death or serious bodily injury* but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument.

(*Id.* at p. 499, quoting U.S.S.G. § 1B1.1, application note 1.D, emphasis added.) The guideline's inclusion of objects that are *not capable* of causing serious bodily injury flies in the face of the California definition, and in *Mathijssen* the defendant's sentence was only enhanced because of the expansive definition that applied in that case.

State v. Tankins (Mo.Ct.App. 1993) 865 S.W.2d 848 is similarly far too distinguishable to be persuasive in this case. Under the Missouri definition of a dangerous instrument, "[*i*]*t is not important whether the object is in fact capable of producing harm*," because "[t]he threat to use the object to produce harm transforms it into a dangerous instrument." (*Id.* at p. 852.) Moreover, in *Tankins* the defendant broke into the victim's house and held the knife to her throat while pushing her head toward his

groin area. (*Id.* at p. 851.) As such, not only was the legal standard in this case far too different from California's to have any weight here, but the knife was also used in a far more dangerous manner. (See also *Porreca v. State* (1983) 56 Md.App. 63 [display of butter knife while bragging about prior stabbing sufficient to support probation revocation]; *State v. Aceves* (Ariz.Ct.App. 2009, No. 2 CA-CR 2007-0182) 2009 WL 33478 at p. *4, n. 2 [threat to use sharp plastic knife in attack sufficed to establish deadly weapon under applicable law].)

Respondent also cites three cases from Texas, one of which, *Harrell v. State*, *supra*, 2012 WL 171861, has already been distinguished above. In Texas, a deadly weapon is defined as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." (Tex. Pen. Code, § 1.07, subd. (a)(17)(B).) Notably, the standard does not require that great bodily injury be *likely* to result, and the statute expressly includes consideration of the defendant's "intended" use as to the instrument's capability.

The three Texas cases are not only distinguishable because of the differing standard, but also because they all address very different circumstances and/or far more dangerous facts than those present here, not to mention limited facts concerning the knife that was used. (See *Williams v. State* (Tex. App. 1987) 732 S.W.2d 777 [finding sufficient evidence of an aggravated sexual assault charge where defendant entered the victim's bedroom at 4:40 a.m. and awakened her by grabbing her face and pressing a butter knife firmly against her side/rib area while telling her not to move or scream or he would kill her]; *Johnson v. State* (Tex.Crim.App. 2017) 509 S.W.3d 320 [finding sufficient evidence that defendant "use[d] or exhibit[ed] a deadly weapon" to support an aggravated robbery conviction where defendant brandished and advanced on the cashiers with a butter

knife from a close proximity while threatening them]; *Harrell v. State*, *supra*, 2012 WL 171861 [see discussion in Section III].)

In addition, in certain of the out-of-state-cases, the butter knife at issue was an aggravating factor in a violent crime, and in such cases the standards and factual scenarios differed in such significant ways that they, too, have little to no application in this case. (See *State v. Franklin* (La.Ct.App. 2001) 803 So.2d 1057, 1060-61 [defendant held butter knife to victim's throat while raping her]; see also *Williams v. State*, *supra*, 732 S.W.2d 77 [described above]; *State v. Rollins* (La.Ct.App. 2011) 2010-0977, 2011 WL 9160375, at p. *4 [butter knife was a dangerous weapon for purposes of aggravated burglary where no details of knife provided, no legal definition of a "dangerous weapon" cited, and no legal analysis of the issue].)

In sum, the out-of-state cases respondent cites applied standards that differ from California's in such substantial ways, and addressed such highly distinguishable, and often far more violent, factual scenarios, that they provide very little, if any, persuasive weight in the current case.[16]

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[16] It also worth noting that the California cases respondent cites generally as examples of the many "everyday objects" that can qualify as deadly weapons are also entirely distinguishable. (See AB13-14.) Those cases generally concerned instruments that were far more likely to cause significant injury than a butter knife, and the instruments were generally aimed at highly vulnerable areas of the body and/or were used with significant, dangerous force, thereby standing in stark contrast to the facts and circumstances presented here. (See e.g. *People v. Zermeno* (1999) 21 Cal.4th 927 [beer bottle hit over victim's *head*]; *People v. Graham* (1969) 71 Cal.2d 303 [defendant wore a shoe and kicked victim in the *head*]; *People v. Claborn* (1964) 224 Cal.App.2d 38 [defendant drove *automobile* directly at police officer's vehicle causing *head-on collision*]; *People v. Herd* (1963) 220 Cal.App.2d 847 [*sharp knife* used to slash victim causing large cut across her lower *abdomen*]; *People v. White* (1963) 212 Cal.App.2d 464 [defendant struck wife on *head* with "great big rock,"

CONCLUSION

As set forth in the Introduction, what this case boils down to is: Did a 17-year-old girl use a *deadly weapon* to assault her sister when she swiped a rounded butter knife toward her legs that were under a blanket, resulting in no injury, and not even leaving a mark? For all the reasons addressed herein, no rational trier of fact could answer this question with any response other than no. A record setting forth such an assault simply does not contain sufficient evidence demonstrating that such a dull instrument, *as used*, was capable of causing great injury, or that the probability of any such injury was high. At most, these facts support an adjudication of simple assault. This result is what both *Beasley* and *In re Brandon T.* unequivocally direct, and the rationale behind those cases is persuasive and should be followed here.

In arguing otherwise, respondent does not rely on the facts of the assault as it occurred, or any reasonable inferences drawn therefrom, and in fact never claims that swiping a dull butter knife toward blank-covered legs is likely to cause injury. Instead, respondent exaggerates the assault and relies on speculative hypothesizing of what appellant *could* have done that has no support in the record. This is not proper under applicable law.

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causing *laceration of her scalp* reaching "to the bone"]; *People v. Russell* (1943) 59 Cal.App.2d 660 [defendant suddenly lunged at victim to strike his *face* with a fingernail file that folded up like a jack-knife, causing jagged wound to his *cheek* requiring eleven stitches]; *People v. Simons* (1996) 42 Cal.App.4th 1100 [screwdriver was a deadly weapon for purpose of conviction for *exhibiting* a deadly weapon to prevent arrest where defendant *aggressively brandished* weapon and *intended to use it against the officers* detaining him in a deadly fashion]; *People v. Lee* (1937) 23 Cal.App.2d 168 [defendant convicted of *simple assault* for hitting police officer several times over the *head* with a club or gas pipe while co-assailant held his hands].)

Simply put, the force actually used and actions actually taken in this case could not have caused great bodily injury to the victim, and no rational trier of fact could have concluded otherwise. As such, appellant's felony adjudication must be reversed.

CERTIFICATION OF WORD COUNT

I, Elizabeth K. Horowitz, hereby certify that, according to the computer program used to prepare this document, Appellant's Reply Brief on the Merits, contains 10,452 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed April 12, 2018 at Tulsa, Oklahoma

Elizabeth K. Horowitz
State Bar No. 298326

PROOF OF SERVICE BY MAIL

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Case Number: S242153

I, the undersigned, declare: I am over 18 years of age, employed in the County of Tulsa, Oklahoma, and not a party to the subject cause. My business address is 5272 S. Lewis Ave, Suite 256, Tulsa, OK 74105. I served the within Appellant's Reply Brief on the Merits by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Tulsa, Oklahoma on April 12, 2018.

I also served a copy of this brief electronically from my electronic service address (elizabeth@ekhlawoffice.com) on the following parties:

- California Attorney General, at docketingLAawt@doj.ca.gov
- California Court of Appeal for the Second District, Division Six, at 2d6.clerk6@jud.ca.gov

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 12, 2018, at Tulsa, Oklahoma.

Elizabeth K. Horowitz