Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

D.W., a Minor

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

_____

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, THIRD APPELLATE DISTRICT

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did The Juvenile Court Violate A Minor's Right To Due Process Under The Fourteenth Amendment When It Granted The Prosecutor's Request To Amend A Petition To State An Alternative Factual Basis For An Offense After The Matter Had Been Tried And Submitted For Decision, Without Requiring The Prosecutor To Provide New Written Notice And Without Granting The Minor The Opportunity To Prepare A Defense To The Amended Allegation?

PARTIES TO THE PROCEEDING

D.W., a minor and petitioner on review, was the appellant below.

The People of the State of California, respondent on review, was the respondent below.

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PETITION FOR WRIT OF CERTIORARI

D.W., a minor, respectfully petitions for a writ of certiorari to review the judgment below issued by the Third Appellate District of the California Court of Appeal.

OPINIONS BELOW

The transcript of the juvenile court's ruling appears at Appendix A to the petition.

The opinion and modified opinion of the California Court of Appeal for the Third Appellate District, the highest state court to review the merits, appear at Appendix B to the petition and are unpublished.

The order from the Supreme Court of California denying discretionary review appears at Appendix C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The California Court of Appeal issued its Opinion on January 17, 2020. A timely petition for rehearing was filed on January 31, 2020. It was denied on February 14, 2020. The Court of Appeal's Opinion became final on February 16, 2020. A timely petition for review was filed in the California Supreme Court on February 26, 2020. The California Supreme Court denied the petition for review on April 15, 2020.

The original deadline for filing the Petition for Writ of Certiorari in this Court was July 14, 2020. By Order dated March 19, 2020, this Court extended the deadline for filing a Petition for Writ of Certiorari due on or after March 19, 2020, by sixty days or one hundred and fifty days from the denial of review by the California Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution amendment V provides in relevant part, "No person shall … be deprived of life, liberty, or property, without due process of law;"

United States Constitution amendment XIV, section 1, provides in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

The proceedings below arose out of an encounter between Mr. Channing Salisbury and five minors, one of who was D.W. Over a thirty-minute period, the parties had three distinct altercations that took place in three different locations each involving unique details. The second incident, which was captured by surveillance cameras, involved a pipe. The third incident, which took place later and in a different location, involved a two-by-four with a nail. This third incident was not filmed.

Based on the encounter between Mr. Salisbury and the minors, the prosecution filed a petition alleging that D.W. committed three felonies and two misdemeanors. Mr. Salisbury was not charged. One of the felonies, Count Three, alleged that D.W. assaulted Mr. Salisbury with a deadly weapon "a pipe." The evidence at trial, specifically the surveillance video footage of the incident in the La Viva Market parking lot, placed the issue of self-defense in contention because it showed that D.W. only threw the pipe at Mr. Salisbury after Mr. Salisbury began swinging his belt buckle at D.W.'s head and face.

After the matter was submitted for decision, the juvenile court *sua sponte* raised the issue of whether there was a fatal variance as to Count Three because, in its estimation, the evidence at trial was that D.W. assaulted Mr. Salisbury with a two-by-four with a nail, not a

pipe. Over trial counsel's objection on due process grounds, the juvenile court granted the prosecution's request to amend Count Three and substitute two-by-four with a nail for pipe. In doing so, the juvenile court explained that because the charge, assault with a deadly weapon, remained the same, the offense was the same, and D.W. was not prejudiced by the amendment. The juvenile court then found Count Three as amended to be true.

The California Court of Appeal agreed that the Due Process Clause did not preclude the juvenile court from amending Count Three to substitute two-by-four with a nail for pipe because the label for the offense, assault with a deadly weapon, remained the same.

Both the juvenile court and the Court of Appeal are wrong. The juvenile court's decision to amend the petition without requiring written notice and without granting D.W. the opportunity to prepare a defense deprived D.W. of his rights to due process under the Fourteenth Amendment.

I. FACTUAL BACKGROUND

On December 5, 2015, Channing Salisbury, a felon with a California Law Enforcement Telecommunications System (CLETS) history that is nineteen-pages long, began threatening several passengers on a light-rail train. CT 115; 2 RT 375; 1 RT 187; see Opn. at 4. He eventually turned his attention to Craig Edmonds, who was much older than Mr. Salisbury and walked with a limp. 2 RT 374-375. Mr. Salisbury, who is white, called Mr. Edmonds, who is black, the "N-word" and demanded to know what Mr. Edmonds "was looking at." 2 RT 375. Mr. Edmonds responded, telling Mr. Salisbury "to sit down and stop threatening people." 2 RT 375. In response, Mr. Salisbury threatened to "kick" Mr. Edmonds' "ass." 2 RT 375-376.

When Mr. Edmonds got off the train, Mr. Salisbury got off too. 2 RT 376. Mr. Salisbury took out a knife. 2 RT 376-377, 378. "[H]e got down in a squat and started putting his hands out and like he was going to do some – commit some sort of Karate act on me…." 2 RT 376. Believing Mr. Salisbury intended to stab him, Mr. Edmonds also took out his pocketknife and stood his ground. 2 RT 377. A security guard arrived and ordered Mr. Salisbury to stop. 2 RT 367,364-365,377. Ignoring her orders, Mr. Salisbury charged at her with his knife, twice. 2 RT 367, 364-365, 377.

Eventually, law enforcement responded, and Mr. Salisbury was arrested for assault with a deadly weapon and a probation violation. 2 RT 387. Before he was arrested, Mr. Salisbury threw away his knife. 2 RT 386. It was found the next day. 2 RT 365, 368, 385-386. Mr. Edmonds chose not to press charges against Mr. Salisbury. 2 RT 379. He was tired and just wanted to go home. 2 RT 379.

The First Incident: Dollar General

The current case arose out of a thirty-minute encounter between Mr. Salisbury and five minors, including D.W., on January 26, 2017, a little over a year after the light-rail incident. During that thirty-minute encounter, the parties had three discrete altercations.

The first altercation took place when Mr. Salisbury encountered the minor, D.W., and four of his friends, one of whom was a girl, in front of the Dollar General in Del Paso Heights, a neighborhood in Sacramento, California that is comprised primarily of African-American, Latino, and Asian residents. 1 RT 290. The minors alleged that Mr. Salisbury cut one of them on the arm during this initial encounter. 1 RT 186, 197; Opn. at 2. Mr. Salisbury testified that one of the minors, not D.W., punched him in the mouth and took his money. Opn. at 2. The minors left the Dollar General, trying to get away from Mr. Salisbury. 1 RT 220-221,134; Opn. at 2.

Surveillance cameras recorded Mr. Salisbury following the minors as they tried to put distance between him and them. Exh 6 Camera 28 at 13:12:03:03-13. He was following them because they robbed him at the Dollar General and he wanted to keep them in his sights so they could be "apprehended." 1 RT 134, 222, 291, 293, 296. The juvenile court found Mr. Salisbury's claim that the minors robbed him not credible. 2 RT 427-28.

The Second Incident: La Viva Market

The surveillance cameras in the parking lot of La Viva Market captured the second interaction between the minors and Mr. Salisbury. The footage showed the minors walking away from Mr. Salisbury as he followed them. At some point, D.W. stopped and grabbed an item that looked like a pipe from the back of a pick-up truck in the parking lot. Exh. 6 Camera 29 at 13:12:42-13:13:03; 2 RT 346-347. He and two of the other minors approached Mr. Salisbury. As they approached Mr. Salisbury, D.W. kept the "pipe-like" item at his side. Exh. 6 Camera 29 at 13:12:42-13:13:03; 2 RT 346-347.

Mr. Salisbury, who initially backed away, advanced on the minors, swinging his belt-buckle at D.W.'s head and face. Exh. 6 Camera 29 at 13:12:42-13:13:03; 2 RT 346-347. The belt-buckle hit D.W. on the arm, leaving a bruise that was visible the next day. Opn. at 4; 2 RT 320, 356. The surveillance footage showed that *after* Mr.

Salisbury swung the belt-buckle at D.W.'s head and face, D.W. threw the pipe at Salisbury. Exh. 6 Camera 29 at 13:12:42-13:13:03; 2 RT 346-347.

Another customer alerted the security guard for La Viva Market about the altercation and he intervened. Opn. at 2; 1 RT 241-243. As the security guard approached Mr. Salisbury, the minors, including D.W., walked away. Opn. at 2. When the security guard called for the minors to come back, they did. Opn. at 2. The girl in the group was crying and visibly shaken. 1 RT 264-265, 267. She was terrified. 1 RT 264.[1] She told the security guard that Mr. Salisbury was "a weirdo" who had been following them for a while. 1 RT 247-248, 265.

One of the minors showed the security guard a cut on his arm, a moment that the surveillance camera captured. Exh 6 Camera 30 at 13:14:00-04. Although at trial the security guard could not recall the minor saying that Mr. Salisbury stabbed him, the security guard recalled seeing a freshly bleeding cut and concluded that Mr. Salisbury inflicted the wound. Opn. at 2.

During his trial testimony, Mr. Salisbury admitted that the minors told the security guard that Mr. Salisbury stabbed one of them:

> Q: When you spoke to the security guard, was he attempting to handcuff you?

[1] Mr. Salisbury denied that there was a teenage girl in the group. 1 RT 198. He

> A: He was confused in the beginning. He said the minors [sic] said you stabbed him, and I said that's bullshit. They just robbed me and that's complete crap.

1 RT 197; *see also* 2 RT 348, 350.

On the day of the incident, the security guard asked the minors if they wanted to file a report. They declined. They just wanted to go home. 1 RT 248, 253. The security guard allowed them to leave. 1 RT 263. After they walked away, the security guard warned Mr. Salisbury not to follow them. 1 RT 263, 248-249. Mr. Salisbury ignored the security guard's warning and followed the minors anyway. 1 RT 263.

The Third Incident

Sometime after Mr. Salisbury followed the minors from La Viva Market, there was a third altercation. There was no surveillance footage of this third incident.

Mr. Salisbury testified that as he followed the minors, he pretended to have a weapon "to scare them." 1 RT 236. When he was interviewed a few days after the incident, he admitted to law enforcement that he actually had a knife. 1 RT 173, 2 RT 332, 348-349, 350-351.

Mr. Salisbury testified that during this third incident, D.W. hit him with a two-by-four with a nail. Opn. at 3; 1 RT 143-144,167-69. On a 911 recording that captured audio of the third incident, Mr. Salisbury could be heard screaming and yelling for help. Opn. at 3.

He sustained one laceration to his head that was half-inch by half-inch and required four stitches. 1 RT 149, 273, 297, 356. He had a swollen jaw and a laceration on his lip. 1 RT 273, 297, 356.

After Mr. Salisbury identified D.W. from a photo lineup as the person who attacked him, law enforcement officers detained D.W. Opn. at 4. Officers ordered D.W. to take off his jacket so that the officers could photograph the bruise on his arm from Mr. Salisbury's belt buckle. 2 RT 320-23. When he refused to have his arm photographed, three officers wrestled D.W. to the ground, bloodying his mouth. 2 RT 324-25. D.W. spit the blood in his mouth onto one of the officer's shoes and onto the walls of the interview room. 2 RT 326; CT 13.

An original California and Institutions Code section 602 (West 2020) petition alleged five counts against D.W. Opn. at 4. Count One alleged robbery in violation of California Penal Code section 211 (West 2020). Opn. at 4. Count Two alleged assault by means of force likely to produce great bodily injury, in violation of California Penal Code section 245 (a)(4) (West 2020). Opn. at 4. Count Three alleged assault with a deadly weapon, *a pipe*, in violation of California Penal Code section 245 (a)(1). Opn. at 4 (emphasis added). Count Four, which alleged misdemeanor battery on a peace officer in violation of California Penal Code section 243(b) (West 2016), was based on the

incident where D.W. spit blood on an officer's shoe. 2 RT 327. And Count Five alleged misdemeanor resisting or delaying a peace officer in violation of California Penal Code section 148 (a)(1) (West 2016). Opn. at 4-5.

II. PROCEDURAL HISTORY

Contested Jurisdictional Hearing

A contested jurisdictional hearing was held on all five counts. Opn. at 5; 2 RT 414. Two days after the trial was completed and the matter was submitted for decision, the juvenile court called the parties back to address what the court considered a fatal variance between the allegation in Count Three of the petition that *a pipe* was the deadly weapon used and the proof at trial that indicated a *two-by-four with a nail* was used. 2 RT 416; Opn. at 5. Labeling the matter a "technical legal issue," the juvenile court asked the parties to submit legal arguments on whether there was a fatal variance between the evidence at trial and the original allegation in Count Three. Opn. at 5; 2 RT 416.[2]

At a hearing on the issue, D.W.'s trial counsel argued that an amendment of Count Three after the matter had been submitted for decision would violate due process because the amendment would

[2] On appeal, D.W. argued that there was no variance between the allegation in Count Three and the evidence adduced at trial. The record contained evidence that a pipe-like item was thrown at Mr. Salisbury. So, there was no fatal variance between the evidence at trial and the allegation in Count Three. Rather, the surveillance footage was fatal to the prosecution's allegation in Count Three because it showed that during the only incident during which D.W. used a pipe, Mr. Salisbury struck the first blow. 1 RT 293-94; Exh. 6 Camera 29 at 13:12:40-13:13:03.

result in a different assault with a deadly weapon offense based on different underlying facts than the one in the original petition and D.W. had not been given prior notice of that offense. 2 RT 419-20; Opn at 5. The defense D.W. prepared was in response to the specific allegation that D.W. assaulted Mr. Salisbury with a pipe or caulking gun in the La Viva Market parking lot. 2 RT 420-21. His defense was based on the evidence of what occurred in the La Viva Market parking lot and the surveillance footage that captured the incident, not what occurred later during the third incident in a different location. 2 RT 419-20. To amend Count Three at such a late stage prejudiced D.W. and deprived him of due process. 2 RT 419-21.

The juvenile court granted the prosecution's motion to amend Count Three to replace "pipe" with two-by-four with a nail because "at the end of the day, the charge is the same, the 245 (a) (1)." 2 RT 424-25; Opn. at 5.

After amending Count Three, the juvenile court sustained four of the five allegations in the petition. Opn. at 5. Regarding Counts Two and Three, the assault allegations, it found that there were "no facts that support self-defense." 2 RT 430. Rather, it concluded that D.W. attacked Mr. Salisbury because he was "irked" at being followed. 2 RT 430. The juvenile court's findings resulted in two strike offenses

for D.W. under California's three-strikes law. *See* Cal. Penal Code § 667 (d)(3) (West 2020).

As for Mr. Salisbury's claim that he began following the minors because they robbed him, the juvenile court found Mr. Salisbury's robbery claim not credible:

> The conduct of the juveniles after the Dollar Store seems inconsistent with Salisbury's robbery claim. When the security guard Hinton called them to return … the video shows they readily complied. After briefly talking to Salisbury, Hinton called them to return a second time just as they were about to leave the property of the Viva market. Once again, they readily complied with his request. Salisbury's own conduct seems inconsistent with the robbery claim.

2 RT 427-28. Based on its findings on the other four counts, the juvenile court adjudged D.W. a ward of the state. 2 RT 433; CT 107. A timely notice of appeal was filed on May 16, 2017. CT 119.

The Appeal

On appeal, D.W. raised four claims.[3] One claim was that the findings on the Counts Two and Three, the assault counts, were not supported by substantial evidence because the evidence that D.W. acted in defense of himself and his friends raised reasonable doubt as to those counts. Opn. at 6-8.

D.W. also argued on appeal that the juvenile court deprived him of his right to due process when it granted the prosecution's request to amend Count Three after the matter had been submitted for decision. Opn. at 9-10. He specifically argued on appeal that by replacing "a pipe" in the petition with "2x4 w/nail," the juvenile court changed the fundamental nature of the assault with a deadly weapon count from one that was based on the circumstances of the second altercation in the La Viva Market parking lot, to an assault with a deadly weapon offense that was based on the circumstances of the third altercation, which occurred later and in a different location. Because the

[3] The other two arguments D.W. raised on appeal are not pertinent to the issues raised in the petition. One claim was a due process argument that because the evidence in the record placed the issue of self-defense in contention, which then shifted the burden to the prosecution to prove the lack of self-defense beyond a reasonable doubt, the juvenile court relieved the prosecution of its burden by failing to consider the evidence of self-defense. The fourth claim was based on the cumulative error doctrine.

amendment resulted in a different assault with a deadly weapon offense than the one in the original petition, due process required the prosecutor to give D.W. written notice of the new offense and required the juvenile court to grant him the opportunity to prepare a defense to it.

The court of appeal affirmed the juvenile court's decision. Opn. at 9-10. The court of appeal agreed with the juvenile court that the amendment of Count Three after the matter was submitted for decision did not violate due process because the charging statute for the amended allegation, California Penal Code section 245 (a)(1), remained the same. Opn. at 9; 2 RT 424. The court of appeal also reasoned that because the proof and defenses would have been the same, that is that "the minor acted in self-defense, that the minor's conduct was reasonable, and the prosecution was required to prove the minor did not act in self-defense," the offense was the same and the amendment did not violate due process. Opn. at 9-10.

The California Supreme Court denied a timely petition for review.

This petition follows.

REASONS TO GRANT THE WRIT

This case presents a substantial question regarding a minor's rights under the Due Process Clause of the Fourteenth Amendment to notice and a fair opportunity to prepare a defense to amended petitions in juvenile court proceedings. In D.W.'s case, the juvenile court allowed the prosecutor to materially alter the factual allegations in a petition, after D.W. had already presented his defense and the matter was submitted, without requiring written notice or granting D.W. the opportunity to present a new defense. In other words, the juvenile court allowed an entirely different offense to be charged—after the trial was *already over*.

Distilled to its essence, due process is about fundamental fairness. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) It was wrong and fundamentally unfair for the juvenile court to sustain an allegation that was made for the first time after the matter was submitted, and to do so without granting D.W. the opportunity to prepare a defense. *Accord Cole v. Arkansas*, 333 U.S. 196, 201 (1948)("It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.")

Because there is no precedent from the Court addressing this specific issue, the Court should grant the writ to clarify that, even in

juvenile court proceedings, if an amendment alleges an alternative factual basis for an offense in a petition, it creates a new offense regardless of whether the statutory label for the offense stays the same. And under those circumstances, the Due Process Clause requires written notice of the amended allegation and the opportunity to prepare a defense to it.

A. For Notice In A Juvenile Petition To Be Adequate Under the Due Process Clause, It Must, At A Minimum, Inform The Minor Of Particularized Factual Allegations Underlying The Offense.

The Court has made clear that juvenile court "hearing[s] must measure up to the essentials of due process and fair treatment." *In re Application of Gault,* 387 U.S. 1, 30 (1967), abrogation on different grounds recognized in *Allen v. Illinois*, 478 U.S. 364, 372 (1986). The minor *In re Gault* was arrested along with a friend for making lewd comments over the phone to a neighbor. *Id.* at 4. The probation officer filed a petition with the court that was not served on the minor or his parents. *Id.* at 5. The petition alleged that the minor was a delinquent minor but made no reference to the factual basis for the allegation. *Id.* A hearing was held during which the judge questioned the minor about the lewd phone call. *Id.* at 6. The matter was continued. *Id.*

Before the next hearing, the minor's parents received written notice of the date and time for further hearings on the minor's

"delinquency." *Id*. The notice did not include the factual basis for the minor's alleged delinquency. *See id*. At that later hearing, the probation officers filed a report with the court listing the charge as "lewd phone calls." *Id*. at 7. Following the hearing, the minor was found to be a delinquent and committed to an institution for a period of his minority. *Id*. at 7-8. The Arizona Supreme Court dismissed his habeas petition and the minor appealed. *Id*. at 9-10.

One of the issues before the Court was whether the minor and his parents were entitled to prior written notice of the allegations against him. *Id*. at 31. The written notice the sheriff provided to the parents before the final hearing that informed them of the minor's alleged "delinquency," even when combined with a prior hearing where the judge interrogated the minor about the lewd phone call, *see* 387 U.S. at 6-7, did not provide the notice required by the Due Process Clause:

> We cannot agree with the court's conclusion that adequate notice was given in this case. Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with *particularity*.

Id. at 33. (emphasis added).

Five years before it issued the decision in *In re Gault,* the Court explored the level of particularity the Fifth Amendment required in a federal indictment in *Russell v. United States,* 369 U.S. 749, 768.

(1962).[4] In that case, the petitioners were convicted for refusing to answer certain questions before a congressional subcommittee. *Id.* at 752. The statute at issue criminalized a witness's refusal to answer questions about a specific subject before Congress. *Id.* at 754-55, 764.[5] Missing from the indictments in *Russell* were references to the specific subject matter the defendants refused to answer questions about. *Id.* at 764.

The Court held that the subject under inquiry was a factual detail that was required to "sufficiently apprise the defendant of what he must be prepared to meet." *Id.* "[T]he accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him." *Id.* at 766 (citations omitted). Without the specific factual information regarding the subject matter under inquiry, the indictment did not provide the level of notice the

[4] The Fifth Amendment grand jury provision provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury…."

[5] 2 U.S.C. § 192, provided in pertinent part, "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor ...."

Constitution required. *Id*. at 764. Although the Court's decision revolved around the federal grand jury statute, the decision noted that the issues raised in the case "brought to bear" the Fifth Amendment's Due Process Clause, recognizing that the requirement that an indictment contains particularized facts to apprise the defendant of what the defendant should be prepared to meet at trial is rooted not only in the grand jury requirement but also in the Due Process Clause. *See id*. at 761.

The particularized facts requirement serves three purposes that ultimately ensure fair criminal proceedings. *Id*. at 763-64,768. First, requiring particularized facts in the allegation forces the prosecution to disclose the specific conduct the defendant is alleged to have engaged in so that a court could determine whether the facts alleged amount to a criminal offense. *Id*. at 768; *see e.g.*, *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937) (holding that the First Amendment precluded defendant's conviction for an allegation in the indictment that he assisted in the conduct of a public meeting which was held under the auspices of the Communist Party). Second, requiring specificity of the facts the prosecution alleges constitutes a criminal offense allows the defendant to raise the issue of an acquittal or conviction if other proceedings are brought against the defendant for a similar offense. *Russell,* 369 U.S. at 764. Finally, and no less important, requiring the

prosecution to state the particularized facts underlying the offense apprises a defendant of what the defendant must be prepared to defend against. *Id*. at 763.

If the indictment only includes the charging statute or elements of the statute without particularized facts, it would be useless to a defendant in first, understanding the charges against him or her and second, preparing a defense to meet those charges:

> In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.

Id. at 765 (internal citations and quotations omitted); *see also Hamling v. United States*, 418 U.S. 87, 117-18 (1974) (stating the same). The Court's explanation in *Russell* for the requirement that a charging document should include particularized facts is consistent with the analysis in *In re Gault* regarding the due process requirement that notice, "set forth the alleged misconduct with particularity." *See* 387 U.S. at 33.

In *De Jonge*, the Court held that because the facts in an indictment alleged only that the defendant assisted in the conduct of a public meeting that was held under the auspices of the Communist Party and did not allege that he was teaching or advocating criminal syndicalism, affirming his conviction on the latter basis "would be sheer denial of due process." 299 U.S. at 362. In reaching its holding, the Court observed that the failure of the indictment to allege that the defendant was advocating criminal syndicalism denied the defendant a key benefit of the due process requirement that a charging document includes the factual basis for the offense: the opportunity to secure evidence of the nature of the meeting and prepare a defense to show that the meeting was "orderly and lawful" and was not called or used for the advocacy of criminal syndicalism or any unlawful action. *Id.*

Including the specific charging statute in a charging document without also including the particularized facts that allege how a criminal statute was violated would be useless to a defendant who has to prepare a defense to meet the charges against him or her. *Russell*, 369 U.S. at 765. For this reason, an indictment that recites the factual allegations underlying the offense is a necessary component for a fair proceeding under the Due Process Clause. *Id.; see In re Gault*, 387 U.S. at 33 (stating that constitutionally adequate notice must contain

specific charge or factual allegations to be considered and must be given in advance of hearing to allow the minor to prepare a defense).

B. If The Focus Of An Assessment Of The Adequacy Of Notice In A Juvenile Petition Is The Particularized Facts That Allege How A Criminal Statute Was Violated, Then A Material Alteration Of Those Facts To Allege An Alternative Factual Basis For The Violation Of The Same Statute Renders The Original Notice Inadequate Under The Due Process Clause.

Although the Court has not addressed specifically whether the amendment of an allegation to state a different factual basis for an offense in the context of juvenile court proceedings creates a different offense that requires new notice, it has addressed the issue in the context of the Fifth Amendment and grand jury indictments. The Court's reasoning in those cases, when extended to juvenile court proceedings, supports a conclusion that when the material facts of an allegation in a juvenile petition are amended to state an alternative factual basis for an offense, even if the statutory label for the offense remains the same, the amendment creates a new offense and due process requires the prosecution to provide the minor new written notice and requires the juvenile court to grant the minor an opportunity to respond.

For example, in *Stirone v. United States*, 361 U.S. 212 (1960), the Court held that the trial court's jury instruction, which allowed the

jury to find the defendant guilty based on a charge not included in the indictment, violated the defendant's right to be tried on only those charges included in the grand jury indictment. *Id.* at 217-19. It was a fatal error, and his conviction was reversed. *Id.* at 219.

The grand jury in *Stirone* indicted the defendant for violating the Hobbs Act[6] by interfering with a cement manufacturer's shipment of sand from out of state, sand needed to make the ready-mix concrete the manufacturer contracted to provide to the builder of a steel processing plant in Pennsylvania. *Id.* at 213-14. Over defense objection, the district court granted the prosecution's request to admit evidence that the defendant's actions also interfered with prospective steel shipments from the steel plant in Pennsylvania to other states, which was also a violation of the Hobbs Act. *Id.* at 214. The district court then instructed the jury that as far as the interstate commerce element of the Hobbs Act violation, the jury could consider either that the sand had been shipped into Pennsylvania or that the concrete

[6] The Act, which is codified at 18 U.S.C. § 1951, provides in pertinent part, "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

manufactured in Pennsylvania would be used to construct a mill that would produce steel that would be shipped from Pennsylvania to other states. *Id.* The defendant was convicted, and in denying his motion for arrest, acquittal, or a new trial, the district court held that "[a] sufficient foundation for introduction of both kinds of proof was laid in the indictment." *Id.* On appeal, the Court of Appeals affirmed. *Id.*

The Court reversed, holding that it was error for the district court to submit the issue of whether the prospective steel shipments were enough to invoke Hobbs Act protection to the jury because that factual allegation was not in the indictment. *Id.* at 219. The indictment the grand jury issued alleged a Hobbs Act violation based only on the interference with the shipment of sand needed to manufacture the concrete that would be shipped to other states. *Id.* It did not include an allegation that the defendant violated the Hobbs Act by interfering with prospective interstate shipments of steel. *Id.* at 213-14. By allowing the evidence of interference with the steel shipments to be considered by the jury as a basis for the Hobbs Act violation, the district court allowed a constructive or informal amendment of the grand jury indictment, which violated the Fifth Amendment. *Id.* at 217-19.

Although the Court in *Stirone* did not couch its analysis in terms of due process, the notice requirement rooted in the Due Process

Clause would have also required the Court to reverse the conviction. *See In re Winship*, 397 U.S. 358, 359 (1970) (noting that the Due Process Clause guarantees that parties subject to a deprivation of liberty or some interest are given advance notice of the allegations against them and granted the opportunity in a fundamentally fair proceeding to respond to those allegations). Before the constructive amendment at trial, the defendant had no notice that he would have to defend against a Hobbs Act violation based on prospective steel shipments. *See id.* at 213-14, 217. He received notice only of the allegation that he violated the Hobbs Act by interfering with shipments of sand used to manufacture concrete, and prepared a defense to the allegation that that specific conduct violated the Hobbs Act. *See id.* at 213-14. Nothing else.

In reaching its holding, the Court in *Stirone* relied on *Ex Parte Bain*, 121 U.S. 1 (1887), *overruled by United States v. Miller*, 471 U.S. 130 (1985), and *United States v. Cotton*, 535 U.S. 625 (2002). *Bain* held that the district court's amendment of an indictment, which narrowed the scope of the indictment by striking some of the particularized facts from the indictment, was an improper amendment of a grand jury indictment. *See* 121 U.S. at 13-14. "The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that

instrument." *Id.* at 9-10. Because the district court amended the indictment, "the indictment on which [the defendant] was tried was no indictment of a grand jury." *Id.* at 13.

Years later, the Court held in *Miller* that an indictment that was amended to narrow not broaden the factual allegations underlying the offense in the indictment did not violate the Fifth Amendment grand jury requirement, overruling *Bain*. 471 U.S. at 144. In *Miller*, the indictment charged the defendant with defrauding his insurer by consenting to a burglary in advance and then misrepresenting the value of the loss to the insurer. *Id.* at 132-33. At trial, the prosecution only provided proof of the allegation that the defendant had inflated the value of the stolen goods. *Id.* at 132. The prosecution moved to strike the other part of the indictment that alleged prior knowledge of the burglary and the defendant objected. *Id.* at 133. The entire indictment was submitted to the jury and the defendant was convicted. *Id.* at 133-34.

On appeal, the defendant argued that the trial proof fatally varied from the scheme alleged in the indictment and required reversal of his conviction. *Id.* at 134. The Ninth Circuit agreed and vacated his conviction. *Id.*

Reversing the Ninth Circuit, the Court held that an amendment of an indictment that narrows and does not expand the allegations in

an indictment does not violate the Fifth Amendment grand jury requirement, overruling *Bain*. *Id*. at 144. The Court explained that *Bain* stood for two distinct propositions. *Id*. at 142. One was a defendant couldn't be convicted of an offense not charged in the indictment. *Id*. at 142-43. The other proposition was rooted in the constitutional requirement that grand juries issue indictments. *Id*. at 142. If a court or prosecutor strikes parts of an indictment, the entire indictment is invalidated because it is no longer the indictment issued by the grand jury. *Id*. In overruling this aspect of *Bain*, the Court explained that in the case where an indictment is narrowed, the defendant would have still received notice of the offense on which he or she is tried. See *id*. at 134-35. "To the extent *Bain* stands for the proposition that it constitutes an unconstitutional amendment to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it, that case has simply not survived." *Id*. at 144. "[W]here an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment." *Id*. at 145 (citing *Salinger v. United States*, 272 U.S. 542, 548-49 (1926)).

The Court reaffirmed, however, the longstanding principle in *Bain*, which also was reaffirmed in *Stirone*. Amendments that result in an offense different from the offense described in the indictment the grand jury issues violate a defendant's right to a grand jury indictment. *Id*. at 143.

In distinguishing *Stirone*, the Court in *Miller* observed that the defendant in Stirone was convicted of an offense that was not charged in the indictment. Id. at 138-40. There were no "notice related concerns" in *Miller*. *Id*. at 134-35. The indictment properly alleged violations of the statute, and "fully and clearly set forth a number of ways in which the acts alleged constituted violations." *Id*. at 134. Miller received notice that he would have to defend against the allegation that he inflated the value of the stolen property. *Id*. at 139-40. "Competent defense counsel certainly should have been on notice that that offense was charged and would need to be defended against." *Id*. at 134. There was no unfair surprise that evidence of the allegation that he inflated the value of the stolen property would be introduced at trial. *Id*. at 134-35.

The Court in *Miller* recognized that one key problem with an amendment like the one in *Stirone*, which alters the indictment to allege an offense not charged in the original indictment, is the lack of notice. *See* 471 U.S. at 134-35, 138 n.5. That lack of notice deprives a

defendant of a fundamentally fair proceeding. *See* 471 U.S. at 134-35, 138 n.5.

The requirement of adequate notice is rooted in the notion of fundamental fairness the Due Process Clause guarantees. *McKeiver*, 403 U.S. at 543. Together *Miller* and *Stirone* support the proposition that the amendment of an indictment during a trial to allege an alternative factual basis for a violation of a criminal statute, a factual basis that was not included in the original indictment, violates due process because the amendment deprives the defendant of notice and opportunity to prepare a defense to the amended charge. 471 U.S. at 138-40. This is true even if the label for the offense, that is, the charging statute, remains the same. *See Stirone,* 361 U.S. at 213-14, 218-19 (original indictment alleged violation of Hobbs Act and amendment alleged an alternative factual basis for violating the Hobbs Act). Thus, where the particularized facts are changed so significantly as to allege a new offense, due process requires new written notice and the opportunity to prepare a defense. *See United States v. Ballard*, 322 U.S. 78, 90 (1944) ("An indictment is amended when it is so altered as to charge a different offense from that found by the grand jury.")

Admittedly, not all amendments to the underlying facts of an allegation would trigger due process requirements of prior written notice and the opportunity to prepare a defense. Amendments that do

not materially alter the factual basis for the offense do not raise due process concerns. *See Russell*, 369 U.S. at 770 (noting that amendments that are a matter of form may be made without resubmission to the grand jury.)

For instance, in the underlying case, had the amendment changed pipe to caulking gun, the amendment would have been an appropriate correction based on Mr. Salisbury's testimony that the object that D.W. threw at him in the La Viva Market parking lot, which looked like a pipe, was, in fact, a caulking gun. *See* 1 RT 160-61. With that correction, the assault with a deadly weapon count that was based on the incident that unfolded in the La Viva Market parking lot would have remained unchanged. And consistent with the notion of fundamental fairness, such a technical change would not have resulted in D.W. being misled by the original petition into preparing a defense based on the circumstances that unfolded in the La Viva Market parking lot. *See Russell*, 369 U.S. at 770 ("Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused.").

The amendment in D.W.'s case was neither technical nor insignificant, however. The substitution of a two-by-four with a nail for "a pipe" when each weapon was tied to discrete altercations in different locations, switched one factual basis for an assault with a

deadly weapon offense for another. It was a different offense. And had the amendment been subject to the Fifth Amendment grand jury requirement, the prosecution would have had to resubmit the indictment to the grand jury for amendment and D.W. would have received adequate notice and the opportunity to prepare a defense to the amended allegation. *See Miller,* 471 U.S. at 134-35, 138 n.5. D.W. and minors like him deserve no less protection in juvenile court proceedings.

The Court has demonstrated "particular sensitivity to minors' claims to constitutional protection against deprivations of liberty by the State." *David Levell W. v. California,* 449 U.S. 1043, 1047 (1980) (Marshall, J., dissenting opinion)(citing *In re Gault*, 387 U.S. at 27).

In D.W.'s case, the substance of the amendment and the circumstances under which it was made constituted an unfair surprise. *Gray v. Netherland*, 518 U.S. 152, 181–82, (1996) ("A defendant must be afforded 'a reasonable opportunity to meet [the charges against him] by way of defense or explanation.'" (quoting *In re Oliver,* 333 U.S. 257, 275 (1948))). States should not be permitted to deprive minors of basic due process protections because the new offense falls under the same criminal statute instead of a completely different one. *See Stirone,* 361 U.S. at 214.

D.W. requests that the Court grant the writ and determine whether in juvenile court proceedings the Due Process Clause requires new written notice and the opportunity to respond if an amendment changes the particularized facts underlying an allegation to allege an alternative factual basis for the violation of a criminal statute.

C. Because The Procedural Safeguards In Adult Criminal Proceedings Would Have Prevented A Late-Stage Amendment Of The Material Facts Underlying A Criminal Allegation, The Court Could Look To Those Safeguards To Determine Whether The Amendment Here Violated Due Process.

In arriving at its holding in *In re Gault*, this Court relied on the research of scholars who examined the juvenile court system and concluded that the absence of the same due process protections afforded adults charged with similar offenses, created a substantial risk of arbitrariness in decisions that has harmed the minors the juvenile court system intended to help. 387 U.S. at 18. Indeed, "loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process." *Id*. at 19.

Although the Court has stated that a minor's right to due process "is virtually coextensive with an adult's," *id*. at 27, in D.W.'s case that was not so. Had the procedural safeguards that apply to

adult criminal proceedings in California applied to D.W.'s proceeding, the surprise late-stage amendment to allege a different factual basis for the assault with a deadly weapon offense in Count Three would have been precluded. *See People v. West*, 477 P.2d 409, 419 (Cal. 1970) ("When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. This reasoning rests upon a constitutional basis: Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (internal citations and quotations omitted)).

For instance, a preliminary hearing would have made clear which specific set of facts the prosecutor was alleging formed the basis for the assault with a deadly weapon offense in Count Three: the incident in the La Viva Market parking lot that involved a "pipe," the incident that involved the "two-by-four with a nail," or both. Following the preliminary hearing, the prosecutor may amend the charging document to include any offenses that are based on the evidence adduced at the preliminary hearing. Cal. Penal Code § 1009. (West 2020). But the prosecutor would have to make the basis for the charge

known, giving the adult defendant notice of the factual basis for the offense long before trial.

In California, juvenile proceedings do not have preliminary hearings. *In re Korry K.*, 175 Cal. Rptr. 91, 93 (Ct. App. 1981). There is a detention hearing, where the juvenile court determines whether the petition pled a prima facie case. Cal. Welf. & Instit. Code § 635 (West 2016). But it is not the same as a preliminary hearing. "A juvenile detention hearing (section 635) or rehearing (section 637) is not the equivalent of an adult preliminary hearing and the minor has no right to prove an affirmative defense for the sole purpose of having the charges against him dismissed the issue being detention, not guilt." *In re Korry K.*, 175 Cal. Rptr. at 93. Even if it were the same, in this case, the detention report the juvenile court used to find a prima facie case had been made on all five counts unambiguously alleged that the deadly weapon that served as the basis for Count Three in the original petition was a pipe, not a two-by-four with a nail. CT 12-13.

Although a prosecutor may amend an indictment or information "for defect or insufficiency, at any stage of the proceedings," amendments that change the offense charged or charge an offense not shown by the evidence taken at the preliminary hearing are prohibited. Cal. Penal Code § 1009. Further, even if the evidence adduced at the preliminary hearing could support the amendment,

where prejudice to the defendant is shown, the matter must be postponed as required in the interests of justice. *People v. Goolsby,* 363 P.3d 623, 627 (Cal. 2015) (citing Cal. Penal Code § 1009).

In this case, D.W. was prejudiced by the fact that he prepared a defense that relied on direct exculpatory evidence in response to a specific allegation that he assaulted Mr. Salisbury with a "pipe." 2 RT 419-21. The pipe was tied to a specific incident in the La Viva Market parking lot. The fact that his defense would have to be substantially modified to respond to an allegation that he assaulted Mr. Salisbury using a two-by-four with a nail in a later incident that occurred in a different location indicates that the amendment prejudiced his right to prepare a defense to the allegation against him. *See e.g., People v. Burnett*, 83 Cal.Rptr.2d 629, 646, 650 (Cal. Ct. App.1999) (reversing conviction for felon in possession of firearm because the defendant had not received notice before trial that the prosecutor intended to argue as an alternative factual basis for the offense his possession of a different gun earlier in the day in a different incident than the incident that was the subject of the preliminary hearing).

"Children, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child's constitutional freedom from bodily restraint is no narrower than an adult's." *Reno v. Flores*, 507 U.S. 292, 316 (1993) (internal citations and quotations

omitted). Under California law, there is no question that in an adult criminal proceeding, had a trial court, after the matter was submitted to the fact-finder, amended a complaint to allege a different factual basis for an assault with a deadly weapon count, due process would have required the court to postpone the proceedings and provide an opportunity for the defendant to meet the amended allegation. *See Goolsby,* 363 P.3d at 627. The circumstances D.W. faced are even more egregious because he suffered the adult consequences of having two strike offenses sustained against him under California's three-strikes law without the same due process protections his adult counterparts would have been afforded. *See* Cal. Penal Code § 667 (d)(3). The Due Process Clause does not tolerate such disparate treatment, especially when the consequences for minors can be so severe. "Due process of law is the primary and indispensable foundation of individual freedom." *In re Gault*, 387 U.S. at 20. "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." *In re Gault,* 387 U.S. at 13 (quoting *Haley v. Ohio* 332 U.S. 596, 601 (1948) (Douglas, J., plurality opinion).

CONCLUSION

D.W. requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Date: September 14, 2020 GIBSON APPELLATE LAW

By: /s/ Jennifer A. Gibson

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CERTIFICATION

I certify, pursuant to Rule 33(g)(i), Rule 8.204, subdivision (c), that the attached Petition for a Writ of Certiorari contains 8,469 words, including footnotes and excluding tables, as measured by the word count of the computer program used to prepare this brief.

Dated: September 14, 2020

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APPENDIX

ATTACHMENT A

Transcript of the Juvenile Court's Ruling

ATTACHMENT B

Opinion and Modified Opinion of the California Court of Appeal for the Third Appellate District

ATTACHMENT C

Supreme Court of California Order Denying Discretionary Review

ATTACHMENT A

MONDAY, APRIL 3, 2017

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In Re the Matter of [redacted] Minor, Case No. 137775, came on this day before Hon. R. Steven Lapham, Judge of the Superior Court of California, for the County of Sacramento, Department #93 thereof.

The Petitioner was represented by John Grimes, Deputy District Attorney in and for the County of Sacramento, State of California.

The Minor was present and represented by Juan Corona, Assistant Public Defender.

The following proceedings were then had, to wit:

THE PRESENTER: Item number one, court number 137775, in the matter of [redacted] Minor is present. Present with the minor is his mother, [redacted] as well as his aunt and two cousins. Representing the minor is Mr. Corona. And representing the district attorney's office is Mr. Grimes.

THE COURT: I put this matter over to today to allow the parties to research an issue that I raised on my own motion regarding the allegation in Count Two which alleges that the deadly weapon was a pipe when, in fact, the testimony appeared to be that it was a two-by-four or some other blunt object.

Does either party wish to address the Court before I proceed? I've done my own research. I'm satisfied that -- my only concern was whether or not the petition could be amended to conform to the proof at this late stage. And it appears that the petition can be amended at any point in time.

But if you disagree, Mr. Corona, I'll allow you to state

your position.

MR. CORONA: Your Honor, I do disagree, and I would object to any amendment to the petition at this time. I am citing In Re Robert G. That is a 1982 case. The citation is 31 Cal.3d 437.

In that case the prosecution sought to amend the Complaint after the close of the case. They sought to amend to add a lesser included offense, a 242, when the original petition had alleged a 245(a)(4) or (a)(1). The Court found it was a violation of the respondent's due process rights to amend so late in that stage because due process requires a notice requirement.

My objection stands on due process grounds as well. Not giving us notice as to whether or not we would be fighting a pipe as opposed to a two-by-four with a nail changes the complexity of the case. It changes the way that I would have addressed my questions and would have presented my evidence.

And at this time I would argue that it denies [redacted] his due process rights. And, Your Honor, with that, I don't know if the Court has read In Re George -- I'm sorry, In Re Robert G., but I think it is on point, and it does address the Court's specific issue.

THE COURT: What if the prosecution had instead of alleging a specific implement like a pipe, what if the prosecution had simply alleged in the petition that the deadly weapon was a blunt object?

MR. CORONA: I think that would have been fine, but at the same time the prosecution argued that the 245(a)(1) with the two-by-four and the nail occurred after the Viva parking lot incident. Where as in the petition it alleged a 245(a)(1) with a

pipe, and that pipe I think at the time that the petition was alleged there was reference to the caulking gun. It was unknown whether or not it was, in fact, a caulking gun or if it was a pipe. So when the prosecution argues that the 245(a)(1) with the two-by-four and the nail occurred after that incident at Viva parking lot then that changes essentially the whole posture of the case.

THE COURT: Have you read In Re Man J., 149 Cal.3d specifically at 481?

MR. CORONA: I have not.

THE COURT: All right. I've reviewed the case you cite, the Robert G. case. That's a case that actually changed as you indicated the charging statute. Man J. seems more directly on point. That was a case like ours where the charge remained the same but the method of commission was altered slightly. I'm trying to recall specifically what those facts were. That's right. It made a minor change. It alleged that the cars that were allegedly damaged by the minor were owned by multiple people rather than a single victim.

The point of that case, however, was that the essential charge remained the same, and there was no prejudice to the minor because the proof would have been the same in any event. So let me ask you, you think you did suffer prejudice as a result of this? What prejudice do you think you suffered?

MR. CORONA: Well, I think when the Court refers to the 245(a)(1) with the two-by-four and the nail, I think that's more of an amendment to the 245(a)(4) which would be Count Two. The 245(a)(1) referencing the pipe, the way the evidence was

presented was related to the caulking gun.

At the time that I argued the case, I argued self-defense as it relates to the caulking gun, and the district attorney argued that this was an I guess a fluid commission of a robbery up until the point that the perpetrators reached a safe place. At the time that I argued my case and presented my case, I was under the impression that the pipe that they were referring to was the caulking gun. So I referenced my questions, and I referenced my closing arguments as it relates to a self-defense claim in that regard.

When the Court chooses to amend the petition based on the fact that there's another 245(a)(1) occurring later on, that's a completely different case than we had before us. The 245(a)(4) was the allegation as it relates to the continuing conduct related to the crutches, the two-by-four and some other objects.

And so at this point to try to fix the prosecution's mistake I think was not my position. I'm not here to assist the prosecution in getting a conviction. So me not addressing those issues was a tactical decision noting that the prosecution had made a failure in its amendment of the Complaint.

THE COURT: Let's go off the record just a second.

(Discussion held off the record.)

THE COURT: Mr. Grimes, do you want to respond to Mr. Corona's statement first?

MR. GRIMES: At the outset I would say it's Count Three we were talking about. I think the Court said Count Two, but it's Count Three.

THE COURT: That's the deadly weapon count?

MR. GRIMES: Yes.

THE COURT: All right.

MR. GRIMES: And I would note simply that Count Three as charged on or about January 26th, 2017, it does not mention La Viva parking lot or after La Viva parking lot or before La Viva parking lot. It mentions a date.

It would be the People's request to amend to conform with the proof. The evidence that came in at trial from the victim, Channing S., had more to do with the two-by-four with the nail than what is alleged. So it's not a material variance of the petition as noted in Code of Civil Procedure 469 and 470. I think it's more consistent with the testimony. The amendment is more consistent with the testimony, and it would be our request at this time that the Petitioner be allowed to make that amendment.

THE COURT: So is it your theory that Count Two referred -- I'm sorry. I don't have my petition in front of me. So Count Two is the assault with a deadly weapon charge?

MR. GRIMES: 245(a)(4).

THE COURT: That's Count Two?

MR. GRIMES: Correct. And Count Three is the 245(a)(1), to wit, a pipe.

THE COURT: Is it your position that the theory of the prosecution's case is that the 245(a)(4) relates to the incident at Harris and Balsam?

MR. GRIMES: It would include that. I think there were several examples of a 245(a)(4) throughout the incident.

THE COURT: And then is it your position that the 245(a)(1)

relates to the Viva parking lot or the incident at Harris and Balsam or both?

MR. GRIMES: It would be -- well, the two -- the two-by-four was -- the victim was specific that the two-by-four happened after he left the parking lot.

THE COURT: Well, in other words, Mr. Corona is saying that he thought that the 245(a)(1) referred to the Viva parking lot incident because it alleged that a pipe was used, and he's saying that the object, whatever it was, that was taken from the pickup truck, he was assuming that was the pipe or a caulking gun. You follow his argument?

MR. GRIMES: Correct.

THE COURT: So how is he not prejudiced if that was the assumption that he was making?

MR. GRIMES: Well, one, we didn't allege caulking gun. I don't think that Count Three is limited to that event. It's been our position what I argued throughout was that this was a fluid attack that started at the Dollar General and continued all the way until the law enforcement arrived sometime later. And that there are multiple assaults that happened throughout. We chose to charge the ones that are on the petition, and I think the way that the evidence came in, it came in based on the victim's testimony that it was a two-by-four with a nail. And that's our request to amend the petition to conform with that proof.

THE COURT: I confess that throughout this trial I thought that the 245(a)(1) referred to the final incident at Harris and Balsam and only that incident. I wasn't considering that it could have been relating to the incident in the Viva parking lot

with the object being thrown at the victim.

MR. GRIMES: Even how it was arrested to the Court, I never argued that whatever was thrown at him was a 245(a)(1).

MR. CORONA: And, Your Honor, that is precisely why the specificity of the charge and the object is crucial to the petition. If the specificity is not accurate or if it's misleading or if it's not consistent, then my client is prejudiced by that lack of notice.

THE COURT: All right. Is matter submitted?

MR. GRIMES: Submit it.

MR. CORONA: Submit it.

THE COURT: All right. It bears repeating that it was the Court that brought this to everyone's attention, and I looked back at my notes just now from closing argument, and I don't see any reference to this issue by either side as to whether we were talking about the Viva market incident or the attack at Harris and Balsam. It's difficult for me to find any prejudice to the defense under those circumstances or to understand how the defense would have conducted things any differently had this issue come up.

The fact is at the end of the day, the charge is the same, the 245(a)(1). The defense could easily have argued that no deadly weapon was used either at the Viva parking lot or at Harris and Balsam. I don't see how -- especially in light of the concession that the prosecution could have charged it more vaguely as simply some type of blunt object, I fail to see how there's any prejudice to the defense. So, basically, I'll deny the Court's own motion and proceed to the verdict.

MR. GRIMES: Is the Court then allowing the People at this time to amend Count Three?

THE COURT: Yes.

MR. GRIMES: It would be the Petitioner's request to amend by interlineation where it read, to wit, a pipe, replace a pipe with a two-by-four with a nail.

MR. CORONA: And, Your Honor, the defense objects at this time under due process rights under the California and U.S. Constitution.

THE COURT: And for the reasons I've stated relying on Man G. -- I'm sorry, yes, Man J., I think the juvenile court has discretion to permit amendment of juvenile court wardship petitions to correct or make more specific the factual allegations supported of the offense charged when the very nature of the charge remains unchanged. And that's actually a direct quote from Man J. at 149 Cal.App.3d 481. And for the purpose of the proposed amendment, I think that can be made at any point in the proceedings.

So, Mr. Corona, your objection is noted, but it's overruled. Anything further we need to do before I address the verdict?

MR. GRIMES: No.

MR. CORONA: No.

THE COURT: All right. I want to make a few comments about the principal witness, Channing Salisbury, before I announce my verdict. First, his testimony at times was confusing, internally inconsistent and inconsistent with prior accounts that he gave to the police. I do not conclude that he was lying but rather that

he was an unreliable reporter of the facts.

My observations of him during his testimony led me to the conclusion that he must be laboring under some type of mental disability. A few examples drew me to this conclusion. Not much was developed about his personal background but certain things popped out during his testimony.

He is 37 years old. Living at the time of the offense in a poorer section of town. And his primary mode of transportation was a bicycle. His current employment is at a flea market repairing electrical equipment. We also know that he has a string of criminal convictions for theft and weapons offenses, most recently a burglary conviction in 2014. Nevertheless, he claimed to be a restauranteur who was responsible for opening the Elephant Bar and Mikuni, two prominent restaurants in Sacramento. He also claimed to be a sushi chef who had been hired by Mikuni and also a person who did private dinners in people's homes. To be sure I have no facts to suggest that these claims are false. But his resume what we know of it makes those claims in my view quite questionable. His testimony regarding the crime itself also gives me pause.

I want to discuss the 911 call first. And parenthetically I say call singular because there's less than a one minute gap between the first and second 911 call, and it may, in fact, be the same call, just a handoff from CHP. But in any event, in that call Salisbury said he needed an ambulance even though his sole injury at that point in time appeared to be relatively minor, an abrasion to his upper lip. He also said that the individuals had lots of weapons, including bats and, quote,

they're trying to hit me with bats, unquote.

There's no evidence that the group had bats or at that point in time they had any weapons at all other than the object that the minor took from the pickup truck which Salisbury described as a caulking gun.

There's also a point in the 911 call where he seems to be asking the 911 dispatcher whether she can see a person hiding behind a trash can. It appears to me that Mr. Salisbury at times has a questionable relationship with reality, and the light rail incident that the defense raised in their portion of the case only reinforced that conclusion in my own mind.

So with those observations, I turn to the individual counts. With respect to Count One, the robbery charge, I find that has not been proved beyond a reasonable doubt. Something evidently happened at the Dollar Store as evidenced by the wound on Salisbury's upper lip which according to Officer Marin as reported to her by security guard Hinton was evident by the time that Salisbury got to the Viva market. Was it robbery? Perhaps. But Salisbury was all over the map on that.

He testified that -- he testified at trial that $1 was taken but previously told officers that $19 had been taken in specific denominations. But even that doesn't add up because he said he started with a twenty dollar bill and bought two beers that morning. There's no video or eyewitness to the incident. There's been no testimony that any money was recovered from any of the juveniles that day. The conduct of the juveniles after the Dollar Store seems inconsistent with Salisbury's robbery claim.

When security guard Hinton called them to return, called the individuals, the group of teenagers to return, the video shows that they readily complied. After briefly talking to Salisbury, Hinton called them to return a second time just as they were about to leave the property of the Viva market. Once again they readily complied with his request.

Salisbury's own conduct seems inconsistent with the robbery claim. The 911 call was made according to Salisbury's testimony from the vicinity of Harris and Balsam streets just after he left the Viva market parking lot. However, camera 30 -- the time clock on camera 30 which is part of exhibit 29B shows that he left the Viva market parking lot at approximately 1:15. The first 911 call commenced a full 12 minutes later which is 12 minutes that I really can't account for, but the bottom line is that although Salisbury testified that immediately after the alleged robbery at the Dollar General, he tried to flag down law enforcement officers and started calling 911 claiming that some of those calls were dropped.

The evidence shows that he actually didn't call 911 until nearly one half hour after the incident at Dollar General. I just find that's inconsistent with Salisbury's claim that he had been robbed.

We then turn to the attack on Harris and Balsam. Again, Salisbury testified very inconsistently and, again, I'm still talking about Count One now, at the end of the day it is impossible to determine what, if anything, Salisbury claimed was actually stolen. He testified about a backpack that contained everything from a tablet which is not further identified, to a

soldering iron, to sushi knives. During a good portion of this testimony it was my impression that he was simply speculating on what may have been in his backpack on that particular day. Nor does the evidence support a finding that there was an intent to obtain the contents of the backpack or to permanently deprive Salisbury of those contents.

Again, Salisbury testified very inconsistently, but at one point he claimed one of his assailants threw the contents of the backpack at him. In another part of his testimony, he claimed that one of the assailants tossed the tablet on the ground. If either of these statements can be believed, they seem inconsistent with an intent to steal the contents of the backpack. For all of those reasons, I find Count One has not been proved beyond a reasonable doubt, so I do not sustain the petition on that count.

I cannot say the same for the remaining counts. However unreliable I might think that Salisbury's testimony was, clearly he suffered a severe beating as evidenced by his physical injuries. Moreover, he was -- we are all essentially an ear witness to that beating by the virtue of it being captured by the 911 call.

Immediately following that attack, Salisbury identified [redacted] as his attacker, and he reiterated that identification during the juris hearing. There's also corroboration for that identification. There's no question that [redacted] was one of the group of five teenagers that Salisbury was following that day. And further of those five teenagers, [redacted] is the most aggressive. In the confrontation in the Viva parking

lot, he is the one who retrieves an object from the pickup truck among the three individuals who advanced on Salisbury, [redacted] is in the lead, and it is [redacted] who throws the object at Salisbury.

[redacted] also had a motive to attack Salisbury. He was clearly irked by the fact that Salisbury continued to follow the group and the attack occurred a very short time after their last encounter at the Viva market parking lot leaving little time for an unknown third party to enter the picture.

There are no facts which support self-defense. Even if for the sake of argument [redacted] felt justified in his anger of being followed, there's no justification for committing a battery under such circumstances. So I find that Counts Two and Three have been proved beyond a reasonable doubt, and I sustain the petition on those counts both as felonies.

I also find that Counts Four and Five have been proved beyond a reasonable doubt. The evidence on those counts was clear and largely uncontested, and I sustain the petition on those counts as misdemeanors.

So with respect to the counts that I have sustained, I find that notice has been given as required by law. That the birth date and county of residence of the minor are correct as stated on the petition. And as I've said that the allegations in Counts Two through Five have been proved beyond a reasonable doubt.

Mr. Corona, is it your desire to go to immediate sentencing?

MR. CORONA: Yes.

THE COURT: Do you wish to address the Court before we do

that?

MR. CORONA: Yes, Your Honor. Your Honor, given that the Court has not sustained Count One which was the principal offense charged in this petition and the principal reason why [redacted] remains in custody, I would ask that he be given time served. He has been in custody since he's been arrested which by my calculation is 67 days in the juvenile hall. I would ask that any remaining time that the Court chooses to impose that he serve on home supervision or electronic monitoring.

He is 17 years old. Although he was not attending school at the time, he was working with his mother washing dishes to help support the family. He comes from a stable environment where he has support not only from his mother but his aunt who's currently present. I would ask at this time that he be released for the remainder of the sentence.

THE COURT: And your reason for saying that Count One is the principal offense is simply that carries the longest sentence?

MR. CORONA: Not only that but that was one of the reasons why probation had recommended 120 days in juvenile hall. The last probation report that we got was from February when we came for the first settlement conference, and in that report probation had recommended 120 days assuming that all the charges in the petition were true. Given that one of the charges I refer to it as a principal charge, but it carries the most severe consequence out of all of them, I would ask that a lesser sentence than probation recommended be imposed.

THE COURT: All right. And how much credit does [redacted]

have at this point?

THE PRESENTER: 67 days, Your Honor.

THE COURT: Mr. Grimes?

MR. GRIMES: Your Honor, it's our position that 120 days is appropriate. The original offer we made was wardship, 120 days. 60 days E.M., 10 days juvenile work project. We'd ask the Court follow that offer.

MR. CORONA: Your Honor, the offer on that was on Count One, violation of Penal Code Section 211.

THE COURT: The recommendation is for early furlough so even if I were to impose 120 days, he would be eligible for furlough now or not? What's his performance been like in the hall?

THE PRESENTER: I can look that up, Your Honor. Your Honor, there's minor infractions. Nothing serious.

THE COURT: [redacted] anything you want to say?

THE MINOR: No.

THE COURT: All right. I read and considered the dispositional memorandum dated February 3rd, 2017. And disposition is as follows: Although -- I'll just say this preliminarily. Although Count One is the primary offense by virtue of the fact that carries the longest maximum, the real crime here in my view is the beating that Mr. Salisbury took at Harris and Balsam street. Even putting the best face on it and assuming that a robbery did occur, it was a relatively benign robbery, if I can say it that way, in comparison to the beating that Mr. Salisbury took at Harris and Balsam. That said, I think [redacted] has served a sufficient amount of time in custody for

that offense.

So it's my intention to order him to serve 67 days on that. If I were to order 120 and if he were to be released on early furlough, the additional time would be served on electronic monitoring. I intend to impose a good amount of electronic monitoring anyway as recommended by probation. So I don't see the need for any more. He doesn't have any electronic monitoring credit I assume?

THE PRESENTER: No, Your Honor.

THE COURT: He's been in the hall the whole time?

THE PRESENTER: Correct.

THE COURT: So disposition is as follows: [redacted] [redacted] is adjudged a ward of the Juvenile Court of Sacramento County. He's committed to juvenile hall to serve 67 days with credit for the 67 days he's already served.

Upon completion of the juvenile hall commitment, the minor is committed to the care and custody of his mother, Joallen [redacted] under the supervision of the probation officer.

I'll impose 60 days of electronic monitoring as recommended in special condition one. And 10 days of juvenile work project as recommended in condition number two.

Mr. Corona, did you want to address any of the other conditions?

MR. CORONA: I did, Your Honor. I noted that probation recommended three separate curricula as part of his probation. I think at this time that would be a little excessive and redundant. I would ask it to be limited to the biggest need maybe perhaps is the aggression and relationships. And just that

as it relates to juvenile work project, I would just submit.

And sorry, Your Honor. I did notice there's a no association with [redacted] Feka. I think that's Mr. Faalogoifo. They are friends. I think it would be unrealistic considering they live near each other, and they do hang out with each other that they do not associate. I would ask that the Court not impose that specific condition. That's on page nine of the probation report.

MR. GRIMES: Where's the counseling listed?

MR. CORONA: It's on page 10.

THE COURT: Mr. Grimes?

MR. GRIMES: Your Honor, I would ask that the counseling that is listed on page 10 at item eight be imposed in full. I think that it's all warranted given the behavior that [redacted] has demonstrated in this case.

I think also the gang component that's issued there in 8B is warranted in light of the fact that the social studies report has him listed as a Del Paso Heights Blood associate there on page three towards the bottom.

I would also ask that the no association order with the co-minor be imposed. I think that these young men were acting with pack mentally that day with the victim, and they should not be allowed to associate together. And I would actually ask the Court to impose nonassociation orders with the other minors that were identified by Officer Eagleton in his testimony.

MR. CORONA: If I may address the issue of the gang curricula and the association with Del Paso Heights. I think it's common practice with probation to ask detainees whether or

not he associates in a general sense with certain members of certain gangs. Living in a certain areas of Sacramento County will naturally associate someone with certain type of gang. Association is not an admission of being a gang member. And I don't think that gang member curricula at this time is warranted given that he's not been classified as a Norteno or Del Paso Heights or any kind of gang member. I think that is there principally to separate him from other members who might not look at him too kindly for the fact that he resides in a specific area.

THE COURT: Well, he did admit that he associates with Del Paso Heights Bloods, and I think that's sufficient for me to order gang counseling. And I think that's in his best interest as well. I'm also looking at the PACT scores. His PACT scores are quite high in both attitudes and behavior and aggression. So I think that counseling is warranted as well.

Ma'am, you've had your hand up for a while. Is there something you want to say?

MINOR'S AUNT: Yes. If he was saying something about them not associating with each other, they go to the same school and the other kids live across the street from me. We all live in the neighborhood. So they can't go to school together or they're in trouble? They are friends. They're just being gang in partial -- I don't understand.

THE COURT: Tell me what your feeling is about the friend that we're talking about.

MINOR'S AUNT: You're talking about the kids that was --

THE COURT: [redacted], for instance.

MINOR'S AUNT: Him and [redacted], they go to school together, and they're friends. Like brothers.

MINOR'S MOTHER: Other kids that were with him didn't get arrested. They live right across the street.

THE COURT: Do you consider them good influences?

MINOR'S MOTHER: No, not good influences. They're kids.

MINOR'S AUNT: They all hang out together. If he step out the door, he'll get in trouble for talking to them? He said stay away from them. They're right there.

THE COURT: If I order it, that's going to be his obligation.

MINOR'S AUNT: That's right. You're right about that. But I'm just asking why when you say that we all live in this little community. I'm not saying that it's wrong, but how could you not be walking home from school together, and then the police pull up and say you violated because they go to the same direction.

THE COURT: Well, they'll have to walk at a distance from one another. That's what nonassociation means.

MINOR'S AUNT: I understand.

THE COURT: My question to you is do you think -- what do you think about those individuals that live across the street from you? What do you think?

MINOR'S AUNT: They just moved there. I really don't know too much about them. But I'm finding out, you know, different things. I don't know too much about them.

THE COURT: What kind of different things are you finding out?

MINOR'S AUNT: I mean they're in and out. They come. They

go. They hang with the kids, and they're in the neighborhood. I don't know them that well. But I know they're my neighbors now, and [redacted] you know, talks to them.

THE COURT: Well, part of the reason for ordering that someone not associate with someone else is to avoid them getting into more trouble.

MINOR'S AUNT: Exactly. You're right.

THE COURT: It would be for [redacted] protection.

MINOR'S AUNT: You're right.

THE COURT: And the question is do you think that's necessary? Are you worried about the kind of kids that [redacted] is hanging out with?

MINOR'S AUNT: Yeah. Yes, I am. And that's why he was in there. Now, the people that were with him, all those -- all those in the video, I don't see them getting charged, and they there just as much as he was. Just because he threw that thing at him because he was swinging a belt at him. He could have hit him or any one of them. But [redacted] just said oh, no, and that's it. The kids -- I don't know what was going on, but he's the only one getting charged and getting a felony or whatever.

THE COURT: Well, he is the one who was identified as the attacker.

MINOR'S AUNT: I understand.

THE COURT: Either party want to further address the issue of the nonassociation?

MR. CORONA: I would just submit and ask the Court to consider [redacted] aunt's comments on the issue.

THE COURT: Well, I will order the nonassociation as to

[redacted]. Probation isn't recommending nonassociation with either of the other individuals. And I have those names in my notes somewhere. But, Mr. Grimes, are you pursuing that?

MR. GRIMES: It would be our request that the order be imposed. I agree with the family that those individuals are equally culpable certainly for certain crimes. Maybe not to the extent that [redacted] is. But when I look at the video and I look at the video in this case, I tend to agree they are culpable which is why I think the nonassociation order is appropriate.

THE COURT: Well, interestingly, the video shows that when a group was advancing on Mr. Salisbury, and I'm talking about the incident that caused him to remove his belt and start swinging it over his head, [redacted] remained back and didn't participate in that. It was [redacted] and the two other individuals who advanced. And that's the only evidence I have except of any misconduct by [redacted] except for Salisbury's testimony that's uncorroborated regarding the general dollar -- the Dollar General incident.

MR. GRIMES: I would submit it, Your Honor.

THE COURT: Well, I'll order the no contact as to [redacted] for the reason that he has his own sustained petition, but I won't order nonassociation with any of the other juveniles who were involved that day.

So, [redacted] what that means is you're to have no association with [redacted]. If you're walking to school, you're going to have to keep a separation there. You'll have to walk in front of him or behind him but clear enough distance so nobody can say that you're associating with him and that means also no electronic communication, text messages, social media, phone

calls, anything of that sort.

THE MINOR: All right.

THE COURT: Did you have a question about that?

THE MINOR: Yeah. About the school. How would I do like that if we're on campus?

THE COURT: So at school unless you have a class together, you're going to have to do the same thing. Steer clear so you have no contact. If he comes up to you, you're going to have to say I can't be seen with you. You have to let him know that he just can't do that. Now if it's in class, you can have association with him but only with reference to school work. Is that clear?

THE MINOR: Yeah.

THE COURT: Okay. I will impose as I said before all three forms of counseling, the aggression and relationships, the gang and the attitudes and behavior. Those are all justified by the PACT scores, and I think would be beneficial to [redacted]

I'll reduce the restitution fine to $250 based on the counts that were sustained. And I assume we need to set a restitution hearing.

MR. CORONA: Yes.

MR. GRIMES: Yes.

THE CLERK: Restitution report will be due May 18th with a hearing of June 2nd at 8:30 in Department 97.

THE COURT: All right. That will be the order.

MR. CORONA: What were those dates again?

THE COURT: June 2nd for the hearing.

THE CLERK: The report will be due May 18th.

THE COURT: And I'll impose all general conditions of probation. Anything further we need to do today?

MR. CORONA: I don't think so, Your Honor.

MR. GRIMES: No, Your Honor.

THE COURT: All right. Hold on just a second. [redacted] you have the right to appeal from my judgment. So if you disagree with any part of my judgment, you can appeal to a higher court. If you want to appeal, you have to file a written notice of appeal. That has to be done within 60 days of today date. In that appeal you must tell the Court exactly what it is you're appealing, whether you are appealing from my entire judgment or from some portion of it. And your notice must be signed. Do you understand your appeal rights as I've described them to you?

THE MINOR: Yeah.

THE COURT: Do you have any questions?

THE MINOR: No.

THE COURT: All right. All right. Good luck.

THE PRESENTER: Your Honor, do you want him hooked up prior to release?

THE COURT: If possible, yes.

(Proceedings concluded.)

ATTACHMENT B

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re D.W., a Person Coming Under the Juvenile Court Law.	C084673
THE PEOPLE, Plaintiff and Respondent, v. D.W., Defendant and Appellant.	(Super. Ct. No. JV137775)

The minor, D.W., appeals the juvenile court order sustaining allegations of two counts of assault with a deadly weapon. He contends: (1) the juvenile court denied him due process by failing to consider his claim of self-defense; (2) there is insufficient evidence he did not act in self-defense; and (3) amendment of the charging document after the matter was submitted deprived him of due process. We affirm the order.

I. BACKGROUND

C.S. was walking near a general store on his way to a nearby liquor store. A group of "teens," including the minor, surrounded C.S. and asked him to buy them a "blunt wrap." Instead, he gave them a dollar. One of the teenagers hit C.S. in the mouth and took his money. The minor was not the person who punched him. C.S. followed the group from the market and tried to call 911.

C.S. followed the group to the parking lot of a supermarket. He testified they turned toward him and attacked him, grabbed tools out the back of a nearby truck, and threw the tools at him. Those items included a caulking gun, boards, and crutches. The minor threw several items at him, including the caulking gun, which grazed C.S.'s elbow. Surveillance footage showed the minor take an item from the back of a truck and throw it at C.S. The footage did not show other items being removed from the truck. After the minor threw the caulking gun, C.S. took his belt off and began swinging it in circles over his head in order to "deter" the group.

A security guard working at the supermarket saw C.S. swinging a belt, and a group of teenagers. They were all yelling back and forth at each other. When the guard yelled out, the group of teenagers started to leave, and C.S. remained. C.S. received a call from the 911 dispatcher. C.S. told the guard the group had "tried to rob" him. The guard called the teenagers back. When they returned, one of them showed the guard a bleeding cut on his forearm and another told the guard that C.S. was following them and acting weird. The guard did not recall the teenager with the cut say that C.S. had cut him, but he believed C.S. had assaulted him and was prepared to detain C.S. The group did not claim C.S. had a knife and declined to report the incident to the police. C.S. told the guard the group had attacked him and tried to rob him, and he was following them. When the group left the supermarket parking lot, C.S. again followed them.

C.S. maintained some distance from the group. In the area of Harris Avenue and Balsam Street, C.S.'s phone connected with 911 and he told the dispatcher, "I got

robbed." During the call, C.S. repeatedly screamed, yelled for help, and sounded distressed. C.S. told the dispatcher that his attackers used a "[b]ig bat" and then said, "[T]hey're trying to hit me with bats." C.S. told the dispatcher that the group "stole some shit out of a guy's truck" and used it to hit him. He also yelled, "Get away bro. Help. No, no." According to C.S., during this attack, the minor rushed at him and hit him in the head with a "two-by-four." The altercation ended when the minor jumped over a fence, fell on his face, and ran away. According to C.S., he suffered several injuries as a result of the altercation.

When Officer David Burnett arrived at the scene, he found C.S. bleeding from his head, his backpack on the ground, and his possessions strewn on the ground. C.S. had lacerations on his left temple and upper lip, and his jaw looked as if it was swelling. C.S. described his assailants. Officer Burnett showed C.S. a photographic lineup, and C.S. identified the minor as the person who had hit him.

C.S.'s trial testimony and statements had many inconsistencies. C.S. initially denied "pulling" a knife during the altercation. He later stated he had acted like he had a weapon, then later admitted he had told Officer David Eagleton he had pulled a knife to defend himself and lost it during the struggle. At trial, he did not remember pulling out a knife.

C.S. initially told Officer Burnett that a group of four young men took $19, a cell phone, and sunglasses from him. He followed them, they threw rocks and bricks at him, and when they got to the supermarket, one of the young men hit him with a pipe. Burnett testified that C.S. told him that the incident began when four male teenagers approached him and asked for a dollar. As he reached into his pocket, one of them punched him. After he was punched, all four teenagers searched through his pockets and took approximately $19. They also took a Samsung Galaxy phone.

A few days later, Officer Eagleton interviewed C.S. C.S. told Officer Eagleton that he followed the teenagers, including the minor, to Harris Avenue—around the corner

from the supermarket—where the group attacked him by hitting him with boards, rocks, and crutches. C.S. specified that the minor was the one who hit him with a two-by-four with a nail in it. The other teenagers were responsible for hitting him with rocks and crutches. After Officer Eagleton showed C.S. the surveillance video from the supermarket, C.S. admitted that he had a knife with him during the confrontation. He insisted, however, that he did not use it until after they had left the supermarket. And, he only pulled it out after they left the supermarket because they began hitting him. C.S. told Officer Eagleton that when the teenagers started hitting him with boards and rocks, he "brought out his knife and started threatening them with the knife." None of the items that C.S. said he was hit with were ever recovered from the scene.

Officer Eagleton recognized the minor from the surveillance video and went to interview him. During his interview of the minor, Officer Eagleton observed a bruise on the minor's left forearm "that appeared to be in a squared off U-shape, almost like a belt buckle." The minor resisted efforts to have his arm with the buckle-shaped bruise photographed. Three officers wrestled the minor to the ground to get him to comply. He then spit blood on Officer Eagleton's shoes and the wall in the interview room.

The defense presented evidence of an unrelated incident in 2015 in which C.S. intimidated passengers on the light-rail train and threatened to beat one passenger who confronted him. C.S. had a knife and swung it at a transit security guard. C.S. told a police officer that he was defending himself against an attack.

An original Welfare and Institutions Code section 602 petition charged the minor with robbery (Pen. Code, § 211—count one),[1] assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)—count two), assault with a deadly weapon, a pipe (§ 245, subd. (a)(1)—count three), misdemeanor battery on a peace officer (§ 243, subd.

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[1] Undesginated statutory references are to the Penal Code.

(b)—count four), and misdemeanor resisting or delaying a peace officer (§ 148, subd. (a)(1)—count five).

Following a contested jurisdictional hearing, and after the matter was submitted for decision, the juvenile court raised an issue about whether there was a fatal variance between the trial testimony and count three as alleged, in that the evidence showed that C.S. was hit with a two-by-four with a nail, not a pipe. The minor's counsel objected on due process grounds. After hearing arguments and reviewing the parties' closing arguments, the juvenile court noted it could not find any prejudice to the defense under the circumstances of this case and could not discern how the defense would have conducted the trial differently. Relying on *In re Man J.* (1983) 149 Cal.App.4th 475 (*Man J.*), the juvenile court found the charge was the same and granted the prosecution's request to amend the wardship petition to specify assault with a "two-by-four with a nail" rather than a pipe as to count three.

Following the amendment, the juvenile court found all of the allegations true except the robbery in count one (§ 211). In making this finding, the trial court noted C.S. was an unreliable reporter, as his testimony was confusing, internally inconsistent, and inconsistent with prior accounts. The trial court suspected C.S. had some type of mental disability. Nonetheless, the juvenile court concluded irrespective of the unreliability of C.S.'s testimony, he was clearly beaten that day, based on his injuries and the 911 call. C.S. immediately identified the minor as his attacker and that identification was corroborated by the surveillance video from the supermarket. The surveillance video also showed minor advancing on C.S. and throwing an object at him. The trial court concluded, "[The minor] . . . had a motive to attack [C.S.]. He was clearly irked by the fact that [C.S.] continued to follow the group . . . . [¶] There are no facts which support self-defense. Even if for the sake of argument [minor] felt justified in his anger of being followed, there's no justification for committing a battery under such circumstances."

At the dispositional hearing the juvenile court declared the minor a ward of the court and granted probation. He was ordered to serve 67 days in juvenile hall with credit for 67 days.

II. DISCUSSION

A. The Court Considered Minor's Self-Defense Claim

The minor contends the trial court violated his due process rights by refusing to consider his self-defense claim. He argues this error relieved the prosecution of its burden to prove beyond a reasonable doubt that he was not acting lawfully in self-defense.

We disagree with the minor's interpretation of the record. The minor reads the trial court's statement, "There are no facts which support self-defense," as a refusal to consider the defense. The more accurate reading of that statement is that the trial court considered the claim and rejected it. The juvenile court did not exclude evidence of self-defense nor did it preclude counsel from arguing the minor acted in self-defense. The juvenile court took the matter under submission and reviewed the videos and exhibits before making its decision. Nothing in the record supports the conclusion the juvenile court refused to consider minor's claim of self-defense; rather, the record indicates, based largely on the surveillance video and 911 calls, the juvenile court rejected that claim as unpersuasive and unsupported by the evidence. Instead, the court found that D.W. was angered by C.S. following him and his group of friends, and D.W. was motivated by that anger to attack C.S. Thus, the court impliedly found that D.W. was the aggressor and that he did not act out of fear that C.S. would harm him or the group.

B. Court's Ruling on Self-Defense

The minor contends the juvenile court's findings of assault with a deadly weapon must be reversed, as there was insufficient evidence to prove he did not act in self-defense.

To establish self-defense as a justification for battery, " 'the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him. [Citation.]' [Citation.] The threat of bodily injury must be imminent [citation], and '. . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citation.]' " (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065.) Imminent harm is not that which appears to be prospective or even in the near future. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) " ' "An imminent peril is one that, from appearances, must be instantly dealt with." ' " (*Ibid*., italics omitted.)

Whether defendant's conduct constituted an act of defense of himself or another, or an unlawful use of force, is a factual question. Therefore, the appropriate standard of review is sufficiency of the evidence. (*People v. Colbert* (1970) 6 Cal.App.3d 79, 85.)

When assessing the sufficiency of the evidence, we consider the entire record in the light most favorable to the judgment below to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Hawkins* (1995) 10 Cal.4th 920, 955, abrogated on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) This same standard applies in reviewing juvenile cases. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence, including reasonable inferences based on the evidence. (*People v. Tran* (1996) 47 Cal.App.4th 759, 771-772.) We do not reweigh evidence or determine if other inferences more favorable to the defendant could have been drawn from it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

The surveillance video showed C.S. following the minor and his friends to the supermarket. He maintained a significant distance between them, but it appeared there was some verbal interaction between the minor and C.S., with him turning and pointing aggressively at C.S. As the group was leaving the store, the minor apparently realized C.S. was still following them, at a distance, and he walked back towards C.S. He turned

back around and continued with his friends. As he passed the pickup truck, he slowed as he looked in the bed of the truck. He stopped and his friends continued on. The minor then walked back to the truck and C.S. stopped. Three of the minor's friends came back to join him. The minor grabbed something out of the truck and walked back toward C.S. C.S. turned and walked away, the minor and his friends continued to approach him, then C.S. removed his belt. The minor continued to approach C.S. as he backed away with his hands up. As the group continued to approach him, C.S. started swinging the belt around. The minor and his friends backed up, then the minor stopped, stood his ground with C.S., and threw the caulking gun at him. C.S. walked away and the group followed him. Then the group walked away. Nothing in this video suggests the minor or his friends were under an imminent threat of bodily injury. To the contrary, there is no evidence C.S. threatened violence, swung his belt, or pulled a knife until the minor aggressively approached him.

As to the later incident, where minor hit C.S. with a two-by-four, there is no evidence the minor had an honest and reasonable belief he was in imminent danger of bodily harm. There is no evidence defendant threatened violence verbally or physically. There is no evidence he got any closer to the group than was previously noted in the surveillance videos. There is no evidence the minor thought C.S. was going to assault him or his friends. The only evidence as to that charge is C.S.'s testimony and statements, the 911 call, and the injuries to C.S. In the 911 call, as he was reporting the group robbed and hit him, he reported one had a stick and was coming toward him and hitting him. The call was filled with his cries for help.

In sum, there is no evidence in this record that the minor and his friends were in imminent peril from C.S. that needed to be dealt with instantly. Accordingly, substantial evidence supports the juvenile court's determination that the minor did not act in self-defense.

C. Amendment to Petition

Minor contends the trial court abused its discretion in permitting the amendment of the petition. He claims this error denied him his due process rights to "prepare and present a defense to the new offense."

Due process requires that a minor have adequate notice of the charge so that they may intelligently prepare a defense. (*In re Robert G*. (1982) 31 Cal.3d 437, 442.) Compliance with this requirement mandates that the minor be notified, in writing, of " 'the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation.' [Citation.]" (*Ibid*.) But a juvenile court may allow an amendment of a wardship petition to correct or make more specific the factual allegations supportive of the charged offense when the nature of the charge remains unchanged. (*Man J., supra*, 149 Cal.App.3d at pp. 479-480.) The court's decision to allow amendment of a petition is reviewed for abuse of discretion. (*Id*. at p. 481.)

In *Man J.*, the petition alleged that the minor maliciously damaged four vehicles, all belonging to one victim. At the close of trial, the court amended the petition to conform to proof: that the vehicles belonged to different individuals. (*Man J., supra*, 149 Cal.App.3d at p. 478.) The Court of Appeal affirmed and held that the amendment did not deny the minor due process. (*Id*. at p. 481.) The court concluded that: "At all times the minor was on notice as to the charges and the allegations against which he would have to defend." (*Id*. at pp. 479-480.)

Here, the juvenile court determined that its amendment to reflect the weapon was a two-by-four with a nail, rather than a pipe, was in the nature of a *Man J.* amendment because the charging statute remained the same, assault with a deadly weapon; only the factual allegation in support of the offense charged, the specific weapon used, was amended. The proof and defenses would be the same as to each. The defense never

challenged the type of weapon used. Rather, the defense was that the minor acted in self-defense, that the minor's conduct was reasonable, and the prosecution was required to prove the minor did not act in self-defense. We agree with the court's analysis and find no abuse of discretion.

III. DISPOSITION

The order is affirmed.

RENNER, J.

We concur:

MURRAY, Acting P. J.

HOCH, J.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re D.W., a Person Coming Under the Juvenile Court Law.	C084673
THE PEOPLE, Plaintiff and Respondent, v. D.W., Defendant and Appellant.	(Super. Ct. No. JV137775) ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

Appellant filed a petition for rehearing with this court. It is ordered that the nonpublished opinion filed herein on January 17, 2020, be modified as follows:

1. At page 2 of the slip opinion, modify the fourth sentence in the first paragraph, so that the sentence reads:

C.S. testified one of the teenagers hit C.S. in the mouth and took his money.

2. At page 2 of the slip opinion, modify the second paragraph to read in its entirety:

C.S. followed the group to the parking lot of a supermarket. He testified they turned toward him and attacked him, grabbed tools out the back of a nearby truck, and threw the tools at him. Those items included a caulking gun, boards, and crutches. C.S. testified the minor threw several items at him, including the caulking gun, which grazed C.S.'s elbow. C.S. testified that after the minor threw the caulking gun, C.S. took his belt off and began swinging it in circles over his head in order to "deter" the group.

3. At page 2 of the slip opinion, following the now modified second paragraph, add the following third paragraph:

Surveillance footage showed the minor take an item from the back of a truck and he and the other teens walked toward C.S. C.S. retreated as they continued toward him. C.S. then removed his belt and began swinging it in the air. The minor stood his ground and positioned himself as if to engage with C.S., and the minor then threw the item at C.S. The footage did not show other items being removed from the truck.

4. At page 2 of the slip opinion, following the eighth sentence in the fourth (previously the third) paragraph that reads "The guard did not recall the teenager with the cut say that C.S. had cut him, but he believed C.S. had assaulted him and was prepared to detain C.S." add the following sentence:

The guard also did not recall the teens claiming C.S. had a knife.

5. Modify the next sentence which reads "The group did not claim C.S. had a knife and declined to report the incident to the police" to read in its entirety:

The teens declined to report the incident to the police.

6. At page 8 of the slip opinion, in the second sentence of the first full paragraph, modify the sentence to read in its entirety:

There is no evidence C.S. threatened violence verbally or physically.

There is no change in the judgment. Appellant's petition for rehearing is denied.

BY THE COURT:

MURRAY, Acting P. J.

HOCH, J.

RENNER, J.

ATTACHMENT C

Court of Appeal, Third Appellate District - No. C084673

S260891

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re D.W., a Person Coming Under the Juvenile Court Law.

THE PEOPLE, Plaintiff and Respondent,

v.

D.W., Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice