NO. S_____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. **JESUS CAMARILLO,** Defendant and Appellant.	First Appellate District, Division Five, Case No. A155577 Solano County Superior Court No. FCR331711; The Honorable, Judge E. Bradley Nelson

APPELLANT'S PETITION FOR REVIEW

**(Application for Permission to File Oversized Petition for Review;
Petition for Writ of Habeas Corpus And
Request for Judicial Notice Filed Concurrently)**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant / Appellant Jesus Camarillo ("appellant"), hereby petitions this Court to review the unpublished appellate decision filed by the First Appellate District Court of Appeal, Division Five, on January 20, 2021 (the "opinion"), affirming the judgment of conviction, but remanding for resentencing. The opinion is appended hereto as Appendix "A."

ISSUES PRESENTED

1. Should jurors be instructed to consider a defendant's youth as a factor in determining whether he or she subjectively believed in the need to use deadly force, and whether that belief was objectively reasonable, when an adolescent asserts self-defense as a defense to murder and/or attempted murder? (*People v. Humphrey* (1996) 13 Cal.4th 1073 (*Humphrey*); *J.D.B. v. North Carolina* (2011) 564 U.S. 261 (*J.D.B.*).)[1] Alternatively, if such an instruction is a "pinpoint" instruction, did defense counsel render ineffective assistance by failing to request jurors consider appellant's youth? And, if an instruction on youth was required, did the Court of Appeal err in concluding that the absence of an instruction was harmless?

2. When a prosecutor relies extensively on an inapplicable instruction in closing and rebuttal arguments which lightens the government's burden of proof—that "self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force" (CALCRIM No. 571)—is the error in giving the instruction rendered harmless because the court also instructed the jury that not all instructions apply?

3. Did defense counsel render ineffective assistance by failing to object to the prosecutor's misstatements of law during closing argument that diminished or negated appellant's plea of self-defense?

4. Did the cumulative errors related to appellant's plea of self-defense deny him due process and a fair trial (U.S. Const. V. & XIV. Amends.)?

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[1] References to "self-defense" include perfect and imperfect self-defense, unless otherwise indicated.

REASONS WHY REVIEW SHOULD BE GRANTED

Research in adolescent brain development has shown, and continues to show, fundamental, biological differences between adolescent and adult minds. Neurobiological research has long shown that the higher-order processing centers of the brain, those portions of the brain responsible for regulating impulse or self-control, emotions, and long-term thinking, do not reach full maturity until at least the mid-20s. "Time and again," the Supreme Court has reached the commonsense conclusions that children are " 'generally are less mature and responsible than adults,' " they " 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' " and "they 'are more vulnerable or susceptible to . . . outside pressures' than adults[.]" (*J.D.B., supra,* 564 U.S. at 272; *Roper v. Simmons* (2005) 543 U.S. 551, 569; *Graham v. Florida*, 560 U.S. 48, 68.) " 'Our history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." (*J.D.B.*, at 274.)

Youth has been a consideration in many different arenas. (See e.g., *J.D.B., supra,* 564 U.S. at 274 [in negligence suits, all American jurisdictions recognize childhood as a relevant circumstance]; *Kirby v. Alcoholic Bev. etc. App. Bd.* (1968) 267 Cal.App.2d 895, 899 [minors cannot purchase alcohol]; *In re T.A.J.* (1998) 62 Cal. App. 4th 1350, 1364 [sex between mutually consenting teenagers is illegal in almost every state]; *Nat'l Rifle Ass'n, Inc. v. Bureau of A.T.F.* (5th Cir.2012) 700 F.3d 185 [young adults between 18 and 21 years old cannot buy guns].)

The differences between children and adults has perhaps been most emphasized in the context of punishment. Eighth Amendment jurisprudence is replete with the recognition that children cannot be treated as miniature adults. (*Haley v. Ohio* (1948) 332 U.S. 596, 599-600; *Gallegos v. Colorado* (1962) 370 U.S. 49, 54*; Eddings v. Oklahoma* (1982) 455

U.S. 104, 115; *Thompson v. Oklahoma* (1988) 487 U.S. 815; *Stanford v. Kentucky* (1989) 492 U.S. 361; *Johnson v. Texas* (1993) 509 U.S. 350; *Gall v. United States* (2007) 552 U.S. 38, 58; *Roper, supra,* 543 U.S. 551; *Graham v. Florida*, 560 U.S. 48; *Miller v. Alabama* (2012) 567 U.S. 460; *Montgomery v. Louisiana* (2016) __ U.S. __, 136 S.Ct. 718.)

This Court has also recognized that children cannot be treated as adults when it comes to punishment. (See e.g., *People v. Caballero* (2012) 55 Cal.4th 262; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1360; *People v. Franklin* (2016) 63 Cal.4th 261; *People v. Contreras* (2018) 4 Cal.5th 349.) The California Legislature has also relied on advances in adolescent brain development research to justify legislative protections for adolescents and young adults. In 2013, the Legislature mandated parole hearings for youthful offenders, requiring the Board to consider youth as a factor in mitigation if the defendant was age 18 or younger when they committed the controlling offense. (Senate Bill No. 260 (2013–2014 Reg. Sess.), enacting section 3051.) Citing much of the same research, in 2015 California increased the age for youth offender parole hearings for individuals who committed their crimes at or before the age of 23 (S.B. No. 261, Stats.2015, ch. 471, § 2), and in 2018, it increased it again to age 25. (§3051; Stats.2017, ch. 684 (S.B.394), §1.5, eff. Jan. 1, 2018.) The Legislature made these changes in light of scientific evidence that "certain areas of the brain, particularly those affecting judgment and decision-making, do not develop until the early-to-mid-20s." (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1308 (2017–2018 Reg. Sess.) as amended Mar. 30, 2017, p. 2.).

With respect to other areas of juvenile punishment, Justice Liu has written to express concerns that it may be time for the Legislature to rethink the old *Roper* line, in light of changes in the legal and scientific landscape. (*People v. Montelongo* (2020) __ Cal.App.5th __, 274 Cal.Rptr.3d

267 (S265597: statement concurring from denying petition for review); see also *In re J.E.* (2020) __ Cal.App.5th __, 273 Cal.Rptr.3d 113, 125 (S265077: Justice Liu's statement dissenting from the denial of review, in which Justice Cuéllar concurred).

The same research concerning adolescent brain development also supports the conclusion that youth should be considered when an adolescent's state of mind is called into question. Almost a decade ago, in *J.D.B.*, the High Court held that youth must be considered in determining whether a suspect is "in custody" for purposes of a *Miranda*[2] analysis. Notwithstanding that a custody inquiry is purely objective, the Court held the test for determining whether or not a juvenile was "in custody" must be evaluated through the lens of a reasonable juvenile, not an adult, because youth, " 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.' " (*J.D.B., supra,* 564 U.S. at 271-272.) Once again citing adolescent brain development research, the Supreme Court found "[youth] is a fact that 'generates commonsense conclusions about behavior and perception[]' [and these] conclusions apply broadly to **children as a class**." (*J.D.B.,* at 272.)

Other states have also considered youth in assessing an adolescent's state of mind. (See e.g., *J.R. v. State* (Alaska Ct. App. 2003) 62 P.3d 114, 114 [court committed instructional error because "the jury should have judged whether [defendant's] conduct was reckless against the standard of a reasonable juvenile—i.e., a reasonable person of his age, intelligence, and experience under similar circumstances"]; accord, *In re William G.* (Ariz. Ct. App. 1997) 963 P.2d 287, 293; *In re Welfare of S.W.T.* (Minn. 1979) 277 N.W.2d 507, 514.)

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

It is time for California to take the next necessary step and determine whether youth should be considered when an adolescent's state of mind is at issue, particularly when an adolescent is tried as an adult. This case is ideal for such a determination. Appellant was tried in adult court for a murder and attempted murder he committed at just 16 years old, and he asserted a plea of self-defense. A defendant claiming self-defense is required to "prove his own frame of mind." (*People v. Davis* (1965) 63 Cal.2d 648, 656; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065.) "[A] jury must consider what 'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge. . . .' [Citation.]" (*Humphrey, supra,* 13 Cal.4th at 1082-1083.) Although the test is objective, "reasonableness is determined from the point of view of a reasonable person in the defendant's position." (*Minifie,* at 1065.) To evaluate whether defendant's belief in the need to defend is objectively reasonable, " '. . . a defendant is entitled to have a jury take into consideration all the elements in the case which might be expected to operate on his mind. . . .' " (*Humphrey,* at 1083.) As explained, the development of the human brain is the most critical factor operating on an adolescent's mind. "By precluding [a] jury from considering . . . evidence as it pertain[s] to the reasonableness element of self-defense, [a] trial court fail[s] to consider that the jury, in determining objective reasonableness, must view the situation from the defendant's perspective." (*Id*. at 1086.)

Appellant urges this Court to grant review to decide a question of first impression with far-reaching implications: should juries be instructed to consider youth as a factor in determining whether a defendant subjectively believed in the need to use deadly force, and whether that belief was objectively reasonable when an adolescent asserts self-defense as a defense to murder and/or attempted murder? (*J.D.B., supra,* 564 U.S.

261; *Humphrey, supra,* 13 Cal.4th 1073; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1205; *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 751; *People v. Mathews* (1994) 25 Cal.App.4th 89.) Courts and juries should not blind themselves to the commonsense reality that children are not simply miniature adults.

Review should be granted to settle important questions of law, and to afford this Court the opportunity to review all of appellant's federal constitutional claims on the merits. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 845.)

STATEMENT OF JURISDICTION

On October 9, 2018, appellant timely appealed from the jury's verdicts and sentence pronounced on August 31, 2018 (CT 266), pursuant to Penal Code section 1237, subdivision (a).[3] On January 20, 2021, the First Appellate District Court of Appeal, Division Five, filed its unpublished opinion, affirming the judgment of conviction but remanding for resentencing. (Appendix A.) On January 29, 2021, appellant filed a petition for rehearing because the reviewing court omitted or misstated over 30 material facts relevant to appellant's claim of self-defense, and it applied the wrong standard in analyzing prejudice from instructional error under *People v. Mil* (2012) 53 Cal.4th 400, 417-418. Rehearing was denied on January 29, 2021 (Appendix B), and this petition for review timely follows.

STATEMENT OF THE CASE

Appellant's case was transferred to adult court after a contested juvenile transfer hearing at which Dr. Elizabeth Cauffman, one of the world's leading experts on adolescent brain developmental, testified. The operative Second Amended Information charged appellant, along with

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[3] All further statutory references are to the Penal Code, unless otherwise indicated.

Jorge Hernandez, with the murder of Sulpicio Rios (count 1: § 187, subd. (a)), and attempted murder of Eduardo Ramirez (count 2: §§ 664 / 187). Gang (§ 186.22, subd. (b)), and firearm enhancements (§ 12022.53, subds. (b), (c) & (d)) were alleged as to each count. (CT 51-54.)[4] The jury acquitted appellant of first degree murder and found the gang enhancements **not** true on either count, but found appellant guilty of second degree murder (count 1) and attempted murder (count 2), with true findings on the firearm enhancements under section 12022.53, subdivisions (d) & (c), respectively. (CT 198-200, 204-205 [verdicts].)

On August 31, 2018, the case was called for a *Franklin* hearing and sentencing. (15RT 628.) Appellant was ordered to serve a determinate sentence of seven years on count 2, consecutive to an indeterminate term of 40 years to life on count 1. (15RT 641-643.)

STATEMENT OF FACTS

A. APPELLANT'S GROUP IS ATTACKED BY NORTEÑO GANG MEMBERS AT A 7-ELEVEN CONVENIENCE STORE.

On December 10, 2016, 16-year-old Camarillo got together with Sevren Mangskau, Jorge Hernandez, and Joel Melendez to go to a party in Fairfield. (9RT 440-441.) Around 8:00 p.m., they went to a taco truck located down the street from a 7-Eleven convenience store in the City of Fairfield. (8RT 267, 316-317.) They placed their food orders and went to the 7-Eleven to get drinks. (8RT 268-270, 318-319, 338.)

Camarillo and Mangskau went inside the store. Melendez waited in the car parked in front of the entrance. As Hernandez walked towards the entrance, his attention was drawn to two men wearing red

[4] Hernandez entered into a leniency agreement with the prosecution and pled no contest to being an accessory after the fact (§ 32) in exchange for his testimony. (5RT 45, 50.)

clothing–Ernesto Garcia, who was in his 30's, and Eduardo Ramirez—and woman, Elena Jimenez, who were also approaching the entrance. (8RT 270, 7RT 122-126.) Ramirez and Garcia were documented Norteño gang members (9RT 393, 400-402), Jimenez was an associate of the Noterño gang. (9RT 405.) Garcia was wearing a red shirt and Ramirez was wearing a red and black plaid jacket, colors worn by Norteño gang members. (7RT 126.)

Hernandez grew concerned because Garcia and Ramirez looked like Norteño gang members and at the time he and Camarillo were Sureño gang members. The two gangs are rivals. (8RT 271-273, 319, 9RT 389-390.) The 7-Eleven was in Sureño territory and not often frequented by Norteños. (7RT 129, 8RT 275.)

Hernandez stopped to hold the door open for Garcia and Ramirez. (8RT 275.) When they were face-to-face, Garcia asked Hernandez, "What's up bitch ass nigga?" and Hernandez replied by asking Garcia if he knew where he was, referring to the fact he was in Sureño territory. (7RT 128-129.) Hernandez asked, "What the fuck?" and Garcia and Ramirez called Hernandez a "Fucking scrap." (8RT 276.)

Garcia then cold-cocked Hernandez, punching him directly in the face without warning. (7RT 129, 154, 157, 8RT 277, 9RT 414.) The unprovoked attacked was captured on the store's surveillance cameras and played for the jury at trial.[5] (Exh. No. 1 [Ch. 12 at 20:41:55–20:42:04].) Garcia attempted to continue to assault Hernandez but he ran away, past the car where Melendez was seated.

Melendez got out of the car and Garcia engaged him in a fist-fight. (8RT 277-278, 321; Exh. No. 1 [Ch. 12 at 20:42:10].) During the fight,

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[5] People's trial exhibit Nos. 1, 2, and 28 were the surveillance videos from the 7-Eleven. (7RT 182-183.) Exhibit Nos. 1 and 28 show different views of the parking lot where the attack occurred.

Camarillo and Mangskau came out of the store and stood off to the side, watching.

As Garcia and Melendez were fighting, Ramirez encircled them, pacing around, keeping his hand on his pocket as if he was holding onto to a weapon. (Exh. No. 1 [Ch. 13 at 20:42], Exh. 28 [Ch. 14 at 20:42:35].) Hernandez testified that while he was holding his side, Ramirez was saying, "Y'all don't want none, y'all don't want it." (8RT 280.) Hernandez believed Ramirez had a gun and was going to shoot them. (8RT 321-322, 335.) Camarillo also believed Ramirez had a gun. While appellant did not testify, his recorded police interrogation was played for the jury. He told the detectives many times he thought Ramirez had a gun. (Interrogation transcript pages 12-13, 16-17.) He said that when he came out of the store, he thought, "Oh my god he has a gun." (Page 16.) He said, Ramirez was acting "like [he had a] thing, a gun." (Pages 12-13, 17.) Appellant was scared. (Page 17.)

The People's gang expert validated the reasonableness of the belief that Ramirez had a gun. He testified it would be risky for Norteño gang members wearing gang colors, as Ramirez and Garcia were, to enter rival gang territory, such as this 7-Eleven, **without** a weapon. He testified Norteños would be **expected** to have a weapon in this type of situation. (9RT 405.)

As the fight wound down, Garcia continued "talking shit." (7RT 130-131.) He called Hernandez's group, "pussy ass scraps" and Hernandez responded by shouting out the name of his gang. (8RT 279, 9RT 379, 395.) For the first time at trial, Jimenez claimed that Hernandez told Garcia to "stay right there" because he had something for them and they could "get smoked on the tracks," however, no evidence corroborated her claim. (7RT 130, 144, 157, 9RT 468-469.)

Fearing they would be killed, Camarillo's group retreated, but their

efforts to retreat were met with more violence. As Camarillo's group got into their car to leave, Jimenez took a swing at Hernandez's face. She missed, but when Hernandez got into the driver's seat she tried to slam the car door on his feet. (8RT 281.) She also attacked the car, punching and kicking the hood while yelling "Norte!" (8RT 282; Exh. No. 1 [Ch. 12 at 20:44:04–08].)

Garcia intensified the attack on Camarillo's group as they attempted to retreat. Before Hernandez moved the car, the video clearly reflected Garcia removing a knife, or similar sharp object, from his pocket and lunging towards the driver's side front tire. (Exh. No. 1 [Ch. 12 at 20:43:58; 8RT 323.) Garcia also twice threw a large can at the driver's side of the vehicle, causing its contents to splatter all over the driver's side of the vehicle. (Exh. No. 1 [Ch. 12 at 20:43:56].)

Once Hernandez got the car into "drive," he drove towards Garcia to scare him off. The concrete parking block stopped the car before it hit anyone. (7RT 1335, 8RT 282.) As they left the parking lot, Garcia threw a large commercial trash can lid at the windshield of the car. (8RT 283, 9RT 420; Exh. No. 1 [Ch. 12 at 20:44:13–44:20].)

The People's gang expert testified that the attack by Garcia, Ramirez and Jimenez was unprovoked. (9RT 402; & 8RT 325.)

B. HERNANDEZ RETRIEVED A WEAPON.

Hernandez knew he had been beaten up in his own territory and he felt "like a bitch." (8RT 283-284.) He wanted to gain some respect back (8RT 285-286), so he went to his house and got a revolver, loaded with six rounds, and wrapped it in a sweatshirt. (8RT 286, 9RT 423-424.) When he got back in the car, he told everyone he had a gun and handed it to Melendez. (8RT 287.) Camarillo was quiet. (8RT 337.) Hernandez testified he obtained the weapon for protection, in case the Norteños tried to shoot them. (8RT 283-284, 324.)

Hernandez drove back to the 7-Eleven to look for Garcia and Ramirez, but they were gone and nothing more happened at the 7-Eleven. (8RT 288.) Camarillo did not participate in any discussion about returning to the 7-Eleven. Camarillo never said he wanted to fight anybody. He was quiet in the car. (8RT 338.)

The car started making noise from where Garcia had slashed the tire, so appellant's group drove slowly back to the taco stand and parked. (8RT 289-290.) Melendez handed the gun to Camarillo, who put it in his waistband. (8RT 292.) There was no talk of getting revenge. Camarillo was quiet, and as far as Hernandez was concerned, it was over, his anger had dissipated. (8RT 327.)

C. JIMENEZ LIED TO RIOS ABOUT BEING PHYSICALLY ASSAULTED.

After attacking appellant's group at the 7-Eleven, Jimenez, Garcia, and Ramirez walked back to Jimenez's apartment where her boyfriend, Sulpicio Rios, and several other Norteños were waiting. (7RT 136-137.) Rios was a validated Norteño gang member and he was wearing red and black. (7RT 140, 155, 9RT 393.) Jimenez wanted attention, so she lied to Rios and told him Hernandez hit her at the 7-Eleven, and said they were coming back with a gun. This made Rios very upset. (7RT 160, 163, 174.)

D. APPELLANT'S GROUP IS ATTACKED AGAIN BY NORTEÑO GANG MEMBERS AT THE TACO STAND.

Camarillo's group parked near the taco stand, and were fixing the car tire Garcia had slashed. Two independent witnesses, Luis Lacatero and Lino Uscanga, testified that appellant's group was just working on the car, not bothering anybody. (8RT 228-229, 255, 260.) It had been about 20 minutes since the Norteños attacked Camarillo's group at the 7-Eleven when the Norteños confronted Camarillo's group again. (1CT 63.)

Jimenez, Ramirez, and Rios had decided to walk to a market near the taco stand. (7RT 138-139, 161, 1CT 63.) Jimenez saw Hernandez and

pointed him out to Rios. Jimenez immediately had a "bad feeling" and tried to get Rios to go home but he said "fuck no." Rios was very upset and Jimenez knew there would be trouble, so she called her Norteños cousins for backup. (7RT 142, 163.)

Rios was angry and he immediately aggressively confronted Hernandez. (7RT 141-142, 161-164.) Both independent percipient witnesses testified that Rios and Ramirez started the confrontation with Camarillo's group (8RT 225, 229, 255), and both percipient witnesses and Jimenez testified that Rios and Ramirez's body language reflected that they wanted to fight. (7RT 143, 8RT 220, 224-226, 232, 246.) Uscangea testified that Ramirez was trying to hold Rios back as Rios attempted to attack appellant's group. (8RT 247-248, 260.)

Jimenez testified Hernandez was standing there as Rios and Ramirez "talked shit," and Rios was the main person "talking shit." (7RT 143.) Hernandez didn't know why Rios was upset with him because he didn't know Jimenez had lied to Rios. (8RT 295, 329-330.) Appellant's group did not engage Rios, but eventually Hernandez reacted to Rios and Ramirez's body language and belligerent attitude and exchanged gang slurs with them. (7RT 142-143, 166, 8RT 225, 240-241; 9RT 429-430.)

As the heated exchange continued, Hernandez saw at least three Norteños in the area (8RT 329), including Garcia who had a knife. (8RT 294, 329.) Ramirez, who was believed to have a gun, was standing behind Rios, pacing behind him and holding onto his side, making the same motions he made at the 7-Eleven indicating he had a weapon. (8RT 299, 332.) Hernandez believed Ramirez still had a gun. (8RT 299-300, 332, 335.)

Appellant was standing next to Hernandez when, suddenly, in the midst of the heated confrontation, Rios made a motion towards his waistband while simultaneously advancing towards Camarillo. (8RT 301-

302, 330-331, 9RT 431-434, 454.) Hernandez testified that Rios took several aggressive steps, and was moving quickly forward towards appellant when appellant fired the gun. (8RT 302, 331.) Hernandez believed Rios was going to attack appellant and Camarillo fired to avoid getting seriously hurt or killed. (8RT 302, 330-334.)

Mangskau also testified Rios was loud and walking aggressively right at Camarillo when appellant shot him. (9RT 431-434, 454-455.) Appellant fired the first shot as Rios was advancing on him then, after the first shot, Rios turned to run and appellant fired two more shots very quickly after firing the first shot. (9RT 435-455.)

Independent percipient witness Uscanga confirmed Mangskau's and Hernandez's testimony. Uscanga testified that Rios made a motion as though he was going to rip his shirt off, tearing it off his chest from the middle outward, before taking a fighting stance and approaching appellant straight on. Uscanga confirmed that Rios was moving his hands upward from his waistband area as he advanced on appellant and appellant fired while Rios was advancing toward him. (8RT 242-244, 248, 256-257, 260-262.) According to Uscanga, appellant fired three shots in rapid succession. (8RT 249, 262.)

Jimenez testified that as Rios was facing Camarillo, she heard Rios say something like, "Watch out, he's got a gun," then Rios turned to run and appellant fired the weapon as Rios was running away. (7RT 146-148, 150-152.)

Camarillo fired three shots in rapid succession when Rios was about 20-to-25 feet away from him. (8RT 242-244, 248-249, 262.) The coroner testified Rios was shot twice in the back and once in the left arm. The only fatal shot entered through the back. (7RT 98-99, 102.) However, the coroner also testified that Rios's body could have been twisting or turning when the fatal shot hit him. (7RT 108, 100.) The prosecutor also told the

jury in closing argument that, "He's turning and he's running. That's how that angle [of the fatal bullet] happens. He turns and runs." (11RT 556.)

Meanwhile, Ramirez ran towards a nearby carwash. Video surveillance from the car wash showed appellant chasing Ramirez and firing two shots at him. (7RT 176, 180-181, 187-188, 191.)

ARGUMENT

I.

REVIEW SHOULD BE GRANTED TO DECIDE WHETHER JURIES SHOULD BE INSTRUCTED TO CONSIDER YOUTH AS A FACTOR IN DETERMINING WHETHER A DEFENDANT SUBJECTIVELY BELIEVED IN THE NEED TO USE DEADLY FORCE, AND WHETHER THAT BELIEF WAS OBJECTIVELY REASONABLE WHEN AN ADOLESCENT ASSERTS SELF-DEFENSE AS A DEFENSE TO MURDER AND/OR ATTEMPTED MURDER.

A. INTRODUCTION.

The trial court has a broad duty to fully instruct the jury on all general principles of law relevant to the issues raised by the evidence which are necessary to the jury's understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This duty exits whether or not the defendant makes a formal request for an instruction. (*People v. Blair* (2005) 36 Cal.4th 686, 744.) Appellant's trial was rendered fundamentally unfair, depriving him of due process, a fair trial, and the right to reliable jury verdicts (U.S. Const. V., VI. & XIV. Amends.), because his jury was not instructed to consider youth as a factor in determining whether he subjectively believed in the need to use deadly force, and whether his belief was objectively reasonable. The jury was given the standard instructions on self-defense (CALCRIM 505), and imperfect self-defense (CALCRIM 571), but those instructions did not go far enough. Appellant's jury should have been instructed to consider his youth.

The Court of Appeal assumed, without deciding, that an instruction on youth should have been given as to the objective aspect of self-defense,

but ultimately concluded it was under no "obligation" to consider whether jurors were misinstructed because, by returning a verdict of second degree murder, the reviewing court reasoned, they did not find appellant actually believed in the need for self-defense. (Opn. 11-12; *id.* at 12 ["had [appellant] been convicted of voluntary manslaughter, rather than second degree murder, we would be obligated to consider his claim"].) However, this is circular reasoning because the absence of an instruction on youth impacted the jury's determination of whether appellant acted with malice. (Cf. *Sotelo-Urena*, *supra,* 4 Cal.App.5th at 756-758 [defendant convicted of first degree murder after jurors were precluded from considering chronic homelessness in assessing his actual belief in the need to act in self-defense and the reasonableness of that belief].)

Moreover, the reviewing court failed to consider that the prosecution's theory was that appellant committed a first degree premeditated gang-retaliation murder (11RT 541) and, by acquitting appellant of first degree murder and finding the gang enhancements not true, the jury manifestly did not believe appellant premeditated this killing or that he planned to kill, but that he formed his intent to kill only under the immediate circumstances of the confrontation. This finding is entirely consistent with voluntary manslaughter arising from imperfect self-defense. (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1180.) Additionally, one of the jury's many questions during deliberations requested "clarification of [the] definition of second degree murder and manslaughter" (CT 194), which reflects the jury was struggling between the two, and it can be reasonably inferred that the elements of second degree murder were difficult questions for the jury. An instruction to consider youth in assessing appellant's mental state would have impacted the jury's assessment of whether he acted with malice or in self-defense.

B. YOUTH SHOULD BE CONSIDERED WHEN ASSESSING AN ADOLESCENT'S MENTAL STATE.

As noted, advances in adolescent brain development research compels the conclusion that adolescents cannot be treated as simply miniature adults. Neurobiological research has long shown that the higher-order processing centers of the brain, those portions of the brain responsible for regulating impulsivity, self-control, emotions, and long-term thinking, do not reach full maturity until at least the mid-20s. (Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking* (2008) 28(1) Developmental Review 78, 79, 83) These characteristics apply to youth as a class and " 'generates commonsense conclusions about behavior and perception.' " (*J.D.B., supra*, 564 U.S. at 272.) "Precisely because childhood yields **objective conclusions** like those we have drawn ourselves–among others, that children are 'most susceptible to influence,' *Eddings,* 455 U.S., at 115, and 'outside pressures,' *Roper,* 543 U.S., at 569–**considering age in [an objective] custody analysis in no way involves a determination of how youth 'subjectively affect[s] the mindset' of any particular child[.]**" (*J.D.B., supra,* 564 U.S. at 275, emphasis added.)

Under the rationale of *J.D.B., supra,* 564 U.S. 261, *Roper, supra,*543 U.S. 551, *Graham, supra,* 560 U.S. 48, other Supreme Court decisions, as well as state legislation and case law, appellant contends that an instruction on youth is necessary when an adolescent's state of mind is in question. This is particularly so in the context of self-defense because jurors are called upon to decide whether an adolescent subjectively believed in the need to use deadly force and whether that belief is reasonable, or whether they acted with malice.

While *J.D.B.* was decided in the context of *Miranda*, a *Miranda* custody analysis is remarkably similar to the inquiry that must be made

when assessing self-defense. In self-defense, the question is: what would appear to be necessary to a reasonable person in a similar situation, with similar knowledge, taking into consideration all the elements which might be expected to operate on the defendant's mind. (*Humphrey, supra,* 13 Cal.4th at 1086.) Similarly, the question of whether a suspect is "in custody" for purposes of *Miranda* is also objective. (*J.D.B., supra,* 564 U.S. at 270.) Self-defense and "custody" both look to the objective circumstances, then pose the question of how a "reasonable person" in a similar situation, with similar knowledge, would have felt (i.e., would a reasonable person feel free to leave; or, would a reasonable person feel the need to act in self-defense). The correlations between custody and self-defense are striking. Therefore, it is not a stretch to consider youth in a self-defense inquiry.

1. California Cases Have Considered Other Objective Class Characteristics, like Youth, in the Context of Self-Defense.

In California, the "reasonable person" standard in the context of self-defense has been held to include other class characteristics, like youth, when those characteristics affect the lens through which a "reasonable person" in the defendant's position would view the situation and the need for self-defense. Three cases are particularly instructive: *Humphrey, supra,* 13 Cal.4th 1073, *Sotelo-Urena, supra,* 4 Cal.App.5th 732, and, *People v. Mathews* (1994) 25 Cal.App.4th 89.

In *Humphrey, supra,* 13 Cal.4th 1073, the defendant, a battered woman who had endured years of abuse, shot her partner as he slept. At trial, she claimed self-defense and presented expert witness testimony concerning Battered Woman's Syndrom. (*Id.* at 1077-1080.) The court instructed the jury on second degree murder, voluntary and involuntary manslaughter, and told jurors to consider evidence of intimate partner battering in deciding whether the defendant **actually believed** it was

necessary to kill in self-defense, but **not** in " 'evaluating the objective reasonableness requirement for perfect self-defense.' " (*Id.* at 1081.) The defendant was found guilty of voluntary manslaughter with personal use of a firearm, and her conviction was affirmed on appeal. (*Ibid.*) This Court reversed the Court of Appeal, holding: "The trial court should have allowed the jury to consider . . . [intimate partner battering] in deciding the reasonableness as well as the existence of defendant's belief that killing was necessary." (*Id.* at 1076-1077.)

This Court held "that evidence of [intimate partner battering] is generally relevant to the reasonableness, as well as the subjective existence, of defendant's belief in the need to defend, and, to the extent it is relevant, the jury may consider it in deciding both questions." (*Humphrey, supra,* 13 Cal.4th at 1088-1089.) "Although the ultimate test of reasonableness is objective, in determining whether a reasonable person in defendant's position would have believed in the need to defend, the jury must consider all of the relevant circumstances in which defendant found herself." (*Id.* at 1083.) By precluding the jury from considering the evidence as it pertained to the reasonableness element of self-defense, the trial court "failed to consider that the jury, in determining objective reasonableness, must view the situation from the defendant's perspective." (*Id*. at 1086.) *Humphrey* also rejected the People's argument that by considering evidence of intimate partner battering, the Court was "changing the standard from objective to subjective, or replacing the reasonable 'person' standard with a reasonable 'battered woman' standard." (*Id.* at 1087; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1205.)

"For the same reasons" as stated in *Humphrey* and *Ochoa, Sotelo-Urena, supra,* 4 Cal.App.5th 732, held that expert testimony regarding chronic homeless was relevant and admissible to both the defendant's actual belief in the need to use lethal force and the

reasonableness of that belief in considering the defendant's claim of self-defense. (*Id.* at 745.) The defendant in *Sotelo-Urena,* a homeless man, was charged with murdering another homeless man. To support his claim of self-defense, the defense sought to admit expert testimony "that individuals who are chronically homeless, like defendant, are subjected to a high rate of violence by both housed and homeless individuals, and that the experience of living for years on the streets instills a perpetual fear of violence that would have affected defendant's belief in the need to defend himself with lethal force." (*Id*. at 745-746.) The trial court found the testimony irrelevant to both perfect and imperfect self-defense and excluded it. (*Id.* at 742-743.) Sotelo-Urena was convicted of first degree murder with use of a knife.

The Court of Appeal reversed Sotelo-Urena's murder conviction, holding that expert testimony regarding chronic homelessness was relevant to both the objective and subjective components of perfect and imperfect self-defense because a "defendant claiming self-defense or imperfect self-defense is required to 'prove his own frame of mind.' [Citation.]" (*Sotelo-Urena, supra,* 4 Cal.App.5th at 745.) "In other words," the court held because, "the jury was to evaluate defendant's belief in the need to use lethal force *from his perspective*. . . . [e]vidence that would assist the jury in evaluating the situation from defendant's perspective was thus relevant." (*Ibid.,* original italics.)

Sotelo-Urena also rejected the People's argument that allowing chronic homelessness to factor into an objective determination of whether the defendant acted reasonably would turn an objective standard into a subjective one. The Court of Appeal observed that this Court had rejected similar arguments in both *Humphrey* and *Ochoa* and explained, paraphrasing *Humphrey*, that "[e]vidence of [chronic homelessness] not only explains how a [chronically homeless individual] might think, react,

or behave, it places the behavior in an understandable light." (*Sotelo-Urena, supra,* 4 Cal.App.5th at 751; *Humphrey, supra,* 13 Cal.4th at 1088.)

The Court of Appeal reached a similar conclusion in *Mathews, supra,* 25 Cal.App.4th 89. In *Mathews,* the police forcibly entered the defendant's home, after announcing their presence and receiving no response. When they entered the home, the defendant, who was legally blind and hearing impaired, confronted them with a shotgun. The defendant was convicted of exhibiting a firearm in the presence of a peace officer under then-section 417, subdivision (b) (now subd. (c)), which required, inter alia, that the person "know[], or reasonably should know," the officer was engaged in the performance of his or her duties. (§ 417, subd. (c).)

The defendant asserted self-defense and the jury was given the standard instruction on self-defense. (*Mathews, supra,* 25 Cal.App.4th at 100.) The defense proposed a special instruction, to augment the standard instruction, stating: " 'In considering the self-defense issues, you must take into account any sensory impairment the defendant had in determining how a reasonable person with such disabilities would have acted.' " (*Id.* at 98-99.) The trial court refused to give the special instruction, but permitted counsel to argue the point. (*Ibid.*) The judgment was reversed on appeal.

The Court of Appeal held: "[T]he failure to instruct on the principle of physical handicap, i.e., sensory impairment, was erroneous. It makes no sense, either in law or logic, to hold appellant to the standard of a reasonable person with normal eyesight and hearing." (*Mathews, supra,* 25 Cal.App.4th at 99.) The court also found that considering defendant's sensory impairments would not turn an objective standard into a subjective one: "While the objective reasonable person standard remains,

it is the reasonable person with a similar physical disability. . . . [¶][¶] "What is 'apparent' to a reasonable person who can see and hear is not 'apparent' to a person who is blind and hearing impaired." (*Id.* at 99-100.)

2. These Cases Reflect That Juries Should Consider Youth In Deciding Both the Subjective and Objective Aspects of Self-Defense.

The foregoing cases demonstrate that instructing a jury to consider youth in assessing what an adolescent claiming self-defense actually believed and whether that belief was reasonable, can be done without compromising the objective nature of a self-defense inquiry. Indeed, if a jury can consider intimate partner battering in deciding the question of whether a reasonable person in that circumstance would have perceived a threat of imminent injury or death, and the reasonableness of that belief (*Humphrey, supra,* 13 Cal.4th at 1088), it can certainly consider youth. Intimate partner battering is arguably more "subjective" than youth because everyone experiences adolescence and the science yields objective conclusions about adolescent brain development, but not everyone experiences being battered by their partner, chronic homeless (*Sotelo-Urena, supra,* 4 Cal.App.5th 732), or sensory impairments (*Mathews, supra,* 25 Cal.App.4th 89).

Paraphrasing *Humphrey*, "[e]vidence of [youth] not only explains how [an adolescent] might think, react, or behave, it places the behavior in an understandable light." (*Humphrey, supra*, 13 Cal.4th at 1088; *Sotelo-Urena, supra,* 4 Cal.App.5th at 751.) Here, as in *Sotelo-Urena*, "A question before the jury was what a reasonable person would have believed about the need to use lethal force, taking into consideration defendant's situation and knowledge." (*Id.* at 752.) Moreover, as *Mathews* observed, "[i]t makes no sense, either in law or logic, to hold" an adolescent to the same standard of reasonableness as an adult. What is

"apparent" to an adult may not be "apparent" to an adolescent. (*Mathews, supra,* 25 Cal.App.4th at 99-100; see also *In re J.G.* (2014) 228 Cal.App.4th 402, 410 [observing that *J.D.B.* may implicate other areas including "areas of **substantive criminal law, such as blameworthiness of [the defendant's] conduct and/or state of mind**"], emphasis added.)

Indeed, it is not a stretch to expand *J.D.B.* and consider youth in a self-defense inquiry because, as explained, the inquiry in a custody and self-defense analysis are extremely similar. Self-defense and "custody" both look to the objective circumstances, then pose the question of how a "reasonable person" in a similar situation, with similar knowledge, would have felt (i.e., would a reasonable person feel free to leave; or, would a reasonable person feel the need to act in self-defense).

Jurors here were told to consider what a "reasonable person" would have believed about the need to use lethal force, taking into consideration the defendant's situation and knowledge. (CALCRIM 505, 517.) However, Camarillo's jury was comprised of adults who brought their own unique adult perspective to the trial. Due to fundamental biological and developmental differences between adolescent and adult minds, absent instruction(s) to consider youth, the jury did **not** consider the situation from **Camarillo's perspective**. Without instruction, the jury did not have the tools it needed to properly consider appellant's mental state.

C. IF AN INSTRUCTION ON YOUTH IS A PINPOINT INSTRUCTION, TRIAL COUNSEL WAS INEFFECTIVE FOR NOT HAVING REQUESTED THE INSTRUCTION.

Under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has a right to the effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) The standard for showing ineffective assistance of counsel is well settled. A defendant must demonstrate that: (1) counsel's

representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696; *Ledesma,* at 217.) Failure to request an instruction is a well-accepted basis for finding ineffective assistance of counsel. (*In re Cordero* (1988) 46 Cal.3d 161, 189.)

Appellant's youth was a well-known fact. Not only because his birth date appeared on every charging document, but his case was transferred to adult court after a contested transfer hearing in the juvenile court. In addition, existing law at the time of appellant's trial provided firm grounds for requesting an instruction on youth. *J.D.B* was decided in 2011, seven years before appellant's trial. There was also a wealth of studies and research in the area of adolescent brain development, and most significantly, counsel had Dr. Elizabeth Cauffman's testimony from Camarillo's juvenile transfer hearing which provided an in-depth analysis of adolescent brain development and the research and findings in the area. The principles of self-defense were also well-settled. In 1996 when *Humphrey* was decided it was already well-settled that " 'a defendant is entitled to have a jury take into consideration all the elements in the case which might be expected to operate on his mind . . .' " (*Humphrey, supra,* 13 Cal.4th at 1083, citing *People v. Smith* (1907) 151 Cal. 619, 628.) These principles provided a basis for an instruction on youth because in order to assess the reasonableness of an adolescent's belief in the need for self-defense **from their perspective**, a jury must consider youth.

Counsel's closing argument underscores that he knew appellant's youth was an important consideration for the jury. Defense counsel told the jury, "You can look at the fact that these Norteños were quite a bit

older than these Sureños. How old was Mr. Mangskau, 15, 16? How old was [appellant] in 2016? 16 years of age. [¶] Neither one of them even had a driver's license. I doubt my client's ever shaved. He's just a kid. [¶] And what you saw at the 7-Eleven wasn't just some dustup, oh, just a fight, it's just a fight. [¶] Later on, Mr. Rios came for blood. These were bullies wearing their colors out hunting, looking for trouble, armed, because you heard their gang expert, Norteños are not going to go for a foray into Sureño territory without being armed. And they acted like they were armed. What is [appellant] . . . supposed to think?" (11RT 573.) As counsel's argument reflects, youth **was** a factor he wanted jurors to consider in assessing the situation from appellant's perspective. Thus, counsel should have requested an instruction on youth.

D. THERE WAS OVERWHELMING EVIDENCE OF SELF-DEFENSE.[6]

The facts here are **more than enough** to create a reasonable doubt as to whether appellant acted in perfect, and especially imperfect self-defense, but the jury rejected self-defense. Camarillo's state of mind, and what he actually and reasonably believed when the need for self-defense arose, began with the terrifying, unprovoked attack by members of the Norteño gang at the 7-Eleven just minutes before the second attack. The videos from 7-Eleven attack speak volumes. (Peo's trial exh. Nos. 1 & 28.) This was not just some minor scuffle. These Norteños were, as trial counsel put it, out for blood. They were aggressive and **extremely** violent. Garcia started what the People's gang expert, and even Jimenez characterized as an unprovoked attack (9RT 402 & 7RT 154) by punching

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[6] The Court of Appeal determined, "there [was] very little evidence that appellant actually believed he was in imminent danger or needed to use deadly force during the incident at the taco truck." (Opn. 15.) However, this conclusion derives from the fact that the reviewing court omitted or misstated at least 30 facts material to appellant's state of mind and his plea of self-defense. (See Appellant's Ptn. for Rehearing.)

Hernandez directly in the face. Hernandez ran away, but the assault on Camarillo's group was far from over.

Garcia engaged Melendez in a fist-fight while Ramirez paced around them, keeping his hand on his pocket in a manner that would indicate to **any reasonable person** that he had a weapon. (E.g., Exh. 28 [Ch. 14 at 20:42:35], Exh. No. 1 [Ch. 13 at 20:43:25–43:36].) Camarillo and Hernandez believed Ramirez had a gun and appellant was scared. (Interrogation transcript at 12-13, 16-17; 8RT 321, 335.) The People's gang expert confirmed their beliefs were reasonable by testifying that Norteños would be **expected** to have a weapon in this type of situation. (9RT 405.)

Even when appellant's group began to retreat, the Norteños only intensified their attack. Garcia used a knife, or similar object, to slash the car tire and he threw several objects at the car, including a large commercial trash can lid which miraculously did shattered the windshield. Jimenez was similarly out of control. She attempted to punch Hernandez in the face, and slam the car door on his feet. Then she beat on the hood of the car with her closed fists yelling "Norte!" (Exh. No. 1 [Ch. 12 at 20:43:44], 8RT 282.)

When appellant left the 7-Eleven, he was terrified. He reasonably believed Ramirez had a gun and he knew Garcia had a knife or similar object. (Exh. No. 1 [Ch. 12 at 20:43:58.) He also knew Hernandez and Melendez were violently attacked by older, bigger Norteño gang members who did not hesitate to inflict physical harm or destroy property, and that the attack only intensified when Camarillo's group attempted to retreat.

These were the facts known to Camarillo when, only about 20 minutes later, he was violently confronted by the Norteños again at the taco stand. There was no dispute that the Norteños started the confrontation and were the aggressors at the taco stand. Every witness testified that Rios's and Ramirez's body language indicated they wanted to

fight. (7RT 166, 8RT 220-226, 246.) Hernandez saw multiple people wearing Norteño gang colors "all scattered" around, including Garcia, who had a knife. (8RT 294.)

While Rios was engaged in a very combative confrontation with Hernandez, Ramirez was pacing behind him, holding onto his side, like he had done at the 7-Eleven, leading Camarillo and Hernandez to reasonably believe he had a gun. (8RT 299-300, 332, 335, Interrogation transcript at 12-13, 16-17.) Suddenly, in the midst of the very heated confrontation, Rios made a quick motion towards his waistband and simultaneously aggressively advanced towards Camarillo. (8RT 301-302, 330, 9RT 431-434, 454.)

According to independent percipient witness Uscanga, Rios made a motion as though he was going to rip his shirt off, tearing it off his chest from the middle outward, took a fighting stance, and approached Camarillo straight on. Uscanga testified Rios was moving his hands upward from his waistband area and advancing on Camarillo when Camarillo fired at him. (8RT 242-244, 248, 256-257, 260-262.) Hernandez and Mangskau also testified Rios took several aggressive steps and was moving quickly forward, advancing on Camarillo, when he shot Rios. (8RT 302, 331, 9RT 431-434, 454-455.)

Given the testimony at trial, appellant submits there can be **no question** Rios presented an imminent threat of death or great bodily injury– but the jury rejected self-defense. Thus, the question of whether Camarillo subjectively believed in the need to use deadly force, and whether his belief was objectively reasonable, was squarely before the jury. (*Humphrey, supra,* 13 Cal.4th at 1088; *Sotelo-Urena, supra,* 4 Cal.App.5th at 756.)

Indeed, there are several signs the jury was struggling to decide one question: Camarillo's mental state when he fired the gun. They acquitted

appellant of first degree murder and found the gang enhancements not true, thus rejecting the prosecution's theory. They made several requests to have testimony regarding self-defense read back during deliberations (1CT 187-189), and requested "clarification of [the] definition of second degree murder and manslaughter." (CT 194.) They deliberated for nearly two full days (CT 184, 196, 209), when the issues in the case were relatively straightforward.

Camarillo did not have "to prove the homicide was justified; []he merely has to raise a reasonable doubt that it might have been." (*Humphrey, supra,* 13 Cal.4th at 1103 (conc. opn. of Brown, J.); *id.* at 1090 ["The actual verdict was reasonable, but so too would have been a different one"].) An instruction on youth could have created reasonable doubt as to whether Camarillo harbored malice and would have impacted the jury's determination of whether he subjectively believed in the need for self-defense and whether that belief was objectively reasonable. Review needs to be granted here to decide these extremely important issues with far-reaching implications.

II.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER IT WAS PREJUDICIAL ERROR TO INSTRUCT THE JURY THAT IMPERFECT SELF-DEFENSE WAS NOT AVAILABLE TO APPELLANT IF HIS OWN WRONGFUL CONDUCT SET INTO MOTION THE CHAIN OF EVENTS THAT JUSTIFIED THE ATTACK ON HIM; AND WHETHER APPELLANT'S COUNSEL SHOULD HAVE OBJECTED TO THE PROSECUTOR'S MISSTATEMENTS OF LAW.

As part of the standard instruction, the trial court erroneously instructed the jury with the optional language, "Imperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force." (CT 159 [CALCRIM No. 571].) "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

It was error to give this aspect of the imperfect self-defense instruction because appellant did not set any chain of events into motion that led to the Norteños' attack at the taco stand, and precluded him from asserting self-defense when the need arose. (*People v. Conkling* (1896) 111 Cal. 626.) Nor was Rios's use of force against appellant's group legally justified. (*People v. Randle* (2005) 35 Cal.4th 987, 1001-1003; *Vasquez, supra,* 136 Cal.App.4th at p. 1179.)

The reviewing court found that "if there was no factual basis for the instruction, the jury would not have applied it." (Opn. 16.) While appellant recognizes that **sometimes** the error in giving an inapplicable instruction can be harmless **if** jurors would have considered the

instruction surplusage, and passed over it without further thought (*People v. Rowland* (1992) 4 Cal.4th 238, 282), **but that is not the situation here**. This erroneous, broadly-worded instruction paved the way for the prosecutor to make **several arguments** which misstated the law and/or facts in an effort to persuade the jury that appellant engaged in "wrongful conduct" that made him the "aggressor" and therefore he could not assert self-defense. Therefore, giving this aspect of the imperfect self-defense instruction lightened the prosecution's burden of proof, and rendered appellant's trial fundamentally unfair, depriving him of due process, the right to a reliable jury verdict, and his right to have the jury fully consider his defense, in violation of the state and federal constitutions. (U.S. Const. V., VI. & XIV Amends.; Cal. Const. art. 1, §§ 7, 15.)

In closing argument, the prosecutor argued, "This is not a self-defense case. The defendant is the aggressor at the taco truck." (11RT 541.) Ignoring what had just happened at 7-Eleven, the prosecutor argued appellant had no actual belief there was an imminent threat of great bodily injury or death when the need for self-defense arose because not a single punch had been thrown at the taco stand and Rios was not part of the fight at 7-Eleven. (11RT 563-564.) This was a misstatement of law. (*Minifie, supra,* 13 Cal.4th at 1065 ["a jury can **properly consider** threats or acts of violence by the group associated with the attacker / victim"].) The prosecutor told the jury appellant's group "escalated it" when **Hernandez** got a gun. (11RT 550, 551.) The prosecutor argued that once Hernandez got the gun, "[t]he defendant's crew is now the aggressor" (11RT 551), and self-defense "does not apply once you become the aggressor." (11RT 552.)

This argument was contrary to the facts and law. Every witness testified that Rios and Ramirez were the aggressors at the taco stand. Additionally, the fact that appellant had a weapon did not make him the aggressor, or strip him of his right to self-defense when the need arose.

(*Conkling, supra*, 111 Cal. at 626.) "That appellant had a gun to rebuff [the victim's] attack does not mean appellant could not have believed his life was in peril – in fact, a defendant claiming imperfect self-defense will always have had the means to rebuff the victim's attack, or else the homicide would not have occurred." (*Vasquez, supra,* 136 Cal.App.4th at 1179.)

Regarding the confrontation at the taco stand, the prosecutor told the jury that it didn't matter why Rios was mad or what his intent was. "The intent of the dead person is not the purpose here. . . . [¶] So don't let that be a red herring." (11RT 553.) In *People v. Ramirez* (2015) 233 Cal.App.4th 940, the court found a similar argument misstated the law and misled the jury. It does matter when the victim escalates a conflict to seemingly deadly proportions. (*Id.* at 950.)

The prosecutor also told the jury that because appellant did not retreat at taco stand, like he had done at the 7-Eleven, he was "the aggressor there." (11RT 559.) This was a misstatement of law. (*People v. Lewis* (1897) 117 Cal. 186, 191 ["our law nowhere imposes the duty of retreat upon one who, without fault himself, is exposed to a sudden felonious attack . . ."]; CALCRIM 505.)

In rebuttal, the prosecutor argued that, "None of this would have happened if [appellant's group] just drove away after the 7-Eleven, if they didn't escalate it and bring a firearm back looking for the Norteños." (11RT 575.) The prosecutor misstated the law and facts. Even assuming **Hernandez** went back to the 7-Eleven looking for the Noterños, he didn't find them there and nothing more happened at the 7-Eleven. The meeting at the taco stand was purely coincidental and by all witness accounts Rios and Ramirez were the aggressors at the taco stand. By conflating these two different incidents, the prosecutor confused the jury and misstated the law.

The prosecutor also misstated the law in rebuttal by telling the jury

appellant had no right to self-defense unless and until he was physically attacked. (11RT 579.) This misstated the law. (*People v. Clark* (1982) 130 Cal.App.3d 371, 377 [" 'Justification does not depend upon the existence of actual danger but rather depends upon appearances; it is sufficient that the circumstances be such that a reasonable person would be placed in fear for his safety and that the defendant acted out of that fear' "].)

The prosecutor so misstated the law and twisted the facts, there can be no doubt the jury was misled and confused. Defense counsel should have objected to all the misstatements of law, because they lightened the prosecutor's burden of proof, diminished appellant's plea of self-defense, and rendered appellant's trial fundamentally unfair, depriving him of due process (U.S. Const. V. & XIV. Amends.; Cal. Const., art. I., §§7 & 15; see Arg. I.C., *ante.* [general law regarding right to effective counsel]). A defendant must make a timely objection and request an admonition to cure any harm in order to preserve a claim of prosecutorial misconduct (*People v. Dykes* (2009) 46 Cal.4th 731, 786), otherwise, the argument is deemed forfeited. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.)

"[I]t is improper for the prosecutor to misstate the law generally (*People v. Bell* (1989) 49 Cal.3d 502, 538), and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 829.) The prosecutor's misstatements of law left jurors with the mistaken belief that once Hernandez–not appellant–made the decision to obtain a weapon and appellant took possession of it, he forever lost his right to self-defense. Furthermore, some jurors might have believed appellant didn't have any right to self-defense because Rios wasn't at the 7-Eleven, or because appellant did not retreat at the taco stand. It was misconduct to have repeatedly misstated the law of self-defense in a manner that lowered the prosecution's burden of proof. (*Hill,* at 829.)

As in *People v. Centeno* (2014) 60 Ca1.4th 659, on this record there is no conceivable reasonable tactical purpose for defense counsel's failure to object. The problems with the prosecutor's argument "were not difficult to discern," and existing law "provided firm grounds for an objection at the time of defendant's trial." (*Id.* at 675.) Moreover, the prosecutor's misconduct continued through rebuttal, where defense counsel's only recourse was through a timely objection and admonition from the trial court. (*Id*. at 676.)

As discussed in the first argument, there was overwhelming evidence of self-defense (Arg. I.D., *ante.*), but the jury rejected self-defense. There can be no doubt the prosecutor's misstatements of law played a significant role in leading the jury astray, denying Camarillo fair and just verdicts. The prosecutor apparently convinced the jury that Camarillo was the aggressor at the taco stand when the need for self-defense arose when the law and facts clear established otherwise. Review should be granted.

III.

REVIEW SHOULD BE GRANTED BECAUSE THE CUMULATIVE EFFECT OF THE ERRORS WAS PREJUDICIAL.

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Hill, supra,* 17 Cal.4th at 845-847.) All of the errors catalogued here directly impacted self-defense. Not instructing on youth erroneously left the jury to hold appellant to an adult standard of reasonableness—a standard he could never achieve—and to ignore critical aspects of adolescence that affected his subjective belief in the need to use self-defense. By erroneously instructing the jury that appellant had no right to imperfect self-defense if his wrongful conduct set a chain of events into motion that justified his adversary's attack on him, it gave the prosecutor a platform for making a plethora of legally incorrect arguments that unmistakably told the jury appellant had no right to self-defense because, inter alia, he was the aggressor.

The confluence of errors resulted in the jury's rejection of self-defense in the face of overwhelming evidence that Rios presented an imminent threat of great bodily injury or death and that appellant actually and reasonably believed in the need to use self-defense. Review should be granted to remedy the manifest injustices that occurred at appellant's trial. Appellant, who was just 16 years old at time of the offense, is serving 47 years to life in state prison when the facts manifestly reflect his actions were justified or no more than manslaughter.

CONCLUSION

Predicated on the forgoing, appellant respectfully requests that this petition for review be granted.

Dated: February 24, 2021 Respectfully Submitted,

Danalynn Pritz,
Attorney for Appellant / Petitioner

CERTIFICATE OF WORD COUNT

The text of this petition for review consists of 9,681 words as counted by the word-processing program used to prepare the brief. Appellant is concurrently filing an application for permission to exceed the word count limitation per California Rules of Court, rule 8.504(d)(4).

Dated: February 24, 2021

Respectfully Submitted,

Danalynn Pritz,
Attorney for Appellant / Petitioner

Appendix "A"

Filed 1/20/21

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JESUS CAMARILLO, Defendant and Appellant.	A155577 (Solano County Super. Ct. No. FCR331711)

A jury found appellant Jesus Camarillo guilty of second degree murder (Pen. Code, §§ 187, subd. (a); 189, subd. (b))[1] and attempted murder (§§ 187, 664). The jury found firearm enhancements true as to each count (§ 12022.53, subds. (c), (d)). Appellant was sentenced to 47 years to life in prison. On appeal, he raises various claims, including that the trial court committed prejudicial error by failing to instruct the jury to consider his youth as part of the instructions on self-defense. We remand for resentencing but otherwise affirm the judgment.[2]

[1] All undesignated statutory references are to the Penal Code.

[2] By separate order filed this date, we deny appellant's related petition for writ of habeas corpus (A160365) raising claims of ineffective assistance of counsel and cumulative error.

FACTUAL AND PROCEDURAL BACKGROUND

I. *The Evidence*

A. *The Fight at the 7-Eleven Convenience Store*

On December 10, 2016, Sureño gang members, Jorge H. and the 16-year-old appellant,[3] were hanging out with associates, Sevren M. and Joel M.[4] The four drove to a 7-Eleven in Fairfield, located in territory claimed by Sureños. Once there, they encountered rival Norteño gang members, Ernesto G. and Eduardo R., who were both wearing red—the color claimed by Norteños. Elena J. accompanied the two men.

Appellant and Sevren M. went inside the store; Joel M. remained in the car; and Jorge H. stood at the store's doorway. When the other three persons approached the store, Jorge H. said to them, "What the fuck?" In return, they called him a "scrap," a derogatory term for Sureños. Ernesto G. and Jorge H. began fighting. According to Elena J., at some point, Jorge H. said "to stay right there because he had something for us and we could get smoked on the tracks." He retreated to the car. Joel M. then got out of the car and began fighting with Ernesto G. Eduardo R. was "just laughing at the situation." Sevren M. and appellant came out of the store and stood by the car.

The fight between Joel M. and Ernesto G. "stopped after a couple of seconds and they all started standing around and just looking at each other." Although he did not see a gun, Jorge H. thought Eduardo R. had one because he "had his hand on his side and he said something along the lines of: Y'all don't want none, y'all don't want it?"

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[3] Following a transfer hearing in the juvenile court, appellant was deemed fit to be tried as an adult. (Welf. & Inst. Code, § 707, subd. (b)(1).)

[4] To protect the privacy interests of victims and witnesses, we refer to them by their first name and last initial. (Cal Rules of Court, rule 8.90.)

Appellant and his friends got in the car, but not before Elena J. attacked Jorge H., who did not fight back. She continued "banging on the hood of the car, kicking it, punching it, yelling Norte." Ernesto G. threw a beer can at the car, and "it splattered everywhere."

Jorge H. drove toward the two men and the woman "to scare them off," hitting the curb. Sevren M. claimed that Eduardo R. "stabbed the front tire." Sevren M. did not see a knife, but he heard air coming out of the tire after Eduardo R. got close to the car. As the car was leaving, one of the men in red "grabbed . . . [a] trash can top and threw it at the car."

Appellant was not involved in the fight or the name calling at the 7-Eleven.

B. *Jorge H. Gets a Gun*

After they left, Jorge H. was "bummed," "in a down mood," and he "[f]elt like a bitch." He felt threatened at the 7-Eleven and worried about losing respect for being pushed out of Sureño territory. They drove to his house, two or three blocks away, where he retrieved a loaded revolver that he gave to Joel M. According to Jorge H., "Sevren [M.] wanted to fight them again and Joel [M.] joined in, so I told them: If you see them niggas, let [me] know." Although the others were "hyped up," appellant was quiet.

When they drove back to the 7-Eleven parking lot, they did not see the group in red. Jorge H. and Joel M. noticed something was wrong with the car, so they pulled into a nearby shopping center close to a taco truck. They realized the car had a flat tire. By this time, Jorge H.'s anger had dissipated, and "it was over as far as I was concerned." He testified that Joel M. handed the gun to appellant who put it in his waistband. They began changing the flat tire.

C. *The Two Groups Meet Again*

After the 7-Eleven fight, Elena J., Ernesto G., and Eduardo R. went across the street to an apartment. Sulpicio R., who was Elena J.'s boyfriend, and the father of her child, was there. Sulpicio R. was also a Norteño gang member. Elena J. told the group that Jorge H. hit her at the 7-Eleven, which was not true. She did so because she was angry. When he heard this, Sulpicio R. became upset. Elena J., Eduardo R., and Sulpicio R. left the apartment to walk to a nearby liquor store. Sulpicio R. was wearing a red and black jacket.

Elena J. or Eduardo R. noticed the group of four from the 7-Eleven fixing their tire by a taco stand. Elena J. felt there would be another fight, and she wanted to go back to the apartment. Sulpicio R. said, "No. Fuck that." Elena J. used her cellphone to call the apartment. Ernesto G. came to the area after Elena J. made the call.

Joel M. told Jorge H. that the people who attacked them at the 7-Eleven were back. Eduardo R. and Sulpicio R. approached Jorge H. and his group with a belligerent attitude, like they wanted to fight. The two groups "were talking shit to each other."

D. *The Shootings*

Sulpicio R. asked Jorge H., "What's up, bro?" Eduardo R. was "pacing behind" and "clutching on his side as if he had a gun." Appellant and Sevren M. were on either side of Jorge H., and Joel M. was standing behind. Appellant was "standing more in front" of the others.

Sulpicio R. said, "What's up? What's up? Let's go to the back and we can do whatever back there." Sulpicio R. wanted to fight, and Jorge H. "was okay with it." According to Elena J., Jorge H. was throwing up gang symbols,

and saying, "Do you guys know where you're at?" Sulpicio R. or Eduardo R. called the group of four, "scraps."

Sulpicio R. was "holding the middle of his pants." He unzipped his jacket and took "three . . . aggressive steps" forward toward appellant. Jorge H. thought Sulpicio R. was going to attack appellant. Appellant pulled out the gun and shot Sulpicio R. three times. Eduardo R. began to run, and appellant chased after him. Jorge H. heard two more gunshots.

Sevren M. testified that appellant fired three shots in quick succession. After the first shot, Sulpicio R. grabbed "towards his shoulder" before turning and trying to run. About a minute later, as he was running from the area, Sevren M. heard two more gunshots.

Elena J. testified that Sulpicio R. said, "Watch out. He's got a gun," and then began running towards a laundromat. As he was running, "his arm went limp and he fell in that ditch." Appellant was "a distan[ce] away" from Sulpicio R. when he fired three shots. Appellant then chased after Eduardo R., and Elena J. heard two more gunshots.

According to an independent witness, Eduardo R. was holding Sulpicio R. back. Sulpicio R. was trying to take his shirt off and took a fighting stance. Before Sulpicio R. could get his shirt off or break away from Eduardo R., three shots were fired. At that point, Eduardo R. and Sulpicio R. were approximately 20 or 25 feet from the group of four. Sulpicio R. had nothing in his hands. His body bent, he turned, and he ran towards the laundromat. Less than a minute later, there were three more shots.

This witness observed no weapons, except for the gun used by appellant. Jorge H. did not see anyone display a weapon at either the 7-Eleven or at the taco truck. Sevren M. testified Sulpicio R. did not have a

knife or gun in his hands. Elena J. also testified that Sulpicio R. had no weapon during the argument.

E. *The Investigation*

When a police officer responded, she did not find a weapon on Sulpicio R.'s person. However, a knife was found on the ground in the parking lot near the laundromat.

An autopsy of Sulpicio R. indicated he suffered three gunshot wounds: two to the back and one to the back of his left arm.

Video surveillance footage from the scene showed appellant chasing Eduardo R. and shooting at him twice. During his police interrogation, appellant admitted he was at the 7-Eleven but said he went home afterwards and was not present at the taco truck shooting.

The defense rested without presenting evidence.

II. *Verdicts and Sentence*

The jury found appellant not guilty of first degree murder, but guilty of the second degree murder of Sulpicio R., and guilty of the attempted murder of Eduardo R. The jury had been instructed that, as to each count, it could only find one of the firearm enhancements true. Specifically, it was instructed that it could not find a "lesser" enhancement true unless it first found that any greater enhancement was not true. Contrary to these instructions, the jury initially completed verdict forms with true findings for all the firearm enhancements as to each count.

The court informed the jury that they had erred and sent them back for further deliberations. As to the finding of murder, the jury returned the verdict forms with the lesser enhancements of use and intentional discharge of a firearm (§ 12022.53, subds. (b), (c)) crossed out, and, as to the finding of attempted murder, the jury crossed out the lesser enhancement of use of a

firearm (§ 12022.53, subd. (b)). The court accepted the findings of intentional discharge of a firearm causing death (§ 12022.53, subd. (d); count 1) and intentional discharge of a firearm (§ 12022.53, subd. (c); count 2). The jury did not find true the allegations that appellant committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

At sentencing, the trial court declined to strike the firearm enhancement as to the conviction for murder. Consequently, it sentenced appellant to an indeterminate term of 15 years to life plus 25 years to life for the enhancement. As to the attempted murder, the trial court struck the firearm enhancement and imposed the midterm of seven years consecutively. As a result, appellant's total sentence was 47 years to life. The trial court also imposed various fines and fees.

DISCUSSION

On appeal, appellant makes seven arguments. First, he contends the trial court should have instructed the jury to consider his youth as part of the instructions on self-defense. Second, he argues defense counsel was ineffective for failing to request such an instruction. Third, appellant contends that part of the jury instruction on imperfect self-defense was improper. Fourth, he argues defense counsel was ineffective for failing to object to alleged instances of prosecutorial misconduct during closing arguments. Fifth, appellant claims the cumulative effect of these errors was prejudicial. Sixth, he contends we should remand for the trial court to consider imposing a lesser firearm enhancement in connection with the second degree murder conviction. Seventh, appellant challenges the imposition of fines and fees. We address each argument in turn.

I. *No Prejudicial Error in Failing to Instruct the Jury to Consider Appellant's Youth in the Self-Defense Instructions*

Appellant argues the jury should have been instructed to consider his "youth as a factor in determining whether he subjectively believed in the need to use deadly force, and whether his belief was objectively reasonable." We conclude the error, if any, was harmless.

A. *Governing Law*

Murder is "the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) Malice exists "when an unlawful homicide was committed with the 'intention unlawfully to take away the life of a fellow creature' (§ 188), or with awareness of the danger and a conscious disregard for life." (*People v. Rios* (2000) 23 Cal.4th 450, 460.) First degree murder includes "any . . . kind of willful, deliberate, and premeditated killing." (§ 189.)

The crimes of second degree murder and voluntary manslaughter are lesser included offenses of first degree murder. (*People v. Seaton* (2001) 26 Cal.4th 598, 672 [second degree murder]; *People v. Randle* (2005) 35 Cal.4th 987, 994 [manslaughter], overruled on other grounds by *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) Second degree murder is "an unpremeditated killing with malice aforethought." (*Seaton*, at p. 672.) Voluntary manslaughter is an intentional, unlawful killing committed without malice. (*People v. Rios*, *supra*, 23 Cal.4th at p. 460.) A defendant lacks malice when he acts in a " ' " 'sudden quarrel or heat of passion,' " ' " or kills in " ' "the unreasonable but good faith belief in having to act in self-defense." ' " (*Ibid.*)

"If the issue of provocation or imperfect self-defense is . . . 'properly presented' . . . , the People must prove beyond reasonable doubt that these circumstances were lacking in order to establish the murder element of

malice." (*People v. Rios*, *supra*, 23 Cal.4th at p. 462, italics omitted.) In other words, "if the fact finder determines the killing was intentional and unlawful, but is not persuaded beyond reasonable doubt that provocation (or imperfect self-defense) was absent, it should acquit the defendant of murder and convict him of voluntary manslaughter." (*Ibid.*)

"For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter. [Citation.] To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable. [Citations.] As the Legislature has stated, '[T]he circumstances must be sufficient to excite the fears of a reasonable person . . . .' [Citations.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082, footnote omitted (*Humphrey*).)

B. *The Jury Instructions on Self-Defense*

Here, the trial court instructed the jury on perfect and imperfect self-defense. Based on CALCRIM No. 505, the jury was instructed that "[t]he defendant acted in lawful self defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] . . . [¶] When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would

have believed. [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the killing and or attempted killing was not justified."

The jury was also instructed on imperfect self-defense based on CALCRIM No. 571. This instruction stated: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self defense. [¶] . . .The difference between complete self defense and imperfect self defense depends on whether the defendant's belief in the need to use deadly force was reasonable. [¶] The defendant acted in imperfect self defense if: [¶] 1. The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable. [¶] . . . [¶] In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant. [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self defense."[5]

C. *Appellant's Claim of Instructional Error as to Reasonable Belief*

Appellant claims the foregoing instructions "did not go far enough." He contends the jurors should have also been told to consider, specifically, his youth when deciding whether his belief in the need to use deadly force was reasonable. He relies primarily on *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 277 (*J.D.B.*), in which the United States Supreme Court held that consideration of a suspect's age or youth is relevant when determining

[5] The jury was instructed similarly as to the attempted murder charge.

whether the suspect is in custody for purposes of a *Miranda*[6] analysis, and that "its inclusion in the custody analysis is consistent with the objective nature of that test."

The United States Supreme Court explained that "children as a class" are generally less mature and less responsible than adults, and they are more susceptible to outside pressures, and, as a result, a child's age may affect how a reasonable person in the suspect's position would perceive his or her freedom to leave. (*J.D.B.*, *supra*, 564 U.S. at pp. 271–273.) This inquiry remains objective because a child's age is not a "personal characteristic," and "considering age in the custody analysis in no way involves a determination of how youth 'subjectively affect[s] the mindset' of any particular child." (*Id.* at p. 275.) Relying primarily on this case,[7] and studies of brain development, appellant argues "juveniles cannot be held to the same 'reasonable person' standard as an adult."

Assuming without deciding that the jury should have been instructed specifically to consider appellant's youth in determining the reasonableness of any belief he had in the need to act in self-defense, and also assuming the more rigorous test of prejudice from *Chapman v. California* (1967) 386 U.S. 18 applies, we conclude "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.) Here, the jury was convinced beyond a reasonable doubt that appellant did not actually[8]

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[6] *Miranda v. Arizona* (1966) 384 U.S. 436.

[7] Appellant also cites *Roper v. Simmons* (2005) 543 U.S. 551, and *Graham v. Florida* (2010) 560 U.S. 48, but these cases concern appropriate punishments for juveniles.

[8] In discussing whether an individual actually believed in the need for self-defense, courts sometimes use the phrase "subjectively" in lieu of or in addition to the phrase "actually." For simplicity, we employ "actually" in all

believe in the need for self-defense because the jury convicted him of second degree murder, not voluntary manslaughter. Having so found, the jury was not required to determine whether any such belief was reasonable.

Of course, appellant contends the jury was also misinstructed as to his actual belief in the need for self-defense—a point we turn to below. Nevertheless, to put a fine point on our conclusion here, appellant's alleged misinstruction as to the reasonableness of his belief is only potentially prejudicial if the jury found he actually held that belief—which did not occur here. That is to say, had he been convicted of voluntary manslaughter, rather than second degree murder, we would be obliged to consider his claim. We turn now to appellant's claim that the jury was also misinstructed as to his actual belief in the need for self-defense.

D. *Appellant's Claim of Instructional Error as to Actual Belief*

Appellant contends the jury instructions on perfect and imperfect self-defense were erroneous because "[g]iven the manifest . . . differences between juvenile and mature adult minds, it was essential for jurors to have been instructed to consider youth in assessing . . . whether Camarillo actually believed in the need to use lethal force."

In *J.D.B.,* the United States Supreme Court explained that considering a child's age in a custody analysis is an objective inquiry, not a subjective one. (*J.D.B.*, *supra*, 564 U.S. at pp. 271–276.) Indeed, when discussing *J.D.B.* in a case involving a juvenile's alleged postwaiver invocation of his *Miranda* rights, the California Supreme Court stated that "nothing in *J.D.B.* calls for application of a subjective test to determine juvenile postwaiver invocations." (*People v. Nelson* (2012) 53 Cal.4th 367, 383, fn. 7.)

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its forms. Similarly, the phrase "objectively" is often used in lieu of or in addition to "reasonably" when discussing the other aspect of self-defense. We employ "reasonably" in all its forms.

Appellant also relies on *People v. Mathews* (1994) 25 Cal.App.4th 89, 93–94, in which a defendant with substantial hearing and vision loss was convicted of exhibiting a firearm in the presence of a peace officer. The jury was instructed, *inter alia*, that the crime required that the individual know or reasonably should know that the other person was a peace officer. (*Id.* at p. 98, fn. 2.) The trial court rejected Mathews's request that the jury, in essence, be instructed that the reasonableness of his belief be judged in terms of his sensory impairments. (*Id.* at pp. 98–99.) The appellate court reversed, finding: "What is 'apparent' to a reasonable person who can see and hear is not 'apparent' to a person who is blind and hearing impaired." (*Id.* at p. 100.)

These cases, arguably, support the proposition that youth is a relevant factor as to whether an individual reasonably believed in the need to act in self-defense. However, they do not support the proposition that a jury must be specifically instructed that youth is a relevant factor when considering what a defendant actually believed.

We recognize that in *Humphrey*, *supra*, 13 Cal.4th at pages 1088 to 1089, our high court held that expert testimony regarding intimate partner battering "is generally *relevant* to the reasonableness, as well as the subjective existence, of defendant's belief in the need to defend, and, to the extent it is relevant, the jury may *consider* it in deciding both questions."[9] And in *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732 (*Sotelo-Urena*), Division Two of this court held that "expert testimony on chronic homelessness was relevant to the issue of defendant's actual belief in the

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[9] Previously referred to as "battered women's syndrome" (see *Humphrey, supra,* 13 Cal.4th at p. 1076), the preferred terminology is now "intimate partner battering." (Evid. Code, § 1107, subd. (f); *People v. Wright* (2015) 242 Cal.App.4th 1461, 1492, fn. 11.)

need to use lethal force to defend himself," and it "was also relevant to the reasonableness of his belief." (*Id.* at p. 750.)

We agree that appellant's age is a relevant factor in determining what he actually believed. But we disagree with his contention that the trial court was required to provide a specific instruction on youth or that defense counsel should have requested one, and neither *Humphrey* nor *Sotelo-Urena* support that contention. Here, the jury was instructed, in determining what the defendant actually believed, to "consider all the circumstances as they were known and *appeared to the defendant*." (Italics added.) Implicit in this instruction is a requirement to consider how the situation appeared to this 16 year old.[10]

Second, there can be no doubt the jury was aware of appellant's age. For example, in his police interrogation, which was video-recorded and viewed by the jury, appellant said he was 16 years old and in 10th grade. Here, unlike in *Humphrey*, *supra*, 13 Cal.4th at pages 1076 to 1077, or *Sotelo-Urena*, *supra*, 4 Cal.App.5th at pages 741 to 743, the defendant was not precluded from presenting evidence or prevented from having the jury consider evidence in a particular manner. Indeed, during closing arguments, appellant's counsel expressly drew attention to his age, describing appellant as a "young man," and stating, "I doubt my client's ever shaved. He's just a kid."[11]

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[10] In his briefing, appellant undercuts his argument that more was needed when he acknowledges, "everyone experiences adolescence," but not everyone suffers from intimate partner battering, chronic homelessness, or sensory impairments.

[11] In his reply brief, appellant suggests that, as a result of the jury instructions on self-defense, the "jurors would have disregarded defense counsel's argument urging them to consider appellant's youth." We discern no conflict between defense counsel's argument and the jury instructions

Finally, there is very little evidence that appellant actually believed he was in imminent danger or needed to use deadly force during the incident at the taco truck. In his police interrogation, appellant denied he was even at the taco truck location where the shooting occurred. There was testimony that Sulpicio R. acted aggressively, and Jorge H. thought Sulpicio R. was going to attack appellant. Additionally, the People's gang expert opined it would be risky for Norteño gang members to go into rival territory unarmed. However, Sulpicio R. was about 20 to 25 feet away when appellant began shooting, and no one observed that Sulpicio R. or anyone else had a weapon at the scene. Appellant essentially shot Sulpicio R. from behind and then chased Eduardo R., firing at least two more shots at him.

Based on this record, we conclude beyond a reasonable doubt, that a jury instruction pinpointing appellant's youth as a factor to be considered when determining whether he actually believed in the need for self-defense would not have changed the murder verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

II. *Appellant's Ineffective Assistance of Counsel Claim Based on the Jury Instructions*

Next, appellant argues he "was denied his Sixth Amendment right to effective counsel . . . because his trial attorney should have, but failed to request an instruction on youth." We are not persuaded.

An appellant who contends he received ineffective assistance has the burden of proving: (1) trial counsel's performance was deficient in that it fell below an objective standard of reasonableness when measured by prevailing professional norms; and (2) there is a reasonable probability that, but for

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which told the jurors to "consider all the circumstances as they were known and appeared to the defendant," who was 16 years old.

counsel's errors, the result of the proceeding would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215–218; *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Appellant cannot establish prejudice. Having found, *ante*, that the failure to provide instructions on self-defense that specifically mention appellant's youth was harmless beyond a reasonable doubt, we also conclude that there is no reasonable probability that instructing the jury in this manner would have altered the verdict. Because appellant cannot show prejudice, this ineffective assistance of counsel claim fails. (*People v. Boyette* (2002) 29 Cal.4th 381, 430–431 [appellate court need not determine whether counsel's performance was deficient if there was no prejudice].)

III. *No Prejudicial Error in the Instruction on Imperfect Self-Defense*

Appellant argues it was error to instruct the jury that " '[i]mperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force.' " Appellant contends there was "no factual basis" for this part of the instruction, and he complains it led the prosecutor to argue that appellant and his group "became the aggressors when . . . [Jorge H.] retrieved a weapon." We are not persuaded.

A. *If the Instruction Did Not Apply, Appellant Suffered No Prejudice*

First, if there was no factual basis for the instruction, the jury would not have applied it. Here, the jury was instructed, based on CALCRIM No. 200, that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." We presume the jury followed this instruction.

(See *People v. Chism* (2014) 58 Cal.4th 1266, 1299.) If there was no factual support for this part of the instruction on imperfect self-defense, then it is not reasonably probable the verdict would have been different because the jury would not have applied it. (*People v. Debose* (2014) 59 Cal.4th 177, 205–206 [" 'error of instruction on an inapplicable legal theory is reviewed under the reasonable probability standard' " of *People v. Watson* (1956) 46 Cal.2d 818, 836].)

In arguing otherwise, appellant relies on *People v. Vasquez* (2006) 136 Cal.App.4th 1176, but his reliance is misplaced. In *Vasquez*, the victim was choking the appellant when the appellant drew his gun and shot the victim, and the trial court refused to provide any instruction on imperfect self-defense. (*Id.* at pp. 1178, 1179.) Here, by contrast, the jury was instructed on self-defense and imperfect self-defense. The challenged phrase was a correct statement of the law. (*People v. Enraca* (2012) 53 Cal.4th 735, 761.) At best, appellant contends, the jury might have disregarded the general instruction (CALCRIM No. 200) and applied the phrase to evidence that appellant argues does not exist. To state his claim is to reject it.

B. *The Prosecutor Did Not Misstate the Law of Self-Defense*

Next, appellant argues the challenged aspect of the instruction in combination with the prosecutor's closing arguments resulted in prejudicial error. We are not persuaded.

Appellant faults the prosecutor for arguing that what happened at the 7-Eleven "didn't matter." But the prosecutor did not make this argument; instead, she argued appellant and his friends returned with a gun to seek retaliation for what occurred at the 7-Eleven. This argument was well within the bounds of acceptable advocacy. Indeed, prosecutors have "wide latitude to discuss and draw inferences from the evidence at trial. [Citation.]

Whether the inferences the prosecutor draws are reasonable is for the jury to decide. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

Appellant claims the prosecutor misstated the law by arguing appellant "could not invoke self-defense because [Sulpicio R.] wasn't there for the first attack at the 7-Eleven." Once again, appellant mischaracterizes the prosecutor's argument. The prosecutor argued appellant did not actually believe he was in imminent, immediate danger because Sulpicio R. was "a substantial distance away. Not a single punch has been thrown at the taco truck. [And Sulpicio R.] was not a part of the 7-Eleven fight at all." This is permissible argument that directly addresses an aspect of appellant's self-defense claim; namely, whether he actually believed he was in imminent danger when Sulpicio R. advanced toward him. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 522 [reviewing court must view alleged objectionable statements "in the context of the argument as a whole"].)

Appellant complains about the prosecutor's statements that appellant and his "crew" became the "aggressor" when they returned with a gun, and the prosecutor argued self-defense "does not apply once you become the aggressor." But the prosecutor never stated, as appellant suggests, that once Jorge H. retrieved the gun, appellant "forever forfeited his right to self-defense, and perhaps his life, no matter what." Instead, the prosecutor told the jury to focus on appellant's "intent" when he shot Sulpicio R., and that the jury was there to decide what appellant did "and . . . his state of mind when he did it." This argument did not misstate the law. (*Sotelo-Urena*, *supra*, 4 Cal.App.5th at p. 745 ["A defendant claiming self-defense or imperfect self-defense is required to 'prove his own frame of mind.' "].)

Appellant claims the prosecutor should not have argued he had a "duty to retreat." But the prosecutor did not do so; instead, when discussing

whether appellant "had time to think" about his decision to shoot Sulpicio R., the prosecutor pointed out that the two groups were arguing, and appellant "did not walk away. He stood his ground out in front because he has the gun." Once again, when viewed in context, this statement was "fair comment on the evidence." (*People v. Gray* (2005) 37 Cal.4th 168, 216.)

Regarding the prosecutor's rebuttal argument, appellant claims she told the jury he "had no right to self-defense unless and until he was physically attacked." Not so. Instead, when discussing whether appellant believed he was "instantly about to die or suffer great bodily injury," the prosecutor pointed out that "[n]ot one punch was thrown at the taco truck yet. These are just a bunch of guys challenging each other to a fight." Finally, appellant takes issue with the prosecutor's example of a situation where self-defense would apply, claiming it was "too narrow." The prosecutor referenced a situation of defending oneself and one's family against home invasion. But, of course, it was just an example, and the prosecutor relied on it to argue that appellant had to believe he was in imminent danger and that the use of deadly force was necessary to defend against the danger. These rebuttal statements and the prosecutor's example were permissible advocacy and fair comment on the evidence. (*People v. Gray*, *supra*, 37 Cal.4th at p. 216.)

In arguing prejudicial error, appellant relies on *People v. Ramirez* (2015) 233 Cal.App.4th 940, but the case is inapposite. In *Ramirez*, the Court of Appeal determined that, under the facts of the case, the jury instruction on contrived self-defense, CALCRIM No. 3472, in combination with the prosecutor's closing argument, prevented the jury from considering a self-defense claim. (*Ramirez*, at pp. 945–948.) Specifically, the court found that CALCRIM No. 3472 was incomplete to the extent it suggested an aggressor

may never claim self-defense—a point repeatedly echoed there by the prosecutor in argument. (*Ibid.*) But here, the jury did not receive CALCRIM No. 3472, and, having reviewed the challenged statements, the prosecutor did not misstate the law. We reject appellant's claim that he suffered prejudicial error as a result of the challenged aspect of the instruction on imperfect self-defense.

IV. *Appellant's Ineffective Assistance of Counsel Claim Based on the Failure to Object During Closing Arguments*

Appellant concedes his defense counsel did not object to the prosecutor's alleged "misstatements of the law," and he recognizes that his claim of prosecutorial misconduct based on these statements must be deemed forfeited. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328 ["It is well settled that making a timely and specific objection at trial, and requesting the jury be admonished . . . is a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal."].) Appellant, therefore, argues he was denied effective assistance of counsel as a result of the failure to object to the prosecutor's statements. We are not persuaded.

A prosecutor's behavior violates the federal Constitution when it comprises an egregious pattern of conduct that infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) " 'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' " (*Ibid.*) "However, prosecutors have wide latitude to present vigorous arguments so long as they are a fair comment on the evidence, including reasonable inferences and deductions from it." (*People v. Leon* (2015) 61 Cal.4th 569, 606.)

Here, in arguing prosecutorial misconduct occurred, appellant relies on the same alleged misstatements of the law addressed *ante*. But, as explained, the prosecutor did not misstate the law of self-defense during closing and rebuttal arguments. The underlying theme of appellant's challenge is that the prosecutor implied appellant "forever lost his right to self-defense" when he took possession of the gun that Jorge H. retrieved after the fight at the 7-Eleven. But, as already explained, the prosecutor simply drew attention to the requirements of self-defense, and what the jury could infer regarding appellant's frame of mind when Sulpicio R. advanced toward him. Her statements were fair comment on the evidence. (*People v. Leon*, *supra*, 61 Cal.4th at p. 606.)

Because the prosecutor did not misstate the law, defense counsel was not required to object to the statements. (*People v. Ledesma*, *supra*, 43 Cal.3d at pp. 215–218.) The ineffective assistance of counsel claim fails.

V. *No Cumulative Error*

Next, appellant contends the cumulative effect of these errors was prejudicial. He claims "there was substantial evidence of self-defense, but the jury got derailed by the instructions given and not given," including the failure to instruct the jury to consider appellant's youth, and by the prosecutor's misstatements of the law.

We disagree. We have rejected many of appellant's assignments of error or we have found the errors, if any, to be harmless. On this record, we cannot find that appellant was prejudiced by the cumulative effect of the errors, if any. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1057 [rejecting claim of cumulative error].) Substantial evidence supports the jury's finding that appellant did not actually believe he was in imminent danger or needed to use deadly force. Sulpicio R. was 20 to 25 feet away when appellant began

shooting. No witness observed or even suggested that Sulpicio R. had a weapon. Appellant fired three shots at Sulpicio R., two of which hit him in the back and one of which hit him in the back of the arm. Appellant then chased after Eduardo R. and fired at least two more shots at him. On such a record, it is not reasonably probable appellant would have obtained a more favorable result absent the cumulative effect of the asserted errors. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

VI. *Remand for Consideration of Whether to Impose Lesser Enhancement That Was Charged and Submitted to the Jury*

Next, relying on *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*), an opinion of this division, appellant argues we should remand for resentencing because the trial court "did not consider the possibility of imposing a lesser firearm enhancement under [section 12022.53,] subsections (b) or (c)."[12] We recognize a panel of the Fifth District Court of Appeal disagreed with *Morrison* in *People v. Tirado* (2019) 38 Cal.App.5th 637, 643–644, review granted Nov. 11, 2019, S257658 (*Tirado*), when it held that section 12022.53, subdivision (h) does not authorize a trial court to substitute one enhancement for another.[13] But because of the unusual procedural

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[12] The Attorney General argues the claim is forfeited, but we decline to so find because appellant was sentenced before *Morrison* was decided.

[13] Our Supreme Court granted review in *Tirado* on the following question: "Can the trial court impose an enhancement under Penal Code section 12022.53, subdivision (b), for personal use of a firearm, or under section 12022.53, subdivision (c), for personal and intentional discharge of a firearm, as part of its authority under section 1385 and subdivision (h) of section 12022.53 to strike an enhancement under subdivision (d) for personal and intentional discharge of a firearm resulting in death or great bodily injury, even if the lesser enhancements were not charged in the information or indictment and were not submitted to the jury?" (See also *People v. Garcia* (2020) 46 Cal.App.5th 786 [agreeing with *Tirado*], review granted June 10, 2020, S261772, pending resolution of *Tirado*.)

history in this case regarding the firearm enhancements, outlined above, we find no tension between these cases as applied to the facts before us.

A. *Governing Law*

" 'Section 12022.53 sets forth the following escalating additional and consecutive penalties, beyond that imposed for the substantive crime, for use of a firearm in the commission of specified felonies, including . . . murder: a 10-year prison term for personal use of a firearm . . . (*id.*, subd. (b)); a 20-year term if the defendant "personally and intentionally discharges a firearm" (*id.,* subd. (c)); and a 25-year-to-life term if the intentional discharge of the firearm causes "great bodily injury" or "death, to any person other than an accomplice" (*id.*, subd. (d)). For these enhancements to apply, the requisite facts must be alleged in the information or indictment, and the defendant must admit those facts or the trier of fact must find them to be true.' [Citation.] Section 12022.53, subdivision (f) provides, 'Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment . . . .' " (*Morrison*, *supra*, 34 Cal.App.5th at p. 221.) However, under section 12022.53, subdivision (h), trial courts can "in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section."

In *Morrison*, the prosecutor initially alleged lesser enhancements under section 12022.53, subdivisions (b) and (c), but later amended the information to remove them, leaving only the enhancement for personally discharging a firearm causing death under section 12022.53, subdivision (d). The jury found this enhancement to be true. (*Morrison*, *supra*, 34 Cal.App.5th at

p. 221.) *Morrison* held the trial court had discretion to impose one of the lesser enhancements. (*Id.* at pp. 222–223.) Because the record did not reflect the trial court was aware it could do so, *Morrison* remanded for resentencing. (*Id.* at pp. 223–224.)

In *Tirado*, only the greatest enhancement, that under section 12022.53, subdivision (d), was alleged and found true by the jury. The appellate court found that the sentencing court had no authority under those circumstances to substitute one of the lesser enhancements under the same statute. (*Tirado*, *supra*, 38 Cal.App.5th at p. 640, rev.gr.) But the Court of Appeal also noted that "the prosecution could have alleged all three section 12022.53 enhancements, and if it had done so, the jury would presumably have found all three true. In that circumstance, the court would have had the discretion to strike the section 12022.53, subdivision (d) enhancement and then either impose one of the other two enhancements or strike them as well." (*Id.* at p. 644.)

Similarly, in *Morrison*, this court observed that "[i]n a case where the jury had also returned true findings of the lesser enhancements under section 12022.53, subdivisions (b) and (c), the striking of an enhancement under section 12022.53, subdivision (d) would leave intact the remaining findings, and an enhancement under the greatest of those provisions would be mandatory unless those findings were also stricken in the interests of justice." (*Morrison*, *supra*, 34 Cal.App.5th at p. 222.) Thus, *Morrison* and *Tirado* agree that trial courts have discretion under section 12022.53, subdivision (h), to strike a greater enhancement and impose a lesser one when the prosecutor alleges the lesser enhancement and when the jury finds it to be true. That is essentially what happened here.

B. *Remand for Consideration of Whether to Impose a Lesser Enhancement on Count 1*

As to the charge of murder, all three section 12022.53 enhancements were alleged. For attempted murder, only the lesser two were alleged, given that Eduardo R. was not injured in the shooting. The jury was instructed regarding the three different kinds of firearm enhancements based on section 12022.53, subdivisions (b), (c), and (d), and initially found them all true. However, the trial court directed the jury to return a verdict on the greatest applicable enhancement only. Accordingly, the jury crossed out its findings for the lesser enhancements and returned verdicts with the findings that appellant personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)) as to the murder, and personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) as to the attempted murder.

At the sentencing hearing, the prosecutor pointed out that "[u]nder Penal Code [section] 12022.53[, subdivision] (h), the Court does have some discretion with regard to the gun enhancement." The prosecutor requested a sentence of 15 years to life on the second degree murder conviction with an additional 25 years to life for the section 12022.53, subdivision (d) enhancement, and the prosecutor requested the midterm sentence of seven years on the attempted murder conviction plus 20 years for the section 12022.53, subdivision (c) enhancement. Defense counsel requested the trial court "to exercise its discretion, to the extent that it can, to give the least amount of time to my client."

For the second degree murder conviction, the trial court sentenced appellant to an indeterminate term of 15 years to life, and "[f]or the true finding on the [section] 12022.53[, subdivision] (d) allegation, discharge of a firearm causing death, I'll impose an additional but consecutive term of 25 to life, decline to exercise my discretion to strike that enhancement, dismiss it

or strike punishment under [section] 12022.53[,subdivision] (h). [¶] For several reasons, I won't articulate all of them, but as I recall the testimony, most, if not all, of the entry wounds to [Sulpicio R.], the victim in Count 1, were on the backside. I know there was some dispute about one of those, whether or not it was—how it was inflicted. You do have Mr. Camarillo's behavior in the juvenile hall, and then, you know, shooting down [Sulpicio R.] wasn't enough, Mr. Camarillo then took off running after [Eduardo R.], the Count 2 victim. [¶] So it wasn't like he was ending the immediate threat he may have perceived and then just standing down. He took further action. [¶] It just doesn't seem like—I know he's young, he was 16 years old at the time, really tragic. [Jorge H.], 19 years old, I think. He's 19 now. . . . [Sulpicio R.], 19. All these folks were fairly young, except for, perhaps, [Eduardo R.]. I don't know if I heard evidence about his age. [¶] But I just think under these circumstances, the [section] 12022.53[, subdivision] (d) enhancement should stand as it was found true. So the total sentence on Count [1] will be 40 years to life."[14]

For the attempted murder conviction, the trial court indicated it waivered between imposing the midterm and the high term. "I know Mr. Camarillo had no real record to speak of, perhaps none at all. The People are requesting [the] midterm, probation recommended [the] midterm, so I'll go along with [the] midterm [sentence of] seven [years]. He was 16 at the time. [¶] . . . [¶] But, you know, his age, 16 at the time, the fact that there was no actual injury to [Eduardo R.], I'll go along with [the] midterm of seven. [¶] And I've waivered on this, but I think what I'm going to do on the [section] 12022.53[, subdivision] (c) enhancement to Count 2, I'm going to strike the

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[14] The presentence report indicates that appellant had two physical altercations with Sevren M. in juvenile hall.

punishment . . . . [¶] Primarily because of the defendant's age, primarily because there were no—there was no actual injury to [Eduardo R.], and also because [Eduardo R.] was not without blame for the incident. And then just overall, you look at this case, it was kind of a single event in this parking lot. And a total term of imprisonment of 45 years to life for the single use of one firearm, seems a bit on the excessive side."

Based on this record, and especially given the trial court's concern that its sentence seemed "a bit on the excessive side," we remand for the trial court to consider whether to strike the section 12022.53, subdivision (d) enhancement and impose a lesser enhancement in connection with appellant's second degree murder conviction. Applying either *Morrison*, *supra*, 34 Cal.App.5th at page 222 or *Tirado*, *supra*, 38 Cal.App.5th at page 644 (rev.gr.), the trial court has the authority to do so because the lesser enhancements were charged, submitted to the jury, and the jury initially found true all of the firearm enhancement allegations. But for the trial court's approach to the instructions and verdict forms, it would have found itself in exactly the position both *Morrison* and *Tirado* agree would permit it to impose lesser enhancements by striking greater ones.

We remand for resentencing because the record does not reflect the trial court was aware it could do so. We express no opinion as to how the trial court should exercise its discretion on remand.

VII. *The Fines and Fees*

At appellant's sentencing hearing, the court imposed a restitution fine of $10,000 (§ 1202.4, subd. (b)), a court operations assessment of $80 (§ 1465.8), and a conviction assessment of $60 (Gov. Code, § 70373).[15]

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[15] The court also imposed but stayed a parole revocation fee of $10,000, pending appellant's successful completion of parole. Appellant does not challenge this fee on appeal.

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, decided after he was sentenced, appellant contends we should vacate the assessments and stay imposition of the restitution fine, or, alternatively, that we should remand the matter for an ability-to-pay hearing. Our remand for resentencing obviates the need to consider appellant's challenge to the restitution fine and assessments because appellant may raise his objections concerning any perceived inability to pay at the resentencing hearing, should he choose to do so.

DISPOSITION

We affirm the judgment of conviction. We remand for resentencing consistent with this opinion.

Reardon, J.*

WE CONCUR:

Needham, Acting P. J.

Burns, J.

A155577

* Judge of the Superior Court of Alameda County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Appendix "B"

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 5

THE PEOPLE,
Plaintiff and Respondent,
v.
JESUS CAMARILLO,
Defendant and Appellant.

A155577
Solano County Super. Ct. No. FCR331711

BY THE COURT:

The petition for rehearing is denied.

Date: 02/02/2021

Needham, J., Acting P.J.

ACTING PRESIDING JUSTICE

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am an active member of the State Bar of California and am not a party to this cause. My business address is 1237 South Victoria Avenue, Suite 508, Oxnard, California 93035.

On February 24, 2021, I submitted a PDF version of this document, described as: **APPELLANT'S PETITION FOR REVIEW** to TrueFiling at http://www.truefiling.com, for filing with the Court and directed that it serve a copy of this document on the parties listed below:

~~First Appellate District Court of Appeal~~
~~District Five~~
~~350 McAllister Street~~
~~San Francisco, California 94102~~

First District Appellate Project
475 Fourteenth Street, Suite 650
Oakland, California 94612

Attorney General, State of California
455 Golden Gate Avenue
San Francisco, California 94102

[X] (BY MAIL) I deposited the foregoing document(s) in a sealed envelope with postage thereon fully prepaid with the United States Postal Service in a mail chute at Oxnard, California, addressed as follows:

Mr. Jesus Camarillo
[address withheld per court rules]

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321 Tuolumme Street
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Clerk of the Court, Appellate Division
Appeals Clerk
Solano Justice Brandh
321 Tuolumme Street
Vallejo, California 94590

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED at Oxnard, California on February 24, 2021.

Danalynn Pritz