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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

In re [redacted]., a Person Coming Under the Juvenile Court Law.	[redacted]
People of the State of California, Plaintiff and Respondent, **v.** [redacted]., Defendant and Appellant.	(San Francisco County Superior Court No. [redacted])

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for San Francisco County

[redacted] Judge

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STATEMENT OF APPEALABILITY

This appeal is from a judgment in a proceeding under Welfare and Institutions Code section 602 that finally disposes of the issues between the parties. (Welf. & Inst. Code § 800, Cal. Rules of Court, Rule 8.204(a)(2)(B).)

STATEMENT OF THE CASE

On May 17, 2019, the San Francisco District Attorney's Office filed a Welfare and Institutions Code section 602 petition charging 15-year-old [redacted]. with two felony violations of second-degree robbery (Pen. Code, § 211, Count One ["[redacted] robbery"] and Count Three ["[redacted]robbery"]); and a misdemeanor violation of resisting, obstructing or delaying a peace officer (Pen.

Code, § 148, subd. (a)(1), Count Two.) (2CT 355-359.) An amended petition was filed on May 17, 2019 charging him with additional count of felony grand theft in violation of Penal Code section 487 for the cell phone theft from [redacted]. (2CT 362, 403.)

After a contested jurisdiction hearing, the court sustained the [redacted] robbery and resisting arrest counts. (2CT 397, 3RT 402.) The court granted the defense motion for acquittal on the [redacted] robbery count, finding insufficient evidence to connect [redacted] to that robbery. (1CT 389-393, 3RT 316.) [redacted] admitted the grand theft violation on May 29, 2019. (2CT 403.) The court set his maximum confinement time at seven years and four months. (2CT 402.)

After a contested disposition hearing on August 26, 2019, the court found that [redacted]'s welfare required that custody be taken from his parent. (Supp. CT 454-461; Supp. RT 27.)[1] The court ordered out-of-home placement in the Catholic Charities Boys and Girls Home, where [redacted] had been staying since June 11, 2019. (Supp CT 446, 456.)

[redacted] filed a timely notice of appeal. (2CT 428.)[2]

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[1] "Supp CT" refers to the clerk's transcript, pages 433-478, filed on November 26, 2019. "Supp RT" refers to the transcript of the jurisdiction hearing on August 26, 2019, and filed as a supplemental record on December 27, 2019.

[2] The notice of appeal was filed prematurely on June 13, 2019 after the jurisdiction hearing. By an order dated September 13, 2019, this Court has construed the notice to have been taken from the trial court's dispositional order on August 26, 2019. (Supp CT 470.)

STATEMENT OF FACTS[3]

The [redacted] Robbery

On April 19, 2019 at 6:50 p.m., [redacted] was walking down Kearny Street towards Market Street, holding his $1200 iPhone XS Max in his hand. (1RT 64.) As he was nearing Bush Street, he found himself surrounded by four young African American men. (1RT 77-78.) One of them punched him on the right side of his temple with a closed fist, causing him to stagger and fall to the ground. (1RT 68.) His glasses were knocked off and as he was on the ground, the boys swung at his face, head and arms, knocking the phone out of his hands. (1RT 74.) The boys took the phone and ran off. (1RT 75.) [redacted] testified that he was shocked and afraid, especially given the number of people accosting him. (1RT 76.) He was bleeding from his forearm. (1RT 79.)

Using the cell phone's GPS tracking feature, police tracked it to Golden Gate and Leavenworth, an area known for stolen cell phone trafficking. (2RT 200.) They saw four subjects matching the descriptions of the boys who had accosted [redacted], and detained and arrested two of them. (2RT 199-201, 222.) The other two boys ran, ignoring police commands to stop. (2RT 204, 222; 3RT 357.) [redacted] was later detained near UN Plaza and identified as one of the boys involved. (2RT 222-224, 282-283.)

[redacted] testified on his own behalf. While he acknowledged intending to participate in a cell phone "snatch

[3] Because the issue on appeal is not dependent on the facts of the underlying offenses, the facts are only briefly summarized here.

and grab," he did not expect the other boys to use violence to take [redacted]'s phone. (3RT 323, 334, 337.) Shown surveillance video of the scene, [redacted] identified himself and the other boys. (3RT 342.) He admitted that he remained in the company of the group, and intended to steal more phones, after the [redacted] robbery. (3RT 341.)

The Cell Phone Theft

According to the probation report, [redacted] was standing at a Muni bus stop on March 14, 2019 when a boy, later identified as [redacted] from security camera footage, grabbed her cell phone and walked down Kearny street, where he was seen giving the phone to another boy. (2CT 408.)

ARGUMENT

I. THE CONDITION GRANTING THE PROBATION OFFICER UNFETTERED DISCRETION TO ORDER [redacted] TO PARTICIPATE IN COUNSELING, DRUG TESTING, DRUG TREATMENT OR "ANY OTHER PROGRAMS AND/OR SERVICES" THAT ARE "DEEMED APPROPRIATE" IS AN UNLAWFUL DELEGATION OF JUDICIAL AUTHORITY.

A. Background

At the contested disposition hearing, after redeclaring wardship and ordering [redacted] removed from the custody of his parents, the court imposed a series of probation conditions, including the following:

> Participate fully in any programs of counseling deemed appropriate by your probation officer which may include individual, group and family counseling as well as drug counseling, testing and treatment, or any other programs and/or services you are referred to by your probation officer.

(Supp. CT 459, Supp. RT 30.)

Defense counsel did not object to or address the condition. (Supp. RT 30.)

B. Standard of Review

This Court reviews appellant's claim that a probation condition violates the separation of powers doctrine independently under the de novo standard of review. (*In re Ilasa* (2016) 3 Cal.App.5th 489, 498; see also *In re Lugo* (2008) 164 Cal.App.4th 1522, 1535-1536.)

C. The Claim Is Cognizable on Appeal.

"A Court of Appeal may review the constitutionality of a probation condition, even when it has not been challenged in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record." (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1345, citing *In re Sheena K.* (2007) 40 Cal.4th 875, 888-889.) This is such a case. Although "in some instances, a constitutional defect may be correctable only by examining factual findings in the record or remanding to the trial court for further findings" (*Sheena K.*, *supra*, 40 Cal.4th at p. 887), the record here contains no pertinent factual findings or discussion. Thus, the validity of the court's order that [redacted] participate in counseling, drug counseling, drug testing, drug treatment or "any other" programs or services "deemed appropriate" by the probation officer presents a question of law based on "generalized legal concepts[.]" (*Id.* at p. 885.)

D. The Court Improperly Delegated Absolute Authority To The Probation Officer To Decide In The First Instance Whether [redacted] Must Participate In Counseling And Other Programs.

Under both the state and federal separation of powers doctrines, it is well settled that courts may not delegate the exercise of their discretion to probation officers. (*In re Pedro Q* (1989) 209 Cal.App.3d 1368, 1372; *United States v. Stephens* (9th Cir. 2005) 424 F.3d 876, 880 [limitations on probation officer's power to decide the nature or extent of punishment imposed on a probationer is of constitutional dimension, derived from Article III's grant to courts of power over cases and controversies.]) Article III, section 3 of the California Constitution provides: "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Judicial power is in the courts and their function is to declare the law and determine the rights of parties in controversy before the court. (*Marin Water etc. Co. v. Railroad Com.* (1916) 171 Cal. 706, 711-712.) Executive or administrative officers cannot exercise or interfere with judicial power. (*Boags v. Municipal Court* (1987) 197 Cal.App.3d 65, 67.) Thus, trial courts alone have the power to impose probation conditions. (See *People v. Welch* (1993) 5 Cal.4th 228, 233; Welf. & Inst. Code, § 730 [juvenile court may impose reasonable conditions of probation that it determines to be "fitting and proper[.]")

The condition at issue here compels [redacted] to participate in varying forms of counseling, drug counseling, testing and

treatment or "any other programs and/or services" as "*deemed appropriate by your probation officer*." (Supp CT 459, emphasis added.) This condition violates the separation of powers doctrine because it grants the probation officer unfettered authority to decide in the first instance whether [redacted] should be required to participate in these programs. (Compare *People v. Penoli,* (1996) 46 Cal.App.4th 298 [upholding probation condition where court ordered the defendant to attend drug treatment, but allowing probation to select the specific treatment program.])

Courts have found similar open-ended probation conditions to be improper delegations of judicial authority. For example, in *People v. Cervantes* (1984) 154 Cal.App.3d 353, the trial court ordered the defendant to "pay restitution in an amount and manner to be determined by the Probation Officer." (*Id.* at p. 356.) The Court of Appeal struck the condition holding that the power to impose probation conditions lies exclusively with the trial court and cannot be delegated to the probation officer. (*Id.* at pp. 357-358.)

In *In re Shawna M.* (1993) 19 Cal.App.4th 1686, the juvenile court ordered that supervised visitation with the minor be permitted "with visitation to be arranged through, and approved by" the human services agency. (*Id.* at p. 1688.) This Court held that the juvenile court's order was an improper delegation of judicial power. (*Id.* at p. 1690.) The Court explained that while the juvenile court could have properly delegated the authority to determine the time, place, and manner of visitation, its order gave "respondent no guidance as to when, how often,

and under what circumstances visitation is to occur." (*Ibid.*) As such, the condition granted "too much discretion to respondent, and is therefore an invalid order." (*Id.* at p. 1691; see *In re Danielle W.* (1989) 207 Cal.App.3d 1227 [visitation order granting the Department complete and total discretion to determine whether or not visitation occurs would be invalid.])

As these and other cases demonstrate, the critical component of lawful delegation under both the state and federal constitutions is that the court must determine whether a defendant must abide by a condition, while the ministerial details of where and how the condition will be satisfied may be properly left to the probation officer. (See *United States v. Stephens, supra*, 424 F.3d at p. 880; *United States v. Melendez–Santana* (1st Cir. 2003) 353 F.3d 93, 103 [while courts need not become involved in details such as scheduling tests, they may not vest probation officers with the discretion to order an unlimited number of drug tests]; *United States v. Kent* (8th Cir.2000) 209 F.3d 1073, 1079 [court's order that if counseling "becomes necessary" probation officer may determine whether defendant must participate, was unlawful delegation because punishment is a judicial function]; *United States v. Peterson* (2nd Cir.2001) 248 F.3d 79, 85 [condition requiring sexual offender counseling "only if directed to do so by his probation officer" would be an impermissible delegation of judicial authority; however if the district judge intended nothing more than to delegate to the probation officer the details of selection and scheduling of the program, such delegation was proper]); *United States v. Pruden* (3d Cir.2005)

398 F.3d 241, 250 [order giving probation officer authority to decide whether or not defendant would have to participate in mental health program was improper.])

Here, the condition requiring [redacted]'s participation in counseling, drug treatment, drug testing and "any other" program or service "deemed appropriate" by his probation officer must be stricken as an improper delegation of judicial authority because "[i]t is for the court to determine the nature of the prohibition placed on a defendant as a condition of probation." (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1359.) As the cases above make clear, the trial court may delegate to the probation officer only the discretion to determine the time, place, and manner of administering probation conditions, not the ultimate authority to order attendance in a program in the first instance. (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1377; *Shawna M., supra*, 19 Cal.App.4th at p. 1690; see *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240.) The delegation of unfettered discretion to a probation officer here violates the state and federal separation of powers doctrine. (See *Danielle W., supra*, 207 Cal.App.3d at p. 1237, *O'Neil, supra*, 165 Cal.App.4th at p. 1359.) Accordingly, the condition must be stricken.

E. Should This Court Find The Challenge Forfeited By The Lack of Objection, Counsel Rendered Ineffective Assistance In Violation of the Sixth Amendment.

To demonstrate a violation of the Sixth Amendment right to effective assistance of counsel, [redacted] must show that "counsel's representation fell below an objective standard of

reasonableness . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) He must then demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id*. at p. 694.) Where the face of the record shows that there could be no plausible tactical explanation for defense counsel's acts or omissions, a claim of ineffective assistance is cognizable on direct appeal. (*People v. Stratton* (1988) 205 Cal.App.3d 87, 94-95.)

Here, the condition on its face clearly and improperly delegated judicial authority to the probation officer in violation of the state and federal separation of powers doctrines. Thus, reasonably competent counsel would have objected to the condition on this ground. It is settled that the failure to raise potentially meritorious objections constitutes deficient performance under the first prong of *Strickland*. (See, e.g., *In re Saunders* (1970) 2 Cal.3d 1033, 1049-1050; *People v. Zimmerman* (1980) 102 Cal.App.3d 647, 657-659.) Thus, counsel's failure to object to the condition fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland, supra*, 466 U.S. at p. 688.)

Under *Strickland's* second prong, trial counsel's error is prejudicial if it is reasonably probable that the defendant would have obtained a better outcome in the error's absence. (*Strickland, supra*, 466 U.S. at p. 694; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) Here, had defense counsel objected to the challenged condition on the grounds

discussed, there is a reasonable probability the court would have stricken or modified the condition. Because no reasonable tactical basis exists to support trial counsel's failure to challenge this condition, he rendered prejudicial ineffective assistance under the Sixth Amendment. (*People v. Pope* (1979) 23 Cal.3d 412, 426.) Accordingly, this Court may reach the issue on the merits.

CONCLUSION

For the reasons set forth above, this Court should grant the requested relief.

Dated: February 3, 2019

Respectfully submitted,

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Staff Attorney

Attorneys for Appellant

CERTIFICATE OF WORD COUNT

Counsel for [redacted]. hereby certifies that this brief consists of 2342 words (excluding cover page information, tables, proof of service, signature blocks, and this certificate), according to the word count of the computer word-processing program. (Cal. Rules of Court, rule 8.360(b)(1).)

Dated: February 3, 2020

[redacted]
Staff Attorney

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE BY TRUEFILING

Re: *People v.* [redacted]. Case No.: [redacted]

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of Alameda, State of California. My business address is 475 Fourteenth Street, Suite 650, Oakland, CA 94612. My electronic service address is eservice@fdap.org. On February 3, 2020, I served a true copy of the attached **Appellant's Opening Brief** on each of the following, by placing same in an envelope(s) addressed as follows:

San Francisco County Superior Court
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850 Bryant Street
San Francisco, CA 94103

[redacted]
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

San Francisco County Superior Court
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San Francisco, CA 94103

[redacted]
(Appellant)

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in Oakland, California, on that same day in the ordinary course of business.

On February 3, 2020, I transmitted a PDF version of this document by TrueFiling to the following:

Xavier Becerra, Attorney General
Office of the Attorney General
(Respondent)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 3, 2020, at Oakland, California.

/s/ BL Palmer

BL Palmer