S206720

In the Supreme Court of the State of California

In re A. J., a Person Coming Under the Juvenile Court.
THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **A. J.,** **Defendant and Appellant.**

Case No.

Third Appellate District, Case No. C068046
Sacramento County Superior Court, Case No. JV130980
The Honorable Robert M. Twiss, Judge

PETITION FOR REVIEW

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
JULIE A. HOKANS
Supervising Deputy Attorney General
JEFFREY A. WHITE
Deputy Attorney General
State Bar No. 255664
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5158
Fax: (916) 324-2960
Email: Jeff.White@doj.ca.gov
Attorneys for Plaintiff and Respondent

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COURT RULES

The People of the State of California hereby petition this Court to grant review to settle an important question of law concerning the interpretation and application of California Rules of Court, rule 5.778[1] and the right of a represented minor to enter a no contest plea over the objection of his or her counsel.

ISSUE PRESENTED

Where a minor's counsel refuses to consent to the minor's admission of charges, must the juvenile court allow and accept a minor's no contest plea over counsel's objection?

SUMMARY OF ARGUMENT

In a published opinion, the Court of Appeal found that the juvenile court had erred in two ways when considering the prosecution's plea bargain offer and thereby failed to respect the minor's personal choice over the fundamental decision of whether to accept the offer. First, the Court of Appeal found that the juvenile court had erred under the plea procedure for juveniles (rule 5.778(c), (d), (e)) by not allowing the minor to plead no contest, which he could do subject only to the approval of the court, as an alternative to admitting the allegations of the petition, which required the consent of counsel. Second, the Court determined that the juvenile court impermissibly relied solely on the belief of defense counsel that there was no factual basis for a plea, rather than independently determining the issue itself.

The findings of the Court of Appeal appear to be an erroneous interpretation and application of the Rules of Court. The decision mistakenly distinguishes between an admission and plea of no contest plea for purposes of whether a represented minor can enter into a plea bargain

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[1] All further references to rules refer to the California Rules of Court, unless otherwise noted.

over counsel's objection. By creating such a distinction, the decision acts contrary to the statutory language of the Welfare and Institutions Code, which requires that a minor's counsel consent to an admission. The decision also seems to put the juvenile court in a position where it may interfere with the advice that counsel gives to the minor who he or she represents. Moreover, the opinion conflates the steps the juvenile court is required to take regarding a plea agreement and the order in which the court is required to take them.

The Court of Appeal's interpretation and application of the rule 5.778 is wrong and warrants review.

STATEMENT OF THE CASE

On November 3, 2010, the district attorney filed a petition in the Sacramento County Superior Court, alleging that 13-year-old appellant, A. J., came within the provisions of Welfare and Institutions Code section 602. (1 CT 54-55.) The petition alleged that appellant had assaulted his mother with a deadly weapon by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1); counts 1 and 2)[2] and that he had maliciously and unlawfully damaged a door (§ 594, subd. (b)(2)(A); count 3). (1 CT 56-57.)

On January 25, 2011, a *Marsden*[3] hearing was held. (1 CT 114.) During the *Marsden* hearing, appellant expressed his desire to admit an allegation and go home with an ankle monitor, but noted that his attorney did not agree. (1 CT 114; 1 RT 40.) On February 2, 2011, the court resumed the *Marsden* hearing and addressed the issue of whether or not appellant was being denied the right to enter a plea. (1 CT 115.) The court

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[2] All further statutory references are to the Penal Code unless otherwise noted.

[3] *People v. Marsden* (1970) 2 Cal.3d 118.

determined that there was not a conflict between appellant and his counsel and that counsel was "satisfied that the minor [was] not guilty of Counts 1 and 2." (*Ibid.*)

On February 18, 2011, following a contested jurisdictional hearing, the court found that all three counts were supported beyond a reasonable doubt and therefore sustained the petition. (1 CT 119-120.) Counts 1 and 2 were deemed felonies and count 3 was deemed to be a misdemeanor. (1 CT 120.)

On March 8, 2011, appellant was continued as a ward of the court.[4] (1 CT 126-127, 134.) Appellant was ordered to serve 127 days in juvenile hall and was given credit for the 127 days he had already served. (1 CT 128, 134.) It was further ordered that appellant be placed into a "suitable Level A placement pursuant to Standing Order 98-003."[5] (*Ibid.*)

Appellant appealed. He argued, and in a published opinion the Court of Appeal agreed, that the juvenile court erred in considering the prosecution's plea offer and appellant's right to accept it. To remedy the error, the Court of Appeal determined that it was necessary to remand the case and have the prosecution submit the extant provisions of the previously offered plea bargain to the juvenile court for its approval, unless the prosecution elected to readjudicate the minor and resume the plea negotiation process. The Court of Appeal further noted that if the plea bargain is submitted to and approved by the juvenile court, the findings and

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[4] Appellant had previously been adjudged a ward of the court following the court's sustainment of a February 22, 2010, petition. (1 CT 1-3, 46.)

[5] Standing Order 98-003 provides that a Level A placement includes "(1) the home of a relative or friend of the minor; (2) a licensed foster home; (3) a licensed group home; or (4) a licensed residential treatment center." (Clerk's Augmented Transcript on Appeal at p. 2.)

orders of the juvenile court shall be modified to be consistent with the terms of the plea bargain. (Attachment A [Court of Appeal opinion].)

REASONS FOR GRANTING THE PETITION

I. A JUVENILE COURT SHOULD NOT BE PERMITTED TO ALLOW OR ACCEPT A NO CONTEST PLEA FROM A MINOR WHEN THE MINOR'S COUNSEL REFUSES TO CONSENT TO AN ADMISSION OF THE ALLEGATIONS

Under the Court of Appeal's decision, a juvenile court can allow or accept a no contest plea from a minor when the minor's counsel refuses to consent to an admission of the allegations. The Court of Appeal's opinion mistakenly distinguishes between an admission and a plea of no contest, thus contradicting the statutory requirement of counsel's consent. The opinion also conflates the steps the juvenile court is required to take regarding a plea agreement and the order in which the court is required to take them.

A. Legal Standards

The issue here involves both statutory provisions and rules of court. "The California Rules of Court are adopted by the Judicial Council of California. The Judicial Council, which is charged by the state Constitution with 'improv[ing] the administration of justice,' is authorized to 'adopt rules for court administration, practice and procedure,' which shall 'not be inconsistent with statute.' (Cal. Const., art. VI, § 6, subd. (d).) 'The rules have the force of statute to the extent that they are not inconsistent with legislative enactments and constitutional provisions.' (*In re Richard S.* (1991) 54 Cal.3d 857, 863.)" (*In re Kler* (2010) 188 Cal.App.4th 1399, 1402.)

Welfare and Institutions Code section 657, subdivision (b), discusses the options available to a minor at a detention hearing. It states that, "At the detention hearing, or any time thereafter, a minor who is alleged to

come within the provisions of Section 601 or 602, may, *with the consent of counsel*, admit in court the allegations of the petition and waive the jurisdictional hearing." (Italics added.)

Rule 5.778 also addresses the procedure to follow when a minor is going to admit an allegation. Rule 5.778(c) provides that:

> The court must . . . inquire whether the child intends to admit or deny the allegations of the petition. If the child neither admits nor denies the allegations, the court must state on the record that the child does not admit the allegations. If the child wishes to admit the allegations, the court must first find and state on the record that it is satisfied that the child understands the nature of the allegations and the direct consequences of the admission, and understands and waives the rights in (b).[6]

Rule 5.778(d) subsequently provides that, "*Counsel for the child must consent to the admission*, which must be made by the child personally." (Italics added.) Rule 5.778(e) provides that, "The child may enter a plea of no contest to the allegations, subject to the approval of the court."

The Court of Appeal also relied on several statutes that are applicable to pleas in the adult courts. Penal Code section 1016 discusses the "[p]ermissible pleas" and the "[e]ffect of [a] plea of nolo contendere" in adult court. Section 1016 provides in pertinent part that a defendant may enter a plea of

> [n]olo contendere, subject to the approval of the court. The court shall ascertain whether the defendant completely understands that a plea of nolo contendere shall be considered the same as a plea of guilty and that, upon a plea of nolo contendere, the court shall find the defendant guilty. *The legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes.*

(Italics added.)

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[6] Rule 5.778(b) lists the rights of a child at a contested hearing.

Penal Code section 1018 provides in part that: "Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, *nor shall that plea be received without the consent of the defendant's counsel.*" (Italics added.)

Finally, the Court of Appeal also addressed rule 5.778(f) and Penal Code section 1192.5. Rule 5.778(f) discusses the findings that a juvenile court "must make" "[o]n an admission or plea of no contest." Similarly, section 1192.5 provides in part as follows:

> *If the court approves of the plea,* it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.

(Italics added.)

B. Application

Because a guilty plea and a no contest plea have the same "legal effect" it is inconceivable that the Legislature would intend to allow a process in which a minor could avoid the safeguards that have been put into place for guilty pleas (or admissions) by allowing the minor to enter a plea of no contest instead.

The Court of Appeal failed to consider all of section 1016 when it reasoned that:

> [T]he juvenile court effectively treated the prosecution's plea bargain offer as calling only for an "admission" by [A. J.] of the

> allegations of the section 602 delinquency petition, to which [A. J.'s] counsel had to "consent." (Rule 5.778(d).) The juvenile court failed to recognize that [A. J.] could, alternatively, "enter a plea of no contest to th[ose] allegations, subject [only] to the approval of the court." (Rule 5.778(e).) Not only rule 5.778, but a related rule as well as statutes recognize this distinction between an "admission" of, and a "no contest" plea to, section 602 petition allegations; this distinction is analogous to the adult criminal plea distinction between pleading guilty and pleading no contest. (Rule 5.754(b); see Welf. & Inst. Code, § 657, subd. (b); see also Pen. Code, §§ 1192.5, 1016, subds. 1 & 3.)

(Attachment A at p. 13.)

Although the Court of Appeal correctly noted that Penal Code section 1016 distinguishes between a plea of guilty and no contest, the Court omitted the fact that the statute goes on to note that "[t]he legal effect of [a no contest] plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes."

Both rule 5.778(d) and Welfare and Institutions Code section 657, subdivision (b), require that in order for a minor to admit allegations, he or she must have the consent of counsel. To the extent that rule 5.778(e) allows a minor to circumvent a safeguard that was clearly established by the Legislature, the rule is inconsistent with Welfare and Institutions Code section 657 and therefore not valid.

Respondent also notes that, while the decision whether or not to enter into a plea agreement is a "fundamental" decision, it is appropriate for the Legislature to put limitations or safeguards on the decision when it deems such safeguards are necessary. In this way the juvenile rules are akin to Penal Code section 1018 and the limitations it places on defendants in capital cases and cases involving a sentence of life without the possibility of parole. In analyzing the consent requirement of section 1018, this Court has noted that "[a]lthough . . . the decision how to plead to a criminal charge is personal to the defendant, . . . 'it is no less true that the

Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised.'" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1299, quoting *People v. Chadd* (1981) 28 Cal.3d 739.)

The plain language of Welfare and Institutions Code section 657, subdivision (b), requires the consent of counsel when a minor is going to admit allegations. As such, the Legislature has clearly decided that it is necessary to regulate the manner in which a minor is allowed to admit charges. To allow a minor to circumvent these regulations by entering a plea of no contest—which is not legally distinguishable—contradicts the Legislature's intent.

The Court of Appeal also noted that "the juvenile court impermissibly relied solely on defense counsel's 'personal assessment' that [A. J.], in fact, was not guilty of the two assault charges, and therefore there was no 'factual basis' to support the 'admission' underlying the prosecution's plea offer." In doing so, the Court of Appeal held that "[t]he juvenile court did not properly 'determine[,] by independent inquiry,' whether there existed a factual basis for the plea offered [A. J.] by the prosecution, through the procedure of a no contest plea." (Attachment A at pp. 13-14.) To support its holding, the Court of Appeal relied upon rule 5.778(f) and Penal Code section 1192.5. (Attachment A at pp. 14-15.)

Respondent submits that both rule 5.778(f) and Penal Code section 1192.5 apply only when the court is determining whether there is a factual basis for a plea or admission that defendant has already made. (See *People v. Willard* (2007) 154 Cal.App.4th 1329, 1334, fn. 2 ["The purpose of the factual basis inquiry, 'is to corroborate what the defendant already admits' by his plea."], quoting *People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1578.) Because the minor here had not admitted the charges, and had not reached any plea agreement with the prosecution, the Court of Appeal

improperly held that the juvenile court was required to conduct an independent inquiry as to a factual basis.

Under both the statutory law and the Rules of Court, neither an admission or no contest plea could be entered without the consent of counsel. Because counsel clearly did not consent to the plea, there was no reason for the juvenile court to move to the next step and determine whether or not there was a factual basis to support it.

The Court of Appeal's opinion allows a minor to enter into an unfavorable plea agreement without the consent of counsel. In doing so, the opinion contradicts the position taken by the Legislature, which requires counsel to consent to a minor's decision to enter into such an agreement. Moreover, it creates a substantial risk that the juvenile court may become involved in judicial plea bargaining in excess of the court's discretion. (See *People v. Turner* (2004) 34 Cal.4th 406, 418; *People v. Labora* (2010) 190 Cal.App.4th 907, 913, 914; *People v. Woosley* (2010) 184 Cal.App.4th 1136, 1144-1145.)

CONCLUSION

For the foregoing reasons, respondent submits that the petition for review should be granted.

Dated: November 16, 2012 Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
JULIE A. HOKANS
Supervising Deputy Attorney General

JEFFREY A. WHITE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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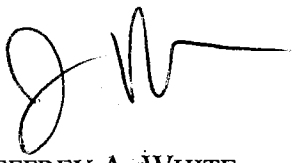
CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 2,608 words.

Dated: November 16, 2012

KAMALA D. HARRIS
Attorney General of California



JEFFREY A. WHITE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

ATTACHMENT A

Filed 10/10/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re ALONZO J., a Person Coming Under the Juvenile Court Law.	C068046
THE PEOPLE, Plaintiff and Respondent, v. ALONZO J., Defendant and Appellant.	(Super. Ct. No. JV130980)

APPEAL from the findings and orders of the Superior Court of Sacramento County, Robert M. Twiss, Judge, sitting in the juvenile court. Reversed.

Joanne Kirchner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

This juvenile delinquency appeal concerns the legal right of a fully able 13-year-old to accept a plea bargain offer without his counsel's consent.

The juvenile here, Alonzo J., was charged in a petition under Welfare and Institutions Code section 602 (hereafter section 602) with two counts of assault with a deadly weapon by means of force likely to produce great bodily injury (a skateboard and a small metal heater) and one count of malicious damage to a door, arising from an argument with his mother. (Welf. & Inst. Code, § 602, subd. (a); Pen. Code, §§ 245, subd. (a)(1), 594, subd. (b)(2)(A).)[1]

The juvenile court foreclosed Alonzo from accepting a prosecution offer to plead to one felony count of assault with a deadly weapon, with home supervision; in doing so, the juvenile court relied solely on Alonzo's counsel's belief that there was no factual basis for the plea. Following a contested jurisdictional hearing, the juvenile court sustained all three charges against Alonzo, continued him as a ward of the court, and directed his placement in either a foster home, group home, residential treatment center, or the home of a relative or friend.

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[1] Statutory references are to those sections in effect at the time of the alleged incidents of November 2010 unless otherwise indicated.

We conclude the juvenile court erred under California Rules of Court, rule 5.778,[2] concerning the acceptance of pleas in juvenile court, and thereby failed to respect Alonzo's personal choice over a fundamental decision in his case—whether to accept the prosecution's plea bargain offer (assuming, as here, that the rule 5.778 criteria that protect the juvenile in accepting a plea bargain offer have been met). Consequently, we shall reverse the juvenile court's adjudication and fashion a disposition in line with analogous law.

FACTUAL AND PROCEDURAL BACKGROUND

The procedural facts are more critical to this appeal than the substantive ones. Consequently, most of our focus will be on the procedural facts.

Substantive Facts

On the night of November 1, 2010, police responded to a 911 call of a family disturbance at the residence that Alonzo shared with his mother and sister.

Alonzo's mother told the police that she and Alonzo had argued, that Alonzo had swung a skateboard at her and missed, and that he then hit her in the face with a space heater. At the contested jurisdictional hearing, the mother denied making these statements.

Alonzo's sister confirmed to the police that Alonzo "had hit [their] mom in the face" with a portable heater, but at the

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[2] Further rule references are to the California Rules of Court.

jurisdictional hearing, the sister did not recall saying this to the police.

Procedural Facts

Prior to the contested jurisdictional hearing, but apparently with the knowledge that Alonzo's mother and sister were recanting, the prosecution offered Alonzo the following plea: (1) plead to a single felony count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)); (2) continue as a ward of the juvenile court (Welf. & Inst. Code, § 725, subd. (b) [previously, in March 2010, Alonzo had admitted a misdemeanor allegation of assault with a deadly weapon against his mother, and was adjudged a ward of the court]); (3) accept home supervision with electronic monitoring; and (4) be credited for time served in juvenile hall.

Alonzo wanted to accept this offer, but his attorney refused to consent. This disagreement spawned an initial *Marsden*[3] hearing on January 25, 2011, over Alonzo's dissatisfaction with his attorney, and a reconvened *Marsden* hearing on February 2, 2011.

At the initial *Marsden* hearing, Alonzo stated to the juvenile court that he wanted "to take the felony and get the ankle monitor and go home." Alonzo explained, "Well, I just I'm trying to go home to my family because I've been here for four months [i.e., in juvenile hall], and this is my last year that I

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[3] *People v. Marsden* (1970) 2 Cal.3d 118.

get to spend with my sister [(who was 17 years old at the time)]. . . . And she [(Alonzo's attorney)] wants me to take the misdemeanor so I could go to the group home. But then it will be my birthday and I'll miss my birthday with my family. And I just want to spend time with my family. So I wanted to take the felony and get the ankle monitor and go home. But she [(his attorney)] won't agree with me."

Later in the initial *Marsden* hearing, Alonzo's counsel responded, "I see a little 13-year-old child who's desperate to get out of custody. He wants to be with his family. And he's willing to admit to a felony crime in order to get out of custody even though he himself acknowledges that he did not engage in the conduct of trying to hit or strike his mother with a deadly weapon or assault her with force likely to result in the infliction of great bodily injury."

At the initial *Marsden* hearing, the juvenile court explained to Alonzo that the prosecution had made a plea offer to Alonzo; that if Alonzo were to accept the offer, that would be how the case would be resolved; and that the offer was "very generous" and "much more favorable" to Alonzo "than the statutory maximums would be in the worst case scenario." Later, the trial court emphasized, in speaking to Alonzo, "Ultimately,

these decisions are yours [(regarding the plea offer)] after you get the full benefit of [your attorney's] advice."[4]

Responding to the juvenile court's last point about Alonzo having the ultimate decisionmaking power regarding the plea bargain offer, Alonzo's attorney noted, "[T]o the extent the Court advised my client that ultimately the decision[] is up to him, there's actually a [rule of the] California Rule[s] of Court [(rule 5.778)] and a Welfare and Institutions Code [section] [(§ 657, subd. (b))] that indicate[] unless an attorney representing a minor joins in the admission [of allegations in a section 602 delinquency petition], the Court cannot take the plea [based on such an admission]."[5]

This prompted the juvenile court at the initial *Marsden* hearing to explain further to Alonzo, "So if you come in and say I want to admit it because I want to go home, and I ask the lawyers, well, what are the facts that could be proven here in court, if I'm not satisfied that the facts could be proven, . . . that you had, in fact, . . . done what was charged, I would not accept your admission. So you don't have that ultimate say."

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[4] The juvenile court noted that the prosecution had actually made two favorable plea bargain offers to Alonzo, but the record before us shows the one offer previously summarized.

[5] As we shall explain in the Discussion, aside from the procedure of an "admission of allegations," there also is an alternative procedure of a "plea of no contest" that plays out here. (Rule 5.778(c), (e).)

With that, the juvenile court at the initial *Marsden* hearing denied Alonzo's *Marsden* motion.

About a week later, however, on February 2, 2011, the juvenile court reconvened the *Marsden* hearing because, said the court, "I may have inadvertently glossed over what the major issue that Alonzo was trying to raise and I wanted to make sure I didn't do that."

As the juvenile court then explained that major issue, "What I'm trying to resolve . . . is whether Alonzo has a right to make the admission [i.e., accept the prosecution's plea bargain offer] because it's solely and exclusively his decision, and there's no legal impediment to that or whether there is a legal impediment to that such that he does not have the right. . . . It seems to me that if you [(Alonzo's attorney)] looked at the circumstance[s] and determine[d] that he, in fact, is guilty but you think that the People can't prove it, he has a right to take the People's offer if he wants to. [¶] On the other hand, if you've [(Alonzo's attorney)] looked at the facts and done your investigation and you've concluded that he simply is not guilty, . . . so that he cannot legitimately stipulate to a set of facts which constitutes proof of [a Penal Code section] 245[, subdivision] (a)(1), then he does not have a right to take the People's offer because he can't get through the plea colloquy [(i.e., a factual basis to support the plea cannot be established)]."

At the reconvened *Marsden* hearing, the juvenile court then noted that Alonzo's counsel believed Alonzo was "simply not guilty," that the court was "not going to question [defense counsel's] personal assessment," and that that resolved the issue—the matter would be set for trial because no factual basis could be established for an admission of allegations (and the juvenile court affirmed its *Marsden* denial).

At the *Marsden* hearings, there was no allegation and no finding that Alonzo personally was unable to knowingly, intelligently and freely accept the prosecution's plea bargain offer.

DISCUSSION

As we shall explain more fully below, we conclude the juvenile court erred in two ways in considering the prosecution's plea bargain offer to Alonzo, and thereby failed to respect Alonzo's personal choice over a fundamental decision in his case—whether to accept that offer (assuming, as here, that the rule 5.778 criteria that protect the juvenile in accepting a plea offer have been met).

First, the juvenile court erred under the plea procedure for juveniles (rule 5.778) by not allowing Alonzo to plead no contest as an alternative plea procedure to admitting the allegations of the section 602 petition. (Rule 5.778(c), (d), (e).)

Second, the juvenile court impermissibly relied solely on the belief of Alonzo's defense counsel that there was no factual

basis for a plea in this case, rather than independently determining this issue itself.

We will initially review the relevant law regarding juvenile and adult pleas and then turn our attention to the plea procedure at issue here.

I. The Law Regarding Juvenile and Adult Pleas

Because an adult defendant in a criminal case has "a constitutionally protected right to participate in the making of certain decisions which are fundamental to his or her defense" (*In re Alvernaz* (1992) 2 Cal.4th 924, 936 (*Alvernaz*) [citing "the crucial decision to reject a proffered plea bargain" (*ibid.*)]), an adult defendant has "personal control"—i.e., a "personal choice" that must be respected—over whether to accept or to reject a plea bargain offer (*People v. Frierson* (1985) 39 Cal.3d 803, 814 [emphasizing "the need to respect the defendant's personal choice on the most 'fundamental' decisions in a criminal case," including the decision whether to make a plea]; *People v. Rogers* (1961) 56 Cal.2d 301, 305 [a plea must be made "personally by [a] defendant" and not by his counsel]; Pen. Code, § 1018 ["every plea shall be entered or withdrawn by the defendant himself or herself in open court"]).

Since January 2007, rule 5.778 (formerly rule 1487 and, before that, rule 1354) has governed the process whereby a juvenile may admit, or enter a no contest plea to, allegations set forth in a section 602 delinquency petition. Rule 5.778 is analogous to Penal Code sections 1016, 1018 and 1192.5, which

govern the taking of a plea in an adult criminal case. Penal Code section 1016 provides, among other things, that an adult may plead guilty or nolo contendere (no contest). (Pen. Code, § 1016, subds. 1 & 3; see rule 5.778(c), (d), (e) [juvenile may admit the allegations of a section 602 delinquency petition, or may plead no contest to those allegations].) Penal Code section 1018 states that every plea shall be entered or withdrawn "by the defendant himself or herself." (See rule 5.778(d) [admission of allegations "must be made by the child personally"].) And Penal Code section 1192.5 provides for due process in the taking of a plea by requiring the trial court to inquire of the defendant that the plea is freely and voluntarily made, and that there is a factual basis for it. (Pen. Code, § 1192.5, 3d par.; see rule 5.778(f)(5), (6) [the juvenile court must make these findings as well].) The Rules of Court "'have the force of statute to the extent that they are not inconsistent with legislative enactments and constitutional provisions.'" (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011.)

Cases, too, analogizing these Rules of Court to these Penal Code sections, have recognized, with respect to juvenile plea proceedings, the requirement of a factual basis for a plea bargain based admission of allegations or no contest plea; the requirement for an explanation of the constitutional trial rights waived by a plea; and the requirement that, since a juvenile's admission of a penal charge in a juvenile court

proceeding is tantamount to a plea of guilty, the juvenile "must personally" make the admission. (See *In re Michael B.* (1980) 28 Cal.3d 548, 553-555; *In re Jermaine B.* (1999) 69 Cal.App.4th 634, 639-640; and *In re Regina N.* (1981) 117 Cal.App.3d 577, 582-587.)

Thus, in light of these legislative and decisional analogies, the law generally affords juveniles the basic plea rights and protections that it affords adult criminal defendants, assuming those juveniles are, as here, capable of understanding and exercising those rights and protections.

As for the specific language in rule 5.778 that distinguishes between an "admission of allegations" and a "plea of no contest," that language is highlighted below as follows:

"(c) *Admission of allegations;* prerequisites to acceptance

" . . . If the child wishes to *admit the allegations* [in the section 602 delinquency petition], the court must first find and state on the record that it is satisfied that the child understands the nature of the allegations and the direct consequences of the *admission*, and understands and waives the [constitutional trial] rights [specified] in (b).

"(d) Consent of counsel—child must admit

"*Counsel for the child must consent to the admission*, which must be made by the child personally.

"(e) *No contest*

"*The child may enter a plea of no contest to the allegations, subject to the approval of the court.*

"(f) Findings of the court . . .

"*On an admission or plea of no contest, the court must make the following findings* noted in the minutes of the court: [¶] . . . [¶]

"(5) The *admission or plea of no contest* is freely and voluntarily made; [and]

"(6) There is a factual basis for the *admission or plea of no contest*[.]" (Italics added.)[6]

And we must note one final plea principle. An adult plea statutory counterpart to rule 5.778—Penal Code section 1192.5—"requires a trial court *to determine by independent inquiry*, before accepting a plea of guilty or nolo contendere [(no contest)] to a felony offense, whether there exists a factual basis for the plea. The purpose behind the inquiry is to '"protect against the situation where the defendant, although he realizes what he has done, is not sufficiently skilled in law to recognize that his acts do not constitute the offense with which

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[6] The original rule on juvenile pleas, former rule 1354, effective in 1977, stated that "the procedure for and legal effect of an entry of no contest shall be the same as that of an admission[.]" (Former rule 1354(f).) This language was deleted from former rule 1487, which succeeded rule 1354 in 1991; and the relevant language of former rule 1487 is identical to that of current rule 5.778, which succeeded rule 1487 in 2007.

he is charged."'" (*People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1576, italics added (*Wilkerson*).)

With this legal backdrop in mind on the juvenile and adult plea processes, we turn to the plea procedure at issue here.

II. The Plea Procedure At Issue Here

A. The Errors in the Procedure in this Case

Pursuant to the legal principles just set forth, we conclude the trial court erred in two ways in considering the prosecution's plea bargain offer to Alonzo.

First, the juvenile court effectively treated the prosecution's plea bargain offer as calling *only* for an "admission" by Alonzo of the allegations of the section 602 delinquency petition, to which Alonzo's counsel *had* to "consent." (Rule 5.778(d).) The juvenile court failed to recognize that Alonzo could, alternatively, "enter a plea of no contest to th[ose] allegations, subject [only] to the approval of the court." (Rule 5.778(e).) Not only rule 5.778, but a related rule as well as statutes recognize this distinction between an "admission" of, and a "no contest" plea to, section 602 petition allegations; this distinction is analogous to the adult criminal plea distinction between pleading guilty and pleading no contest. (Rule 5.754(b); see Welf. & Inst. Code, § 657, subd. (b); see also Pen. Code, §§ 1192.5, 1016, subds. 1 & 3.)

Second, the juvenile court impermissibly relied solely on defense counsel's "personal assessment" that Alonzo, in fact,

was not guilty of the two assault charges, and therefore there was no "factual basis" to support the "admission" underlying the prosecution's plea offer (a "factual basis" is required not only for an "admission" of section 602 petition allegations, but also for a "plea of no contest" to such allegations). (Rule 5.778(f)(6).) The juvenile court did not properly "determine[,] by independent inquiry," whether there existed a factual basis for the plea offered Alonzo by the prosecution, through the procedure of a no contest plea. (See *Wilkerson*, *supra*, 6 Cal.App.4th at p. 1576.) Our state's high court concluded as follows in *People v. Holmes* (2004) 32 Cal.4th 432 (*Holmes*), explaining a trial court's "factual basis" duty under Penal Code section 1192.5 for approving a plea bargain for an adult criminal defendant:[7]

"We conclude that in order for a court to accept a [plea bargain], it must garner information regarding the factual basis for the plea from either [the] defendant or defense counsel to comply with [Penal Code] section 1192.5. If the trial court inquires of the defendant regarding the factual basis, the court may develop the factual basis for the plea on the record through its own examination by having the defendant describe the conduct that gave rise to the charge [citation], or question the defendant regarding the factual basis described in the complaint

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[7] As noted, rule 5.778 is analogous to Penal Code section 1192.5, in the context of the requisite factual basis for a plea bargain. (Rule 5.778(f)(6).)

or written plea agreement. [Citations.] If the trial court inquires of defense counsel regarding the factual basis, it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement." (*Holmes, supra*, 32 Cal.4th at p. 436.)

Here, the juvenile court, by relying solely on defense counsel's "personal assessment" to establish the factual basis, did not "independently" determine the factual basis as required by *Wilkerson*, and did not follow the document-based path set forth by *Holmes* (see *Holmes, supra*, 32 Cal.4th at p. 436, citing with approval *Wilkerson, supra*, 6 Cal.App.4th at pp. 1576-1579).

In short, then, the juvenile court's plea procedure failed to respect Alonzo's personal choice over a fundamental decision in his case—whether to accept the prosecution's plea bargain offer (assuming, as here, the rule 5.778 criteria that protect the juvenile in accepting a plea offer have been met).[8]

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[8] We recognize that a 13-year-old juvenile such as Alonzo—even a fully able one—is just that, a 13-year-old, and not a 33-year-old. Rule 5.778, regarding an admission of allegations or a plea of no contest, requires, among other findings, that the court find that the juvenile has knowingly and intelligently waived the right to a court hearing with constitutional trial protections; that the juvenile understands the nature of the conduct alleged in the petition and the possible consequences of an admission or a plea of no contest; that the admission or the plea of no contest is freely and voluntarily made; and that there is a factual basis for the admission or the plea. (Rule 5.778(f).)

B. Prejudice

This conclusion raises the question, Did the juvenile court's improper plea procedure prejudice Alonzo? Our answer: Yes, it did.

The fully developed record before us shows a reasonable probability that the plea bargain offer here would have resulted in a more favorable resolution to Alonzo than the jurisdictional hearing. (See *Missouri v. Frye* (2012) 566 U.S. ___ [182 L.Ed.2d 379, 391] (*Frye*); *Lafler v. Cooper* (2012) 566 U.S. ___ [182 L.Ed.2d 398, 413] (*Cooper*).)

Had Alonzo been allowed, pursuant to the prosecution's plea bargain offer, to plead no contest to a single violation of Penal Code section 245, subdivision (a)(1), the juvenile court would not have sustained two such violations against Alonzo following the jurisdictional hearing, as well as the misdemeanor violation of Penal Code section 594, subdivision (b)(2)(A). And that fully developed record shows a reasonable probability that (1) Alonzo would have accepted the offer (given his comments at the *Marsden* hearings); (2) the prosecution would not have canceled the offer (given that it made two favorable offers and that its witnesses were recanting); and (3) the juvenile court would have approved the offer (given that the court stated initially that the case would be resolved pursuant to the terms of the plea bargain offer, if Alonzo accepted the offer; and given that the court later found a factual basis that would have supported the plea offer, and a factual basis appeared to be the court's only concern regarding the offer). (See *Frye*, *supra*,

566 U.S. at p. ___ [182 L.Ed.2d at p. 391] [applying this three-point test to establish prejudice in the analogous context of a plea offer lapsing or being rejected because of a defense counsel's ineffective assistance, assuming the prosecution and the juvenile court have the authority to exercise this discretion under state law, which they do in California—see *Alvernaz*, *supra*, 2 Cal.4th at pp. 942-944]; see also *Cooper*, *supra*, 566 U.S. at p. ___ [182 L.Ed.2d at p. 413] [if the record is fully developed on any of these three points, an appellate court may determine that point].)

C. Remedy

And that leaves the matter of remedy. As to this matter, we are guided by our state high court's decision in *Alvernaz*, *supra*, 2 Cal.4th 924. The *Alvernaz* court held "that the appropriate remedy for ineffective assistance of counsel that has resulted in a defendant's decision to reject an offered plea bargain (and to proceed to trial [with a less favorable outcome]) is as follows: . . . [T]he district attorney shall submit the previously offered plea bargain to the trial court for its approval, unless the district attorney within 30 days elects to retry the defendant and resume the plea negotiation process. If the plea bargain is submitted to and approved by the trial court, the judgment shall be modified consistent with the terms of the plea bargain." (*Id.* at p. 944.)

Alvernaz rejected the remedies of *specifically enforcing* the offered plea bargain, or *compelling* the prosecution to

reinstate the offer, deeming those remedies, following a fair trial and conviction, inconsistent with a trial court's discretion in determining the appropriate sentence and inconsistent with a prosecutor's discretion in negotiating and withdrawing offered plea bargains. (*Alvernaz*, *supra*, 2 Cal.4th at pp. 942-944; see also *Cooper*, *supra*, 566 U.S. at p. ___ [182 L.Ed.2d at p. 413] [basing the remedy there on the applicable state law from Michigan].)

Alvernaz involved a defense counsel's error that foreclosed the effectuation of a favorable plea bargain offer, while here the juvenile court's error resulted in a similar fate; either way, though, the same endpoint was reached--a favorable plea bargain offer was foreclosed erroneously. Consequently, a similar remedy is appropriate. Furthermore, because this is a juvenile delinquency case with Alonzo as a ward of the juvenile court, we are mindful of the legal requirement that minors under the juvenile court's delinquency jurisdiction "shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances." (Welf. & Inst. Code, § 202, subd. (b).) For these reasons, we fashion the disposition that follows.

DISPOSITION

The adjudication of the juvenile court is reversed. The prosecution shall submit the extant provisions of the previously

offered plea bargain (delineated in the *Procedural Facts* segment of the Factual and Procedural Background of this opinion) to the juvenile court for its approval, unless the prosecution within 30 days elects to readjudicate Alonzo and resume the plea negotiation process. If the plea bargain is submitted to and approved by the juvenile court, the findings and orders of the juvenile court shall be modified consistent with the terms of the plea bargain. Pursuant to Welfare and Institutions Code section 202, subdivision (b), the juvenile court retains the power to fashion any order appropriate under the circumstances that is not inconsistent with this opinion. ***(CERTIFIED FOR PUBLICATION.)***

BUTZ, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re A .J.** No.: **C068046**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 16, 2012, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Joanne M. Kirchner
Attorney at Law
2407 "J" Street, Suite 301
Sacramento, CA 95816
(Attorney for Appellant)
(2 copies)

CCAP
Central California Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816

The Honorable Jan Scully Esq.
Sacramento County District Attorney's Office
P.O. Box 749
Sacramento, CA 95814-0749

Clerk of the Court
Sacramento County Superior Court
720 Ninth Street, Room 611
Sacramento, CA 95814

Court of Appeal of the State of California
Third Appellate District
621 Capitol Mall, 19th Floor
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 16, 2012, at Sacramento, California.

_____
Declarant

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