

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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

PEOPLE OF THE STATE OF CALIFORNIA,

S268437

Plaintiff and Respondent,

v.

D.N.,

Fresno County  
Superior Court  
No. 19CEJ600384

Defendant and Appellant.

Court of Appeal, Fifth Appellate District, No F080624  
Fresno County Superior Court  
No. 19CEJ600384

Hon. Gary Hoff, Judge

**APPELLANT’S OPENING BRIEF ON THE MERITS**

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APPELLANT'S OPENING BRIEF ON THE MERITS

INTRODUCTION

This Court has granted review to resolve the following question:

Did the trial court improperly delegate its authority to the probation department and violate the minor's due process rights by permitting the probation department to offer the minor community service hours "to work off any alleged probation violations"?

After declaring the minor a ward of the court and placing him on probation, the juvenile court here authorized the probation department to impose community service hours as a sanction for a future violation of probation. The court's order permits the probation department to impose such a sanction in the absence of

a judicial finding that the minor has actually violated any condition of his probation. Moreover, the order does not specify any need for notice, a hearing, or other elements of due process as required by law.

The court's order not only deprives appellant of his due process rights, it also violates the separation of powers doctrines under the state and federal constitutions. By placing the probation officer in the concurrent roles of prosecutor and judge, the challenged probation condition improperly delegates judicial authority and violates appellant's rights to due process.

Appellant asks this Court to strike the order improperly delegating judicial authority to the probation department.

## STATEMENT OF THE CASE

On August 20, 2019, a juvenile wardship petition (Welf. & Inst. Code, § 602) was filed in Fresno County case number 19CEJ600384, alleging that D.N., a minor, had violated Penal Code section 288.5, subdivision (a), on or about May 5, 2017, through July 16, 2019. (CT 5-7.) D.N. was alleged to have been between twelve and fourteen years old at the time the offense was committed. (CT 5-7.)

Following a contested jurisdictional hearing, the court found the allegation to be true and sustained the petition. (CT 120.)

On December 4, 2019, the court declared D.N. to be a ward of the court and placed him on probation. (CT 122-124, RT 516-17.) After ordering D.N. to remain in a GPS (“global positioning system”) program for at least three months, the court authorized the probation department “to offer the minor community service, up to 50 hours of community service, up to a cumulative total of 10 days, to work off any alleged probation violations.” (RT 517.) The court added that these sanctions could include up to 30 days on the GPS program. (RT 517.)

On January 10, 2020, D.N. filed timely notice of appeal. (CT 152.) On March 23, 2021, the Court of Appeal, Fifth Appellate District, issued an opinion in which it struck an order requiring AIDS testing and remanded for further findings on that matter, but otherwise affirmed the dispositional order. (Slip opn., pp. 1-2.) This Court granted D.N.’s petition for review on June 30, 2021.



## STATEMENT OF FACTS

Due to the narrow issue before this court, the facts may be briefly summarized. D.N.'s cousin testified that when she was six or seven, D.N. had touched her "private" with his hand, both over and under her clothing, on between five and ten occasions. (RT 238-247, 252-253.) On one occasion, D.N. had his cousin touch his "private." (RT 302-303.)

The incidents were alleged to have occurred between May 5, 2017, and July 16, 2019, when D.N. was between twelve and fourteen years old. (CT 5-7.)

## ARGUMENT

THE PROBATION CONDITION PERMITTING THE PROBATION OFFICER TO PUNISH APPELLANT FOR A VIOLATION OF PROBATION WITHOUT A JUDICIAL FINDING THAT APPELLANT ACTUALLY VIOLATED PROBATION IS AN UNLAWFUL DELEGATION OF JUDICIAL AUTHORITY AND VIOLATES THE SEPARATION OF POWERS CLAUSE OF THE CALIFORNIA CONSTITUTION, AS WELL AS APPELLANT'S RIGHT TO DUE PROCESS OF LAW

The probation condition in this case not only permits the probation officer to unilaterally find appellant in violation of probation, but to also choose the appropriate sanction for any alleged violation. This Court has granted review in order to determine whether the scope of this delegation of authority violates the separation of powers doctrine and further deprives appellant of due process of law.

The probation condition at issue is invalid on multiple grounds: as an improper delegation of judicial authority in violation of the separation of powers doctrine, and as a deprivation of the due process afforded under the law to a minor who has been declared a ward of the court and placed on probation. Appellant accordingly asks this Court to strike the condition.

While juvenile courts have broad authority to impose probation conditions upon minors who have been declared wards of the court, both the state and federal separation of powers doctrines prohibit a court from delegating the exercise of its discretion to the probation department. (*In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1372; cf. *United States v. Stephens* (9th Cir. 2005) 424 F.3d 876, 880-881.) Although appellant has been unable to find a definitive holding from this Court regarding the

conditions under which a juvenile court may delegate authority traditionally reserved to the courts to a probation officer, the Courts of Appeal have addressed this and related issues many times over the years. (See, e.g., *In re J.C.* (2019) 33 Cal.App.5th 741, 744-745; *In re Robert M.* (2013) 215 Cal.App.4th 1178, 1185; *In re Victor L.* (2010) 182 Cal.App.4th 902, 917-919; *In re Pedro Q.*, *supra*, 209 Cal.App.3d at p. 1372.) From this body of law a set of standards has evolved for evaluating whether a particular delegation violates the separation of powers doctrine or otherwise infringes upon statutory or constitutional protections.

The Courts of Appeal have generally held that a court may only delegate authority to a nonjudicial entity such as a probation officer where certain conditions are met. First, the delegation must be incidental or subsidiary to a function or power otherwise properly exercised by the court. (*In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1235.) Second, the court must retain ultimate control over the exercise of the delegated function through judicial review. (*Ibid.*) An example of a situation where delegation has been endorsed by the reviewing courts is where a juvenile court imposes specific conditions of probation but leaves it to the probation department to supervise the time, place, and manner of compliance with the conditions. (See, e.g., *In re Victor L.*, *supra*, 182 Cal.App.4th at p. 919.)

Here, by contrast, the juvenile court delegated to the probation officer not simply the specific details of a particular probation condition, but rather the authority to determine whether conditions of probation had been violated, as well as the

authority to impose sanctions for such violations without the necessity of a court hearing or due process. This delegation is of a different character and degree than that generally endorsed by the Courts of Appeal.

In sum, the probation condition empowering the probation department to adjudicate and punish probation violations is unlawful and must be vacated. As will be discussed further, the order violates the separation of powers clause of the California Constitution and constitutes a violation of due process under the federal and state constitutions.

A. Procedural History

During the disposition hearing, the court set multiple conditions of probation, including an order that D.N. remain on a GPS program for “at least” three months. (RT 517; see also RT 519.) The court then ordered:

[T]he Court is authorizing the Probation Department [to] offer the minor community service, up to 50 hours of community service, up to a cumulative total of 10 days, to work off any alleged probation violations. That can also include the GPS system as a sanction, but he'd already be on that program.

(RT 517.)

The court went on:

I would anticipate if there's any significant violation of any term and condition of the grant of probation here, that he would be brought back to court for additional recommendations, which most likely would include substantial amount of time in custody.

(RT 517.)

Defense counsel did not object to the condition. (RT 515-523.)

In the Court of Appeal, appellant argued that the delegation of authority to the probation officer to (a) determine whether he had violated the terms of probation and (b) impose punishment for any such violations violated the separation of powers doctrine and deprived him of his liberty without due process. (See Appellant’s Opening Brief, pp. 17-20.) The Court of Appeal nonetheless upheld the challenged delegation, finding that the discretion afforded to the probation officer was limited and that ultimate authority remained with the court because appellant was able to seek judicial review. (Slip opn., pp. 7-8.)

B. Standard of Review

The question of whether the juvenile court improperly delegated its authority is a constitutional challenge to a probation condition and presents a pure question of law. It is reviewed de novo on appeal. (See *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1345; *In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143; *In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1314.) As the Court of Appeal below correctly found (slip opn., pp. 6-7), an appellate court “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, supra*, 217 Cal.App.4th at p. 1345, citing *In re Sheena K.* (2007) 40 Cal.4th 875, 888–889.)

C. California Law Vests the Authority to Determine Whether a Probation Violation Has Occurred in the Court; This Authority Cannot be Delegated to the Probation Officer.

Article III, section 3, of the California Constitution delineates the rights and responsibilities of the three branches of state government: “The 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.” (Cal. Const., Art. III, § 3.) The effect of this doctrine is to limit the authority of any one of the three branches of government to claim for itself the core functions of another branch. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 662.) This constitutional provision protects “any one branch against the overreaching of any other branch. [Citations.]” (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 662, internal quotation marks omitted; see also *In re Ilasa* (2016) 3 Cal.App.5th 489, 498.)

Judicial power is vested in the courts, whose function it 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 must not exercise or interfere with judicial power. (*In re Danielle W., supra*, 207 Cal.App.3d at p. 1235, fn. omitted; *Boags v. Municipal Court* (1987) 197 Cal.App.3d 65, 67.)

Specific to the context of probation, “the court sets conditions of probation and the probation officer supervises compliance with the conditions.” (*People v. Kwizera* (2000) 78

Cal.App.4th 1238, 1240.) “[C]ourts may not delegate the exercise of their discretion to probation officers.” (*In re Pedro Q.*, *supra*, 209 Cal.App.3d at p. 1372.) A limited exception embraced by some appellate courts allows a court to “dictate the basic policy of a condition of probation, leaving specification of details to the probation officer.” (*In re Victor L.*, *supra*, 182 Cal.App.4th at p. 919.) But always, “the severity of the sentence and the placing of defendant on probation rest in the sound discretion of the trial court.” (*People v. Hernandez* (1984) 160 Cal.App.3d 725, 749.)

This division of constitutional responsibility is in line with the federal standard. As the Ninth Circuit has observed, the division of responsibilities between a court and a probation officer is not merely one of practicality; it is rather one “of constitutional dimension, deriving from Article III’s grant to the courts of power over ‘cases and controversies.’” (*United States v. Stephens*, *supra*, 424 F.3d at p. 881, citing *United States v. Pruden* (3rd Cir. 2005) 398 F.3d 241, 250.)

The California Legislature has further defined the specific responsibilities of courts and probation officers. Welfare and Institutions Code section 730 provides that when a minor has been adjudged a ward of the court under Welfare and Institutions Code section 602, the court may make various placements and orders regarding the minor’s care, including placing the minor on supervised probation at home. (Welf. & Inst. Code, § 730, subd. (a); see also Welf. & Inst. Code, § 727, subd. (a).) These statutes and others describe, in various contexts, the roles of the court and of the probation department.

Section 730, subdivision (b), for instance, provides generally that when a ward “is placed under the supervision of the probation officer or committed to the care, custody, and control of the probation officer, the court may make any and all reasonable orders for the conduct of the ward.” That subdivision continues: “The court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.” (Welf. & Inst. Code, § 730, subd. (b).)

Other legislative directives, while not necessarily having direct bearing on the case at hand, nonetheless further clarify the relationship between the juvenile courts and probation. For instance, subdivision (b) of Welfare and Institutions Code section 730 further outlines the relationship between the court and probation officer by directing that a ward’s earnings be *reported to* the probation officer so that those earnings may be applied to financial obligations as *directed by* the court. (Welf. & Inst. Code, § 730, subd. (b).) Section 730.8 specifically addresses restitution and community service, requiring reporting to the court to ensure compliance with relevant orders; even where the minor is committed to the Department of the Youth Authority, the court continues to supervise compliance with restitution orders, and the Department has the duty to report to the court. (Welf. & Inst. Code, § 730.8.)

Welfare and Institutions Code section 727 notes that it is the responsibility “of the probation agency to determine the appropriate placement for the ward once the court issues a



placement order.” (Welf. & Inst. Code, § 727, subd. (a)(4).) Further, “[t]he court has no authority to order services unless it has been determined through the administrative process of an agency that has been joined as a party, that the minor [...] is eligible for those services.” (Welf. & Inst. Code, § 727, subd. (b)(2).) In other words, the administration of juvenile justice involves all three branches of government, working together in clearly defined roles.

In terms of the specific role of adjudicating probation violations and ensuring due process protections, the law is clear that these roles belong to the judiciary. Both the relevant statutes and the attendant rules of court support the conclusion that only the court may find a minor to be in violation of probation and impose a sanction for that violation. For instance, Welfare and Institutions Code section 777 requires a formal noticed hearing before the court where a party seeks a change in custody or commitment to a more restrictive placement. (Welf. & Inst. Code, § 777.) Section 778 also sets out a procedure by which a probation order or other placement may be modified by petition of interested parties. Although section 778 is less specific about the due process requirements than section 777, the statute nonetheless specifies that changes to the probation order are made by *the court*, following notice and a hearing. (Welf. & Inst. Code, § 778.)

Similarly, the California Rules of Court outline procedures for modifications to a minor’s probation or other placement order, procedures which plainly contemplate that these changes will be made by the court following a noticed hearing. Rule 5.570 requires

a verified petition (subd. (a)), with a statement of grounds (subd. (e)), and a hearing unless all parties stipulate otherwise (subd. (f)). A party requesting a modification under Welfare and Institutions Code section 778, subdivision (a), “has the burden of proving by a preponderance of the evidence that the ward's welfare requires the modification.” (Cal. Rules of Court, rule 5.570, subd. (i).) Welfare and Institutions Code sections 776 and 779 provide further procedural safeguards.

Case law has likewise held that determination that a probation violation has occurred may not be left to the probation department. (See, e.g., *In re Gabriel T.* (2016) 3 Cal.App.5th 952, 960-961.) In *Gabriel T.*, the Fifth District found that a juvenile court erred in imposing a probation condition that permitted the probation officer to impose one-time, thirty-day custodial sanction for a violation of probation, with no requirement for a judicial finding that the minor had violated probation. Although *Gabriel T.* involved a custodial sanction governed by Welfare and Institutions Code section 777, similar notice and due process provisions are found in section 778, which controls modifications of conditions of probation which do not involve the removal of a minor from the custody of his or her parents or guardians.

A probation officer may seek to impose a non-custodial sanction for a purported violation of probation by petitioning the juvenile court for a modification of probation conditions under section 778. (See *In re Glen J.* (1979) 97 Cal.App.3d 981, 984, 986.) But any such modification must be done via a noticed hearing before the court, as described above and dictated by section 778.

The statutory scheme does not authorize the probation department to impose a change in probation conditions in the absence of judicial oversight and without a finding that the change is in the best interests of the minor.

In the juvenile context, of course, the court has broad discretion in imposing probation conditions for the purpose of rehabilitation, so a lack of statutory authorization for a particular condition is not fatal to the court's ability to impose that condition. (*In re Ronny P.* (2004) 1117 Cal.App.4th 1204, 1206-1207; but see *In re Bernardino S.* (1992) 4 Cal.App.4th 613, 623 [court cannot impose condition that effectively expands legislative criteria for that condition].) This broad authority, however, does not alter the fundamental division of labor between the court and the probation department. Most importantly, this broad authority to *set conditions of probation* does not authorize the court to delegate its fundamental responsibility to *determine if those conditions have been fulfilled*, and where necessary, to order modifications to the disposition.

Of course, as noted previously, a general rule has emerged among reviewing courts permitting “even the primary function” of any of the three branches of government to be exercised by another branch “so long as (1) the exercise thereof is incidental or subsidiary to a function or power otherwise properly exercised by such department or agency, and (2) the department to which the function so exercised is primary retains some sort of ultimate control over its exercise, as by court review in the case of the exercise of a power judicial in nature.” [Citation.]” (*In re Danielle*

*W.*, *supra*, 207 Cal.App.3d at p. 1236, see also *In re Robert A.* (1992) 4 Cal.App.4th 174, 186; but see *People v. Cruz* (2011) 197 Cal.App.4th 1306, 1309-1311 [Pen. Code, § 1210.12, giving “sole discretion” to county probation department to determine probationers’ eligibility for GPS program, impermissibly interfered with trial court authority to set terms and conditions of probation, and violated the separation of powers clause of the California Constitution].) Particularly in the juvenile justice realm, executive branch entities such as probation or social service departments often bear a “hybrid responsibility” of representing the executive by pursuing the best interest of the child, while also administering the court’s orders. (See *In re Danielle W.*, *supra*, 207 Cal.App.3d at p. 1238; see also *In re Robert A.*, *supra*, 4 Cal.App.4th at p. 188; *In re Jennifer G.* (1990) 221 Cal.App.3d 752, 758-759; *In re Kristin W.* (1990) 222 Cal.App.3d 234, 256.)

But the court retains the responsibility of determining the rights of the parties to a controversy, and most importantly, providing due process to the minor. (Cf. *Dept. of Soc. Servs. v. Superior Court* (1997) 58 Cal.App.4th 721, 738.) In other words, the statutory scheme envisions, and the courts have endorsed, a division of responsibility requiring that the probation officer provides the immediate supervision of the ward, while the court maintains ultimate control not only over the minor’s placement, but also over the minor’s *compliance* with the court’s orders and the directives of the probation officer. (See Welf. & Inst. Code, §§

777-778.) The determination of whether a probationer has violated the terms of probation is vested only in the court.

D. The Court of Appeal Opinion Erred in Finding That the Probation Condition at Issue Here Was a Permissible Delegation of Authority.

The Court of Appeal here found that the delegation of authority to the probation officer did not run afoul of the separation of powers clause because the juvenile court delegated only “incidental authority regarding possible community service” but “retained ultimate control over this issue.” (Slip opn., p. 8.) The appellate court disagreed “that this delegation permitted the probation officer to decide if and when a violation of probation had occurred.” (Slip opn., p. 8.) This finding not only misinterprets the juvenile court’s order, but also ignores the important distinction between delegations that have been upheld by reviewing courts and the delegation at issue here: this order delegates the authority to the probation officer to determine if the minor has violated probation, and to impose sanctions for alleged violations without a judicial finding or any semblance of due process.

First, the Court of Appeal is simply incorrect in holding that the order did not permit the probation officer to determine if and when a violation had occurred. The delegation plainly permitted the probation department to unilaterally impose sanctions within general parameters “to work off any alleged probation violations.” (RT 517.) Even if this order were ambiguous – which it is not – the court’s subsequent statements make it clear that the court intended for the probation officer to impose community service or

additional GPS monitoring for minor probation violations without a need to return to court: “I would anticipate if there’s *any significant violation* of any term and condition of the grant of probation here, that he would be brought back to court for additional recommendations.” (RT 517, emphasis added.) In other words, a “significant violation” would require a court hearing, but minor violations would be dealt with by the probation officer.

Second, a review of the case law, including the cases relied on by the Court of Appeal, reveals that this delegation is far more serious than those that have been endorsed by the appellate courts of this state. The appellate court here relied on *People v. Penoli* (1996) 46 Cal.App.4th 298 and *In re Victor L.*, *supra*, 182 Cal.App.4th 902, two cases that involved a probation officer choosing the specific implementation of a court-ordered probation condition. Neither case involved the delegation of authority to a probation officer to determine whether a probation violation had occurred, or what sanction to impose in the event of an alleged violation.

In *Victor L.*, the appellate court held that it was appropriate for a juvenile court to “dictate the basic policy of a condition of probation, leaving specification of details to the probation officer.” (*In re Victor L.*, *supra*, 182 Cal.App.4th at p. 919.) The probation condition at issue there required the minor to stay away from areas known by him to be used for gang-related activity. (*Id.* at p. 913.) On appeal, the minor challenged this condition on various constitutional grounds, including vagueness and a violation of his right to travel. (*Id.* at pp. 913-915.) To avoid these challenges, the

appellate court ordered modification of the condition to require that the probation officer notify the minor of which areas he must avoid. (*Id.* at pp. 917-918.) The appellate court reasoned that “the probation officer is in a better position to identify the forbidden areas for each minor,” and that requiring the judge in each case involving such a probation order to identify the specific locations the minor must avoid “would impose an undue burden on the judiciary.” (*Id.* at p. 918.)

Although the original order had not presented a separation of powers issue, the appellate court found that its directed delegation did not violate that doctrine, either, falling instead under “the more general rule that a court may dictate the basic policy of a condition of probation, leaving specification of details to the probation officer.” (*In re Victor L.*, *supra*, 182 Cal.App.4th at p. 919.) The court distinguished its modified order from the order disapproved by the court in *People v. O’Neil* (2008) 165 Cal.App.4th 1351, which had barred a probationer from associating with any person or in any place disapproved by the probation officer. (*People v. O’Neil*, *supra*, 165 Cal.App.4th at p. 1354.) The appellate court in *O’Neil* had found the contested condition to be overbroad. (*Ibid.*) The *Victor L.* court distinguished its own order from that holding because the order as modified by the appellate court was not open-ended, but instead specified that the minor was to avoid areas of “gang-related activity,” and only the specifics of that order were left to the discretion of the probation officer. (*In re Victor L.*, *supra*, 182 Cal.App.4th at p. 919.)

Similarly, in *People v. Penoli*, the appellate court upheld a condition of probation requiring the probationer to enter a residential drug treatment program “approved by” the probation officer. (*People v. Penoli, supra*, 46 Cal.App.4th at p. 301.) On appeal, the defendant argued that the condition delegated “excessive judicial authority to the probation department to select a drug rehabilitation program.” (*Id.* at pp. 301, 307.) In upholding the condition, the Court of Appeal observed that “the trial court is poorly equipped to micromanage selection of a program,” citing as potential difficulties the court’s inability to “remain apprised of currently available programs” and the difficulty of managing issues of timing and availability. (*Id.* at p. 308.) The appellate court found that the delegation did not give the probation officer unfettered discretion, because the order specifically identified the type of the program as “drug treatment.” (*Id.* at p. 301.) Under the terms of the probation condition, the probation officer was permitted only to choose the time, place, and manner of the specified program – all determinations that fall well within the purview of the probation department.

The Court of Appeal here found the holdings in *Victor L.* and *Penoli* instructive because in each case, “the discretion granted to the probation officer was limited.” (Slip opn., p. 7.) But the discretion afforded to the probation officer in the instant case is different not just in scope but in character from the discretion at issue in *Victor L.* and *Penoli*. Nothing in either case suggests that the probation officer was empowered to make a unilateral finding



that the probationer had violated probation, and to accordingly impose punishment.

Although not discussed by the Court of Appeal here, this case is likewise distinguishable from cases that have rejected improper delegation claims where a probation officer was empowered to determine the ultimate length of a minor's commitment based on the minor's successful completion of a particular program. (See, e.g., *In re J.C.* (2019) 33 Cal.App.5th 741.) In *In re J.C.*, the juvenile court ordered a minor to participate in and successfully complete all phases of a particular program. (*Id.* at pp. 743-744.) The juvenile court set a review date seven months after the disposition order, but declined to impose a fixed term of commitment, on the ground that different minors completed the program at different rates. (*Id.* at p. 744.)

On appeal, the minor contended that the juvenile court had impermissibly delegated the authority to determine the length of his commitment to the probation officer, who would make the determination of when and whether the minor had successfully completed the program, which in turn would determine when the minor would be released. (*In re J.C.*, *supra*, 33 Cal.App.5th at p. 744-745.) The appellate court rejected this argument, relying on *In re Robert M.* (2013) 215 Cal.App.4th 1178, another case involving a requirement that a minor complete a particular program before returning to court for a potential modification of his custodial commitment. In each case, the appellate court found that the order conditioning the minor's release from custody on completion of a program did not impermissibly mingle the

responsibilities of the judicial and executive branch, because in each case the ultimate determination of completion remained the responsibility of the court. (*In re J.C.*, *supra*, 33 Cal.App.5th at p. 746, *In re Robert M.*, *supra*, 215 Cal.App.4th at p. 1185.)

Again, not only do these cases not support the holding of the Court of Appeal in the instant case, they illustrate the very heart of the issue before this court: the court here retained authority only over “significant” probation violations (a term that the court left undefined), delegating to the probation officer the power to adjudicate and punish (albeit within stated parameters) more minor violations. This type and degree of delegation is far outside the bounds endorsed by the case law.

E. The Delegation of Authority to the Probation Officer to Adjudicate and Punish Probation Violations Deprives Appellant of Due Process as Guaranteed by the State and Federal Constitutions

Unlike the cases relied upon by the Court of Appeal, wherein a probation officer was granted discretion to determine the specifics of programs or directives within the boundaries of more general orders by the court, the probation officer here was granted the authority to determine whether appellant fails to obey the terms of his probation, and in turn to impose sanctions for those alleged violations without a noticed hearing or finding by a judicial officer as required by the relevant rules and statutes. This effectively means that appellant’s liberty interest may be determined by a single probation officer, with no observation of

appellant's statutory or constitutional rights, including the right to assistance of counsel.

Due process under the federal and state constitutions requires that a defendant may not be found in violation of probation and punished without notice and a formal hearing before a neutral and detached judicial officer. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a); *People v. Vickers* (1972) 8 Cal. 3d 451, 457–458, citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 488-489.) “Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.” (*In re Gault* (1967) 387 U.S. 1, 13.)

Moreover, appellant's ability to bring his own petition under Welfare and Institutions Code section 778 if he disputes the probation officer's unilateral finding that he has violated probation does not, as the Court of Appeal found, alleviate the constitutional problem. (See slip opn., pp. 7-8.) Under the state and federal constitutions, and moreover under the Welfare and Institutions Code of this state, appellant possesses due process rights which attach prior to a determination that he has violated his probation. Due process rights may not simply be ignored because a vehicle exists by which an affected party may subsequently challenge the deprivation of those rights.

More fundamentally, Welfare and Institutions Code section 778, subdivision (a), places the burden of proof on the party requesting the modification to show, by a preponderance of the evidence, that the ward's welfare requires the modification. (See Cal. Rules of Court, rule 5.570, subd. (i)(1).) Appellant would thus

have the burden under section 778 to prove by a preponderance of the evidence that he did not violate probation. (Cal. Rules of Court, rule 5.570, subd. (i).) In our system of justice, an accused never has to prove himself innocent, even when facing a probation violation. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441; *People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1285.)

The probation order in question here impermissibly delegates judicial authority to the probation officer, and does so in a manner that is all but guaranteed to deprive appellant of due process, the right to counsel, the right to notice and a hearing, and the right to have any violation proven by a preponderance of the evidence. Accordingly, the juvenile court's order violates not only the separation of powers doctrine, but also general principles of due process, and must be vacated.

## CONCLUSION

For the foregoing reasons, appellant asks this Court to strike the probation condition delegating authority to probation officer to adjudicate and punish probation violations.

Dated: October 22, 2021

Respectfully submitted,

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## CERTIFICATE OF WORD COUNT

As required by California Rules of Court, Rule 8.360(b), I certify that this brief contains 5,879 words, as determined by the word processing program used to create it.

/s/Elizabeth M. Campbell  
Elizabeth M. Campbell  
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I, the undersigned, declare as follows:

I am a member of the State Bar of California and a citizen of the United States. I am over the age of 18 years and not a party to the within-entitled cause; my business address is PMB 334, 3104 O Street, Sacramento, California, 95816.

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Appellant's Opening Brief on the Merits

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/s/Elizabeth M. Campbell  
DECLARANT

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Supreme Court of California

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