IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Ricardo P.

A minor.

No. S230923

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

Ricardo P.,

Defendant and Appellant.

First Appellate District No. A144149
Alameda County Superior Court No. SJ14023676
Hon. Leopoldo E. Dorado, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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QUESTION PRESENTED

Did the trial court err by imposing an "electronics search condition" on the juvenile as a condition of his probation when that condition had no relationship to the crimes he committed but was justified on appeal as reasonably related to future criminality under *People v. Olguin* (2008) 45 Cal.4th 375, because it would facilitate the juvenile's supervision?

STATEMENT OF THE CASE AND FACTS

On September 18, 2014, a Santa Clara County Welfare and Institutions Code section 602 petition was filed alleging two felony violations of Penal Code section 459/460(a) (First Degree Burglary). (CT

18, 20.)[1] The charges stemmed from two incidents that occurred between 10:00 am and noon on a single day.[2] In the first incident, three people were seen entering a home through a sliding glass door. A resident of the home then came through the front door, and all three people left through the back door without taking anything. (CT 14, 122-124.) In the second incident, a neighbor saw two people break a sliding glass door to enter a house; a video recording also captured them breaking the door. (CT 12-13, 61, 68.) Several items of costume jewelry worth a total value of $200 were taken. (CT 13, 58, 70.) Ricardo and two of his adult cousins were arrested soon afterwards. (CT 41, 52, 63.) Ricardo was positively identified by a witness to one of the break-ins. (CT 77.) Ricardo's two adult co-defendants were charged, pleaded guilty, and were sentenced to state prison for two and three years. (CT 140.)

On October 9, 2014, Ricardo admitted both counts. (CT 5, 8.) On November 4, 2014, the petition was transferred to Alameda County, Ricardo's county of residence. (11/4/2014 RT 2.) On December 15, 2014, Ricardo was made a ward of the court and placed on probation. (12/15/2014 RT 3.) Over defense objection, the probation conditions imposed included a requirement that Ricardo submit to a search of

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[1] "CT" refers to the Clerk's Transcript on Appeal and "RT" to the Reporter's Transcript of Proceedings.

[2] These facts were taken from the probation reports and San Jose Police Department reports.

"electronics including passwords." (12/15/2014 RT 4; CT 148.)

On appeal, Ricardo challenged the imposition of this condition as unconstitutional and unreasonable under the test set forth in *People v. Lent* (1975) 15 Cal.3d 481. On October 22, 2015, the Court of Appeal, in a published opinion, held the condition valid under the *Dominguez/Lent* test as reasonably related to future criminality (Opin., at pp. 17-18.) To conform to constitutional requirements, the Court of Appeal ordered the juvenile court to modify the probation condition and suggested wording that would limit searches to "text and voicemail messages, photographs, e-mails, and social-media accounts," sources the court said were "reasonably likely to reveal" Ricardo's involvement in drugs. (Opin., at p. 15.)

SUMMARY OF ARGUMENT

The electronics search condition does not pass muster under the *Dominguez/Lent* test because it does not relate to Ricardo's underlying offense or to his prior offenses and is thus unrelated to future criminality. Under the *Dominguez/Lent* test, a probation condition is invalid if it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." (*People v. Lent, supra,* 15 Cal.3d at p. 486.) California courts have consistently interpreted the *Dominguez/Lent* test to require a nexus between the

probation condition and the underlying offense or probationer's prior offenses for the condition to be valid as reasonably related to future criminality. This case represents the first time a California court has upheld under *Lent* an electronics search condition that has no relationship with the defendant's underlying offense or prior offenses and serves only to increase surveillance of the probationer.

The Court of Appeal erroneously expanded language in *People v. Olguin* (2008) 45 Cal.4th 375, which concerned a narrow issue of officer safety, to broadly validate any probation condition that could arguably facilitate supervision of the probationer even if the condition is unconnected to the probationer's underlying offense or prior offenses. The Court of Appeal's decision threatens to eviscerate the *Dominguez/Lent* test by expanding the third prong (reasonably related to future criminality) so broadly as to allow any probation condition that facilitates supervision of the probationer, no matter how intrusive or unconnected to the defendant's offense or to prior offenses.

The Court of Appeal also incorrectly invoked this Court's decision in *People v. Olguin, supra,* 45 Cal.4th 375, which involved a probation condition that did not impinge on the probationer's constitutional rights, to validate the highly intrusive electronics search condition. The Court of Appeal failed to subject the electronic search condition, which impinges on Ricardo's "precious constitutional rights," to the heightened scrutiny

required by *Lent* jurisprudence. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942.) The Court of Appeal erred in equating searches of electronic devices and digital data with physical property searches and disregarded the United States Supreme Court's decision in *Riley v. California* (2014) 134 S.Ct. 2473, 2488-2489, which made clear the substantial difference between searches of physical property and searches of digital data and electronic devices and held that the privacy concerns implicated by a search of electronic devices necessitate greater protections for users of those devices beyond those required for a search of physical property.

Furthermore, the Court of Appeal's incorrect interpretation of *Olguin* – allowing any probation condition that can be said to facilitate supervision of a probationer – would inevitably result in unconstitutional probation conditions. Any probation condition that increases government surveillance of a probationer could be justified on the basis that it facilitates supervision of the probationer. However, many hypothetical probation conditions that would increase surveillance of the probationer also unduly burden the probationer's constitutional rights and would not survive the heightened scrutiny required when a probation condition impinges on constitutional rights. The Court of Appeal's reasoning would render the *Dominguez/Lent* test not only meaningless, but also unconstitutional.

ARGUMENT

I. THE COURT OF APPEAL ERRED IN FINDING THE ELECTRONICS SEARCH CONDITION VALID UNDER *PEOPLE V. LENT.*

The Court of Appeal erred in holding that, under *People v. Olguin*, *supra,* 45 Cal.4th 375, any probation condition that can possibly be said to facilitate supervision of the probationer is reasonably related to future criminality and thus valid under the *Dominguez/Lent* test. The court below ignored the fundamental principle of the *Dominguez/Lent* test – the existence of a nexus between the probation condition and the defendant's underlying offense or prior offenses—and departed from over forty years of *Lent* jurisprudence. Such reasoning eviscerates the *Dominguez/Lent* test by broadening the third prong (reasonably related to future criminality) so as to allow any probation condition that increases surveillance of a probationer, no matter how disconnected from the probationer's offense or background.

The Court of Appeal also erred by failing to subject the condition, which impinges on Ricardo's constitutional rights, to the heightened level of scrutiny required when constitutional rights are at issue. Thus, the Court of Appeal disregarded the United States Supreme Court's decision in *Riley v. California*, *supra,* 134 S.Ct. 2473, which articulated the need for heightened protections for searches of digital data and electronic devices.

The condition would allow law enforcement and the probation department unfettered access to intimate details of Ricardo's life and would, in effect, allow law enforcement to continually monitor his communications, locations, and associations. The Court of Appeal's decision, if allowed to stand, would open the door to the imposition of similar probation conditions in every criminal and juvenile case.

A. Factual and Procedural Background.

Ricardo's two felony violations of first-degree burglary were not drug-related, but in his conversations with the probation department, Ricardo admitted occasional marijuana use. (12/15/2014 RT 6; CT 15, 140.) The record contains no mention of any prior offenses by Ricardo, drug-related or not. However, because of his prior marijuana use, the court imposed probation conditions that included drug testing, the warrantless search of Ricardo's person and property, and an order that he stay away from known drug users. (CT 148.) The court also imposed a condition requiring him to submit to search of his electronic devices and to provide his electronics passwords to the probation department. (12/15/2014 RT 5.) Defense counsel objected to the condition, stating "the cell phone and electronics search term . . . is not reasonably related to the crime or preventing future crime." (12/15/2014 RT 5, 6.)

The juvenile court justified the electronic search condition on the

basis that some teenagers boast about their drug use on social media, and thus monitoring Ricardo's communications on social media would assist the probation department in ensuring Ricardo was not using drugs. (12/15/2014 RT 5; Opin., at pp. 3-4.) The court explained that "[T]his is appropriate for individuals who – particularly minors or people that are [appellant's] age. I find that minors typically will brag about their marijuana usage or drug usage, particularly their marijuana usage, by posting on the Internet, showing pictures of themselves with paraphernalia, or smoking marijuana. It's a very important part of being able to monitor drug usage and particularly marijuana usage." (12/15/2014 RT 6.) Because Ricardo had no prior offenses, no attempt was made to justify the electronics search condition as related to a prior offense.

On appeal, Ricardo challenged the electronics search condition as unreasonable under *Lent*, unconstitutionally overbroad, and permitting illegal eavesdropping in violation of Penal Code section 632. The Court of Appeal agreed the condition as written was unconstitutionally overbroad and struck the phrase "electronics including passwords" from the warrantless search condition. (Opin., at p. 17.) The Court of Appeal indicated that, on remand, the juvenile court could validly impose a condition requiring searches of a "narrower range of electronic information" that would be "reasonably likely to reveal whether Ricardo is boasting about his drug use . . . such as text and voicemail messages,

photographs, e-mails, and social-media accounts." (Opin., at pp. 17-18.)

Thus, while holding the condition as written overbroad, the Court of Appeal, at the same time, found the probation condition reasonable under the third prong of the *Lent* test because "the electronics search condition is reasonably related to enabling the effective supervision of Ricardo's compliance with" other probation conditions. (Opin., at p. 10.) Even though the Court of Appeal agreed with Ricardo that the condition was not related to the underlying offense, the court reasoned that "[u]nless our state Supreme Court departs from its holding in *Olguin,* we are bound to accept the principle that conditions reasonably related to enhancing the effective supervision of a probationer are valid under *Lent.*" (Opin., at pp. 8, 10.) The Court of Appeal also expressed some "skepticism about" the juvenile court's remarks concerning the "prevalence of minors' boasting on the Internet about marijuana use," but found that that juvenile court's reliance on its belief that teenagers tend to brag about marijuana use on social media was not "outside the bounds of reason" and thus a valid basis for imposing the condition. (Opin., at p. 10.)

B. The Court of Appeal's Decision Departs From a Fundamental Principle of the *Dominguez/Lent* Test Requiring a Nexus Between the Probation Condition and the Underlying Offense or Probationer's Prior Offenses.

The Court of Appeal's reasoning in this case relies on a fundamental misunderstanding of the nature of the *Dominguez/Lent* test, developed almost fifty years ago and adopted by this Court in 1975. (*People v. Lent* (1975) 15 Cal.3d 481.) Contrary to the Court of Appeal's interpretation of *People v. Olguin*, the origins of the test and subsequent jurisprudence demonstrate the essential nature of a nexus between the probation condition and the underlying offense or probationer's prior offenses.

People v. Dominguez (1967) 256 Cal.App.2d 623, in which the Court of Appeal first articulated the three-prong test adopted by this Court in *People v. Lent, supra,* 15 Cal.3d 481, emphasized the requirement of a nexus between the probation condition and the probationer's underlying offense. *Dominguez* involved a challenge to a probation condition prohibiting the probationer, who had been convicted of second-degree robbery, from becoming pregnant while unmarried. In determining whether the probation condition was valid, the Court of Appeal first looked to the statutory requirement that probation conditions be "reasonable" that further "the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person

resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer." (*Id.* at p. 627, citing Cal. Pen. Code § 1203.1, subd. (j).)[3] To determine the limits of the trial court's statutory authority to impose conditions of probation, the *Dominguez* court looked to several prior cases in which the courts' analysis centered on whether the disputed condition was related to the underlying offense. (*Dominguez, supra,* 256 Cal.App.2d at p. 628; see *People v. Osslo* (1958) 50 Cal.2d 75 (condition prohibiting probationer from holding a position with a union upheld where the underlying offense involved crimes stemming from union activity); *People v. Stanley* (1958) 162 Cal.App.2d 416 (condition of probation requiring defendant to refrain from having a telephone in his home or on property under his control upheld where the crime of which he was convicted was bookmaking by telephone).)

The *Dominguez* court then articulated a three-prong test: "A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid." (*People v. Dominguez, supra,* 256 Cal.App.2d at p. 627.) The

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[3] The *Dominguez/Lent* test is applicable to juveniles as well as adults. (*In re D.G.* (2010) 187 Cal.App.4th 47; Wel. & Inst. Code § 730, subd. (b) (authorizing the juvenile court to "make any and all reasonable orders for the conduct of the ward").)

court emphasized the requirement that the likelihood of future criminality must be connected to the underlying offense. "Appellant's future pregnancy was unrelated to robbery. . . . Appellant's future pregnancy had no reasonable relationship to future criminality." (*Id* at p. 627.) Because the probation condition was unrelated to the defendant's underlying offense or prior offenses, it could not be reasonably related to the risk of her future criminality and was thus invalid. (*Id.* at pp. 627-628.)

Shortly after *Dominguez* was decided, this Court applied the three-prong *Dominguez* test in *People v. Bushman* (1970) 1 Cal.3d 767, and *People v. Mason* (1971) 5 Cal.3d 759, and in both cases emphasized the requirement of a nexus between the condition and the underlying offense.[4] In *Bushman*, this Court invalidated a probation condition that required the defendant to seek psychiatric treatment. (*Bushman, supra,* 1 Cal.3d at p. 777.) In concluding that the probation condition was not reasonably related to future criminality, the Court emphasized the lack of a nexus between the condition and the underlying offense: "without any showing that mental instability contributed to that offense, psychiatric care cannot reasonably be related to future criminality." (*Bushman, supra,* 1 Cal.3d at p. 777.) In *Mason, supra,* 5 Cal.3d at p. 764, this Court upheld a warrantless property search condition for a narcotics offender as reasonably related to prior

[4] In *Bushman* and *Mason*, the Court inadvertently misstated the test as disjunctive rather than conjunctive but applied the test correctly. (See *Lent, supra,* 15 Cal.3d at p. 487, fn. 1.)

criminal conduct and thus future criminality.

This Court clarified the wording of the *Dominguez* test in *Lent*, which upheld a probation condition requiring a probationer to pay restitution related to a theft charge of which he had been acquitted. The probationer had been convicted of a separate theft charge against the same victim, and the Court reasoned that the evidence developed at the probation revocation hearing and trial supported the imposition of the condition as both related to the underlying offense of which he was convicted and, given that relationship, as a deterrent to future criminality. (*People v. Lent, supra,* 15 Cal.3d at pp. 486-487.)

Consistently over the past forty years, as this Court and the Courts of Appeal have applied the *Dominguez/Lent* test to a variety of probation conditions for both adults and juveniles, they have continued to require a nexus between the probation condition and the circumstances of the underlying offense or prior offenses in order for the probation condition to be justified as reasonably related to future criminality. In *People v. Carbajal* (1995) 10 Cal.4th 1114, this Court, applying the *Dominguez/Lent* test, found valid a probation condition requiring the probationer to pay restitution following his conviction for hit-and-run. This Court held that the condition was related to the underlying offense, even though there was no showing that the damage to the victim's parked car was caused by the defendant's criminal actions in leaving the scene of the accident. (*Id.* at p.

1119, 1124.) The Court made clear that the restitution was related to future criminality because it was related to the underlying offense. Because it forced "the defendant to accept the responsibility he attempted to evade by leaving the scene of the accident without identifying himself, the restitution condition acts both as a deterrent to future attempts to evade his legal and financial duties as a motorist and as a rehabilitative measure tailored to correct the behavior leading to his conviction." (*Id.* at p. 1124.)

Conversely, the Courts of Appeal have consistently invalidated probation conditions as not reasonably related to future criminality where the nexus between the condition and the offense or defendant's prior offenses was lacking. For example, in *People v. Burton* (1981) 117 Cal.App.3d 382, the court struck a probation condition that defendant refrain from consuming alcohol as not reasonably related to future criminality because the "record is completely devoid of any evidence that [defendant] had consumed alcoholic beverage[s] prior to, during, or after the assault for which he was convicted," and "the record fails to establish the requisite factual nexus between the crime, [defendant's] manifested propensities and the probation condition." (*Id.* at p. 390; see also *People v. Petty* (2013) 213 Cal.App.4th 1410, 1417 (probation condition requiring defendant to take antipsychotic medication invalid where his "long mental health history" was not reasonably related to underlying offense); *In re Erica R.* (2015) 240 Cal.App.4th 907, 913 (electronics search condition

invalid where underlying offense of drug possession unrelated to electronics or social media usage).)

The relationship of the probation condition to future criminality required by the *Dominguez/Lent* test must be specific to the individual defendant in order to be deemed reasonable and valid under *Lent*. Thus, in *People v. Brandão* (2012) 210 Cal.App.4th 568, the Court of Appeal found invalid a probation condition prohibiting the probationer from associating with known gang members because there was no evidence that the defendant was involved in a gang and because the underlying offense was not gang-related. (*Id.* at 576-577.) The court explained that the condition could only be reasonably related to future criminality if it was "reasonably related to a risk *that* defendant will reoffend." (*Id.* at p. 574 (emphasis added).) The court noted that "a remote, attenuated, tangential, or diaphanous connection to future criminal conduct" does not provide the requisite nexus and does not pass *Lent* muster. (*Ibid.*)

Though the court in *Brandão* agreed that association with gang members is "less than ideal," it rejected the Attorney General's argument that a probation condition unrelated to the defendant's prior offenses or underlying offense would be valid if it could be possibly related to future criminality in a general sense. (*Id.* at p. 577; see also *In re D.G.* (2010) 187 Cal.App.4th 47, 53 (probation condition prohibiting the minor from coming within 150 feet of a school that he was not attending invalid where his past

or current offenses did not demonstrate "a predisposition to commit crimes near school grounds or upon students," so his background could not lead to a "specific expectation he might commit such crimes"); *In re Martinez* (1978) 86 Cal.App.3d 577, 581-582 (probation condition cannot be imposed simply based on the "speculati[on]" that such a condition might prevent future crime).) Thus, when deciding whether a probation condition is reasonably related to future criminality, a court must consider whether the condition is reasonably related to that specific defendant's risk of re-offending. Speculation that the condition could be related to criminality, as the juvenile court engaged in here when it discussed the possibility that minors may brag about marijuana usage on the internet (Opin., at p. 10), is not adequate under *Lent* jurisprudence.

An additional consideration in juvenile cases is this Court's requirement that juvenile probation conditions be "tailored specifically to meet the needs of the juvenile." (*In re Tyrell J.* (1994) 8 Cal.4th 68, 82; see also *In re D.G., supra,* 187 Cal.App.4th at p. 56 (A "probation condition that can be justified only on grounds that can be applied equally to every juvenile probationer is hardly tailored to the needs" of the minor.).) The logic of the Court of Appeal in this case would allow expansive electronics surveillance conditions in every case, and the probation condition thus cannot be said to be tailored to the needs of the particular juvenile.

Here, the Court of Appeal held that the probation condition passed

the test set forth in *People v. Lent* because "the third prong required to invalidate a probation condition – that the condition forbids conduct unrelated to future criminality – is *not* satisfied." (Opin., at p. 9 (emphasis in original).) The Court of Appeal agreed with Ricardo that nothing in the record permitted "an inference that electronics [including cell phones] played a role" in his offense (Opin., at p. 8), but found persuasive the Attorney General's contention that the electronics search condition would enable the probation department to "monitor and enforce compliance" with other conditions designed to address Ricardo's marijuana use and potential contact with his two adult co-defendants. (Opin., at p. 10.) The Court of Appeal suggested that "allowing text messages or Internet activity to be reviewed" would allow the probation department to "assess whether Ricardo is communicating about drugs or with people associated with drugs." (Opin., at p. 10.)

The Court of Appeal's decision in this case radically departs from settled case law that requires a probation condition have more than a "remote" or "attenuated" connection with the defendant's underlying offense or prior offenses to pass the third prong of *Lent.* (See *Brandão, supra,* 210 Cal.App.4th at p. 574.) There was no evidence that electronics usage played a role in the underlying offense or that Ricardo had ever used electronics to purchase drugs or engage in any illegal activity. The contention that a probation condition unconnected to the defendant's crimes

is valid if it could possibly be connected to future criminality was exactly the argument contemplated and rejected in *Brandão, supra,* 210 Cal.App.4th at p. 577, and *In re D.G., supra,* 187 Cal.App.4th at p. 53, as prohibited by *Lent* and subsequent case law. (See also *In re Erica R., supra,* 240 Cal.App.4th at p. 913; *In re J.B.* (2015) 242 Cal.App.4th 749, 756.) Because no nexus exists between electronics usage and the underlying offense of burglary, there is no connection between electronics usage and the risk that Ricardo will engage in criminal activity in the future, and thus the probation condition fails the third prong of *Lent.*

The Court of Appeal also erred by relieving the state of its burden to prove that the probation condition is reasonably related to the risk the specific defendant will engage in criminal activity and replacing it with a universal assumption that all defendants will use electronic devices in future criminal activity: "Given the ubiquity of electronic devices, particularly cell phones, we cannot say that an electronics search condition is unreasonable simply because the record does not show that the probationer necessarily has access to such devices or has used them to engage in illegal activity." (Opin., at p. 11.) Under the Court of Appeal's reasoning, the evidence in the record is irrelevant – if a hypothetical electronic device could possibly be used in criminal activity, then it is open to warrantless search by the probation officer or police. Neither *Lent* nor *Olguin* (see Section C, *post*) support this sweeping conclusion or broad

expansion of a warrantless search clause.[5]

Ricardo does not claim that a probation condition authorizing warrantless searches of electronic devices is never permissible under *Lent.* If a nexus exists between electronics or social media usage and the underlying offense or probationer's prior offenses, such a condition might be valid as reasonably related to future criminality. For example, in *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, which involved imposition of a probation condition similar to the one at issue here, the record contained evidence that the defendant had used social media sites to promote a criminal street gang. (See also *In re Malik J.* (2015) 240 Cal.App.4th 896, 903-904 (court upheld a restricted electronics search condition to allow search of cell phones in juvenile's possession to determine whether they were stolen where juvenile had previously stolen cell phones).)

Though an electronics search condition may be valid under *Lent* where the defendant's underlying offense or prior offenses involve electronics or social media, such a condition should not be allowed in this case. Ricardo's offense did not involve electronics or social media, there is no record of any prior offenses on his part, and thus, there is no basis to conclude that electronics and social media are related to his particular risk

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[5] Nor does such a condition pass constitutional muster, given the heightened privacy concerns implicated in searches of digital data and electronic devices. (See *Riley v. California, supra,* 134 S.Ct. 2473, as discussed in Section D, *post.*)

of future criminality. Because no nexus exists between the condition and the underlying or prior offenses, the condition does not pass *Lent* scrutiny.

C. The Court of Appeal's Overly Expansive Interpretation of *Olguin* to Permit Probation Conditions That Serve Only To Facilitate Supervision of the Probationer Renders the *Dominguez/Lent* Test Meaningless.

In deciding that the electronics search condition here was justified under *Lent's* third prong as reasonably related to future criminality, the Court of Appeal relied primarily on language in this Court's decision in *People v. Olguin* (2008) 45 Cal. 4th 375. (Opin., at pp. 9-10.) The Court of Appeal erred by erroneously expanding language in *People v. Olguin*, which concerned only officer safety, to broadly validate any probation condition that could arguably facilitate supervision of the probationer.

People v. Olguin concerned a narrow issue of officer safety and did not discuss the type of intrusive search condition at issue in this case. In *Olguin,* this Court upheld under *Lent* a probation condition requiring the probationer to inform the probation department of all pets living at his residence in order to protect the safety of the probation officer when making unscheduled visits to the probationer's home. (*Olguin*, *supra*, 45 Cal. 4th at pp. 380-381.) The Court in *Olguin* explained "the protection of the probation officer while performing supervisory duties is reasonably

related to the rehabilitation of a probationer" and that the notification condition served to "inform and protect" the probation officer. (*Id.* at p. 381.) The *Olguin* court noted that the pet notification condition was "simple" and "imposed no undue hardship or burden." (*Id.* at p. 382.)

First, the Court of Appeal incorrectly applied language in *Olguin*, which addressed only officer safety and potential distractions that would hamper valid probation searches, to extend to *any* probation condition that would facilitate supervision of the probationer, even if unrelated to officer safety. The Court of Appeal reasoned that, under *Olguin*, it was "bound to accept the principle that conditions reasonably related to enhancing the effective supervision of a probationer are valid under *Lent,*" even if unrelated to officer safety. (Opin.. at p. 10.) Given that officer safety and protection is not an issue in this case, and that no attempt has been made to justify the electronics search condition on those grounds, the court's decision goes far beyond the logic of *Olguin*. "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 529, fn. 2.)

Second, the Court of Appeal's reliance on *Olguin* to expand *Lent*'s third prong so as to allow to any condition that serves only to facilitate supervision of the probationer is unsupported by existing law. No published case has previously cited *Olguin* for the proposition that a

probation condition related only to enhancing supervision of the probationer, without reference to officer safety, passes *Lent* muster. (See Opin., at pp. 9-10.) And, courts have rejected similar arguments in the past. (See *People v. Brandão, supra,* 210 Cal.App.4th 568; *In re D.G., supra*, 187 Cal.App.4th 47; *In re Erica R., supra,* 240 Cal.App.4th at p. 913; *In re J.B., supra,* 242 Cal.App.4th 749.) *Olguin's* holding specifically rests on the commonsense notion that probation officers must be safe in order to perform their duties. The Court of Appeal here erred by expanding the language in that case to validate any probation condition that facilitates supervision of the probationer, no matter how intrusive or unconnected to the probationer's prior or current offenses. The Court of Appeal's reasoning in this case that *Olguin* that validates any condition "reasonably related to enhancing the effective supervision of a probationer" is supported neither by *Olguin* nor by subsequent cases citing it. (See Opin., at p. 10.)

The Court of Appeal's reasoning essentially renders *Lent* meaningless by broadening the third prong to allow any probation condition that enhances surveillance of the probationer and would yield absurd results if implemented in future cases. If any probation condition that enhances supervision of the probationer is valid under *Lent*, almost any conceivable probation condition that provides information to the probation department about the probationer would be justified, regardless of the extent to which it burdens the probationer or infringes upon his rights and liberties. For

example, regular review of Ricardo's private health records could provide information about his possible drug or alcohol use, a body-mounted camera with a recording device would provide information about his movements and interactions with possible drug users, and interception of his mail and a wiretap of his landline phone would provide information about his communications, wherein he might mention drug use. Indeed, constant, uninterrupted 24-hour surveillance of any juvenile or adult probationer, including his communications with family, friends, teachers, health providers, therapists, and employers, would be valid under *Lent*, according to the present Court of Appeal, regardless of the circumstances of the probationer's offense and background.

The present Court of Appeal's extension of *Olguin* eviscerates *Lent* by broadening the test's third prong to include almost any conceivable probation condition under the justification that it would aid the probation officer in monitoring the probationer. This unwarranted and unprecedented expansion renders the *Dominguez/Lent* test meaningless. It also runs contrary to the goals of this Court in establishing the *Dominguez/Lent* test – to limit the trial court's authority to the imposition of probation conditions that accord with Penal Code section 1203.1 and are "reasonably related" to the offense. (See *People v. Carbajal, supra,* 10 Cal.4th at p. 1121; *Dominguez, supra.* 6 Cal.App.2d at pp. 626-627.) Thus, as interpreted by the Court of Appeal, the *Dominguez/Lent* test would no longer serve to

meaningfully guide trial courts in the exercise of their discretion to impose probation conditions.

D. Because the Probation Condition Impinges on Constitutional Rights to an Unprecedented Degree, The Court of Appeal Erred in Finding it Valid Under the Narrow Holding of *People v. Olguin*.

The Court of Appeal erred in invoking *Olguin,* which involved a probation condition that did not implicate constitutional rights, to uphold the electronics search condition.

Probationers, juvenile and adult, do not give up their constitutional rights when they are placed on probation. "Human liberty is involved. A probationer has the right to enjoy a significant degree of privacy, or liberty" under the Constitution. (*People v. Keller* (1978) 76 Cal.App.3d 827, 832; see also *Morrissey v. Brewer* (1972) 408 U.S. 471, 482 (a parolee's liberty "includes many of the core values of unqualified liberty"); *In re Jaime P.* (2006) 40 Cal.4th 128, 136-137.) Thus, a probation condition that impinges on important constitutional rights is subjected to a further level of "close scrutiny." (*People v. Olguin, supra,* 45 Cal.4th at p. 384; *People v. Bauer, supra,* 211 Cal.App.3d at p. 942; *United States v. Consuelo-Gonzalez* (9th Cir. 1975) 521 F.2d 259, 265 (a probation condition that restricts "otherwise inviolable constitutional rights" is subject to special scrutiny).)

If a probation condition restricts the probationer's constitutional rights, then (1) it must be narrowly tailored to serve the interests of public safety and rehabilitation and (2) it must be narrowly tailored to the individual probationer. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084; *In re White* (1979) 97 Cal.App.3d 141, 146.) To the extent a probation condition unduly impinges on the probationer's constitutional rights, "it is not reasonably related to the compelling state interest in reformation and rehabilitation," and is thus not valid under *Lent*. (*In re White, supra,* 97 Cal.App.3d at p. 146, quoting *People v. Mason, supra,* 5 Cal.3d at p. 768.) By the same token, if a probation condition is not reasonably related to the probationer's underlying offense or prior offenses, impingement on his constitutional rights is not justified because the condition is not narrowly tailored to the probationer or to the state's legitimate interests in public safety and rehabilitation.

That the electronics search condition substantially impinges on Ricardo's constitutional rights is without dispute. An individual's privacy interest in his electronic devices goes far beyond physical objects and cannot be overstated. In *Riley*, the United States Supreme Court explicitly rejected the argument that a search of digital data was "materially indistinguishable" from a search of physical objects: "That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies

lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." (*Riley v. California, supra,* 134 S.Ct. 2473 at pp. 2488-2489.)

As the *Riley* court noted, cell phones contain a digital record of nearly every aspect of the users' lives. (*Riley, supra,* 134 S.Ct. 2473 at 2490.) Internet browsing history can reveal the user's most private interests and concerns, such as medical issues, political affiliation, and religious views. (*Ibid.*). Cell phone data also reveals the user's location, which can allow probation officers to precisely reconstruct a probationer's movements. (*Ibid.*) Such tracking can reveal a user's "familial, political, professional, religious and sexual associations." (*United States v. Jones* (2012) 565 U.S. ___ [132 S.Ct. 945, 955].) Additionally, most cell phones have application software capability, which allow carriers to use tools ("apps") for managing private, detailed information. (Aaron Smith, Smartphone Ownership 2013 (June 5, 2013) Pew Research Center's Internet & American Life Project, p. 2 <http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013> [as of May 20, 2016].)

The privacy interest in a user's cell phone is magnified by its immense storage capacity. (*Riley, supra*, 134 S.Ct. at 2489.) "The current top-selling smartphone has a standard capacity of 16 gigabytes [which] translates to millions of pages of text, thousands of pictures, or hundreds of

videos." (*Ibid.*) This storage capacity has several interrelated privacy consequences. (*Ibid.*) For instance, cell phones can contain several types of information, such as bank records, notes, address books, contact history, videos and pictures, which can reveal more in conjunction with one another. (*Ibid.*) Also, cell phone data can span several years, and a user's life can be reconstructed with all of the above information. (*Ibid.*) Again, location storage and increasingly popular photo and video sharing, labeled by time, location, and description, make tracking a user's life very easy. (*Ibid.*)

As Justice Sotomayor noted in *United States v. Jones*, *supra,* 132 S.Ct. at 956, "[a]wareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." An all-access electronics search condition gives the probation department the power to monitor the most intimate details of Ricardo's life: his every move, association, political, religious and sexual expression and thought. Ricardo would not be able to have private conversations with his friends or discuss particular issues with groups of friends freely. Every electronic message sent (e-mail, text and social media), every Facebook post or comment, every Instagram photo post or comment, every Twitter post, every typed word and every click would be subject to probation

department scrutiny.[6]

The Court of Appeal erred when it incorrectly invoked *Olguin*, which involved a probation condition that did not implicate constitutional rights, to validate the electronics search condition, which does substantially impinge on Ricardo's constitutional rights. Because the condition did not implicate a constitutional right, the Court in *Olguin* reviewed the imposition of the pet notification condition for abuse of discretion. (*Id.* at p. 384.) This Court in *Olguin* did not contemplate or discuss the reasonableness of imposing the type of intrusive surveillance condition challenged by Ricardo or the privacy concerns raised by searches of digital data more recently articulated by the United States Supreme Court in *Riley v. California, supra,* 134 S.Ct. 2473. The probation condition here, an "open-ended search condition permitting review of all information contained or accessible on the minor's smart phone or other electronic devices," is hardly equivalent to the minimal obligation to inform the probation officer of pet ownership approved in *Olguin*. (*In re J.B., supra,* 242 Cal.App.4th at p. 758.) Thus, the Court of Appeal's conclusion, that a condition authorizing warrantless searches of Ricardo's electronic devices is comparable to the pet notification condition discussed in *Olguin*, is

[6] The Court of Appeal's suggested modification of the condition would still allow for unfettered access to Ricardo's electronic communications, including text and voicemail messages, photos, emails, and social-media accounts. (Opin., at p. 15.)

completely unsupported by *Olguin*, which emphasized the reasonableness of the pet notification condition and stressed its minimal burden on the probationer. (*Olguin, supra,* 45 Cal. 4th at p. 382.)

Furthermore, the probation condition at issue in *Olguin* did not expand the scope of a warrantless search condition or increase the degree of surveillance of the probationer. Rather, in holding that the probationer could be required to notify the probation department about pets at his residence, this Court simply protected probation officers by ensuring they could carry out their duties safely and without distraction. The pet notification condition placed a minimal burden on the probationer and did not increase the scope of a warrantless search, unlike the electronics search condition at issue in the present case, which substantially infringes on Ricardo's privacy. The Court of Appeal in this case erred in applying the language of *Olguin* to expand the authority of the probation department and law enforcement to essentially monitor a probationer's communications, location, associations, and all of the "privacies of life." (See *Riley, supra,* 143 S.Ct. at p. 2495 (quoting *Boyd v. United States* (1886) 116 U.S. 616).)

In direct contradiction to *Riley*, the Court of Appeal in this case equated searches of electronic devices with searches of physical property. The Court of Appeal reasoned that expanding a condition authorizing warrantless searches of Ricardo's property to include electronic devices was equivalent to a probation condition authorizing the search of a

probationer's vehicle where the probationer had not used a vehicle to engage in illegal activity. (Opin., at p. 11.) Thus, the Court of Appeal disregarded *Riley's* articulation that the data and information accessed in searches of electronic devices is significantly more private and far-reaching in scope than any personal information accessed during searches of physical property. (*Riley, supra,* 134 S.Ct at pp. 2488-2489.)

The Court of Appeal's interpretation of *Olguin* and *Lent* to permit any probation condition that facilitates supervision of a probationer necessarily brings the *Dominguez/Lent* test into conflict with constitutional principles. Those principles require that probation conditions involving intrusive surveillance be imposed with great caution. As discussed in Section C., *post*, the Court of Appeal's reasoning opens the door to a multitude of probation conditions authorizing government surveillance of juvenile and adult probationers and will necessarily result in constitutional violations.

CONCLUSION

For these reasons, the electronics search condition must be stricken.

Dated: May 25, 2016

/s/Megan Hailey-Dunsheath
Megan Hailey-Dunsheath
Attorney for Ricardo P.

CERTIFICATION OF WORD COUNT

I, Megan Hailey-Dunsheath, in accordance with California Rules of Court, Rule 8.204(c)(1) and Rule 8.360(b), certify that the attached APPELLANT'S OEPNING BRIEF ON THE MERITS contains 6770 words, excluding cover page and case caption. I certify that I prepared this brief in Microsoft Word and this is the word count generated by that word-processing program.

Executed under penalty of perjury at Berkeley, California, on May 25, 2016.

/s/Megan Hailey-Dunsheath
Megan Hailey-Dunsheath

PROOF OF SERVICE BY MAIL

Re: Ricardo P., Court Of Appeal Case: A144149, Superior Court Case: SJ14023676

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On May 25, 2016, I served a copy of the attached Appellant's Opening Brief (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

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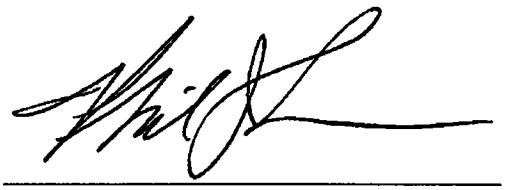
Ricardo P.
(Address on File)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 25th day of May, 2016.

Phil Lane
(Name of Declarant)



(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Ricardo P., Court Of Appeal Case: A144149, Superior Court Case: SJ14023676

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On May 25, 2016 a PDF version of the Appellant's Opening Brief (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated and/or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

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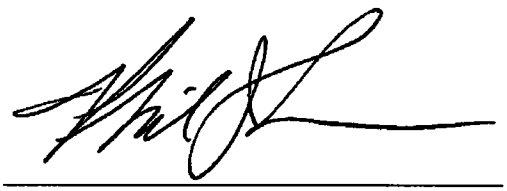
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 25th day of May, 2016 at 10:33 Pacific Time hour.

Phil Lane
(Name of Declarant)



(Signature of Declarant)