In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CLYDELL BRYANT,

Defendant and Appellee.

Case No. S259956

Second Appellate District, Division One, Case No. B271300
Los Angeles County Superior Court, Case No. GA094777
The Honorable Michael Villalobos, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Whether the validity of a mandatory supervision condition should be assessed in the same manner as a parole condition, rather than a probation condition, since mandatory supervision is more akin to parole, particularly with respect to the supervisee's limited privacy expectations and the State's greater interest in reducing recidivism.

INTRODUCTION

Recognizing a trial court's broad discretion to impose reasonable supervision conditions, this Court held in *People v. Lent* (1975) 15 Cal.3d 481 that a probation condition will not be invalidated unless it is unrelated to the offense, relates to conduct which is not unlawful, and requires or forbids conduct that is not reasonably related to future criminality. Later, in *People v. Burgener* (1986) 41 Cal.3d 505, this Court made clear that, although a parole condition must similarly be reasonable and related to future criminality, it is not assessed or justified in the same way that a probation condition would be under the *Lent* test because of the differences between parolees and probationers. Under *Burgener*, supervision conditions that would be invalid under *Lent* for probationers may be permissible for parolees.

In this case, appellant Clydell Bryant was placed on mandatory supervision, which, along with postrelease community supervision (PRCS), is one of the two new types of supervised release created by the Criminal Justice Realignment Act of 2011.

(See Penal Code, §§ 1170, subd. (h)(5); 3450.)[1] The court below invalidated Bryant's electronics search condition, applying *Lent* as if Bryant were a probationer and holding that the condition was not reasonably related to preventing future criminality. But mandatory supervision is more comparable to parole, which requires a greater level of supervision than probation, and thus the validity of a mandatory supervision condition should be governed by *Burgener*, not *Lent*.

Probationers are comparatively lower risk offenders who are granted what is considered to be an act of clemency in lieu of punishment, whereas parolees have been punished with a sentence of imprisonment. Parole is a continuation of the prison sentence in the community and a period of reintegration into society requiring higher levels of supervision than what is necessary for a probationer. Mandatory supervision is more like parole than probation in these respects. Like parolees, offenders on mandatory supervision were ineligible for or denied probation and sentenced to imprisonment based on the greater risk they pose to society, and they are similarly completing their custody sentences and reintegrating into society under supervision. For these reasons, both parolees and offenders on mandatory supervision have diminished privacy expectations in comparison to probationers, and the State has an overwhelming interest in supervising them. Therefore, an offender's status on mandatory supervision or parole, alone, may justify different or broader

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

supervision conditions than what may be reasonably imposed on a probationer absent case-specific findings. In assessing a condition of mandatory supervision, a reviewing court should simply ask, as this Court did in *Burgener*, whether the condition is reasonably related to effective supervision and future criminality.

Under *Burgener*, Bryant's electronics search condition is valid. Consideration of the condition in the appropriate context—including that Bryant had been denied probation and sentenced to imprisonment, that his mandatory supervision period is a continuation of his custody sentence as opposed to a grant of clemency like probation, and that he has even fewer privacy expectations than a probationer—demonstrates that the limited electronics search condition was reasonably related to effective monitoring and deterring future criminality.

STATEMENT OF THE CASE

Appellant Clydell Bryant was convicted of one count of carrying a firearm concealed in a vehicle and sentenced to imprisonment in county jail for a term of two years, with half of the term to be served in custody and half on mandatory supervision. (1CT 93, 97-98, 118, 120-122.) As a condition of mandatory supervision, the trial court ordered Bryant to submit to searches of texts, emails, and photographs on cell phones or other electronic devices in his possession or in his residence. In its initial published opinion, the Court of Appeal reviewed the validity of the electronics search condition under *People v. Lent* (1975) 15 Cal.3d 481, treating it like a probation condition, and ordered it stricken. The Court held that an electronics search condition is reasonably related to a defendant's criminality under *Lent* only where there is a showing that his current or past offenses were specifically connected to electronic device use. (*People v. Bryant* (2017) 10 Cal.App.5th 396, 404-406.) The People petitioned for rehearing, arguing that the Court of Appeal's reasoning was incorrect because mandatory supervision, like parole, can permit a wider range of conditions than would be permissible for probationers. The Court of Appeal denied rehearing.

The People sought review, asking this Court to clarify the test for assessing mandatory supervision terms. In the alternative, the People asked the Court to hold this case while awaiting the decision in *In re Ricardo P.*, S230923, which addressed the validity of an electronics search condition in the

probation context. This Court granted the People's alternative request and, after issuing a decision in *Ricardo P.*, remanded the case to the Court of Appeal. In *Ricardo P.*, the Court held that an electronics search probation condition was invalid under *Lent* because it was not reasonably related to preventing future criminality. (*In re Ricardo P.* (2019) 7 Cal.5th 1113, 1116.) The Court reasoned that the condition and the State interests served by it lacked proportionality to the significant burden it imposed on the juvenile probationer's privacy interests because there was no showing that his criminal conduct involved electronic devices. (*Id*. at p. 1122.)

On remand, the People argued that *Ricardo P.* did not control the outcome here because that case involved a probation condition rather than a mandatory supervision condition. Given the widespread acceptance among the courts of appeal that mandatory supervision is more akin to parole than probation, the People argued that mandatory supervision conditions should be reviewed like parole conditions and upheld as long as they are reasonably related to preventing future criminality without the need for a particular connection to the offense or offender's prior crimes. The Court of Appeal rejected the People's argument and again analyzed Bryant's mandatory supervision term under *Lent* in the same way it would have analyzed a condition imposed on a probationer. As support for this approach, the Court relied primarily on section 1170, subdivision (h)(5)(B), which provides that offenders on mandatory supervision are to be supervised by the county probation department according to the same general

terms, conditions, and procedures as probationers. (*People v. Bryant* (2019) 42 Cal.App.5th 839, 849.)

ARGUMENT

COURTS SHOULD ASSESS THE REASONABLENESS OF A MANDATORY SUPERVISION CONDITION IN THE SAME MANNER AS A PAROLE CONDITION

Courts should assess the validity of a mandatory supervision condition in the same manner as a parole condition because mandatory supervision is more akin to parole than to probation. And mandatory supervision, like parole, warrants a wider range of supervision conditions. Under the proper test, Bryant's electronics search condition is reasonable.

A. Supervision of Felony Offenders and Judicial Review of Supervision Conditions

1. Supervision of Felony Offenders in California

Felony offenders subject to supervision in California historically were either placed on probation or sentenced to state prison and released on parole. In 2011, the Criminal Justice Realignment Act added two new types of felony supervision in California: mandatory supervision and PRCS. (See §§ 1170, subd. (h)(5); 3450.) These four distinct types of supervision apply to different categories of offenders. Probation is reserved for offenders who pose less risk to society and require the least amount of supervision. And, unlike the other forms of supervision, probation applies only when a court determines that a sentence of imprisonment is not warranted. (See § 1203, subd.

(b)(3) [probation may be granted if there are mitigating circumstances or if it would best serve the "ends of justice"]; Cal. Rules of Court, rule 4.414 [listing factors relating to the offender or crime that affect grant or denial of probation].) It is an act of clemency imposed "in lieu of punishment" (*People v. Howard* (1997) 16 Cal.4th 1081, 1092; see also *People v. Moran* (2016) 1 Cal.5th 398, 402) and is reserved for offenders "whose conditional release into society poses minimal risk to public safety and promotes rehabilitation" (*People v. Welch* (1993) 5 Cal.4th 228, 233; accord, *United States v. Cervantes* (9th Cir. 2017) 859 F.3d 1175, 1181). The primary goals of probation are to foster rehabilitation and to protect the public. (*People v. Carbajal* (1995) 10 Cal. 4th 1114, 1120-1121; accord, *Moran*, *supra*, 1 Cal.5th at p. 402.)[2]

Mandatory supervision, PRCS, and parole, on the other hand, apply to offenders who are ineligible or deemed unsuitable for probation and are punished with a sentence of imprisonment. Mandatory supervision applies to felony offenders where, pursuant to the Realignment Act, their custody term is to be served in county jail rather than state prison. (See § 1170, subd. (h)(1)-(3) & (5) [applying to certain felonies and excluding offenders with prior or current serious or violent felonies, offenders required to register as sex offenders, and theft-related

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[2] Trial courts may impose a specified period of time in county jail as a condition of probation, but it is not a sentence of imprisonment; imposition or execution of the sentence is still suspended. (See § 1203.1, subd. (a)(2).)

crimes where a section 186.11 takings enhancement is found true].) These offenders are sentenced to a "split term" requiring the first portion of the sentence of imprisonment to be served in county jail and the concluding portion in the community under mandatory supervision. (§ 1170, subd. (h)(5).) The mandatory supervision period is considered a continuation of the custody term. (See *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422 ["a county jail commitment followed by mandatory supervision imposed under section 1170, subdivision (h), is akin to a state prison commitment; it is not a grant of probation or a conditional sentence"]; accord, *People Martinez* (2014) 226 Cal.App.4th 759, 762-763; see also § 667.5, subd. (d) [for prior prison term purposes, "defendant shall be deemed to remain in prison custody for an offense until the official discharge from custody, including any period of mandatory supervision"].)

Parole and PRCS operate in a similar manner but apply to felons who are placed on supervised release after serving a state prison term. (§§ 3000 et seq., 3450 et seq.) Parole applies to high-level felons, including serious or violent felony offenders, third-strike offenders, high-risk sex offenders, or those who have severe mental disorders and are required as a term of parole to undergo treatment by the Department of State Hospitals under section 2962. (§ 3451, subd. (b)(1)-(5).) PRCS applies to all other felons convicted of crimes requiring a state prison term. (§ 3451.) PRCS offenders are released to the county probation department for supervision, while parolees are supervised by the California Department of Corrections and Rehabilitation (CDCR). (§§ 3450,

3451, subd. (a).) Similar to mandatory supervision, parole is "release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." (*Samson v. California* (2006) 547 U.S. 843, 850; see *ibid.* ["'parole is an established variation on imprisonment of convicted criminals'"]; accord, *Martinez*, *supra*, 226 Cal.App.4th at p. 763 ["'Even when released from actual confinement, a parolee is still constructively a prisoner subject to correctional authorities. [Citations.]'"]; see also *Cervantes*, *supra*, 859 F.3d at pp. 1180-1181 [parolees are "simply serving the tail end of th[eir] sentence at liberty, subject to whatever conditions of supervision the court deems necessary to protect the public and promote rehabilitation"].)[3]

2. The Permissible Scope of Supervision Conditions

The State generally has broad discretion to impose any supervision condition it may deem proper. (See § 3053, subd. (a) [addressing parole conditions]; *Welch*, *supra*, 5 Cal.4th at p. 233 [addressing probation conditions], citing § 1203.1; *Martinez*, *supra*, 226 Cal.App.4th at pp. 762-763 [addressing mandatory supervision conditions]). Supervision conditions, however, must be reasonable because supervisees retain constitutional

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[3] PRCS operates in a very similar manner to parole. (See, e.g., *People v. Douglas* (2015) 240 Cal.App.4th 855, 864; *People v. Jones* (2014) 231 Cal.App.4th 1257, 1266.) Because this case involves mandatory supervision, and not PRCS, respondent will focus mainly on comparing mandatory supervision with parole for the sake of simplicity.

protection against arbitrary and oppressive government action. (*Burgener*, *supra*, 41 Cal.3d at p. 532 [parole and probation conditions must be reasonable]; see also *Ricardo P.*, *supra*, 5 Cal.5th at p. 1118 [applied to probation].)

This Court's decision in *Lent* involved an interpretation of section 1203.1, subdivision (j), governing probation terms. (*Lent*, *supra*, 15 Cal.3d at p. 486; see *Ricardo P.*, *supra*, 7 Cal.5th at p. 1128.) It provided a framework for assessing the reasonableness of probation conditions, adopting the rule that a condition will not be deemed invalid unless 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.'" (*Id.* at p. 486.)

The Court has since clarified that a nexus to the offense or the offender's prior crimes is not required for a probation condition to be reasonably related to future criminality, as such a rule "would essentially fold *Lent's* third prong into its first prong." (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1122.) Rather, to satisfy the third factor, a condition need only be "'reasonably directed at curbing [the defendant's] future criminality.'" (*Id.* at p. 1122, quoting *Moran*, *supra*, 1 Cal.5th at pp. 404-405.) This includes conditions unrelated to the offense that focus on the offender. (See *Moran*, *supra*, 1 Cal.5th at pp. 404-405 [probation conditions aimed at rehabilitating the offender need not be tied to the precise crime]; *People v. Olguin* (2008) 45 Cal.4th 375, 380 ["even if a condition of probation has no relationship to the crime

of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality"], citing *Carbajal*, *supra*, 10 Cal.4th at p. 1122 [probation condition need not be related to the offense if it meets a factor set forth in § 1203.1].) But some degree of proportionality is required between the State interest served by a probation condition and the burden it imposes on the probationer's privacy interests for it to be considered reasonable. (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1122.)

Both *Lent* and *Ricardo P.* involved probationers, and those decisions therefore did not address the reasonableness of conditions imposed on other types of supervised offenders. This Court did, however, address the permissible scope of a parole condition in *Burgener*. There, the defendant argued that a parole search condition could be "reasonably related to parole supervision only if it would be a proper condition of probation," and thus parole conditions must also satisfy the *Lent* criteria. (*Burgener*, *supra*, 41 Cal.3d at p. 532.) While this Court agreed that parole conditions, like probation conditions, "must be reasonable since parolees retain constitutional protection against arbitrary and oppressive official action," the Court rejected the defendant's argument that parolees and probationers are in the same position for purposes of assessing their supervision conditions. (*Ibid*. ["We have never equated parole with probation in this regard"].)

In approving the parolee's search term in *Burgener*, the Court pointed to the differences between parole and probation,

including that parole is mandatory and that a parolee is a convicted felon released from prison. (*Burgener*, *supra*, 41 Cal.3d at pp. 531-532.) The Court explained that "[a] convicted defendant released on probation, as distinguished from a parolee, has satisfied the sentencing court that notwithstanding his offense imprisonment in the state prison is not necessary to protect the public." (*Id*. at pp. 532-533.) "The probationer may serve a jail term as a condition of probation (§ 1203.1), but his probation is not a period of reintegration into society during which the same degree of surveillance and supervision as that deemed necessary for prison inmates is required." (*Id*. at p. 533.)

Balancing the limited liberty and privacy interests of the parolee against the societal interest in public safety led the Court to conclude that "warrantless searches of parolees are not per se unreasonable if conducted for a purpose properly related to parole supervision." (*Burgener*, *supra*, 41 Cal.3d at p. 532.)[4] The Court accordingly ruled that "[t]he distinction between felony parole and probation justifies the inclusion of [a] parole search condition in all parole agreements." (*Ibid*.) It also explained that a parole search condition need not be related to a defendant's offense but instead "is, per se, related to future criminality" and reasonable. (*Id*. at p. 533.)[5]

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[4] In *People v. Reyes* (1998) 19 Cal.4th 743, 739, 742, this Court subsequently disapproved of a different part of the *Burgener* opinion that required reasonable suspicion for parole searches.

[5] This Court has not addressed the proper analytic framework for assessing the validity of supervision conditions

(continued…)

B. Like Parolees, Offenders on Mandatory Supervision Can Be Subject to a Broader Range of Conditions than Would Be Appropriate for Probationers

As *Burgener* establishes, the reasonableness of a supervision condition is informed by the type of supervised offender subject to it, and a condition that might not be reasonable when imposed on a probationer may be reasonably imposed on a parolee. (*Burgener*, *supra*, 41 Cal.3d at pp. 532-533; cf. *Ricardo P.*, *supra*, 7 Cal.5th at p. 1118 [probation condition that might be impermissible for an adult is not necessarily unreasonable for a juvenile probationer].) Together, *Ricardo P.* and *Burgener* also suggest that the reasonableness of a probationer's supervision conditions may depend upon a more individualized inquiry concerning the particular offender, the offense, or a balancing of the interests at stake, whereas parole conditions may be considered reasonable and related to effective supervision solely due to the parolee's status. (See *Burgener*, *supra*, 41 Cal.3d at pp. 532-533.) This is because, as the risk posed to society by an offender increases, so too does the level of punishment and supervision assigned. Higher level supervisees are subject to more monitoring and broader conditions than lower level

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outside the probation context since *Burgener*. The dissenting opinion in *In re E.J.* (2010) 47 Cal.4th 1258, 1295-1296 (dis. opn. of Moreno, J.), concluded that the *Lent* test applies to parole terms, but did not discuss whether the analysis would be any different depending on the type of supervised offender, and the majority opinion did not address this issue.

supervisees, and this is particularly true for an offender who is still effectively completing a sentence of imprisonment. (See *Burgener*, *supra*, 41 Cal.3d at p. 533 ["probation is not a period of reintegration into society [like parole] during which the same degree of surveillance and supervisions as that deemed necessary for prison inmates is required"]; *Prison Law Office v. Koenig* (1986) 186 Cal.App.3d 560, 566-567 [parolees retain restricted rights when compared to probationers because the former "is constructively a prisoner in the legal custody of state prison authorities until officially discharged from parole"].)[6] Under this framework, because mandatory supervision is more akin to parole, its supervision conditions should be assessed like parole conditions rather than probation conditions.

1. Mandatory supervision is more like parole than probation

For purposes of assessing the validity of a supervision condition, mandatory supervision is closer to parole than probation. Whereas a grant of probation is considered an act of clemency in lieu of punishment (see *Moran*, *supra*, 1 Cal.5th at p. 402), a split term that includes mandatory supervision is more

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[6] These principles are also reflected in the statutes governing probation. (See, e.g., §§ 1202.8, subds. (a) [a probationer's "level and type of supervision" is determined by the probation officer, consistent with court-ordered conditions] & (b) [requiring continuous electronic monitoring only for probationers who are designated high-risk sex offenders]; 1203, subds. (a) & (b) [misdemeanants may be placed on informal or summary probation (or receive a "conditional sentence") without supervision by probation officer, while felony probationers are formally supervised by probation officer].)

akin to a state prison term followed by parole. (See *Fandinola*, *supra*, 221 Cal.App.4th at p. 1422 [a county jail commitment followed by mandatory supervision is "akin to a state prison commitment; it is not a grant of probation or a conditional sentence"]; accord, *Martinez*, *supra*, 226 Cal.App.4th at p. 763; *Cervantes*, *supra*, 859 F.3d at p. 1181 ["like parole, mandatory supervision is 'more akin to imprisonment than probation is to imprisonment,'" and thus mandatory supervision is more similar to parole than probation], quoting *Samson*, *supra*, 547 U.S. at p. 850; Couzens & Bigelow, Felony Sentencing After Realignment (May 2017) http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf, at pp. 16-17, 54 [a split term "is the equivalent of a state prison commitment"].) Offenders on mandatory supervision, like parolees, have not yet completed their sentences and remain in constructive custody. (See §§ 1170, subdivision (h)(5)(B) ["During the period when the defendant is under that supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court"], 667.5, subd. (d) [stating that, for purposes of prior prison terms, a defendant "shall be deemed to remain *in prison custody* for an offense until the official discharge from custody, *including any period of mandatory supervision*"], italics added; *Fandinola*, *supra*, 221 Cal.App.4th at p. 1422 [recognizing that section 667.5, subdivision (b), provides one-year enhancements for prior prison terms, including split sentences served in part by mandatory supervision].)

Moreover, following the 2015 amendment to the Realignment Act, split terms including a period of mandatory supervision are generally required. (§ 1170, subd. (h)(5)(A) & (h)(7).) Thus, a split term does not reflect any discretionary determination by a trial court that a defendant is unsuited for a sentence of imprisonment. (Compare § 1170, subd. (h)(5)(A) [split term "shall" be imposed unless the court finds in the interests of justice it is not appropriate in that case], *Fandinola*, *supra*, 221 Cal.App.4th at p. 1422 [mandatory supervision comes into play only after probation is denied], and Cal. Rules of Court, rule 4.415(a) [stating the statutory presumption in favor of mandatory supervision should lead to limited denials of mandatory supervision], with *Burgener*, *supra*, 41 Cal.3d at pp. 531-532 [parole is mandatory and does not reflect a discretionary determination by the trial court that prison is not necessary].)[7]

Because mandatory supervision and parole are comparable as extensions of the supervisees' custody sentences, the privacy expectations of the respective supervisees are also comparable. Offenders on felony supervision enjoy fewer freedoms than law-

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[7] Mandatory supervision and parole are different in some ways that do not affect the analysis here. For example, the length of the custody and mandatory supervision portions of a split term are determined by the court at sentencing (§ 1170, subd. (h)(5)), whereas a parole release date is determined by the Board of Parole Hearings after a prerequisite amount of the custody term has been served (§ 3040). Also, for parolees, supervision conditions may be imposed not only by the court and parole officer but also by the Board of Parole Hearings. (See §§ 3040-3041.)

abiding citizens by virtue of their convictions and the conditions placed upon them. (See *United States v. Knights* (2001) 534 U.S. 112, 119; *People v. Reyes* (1998) 19 Cal.4th 743, 750.) And it is well established that probationers have diminished privacy expectations when compared to law-abiding citizens. (See *Griffin v. Wisconsin* (1987) 483 U.S. 868, 874; *Knights*, *supra*, 534 U.S. at p. 119; *In re Jaime P.* (2006) 40 Cal.4th 128, 137.) But on the continuum, "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." (*Samson*, *supra*, 547 U.S. at p. 850, citing *United States v. Cardona* (1st Cir. 1990) 903 F.2d 60, 63 ["parole is the stronger medicine; ergo, parolees enjoy even less of the average citizen's absolute liberty than do probationers"]; accord, *People v. Schmitz* (2012) 55 Cal.4th 909, 921.)[8]

Indeed, parolees have "severely diminished expectations of privacy by virtue of their status alone." (*Samson*, *supra*, 547 U.S. at p. 850; accord, *Schmitz*, *supra*, 55 Cal.4th at p. 921; see also *Reyes*, *supra*, 19 Cal.4th at p. 751 [explaining that "[r]easonable expectations of privacy that society is prepared to recognize as

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[8] *Samson*, *Schmitz*, and *Reyes* each discussed the privacy expectations of parolees or probationers in the context of a Fourth Amendment challenge to a search that was conducted pursuant to a supervision condition, rather than a challenge to the validity of a supervision condition. (See *Samson*, *supra*, 547 U.S. at pp. 847-850; *Schmitz*, *supra*, 55 Cal.4th at pp. 916-921; *Reyes*, *supra*, 19 Cal.4th at pp. 746-751.) The People rely on these cases here only to emphasize the distinctions between the types of supervised offenders.

legitimate receive the greatest level of protection; diminished expectations of privacy are more easily invaded; and subjective expectations of privacy that society is not prepared to recognize as legitimate have no protection"].) "'As a convicted felon still subject to the Department of Corrections, a parolee has conditional freedom—granted for the specific purpose of monitoring his transition from inmate to free citizen.'" (*Schmitz*, *supra*, 55 Cal.4th at p. 921, quoting *Reyes*, *supra*, 19 Cal.4th at p. 752; cf. *Hudson v. Palmer* (1984) 468 U.S. 517, 530 [prison inmate does not have a reasonable expectation of privacy in cell]; *People v. Loyd* (2002) 27 Cal.4th 997, 1002-1003 [warrantless monitoring of jail calls permitted because inmates have no reasonable expectation of privacy in jail cell].)

In turn, the State has an overwhelming interest in supervising parolees due to their high rate of recidivism. (*Samson*, *supra*, 547 U.S. at p. 853 ["This Court has repeatedly acknowledged that a State has an '"overwhelming interest"' in supervising parolees because 'parolees . . . are more likely to commit future criminal offenses'"], quoting *Pennsylvania Bd. of Probation and Parole v. Scott* (1995) 524 U.S. 357, 365; *Schmitz*, *supra*, 55 Cal.4th at p. 921 [the State has a "compelling interest to supervise parolees and to ensure compliance with the terms of their release"]; see *Cervantes*, *supra*, 859 F.3d at p. 1182 [due to the high rate of recidivism, the State's interest in supervising parolees is overwhelming].) Parolees are punished with a sentence of imprisonment because they "pose[] a significantly greater risk to society" than offenders who are granted probation.

(*Burgener*, *supra*, 41 Cal.3d at p. 533; see *Schmitz*, *supra*, 55 Cal.4th at pp. 923-924 [explaining that parolees are more likely to commit future crimes, there are "'grave safety concerns that attend recidivism,'" and parolees have greater incentive to conceal their crimes and dispose of incriminating evidence due to their conditional release], quoting *Samson*, *supra*, 547 U.S. at p. 854; *Burgener*, *supra*, 41 Cal.3d at p. 533 [noting parolees are punished with term of imprisonment because their crimes rendered them ineligible for probation, a court determined they posed too much risk, or they failed to comply with previous probation terms].)

Offenders on mandatory supervision are in a similar position to parolees in these respects. They were denied probation and sentenced to imprisonment based on the risk they pose to society or their criminal history, and they are also in constructive custody while under supervision. Like parolees, for the purpose of imposing conditions of their release, they have even more severely diminished privacy expectations than probationers and the State's interest in meaningful supervision is overwhelming. Therefore, as with parole conditions, mandatory supervision conditions may be reasonable and related to effective supervision due to the supervised offender's status alone. (See, e.g., *Burgener*, *supra*, 41 Cal.3d at p. 532 ["[t]he distinction between felony parole and probation justifies the inclusion of the parole search condition in all parole agreements"].)

2. The lower courts' reasons for applying *Lent* in the mandatory supervision context are unpersuasive

Lower courts have recognized that mandatory supervision more closely resembles parole than probation. (See *Martinez*, *supra*, 226 Cal.App.4th at pp. 762-763 [finding mandatory supervision is not the equivalent of probation and is more like parole]; *Fandinola*, *supra*, 221 Cal.App.4th at p. 1422 [finding mandatory supervision is more like parole and noting that mandatory supervision "comes into play *only after* probation has been denied"], italics added; see also *Cervantes*, *supra*, 859 F.3d at p. 1180 ["[a]lthough the issue is admittedly a close one, for Fourth Amendment purposes we think mandatory supervision is more akin to parole than probation"].) Indeed, for that reason, the Court of Appeal in *Martinez* concluded that the validity of a mandatory supervision condition should be assessed like a parole condition. (*Martinez*, *supra*, 226 Cal.App.4th at pp. 762-763 [explaining that, like parole, mandatory supervision "'comes into play only after probation has been denied'" and is "'akin to a state prison commitment'"], quoting *Fandinola*, *supra*, 221 Cal.App.4th at pp. 1422-1423.) Nevertheless, *Martinez* ultimately subjected a mandatory supervision condition to the same *Lent* assessment that would be applied to a probation condition, and other courts have followed suit. (See *Martinez*, *supra*, 226 Cal.App.4th at p. 764; see also *Bryant*, *supra*, 42 Cal.App.5th at pp. 848-850; *People v. Malago* (2017) 8 Cal.App.5th 1301, 1305-1306; *People v. Relkin* (2016) 6 Cal.App.5th 1188, 1193-1194.) Their reasoning in support of this approach is unpersuasive.

For example, *Martinez* relied on *In re Stevens* (2004) 119 Cal.App.4th 1228, 1233. (*People v. Martinez, supra,* 226 Cal.App.4th at p. 764.) In *Stevens*, the Court of Appeal determined that parole and probation conditions are assessed the same way under *Lent*. (*Stevens*, *supra*, 119 Cal.App.4th at p. 1233.) But *Stevens* reached that conclusion without acknowledging this Court's contrary determination in *Burgener* and after incorrectly observing that "the expectation of privacy is the same" for parolees and probationers. (*Ibid.*; see *Burgener*, *supra*, 41 Cal.3d at pp. 532-533.) Two years after *Stevens* was decided, the United States Supreme Court explained that "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." (*Samson*, *supra*, 547 U.S. at p. 850; accord, *Schmitz*, *supra*, 55 Cal.4th at p. 921.) The *Stevens* decision therefore does not withstand scrutiny, and *Martinez's* reliance on *Stevens* was misplaced. The same is true of the decisions in *Malago* and *Relkin*, which relied on the flawed reasoning in *Stevens* and *Martinez.* (See *Malago*, *supra*, 8 Cal.App.5th at pp. 1305-1306; *Relkin*, *supra*, 6 Cal.App.4th at pp. 1193-1194.)

The Court of Appeal below offered a different reason. It relied primarily on the language of section 1170, subdivision (h)(5)(B), which provides that a defendant on mandatory supervision "shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation." (See *Bryant*, *supra*, 42 Cal.App.5th at p. 849.) But section 1170, subdivision (h)(5)(B),

sets forth only the *manner* in which mandatory supervision is to be administered and supervised. The statute says nothing about the permissible *scope or substance* of the mandatory supervision conditions being administered. (See *Martinez*, *supra*, 226 Cal.App.4th at pp. 762-763 [explaining that, although offenders on mandatory supervision are to be monitored like probationers, "'this does not mean placing a defendant on mandatory supervision is the equivalent of granting probation or giving a conditional sentence. Indeed, section 1170, subdivision (h), comes into play only after probation has been denied"'], quoting *Fandinola*, *supra*, 221 Cal.App.4th at p. 1422; Couzens & Bigelow, *supra*, at pp. 54-55 ["Merely because the probation officer is supervising the defendant does not make it 'probation' any more than people being supervised by probation on post release community supervision following release from prison"].)

In fact, the goal of the realignment legislation that created mandatory supervision and PRCS was simply to reduce recidivism by transferring custody and supervision of certain felony offenders from the State to county authorities. (See § 17.5, subd. (a)(5) ["Realigning low-level felony offenders . . . to locally run community-based corrections programs . . . will improve public safety outcomes among adult felons and facilitate their reintegration back into society"]; § 3450, subds. (a)(5); see Couzens & Bigelow, *supra*, at p. 6 [realignment legislation was meant "merely to change the place where sentences for certain crimes are to be served"].) Prior to 2011, offenders who are now subject to mandatory supervision or PRCS would have been

sentenced to prison and released on parole under the supervision of CDCR. (See § 1170, subd. (h)(5); § 3450; § 3451, subd. (a); *People v. Scott* (2014) 58 Cal.4th 1415, 1422; *People v. Cruz* (2012) 207 Cal.App.4th 664, 671.) In this regard, the realignment legislation simply divided felons who are sentenced to imprisonment into three categories, with the lower level of these felons now serving their terms in county jail followed by county supervision, the middle level serving their terms in state prison followed by county supervision, and the highest level continuing to serve their terms in state prison followed by state supervision. (See §§ 1170, subd. (h)(5); 3451, subd. (a).) Nothing changed the fact that these felons were denied probation and sentenced to a term of imprisonment due to the risk they pose to the public, and there is no suggestion in the legislation that mandatory supervision was intended to be equated with probation. (See generally *Burgener*, *supra*, 431 Cal.3d at p. 532-533 ["We have never equated parole with probation in this regard"]; Couzens & Bigelow, at p. 6 [realignment applies only where probation is denied]; *id.* at pp. 54-55 [mandatory supervision is not probation simply because it is monitored by county probation officers].)[9]

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[9] An initial version of the Criminal Justice Realignment Act provided that a defendant's sentence may include "a period of county jail time and *a period of mandatory probation* not to exceed the maximum possible sentence." (Stats. 2011, ch. 39, § 27, eff. June 30, 2011, operative Oct. 1, 2011, italics added.) Before the operative date of the Act, the Legislature amended section 1170 to delete the reference to "mandatory probation" and substitute it with the term "mandatory supervision." (Stats. 2011-2012 1st Ex. Sess., ch. 12, § 12, eff. Sept. 21, 2011, operative

(continued…)

What the decisions cited above overlook is that the probationers in *Lent* and *Ricardo P.* were deemed suitable for another chance at living a law-abiding life in the community instead of punishment, and they were not serving the concluding portion of a sentence of imprisonment or even sentenced to imprisonment at all. Although probation and parole share the same general reformative and rehabilitative goals, parole focuses in large part on reintegration into society after imprisonment. (See *Morrissey v. Brewer* (1972) 408 U.S. 471, 477 ["Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals"]; *Schmitz*, *supra*, 55 Cal.4th at p. 916 [a parolee's conditional freedom is granted "for the specific purpose of monitoring his transition from inmate to free citizen"]; *Stevens*, *supra*, 119 Cal.App.4th at p. 1233 ["The fundamental goal of parole is to help individuals reintegrate into society as constructive individuals[], to end criminal careers through the rehabilitation of those convicted of crime[,] . . . and to become self-supporting"], internal quotations and citations omitted; see also § 3000, subd. (a)(1) ["the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship"].) Probation focuses more on the offender's rehabilitation with regard to his or her

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(…continued)
Oct. 1, 2011; Stats. 2011, ch. 361, § 6.7, eff. Sept. 29, 2011, operative Oct. 1, 2011.)

particular offense or criminal history. (See *Moran*, *supra*, 1 Cal.5th at p. 402 [probation is primarily rehabilitative in nature]; see, e.g., *Ricardo P.*, *supra*, 7 Cal.5th at pp. 1116, 1122 [requiring proportionality analysis between the goal of the probation condition and the intrusion into the probationer's privacy right, and reviewing particulars of juvenile probationer's offense and criminal history].)

3. The reasonableness of a mandatory supervision condition should be assessed under *Burgener*

This Court did not have occasion in *Lent* or *Ricardo P.* to address any type of felony supervision other than probation (see *Ricardo P.*, *supra*, 7 Cal.5th 1113; *Lent*, *supra*, 15 Cal.3d 481), but it did in *Burgener*, and it found the distinctions between a probationer and a parolee to be important in its assessment of the parole search condition there (see *Burgener*, *supra*, 431 Cal.3d at pp. 532-533). While the *Lent* test could be applied in a manner that accounts for the differences between probation and mandatory supervision, as well as PRCS and parole, it was not tailored for that distinct inquiry and, as explained, the lower courts have not accounted for those differences in applying it. Rather, the lower courts have largely ignored distinctions between the different types of supervised offenders and have approved mandatory supervision and parole conditions only if they would be upheld as reasonable probation conditions—an approach that was rejected in *Burgener*. (See *Burgener*, *supra*, 41 Cal.3d at pp. 532-533.) Outside the probation context, the better approach is simply to ask, as the *Burgener* Court did, whether a

mandatory supervision, PRCS, or parole term is reasonably related to effective supervision or future criminality. (See *ibid.*) This inquiry appropriately takes into account conditions related to the offense, unlawful activity, the offender and his or her future and past criminality, and the needs attending meaningful supervision. It also considers whether the supervision condition is reasonable for the type of supervised offender at issue.

C. The electronics search condition imposed as one of Bryant's mandatory supervision terms is reasonably related to effective supervision and deterring future criminality

Bryant was denied probation based on his recidivism, including his history of reoffending while on probation and the threat he posed to the community by possessing a loaded and unregistered firearm in a high crime area known for shootings. (3RT 1210-1212.) He also had a history of alcohol and drug-related offenses as well as gang membership. (3RT 1211-1215; 1CT 109, 118-120.) The trial court sentenced him to a two-year split term, with the first year to be served in county jail and the second year to be completed in the community under mandatory supervision. (1CT 118, 120-122.)

Among Bryant's mandatory supervision conditions, the court imposed the following electronics search condition: "Defendant is to submit to search of any electronic device either in his possession including cell phone and/or any device in his place of residence. Any search by probation is limited to defendant[']s

text messages, emails, and photos on such devices." (1CT 120.)[10] Bryant objected on the ground that neither his offense nor his criminal history involved electronic devices. (3RT 1216-1217.) The court did not abuse its discretion in imposing the condition. (See *Ricardo P.*, *supra*, 7 Cal.5th at p. [applying abuse-of-discretion standard to probation conditions]; *Martinez*, *supra*, 226 Cal.App.4th at p. 764 [mandatory supervision]; *People v. Navarro* (2016) 244 Cal.App.4th 1274, 1299 [parole].)[11]

Bryant is not a probationer who has been granted clemency in lieu of custody and whose conditions need to be fashioned to his particular conduct. While on mandatory supervision, he is in constructive custody and subject to more rigorous supervision, like a parolee. At the same time, Bryant's electronics search condition is reasonably limited, permitting searches of only his text messages, emails, and photographs. The condition facilitates monitoring of his potential drug use or sales, gang association, and weapons possession, which is reasonably related to effective supervision because it aims to prevent recidivism and ensure

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[10] The court additionally imposed specific conditions prohibiting gang association; requiring him to stay away from gang areas; requiring him to submit to controlled substance testing and a plan for alcohol treatment; and prohibiting narcotics, dangerous drugs, or weapons possession. (1CT 119-120; 3RT 1211-1215.)

[11] This Court in *Ricardo P.* cited the instant case as an example where proportionality between the crime and search condition would be lacking under *Lent*. (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1123.) But there is no indication in *Ricardo P.* that the Court considered any of the differences between probation and mandatory supervision that are now under review.

compliance with his terms of release. His status as an offender on mandatory supervision inherently favors the State's overwhelming interest in supervision over his extremely limited privacy interests. (See generally *People v. Delrio* (2020) 45 Cal.App.5th 965, 971 [upholding parole search of cell phone, despite lack of clarity in electronics search condition, and finding the balance favored the State's substantial interest in supervising parolees over the parolee's diminished privacy expectations; also noting that "[b]ecause a parolee remains in the legal custody of the CDCR (*Samson*, *supra*, 547 U.S. at p. 851 []), he or she cannot reasonably expect to be free of warrantless cell phone searches under all circumstances"]; see also *Schmitz*, *supra*, 55 Cal.4th at p. 924 ["Warrantless, suspicionless searches are a vital part of effective parole supervision"].)

Even if a more individualized inquiry beyond Bryant's status as an offender on mandatory supervision were required, the circumstances here justify the condition, taking into account his lesser expectation of privacy and the closer monitoring that is warranted in the mandatory supervision context. Although Bryant's offense of carrying a concealed firearm in a vehicle did not involve the use of electronic devices, his criminal history showed a variety of offenses, repeated failures to comply with probation terms, gang membership, and substance abuse. The trial court noted that Bryant had been convicted of "at least ten misdemeanors," he had often been on probation when he reoffended, and he was arrested on two new offenses while the present case was pending. (3RT 1211.) The court found that

such consistent law breaking showed "a pattern of failing to comply with the law[,]" and it stated that "where the system has failed [Bryant] is that maybe it has been too lenient with him in grants of probation. And maybe if he'd been given a more serious reckoning that maybe he wouldn't be here today[.]" (3RT 1211-1212.) Periodic monitoring of photographs, texts, and emails on Bryant's electronic devices provides the meaningful, close supervision necessary to ensure compliance with his other conditions of release and to deter his future criminality.

Moreover, any concerns about the potential privacy intrusion attendant to a cell phone search (see *Riley v. California* (2014) 573 U.S. 373) are diminished in the mandatory supervision context, especially where, as here, the search condition is limited. *Riley* addressed a pre-conviction search incident to arrest, not the validity of a post-conviction condition of supervised release. (See *id*. at p. 386.) A mandatory supervision condition is imposed only after the defendant is convicted and sentenced to imprisonment. (See *Delrio*, *supra*, 45 Cal.App.5th at pp. 976-977 [finding *Riley* distinguishable "because it involved a different exception to the warrant requirement . . . , as well as different governmental interests . . . than those promoted by the parole search exception"].) Additionally, the "sweeping" electronics search condition that concerned the Court in *Ricardo P.* was imposed on a probationer and required him to provide passwords and access to all electronic information. (*Ricardo P.*, *supra*, 7 Cal.5th at pp. 1122-1123.) Bryant was on mandatory supervision and his condition permitted searches of only photographs, emails, and

text messages. (1CT 120.) Under these circumstances, *Riley* and *Ricardo P.* are distinguishable. (See generally *United States v. Johnson* (9th Cir. 2017) 875 F.3d 1265, 1275 ["While privacy interests in cell phones are significant, Johnson's parole status alone distinguishes our case from [a probation case] and *Riley*"]; *Delrio*, *supra*, 45 Cal.App.5th at pp. 976-977 [stating "[w]e are aware of no court that has applied *Riley's* holding to parole searches"].)[12]

Like all offenders sentenced to a split term and placed on mandatory supervision, Bryant was deemed unsuitable or ineligible for probation. Indeed, he was denied probation due to

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[12] The Court of Appeal's disagreement below was based in part on its incorrect conclusion that "because Bryant is an adult, the justification for state supervision of his personal drug use is weaker than in the case of minors, and his constitutionally protected interest in his privacy is greater." (*Bryant*, *supra*, 42 Cal.App.5th at p. 848.) As explained, Bryant's position is more similar to that of a parolee than a probationer. In the context of addressing a Fourth Amendment challenge to the reasonableness of a search, this Court has said "it is certainly arguable that the State's interest in reducing the unduly high recidivism rate among *adult* parolees is on a par with, if not greater than, the need to assure that juvenile[] probationers do not reoffend." (*Jaime P.*, *supra*, 40 Cal.4th at p. 138, citing *Samson*, *supra*, 547 U.S. at p. 853.) In a similar context, the Court indicated in *Reyes* that an adult parolee enjoys similar, if not lesser, privacy expectations than a juvenile probationer. (*Reyes*, *supra*, 19 Cal.4th at p. 751 [reconciling adult and juvenile probation precedent with *Burgener*].) Moreover, neither case equated juvenile probationers with adult parolees for all purposes or considered the significant differences between probation and parole that are relevant to the assessment of the validity of a supervision condition.

his apparent disregard for past probation conditions and escalating criminal conduct. The limited electronics search condition may be one of the most meaningful ways to ensure Bryant's compliance with his uncontested substance abuse and gang association conditions. And because he was on mandatory supervision, any consideration of the State's overwhelming interest in supervision and his extremely diminished privacy expectations inherently favors the State and the validity of the condition. Therefore, even without a connection to Bryant's particular crimes, the limited electronics search condition is reasonably related to effective supervision and deterring future criminality.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: June 19, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 6,697 words.

Dated: June 19, 2020

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DECLARATION OF ELECTRONIC SERVICE + SERVICE BY MAIL

Case Name: People v. Clydell Bryant No.: S259956

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On June 19, 2020, I electronically served the attached Respondent's Opening Brief on the Merits by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on June 19, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at Office of the Attorney General, 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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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 June 19, 2020, at Los Angeles, California.

Lisa P. Ng	/s/ Lisa P. Ng
Declarant	Signature

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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