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In the Supreme Court of the State of California

In re RICARDO P., a Person Coming Under the Juvenile Court Law.	Case No. S230923
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RICARDO P.,** Defendant and Appellant.	SUPREME COURT FILED AUG 24 2016 Frank A. McGuire Clerk Deputy

First Appellate District, Division One, Case No. A144149
Alameda County Superior Court, Case No. SJ14023676
The Honorable Leopoldo E. Dorado, Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

ISSUED PRESENTED

Whether the juvenile court abused its discretion under *People v. Lent* (1975) 15 Cal.3d 481 by imposing an electronics search condition of probation as a rehabilitative and deterrence measure reasonably related to future criminality.

INTRODUCTION

Ricardo P. was adjudged a ward and placed on probation after he admitted two felony first degree burglaries. (Typed Opn. 1.) To monitor Ricardo's involvement with drugs, the juvenile court imposed conditions of probation, including Ricardo's submission to warrantless searches of data stored on his electronic devices and data in electronic accounts accessed through these devices. (*Id.* at pp. 3, 5.)

The Court of Appeal recognized that a properly drafted condition could include electronics searches "reasonably likely to be relevant to Ricardo's rehabilitation" (*id.* at p. 15), but it found the condition, as written, unconstitutionally overbroad by not "limit[ing] the types of data on or accessible through his cell phone that may be searched in light of this purpose" (*id.* at p. 14). The appellate court ordered the juvenile court "to determine which types of information must be subject to search to accomplish the condition's purpose" and "to impose a narrower condition if it wishes." (*Id.* at p. 17.) Such a condition might include "electronic information that is reasonably likely to reveal whether Ricardo is boasting about his drug use or activity, such as text and voicemail messages, photographs, e-mails, and social-media accounts." (*Id.* at p. 18.)

Ricardo challenges the Court of Appeal's threshold determination under the tripartite test of *People v. Lent, supra,* 15 Cal.3d 481[1] that an electronics search condition is authorized by state law in his case. (See Typed Opn. 6-11.) The appellate court found *Lent*'s third factor was not satisfied and rejected Ricardo's argument there needs to be evidence he had used electronic devices and social media to communicate about illegal conduct. (*Id.* at p. 9.) The court instead held it sufficient that the searches would enable effective supervision of Ricardo through his other probation conditions. (*Id.* at p. 10.) No controlling authority, the court said, "requires a connection between a probationer's past conduct and the locations that may be searched to uphold a search condition under *Lent*, *supra*, 15 Cal.3d 481. Because no such connection is required, conditions permitting searches of probationers' vehicles, for example, are permissible regardless of whether the record shows that the probationer has access to a vehicle or has engaged in illegal activity related to a vehicle. 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. We therefore conclude that the electronics search condition here is valid under *Lent* because it is reasonably related to preventing future criminality." (Typed Opn. 11.) The Court of Appeal's conclusion rejecting Ricardo's *Lent* claim is correct.

Ricardo's alternative constitutional claim is improperly raised and premature. It need not be addressed on the merits and would fail if it were.

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[1]*Lent* was superseded on another ground by Proposition 8 as stated by *People v. Wheeler* (1992) 4 Cal.4th 284, 290-295.

STATEMENT

The statement is taken from the opinion by the Court of Appeal, which in turn took the facts of the offense from the probation report. (Typed Opn. 2, fn. 4.)

> In February 2014, when he was almost 18 years old, Ricardo and two adults broke into two homes in San Jose. They were chased out of the first home before they could take anything. A few hours later, they stole costume jewelry from the second home, and all three were soon apprehended.
>
> Several months later, the Santa Clara County District Attorney filed a petition under Welfare and Institutions Code section 602, subdivision (a) seeking to have Ricardo declared a ward of the court. The petition alleged two felony counts of first degree burglary. After Ricardo admitted the petition's allegations, the case was transferred to Alameda County for disposition.
>
> At the dispositional hearing, the juvenile court declared Ricardo a ward of the court and placed him on probation with various conditions. These included conditions prohibiting him from using or possessing controlled substances, associating with people he "know[s] to use, deal[,] or possess illegal drugs," and having any contact with the two adult co-participants in the burglaries. Additional conditions were imposed to facilitate monitoring of Ricardo's compliance with the terms of his probation. These included conditions requiring him to submit to drug testing and to "[s]ubmit person and any vehicle, room[,] or property, electronics including passwords under [his] control to search by Probation Officer or peace office[r] with or without a search warrant at any time of day or night." [. . .]
>
> Ricardo objected to the drug-related conditions on the basis there was no evidence he used drugs. In response, the juvenile court cited the following language from the dispositional report: "In regards to the present offense, the minor reported he wasn't thinking. He continued by saying that he stopped smoking marijuana after his arrest because he felt that [it] did not allow him to think clearly." When Ricardo then objected to the electronics search condition, the court responded, "I think the law is very clear that [such a condition] is

> appropriate[,] . . . particularly [for] minors or people that are [Ricardo'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."

(Typed Opn. 2-4, fns. omitted and bracketed ellipsis added.)

SUMMARY OF ARGUMENT

"Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter." (Welf. & Inst. Code, § 202, subd. (b).) "The purposes of juvenile wardship proceedings are twofold: to treat and rehabilitate the delinquent minor, and to protect the public from criminal conduct." (*In re Jose C.* (2009) 45 Cal.4th 534, 555.)

Appropriate restrictions on juvenile wards include "[l]imitations on the minor's liberty imposed as a condition of probation or parole." (Welf. & Inst. Code, § 202, subd. (e)(3).) Under Welfare and Institutions Code section 730, subdivision (b), when a ward described in section 602 is placed under the supervision of the probation officer or committed to the care, custody, and control of the probation officer, "[t]he court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." This court consistently implements the legislative authorization of probation conditions that reasonably afford

the prospect of a ward's reformation and the protection of society. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

The court determines the validity of a probation condition under state law by applying the tripartite test of *People v. Lent, supra,* 15 Cal.3d 481. The *Lent* test provides that a probation condition is unauthorized only if it (1) has no relationship to the crime of 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.) A condition will not be invalidated unless all three factors in the *Lent* test are present. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) The question on review presupposes the first and second *Lent* factors are present in this case. The Court of Appeal found under *Lent*'s first factor that Ricardo's possession of two cell phones when arrested for the burglaries he committed with adults did not show that the phones "played [any] role in his criminal activity." (Typed Opn. 8.) As to *Lent*'s second factor, the court noted that the use of electronic devices typically is not itself criminal conduct. (*Id.* at p. 9.)

The Court of Appeal correctly held that the third factor—i.e., the condition is one that "requires or forbids conduct which is not reasonably related to future criminality" (*Lent, supra*, 15 Cal.3d at p. 486)—is not triggered by the electronics search condition. Contrary to Ricardo's argument, the third factor does not depend upon a showing that electronic devices or electronic information accessible through the devices have a proven nexus to earlier admitted conduct that brings his case within section 602 or that directly impacts his prospects for rehabilitation. Nor, as his argument implies, does *Lent*'s tripartite structure yield a de facto two-part test under which the first "no relationship to the crime" factor subsumes the third "not reasonably related to future criminality" factor. This court invoked the third *Lent* factor in *People v. Olguin, supra*, 45 Cal.4th 375, to uphold a condition that, while lacking a direct relationship to the offense of

conviction, enabled the court and the probation officer to supervise the offender's adherence to other conditions and to deter and detect new crimes or probation violations. Consistent with this court's decisions, *Lent*'s third factor is triggered where the condition's *mode* of regulating otherwise lawful conduct does not reasonably relate to future criminality. In that way, the third factor takes into account the reformative and public protection goals of the juvenile justice system specifically and the probation system for juveniles and adults generally.

Contrary to Ricardo's claim, the scope of juvenile probation conditions is not unfettered or subject only to the imagination of the juvenile court in positing rationales linking the condition to deterrence. The scope of juvenile probation conditions is still checked by the reasonableness requirement of Welfare and Institutions Code section 730, subdivision (b). At bottom, the nexus test posited by Ricardo is contrary to *Lent*, is unnecessary, and would undermine the juvenile court's ability to further the ward's rehabilitation.

The juvenile court was entitled to assess Ricardo as one who could benefit from searches of his electronic devices while a ward under the supervision and control of the probation officer. The court's purpose to monitor Ricardo's adherence to drug laws and other conditions relating to use of controlled substances is reasonable in light of the record. Ricardo believed marijuana use contributed to his participation in the burglaries, and he claimed he quit using marijuana to think clearly, and presumably exercise better judgment. Suspicionless searches of his electronic devices reasonably relate to future criminality as such searches promote rehabilitation and protect the public from renewed criminal conduct by furnishing a valuable indication of whether Ricardo is following the conditions of probation, especially drug-related conditions. The very existence of the search condition could deter Ricardo from backsliding. It

would be odd and diminish the objectives of the juvenile probation system if the condition only could be imposed for the purpose of deterring a ward from committing future offenses with an electronic device like one used to promote the ward's previous offense or intrinsic to the commission of that offense.

This court need not address Ricardo's Fourth Amendment claim that electronics search conditions are unconstitutionally overbroad under *Riley v. California* (2014) 573 U.S. ___ [134 S.Ct. 2473]. That claim is not fairly included in the question on review or the answer. Moreover, his challenge is premature. Since this court may clarify constitutional overbreadth analysis in *In re A.S.*, No. S220280, further review should await the juvenile court's decision on remand. Regardless, the claim fails on the merits. *Riley* announced a rule addressing searches of cell phones incident to arrest, making clear that other exceptions to the warrant requirement may still justify a search of a cell phone. This case is governed by the distinctly different exception for searches judicially authorized as conditions of probation.

ARGUMENT

I. AN ELECTRONICS SEARCH CONDITION IS REASONABLE IN RICARDO'S CASE UNDER *LENT*

Ricardo contends an electronics search condition is precluded in this case by *People v. Lent, supra,* 15 Cal.3d 481. We disagree. The Court of Appeal properly concluded that Ricardo's submission of electronic information to warrantless searches is reasonably related to his rehabilitation and to deterring future criminality by providing for appropriate supervision in light of his particular circumstances.

A. The Juvenile Court Has Broad Statutory Discretion to Impose Probation Conditions to Rehabilitate a Ward, and a Ward's Search Condition Is Reviewed for Abuse of Discretion Under the *Lent* Test

A juvenile court may impose on a ward on probation "any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).)[2] "A juvenile court enjoys broad discretion to fashion conditions of probation for the purpose of rehabilitation and may even impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile." (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5; accord, *In re Sheena K.*, *supra*, 40 Cal.4th at p. 889.) The same principle applies when the juvenile court imposes on a ward a requirement that the minor submit to warrantless searches. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 81-82, overruled on a related ground in *In re Jaime P.* (2006) 40 Cal.4th 128, 130, 139.)

Juveniles are reasonably deemed to be more in need of guidance and supervision than adults. The state, when it asserts jurisdiction over a minor, stands in the shoes of the minor's parents, who may curtail a child's exercise of rights as an aspect of their constitutionally protected right to direct the upbringing and education of their children. (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.) Additionally, "[a]lthough the goal of both types of probation is the rehabilitation of the offender, '[j]uvenile

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[2] A court in a criminal case also has broad discretion to impose "any and all . . . reasonable conditions, as it may determine are fitting and proper to 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 that breach, and . . . for the reformation and rehabilitation of the probationer." (Pen. Code, § 1203.1, subd. (j).)

probation is not, as with an adult, an act of leniency in lieu of statutory punishment; it is an ingredient of a final order for the minor's reformation and rehabilitation.' [Citation.] . . . [¶] In light of this difference, a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court. [Citations.]" (*In re Tyrell J.*, *supra,* 8 Cal.4th at p. 81.)

With respect to either juveniles or adults, "[g]enerally '[a] condition of probation will not be held 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 . . . ." [Citation.]' [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, 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. [Citation.]" (*People v. Olguin*, *supra*, 45 Cal.4th at pp. 379-380, quoting *Lent*, *supra*, at p. 486.) Courts have consistently held the *Lent* test applies to juvenile probation conditions. (*In re P.O.* (2016) 246 Cal.App.4th 288, 294; *In re D.G.* (2010) 187 Cal.App.4th 47, 52.)

A juvenile court's probation conditions are reviewed for abuse of discretion. Such discretion will not be disturbed in the absence of manifest abuse. (*In re P.A.* (2012) 211 Cal.App.4th 23, 33; *In re Josh W.*, *supra*, 55 Cal.App.4th at p. 5.)

B. *Lent*'s Third Factor of Future Criminality Ensures the Mode of Regulating Otherwise Lawful Conduct Is Conducive to the Rehabilitative and Deterrent Functions of the Probation System; It Requires No Nexus to Earlier Offenses

In *Lent, supra*, 15 Cal.3d 481, this court stated that "a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Id.* at p. 486.) The court did not suggest, let alone hold, that "future criminality" must be comparable to a previous offense. The probation condition in *Lent* involved a restitution order that the trial court based on the total amount lost by the victim, despite the fact that the defendant was convicted on one count but acquitted on the other. (See *ibid.*) Concluding that a trial court is not limited under that third criterion "to the transactions or amounts of which the defendant is actually convicted," this court found no abuse of discretion in the restitution order for funds taken in the transaction of which the defendant was acquitted. (*Id.* at pp. 486-487.)

Thus, the restitution order in *Lent* was valid to deter future misconduct although a sizable amount was *not* justified by the offense of which the defendant was convicted. This court in *Lent* plainly did not consider a connection between past and future misconduct as a requirement for the reasonableness of a condition of probation. In other words, *Lent* found a reasonable relationship between the challenged condition and "future criminality" based, in part, on facts that were not tied to proven conduct of the probationer. That is consistent with this court's subsequent decisions applying *Lent*.

1. *Olguin* and *Ramos* establish that a condition may be related to "future criminality" within the meaning of *Lent*, even if the regulated conduct was not involved in the underlying offenses

In *People v. Olguin*, *supra*, 45 Cal.4th 375, the defendant, who had been convicted of driving under the influence of alcohol, challenged as not reasonably related to future criminality and as constitutionally overbroad a probation condition requiring him "to notify his probation officer of the presence of any pets at defendant's place of residence." (*Id.* at p. 378.) Acknowledging that the challenged condition "ha[d] no relationship" to the defendant's crime and the ownership of most pets does not involve criminal conduct, this court nonetheless upheld the condition under *Lent* because it protected the safety of the probation officer charged with "supervising [the] probationer's compliance with specific conditions of probation." (*Id.* at p. 381.) The condition furthered the probation officer's "ability to make unscheduled visits and to conduct unannounced searches of the probationer's residence. Probation officer safety during these visits and searches is essential to the effective supervision of the probationer and thus assists in preventing future criminality. Therefore, the protection of the probation officer while performing supervisory duties is reasonably related to the rehabilitation of a probationer for the purpose of deterring future criminality." (*Ibid.*) The *Olguin* court stated that "even if [the] condition of probation has no relationship to the crime of which [the] defendant was convicted" (*id.* at p. 380), "a condition of probation that enables a probation officer to supervise his or her charges effectively is . . . 'reasonably related to future criminality'" (*id.* at pp. 380-381). The court's supporting citations for the latter quoted passage included *People v. Balestra* (1999) 76 Cal.App.4th 57, 65-67, which this court parenthetically explained was a decision "upholding [a] warrantless search condition that served [a] valid

rehabilitative purpose of helping probation officer ensure that probationer obeys all laws." (*Olguin, supra*, at p. 381.)

Olguin's holding followed logically from the court's earlier decision in *People v. Ramos* (2004) 34 Cal.4th 494. There, the court rejected a probationer's challenge to a search condition under *Lent*. The court stated: "The trial court properly held that the probation search condition was reasonably related to the DUI conviction, which allowed officers to search and seize defendant's person, property, and automobile in order to protect the public. As we have held, 'the level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice his activities are being routinely and closely monitored. Moreover, the purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches.' [Citation.]" (*Id.* at pp. 505-506.) *Ramos* referred to the deterrent effect of probation searches on future criminality separately from the relationship of the condition to the offense of conviction. If they had amounted to the same thing, this court presumably would have said so.

Ramos and *Olguin* together confirm that a probation condition, including probation search conditions, can relate to "future criminality" within the meaning of *Lent*, even if the regulated conduct was not directly involved in the offenses of which the defendant was convicted. *Lent*'s third factor, thus, does not turn upon proofs or admissions establishing that the regulated activity is intrinsic or instrumental to the probationer's crime, or is otherwise emblematic of a particular method or instrumentality of committing an offense for which the minor is declared a ward.

Division One of the First District recently observed in *In re P.O.*, *supra*, 246 Cal.App.4th 288, that if the reasoning for another division's invalidation of an electronics search conditions under the third prong of

Lent were correct (in a noncitable decision now under review), "then juvenile courts would be unable to impose standard search conditions permitting warrantless searches of a minor's person, residence, vehicle, and other physical locations without a showing that those locations were all connected to past criminal conduct. In fact, such conditions are routinely imposed despite their potential to invade minors' privacy. [Citations.] Although 'a minor cannot be made subject to an automatic search condition' [citation], this requires a court to consider whether a search condition is appropriate under the circumstances before imposing it, not to find a connection between the locations to be searched and the minor's past conduct. And to the extent the concern with the reasonableness of electronics searches conditions stems from the impact electronic searches have on privacy, the fact that a probationer is a minor justifies *more* intrusive probation conditions. . . ." (*Id.* at p. 296.)

2. Decisions by other courts reflect that electronics search conditions may be upheld as reasonably relating to future criminality in terms of the enforcement of other conditions of probation

Even where the use of an electronic device is neither intrinsic to nor facilitates or promotes a juvenile or adult probationer's offenses, decisions of intermediate courts commonly affirm that searching those devices may reasonably relate to future criminality in terms of enforcing other probation conditions. (*In re J.E.* (2016) 1 Cal.App.5th 795, __ [205 Cal.Rptr.3d 28, __], petn. for review pending, petn. filed Aug. 22, 2016, S236628; *In re George F.* (2016) 248 Cal.App.4th 734 [203 Cal.Rptr.3d 607, 611-612], petn. for review pending, petn. filed Aug. 5, 2016, S236397; *In re P.O.*, *supra*, 246 Cal.App.4th at pp. 294-296; *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1176-1177; *United States v. Bare* (9th Cir. 2015) 806 F.3d 1011, 1017-1020; contra, *In re J.B.* (2015) 242 Cal.App.4th 749, 755-756; *In re Erica R.* (2015) 240 Cal.App.4th 907, 913.)

Given the ubiquity of electronic devices, particularly cell phones, an electronics search condition is not unreasonable simply because the record does not show the probationer accessed such devices at the time of his offenses, has used them to engage in other illegal activity, or currently has access to them. As one court considering this issue observed, "[e]ssential to [the minor's] rehabilitation is deterring [the minor] from reoffending." (*In re George F.*, *supra*, 248 Cal.App.4th at p. __ [203 Cal.Rptr.3d at p. 612].) An electronics search condition does "just that, by making sure [the minor] knows that if he strays, his probation officers will find out. The wisdom in *Olguin* . . . is that effective supervision of a probationer deters, and is therefore related to, future criminality." (*Ibid.*)

3. Ricardo's view of *Lent*'s third prong is incorrect

Ricardo insists this court's *Lent* jurisprudence requires a proven nexus between the probation condition and a ward's prior offenses and that validating a condition "that serves only to facilitate supervision of the probationer is unsupported by existing law." (AOBM 25.) He reads the decisions too narrowly. *Olguin* unmistakably stands for the principle that conditions reasonably related to enhancing the effective supervision of probationers are valid under *Lent*. More recently, in upholding under *Lent*'s third factor a no-contact condition curbing "future criminality by preventing [the probationer] from returning to the scene of his past transgression and thus helping [the offender] avoid any temptation of repeating [the] socially undesirable behavior," this court made clear that "conditions of probation aimed at rehabilitating the offender need not be so strictly tied to the offender's precise crime." (*People v. Moran* (Aug. 4, 2016, S215914) __ Cal.4th __ [2016 WL 4137577, *3] [discussing cases].)

Ricardo distinguishes *Olguin*'s unequivocal statement rejecting his reading of *Lent*'s third prong (i.e., "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" (45 Cal.4th at p. 380)) as intended only to promote officer safety, an issue not involved in this case. Ricardo's view ignores the holding in *Olguin* that the condition was permissible because it was "facilitative of the search condition, a term of probation that defendant [did] not challenge." (*Ibid.*) The court emphasized that the search condition itself aided in deterring further offenses and in monitoring compliance with the terms of probation. Thus, the search condition promoted rehabilitation, reduced recidivism, and protected the community from future harm. (*Ibid.*) "A condition of probation that enables a probation officer to supervise his or her charges effectively is, therefore, 'reasonably related to future criminality.'" (*Id.* at pp. 380-381.) *Olguin* did not limit that holding to conditions involving officer safety. Rather, the court approved both the search condition, and the challenged condition that implemented it, because the mode of regulating the probationer's conduct through those conditions was reasonably related to future criminality. *Olguin* struck a sensible balance between the probationer's reduced liberty interest and the compelling necessity to control and reform that individual.

Nor is *Olguin* the only decision by this court following this path. In an earlier case where this court inadvertently described the tripartite factors test in disjunctive rather than conjunctive terms, the court upheld a probation search condition for a narcotics offender, "since that condition is reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses." (*People v. Mason* (1971) 5 Cal.3d 759, 764, disapproved as to the test's disjunctive wording by *Lent*, *supra*, at p. 486, fn. 1.) The court's use of the conjunctive "and" indicates the search condition was valid for those two separate

reasons. The court did not suggest that only future crimes similar to past ones were properly deterred by search conditions.

In *People v. Carbajal* (1985) 10 Cal.4th 1114, this court again found that noncriminal behavior can be forbidden or required if the conduct is reasonably related to either the underlying crime or future criminality. (*Id.* at p. 1123.) This court found that a restitution order for leaving the scene of an accident not only served to compensate for loss but also to rehabilitate the defendant, and to "deter[] future criminality." (*Id.* at p. 1124.) While *Carbajal* acknowledged the direct relation between restitution for the prior harm inflicted and deterrence in that case, it did not mandate linkage between past and future criminal behavior as a necessary predicate for satisfying *Lent*. (*Id.* at pp. 1124-1125.)

Under Ricardo's view, conduct not involving criminal behavior may not be required or forbidden unless it relates to the offense of conviction (the first prong of the *Lent* test), even if the condition otherwise rationally regulates lawful conduct that implicates future criminality. That approach reduces the three-part factors test of *Lent* to a two-part test. As shown, that position is unsupported—indeed, refuted—by this court's precedent and is inconsistent with *Lent* itself. Furthermore, the limitation suggested by Ricardo would needlessly fetter trial and juvenile courts in their efforts to fashion probation conditions to guide and rehabilitate minors and adult offenders. Additionally, it could discourage the juvenile court from considering aspects of the juvenile's history that were not the basis of a juvenile adjudication as a ward, even if they suggest a need for additional conditions to promote rehabilitation and deter future misconduct of a different sort.

This case presents such a circumstance. Despite Ricardo's admission that he used marijuana and quit after his arrest in order to think clearly and thereby exercise better judgment, he contends that reliable information in

the form of his own statements to the probation officer cannot be used in the imposition of probation conditions. Presumably, any information regarding antisocial, but noncriminal, behavior also could not be used. Such a position is at war not only with *Lent* but with the goals of the juvenile justice system, as well as the statutory discretion afforded to the juvenile court to fashion such reasonable probation conditions as it may determine fitting and proper to the ward's rehabilitation. The undesirable consequences of Ricardo's position demonstrate the wisdom of *Olguin*.

Valid conditions permitting warrantless searches of a minor's person, property, and residence are common without a showing of the connection between the places to be searched and the property involved the underlying offense. (See *In re Tyrell J.*, *supra*, 8 Cal.4th at pp. 86-87; *In re Binh L.* (1992) 5 Cal.App.4th 194, 203-204.) Likewise, existing law, including *Olguin* and cases on which it relied (e.g., *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240; *People v. Balestra*, *supra*, 76 Cal.App.4th at pp. 65-67), confirms that reasonable conditions that facilitate supervision are proper.

Cases cited by Ricardo do not support his contrary position. The courts in *In re Martinez* (1978) 86 Cal.App.3d 577, *People v. Burton* (1981) 117 Cal.App.3d 382, *In re D.G.*, *supra*, 187 Cal.App.4th 47, *People v. Brandão* (2012) 210 Cal.App.4th 568, and *People v. Petty* (2013) 213 Cal.App.4th 1410, did not require linkage between the current offense of conviction and future criminality that might be deterred or detected by a challenged probation condition. Rather, the courts found nothing in the respective defendants' backgrounds or personal history that afforded a reasonable relationship between the probation condition itself and possible future criminality. *People v. Brandão*, *supra*, 210 Cal.App.4th 568 did not discuss *Olguin* in connection with the third *Lent* factor. (*Id.* at p. 572.) *In re J.B.*, *supra*, 242 Cal.App.4th 749 inexplicably distinguished *Olguin* as

not involving a search condition. (*Id.* at pp. 757-758.) *In re Erica R.*, *supra*, 240 Cal.App.4th 907, and *D.G.*, *supra*, 187 Cal.App.4th 47 did not cite *Olguin* at all. Both *J.B.* and *Erica R.* declared juvenile probation conditions cannot be as broad as an adult probation analogue, a clear departure from this court's jurisprudence that warrants disapproval. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 889.)

C. Judged by These Considerations, an Electronics Search Condition Is Reasonable Under *Lent* in This Case

The juvenile court did not impose an electronics search condition to prohibit specifically defined conduct involving Ricardo's use of electronic devices. It did so instead to ensure Ricardo knows the court can effectively supervise his obedience to the conditions of probation, particularly his adherence to the drug conditions. In that manner, Ricardo knows if he backslides, it can become known to the juvenile court in time for its consideration of further corrective action needed to rehabilitate him. That purpose comes within *Olguin*, *supra*, 45 Cal.4th 375.

"'In fashioning the conditions of probation, the juvenile court should consider the minor's entire social history in addition to the circumstances of the crime.'" (*In re R.V.* (2009) 171 Cal.App.4th 239, 246.) The juvenile court followed that principle in this case. The court noted Ricardo's history of marijuana use, citing his admission to the probation officer "that he stopped smoking marijuana after his arrest because he felt that [it] did not allow him to think clearly." (CT 140.) Based on this evidence, the court explained the purpose of the condition: "I find that minors typically will brag about their marijuana usage, or drug use, 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.) The juvenile court was permitted to infer, as it impliedly did, that a

minor like Ricardo who admits not thinking clearly when committing his offense due to the use of drugs, could share with other wards a habit of promoting or boasting about illegal drugs and drug use on electronic devices. That inference involves accepted discretion in the formulation of probation conditions, not proofs based on the facts of the offenses.

In this case, the juvenile court could reasonably conclude that an electronics search condition would address possible future criminality by Ricardo in two ways, both related to the ward's rehabilitation and the deterrence of additional crimes. First, the court imposed conditions forbidding Ricardo from associating with or contacting his confederates from the underlying burglary offenses. (CT 150.) Consequently, the challenged electronics search condition could permissibly aid in determining whether Ricardo has contacted, or attempted to contact, the persons with whom his other probation conditions prohibit contact. In this way, compliance can be monitored much more effectively, and future burglaries or other crimes can be prevented. (Cf. *People v. Ebertowski*, *supra*, 228 Cal.App.4th at p. 1175 [password probation condition permissible to implement association condition].)

Second, the juvenile court noted that "minors typically brag about their marijuana usage . . . by posting on the Internet . . . ." (12/15/2014 RT 6.) Thus, the condition could assist in uncovering any subsequent marijuana possession or use, as well as deter Ricardo from arranging to purchase marijuana via his electronic devices. The very existence of the condition should deter such behavior.

Ricardo also contends that the imposition of the challenged condition was an abuse of discretion because there is no evidence in the record that he owns or has access to electronic devices. Consequently, he submits, the condition is not tailored to his circumstances. This argument is akin to an assertion that it is an abuse of discretion to prohibit a probationer from

possessing a deadly or dangerous weapon because there is no evidence that he possesses such a weapon, or to order a probationer to stay away from a victim who has moved to another state that the offender has no intention of visiting. Electronic devices are readily accessible and used routinely by minors. If Ricardo does possess any devices during his probationary period, they should be subject to inspection to ensure compliance with the other conditions of probation and to prevent future criminality.

D. Ricardo's Additional Arguments Lack Merit

Ricardo argues from *People v. Brandão*, *supra*, 210 Cal.App.4th at page 574, that "[n]ot every probation condition bearing a remote, attenuated, tangential, or diaphanous connection to future criminal conduct can be considered reasonable." (AOBM 19; see also *In re Erica R.*, *supra*, 240 Cal.App.4th at p. 913.) Ricardo does not explain how the connection between an electronics search condition and future criminality is too remote or attenuated. He makes no comparable argument regarding searches of his home or other property. As explained, the ability to search his electronic devices will enable the probation officer to determine if Ricardo has contacted his coparticipants and is at risk of slipping back into criminal ways, or if he has attempted to buy marijuana or other drugs with the aid of those devices, or if he has communicated about drug- or crime-related activities in social media.

Ricardo argues that this view of future criminality is so expansive that it would justify any probation condition, no matter how oppressive. (AOBM 27.) He paints with too broad a brush. A juvenile court does not impose probation conditions in a vacuum. It considers the offenses, both current and previous, charged and uncharged. It also considers the minor's background and history—e.g., the minor's educational needs, family issues, community support or lack thereof, and medical or psychological problems. After such evaluations, a court may find an electronics search condition that

may be essential to rehabilitate and deter one ward would not contribute to the reformatory and deterrent objectives of the conditions of probation applying to another ward. (*In re J.E., supra,* 1 Cal.App.5th at p. __ [205 Cal.Rptr.3d at p. __] ["whether a probation condition is reasonably related to a specific minor's future criminality is necessarily intertwined with the facts and circumstances surrounding the minor in question"].) And, of course, the condition must be reasonable. (Welf. & Inst. Code, § 730, subd. (b).) Arbitrary or excessive conditions do not pass this threshold requirement. These limitations on a court's discretion to restrict a juvenile ward will preclude the imposition of the conditions suggested by Ricardo's parade of horribles. (See AOBM 27.)

Second, probation conditions are informed and constrained by constitutional prohibitions against overbreadth and vagueness. (*In re Sheena K., supra,* 40 Cal.4th at p. 890.) Ricardo's hypothetical probation conditions would probably violate one or both of those prohibitions. For these reasons, Ricardo's attempt to equate a targeted electronics search condition with blanket authorization for around the clock surveillance in every case is an untenable view of *Lent.*[3]

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[3] In an appropriate case, continuous surveillance through the use of a GPS-enabled ankle bracelet may very well be an appropriate condition of probation, particularly when the alternative is incarceration where continuous monitoring is not only the norm, but just one of many onerous restrictions. (See *In re R.V., supra,* 171 Cal.App.4th at pp. 247, 249 [holding, in light of "the history of R.V.'s violations of the Penal Code and of the conditions of his probation, the GPS monitoring condition was both reasonably related to his past behavior and likely to deter future criminality," and observing that "the GPS monitoring condition [was] a less harsh alternative to an out-of-home placement at a juvenile camp, which certainly would have been within the court's authority"]; see also Pen. Code, § 1210.7 et seq. [providing statutory authorization for continuous electronic monitoring of probationers].)

Third, checks on actual and potential abuses of a search condition exist. That a suspicionless search condition is reasonable at inception does not mean an ensuing search is necessarily constitutionally reasonable. (See *People v. Reyes* (1998) 19 Cal.4th 743, 753-754 [parole search could be unreasonable if performed too often or done in a way that is arbitrary of oppressive].) Likewise, a condition that does not facilitate the probationary purpose of a search and that dilutes its rehabilitative and deterrent objectives—such as a condition specifically authorizing a search, even if arbitrary or undertaken for the purpose of harassment of the ward or in ignorance of the condition—would fail under *Lent* as a mode of regulating conduct not reasonably related to future criminality. (See *People v. Sanders* (2003) 31 Cal.4th 318, 333 ["if an officer is unaware that a suspect is on probation and subject to a search condition, the search is not justified by the state's interest in supervising probationers or by the concern that probationers are more likely to commit criminal acts"]; *People v. Robles* (2000) 23 Cal.4th 789, 799 ["Many law-abiding citizens might choose not to open their homes to probationers if doing so were to result in the validation of arbitrary police action. If increased numbers of probationers were not welcome in homes with supportive environments, higher recidivism rates and a corresponding decrease in public safety may be expected, both of which would detract from the 'optimum successful functioning' of the probation system"]; cf. *People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180, 1196-1197 [dicta stating that the "view that a probationer could be required, in effect, to waive advance knowledge [would] be against public policy in that it would substantially degrade the deterrent effect of the exclusionary rule and jeopardize the Fourth Amendment rights of nonprobationers"].)

Finally as a practical matter, it is doubtful that the electronic devices of wards will be inspected with any regularity given the scarcity of supervisory resources.

In sum, the juvenile court acted well within its broad discretion in concluding that a condition authorizing the search of Ricardo's electronic devices could help his probation officer discover information relating to future illegal activity and by its very existence discourage such activity. That court could reasonably conclude the search condition was needed to both rehabilitate Ricardo and deter him from further offenses. The Court of Appeal properly upheld the electronics search condition under *Lent*.

II. THE FOURTH AMENDMENT CLAIM IS NOT PROPERLY BEFORE THE COURT, AND AN ELECTRONICS SEARCH CONDITION WOULD NOT CONSTITUTE A FACIALLY UNREASONABLE IMPINGEMENT ON RICARDO'S CONSTITUTIONAL RIGHTS AS A JUVENILE WARD

Ricardo contends that the electronics search condition violates his right to be free of unreasonable searches and seizures. (AOBM 28-34.) He argues *Riley v. California*, *supra*, 573 U.S. ___ [134 S.Ct. 2473] forces a reexamination of such search conditions. His constitutional claim is beyond the scope of the questions presented for review and also premature. The record is insufficient until the juvenile court actually decides how an electronics search condition should be formulated to be responsive to Ricardo's rehabilitation and to public safety. On the merits, *Riley* does not forbid, by holding or inference, a warrantless search of a juvenile ward's electronic devices during a term of supervised probation.

A. The Constitutional Issue Is Beyond the Scope of Review and Premature; Nor Is the Record Sufficient

This court "may decide any issues that are raised or fairly included in the petition or answer." (Cal. Rules of Court, rule 8.516(b)(1).) Ricardo's petition for review presented two state law issues, both of which were

expressly limited to claims under *Lent*.[4] Respondent file an answer that reformulated those claims into a single question of statutory reasonableness.[5] Accordingly, Ricardo's constitutional claim is not raised or fairly included in the questions on review.

Moreover, Ricardo's claim is premature. Respondent elected not to challenge by way of review the Court of Appeal's conclusion that the original condition was constitutionally overbroad or its judgment permitting the juvenile court "to impose a probation condition permitting searches of a narrower range of electronic information related to the court's supervisory concerns." (Typed Opn. 17.) Given that the original condition will not be imposed under any circumstance, and remand would be necessary for any new electronic device search condition to be imposed, the precise reach of the condition to which petitioner may ultimately be subject has yet to be determined. Of course this court may expand review to include constitutional overbreadth. However, unless and until the juvenile court decides the precise language of the new condition, the existing record on the overbreadth issue appears insufficient to decide it. (See *People v. Venegas* (1998) 18 Cal.4th 47, 95, fn. 42.)

Pending on review is a juvenile ward's challenge to a no-contact probation condition that raises a constitutional overbreadth claim. (*In re*

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[4] "I. Is a juvenile probation condition, the sole purpose of which is to facilitate general supervision of the minor, reasonably related to future criminality and thus valid under *People v. Lent* (1975) 15 Cal.3d 481? [¶] "II. Is a probation condition requiring a juvenile to submit his electronic devices for search at any time and requiring submission of his social media and electronics passwords to the probation department valid under *People v. Lent* where there is no indication electronic devices had ever been used by the minor for illegal or harmful activity?" (Petn. for Review 2.)

[5] "Whether an electronic search condition of probation is statutorily unreasonable in the disposition of a minor's residential burglary case." (Answer to Petn. for Review 1).

A.S., No. S220280.) This court's decision in *A.S.* may clarify how juvenile courts should resolve arguments by a ward claiming a constitutional right to narrow tailoring of a probation condition. Such a superseding decision by this court might prove relevant on remand in this case. In turn, the prospect of such a clarification affords an additional reason to defer this claim until the juvenile court has the opportunity to reconsider the wording of the electronics search condition.

B. The Fourth Amendment/Overbreadth Claim Lacks Merit

It is undisputed that a juvenile court may order a ward to submit to a search of his or her person, home, vehicle, and personal effects as a condition of probation. (*In re Tyrell J.*, *supra*, 8 Cal.4th at pp. 83-86.) Ricardo suggests that this rule may be overbroad as applied to searches of electronics and must be reexamined in light of *Riley v. California, supra,* 573 U.S. ___ [134 S.Ct. 2473]. We disagree. "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement. (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) Constitutional challenges to probation conditions are reviewed de novo. (*In re Malik J.* (2015) 240 Cal.App.4th 896, 901.)

Generally speaking, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the conditions to avoid being invalidated as being unconstitutionally overbroad." (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) But a probation condition is not overbroad if it burdens no constitutionally protected right more than necessary to protect a significant government interest. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090,

1120.) Nor is a constitutional right "*impermissibly* burdened" where the condition is "'consistent with the rehabilitative purpose of probation.'" (*People v. Moran*, *supra*, __ Cal.4th __ [2016 WL 4137577, *5, quoting *In re Antonio R.*, *supra*, 78 Cal.App.4th at p. 942.) No such impermissible burden attends a search condition for a probationer's home and property—as this court held decades ago. (*People v. Mason*, *supra*, 5 Cal.3d at pp. 764-765 (maj. opn. of Burke, J.).)

"As [this court] explained in *Olguin*, *supra*, 45 Cal.4th 375, 'in the absence of a showing that the probation condition *infringes upon a constitutional right*,' 'this court simply reviews such a condition for abuse of discretion, that is, for an indication that the condition is 'arbitrary or capricious' or otherwise exceeds the bounds of reason under the circumstances." (*Moran*, *supra*, 2016 WL 4137577, *5, italics in *Moran*.)

The claim that *Riley* compels a new constitutional rule of probation searches for "electronics and passwords" or otherwise is misplaced. First, *Riley* is based not on any theory "that the information on a cell phone is immune from search," but instead on a determination that a search of the information on a phone did not fall within the justifications for the exception to the warrant requirement for items seized incident to arrest. (*Riley*, *supra*, 134 S.Ct. at p. 2493.) By contrast, searches pursuant to a condition of probation come within a different exception to the warrant requirement for probation searches. That exception requires evaluating a search condition for constitutional *reasonableness*, "'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" (*United States v. Knights* (2001) 534 U.S. 112, 118-119, quoting *Wyoming v. Houghton* (1999) 526 U.S. 295, 300; see also *People v. Schmitz* (2012) 55 Cal.4th 909, 916 [constitutional challenge to a parole search based on a search condition determined by

"weigh[ing] the privacy interests of the parolee against society's interest in preventing and detecting recidivism"].)

Second, *Riley* applies the warrant requirement to a cell phone search for reasons that lack application to probation search conditions. Specifically, the high court found that the dual rationales of potential "harm to officers and destruction of evidence" excusing a warrant for a search incident to arrest have little force with respect to digital content on a cell phone and that an officer's search of the "vast quantities of personal information literally in the hands" of an arrestee "bears little resemblance" to a "brief physical search" of a person placed into custody. (*Riley*, *supra*, 134 S.Ct. at pp. 2484-2485.) Just as reasonableness, rather than the warrant requirement, is at issue when a probation search condition is imposed, neither the protection of the officer nor the preservation of evidence is relevant respecting the reasonableness of such a condition as applied to juvenile wards. As discussed, the objectives of such a search condition is to rehabilitate the ward by effective supervision and protect the public from further criminal violations.

Likewise, while the potential for "vast quantities of personal information" in a cell phone is not normally replicated in contents of a jacket pocket or a purse during a custodial arrest, information in a home subject to a probation search is a different matter. There is obvious potential for much larger amounts of personal data being found in a residential search than in a cell phone search. Neither *Riley* nor other controlling decisional authority holds a legitimate expectation of privacy in electronic information *exceeds* a person's legitimate expectation of privacy in the home. It would require rewriting the Fourth Amendment to make that proposition true.

Some lower courts have improperly discounted or ignored settled principles endorsing probation conditions that authorize searches of the

home, in finding comparable electronic device search conditions categorically overbroad. In rejecting an electronic device search condition, the court in *In re Malik* observed, "The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." (*In re Malik, supra*, 240 Cal.App.4th at p. 902, quoting *Riley, supra*, 134 S.Ct. at p. 2495.) Exactly so: as information on a cell phone is *no less worthy of protection* than the same information protected in the home, likewise it is no more worthy. Appropriate searches for information either in the home or in technology of wards under the control and supervision of the probation officer may be reasonably related to the effective enforcement of the ward's conditions of supervision and to the probationer's future criminality and rehabilitation by extension. (See *In re J.E., supra*, 1 Cal.App.5th at p. __ [205 Cal.Rptr.3d at p. __ & fn. 6]; *In re George F., supra*, 248 Cal.App.4th at p. __ [203 Cal.Rptr.3d at p. 612].)

Third, *Riley* enforced privacy interests of two adults not yet convicted of a crime. (See *Riley, supra*, 134 S.Ct. at pp. 2480, 2481-2482 [one adult searched in conjunction with arrest for firearms possession after traffic stop and the other searched after arrest for distribution of crack cocaine].) By contrast, wards of the court subject to search conditions have a *diminished and categorically different* expectation of privacy than was the case in *Riley*. (See *In re Jaime P., supra*, 40 Cal.4th at p. 136 ["[A] search condition may diminish, but does not entirely preclude, a reasonable expectation of privacy, i.e., a reasonable expectation that officers will not undertake a random search supported by neither evidence of criminal activity nor advance knowledge of the search condition. [Citations.] This reasoning would apply with equal force to juvenile or adult probationers"].)

Fourth, *Riley* made clear as respects body searches of arrestees that "other case-specific exceptions may still justify a warrantless search of a

particular phone." (*Riley, supra,* 134 S.Ct. at p. 2494; see *In re P.O., supra,* 246 Cal.App.4th at pp. 294-296.) It would make no sense to conclude "other case-specific exceptions" exist for adult arrestees, but not for juvenile wards placed on probation based on findings of a criminal offense.

Fifth, *Riley*'s analytical predicate for applying the warrant clause to the arrestees' cell phones was the absence in a search incident to arrest of a core protection of the Fourth Amendment: advanced judicial authorization of a search of the same scope as the ones conducted by the officers. Unlike in *Riley*, a ward's electronics search condition serves the compelling state interest of supervising the minor, as a person with a diminished and different expectation of privacy than arrestees, by judicially controlling in advance the scope of the authorized intrusion. *Riley* does not alter the balance of interests respecting a suspicionless search of electronic devices under an otherwise valid search condition of a juvenile's probation.

CONCLUSION

Accordingly, the judgment of the Court of Appeal should be affirmed.

Dated: August 24, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 9,387 words.

Dated: August 24, 2016

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **in re Ricardo P.**
No.: **S230923**

I declare:

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

On August 24, 2016, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, 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 August 24, 2016, at San Francisco, California.

B. Wong
Declarant

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Signature

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