SUPREME COURT NO. S259956

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE , Plaintiff and Respondent, v. CLYDELL BRYANT, Defendant and Appellee.	Court of Appeal No. B271300 Superior Court No. GA094777

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

Honorable Michael Villalobos, Judge

APPELLEE'S ANSWERING BRIEF ON THE MERITS

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Issue Presented

Should the validity of a condition of release on mandatory supervision be assessed under the standards applicable to conditions of parole or of the standards applicable to conditions of probation?

Introduction

Appellee Clydell Bryant was placed on mandatory supervision as part of a split sentence for carrying a concealed firearm in a vehicle. The trial court imposed a condition requiring appellee to submit to the search of any text messages, e-mails, and photographs on his electronic devices. The Court of Appeal struck the condition, applying this court's standards for assessing probation conditions in *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and *In re Ricarado P.* (2019) 7 Cal.5th 1113 (*Ricardo P.*), and not the standards for assessing parole conditions under *People v. Burgener* (1986) 41 Cal.3d 505, 532-533 (*Burgener*), disapproved in part in *People v. Reyes* (1998) 19 Cal.4th 743, 752). This court should find that the Court of Appeal properly applied the standards applicable to probation conditions and rightfully struck the electronic-search condition. If this court instead applies the standards under *Burgener*, it should nonetheless strike the condition and affirm the judgment of the Court of Appeal.

Statement of the Case

A jury convicted appellee of carrying a concealed firearm in a vehicle and found that he was not listed in the Department of Justice as the registered owner of the firearm and that the firearm was loaded. (Clerk's Transcript [CT] 93, 97-98, 121; 3

Reporter's Transcript [RT] 955.) The trial court sentenced appellee to the midterm of two years in the county jail, with half the term to be served in county jail and the other half under mandatory supervision under Penal Code section 1170, subdivision (h)(5)(B).[1] (CT 93, 97-98, 120-122; 3RT 1213.) One of the terms for mandatory supervision required appellee to submit to the search of any electronic devices including any cell phone in his possession or place of residence. (CT 120; 3RT 1216-1217.) The search by the probation department was limited to text messages, e-mails, and photographs on the electronic devices. (CT 120; 3RT 1216-1217.)

Appellee challenged the search condition on appeal. The Court of Appeal struck the search condition under the third prong of *Lent*.[2] (*People v. Bryant* (2017) 10 Cal.App.5th 396, 404-405 (*Bryant I*.) This court granted the respondent's petition for review and remanded to the Court of Appeal after deciding *Ricarado P.* The Court of Appeal again struck the search condition under *Lent*. (*People v. Bryant* (2019) 42 Cal.App.5th 839, 847-850 (*Bryant II*).

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] "Generally, '[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." (*People v. Olguin* (2008) 45 Cal.4th 375, 379, quoting *Lent, supra,* 15 Cal.3d at p. 486.)

Statement of Facts[3]

On a night in August 2014, Pasadena Police Department officers responded to a call for service outside a housing complex where a group of individuals were drinking and refusing to leave the area. Appellee and his girlfriend, Lamaine Jones, were smoking marijuana in a parked car in the area. Jones sat in the driver's seat and appellee in the passenger seat. The car belonged to Jones's mother.

A Pasadena police officer approached the driver's side of the car and smelled a strong odor of marijuana coming from the car. The officer asked Jones and appellee to step out of the car so he could check for marijuana. Jones and appellee complied.

The officer searched the car and found a semi-automatic .45 caliber Hi-Point handgun under the front passenger seat. According to the officer, the gun was accessible to a person in the passenger seat, but not the driver's seat. There were nine bullets in the gun's magazine. The police later determined that the gun was not registered. Appellee's DNA matched DNA found on the gun's magazine. DNA from several persons found on the gun's handle could not be matched to any specific person.

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[3] The statement of facts is derived from the Court of Appeal's opinion in *Bryant II, supra,* 42 Cal.App.5th 839, 842.

Argument

I. Courts should assess the reasonableness of postrelease community supervision conditions in the same manner as probation conditions.

A. After the Realignment Act, there are four paths of confinement and supervision of felony offenders in California.

Prior to the Realignment Act (Stats. 2011, ch. 15, § 1), felony offenders subject to supervision in California were either placed on probation or sentenced to state prison and released on parole. "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. 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." (*Burgener, supra,* 41 Cal.3d at pp. 532-533.) A parolee, on the other hand, has been imprisoned because he or she poses a significantly greater risk to society. (*Id.* at p. 533.) The offense may have rendered the parolee ineligible for probation initially. (*Ibid.*; *See* §§ 1203, 1203.06-1203.09.) "The sentencing judge may have determined that the defendant posed too great a risk to the public to warrant a grant of probation." (*Burgener* at p. 533, citing *People v. Warner* (1978) 20 Cal.3d 678, 689.) "Or, the defendant

may have been sentenced to prison following a revocation of probation occasioned by his failure to comply with conditions of probation." (*Burgener* at p. 533.)

The 2011 Realignment Act substantially revamped California's penal system by shifting responsibility for the custodial housing and postrelease supervision of certain felons from the state to the local jails and probation departments. (*Wofford v. Superior Court* (2014) 230 Cal.App.4th 1023, 1032; *People v. Cruz* (2012) 207 Cal.App.4th 664, 668, 671; § 1170, subd. (h).) Before the Realignment Act, a prison sentence ended with a period of parole administered by the state. (*People v. Isaac* (2014) 224 Cal.App.4th 143, 145, citing Stats. 2010, ch. 219, § 19.) As explained by this court, "'Parole is the conditional release of a prisoner who has already served part of his or her state prison sentence. Once released from confinement, a prisoner on parole is not free from legal restraint, but is constructively a prisoner in the legal custody of state prison authorities until officially discharged from parole. [Citations].'" (*In re Taylor* (2015) 60 Cal.4th 1019, 1037.)

Today, as a result of the Realignment Act, parole is reserved for "high-level offenders, i.e., third strikers, high-risk sex offenders, and persons imprisoned for serious or violent felonies or who have a severe mental disorder and committed specified crimes. (§ 3451, subd. (b).) All other released persons are placed on postrelease community supervision. (§ 3451, subd. (a).)." (*People v. Armogeda* (2015) 233 Cal.App.4th 428, 434.) Postrelease community supervision was created by the

Realignment Act as an alternative to parole and is conducted by a county agency rather than by the Department of Corrections and Rehabilitation. (*People v. Gutierrez* (2016) 245 Cal.App.4th 393, 399.)

The Realignment Act also provides that eligible felons will serve their prison terms in local jails rather than state prison.[4] (*Wofford v.Superior Court, supra,* 230 Cal.App.4th at p. 1033; *People v. Cruz, supra,* 207 Cal.App.4th at p. 671; § 1170, subd. (h)(1), (2).) When imposing these local sentences, the trial court may select a straight commitment to jail for the applicable term, or it may select a hybrid sentence in which it suspends execution of a portion of the term selected at the court's discretion and releases the felon into the community under the mandatory supervision of the county probation department. (*Wofford* at p. 1033; *Cruz* at p. 671; see §§ 19.9; 1170, subd. (h)(5).) Section 1170, subdivision (h), in describing the split-sentence option, provides that the court shall "*suspend execution*" of the portion of the term to be served under mandatory supervision in the community, and during the mandatory supervision period the defendant shall be supervised by the probation department "in accordance with the *terms, conditions, and procedures generally applicable to persons placed on probation*...." (*Wofford* at p. 1033, original italics, quoting § 1170, subd. (h)(5)(B)(i).)

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[4] Defendants who have a current or prior serious (§ 1192.7, subd (c)) or violent (§ 667.5, subd. (c)) felonies; are required to register as sex offenders; or whose sentences are enhanced for certain multiple fraud or embezzlement offenses under section 186.11 must serve their sentences in state prison. (§ 1170, subd. (h)(3).)

Thus, a non-capital felon may now be punished in the following four ways:

· Probation;

· Commitment to county jail for the full term or with a portion of the sentence suspended under the court's discretion under supervision of the probation department;

· Imprisonment in the state prison followed by postrelease community supervision (PRCS) by the probation department; and

· Imprisonment followed by parole under the supervision of the Department of Corrections and Rehabilitation.

The appellee in this case was committed to county jail with a portion of his sentence suspended under mandatory supervision of the probation department, with the electronic-search condition now before this court.

B. Supervision conditions are subject to scrutiny.

1. Probation Conditions

The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and what conditions should be imposed. (*People v. Welch* (1993) 5 Cal.4th 228, 233-234, citing § 1203, subd. (b); Cal. Rules of Court, rule 4.414; *People v. Warner, supra,* 20 Cal.3d at pp. 682-683.) While some probation conditions are statutorily mandated or recommended in certain cases, most stem from the sentencing court's general authority to impose any "reasonable" conditions that it "may determine" are "fitting and proper to the end that justice may be done...." (*Welch* at p. 233, citing § 1203.1.)

Probation conditions that regulate conduct "not itself criminal" must be "reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Welch, supra,* 5 Cal.4th at pp. 233-234, citing *Lent, supra,* 15 Cal.3d at p. 486.) As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or exceeds the bounds of reason, all of the circumstances being considered. (*Welch* at p. 234, citing *People v. Warner, supra,* 20 Cal.3d at p. 683; *People v. Giminez* (1975) 14 Cal.3d 68, 72.)

2. Parole Conditions

Section 3053, subdivision (a) authorizes the Board of Prison Terms to impose upon the parolee "any conditions that it may deem proper." Parole conditions, like probation conditions, must be reasonable since parolees retain constitutional protection against arbitrary and oppressive official action. (*Burgener, supra,* 41 Cal.3d at p. 532.)

In *Burgener,* the defendant challenged the legality of a parole search condition. (*Burgener, supra,* 41 Cal.3d at p. 529.) This court observed, "'The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts…." (*Id.* at p. 531.) This court concluded that the distinction between felony parole and probation justifies the

inclusion of a parole search condition in all parole agreements.[5] (*Id.* at p. 532.)

3. Mandatory Supervision Conditions

Conditions of mandatory supervision are also subject to judicial scrutiny. (See, e.g., *People v. Martinez* (2014) 226 Cal.App.4th 759.) This court must decide whether these conditions are subject to the heightened scrutiny applicable to probation conditions as opposed to parole conditions.

C. Mandatory supervision is statutorily more like probation than parole.

The postrelease supervision at issue in this case is mandatory supervision under Penal Code sections 19.9 and 1170, subdivision (h)(5)(B) and not PRCS under section 3451. However, respondent refers to both mandatory supervision and PRCS in its brief. While both are administered by the probation department, the two differ in many respects. Mandatory supervision under section 1170, subdivision (h)(5)(B) applies to felons committed to county jail with split sentences. Under section 1170, subdivision (h)(5)(B), mandatory supervision is supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation. There are no conditions required by statute.

If a defendant is placed on mandatory supervision, the court suspends a concluding portion of the sentence. (§ 1170, subd. (h)(5)(A)). For probationers, the court may suspend the

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[5] This court did not address parole conditions for the search of electronic devices in *Burgener,* as it was decided in 1986, prior to the era of the modern cell phone.

imposition or the execution of the sentence (§ 1203.1, subd. (a).) A probationer may also be ordered to serve time in a county jail as a condition of probation. (§ 1203.1, subd. (a)(2).) Under section 1170, subdivision (h)(5)(B), proceedings to revoke mandatory supervision are governed by sections 1203.2, subdivisions (a) and (b) and 1203.3, which also govern probationers.[6]

PRCS under section 3451, on the other hand, applies to non-high-level felons who have completed their terms in state prison, and who would have been on parole prior to realignment. Section 3451, subdivision (a) provides that the period of community supervision shall last for a period not exceeding three years after release from prison.[7]

Section 3453, subdivisions (a) through (t) sets forth a laundry list of required conditions for PRCS. These terms include the search of the person and the person's residence at any time with or without a warrant (subd. (f)); requirements for permission to travel more than 50 miles from the person's place of residence (subd. (k)) and a travel pass before leaving the state or county for more than two days (subd. (l)); a prohibition on being in the presence of a firearm or ammunition or any item that appears to

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[6] Under section 3455, subdivision (a), the supervising agency may petition the court under section 1203.2 to revoke, modify, or terminate PRCS if it determines that intermediate sanctions, such as flash incarceration, under section 3454, subdivision (b) are not appropriate.

[7] For parolees, section 3000, subdivision (b)(1), provides that the period of parole is not to exceed five years for an inmate imprisoned for any offense other than first or second degree murder for which the inmate received a life sentence, and not to exceed three years for an inmate imprisoned for any other offense.

be a firearm or ammunition (subd. (m)); and the waiver of any right to a court hearing prior to the imposition of a period of "flash incarceration" in a city or county jail for a period of not more than 10 consecutive days for any violation of any PRCS condition (subd. (q)).[8] There are no such statutory requirements for probation.

Section 3003, subdivisions (a) and (b) require that an inmate on parole or PRCS be returned to the county that where the inmate last legally resided before incarceration, with some exceptions. Section 3004, subdivision (a) authorizes the Board of Parole Hearings to require a parolee to consent to the use of electronic monitoring or supervising devices. This condition bears similarity to the 50-mile travel restriction and travel pass requirement for PRCS. Section 3067, subdivision (b)(3) requires that parolees and those on PRCS be notified that they are subject to search or seizure at any time, with or without probable cause.

In sum, mandatory supervision aligns with probation while PRCS aligns more closely with parole.[9] (See *People v. Garcia* (2018) 22 Cal.App.5th 1061, 1064; *People v. Gutierrez, supra,* 245 Cal.App.4th at p. 399 [PRCS is similar but not identical to parole.].)

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[8] Section 3000.08, subdivision (e) authorizes flash incarceration of parolees. Under section 1203.35, subdivision (a)(1), probationers and defendants under mandatory supervision may be subject to flash incarceration if the court obtains a waiver of a court hearing prior to the imposition of flash incarceration. Probation may not be denied for a refusal to sign a waiver.

[9] Appellee does not argue the appropriate standards of assessment for PRCS, as this is not at issue in this case.

D. The Courts of Appeal have evaluated the reasonableness of mandatory supervision conditions in the same manner as probation conditions.

1. The Court of Appeal's Decision in this Case

In this case, respondent conceded before the Court of Appeal that the electronic-search condition is invalid if *Ricardo P.* controls. (*Bryant II, supra,* 42 Cal.App.5th at pp. 848-849.) Respondent contended, however, that *Ricardo P.* does not control because *Lent* and *Ricardo P.* addressed conditions of probation, and neither should apply to terms of mandatory supervision imposed under section 1170, subdivision (h)(5). (*Bryant II* at p. 849.) Respondent asserted that mandatory supervision is more akin to parole than probation because mandatory supervision and parole are mandatory post–incarceration periods during which convicted felons serve a portion of their sentences outside of prison; probation, by contrast, "is a grant of clemency in lieu of a custody commitment." (*Ibid.*) Because of the similarities between mandatory supervision and parole, and their differences with probation, respondent argued that mandatory supervision terms should not be evaluated under the *Lent* test, but rather by the standards applicable to searches of parolees under *Burgener, supra,* 41 Cal.3d 505. (*Bryant II* at p. 849.) "Under *Burgener*, a warrantless search condition of a felony parolee does not violate the parolee's 'constitutional protection against arbitrary and oppressive official action.' (*Burgener* at pp. 532-533.)" (*Bryant II* at p. 849.)

The Court of Appeal disagreed with respondent, reasoning that the *Burgener* court accepted parole search conditions based

in its determination that those conditions do not violate the Fourth Amendment's proscription against unreasonable searches and seizures and no other law provided greater protection for parolees. (*Bryant II, supra,* 42 Cal.App.5th at p. 849, citing *Burgener*, *supra*, 41 Cal.3d at pp. 530-536.) The Court of Appeal observed that the *Lent* test, by contrast, is not a constitutional requirement but rather the result of judicial interpretation of section 1203.1, subdivision (j), which permits a court granting probation to impose "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done." (*Bryant II* at p. 850, citing § 1203.1, subd. (j); *Lent, supra,* 15 Cal.3d at p. 486; *Ricardo P.*, *supra*, 7 Cal.5th at p. 1128; *People v. Dominguez* (1967) 256 Cal.App.2d 623, 627.)

The Court of Appeal concluded that the text of section 1170, subdivision (h) compelled the conclusion that persons subject to mandatory supervision have the benefit of the greater protection afforded probationers as opposed to being protected no more than the constitution requires for parolees. (*Bryant II, supra,* 42 Cal.App.5th at p. 849.) Section 1170, subdivision (h)(5)(B) declares that persons subject to 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*." (*Bryant II* at p. 849, original italics.) Because terms and conditions applicable to persons placed on probation are subject to the *Lent* test, it follows that terms and conditions applicable to those on mandatory supervision must also satisfy *Lent*. (*Ibid.*) "Accordingly, the courts that have

addressed the issue have consistently applied the *Lent* test to mandatory supervision terms." (*Ibid.*, citing *People v. Malago* (2017) 8 Cal.App.5th 1301, 1306; *People v. Relkin* (2016) 6 Cal.App.5th 1188, 1194; and *People v. Martinez*, *supra,* 226 Cal.App.4th at p. 764.)

2. Other Courts of Appeal Decisions

In *People v. Martinez, supra,* 226 Cal.App.4th 759, the defendant challenged a condition of supervised release under a split sentence. (*Id.* at p. 762.) The Court of Appeal interchangeably described the condition as a probation condition and a condition of supervised release. (*Id.* at p. 762.)

The court stated that a county jail commitment followed by mandatory supervision imposed under section 1170, subdivision (h), is akin to a state prison commitment and is not a grant of probation or a conditional sentence. (*People v. Martinez, supra,* 226 Cal.App.4th at p. 763, citing *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422. Therefore, "'mandatory supervision is more similar to parole than probation.'" (*Martinez,* at p. 763, citing *Fandinola* at p. 1422.) The court stated that it would therefore analyze the validity of the terms of supervised release under standards analogous to the conditions or parallel to those applied to terms of parole. (*Martinez* at p. 763.)

The court further stated that the validity and reasonableness of parole conditions is analyzed under the same standard as that developed for probation conditions. (*Martinez, supra,* 227 Cal.App.4th at p. 764, citing *In re Hudson* (2006) 143 Cal.App.4th 1, 9; *In re Stevens* (2004) 119 Cal.App.4th 1228,

1233.) The court concluded that the *Lent* test applies, substituting "parole" for "probation" in the three prongs. (*Martinez, supra,* at p. 764, citing *Lent, supra,* 15 Cal.3d at p. 486.) The Courts of Appeal followed *Martinez* in *People v. Relkin, supra,* 6 Cal.App.5th at p. 1194 and in *People v. Malago, supra,* 8 Cal.App.5th at p. 1306.

E. The Court of Appeal's reasoning in *Bryant II* for evaluating the reasonableness of appellee's mandatory supervision condition in the same manner as probation conditions is correct.

As explained, the Court of Appeal based its decision about assessing the reasonableness of appellee's mandatory supervision on the language of section 1170, subdivision (h)(5)(B) [persons subject to 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*."] (*Bryant II, supra,* 42 Cal.App.5th at p. 849, original italics.) The Court of Appeal is correct in its statutory interpretation.

Respondent argues that section 1170, subdivision (h)(5)(B) sets forth only the "manner" in which mandatory supervision is to be administered and says nothing about the scope or substance of the mandatory supervision conditions being administered. (OBM 29-30.) Respondent is wrong. The mandate that persons be supervised by probation in accordance with the **terms, conditions, and procedures** generally applicable to persons placed on probation speaks to far more than the manner of administering mandatory supervision. The reference in the

statute to "procedures" generally applicable to persons placed on probation sets forth the manner in which mandatory supervision is to be administered. The reference to "terms" and "conditions" in the statute dictates that the scope and substance of the conditions for mandatory supervision are akin to those generally applicable to probationers. It logically follows that the terms and conditions for mandatory supervision should be subject to the same scrutiny as for probation conditions. The "procedures" prong also suggests that the level of judicial scrutiny applied to probation conditions should prevail.

When interpreting statutes, reviewing courts begin with the plain, commonsense meaning of the language used by the Legislature. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1131.) If the language is unambiguous, the plain meaning controls. (*Ibid.*; *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499, 519.) Whenever possible, significance must be given to every word in a statute in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage. (*Rodriguez, supra,* 55 Cal.4th at p. 1131; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330.) Put another way, statutes are to be interpreted in a manner that gives significance to each word and avoids redundancies. (*People v. Torres* (2020) 48 Cal.App.5th 550, 562, citing *Pacific Legal Foundation v. Unemployment Insurance Appeals Board* (1981) 29 Cal.3d 101, 114.)

Here, significance must be given to each of the words, "terms," "conditions," and "procedures." These three terms

combined are all-encompassing. Had the Legislature intended that the terms and conditions of supervised release be similar to those for persons placed on parole rather than probation, it would have stated so in the statute.

F. Defendants on mandatory supervision are more similarly situated to probationers than parolees.

As explained in Sections I-A and I-C, *ante,* parole is reserved for the most serious offenders while probationers are on the other end of the spectrum, having satisfied the sentencing court that imprisonment in the state prison is not necessary to protect the public. Mandatory supervision and PRCS fall between the two extremes, with mandatory supervision aligning more closely with probation and PRCS more closely with parole.

Mandatory supervision, like probation, is discretionary. Under section 1170, subdivisions (h)(5)(A) and (B), the court shall suspend a concluding portion of the sentence and place the defendant on mandatory supervision unless the court finds in the interests of justice that it is not appropriate. The court therefore has discretion in determining both the appropriateness of mandatory supervision and the portion of the sentence to be served out of custody. It logically follows that the court must expressly or impliedly find at the time of sentencing that it is safe for society and in furtherance of rehabilitation that the defendant be out of custody for a period of time, under mandatory supervision.

Parole and PRCS, on the other hand, are mandatory, after the completion of a prison term. (§ 3000, subd. (a)(1) [parole]; §

3451, subd. (a) [PRCS].) Defendants who have served their complete terms prior to parole or PRCS have not necessarily demonstrated their suitability for release. There is no judicial discretion similar to probation or mandatory supervision. On the other hand, to earn early release on parole or PRCS, inmates must demonstrate their suitability for release while in prison, based on conduct. There is no advance finding by the court at the time of sentencing that a defendant's release after serving a portion of the sentence will serve society or promote rehabilitation.[10]

Contrary to respondent's argument, the statutory presumption in favor of the imposition mandatory supervision expressed in section 1170, subdivision (h)(5)(A) and California Rules of Court, rule 4.415(a) does not negate the trial court's discretion. The court may still decline to impose mandatory supervision when denial is in the interests of justice. (§ 1170, subd. (h)(5)(A); Cal. Rules of Court, rule 4.415(b) [non-exclusive list of factors that the court may consider in determining that mandatory supervision is not appropriate in a particular case].) Similar to probation, the court also has broad discretion in setting the conditions for mandatory supervision. (Cal. Rules of Court, rule 4.415(c) [non-exclusive list of factors the court may consider in determining the appropriate period and conditions for mandatory supervision].)

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[10] The statutorily mandated terms for parole and PRCS are identical for inmates who complete their sentences and for those who earn early release.

Respondent argues that mandatory supervision is more akin to imprisonment than probation is to imprisonment, and thus more similar to parole than probation. (OBM 23.) In particular, respondent argues that parolees have more severely diminished expectations of privacy than probationers due to the nature of their offenses, and the risk of recidivism, and that the same should apply to mandatory supervision. Not so.

As is the case with parolees, probationers are not entitled to the same degree of constitutional protection as other citizens. (*People v. Arevalo* (2018) 19 Cal.App.5th 652, 656; *People v. Lopez* (1998) 66 Cal.App.4th 615, 624; see *United States v. Knights* (2001) 534 U.S. 112, 121 [122 S.Ct. 587, 151 L.Ed.2d 497].) A warrantless search condition is a reasonable term in any parole of a convicted felon from state prison. (*Burgener, supra,* 41 Cal.3d at p. 532.) Such a condition is required for PRCS. (§ 3453, subd. (f); see also § 3067, subds. (a), (b)(3) [requirement of notification of search condition for defendants on parole and PRCS].) No required search term exists for mandatory supervision or probation. Had the Legislature intended that defendants on mandatory supervision be similarly situated to parolees in restrictions on their constitutional liberties, it would have provided so in section 1170, subdivision (h).

Respondent's argument that those on mandatory supervision are continuing their sentences while those on probation have not been imprisoned presents a distinction without a difference: Probationers, parolees, those on mandatory supervision, and those on PRCS are all subject to incarceration if

they violate the terms of their supervision. The Legislature has implicitly confirmed through its statutory scheme that defendants on mandatory supervision are more similarly situated to probationers than parolees. The same standards for evaluating conditions of supervision should apply to both. As respondent conceded in the court below, appellant's electronic-search condition fails under *Ricardo P.*

II. Appellee's electronic-search condition fails whether it is assessed under the standards applicable to conditions of parole or under the standards applicable to conditions of probation.

As noted, respondent conceded that appellee's electronic-search condition fails under *Ricardo P.* It also fails under *Burgener*.

"[P]arole conditions, like conditions of probation, must be reasonable since parolees retain constitutional protection against arbitrary and oppressive official action." (*Burgener, supra,* 41 Cal.3d at p. 532.) Conditions of parole must be reasonably related to the compelling state interest of fostering a law-abiding lifestyle in the parolee. (*In re Corona* (2008) 160 Cal.App.4th 315, 321.) A warrantless search condition is, per se, related to future criminality, and thus is a reasonable condition of parole. (*Burgener* at p. 533.)

Respondent seeks to justify appellee's electronic-search condition based generally on his status as an offender, and on his criminal history, repeated failures to comply with probation terms, gang membership, and substance abuse. (OBM 35-36.)

Under respondent's theory, virtually all individuals on parole, and by extension mandatory supervision, would be subject to search of their electronic devices, including cell phones.

The United States Supreme Court in *Riley v. California* (2014) 573 U.S. 373 [189 L.Ed.2d 430, 134 S.Ct. 2473] (*Riley*) observed that "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the 'privacies of life' [citation.]" (*Id.* at p. 403; accord, *People v. Macebo* (2016) 1 Cal.5th 1206, 1215; *People v. Sandee* (2017) 15 Cal.App.5th 294, 300; *In re Erica R.* (2014) 240 Cal.App.4th 907, 913; *In re Malik J.* (2015) 240 Cal.App.4th 896, 902; *People v. Michael E.* (2014) 230 Cal.App.4th 261, 276-277.) The Supreme Court also observed that searches of data stored on cell phones differ materially from searches of physical items. (*Riley* at p. 393.) "Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom." (*Ibid.*)

The Supreme Court reasoned that cell phones differ in both a quantitative and a qualitative sense from other objects that an arrestee might possess, and that cell phones now encompass devices that are in fact minicomputers that also happen to have the capacity to be used as a telephone. (*Riley, supra,* 573 U.S. at

p. 393.) Modern cell phones have immense storage capacity. (*Ibid.*) As opposed to physical searches, which are limited by physical realities and tend to constitute only a narrow intrusion on privacy, cell phone searches can reveal the sum of a person's private life, including political associations, dating profiles, financial information, and medical history. (*Id.* at pp. 393-394; accord, *In re Ricardo P., supra,* 7 Cal.5th at p. 1123.)

The limitation in appellee's search term to photographs, emails, and text messages provides no protection, and is equally intrusive as a general electronic-search term, contrary to respondent's argument. (OBM 37-38.) Photographs, emails, and text messages reveal every aspect of a person's life. Respondent seeks to distinguish *Riley* because it addressed a pre-conviction search incident to an arrest as opposed to a condition of mandatory supervision, post-arrest. (OBM 37.) Respondent misses the point. The sweeping search condition imposed on appellee, allowing unfettered intrusion into his personal life, constitutes "arbitrary and oppressive official action," which *Burgener* prohibits. (*Burgener, supra,* 41 Cal.3d at p. 532.) The invasion into appellee's most private personal affairs—particularly in the absence of any link between electronic devices and his offense—is not reasonably related to the compelling state interest of fostering a law-abiding lifestyle. (See *In re Corona, supra,* 160 Cal.App.4th at p. 321.) The condition fails under *Burgener* and its progeny.

Conclusion

The legislative scheme for post-release supervision dictates that this court should evaluate appellee's conditions of mandatory supervision under the standards applicable to conditions of probation, and not parole. Appellee's electronic-search condition—a sweeping invasion of privacy—does not survive scrutiny even if evaluated similarly to a parole condition under *Burgener*. This court should affirm the judgment of the Court of Appeal.

DATED: August 11, 2020

Respectfully Submitted,

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Certificate of Word Count

(Cal. Rules of Court, rule 8.204(c)(1))

This answering brief on the merits contains approximately 5,496 words per a computer-generated word count.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 11, 2020.

By: 
David Greifinger

Proof of Service

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is 15515 W. Sunset Blvd., No. 214, Pacific Palisades, California 90272

On August 11, 2020, I served the following document(s) described as: **APPELLEE'S ANSWERING BRIEF** on all interested parties to the action by by transmitting an electronic copy or by placing a true copy thereof enclosed in sealed envelope(s) addressed as indicated on the attached service list, in the United States Mail, first class postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 11, 2020, at Pacific Palisades, California.

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