

# POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of  
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| Week Of         | Topic  | Guest | General |
|-----------------|--|-------|---------|
| August 24, 2020 | Electronic Search Conditions for Probationer |       | 30 min. |

*In re Ricardo P.* (2019) 7 Cal.5th 1113, 1128, the Supreme Court addressed the question of when an electronics device search condition is invalid because it “requires or forbids conduct which is not reasonably related to future criminality.” This P&A discusses this analysis in *Ricardo P.* and how it has been applied to recent adult and juvenile cases.

Do you want to ask for an electronic device search condition as a condition of probation? These particular search conditions are frequently challenged on appeal. This P&A offers suggestions on making the adequate record in support of the electronic device search condition.

## I. Overview

### A. Background on Probation Conditions

A trial court has broad discretion to impose reasonable conditions of probation in order to promote the rehabilitation of the probationer and to protect public safety. (Pen. Code, § 12031.1, subd. (j); *People v. Olguin* (2008) 45 Cal.4th 375, 379.)

- Under *People v. Lent* (1975) 15 Cal.3d 481, a probation condition is *invalid* if it: (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is itself not criminal, and (3) *requires or forbids conduct that is not reasonably related to future criminality*. (*Id.* at p. 486, emphasis added.)
- All three prongs of the *Lent* test must be present to *invalidate* a probation condition. In other words, even if two of the three prongs are invalid, the condition will still be upheld if the third condition is valid. (*Olguin, supra*, 45 Cal.4th at p. 379.)

## **B. Supreme Court's Analysis in *Ricardo P.***

At issue in *In re Ricardo P.* (2009) 7 Cal. 5th 1113, was a condition of probation imposed upon a minor requiring the minor to submit to warrantless searches of his electronic devices. The Supreme Court presupposed the first and second *Lent* requirements were satisfied. It said the case turned on the third prong of the *Lent* test – whether the electronics search condition issued by the Alameda County Juvenile Court “requires or forbids conduct which is not reasonably related to future criminality.” Although *Ricardo P.* involved a juvenile, the Supreme Court made clear that its analysis also applies in the adult probation setting because “the *Lent* test governs in juvenile and adult probation cases alike.” (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1119.)

In *Ricardo P.*, the juvenile was declared a ward of the court after he committed two felony burglaries. The trial court placed him on probation and imposed various conditions of probation, including one that required the juvenile to submit electronics under his control to search by a probation officer or peace officer with or without a warrant. The juvenile had told a probation officer that he committed the burglaries because he was not thinking and had stopped smoking marijuana because it interfered with his ability to “think clearly.” In the view of the juvenile court, minors often brag about marijuana usage on the Internet. The juvenile court thought it was important to permit the probation officer to monitor Ricardo’s drug usage through searches of the juvenile’s electronic media and accounts. (*Id.* at p. 1117.)

The case made its way to the California Supreme Court. The Supreme Court accepted the Court of Appeal’s conclusion that the first two prongs of *Lent* were satisfied, in other words, were invalid. First, the electronic search condition had no relationship to the crime for which Ricardo was convicted (burglary) and, second, the condition relates to conduct which is itself not criminal (i.e., bragging about marijuana use on the internet.). Thus the Court turned to the third prong and determined that it too was invalid. The Court concluded that the electronics search condition was not reasonably related to future criminality under *Lent*’s third prong because the burden on the minor’s privacy was substantially disproportionate to the goal of monitoring and deterring drug use. *Lent*’s requirement that a probation condition be related to future criminality “contemplates a degree of proportionality between the burden imposed by the probation condition and the legitimate interests served by that condition.”

Here, the juvenile court imposed the electronics search condition solely to enable probation officers to monitor whether the juvenile was communicating about drugs with people associated with drugs. But the Supreme Court pointed out there was no suggestion in the record that Ricardo had ever used electronic devices to commit, plan, discuss or even consider illegal use or possession of drugs. The Court said the burden the search condition imposed on Ricardo’s privacy was substantially disproportionate to the condition’s goal of monitoring and

detering drug use. (*Id.* at p. 1119.)

The Supreme Court pointed out that *Lent*'s third prong does not require a "nexus" between the probation condition and the defendant's underlying offense. But *Lent*'s requirement that a probation condition be reasonably related to future criminality contemplates a degree of proportionality between the burden imposed by a probation condition and the legitimate interests served by that condition. (*Id.* at p. 1122.)

Thus, the Supreme Court in *Ricardo P.* said that trial courts considering imposition of an electronics device search clause must consider whether, in light of the facts and circumstances in each case, the burdens imposed by the condition are proportional to achieving some legitimate end of probation. Applied here, the Court stated: "The plain language of this electronics search condition would require Ricardo to provide probation officers full access, day or night, not only to his social media accounts but also to the contents of his e-mails, text messages, and search histories, all photographs and videos stored on his devices, as well as any other data accessible using electronic devices, which could include anything from banking information to private health or financial information to dating profiles." (*Id.* at p. 1123.)

The Court said the electronics search condition significantly burdened the privacy interest of the juvenile due to the type and quantity of information stored on electronic devices, yet, nothing suggested the juvenile had ever used an electronic device or social media in connection with illegal activity." (*Ricardo P.*, at pp. 1122-1123.) Thus, the search condition was not reasonably related to future criminality and was therefore invalid under *Lent*. (*Id.* at p. 1124.)

The Supreme Court in *Ricardo P.* emphasized that it was not "categorically invalidating electronic search conditions" and pointed out that in certain cases, the probationer's offense or personal history may provide the court "with a sufficient factual basis from which it can determine that an electronics search condition is a proportional means of deterring the probationer from future criminality." (*Id.* at pp. 1128-1129.) In the absence of evidence that a defendant had used, or will use, electronic devices in connection with any illegal activity, the substantial burdens imposed by a sweeping electronics search condition are not justified. (*Id.* at p. 1122.)

## **II. Examples of "Conduct Reasonably Related to Future Criminality"**

In *Ricardo P.*, the Supreme Court stated, "[I]n certain cases, the probationer's offense or personal history may provide the juvenile court with a sufficient factual basis from which it can determine that an electronics search condition is a proportional means of deterring the probationer from future criminality," citing *People v. Appleton* (2016) 245 Cal.App.4th 717, 724

“[finding electronics search condition reasonable because the defendant lured victim using ‘either social media or some kind of computer software’]; *In re Malik J.* (2015) 240 Cal.App.4th 896, 902 [condition allowing officers ‘to search a cell phone to determine whether [the defendant] is the owner’ was reasonable in light of the defendant’s ‘history of robbing people of their cell phones’].)”

In ***People v. Castellanos*** (2020) 51 Cal.App.5th 267, the defendant was stopped for speeding. The officer saw three cellphones in the center console. The defendant admitted two of the phones belonged to him. The other phone belonged to his girlfriend, who was with him in the car. After a K-9 search of the car, the officer found large amount of cocaine in the trunk and the defendant admitted he was transporting it to someone. Following a plea of no contest to transporting a controlled substance, the court placed the defendant on probation with an electronic search clause requiring the defendant to provide law enforcement with access to any electronic device, including all passwords to any social media accounts. The Court of Appeal upheld the condition, stating, “[T]he relationship between drug distribution and the use of cell phones or electronic devices is more than just ‘abstract or hypothetical.’ ” [get cite]

In ***Alonzo M.*** (2019) 40 Cal.App.5th 156, the juvenile committed a series of felony auto burglaries with a group of other juveniles. The minor and his mother stated his criminal activity was related to “ ‘poor peer association.’ ” (*Id.* at p. 162.) The minor was placed on probation and ordered, in part, to have no contact with his “co-responsibles” or “anyone that he knew to be disapproved of by his parents or probation.” (*Id.* at p. 163.) The juvenile court also imposed an electronic search condition requiring the juvenile to submit his cell phone and any other electronic device under his control to a search “of any medium of communication reasonably likely to reveal” whether he was complying with the terms of his probation with or without a search warrant at any time of day or night. (*Id.* at p. 163.) The Court of Appeal concluded the electronics search condition had to be remanded for modification because it was “not limited to monitoring the company Alonzo keeps.” (*Id.* at p. 167.)

In ***People v. Winston*** 2020 WL 4217769, the defendant pleaded no contest to one count of grand theft, one count of identity theft and one misdemeanor count of receiving stolen property in exchange for dismissal of other charges, and was placed on probation for three years. Despite defendant’s objection, the trial court imposed an electronic search condition at the prosecutor’s request, allowing search and seizure of any electronic devices the defendant owns, possesses or had accessed to, and provide the passwords. In support of the request for the electronic search condition, the prosecution argued that since the defendant pleaded guilty to identity theft, there was a concern of her “getting access to people’s accounts online.” In response to the defendant’s objections, the prosecution offered to tailor the condition by limiting its scope to financial records, but defendant’s counsel rejected the offer.

Since the electronic search condition had no relationship to the defendant's crimes and use of electronic devices is itself not criminal, the issue was the validity of the remaining *Lent* prong—whether the condition was reasonably related to preventing future criminality. The Court of Appeal concluded it was: Based on Winston's criminal history of identity theft and record of dishonesty, there is a legitimate state interest in imposing an electronic search condition since, in today's financial world, identity theft committed offline often goes hand in hand with identity theft committed online. Thus, we think there is a sufficient relationship to future criminality to pass muster under *Lent*, despite the burdensomeness of the condition."

The Court explained its reasoning: "The record shows that, since 2014, Winston has been arrested numerous times for theft-related offenses. Some of these arrests took place in Alabama and led to convictions there for felony second degree property theft. Winston's current offenses involved multiple stolen items with personal identifying information from numerous victims, in addition to stolen merchandise from Kohl's valued over \$1,400." The Court of Appeal noted that defendant's pattern of criminal activity "is persistent and relatively recent." Her interviews with the probation department indicated the defendant showed no remorse and took no responsibility for her behavior. "Thus, the probationer before us has a demonstrated record of poor compliance with probation conditions, is a flight risk, and has said she feels free to commit further property offenses." The Court of Appeal stated that while there was no evidence that defendant used a computer or any other electronic device to carry out her crimes, *Ricardo P.* does not require such a nexus. The Court concluded, "Considering that [the defendant's] pattern of criminal conduct involved property and identity theft, the prosecution's stated need to ensure close digital monitoring of her conduct is legitimate and warrants a substantial degree of intrusion into her life."

Nevertheless, the Court of Appeal focused on the proportionality discussion in *Ricardo P.* and determined the particular search condition here, as worded, "is too broad to meet *Ricardo P.*'s requirement that it be carefully calibrated to the state's legitimate interest in probation supervision." The Court of Appeal acknowledged the stated purpose of the condition is to monitor whether the defendant could obtain access to people's accounts online, and this a legitimate objective. But the Court said access to electronic devices encompasses a wide range of information about an individual that is highly private and irrelevant to this purpose. Thus, the Court remanded the case to the trial court so that the search condition "could be more narrowly tailored to the supervisory objectives of the condition," preventing the defendant from carrying out theft of money or property or identity theft." Although declining to suggest specific language, the Court of Appeal remarked that "limiting the condition to access financial records, as the prosecution offered to do at [defendant's] sentencing, would be an improvement."

In *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, the defendant was a gang member "who promotes his gang on social media, makes violent threats in person to armed police officers, and physically resists armed officers." (p. 1175.) He was granted probation after pleading no

contest to the making of criminal threats, resisting an officer and admitted a gang allegation. The court imposed probation conditions requiring the defendant to provide all passwords to his electronic devices, including cell phones and computers in his custody or control and to submit those devices to search at any time by a peace officer, with or without a warrant. In addition, the probation condition required him to provide all passwords to any social media sites. The Court of Appeal rejected the defendant's challenges to the conditions, stating: "Defendant's current offenses were threatening and resisting a police officer for the benefit of his gang. The password conditions were related these crimes, which were plainly gang related, because they were designed to allow the probation officer to monitor defendant's gang associations and activities. Defendant's association with his gang was also necessarily related to his future criminality. His association with his gang gave him the bravado to threaten and resist armed police officers. The only way that defendant could be allowed to remain in the community on probation without posing an extreme risk to public safety was to closely monitor his gang associations and activities. The password conditions permitted the probation officer to do so. Consequently, the password conditions were reasonable under the circumstances, and the trial court did not abuse its discretion in imposing them." (*Id.* at pp. 1176-1177.)

### **III. Examples of "Conduct Not Reasonably Related to Future Criminality"**

In *People v. Alejandro* 2020 WL 770218, the defendant, an admitted gang member, pleaded no contest to unlawfully carrying a concealed weapon on his person and in a vehicle on a public street. The prosecutor requested an electronics devices search condition. In support of the request, the prosecutor submitted the declaration of a sheriff's deputy who had significant experience in investigating various crimes, including weapons related and gang offenses.

According to the deputy, based on his nearly 20 years of training and experience, persons convicted of weapons related offenses often use the devices to sell or purchase weapons, threaten others, or conspire to commit offenses. They may also post photographs on social media and geolocation data may be used to provide evidence leading to the location of violent offenses, including where weapon sales are occurring and where caches of weapons are kept or hidden. Additionally, the deputy stated in his declaration that gang members commonly boast about their gang activities and affiliations in text or chat communications, in photographic images and videos, and on social media. Many of these images are stored on electronic devices, including cell phones. Geolocation data may show where gang members congregate and where illegal offenses have occurred.

The deputy's declaration explained in general terms that law enforcement needs to have complete access to electronic devices, including all the contents and all passwords. Neither the prosecution's brief nor the deputy's declaration contained any arguments or information specific to the defendant, his criminal background, or the particular offense he committed.

At issue was the third *Lent* prong, i.e., “requires or forbids conduct which is not reasonably related to future criminality.” The Court of Appeal explained the record was factually inadequate to support the request for the electronic search condition: “The factual basis for the plea indicates only that defendant possessed a loaded firearm in his backpack when he was detained by police, and that he admitted he was a gang member. There is no probation report and no evidence regarding any personal history of defendant. Nothing in the record indicates defendant used an electronic device in committing the offense or had any history of using electronic devices to commit, facilitate, or plan criminal conduct, or to brag about such conduct on social media. Nor is there any evidence that as a gang member defendant used electronic devices or social media to boast about his gang membership or affiliation.”

The Court rejected the prosecution’s inadequate efforts to support the electronic search condition: “The only support for the sweeping electronics search condition in the record is [the deputy’s] generalized declaration, unrelated to either defendant or his specific offense, that those who commit weapons-related offenses often use electronic devices to sell or purchase weapons, threaten others, or conspire to commit offenses, may post photographs on social media with weapons, and geolocation data may be used to locate where weapons sales are occurring or where weapons are located. As for gang members, the boilerplate declaration claims they often boast about their gang ties using their cell phones and social media.”

The Court of Appeal stated that such generalized, hypothetical statements – even if presumed true – were unrelated to the *particular* defendant in this case and thus did not satisfy the requirements of *Lent*.

In ***People v. Zadran* 2020 WL 4344606**, “Defendant was convicted of multiple counts of identity theft and . . . one count of grand theft based on an overarching scheme to steal cell phones from Sam’s Club. During the scheme, defendant sent various accomplices into Sam’s Club with other people’s identifying information and fake identification cards to fraudulently execute cell phone service contracts on behalf of the unsuspecting victims of identity theft. There is no evidence, however, that he acquired the identifying information or manufactured the identification cards with the assistance of electronic devices, internet access, or social media. Indeed, there is no evidence as to how defendant acquired the information or identification cards. There is also no evidence that defendant has ever used any electronic storage device or social media in connection with criminal conduct. Given the heavy burden an electronics search condition imposes on defendant’s privacy interests, the evidence supporting a finding under *Lent*’s third prong must be related directly to the defendant or his crime. Because there is no such evidence in this record, the electronic search conditions are invalid under *Lent*, *supra*, 15 Cal.3d 481 and *Ricardo P.*, *supra*, 7 Cal.5th 1113 and must be stricken.”

In ***People v. Davis* 2020 WL 4217769**, “As in *Ricardo P.*, only the third prong of the *Lent* test (conduct not reasonably related to future criminality) is at issue here. The factual basis for the

plea indicates only that defendant filed a false document with a county office in an attempt to take control of a piece of property. Nothing in the record indicates defendant used an electronic device in committing the offense, or had any history of using electronic devices to commit, facilitate or plan criminal conduct, or of using social media to demonstrate she had committed such conduct. The prosecutor speculated that the sophistication of the crime may have required internet usage, but offered no evidence to support imposition of the condition. The trial court's conclusion that the condition was necessary for proper supervision does not satisfy the requirements of *Lent*, any more than the juvenile court's generalized statements about teenagers posting their drug use on social media did in *Ricardo P.*"

In ***People v. Thrower* 2020 WL 1482118**, the defendant pled no contest to a violation of Penal Code section 273.5., subd.(a). The following condition of probation was imposed: "Defendant shall submit his/her person, place, property, automobile, electronic storage devices, and any object under his/her control, including but not limited to cell phones and computers, to search and seizure by any law enforcement officer or probation officer, any time of the day or night, with or without a warrant, with or without his/her presence or further consent."

Attached to the prosecutor's points and authorities in support of the electronics search condition was lengthy declaration from a detective from the Sheriff's Department Hi-Tech Crimes Task Force. The declaration stated in part: "Based on my training and experience, those who have committed domestic violence-related crimes often violate restraining orders, protective orders, or no contact orders which had been issued post-offense. Evidence of these violations is often found on electronic devices. The offender may communicate with the victim via text, chat, or email communication, or they may use a third party (friend) to deliver communications to the victim on the offender's behalf. Offenders may use a multitude of various programs to mask the communication in an attempt to avoid detection (i.e., they may use a Google voice number to call in violation of the order, hoping that the victim does not recognize the caller). Geolocation data may provide evidence that the suspect's device was near the victim location in violation of an order. Photographic images, videos, or voice recording communications are additional methods of communication which may violate orders and evidence of such communications may be found on the offender's electronic device."

The Court of Appeal stated: "There is no evidence in this record indicating defendant used a computer, cell phone, or similar electronic devices in any way related to his offense against [the victim] and no evidence indicating he will use such devices to violate the peaceful contact order. Assuming the sworn declaration from [the detective] could be considered expert testimony upon which a trial court could base findings supporting the condition, it does not support a condition as applied to the facts of this case. The declaration does not tie [the detective's] observations to any particular facts about defendant or his crimes, being instead generic testimony. Given the heavy burden an electronics search condition imposes on the probationer's privacy interests, the evidence supporting a finding under *Lent*'s third prong



must be related to the defendant or his or her crime rather than the type of generic evidence presented here. This no evidence was presented supporting a finding that the electronics search condition imposed was reasonably related to defendant's future criminality."

#### IV. Takeaways

- Is the electronic search condition connected to the *defendant's* criminal conduct or personal history, as opposed to relying on generalities? In other words, focus on the defendant *specifically* and provide those facts to the court.
- A nexus between the probation condition and the defendant's underlying offense is not required so long as the probation condition is reasonably related at curbing the defendant's future criminality.
- Is the electronic search condition *narrowly* tailored to the purpose of the condition? If not, while the appellate court may uphold the search condition, it may remand it for a "tighter fit" to the supervisory objectives it seeks to achieve.
- Look at the burdens imposed by the search condition and ask whether they are *proportional* to achieving some legitimate end of probation? (e.g., in an unpublished case, the defendant was convicted of domestic violence. He was placed on probation and subject to an electronic search condition in which "[p]robation officers would be permitted to search defendant's e-mail, voicemail, and social media accounts without limitation. They also could search defendant's bank accounts, medical records, and any other online account he might maintain". The Court of Appeal stated: "This unfettered access to defendant's constitutionally protected, private information 'imposes a burden that is substantially disproportionate to the legitimate interests in promoting rehabilitation and public safety.'")
- The prosecutor must make a record that can hold up on appeal. (e.g., in an unpublished case, the defendant pleaded guilty to possession of opium for sales. The Court of Appeal concluded the prosecution failed to establish justification for a broad electronic search condition. "[T]here is no evidence in the record that the defendant engaged in electronics communications about drug sales. Nor is there any evidence raising a concern about defendant's future criminality in relation to electronic devices.") Marshall the facts in your case that support the electronic device search condition, mindful of the three prongs of *Lent* that you must address.

#### IV. Some General Notes on Juvenile Electronic Search Conditions

Juvenile probation conditions, like adult probations conditions, are reviewed under the *Lent* criteria. A condition that would be improper for an adult is permissible for a juvenile only if it is tailored specifically to meet the needs of the juvenile. (*In re D.G.* (2010) 187 Cal.App.4th 47.) Juvenile probation conditions are judged by the same three-part standard applied to adult probation conditions under *Lent*. (*In re Ricardo P.* (2019) 7 Cal.5th 1113, 11188-1119.)

The permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults. Even where there is an invasion of protected freedoms, the power of the state to control the conduct of children is broader than the scope of its authority over adults. Thus a probation condition that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.)

Juvenile probation conditions may be broader than those imposed on adult offenders “because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor’s constitutional rights are more circumscribed.” (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.) A condition that would be improper for an adult is permissible for a juvenile only if it is tailored specifically to meet the needs of the juvenile. (*Id.* at p. 53.) In determining reasonableness, courts look to the juvenile’s offenses and social history. (*In re Edward B.*, (2017) 10 Cal.App.5th 1228, 1232-1233.)

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to the P&A author, Mary Pat Dooley, at (510) 272-6249, [marypat.dooley@acgov.org](mailto:marypat.dooley@acgov.org). Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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