ARGUMENT

I. THE PROBATION CONDITION ALLOWING ELECTRONICS SEARCHES IS INVALID UNDER *LENT* AND IS UNCONSTITUTIONALLY OVERBROAD

In assessing the reasonableness of a probation condition under *Lent*, courts look to whether the condition "'requires or forbids conduct which is not *reasonably related* to future criminality . . . .'" (*Lent*, *supra*, 15 Cal.3d at 486 [citation omitted, emphasis added].) Here, the electronics search condition is not reasonably related to future criminality because D.H. did not use electronics in connection with any unlawful conduct in the past and has not shown any propensity to do so during his probationary period, yet the condition allows probation officers to perform an invasive search of his electronic devices to look for signs of prohibited conduct.

Even if the Court were to limit the scope of such searches, the searches would inevitably sweep in vast personal information having no connection to possible probation violations. By imposing this substantial burden on D.H.'s digital privacy rights, without any connection between electronics and his unlawful conduct, the electronics search condition "'is not reasonably related to future criminality.'" (*Lent*, *supra*, 15 Cal.3d at 486 [citation omitted].)

Separately, the condition is unconstitutionally overbroad. Given the trial court's stated reason for the search—to monitor whether D.H. accesses pornography online—the search, at a minimum, must be limited to the areas of D.H.'s cell phone or computer that might reveal whether he accesses pornography. The court's rationale at best supports a search of D.H.'s internet browser history for evidence of accessing pornography.

Yet the court's order places no limits on the areas of D.H.'s phone or computer that probation officers can search. By the very general terms of the condition, officers can search any application on, or accessible through, D.H.'s devices. And, the order specifically allows the search of social media sites "including Facebook, Instagram and Myspace"—even though those sites ban content with

nudity or sexual activity and, thus, would assuredly *not* reveal whether D.H. improperly accessed pornography.[2] (CT 66.) Given that the search condition "permits review of all sorts of private information that is highly unlikely to shed any light on whether" D.H. is accessing pornography, the condition is overbroad. (*In re P.O.* (2016) 246 Cal.App.4th 288, 298.)

A. Background on the Electronics Search Condition

The electronics search condition was included in the trial court's oral pronouncement, the minute order, and the list of "conditions of probation and court orders" that D.H. and his parents signed. (2 RT 8:19-22; CT 66, 70.) However, the terms of the condition were described differently in each instance.

Oral order. The trial court orally instructed D.H. that "any electronic devices in your possession or control are subject to search,

---

[2] See Facebook Community Standards, Encouraging Respectful Behavior, Nudity (prohibiting displays of nudity and sexual activity) (*available at* https://www.facebook.com/communitystandards); Myspace Services Terms of Use Agreement, Section 8, Content/Activity Prohibited (prohibiting content that "exploits people in a sexual or violent manner," "contains nudity," "uses sexually suggestive imagery") (*available at* https://myspace.com/pages/terms - 8.); Instagram Community Guidelines (prohibiting nudity and content that shows sexual intercourse or genitals) (*available at* https://help.instagram.com/477434105621119/).

and you're to provide passwords to allow that search by law enforcement officials or the probation officer." (2 RT 8:19-22.) The court drew a link between the search condition and a separate condition prohibiting D.H. from accessing pornography online, explaining, "I'm not saying you can't use a computer; I'm not saying you can't use a device. I'm saying that you can't access pornography and that the authorities, or probation officer, peace officers, have a right to check your devices to be sure there's no pornography." (2 RT 5:28–6:11.) Defense counsel objected on the basis that the search term deprived D.H. of significant privacy without any nexus to his offense. (2 RT 5:9–6:14.)

Minute order. The minute order from the hearing stated more specifically that D.H. must "[p]rovide all passwords to any electronic devices, including cell phones, computers or notepads, within your custody or control, and submit such devices to search at any time without a warrant by any peace officer." (CT 66.) Further, it specified that D.H. must "[p]rovide all passwords to any social media sites, including Facebook, Instagram and Myspace and to submit those sites to search at any time without a warrant by any peace officer." (*Ibid*.)

Signed terms and conditions. But, the terms and conditions signed by D.H. and his parents required more generally that he "submit person and any vehicle, room or property under your control to search by probation officer or peace officer with or without a search warrant at any time of day or night (including electronic devices & passwords[])]." (CT 70.)

This Court "review[s] conditions of probation for abuse of discretion." (*People v. Olguin* (2008) 45 Cal.4th 375, 379 ("*Olguin*").) The Court reviews a constitutional challenge to a condition de novo, regardless of whether the condition was "challenged in the trial court." (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1345 ("*Pirali*").)

A preliminary issue is which formulation of the probation condition governs. "[T]hough the older rule is to give preference to the reporter's transcript where there is a conflict [in the terms of probation], the modern rule is that if the clerk's and reporter's transcripts cannot be reconciled, the part of the record that will prevail is the one that should be given greater credence in the circumstances of the case." (*Pirali*, *supra*, 217 Cal.App.4th 1341, 1346). Here, the three different formulations of the search condition do not necessarily

conflict, they just differ in the degree of specificity. Given the discrepancy, the Court should determine which formulation governs.

In this case, it makes sense to "give[] greater credence" to the minute order, which provides a fuller explanation of the parameters of the search. (*Pirali*, *supra*, 217 Cal.App.4th 1341, 1346.) "[P]robation conditions 'need not be spelled out in great detail in court as long as the defendant knows what they are.'" (*Ibid.* [citation omitted].) Where, as here, "'the probation conditions are spelled out in detail on the probation order,'" the trial court need not recite the full details. (*Ibid*. [citation omitted].) Further, the level of specificity contained in the minute order helps cure some vagueness problems by indicating that the word "electronics" includes "cell phones, computers, or notepads." (CT 66.) (Nonetheless, as described below, the condition still requires narrowing.)

For purposes of review, the Court should evaluate the electronics search condition as it is described in the minute order.

B. The Invasive Search Condition is Invalid Under *Lent* Because it is Not Reasonably Related to D.H.'s Rehabilitation Where Nothing Connects His Use of Electronics to Unlawful Conduct

In several prior cases, this District has already considered the validity of an electronics search condition under *Lent*. (*In re P.O.*,

supra, 246 Cal.App.4th 288, 291 [collecting cases].) A condition is invalid under *Lent* if "it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .'" (*Lent*, *supra*, 15 Cal.3d at p. 486 [citation omitted].)

Here, the electronics search condition meets the first two prongs for invalidity under the *Lent* test. D.H. admitted to misdemeanor indecent exposure, which does not by definition involve the use of electronics. Although D.H. had a cell phone on him while he was on the bus, he did not use the cell phone in connection with the offense. (CT 43 [noting that D.H. "had an orange cased cellular phone with him"].) Further, the search condition relates to the use of electronics, which "is not in itself criminal," for purposes of the second prong of *Lent*, *supra*, 15 Cal.3d 481, 486.

The central question, then, is whether under the third *Lent* prong the electronics search condition is "'reasonably related to future criminality . . . .'" (*Lent*, *supra*, 15 Cal.3d 481, 486 [citation omitted].) "Not every probation condition bearing a remote, attenuated, tangential, or diaphanous connection to future criminal

conduct can be considered reasonable." (*People v. Brandão* (2012) 210 Cal.App.4th 568, 574.)

The divisions within this district have disagreed over whether an electronics search is valid under the third prong of *Lent* where, as here, there is nothing in the minor's offense, or in the record otherwise, connecting the minor's use of electronic devices to any criminal activity. (*In re P.O.*, *supra*, 246 Cal.App.4th 288, 296.) The California Supreme Court has granted review of this Division's decision in *In re Ricardo P*. (2015) 241 Cal.App.4th 676 (review granted Feb. 17, 2016, S230923) to decide this question.

In the absence of the Supreme Court's guidance on this issue, the Court might revisit its prior reasoning. This Division has relied on the Supreme Court's approval of a pet notification condition in *Olguin* as support for any probation condition "that enables probation officers 'to supervise [their] charges effectively . . . .'" (*In re P.O*, *supra*, 246 Cal.App.4th 288, 295 [citing *Olguin*, *supra*, 45 Cal.4th at p. 379].) "This is true," the Court has stated, "'even if [the] condition . . . has no relationship to the crime of which a defendant was convicted.'" (*Ibid.* [citing *Olguin*, *supra*, 45 Cal.4th at p. 380].)

However, *Olguin* involved a nonintrusive notification condition wholly different from the invasive warrantless search imposed here. In *Olguin*, the Supreme Court considered a probation condition that required a probationer "to notify his probation officer of the presence of any pets at [his] place of residence." (*Olguin*, *supra*, 45 Cal.4th 375, 378.) The Court observed that the notification condition "is a simple task [and] imposes no undue hardship or burden." (*Id.* at 382.) Further, the Court concluded that the condition "facilitates the effective supervision of probationers." (*Id.* at 378.) Based on these facts, the Court determined that the pet notification condition reasonably relates to deterring future criminality under *Lent*. (*Ibid*.)

Olguin does not stand for the sweeping proposition that any condition that facilitates effective supervision of probationers passes the *Lent* test. (*People v. Soto* (2016) 245 Cal.App.4th 1219, 1227 ["We do not believe that *Olguin* compels a finding of reasonableness for every probation condition that may potentially assist a probation officer in supervising a probationer."]; see also *In re J.B.* (2015) 242 Cal.App.4th 749, 757–758.) If *Olguin* did, trial courts could impose any intrusive probation condition with no relation to the probationer's offense and no "reasonableness" restraints—as long as the condition

could be said to enable effective supervision. Video surveillance inside a probationer's home would enable effective supervision. But *Olguin* does not go this far.

Most notably, *Olguin* does not consider whether a condition that imposes a significant burden on constitutional rights—as the electronics search condition does here—would pass muster under the *Lent* test. (*In re J.B.*, *supra*, 242 Cal.App.4th at 757 [explaining that the *Olguin* Court "had no occasion" to discuss the impact of constitutional burdens on the validity of a probation condition that facilitates supervision].) To the contrary, the Court in *Olguin* wholly rejected defendant's argument that the pet notification condition implicated *any* constitutionally protected rights. (*Ibid.*; *Olguin*, *supra*, 45 Cal.4th 375, 384–385.) The Court's approval of the simple notification condition in *Olguin* fails to justify the intrusive electronics search here.

This Court has read the Supreme Court's analysis in *Olguin* as only interested in the practical burdens of complying with the condition, not the condition's burden on constitutional rights. (*In re P.O.*, *supra*, 246 Cal.App.4th 288, 296.) But, given the lack of any constitutional concerns at stake in *Olguin*, there is no basis to draw

this conclusion. Moreover, it is hard to imagine why *practical* burdens would matter to the reasonableness of a probation condition, but not *constitutional* ones.

To the contrary, Division Two of this district has stated that constitutional concerns are "a second level of scrutiny" to the *Lent* test. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942.) In *Bauer*, Division Two struck a condition requiring a probationer "to have his probation officer's approval of his residence" because there was nothing in the record "suggesting in any way that appellant's home life . . . contributed to the crime of which he was convicted or is reasonably related to future criminality" and "[t]he condition is all the more disturbing because it impinges on constitutional entitlements—the right to travel and freedom of association." (*Id.* at 943–945.)

More broadly, California and federal courts routinely determine the reasonableness of a search or other privacy intrusion by balancing the extent of the intrusion against the purported need for the intrusion. (See, e.g., *Skinner v. Railway Labor Executives' Association* (1989) 489 U.S. 602, 619 [explaining, in the context of alcohol and drug testing by an employer, that "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth

Amendment interests against its promotion of legitimate governmental interests'" (citations omitted)]; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 37 ("The comparison and balancing of diverse interests is central to the privacy jurisprudence of both common and constitutional law."); *People v. Melton* (1988) 44 Cal.3d 713, 738 ("the test for court-ordered intrusions beneath the body's surface" requires "'*probable cause to believe the intrusion will reveal [material] evidence*,'" as well as "'an *additional* balancing test to determine whether the character of the requested search is appropriate'" [citation omitted].)

In the criminal context, "while the privacy interest of a probationer has been 'significantly diminished,' it is still substantial." (*United States v. Lara* (9th Cir. 2016) 815 F.3d 605, 610 [internal citation omitted].) "[T]here is a limit on the price the government may exact in return for granting probation. Specifically, 'any search made pursuant to [a] condition included in the terms of probation must necessarily meet the Fourth Amendment's standard of reasonableness.'" (*Id.* at 609 [quoting *United States v. Consuelo-Gonzalez* (9th Cir. 1975) 521 F.2d 259, 262 (en banc)].) And, to determine the reasonableness of a search under the Fourth

Amendment, the court must "balance, 'on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which [the search] is needed for the promotion of legitimate governmental interests." (*Id.* at 610.)

The same type of balancing test likewise applies under the *Lent* "reasonably related" clause. When a probation condition intrudes upon privacy rights, the question of whether it is "reasonably related" to future criminality depends on the level of the intrusion balanced against the particular circumstances that support the search.

Turning to the electronics search condition at issue here, it significantly burdens D.H.'s constitutional privacy rights. The condition specifically allows probation officers to search D.H.'s cell phone or computer. A cell phone search by itself is "differ[ent] in both a quantitative and a qualitative sense" from traditional, non-digital searches, as the United States Supreme Court recently explained in *Riley v. California* (2014) 134 S. Ct. 2473, 2494–2495 ("*Riley*"). (See also *In re J.B.*, *supra*, 242 Cal.App.4th 749, 758–759; *In re Erica R.* (2015) 240 Cal.App.4th 907, 913.) And, the same principle holds true for a computer search.

The Supreme Court's privacy concerns in *Riley* are not rendered inapplicable here simply because *Riley* involved an arrestee, rather than a probationer. "Although *Riley* concerned warrantless searches of cell phones incident to arrest, the Court used sweeping language to describe the importance of cell phone privacy." (*Lara*, *supra*, 815 F.3d 605, 611.) Thus, *Riley* speaks to the privacy invasion inherent in *any* cell phone search, regardless of whether the defendant is an arrestee or probationer. (*Id.* at 611–612.)

As far as the level of intrusion, *Riley* explained that "a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." (*Riley*, *supra*, 134 S. Ct. 2473, 2491.) Again, the same is true for a computer.

Further, any attempted restrictions on the scope of a cell phone or computer search would "impose few meaningful constraints on officers," because "[t]he proposed categories would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where." (*Riley*, *supra*,

134 S. Ct. at p. 2942.) Thus, contrary to this Court's comment in *In re P.O.*, using constitutional concerns to simply narrow the search, rather than to prevent it in the first place, does not sufficiently address the privacy invasion inherent in a digital search. (*In re P.O.*, *supra*, 246 Cal.App.4th 288, 296 [stating that the burden of an electronics search on a minor's privacy rights is "a constitutional concern better addressed by the overbreadth doctrine"].)

In contrast to *In re P.O.*, Divisions Two and Three have struck the right "reasonableness" balance between a probationer's privacy rights and the government's interest in monitoring probationers: An intrusive electronics search condition should only be imposed in cases where the juvenile court has found an individualized connection between the probationer's prior use of technology and potential future violations of his probation terms. (*In re J.B.*, *supra*, 242 Cal.App.4th 749, 757–759; *In re Erica R.*, *supra*, 240 Cal.App.4th 907, 913–915.) This protects the privacy interests of juveniles who have not used electronics in connection with prohibited conduct.

At the same time, the nexus requirement does not prevent electronic searches in cases involving the use of a cell phone or social media for criminal conduct. For those juveniles who have used

electronics as part of their past criminal activities, a sufficiently tailored electronics search condition will reasonably relate to future criminality and justify the intrusive monitoring tool.

Here, there is no basis for imposing an intrusive electronics search condition. D.H. did not use his cell phone, or any other electronics, in the commission of his offense. Further, there is no evidence linking the fact that D.H. watched pornography in the past to his decision or motivation to commit the offense. The only reference to D.H. accessing or watching pornography is in his psycho-diagnostic evaluation, which indicates that he has watched pornographic movies on television and, once, when he was 11, watched pornography on a computer. (CT 59.) These facts do not reveal any recent or future proclivity for accessing pornography by phone or computer. Nor are there other reasons to monitor D.H.'s electronic activity, given his "extremely low" recidivism risk. (CT 46.) Under all of these circumstances, warrantless searches of D.H.'s phone and computer are not "reasonably related" to his rehabilitation.

Thus, the electronics search condition must be stricken in full.

C. At a Minimum, the Condition is Overbroad Because it Allows the Search of Large Amounts of Information that Have Nothing to do With D.H.'s Compliance With Probation

Separately, the electronics search condition is unconstitutionally overbroad and, at a minimum, must be modified.

A probation condition "is unconstitutionally overbroad . . . if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.'" (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153 [citation omitted].) "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 [probationer]'s constitutional rights . . . ." (*Ibid.*)

This instant search condition is overbroad because it does not limit the scope of the search to the areas of a cell phone or computer that would show whether D.H. accessed pornography. Both cell phones and computers have a range of applications and programs that contain detailed personal information unrelated to any potential probation violation—such as health and financial information, music, electronic books, online games, and homework assignments. Probation officers do not have a valid basis to search this type of

unrelated data.

Accordingly, the electronics search condition must be limited to the applications or programs on a cell phone or computer that might be used to access or store pornography. For instance, a search of D.H.'s internet browser history may relate to a search for pornography. However, there is no justification for probation officers to search D.H.'s social media accounts (CT 66), because social media sites ban pornography and, thus, would not contain any evidence of D.H. accessing pornography. (See *ante*, p. 14, fn. 2.)

Further, for both overbreadth and vagueness purposes, the electronics search condition should specify that it only applies to "cell phones and computers," and not to other unnamed "electronics" or "devices." Although the minute order also includes "notepads" in the search parameters (CT 66), it is unclear what types of electronic devices qualify as "notepads" and thus the term should be stricken.