In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **CLYDELL BRYANT,** Defendant and Appellant.	Case No. S259956

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

RESPONDENT'S REPLY BRIEF

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ARGUMENT

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

Recognizing a trial court's broad discretion to impose reasonable supervision conditions, this Court held in *People v. Lent* (1975) 15 Cal.3d 481 that a probation condition will not be invalidated unless it is unrelated to the offense, relates to conduct which is not unlawful, and requires or forbids conduct that is not reasonably related to future criminality. The Court clarified in *In re Ricardo P.* (2019) 7 Cal.5th 1113 that there must be proportionality between the goal of a probation condition and the intrusion into a probationer's privacy right in order for the condition to be reasonably related to future criminality under *Lent*. The Court reviewed the particulars of the juvenile probationer's offense and criminal history in its analysis.

When the Court addressed the validity of a *parole* search condition in *People v. Burgener* (1986) 41 Cal.3d 505, it made clear that, although a parole condition must also be reasonably related to future criminality, it is not assessed or justified in the same way that a probation condition would be under the *Lent* test because of the differences between parolees and probationers. Under *Burgener*, supervision conditions that would be invalid under *Lent* for probationers may be permissible for parolees based on the parolee's status alone.

For purposes of assessing the validity of a supervision condition, mandatory supervision is closer to parole than to probation. And, like parole, mandatory supervision can include

broader supervision conditions than what might be permitted for a probationer based on the supervised offender's status alone. This is so because offenders on mandatory supervision, like parolees, were sentenced to imprisonment and similarly have lesser privacy expectations than probationers because they are also reintegrating into society and in constructive custody while under supervision. Under the proper test for appellate review of such conditions, which accounts for the nature of mandatory supervision and the closer monitoring warranted for offenders on mandatory supervision, Bryant's limited electronics search condition is valid. (See OBM 14-39.)

Bryant argues that mandatory supervision is more like probation mainly because mandatory supervision is administered similarly to probation, and a mandatory supervision condition is therefore valid only if it would be upheld as a valid probation condition. (ABM 11-27.) But this ignores the central distinction between probationers and offenders who are sentenced to imprisonment. Mandatory supervision, like parole, is ordered only after probation has been denied and a sentence of imprisonment has been imposed, and it is part of the sentence of imprisonment.

A convicted felon who is ineligible for or denied probation poses greater risk to the public and should reasonably be subject to closer monitoring than a probationer. Yet the Court of Appeal below applied *Lent* to Bryant's electronics search condition in the same way it would have with a probation condition and invalidated the condition because it was not connected to his

particular criminal history, effectively disregarding his status as an offender on mandatory supervision. The better approach for reviewing courts is to apply *Burgener*, which recognizes the greater supervision needs for such offenders, and simply ask whether a condition of mandatory supervision is reasonably related to future criminality, considering the broader conditions that may be warranted for this type of supervised felon.

A. Mandatory supervision is closer to parole than probation

Probation is fundamentally different from the other types of felony supervision. It is reserved for offenders who are deemed suitable for another chance at living a law-abiding life in the community instead of punishment in the form of a sentence of imprisonment. (See OBM 14-15, citing Penal Code, § 1203, subd. (b)(3); *People v. Moran* (2016) 1 Cal.5th 398, 402.)[1] In sharp contrast, mandatory supervision—like postrelease community supervision (PRCS) and parole—applies only after an offender is found to be ineligible or unsuitable for probation and punished with a sentence of imprisonment. (See § 1170, subd. (h)(1)-(3) & (5); § 3000 et seq.; § 3450 et seq.)[2]

As explained in the People's opening brief, and contrary to appellant's central assertion, a split term and the attendant period of mandatory supervision is more akin to a state prison term and the ensuing period of parole than it is to probation.

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

[2] Mandatory supervision and PRCS are distinct; mandatory supervision is not a form of PRCS. (But see ABM 16.)

(See OBM 22-23, citing *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422; accord, *People v. Malago* (2017) 8 Cal.App.5th 1301, 1305; *People v. Relkin* (2016) 6 Cal.App.5th 1188, 1193-1194; *People v. Rahbari* (2014) 232 Cal.App.4th 185, 192; *People v. Martinez* (2014) 226 Cal.App.4th 759, 762-763; *United States v. Cervantes* (9th Cir. 2017) 859 F.3d 1175, 1181; Couzens & Bigelow, Felony Sentencing After Realignment (May 2017) http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf, at pp. 16-17, 54.) Much like parolees, offenders sentenced to a split term serve the first portion of their sentence of imprisonment in custody and the second portion in constructive custody under mandatory supervision. They are completing a sentence of imprisonment and even receiving custody credit for each day served under mandatory supervision. (§ 1170, subd. (h)(5)(B) [while on mandatory supervision "the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court"]; see § 667.5, subd. (d) [for prior prison term purposes, "defendant shall be deemed to remain in prison custody for an offense until the official discharge from custody, including any period of mandatory supervision"].) A probationer is not completing a sentence of imprisonment and was never sentenced to imprisonment at all.

1. Mandatory supervision is more like parole even though it is monitored by probation officers

Despite the fundamental distinction between probation on the one hand and, on the other, mandatory supervision, PRCS, and parole, Bryant maintains that mandatory supervision is more like probation primarily because the two are administered similarly. Like the Court of Appeal below, he relies on the language in section 1170, subdivision (h)(5)(B), which provides that an offender on mandatory supervision "shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation." (See ABM 13, 22-24; *People v. Bryant* (2019) 42 Cal.App.5th 839, 849.)

When construing a statute, the reviewing court's "'fundamental task [] is to determine the Legislature's intent so as to effectuate the law's purpose.'" (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265.) The reviewing court "'begin[s] with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent.'" (*Ibid.*) "The plain meaning controls if there is no ambiguity in the statutory language." (*Ibid.*) "If, however, the statutory language may reasonably be given more than one interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme

encompassing the statute." (*Ibid.*, quotations and citations omitted.)

Bryant suggests the language of section 1170, subdivision (h)(5)(B), means that *all* of the terms and conditions imposed upon an offender on mandatory supervision must be the same as those that would be imposed on a probationer. (ABM 13, 22-24.) But the subdivision focuses solely on the manner in which mandatory supervision is to be administered and supervised by the county probation officer. The subdivision says nothing about the permissible scope or substance of the specific supervision conditions being administered or, more importantly, a trial court's authority to set such conditions. (See OBM 29-30; see, e.g., *Rahbari*, *supra*, 232 Cal.App.4th at p. 195 [explaining that section 1170, subdivision (h)(5)(B), "focuses on the county probation officer's supervision, not the trial court's authority" to set terms and conditions, and other statutes enacted after its passage "suggest that the Legislature has not considered that provision to mean *all* terms, conditions, and procedures of probation apply to mandatory supervision"]; *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 764 [the language "pertains to the *nature and manner of supervision by the probation officer over the defendant*—in other words, the nature and manner of the supervision itself"—and did not authorize

imposition of probation supervision costs for mandatory supervision under former version of section 1203.1b].)[3]

Bryant also overlooks that section 1170, subdivision (h)(5)(B), states that the probation officer is to supervise offenders on mandatory supervision according to the "terms, conditions, and procedures *generally applicable*" to probationers. (Italics added; see ABM 22-24.) A plain reading of the phrase "generally applicable" confirms that the Legislature allowed for some variance between the probation department's supervision of offenders on mandatory supervision and those on probation. (§ 1170, subd. (h)(5)(B).) "Generally" means "in a general manner," "in disregard of specific instances and with regard to an overall picture," and "usually." (https://www.merriam-webster.com/dictionary/generally.) While probation officers supervise offenders on mandatory supervision in the same general manner as probationers, and many of the terms and conditions are the same, there are and should be some differences. (See, e.g., *Rahbari*, *supra*, 232 Cal.App.4th at p. 195 [the Legislature enacted "specific statutes for persons on mandatory supervision,

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[3] Section 1203.1b, subdivision (a), has since been amended to include that offenders placed on mandatory supervision may be ordered to pay supervision costs to the probation department. Additionally, *Rahbari*, *Ghebretensae*, and *Fandinola*, *supra*, 221 Cal.App.4th 1415, addressed an earlier version of section 1170, subdivision (h)(5), which has also been amended. However, their discussions of the provision stating that probation officers are to supervise offenders on mandatory supervision according to the "terms, conditions, and procedures generally applicable" to probationers remains relevant as that language has not changed.

some of which are the same as those for probationers and some of which are different"]; Couzens & Bigelow, *supra*, at p. 17 [explaining that mandatory supervision conditions "likely will resemble traditional terms of probation," but care should be exercised in selecting terms and conditions that will impact treatment and the probation officer's workload depending upon the actual custody time and supervision time ordered].)[4]

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[4] There are many overlapping terms and conditions commonly imposed on all types of felons on supervision, including that they obey all laws, periodically report to their supervision officers, submit to warrantless searches, are subject to some travel restrictions, and are prohibited from using or possessing weapons. (See, e.g., § 3067, subd. (b)(2) [violation of any law while on parole will result in incarceration in county jail or, if previously on parole, in state prison], (b)(3) [parolees must submit to warrantless search condition]; § 3453, subds. (b) [offenders on PRCS must obey all laws], (e) [report to probation agency as directed], & (f) [warrantless search condition], (h)(1) [notify of change of address], (k)-(l) [obtain permission for travel]; 15 Cal. Code Regs. § 2512 [listing general requirements for all parolees, including that they obey all laws, report to parole agent, obtain permission for certain travel, not own or possess weapons]; *People v. Hall* (2017) 2 Cal.5th 494, 499-500 [discussing probation conditions prohibiting weapons use or possession]; *Moran*, *supra*, 1 Cal.5th at p. 406 [probation conditions limiting movement or travel are common]; *People v. Robles* (2000) 23 Cal.4th 789, 795 [noting warrantless search conditions for probationers].) For example, the Los Angeles County Probation Department website lists two of the same general reporting and travel requirements for probationers, offenders on mandatory supervision, and offenders on PRCS. (See https://probation.lacounty.gov/instructions [noting all probationers are required to report to probation officer and may not leave county without permission]; https://probation.lacounty.gov/community-supervision-

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Indeed, if the Legislature intended for section 1170, subdivision (h)(5)(B) to mean that *all* terms, conditions, and procedures must be the same, it would have had no reason to expressly amend some of the statutes that govern probation terms to include mandatory supervision, and it would not have done so without amending all of the relevant statutes. For example, the Legislature expressly amended some provisions of section 1203.3, governing revocation and modification of probation, to include mandatory supervision (§ 1203.3, subds. (a) & (b)(1)-(2), (6)), but it did not do so with the provisions permitting modification of victim restitution orders or revocation of probation based on a probationer's escape from jail (§ 1203.3, subds. (b)(3)-(5), (c), & (d)).[5] Additionally, instead of amending

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mandatory-sentence [same as to mandatory supervision and PRCS].)

[5] The Legislature reasonably did not extend the restitution provisions to mandatory supervision because victim restitution ordered under section 1202.4 for offenders who are sentenced to imprisonment is more limited than victim restitution that may be ordered as a condition of probation under section 1203.1, subdivision (b). (See *People v. Martinez* (2017) 2 Cal.5th 1093, 1101; *People v. Anderson* (2010) 50 Cal.4th 19, 29 ["When section 1202.4 imposes its mandatory requirements [for losses from the crime of which defendant was convicted] in favor of a victim's right to restitution, the statute is explicit and narrow. When section 1203.1 [which permits restitution as a probation condition] provides the court with discretion to achieve a defendant's reformation, its ambit is necessarily broader"], quotations and citations omitted; *Rahbari*, *supra*, 232 Cal.App.4th at pp. 194-196 [finding victim restitution ordered for offenders sentenced to a split term is imposed under section

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the statute governing *probation* revocation fines (§ 1202.44), the Legislature amended the statute governing *parole* revocation fines to include mandatory supervision revocation fines (§ 1202.45, as amended by Stats. 2012, ch. 762 (S.B. 1210), § 1).

Mandatory supervision is not equivalent to probation simply because both programs are monitored by the county probation department in a similar way. (See *Martinez*, *supra*, 226 Cal.App.4th at pp. 762-763 [explaining that, although mandatory supervision "is to be monitored by county probationer officers 'in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation' (§ 1170, subd. (h)(5)(B)(i)), 'this does not mean placing a defendant on mandatory supervision is the equivalent of granting probation or giving a conditional sentence'"], quoting *Fandinola*, *supra*, 221 Cal.App.4th at p. 1422; Couzens & Bigelow, *supra*, at pp. 54-55 ["Merely because the probation officer is supervising the defendant does not make [mandatory supervision] 'probation' any more than people being supervised by probation on postrelease community supervision following release from prison"].) Section 1170, subdivision (h)(4), itself clarifies that probation is distinct from mandatory supervision by providing that "[n]othing in this subdivision shall be construed to prevent *other* dispositions

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1202.4, not 1203.1, because these offenders serve the equivalent of a state prison term and may not refuse mandatory supervision; that the Legislature did not extend section 1203.3's victim restitution provisions to mandatory supervision supports that construction].)

authorized by law, including pretrial diversion, deferred entry of judgment, or *an order granting probation* pursuant to Section 1203.1." (Italics added.)

The realignment legislation could have provided that offenders sentenced to a split term were to serve the supervision portion of their sentence on *probation*. But it does not. And, tellingly, an early version of section 1170, subdivision (h)(5), providing for a defendant's split term to include "a period of county jail time and a period of *mandatory probation*" (Stats. 2011, ch. 39 (A.B. 117), § 27, eff. June 30, 2011, italics added), was revised to replace mandatory probation with *mandatory supervision*. (See OBM at 31-32, fn. 9.) Before the statute's effective date, it was amended to omit "mandatory probation" and instead explain that a trial court was to "suspend execution of a concluding portion of the term . . . during which time the defendant shall be supervised by the county probation officer . . . for the remaining unserved portion of the sentence imposed by the court." (Stats. 2011-2012 1st Ex. Sess., ch. 12 (A.B. 17), § 12, eff. Sept. 21, 2011, operative Oct. 1, 2011). Soon thereafter, the statute was amended again to clarify that the supervision portion of a split term "shall be known as mandatory supervision." (§ 1170, subd. (h)(5)(B), as amended by Stats. 2012, ch. 43 (S.B. 1023), § 27, eff. June 27, 2012; see § 19.9, added by Stats. 2012, ch. 43 (S.B. 1023), § 14 [defining "mandatory supervision"]; *Rahbari*, *supra*, 232 Cal.App.4th at pp. 192-193; *Ghebretensae*, *supra*, 222 Cal.App.4th at p. 766.)

Bryant further suggests that mandatory supervision is distinguishable from parole because some parole and PRCS terms and conditions are set by statute, including warrantless search conditions and procedures required upon release from actual custody, whereas similar mandatory supervision conditions are generally imposed by the trial court. (See ABM 17-18, 25-26, citing § 3067, subd. (b)(3).) This, again, addresses administrative differences between the different forms of supervision; it does not mean that warrantless search conditions, for example, are not equally justified for offenders on mandatory supervision or that the Legislature intended for lesser restrictions to be placed on them.

It makes sense that the Legislature codified some terms and conditions for offenders on PRCS, as it had with parolees, not only because offenders on PRCS similarly transition from California Department of Corrections and Rehabilitation (CDCR) custody to supervision but also because they are monitored by their local county probation department instead of CDCR. Since inmates were not transferred from state custody to local county supervision prior to the enactment of the realignment legislation, the Legislature reasonably provided direction to the various counties. (See §§ 3450, 3451, 3453.) However, because offenders sentenced to a split term remain local, transitioning from local county jail custody to local county supervision, the Legislature logically left the specific conditions and procedures to the particular county. (See generally § 17.5, subd. (a)(5) [explaining that realigning some felony offenders "to locally run community-

based corrections programs, which are strengthened through community-based punishment, evidence-based practices, improved supervision strategies, and enhanced secured capacity, will improve public safety outcomes among adult felons and facilitate their reintegration back into society"].)

Moreover, the Legislature's reason for statutorily mandating parole search conditions, in particular, was to permit officers to search parolees based on status alone without having to verify the existence of search conditions for a particular parolee. (See § 3067, subd. (b)(3); Sen. Rules Com., Ofc. Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2284 (1995-1996 Reg. Sess.) August 26, 1996.) Lawful warrantless search conditions preceded the enactment of section 3067. In fact, this Court has twice ruled that warrantless search conditions are per se reasonable for all parolees due to the nature of parole and the differences between that form of supervision and probation, even though parole search conditions were not statutorily mandated at the time. (See *People v. Reyes* (1998) 19 Cal.4th 743, 752-753 [explaining, as to a 1995 conviction, that, "[a]s a convicted felon still subject to the Department of Corrections, a parolee has conditional freedom—granted for the specific purpose of monitoring his transition from inmate to free citizen. The state has a duty not only to assess the efficacy of its rehabilitative efforts but to protect the public, and the importance of the latter interest justifies the imposition of a warrantless search condition"]; *Burgener*, *supra*, 41 Cal.3d at pp. 532-533 [search conditions are per se reasonable for all parolees as parole is a period of

reintegration into society requiring closer monitoring than probation]; see also § 3067, subd. (b)(3) [Added by Stats.1996, c. 868 (A.B. 2284), § 2].)

The Court's reasoning in *Reyes* and *Burgener* extends to offenders on mandatory supervision. At the time of those decisions, offenders who are now on mandatory supervision or PRCS would have been placed on parole. (See OBM at 30-31; § 1170, subd. (h)(5); § 3450; § 3451, subd. (a); *People v. Scott* (2014) 58 Cal.4th 1415, 1421, 1424-1426; *People v. Cruz* (2012) 207 Cal.App.4th 664, 671.) The realignment legislation simply transferred custody and supervision of these would-be parolees from the State to local county authorities in an effort to address the fiscal emergency declared in 2011. (See OBM at 30, citing § 17.5, subd. (a)(5), § 3450, subd. (a)(5), and Couzens & Bigelow, *supra*, at p. 6; see also *People v. Noyan* (2014) 232 Cal.App.4th 657, 664 [realignment legislation was enacted to address a fiscal emergency and public safety, and it shifted responsibility for housing and supervising certain felons from the State to the county]; *Cruz*, *supra*, 207 Cal.App.4th at p. 671.) It did not change the fact that these felons are denied probation and sentenced to imprisonment because they pose greater risk to the public, nor did it change the length of the sentences imposed or the fact that they are completing their sentences while under supervision.[6] As with parole, the focus of mandatory supervision

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[6] According to a study of information from twelve counties from October 2011 to October 2015, offenders on mandatory supervision and PRCS were more likely than probationers to

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continues to be on the supervisee's reintegration into society following incarceration. (See OBM 32, citing § 17.5, subd. (a)(5), § 3000, subd. (a)(1), & § 3450, subd. (a)(5); *Burgener*, *supra*, 41 Cal.3d at p. 533; *Martinez*, *supra*, 226 Cal.App.4th at p. 763.)

2. Mandatory supervision, like parole, is compulsory and may not be refused

Bryant's further attempt to distinguish mandatory supervision from parole, by arguing that the former is discretionary and therefore more like a grant of probation, is misleading. He contends that, since a trial court retains some discretion to deny mandatory supervision, the court must make an express or implicit finding at 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." (ABM 24.) This argument inverts the statutory presumption for a split term and misses the point.

As the People explained in the opening brief, unlike a grant of probation, imposition of a split term "does not reflect any discretionary determination by a trial court *that a defendant is unsuited for a sentence of imprisonment*." (OBM 24, italics added; see also *Burgener*, *supra*, 41 Cal.3d at pp. 531-533 [noting mandatory nature of parole and that it does not reflect a

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serve time in county jail for new offenses during their supervision periods, and offenders on mandatory supervision were the most likely to be returned to custody for new felony offenses. (Nguyen, Grattet, & Bird, California Probation in the Era of Reform (August 2017), Public Policy Institute of California, https://www.ppic.org/wp-content/uploads/r_0817vnr.pdf, *3, 9.)

discretionary determination by the trial court that prison is not necessary].) Similar to parole, mandatory supervision applies only *after* a trial court denies probation and determines that a sentence of imprisonment is warranted. (See *Fandinola*, *supra*, 221 Cal.App.4th at p. 1422; *Martinez*, *supra*, 226 Cal.App.4th at pp. 762-763.) Once that determination is made, a split term with a period of mandatory supervision is statutorily presumed and generally required. (§ 1170, subds. (h)(5)(A) [split term "shall" be imposed "[u]nless the court finds that, in the interests of justice, it is not appropriate in the particular case"], (h)(5)(B) ["[t]he period of supervision shall be mandatory"]; Cal. Rules of Court, rule 4.415(a) [reflecting the statutory presumption in favor of mandatory supervision].)

Section 1170, subdivision (h)(5), originally provided trial courts with a choice between imposing a full custody term or a split term, but the statute was amended as of January 1, 2015, and now presumes that a split term will be imposed. (See § 1170, subd. (h)(5)(A), as amended by Stats. 2014, ch. 26 (A.B. 1468), § 17, effective January 1, 2015.) Bryant's suggestion that there is still an equal choice between the two is based upon case law pre-dating the 2015 amendment. (See ABM 13-14, citing *Wofford v. Superior Court* (2014) 230 Cal.App.4th 1023, 1033 [setting forth the pre-2015 sentencing choices under section 1170, subdivision (h)(5)].) Post-2015, a trial court's selection of a straight term of incarceration without a period of mandatory supervision is the exception, and a finding justifying the court's order is required only in that exceptional circumstance where the court

determines, in the interests of justice, that a split term is not appropriate. (See Cal. Rules of Court, rules 4.415(a) [statutory presumption in favor of a split term with a period of mandatory supervision should lead to limited denials], 4.415(d) [court must state on the record the reasons for denying mandatory supervision].)

Mandatory supervision is also "mandatory" and closer to parole in that an offender may not refuse it. (See § 1170, subd. (h)(5)(B) ["[t]he period of supervision shall be mandatory"]; *Rahbari*, *supra*, 232 Cal.App.4th at pp. 194-195 [defendant may not refuse mandatory supervision]; Couzens & Bigelow, *supra*, at pp. 16-17 [defendant may not refuse mandatory supervision, and court may set appropriate conditions without regard for the defendant's willingness to accept them]; see also § 3000, subd. (a)(1) [a state prison term "shall include a period of parole supervision"]; *Burgener*, *supra*, 41 Cal.3d at pp. 529, 531 [noting mandatory nature of parole].) A probationer, however, has a choice between accepting the terms of probation or a sentence of imprisonment. (See *People v. Anderson* (2010) 50 Cal.4th 19, 32; *Rahbari*, *supra*, 232 Cal.App.4th at p. 195.) Accordingly, a trial court's imposition of a split term, which is generally required once probation is denied in a section 1170, subdivision (h)(5)-eligible case, is not at all comparable to a court's discretionary choice to grant probation in lieu of punishment.

3. Offenders on mandatory supervision may be subject to broader supervision conditions because they require closer monitoring than probationers

Bryant characterizes the People's argument, that offenders on mandatory supervision are continuing their sentences while probationers were never sentenced to imprisonment, as making "a distinction without a difference" because probationers may be ordered to serve time in county jail as "punishment" for a probation violation. (ABM 26.) But this distinction is precisely the reason the Court has already ruled that parolees and probationers are not in the same position for purposes of assessing their supervision conditions. (*Burgener*, *supra*, 41 Cal.3d at pp. 531-533; see also *Martinez*, *supra*, 226 Cal.App.4th at pp. 762-763 [finding, for similar reasons, that mandatory supervision is more akin to parole and its conditions should be assessed like parole conditions, rather than probation conditions].) As the Court explained in *Burgener*, "[t]he 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 p. 533.) The same is true with a jail term served as a condition of reinstatement of probation after a probation violation. (Compare *People v. Jeffrey* (2004) 33 Cal.4th 312, 317 [jail term served after probation violation is a condition of reinstatement of probation], with ABM

26 [referring to jail term served after probation violation as "punishment"].)

The United States Supreme Court has similarly explained that parolees have even "fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." (*Samson v. California* (2006) 547 U.S. 843, 850; accord, *People v. Schmitz* (2012) 55 Cal.4th 909, 921.) By the same token, offenders on mandatory supervision likewise have fewer privacy expectations than probationers. (See *Fandinola*, *supra*, 221 Cal.App.4th at pp. 1421-1422 [split term and attendant period of mandatory supervision is more akin to a state prison term and parole]; accord, *Rahbari*, *supra*, 232 Cal.App.4th at p. 195; *Martinez*, *supra*, 226 Cal.App.4th at p. 763; see also *Cervantes*, *supra*, 859 F.3d at p. 1181.) And the State has the same overwhelming interest in supervising them due to their higher recidivism rate and the greater risk they pose to the public than probationers. (See OBM 26-27; *Samson*, *supra*, 547 U.S. at p. 853 [the State has an overwhelming interest in supervising parolees because they are more likely to commit future crimes]; *Schmitz*, *supra*, 55 Cal.4th at p. 921 [same].)

Mandatory supervision, PRCS, and parole apply only after probation is denied, and the sentence of imprisonment "has come about just because [that offender] poses a significantly greater risk to society" than a probationer. (*Burgener*, *supra*, 41 Cal.3d at p. 533.) For these reasons, offenders on mandatory supervision, like parolees, are subject to closer monitoring and

can reasonably be subject to broader supervision conditions than probationers.

B. Bryant's mandatory supervision condition is reasonably related to preventing future criminality

The reasonableness of a supervision condition must be informed by the type of supervised offender subject to it, and a condition that might not be reasonable when imposed on a probationer can be reasonable for a parolee or, by extension, an offender on mandatory supervision. (See *Burgener*, *supra*, 41 Cal.3d at p. 532 ["[t]he distinction between felony parole and probation justifies the inclusion of the parole search condition in all parole agreements"]; cf. *Ricardo P.*, *supra*, 7 Cal.5th at p. 1118 [probation condition that might be impermissible for an adult is not necessarily unreasonable for a juvenile probationer].) Indeed, a mandatory supervision or parole condition may be reasonably related to future criminality due to the supervised offender's status alone, whereas the reasonableness of a similar probation condition may depend upon a more individualized inquiry concerning the particular probationer, the offense, or the interests at stake. (Compare *Burgener*, *supra*, 41 Cal.3d at p. 532, with *Ricardo P.*, *supra*, 7 Cal.5th at pp. 1116, 1122 [requiring proportionality between the goal of the probation condition and the intrusion into the probationer's privacy right, and reviewing particulars of juvenile probationer's offense and criminal history].)

Nevertheless, following the Court of Appeal below, Bryant contends that the Court should assess his mandatory supervision condition under *Lent*, *supra*, 15 Cal.3d at page 486, in the same

way it would assess a probation condition, without considering the different privacy and supervision interests at issue. (Compare ABM 21-22 & *Bryant*, *supra*, 42 Cal.App.5th at p. 849 [assessing mandatory supervision condition under *Lent* in the same way as a probation condition], with *Burgener*, *supra*, 41 Cal.3d at pp. 532-533 [although a parole condition must also be reasonably related to future criminality, it is not analyzed or justified in the same way as a probation condition because parolees are denied probation and sentenced to imprisonment].) *Lent* adopted the rule that a probation condition will not be deemed invalid unless it "'(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.'" (*Lent*, *supra*, 15 Cal.3d at p. 486.) But *Lent* involved an interpretation of section 1203.1, subdivision (j), governing probation conditions. (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1128; *Lent*, *supra*, 15 Cal.3d at p. 486.)

As noted, most of the lower courts to address the issue as well as the Ninth Circuit Court of Appeals have agreed that mandatory supervision is more akin to parole than probation. (See *Fandinola*, *supra*, 221 Cal.App.4th at p. 1422; accord, *Malago*, *supra*, 8 Cal.App.5th at pp. 1305-1306; *Relkin*, *supra*, 6 Cal.App.5th at pp. 1193-1194; *Rahbari*, *supra*, 232 Cal.App.4th at p. 195; *Martinez*, *supra*, 226 Cal.App.4th at p. 763; see also *Cervantes*, *supra*, 859 F.3d at p. 1181.) For this reason, the Court of Appeal in *Martinez* further agreed that mandatory supervision conditions should be assessed like parole conditions. (*Martinez*,

supra, 226 Cal.App.4th at pp. 762-763; see also *Cervantes*, *supra*, 859 F.3d at p. 1181 [because mandatory supervision is more like parole than probation, the line of precedent applicable to parolees governs a Fourth Amendment analysis of a search conducted pursuant to a mandatory supervision search condition].)

Bryant notes, as did the People in the opening brief, that *Martinez* ultimately applied *Lent* to a mandatory supervision condition despite its conclusion that such conditions should be assessed like parole conditions. (See ABM 21-22; OBM 28-29.) As explained in the People's opening brief, *Martinez* relied on the flawed reasoning in *In re Stevens* (2004) 119 Cal.App.4th 1228, 1233, in applying *Lent*. (See OBM 28-29, citing *Martinez*, *supra*, 226 Cal.App.4th at p. 764; compare *Stevens*, *supra*, 119 Cal.App.4th at p. 1233 [assessing a parole condition in the same way as a probation condition under *Lent*, without acknowledging *Burgener* and after finding a parolee's and probationer's privacy interests are the same], with *Samson*, *supra*, 547 U.S. at p. 850 [parolees have fewer privacy expectations than probationers]; & *Burgener*, *supra*, 41 Cal.3d at pp. 532-533 [parole and probation conditions are not assessed in the same way].) And it is not clear whether *Martinez* considered the distinctions between a probationer and an offender on mandatory supervision when it upheld the mandatory supervision condition there. (See *Martinez*, *supra*, 226 Cal.App.4th at pp. 764-756.)

As noted in the opening brief, *Lent* could be applied in a manner that appropriately considers the different interests implicated by supervisees on mandatory supervision or parole,

and Bryant's electronics search condition would be valid under that kind of application of *Lent* or under *Burgener*. (OBM 33-39.)[7] But *Lent* was tailored to assess probation conditions and the lower courts have not accounted for the distinctions between probationers and the other types of supervised felons in applying it. Therefore, the better approach when assessing mandatory supervision, PRCS, or parole conditions is to follow *Burgener* and simply ask whether the condition is reasonably related to effective supervision or future criminality. (See *Burgener*, *supra*, 41 Cal.3d at pp. 532-533.) This inquiry appropriately takes into account conditions related to the offense, the offender and his or her future and past criminality, any prohibitions on unlawful activity, and the needs attending meaningful supervision *for that type of supervisee*.

Under the proper test, the electronics search condition imposed as one of Bryant's mandatory supervision conditions is reasonably related to effective supervision and deterring future criminality. Bryant was denied probation based on his recidivism, including his history of reoffending while on probation and the threat he posed to the community by possessing a loaded and unregistered firearm in a high-crime area known for shootings. (3RT 1210-1212.) The trial court made clear that

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[7] As the People conceded in the Court of Appeal, Bryant's electronics search condition would be invalid if assessed under the rubric of *Ricardo P.*, meaning it would be invalid if assessed in the same way as a probation condition. (See *Ricardo P.*, *supra*, 7 Cal.5th at p. 1123, citing *People v. Bryant* (2017) 10 Cal.App.5th 396, 405.)

Bryant was not suitable for probation, and it felt the court system had been too lenient with Bryant's prior grants of probation. (3RT 1211-1212.) By denying probation and imposing a sentence of imprisonment, the court made the determination that Bryant posed greater risk to the public and needed closer monitoring than a probationer. (See generally *Cervantes*, *supra*, 859 F.3d at p. 1181 [in imposing a split term, "a court must first conclude that the facts relating to the defendant's crime or criminal background are sufficiently aggravated to warrant imprisonment as opposed to probation, a judgment that itself indicates the defendant 'poses a significantly greater risk to society' than offenders placed on probation"], quoting *Burgener*, *supra*, 41 Cal.3d at p. 533.)

While on mandatory supervision, Bryant is in constructive custody and subject to more rigorous supervision, like a parolee. The reasonableness of his supervision conditions therefore does not depend on the conditions being tailored to his particular criminal conduct. And his electronics search condition—permitting searches of only his text messages, emails, and photographs—is reasonably limited. (See 3RT 1216-1218.) It facilitates monitoring of his potential drug use or sales, gang association, and weapons possession, and it helps ensure compliance with his terms of release. Because Bryant's status as a convicted felon on mandatory supervision inherently favors the State's overwhelming interest in supervision over his extremely limited privacy interests, his electronics search condition is valid. (See generally *Samson*, *supra*, 547 U.S. at pp. 850, 853 [noting

overwhelming supervisory interest in parolees and their extremely diminished privacy interests]; *United States v. Johnson* (9th Cir. 2017) 875 F.3d 1265, 1275 [upholding a cell phone search, while recognizing significant privacy interests in cell phones, due to the defendant's status as a parolee, and noting his reduced privacy expectations in comparison to a probationer]; *People v. Delrio* (2020) 45 Cal.App.5th 965, 971 [upholding parole search of cell phone, conducted pursuant to an electronics search condition, finding the balance favored the State's substantial interest in supervision over the parolee's diminished privacy expectations; the Court also noted that parolees remain in legal custody of CDCR and that it was not aware of any court invalidating a search of a parolee's cell phone or applying *Riley v. California* (2014) 573 U.S. 373 to a parole search].)

Even if a more individualized inquiry were required, Bryant's electronics search condition would be valid, considering his greatly diminished privacy expectations and the closer monitoring that is warranted under mandatory supervision. Although Bryant's instant offense did not involve electronic devices, he demonstrated a flagrant disregard for past probation conditions and had committed a variety of offenses, resulting in ten prior misdemeanor convictions, the felony conviction here, and arrests on two new cases while the instant case was pending. He also had a history of alcohol-related and drug-related offenses as well as gang membership. (3RT 1211-1215; 1CT 109, 118-120.) Occasional monitoring of photographs, texts, and emails on his electronic devices provides the meaningful supervision

necessary to ensure compliance with his other terms of release and to deter his future criminality.

The People are not asking this Court to extend *Burgener* to a wholly different category of supervised felons; the People are simply asking this Court to recognize that offenders on mandatory supervision, who would have been parolees prior to the realignment legislation, are still more similar to parolees than to probationers and that their supervision conditions should be assessed accordingly. It is important to keep in mind that, in response to a fiscal emergency, the realignment legislation mainly shifted responsibility for housing and supervising some convicted felons from the State to the local counties. The legislation did not change the fact that these convicted felons were sentenced to a term of imprisonment due to the greater risk they pose to the public. Offenders on mandatory supervision are in constructive custody and, like parolees, are reintegrating into society following incarceration. Any meaningful assessment of the validity of their supervision conditions must address their status and allow for the broader conditions that may be necessary in order to effectively supervise them. Considered in the proper context, Bryant's electronics search condition is reasonably related to effective supervision and deterring future criminality.

CONCLUSION

The Court of Appeal's order striking Bryant's electronics search condition should be reversed. Under *Burgener*, this Court should uphold the condition permitting warrantless searches of photographs, text messages, and emails on his electronic devices as a valid mandatory supervision condition.

Dated: October 30, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF uses a 13 point Century Schoolbook font and contains 5,740 words.

Dated: October 30, 2020

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DECLARATION OF ELECTRONIC SERVICE + SERVICE BY MAIL

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

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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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 October 30, 2020, at Los Angeles, California.

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

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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