



SWARM LITIGATION BULLETIN

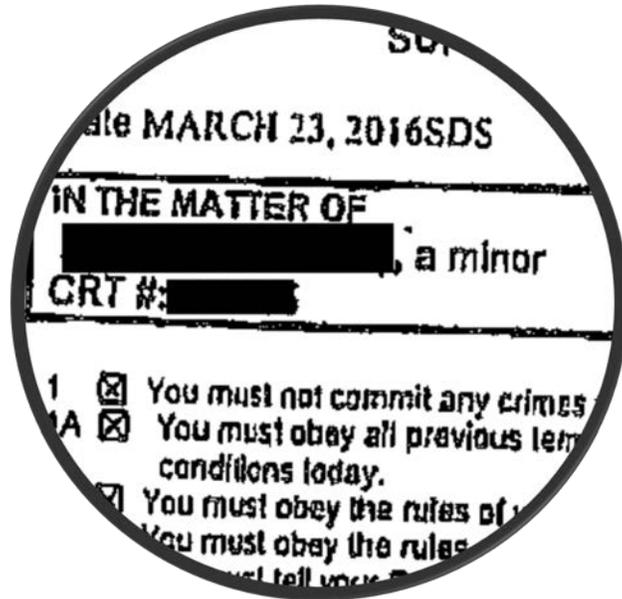


Challenging Probation Conditions after *Ricardo P.*

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What is swarm litigation? Swarm litigation is an intensive, coordinated effort by defenders (trial and appellate) to shape the law on particular issues. We circulate arguments or briefing to attorneys to present in the trial court, preserving the issue for appeal. We coordinate these efforts with appellate counsel for maximum success on appeal. PJDC has had great success “seeding” issues in the courts to systematically shape the law in California. *Ricardo P.* (August 15, 2019) 7 Cal. 5th 1113 is one example. In 2014, a bench officer in Alameda County began to indiscriminately impose “electronic search” conditions on children in delinquency cases. PJDC, the Alameda County Public Defender, Alameda County conflict defenders, and the First District Appellate Project worked together to challenge this practice in the First Appellate District. This litigation effort spread to every corner of California and ultimately resulted in the California Supreme Court’s 2019 opinion in *Ricardo P.*—a huge win for our clients. This handout is intended to launch another wave of swarm litigation based on that decision.

I. INTRODUCTION

Ricardo P. (2019) 7 Cal. 5th 1113 is the most important case from the California Supreme Court on the validity of probation conditions since *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). It places further limitations on when a probation condition may be lawfully imposed, while providing helpful guidance to litigants and the courts. Best of all for our clients, many routine conditions may no longer be lawful in the wake of *Ricardo P.* and are now subject to challenge.

II. LENT

Under Welfare and Institutions Code section 730, subdivision (b), the court “may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.”

For more than 50 years the test for reasonableness has been that set forth in *People v. Lent, supra*, 15 Cal.3d 481. Under *Lent*, a condition is “invalid [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.’” (*Id.* at p. 486.) “This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term.” (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) “A condition of probation which is impermissible for an adult criminal defendant is not necessarily unreasonable for a juvenile receiving guidance and supervision from the juvenile court.” (*In re Todd L.* (1980) 113 Cal.App.3d 14, 19.)

III. RICARDO P.

Ricardo P. considered the validity under *Lent* of an electronic search condition imposed on a youth with a sustained petition for two counts of burglary. The condition required Ricardo to submit to warrantless searches of his electronic devices, including any electronic accounts that could be accessed through these devices. Although there was no indication Ricardo used an electronic device in connection with the

burglaries, the court imposed the condition in order to monitor his compliance with separate conditions prohibiting him from using or possessing illegal drugs. The court of appeal upheld the condition reasoning that while condition met the first two prongs of *Lent*, it did not meet the third prong, reasoning that the electronics search condition "is reasonably related to enabling the effective supervision of Ricardo's compliance with his other probation conditions," specifically various drug-related conditions. Hence, the condition was valid under *Lent*. (*Ricardo P.*, *supra*, 7 Cal. 5th at 1116-1117.)

Ricardo P. reversed, holding that, even accepting the questionable "inference that he was using drugs at the time he committed the burglaries, as well as the juvenile court's generalization about teenagers' tendency to brag about drug use online [...] we conclude that the electronics search condition here does not satisfy *Lent*'s third prong, such that the condition is invalid under *Lent*, because the burden it imposes on Ricardo's privacy is substantially disproportionate to the condition's goal of monitoring and deterring drug use." (*Id.* at pp. 1119-1120.)

Examining *Lent* itself and post-*Lent* cases, *Ricardo P.* observed, "Our cases upholding probation conditions under *Lent*'s third prong have involved stronger connections between the burdens imposed by the challenged condition and a probationer's criminal conduct or personal history." (*Id.* at p. 1120.)

Noting that pre-*Lent* cases "similarly required a closer relationship between the probation condition on one hand and the probationer's criminal conduct and deterring future criminality on the other," the court examined *People v. Mason* (1971) 5 Cal.3d 759: "[W]e determined that the validity of a condition requiring a 'prior narcotics offender' to submit to warrantless property searches 'seems beyond dispute ... since that condition is reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses.'" (*Id.* at p. 764.) We relied on case law holding that 'such a condition is reasonable and valid' because it is "'related to [the probationer's] reformation and

rehabilitation *in the light of the offense of which he was convicted.*” (Ricardo P., at pp. 1120-1121; original emphasis, citations omitted.)

By contrast, Ricardo P. noted, in *In re Bushman* (1970) 1 Cal.3d 767, the high court “invalidated a probation condition requiring the defendant ‘to seek psychiatric treatment at his own expense with a qualified psychiatrist approved by the court, and to continue the treatment as required by the doctor and approved by the probation department and the court.’ (Id. at p. 776.) The defendant had been convicted of disturbing the peace, and there was no evidence that he needed psychiatric care and no suggestion that psychiatric care had any relationship to the crime of which he was convicted. (Id. at p. 777.) ‘Furthermore,’ we explained, ‘without any showing that mental instability contributed to that offense, psychiatric care cannot reasonably be related to future criminality.’” (Ricardo P., at p. 1121.)

Ricardo P. noted that intermediate courts “have similarly recognized that *Lent*’s third prong requires more than just an abstract or hypothetical relationship between the probation condition and preventing future criminality.” (Ricardo P., at p. 1121.) However, the court rejected any requirement of a nexus between the condition and the underlying offense: “‘conditions of probation aimed at rehabilitating the offender need not be so strictly tied to the offender’s precise crime’ (citation) so long as they are ‘reasonably directed at curbing [the defendant’s] future criminality.’ (citation) For example, courts may properly base probation conditions upon information in a probation report that raises concerns about future criminality unrelated to a prior offense.” (Id. at p. 1122.)

“Yet *Lent*’s requirement that a probation condition must 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 the condition. (*Lent, supra*, 15 Cal.3d at p. 486; see *People v. Fritchey* (1992) 2 Cal.App.4th 829, 837–838 [“[A] reasonable condition of probation is not only fit and appropriate to the end in view but it must be a reasonable means to that end. Reasonable means are moderate, not excessive, not

extreme, not demanding too much, well-balanced."].)" (*Ricardo P.*, at p. 1122.)

Ricardo P. determined: "Such proportionality is lacking here. As noted, nothing in the record suggests that Ricardo has ever used an electronic device or social media in connection with criminal conduct. The juvenile court instead relied primarily on indications that Ricardo had previously used marijuana and its generalization that 'minors typically will brag about their marijuana usage or drug usage, particularly their marijuana usage, by posting on the Internet, showing pictures of themselves with paraphernalia, or smoking marijuana.' Based solely on these observations, the juvenile court imposed a sweeping probation condition requiring Ricardo to submit all of his electronic devices and passwords to search at any time. Such a condition significantly burdens privacy interests." (*Ricardo P.*, at pp. 1122-1123.)

"If we were to find this record sufficient to sustain the probation condition at issue, it is difficult to conceive of any case in which a comparable condition could not be imposed, especially given the constant and pervasive use of electronic devices and social media by juveniles today. In virtually every case, one could hypothesize that monitoring a probationer's electronic devices and social media might deter or prevent future criminal conduct." (*Ricardo P.*, at p. 1123.)

Ricardo P. also rejected the court of appeal's third prong analysis based on language of *People v. Olguin*, *supra*, 45 Cal.4th 375, a case that upheld a requirement that the probationer notify the probation officer of any pets at his residence: "[a] condition of probation that enables a probation officer to supervise his or her charges effectively is ... 'reasonably related to future criminality.'" This notification requirement was reasonable," *Ricardo P.* said, "because it 'facilitat[ed] unannounced searches of [*Olguin's*] residence' to ensure compliance with the unchallenged probation search condition. We had no occasion in *Olguin* to consider, let alone approve, the reasonableness of any search condition that would assist an officer in supervising a probationer's compliance with another term of probation." (*Ricardo P.*,

at p. 1125.) *Ricardo P.* warned: "If we were to hold that any search condition facilitating supervision of probationers is 'reasonably related to future criminality,' we might be obligated to uphold under *Lent* a condition mandating that probationers wear 24-hour body cameras or permit a probation officer to accompany them at all times. Such conditions would enhance supervision of probationers and ensure their compliance with other terms of probation. But they would not be reasonable because the burden on the probationer would be disproportionate to the legitimate interest in effective supervision." (*Ibid.*)

"In sum, we hold that the electronics search condition here is not reasonably related to future criminality and is therefore invalid under *Lent*. Our holding does not categorically invalidate electronics search conditions. In 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." (*Ricardo P.*, at pp. 1128-1129.)

IV. MANY TYPES OF PROBATION CONDITIONS SHOULD NOW BE CHALLENGED UNDER RICARDO P.

Ricardo P.'s analysis should not be confined to challenging electronic search conditions. Defenders can use it to challenge a wide range of probation conditions.

***Ricardo P.* Takeaways re *Lent*'s Third Prong: a condition that "requires or forbids conduct which is not reasonably related to future criminality" means:**

- The probation condition is not "'related to [the probationer's] reformation and rehabilitation in the light of the offense of which he was convicted'" OR there is no showing that the condition is based upon information in a probation report that raises concerns about future criminality (unrelated to a prior offense).

TAKEAWAY: a condition must relate to the underlying

offense or information in a probation report that raises concerns about future criminality.

- There is an “[in]sufficient factual basis from which it can [be] determine[d] that the [] condition is a proportional means of deterring the probationer from future criminality.” To be reasonable, there must be “proportionality between the burden imposed by a probation condition and the legitimate interests served by the condition.” **TAKEAWAY: a condition must be proportional.** This allows defenders to argue that the condition is unreasonable because the burden on the probationer is disproportionate to the legitimate interest in effective supervision.
- “[A]ny showing that [a stated rationale for the condition: e.g., mental instability, drug use] contributed to that offense, [the condition: psychiatric care, drug testing] cannot reasonably be related to future criminality.” There must be “more than just an abstract or hypothetical relationship between the probation condition and preventing future criminality.” **TAKEAWAY: there is a limit on what can be considered “relate to future criminality.”**

Defenders should pay close attention to “standard” probation terms previously assumed to be lawful in all cases. A typical “4 way search clause” like the following may now be unlawful under certain circumstances: “You must permit a law enforcement officer or probation officer to search your person, residence, vehicle, or property at any time of the day or night with or without a warrant and without probable cause.” Example: your client is adjudicated for an offense resulting from a fistfight on a playground. Such a search condition may now be unlawful under *Lent*. Other conditions subject to challenge after *Ricardo P.* may include: electronic monitoring, curfew where there is no lawful ordinance; substance abuse counseling, drug/alcohol

testing, and gang terms. Defenders could also use *Ricardo P.* to argue that the sheer number of rules is disproportional.

But defenders should review **all** conditions carefully to determine their validity under *Lent* and *Ricardo P.* If you have any questions about probation condition claims, post them to PJDC's listserv for answers. Don't forget to share your research and experience litigating conditions with list. Remember to preserve your claims for appeal (see Section V, below), and make sure to file a timely notice of appeal (within 60 days of disposition). Contact your appellate project to let them know that a novel probation condition claim (e.g., "search clause" based on *Ricardo P.*) is forthcoming. This will assist the project in assigning qualified appellate counsel. (Don't forget to communicate with appellate counsel once the case is assigned.)

V. HOW TO PRESERVE *LENT* CLAIMS FOR APPEAL

Object!

As a general rule, a failure to object to a probation condition on the grounds that it is unreasonable under *Lent* forfeits the claim of error on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) The objection must identify the condition and should state *why* it is unreasonable.

SCRIPT EXAMPLE:

"Judge, I am objecting to the imposition of the [describe or reference] probation condition on the ground that it is unreasonable under People v. Lent (1975) 15 Cal.3d 481. It has no relationship to the crime of which my client was adjudicated was convicted; it relates to conduct which is not in itself criminal; and it requires or forbids conduct which is not reasonably related to future criminality."

Confirm that all conditions and rules are a part of the record!

Don't forget to ensure that the record contains all conditions and rules which are the target of your objections (e.g., if GPS is a condition, the rules of the GPS contract may not be included in the probation report).

Remember: if it's not in the record, it doesn't exist for appellate review!

