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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CLARIZA PASCUAL, Defendant and Appellant.	D074100 (Super. Ct. No. SCN377996)

APPEAL from a judgment of the Superior Court of San Diego County, David G. Brown, Judge. Affirmed in part and reversed in part with directions.

Kristin Traicoff, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Over several months while employed as a Walmart cashier, Clariza Pascual stole approximately $13,000 from the till. A jury convicted her of felony grand theft (Pen.

Code,[1] § 487, subd. (a)), count 1) and grand theft by embezzlement (§ 508, count 2), which the People charged as a misdemeanor. The court suspended imposing sentence and granted three years' formal probation.

On appeal Pascual contends (1) both convictions should be reversed because the court erroneously instructed with CALCRIM No. 361 (failure to explain or deny adverse testimony); (2) her conviction for grand theft should be reversed because she could be convicted of only one theft-related offense and embezzlement "most closely matched to the facts of the case;" and (3) probation conditions requiring her probation officer's approval of her residence and that she consent to warrantless searches of her electronic devices are unconstitutionally overbroad and an abuse of discretion.

The Attorney General concedes that one of Pascual's theft convictions must be stricken, but contends it should be the misdemeanor embezzlement conviction. We agree and will reverse Pascual's conviction on count 2. We reject Pascual's other contentions.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The People's Case*

From July through September 2017, Pascual worked weekends as a Walmart cashier.[2] Walmart management noted cash shortages ($400 to $1,600 per day) in certain cash registers occurring on weekends during this period, totaling $13,080.

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1 Undesignated statutory references are to the Penal Code.

2 Dates are in 2017 unless otherwise noted.

Pascual worked the cash registers with the shortages. Walmart has surveillance cameras in the ceiling over each register. Walmart management viewed the surveillance video of the registers where Pascual worked and noted she engaged in "odd behaviors." For example, Pascual positioned a price code chart over the high denomination bills in the cash register, which blocked the overhead view of that part of the till. Walmart cashiers are trained to place this chart elsewhere, where it would not obscure the camera's view of the till. After positioning the price code chart, Pascual took blank receipt tape, placed it over the high denomination bills ($100's and $50's) in the till, and then with two hands in the till, removed the latex glove on her right hand, inside out, so that the ball of money (covered in receipt tape) was inside the glove. She put the glove (with the money inside it) into her pocket, or on the floor near her feet, where she retrieved it later.

The jury saw a 59-minute compilation of surveillance video showing Pascual repeatedly engaging in these behaviors over numerous different dates and on different registers. The video of August 20 is particularly revealing because initially Pascual did not position the price code chart over the till. When the cash drawer opens, money is visible in the slots containing high denomination bills. One second later, Pascual moved the chart, blocking the camera's view of those bills. Then, she took blank receipt tape in her gloved right hand, put both hands in the high denomination part of the till, and after fiddling around inside the till with both hands for about 10 seconds, she bent down and removed her right glove. The overhead view of the till, still open, shows the high denomination slots are now empty.

B. *Defense Case*

Pascual testified in her own defense. She explained that she frequently removed and put on new gloves because the Walmart-supplied gloves are defective. Pascual also testified while working as a dental assistant she was used to changing gloves frequently and even more so because she was "OCD." Pascual testified that she placed the price code chart over the large bills to protect the register from theft and that she needed the codes there for easy reference. She explained that her hands were in the money to organize the bills. She denied stealing and explained that she wrapped blank receipt tape in her glove because it was trash. On the day she was arrested, police found receipt tape rolled underneath her gloves, but no money.

Another Walmart cashier testified that she uses blank receipt tape to write notes, and she has seen Pascual use blank receipt tape for that purpose.[3]

C. *The People's Rebuttal*

In the 59-minute surveillance video, Pascual is never seen writing a note on blank receipt tape. Moreover, when management initially confronted Pascual about the theft, she said she wore gloves because money is dirty, and she denied removing her gloves. Pascual also did not mention anything about having to reorganize the money in the till, and she did not explain why she had so many blank receipt tapes.

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[3] On cross-examination, the witness conceded that she has never put blank receipt tapes in the till.

II. *THE COURT PROPERLY INSTRUCTED WITH CALCRIM No. 361*

A. *Additional Background*

Pascual sought to provide benign explanations for several of her unusual behaviors. For example, she testified that she frequently changed gloves because Walmart provides "cheap gloves" with "holes, torn or something." She also testified that she is "OCD" and used gloves "all the time" in her other job as a dental assistant. Pascual testified that she placed the price code chart over the large bills to "block anyone's view" of the "big bills" because "there's people around me, um, people go back and forth in that area. Um, I don't know, I guess you're just protecting the area." She testified that she put both hands in the money because on most occasions, another cashier had previously been working at the register, which was "very disorganized." Pascual testified that the blank receipt tape in her glove was "most probably" trash, which she threw away in the breakroom after her shift, not in the trash can at her workstation.

The court instructed the jury with CALCRIM No. 361 as follows:

> "If the defendant failed in her testimony to explain or deny evidence against her, and if she could reasonably be expected to have done so based on what she knew, you may consider her failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The people [*sic*] must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

B. *Pascual's Contentions*

Pascual contends that the court erred in instructing with CALCRIM No. 361 because she did not fail to explain or deny evidence against her. Pascual acknowledges

that counsel did not object to this instruction; however, to avoid forfeiture on appeal, she contends the issue is reviewable under section 1259 because the instruction affected her substantial rights or, alternatively, counsel was constitutionally ineffective for not objecting. She further contends that the error requires reversal unless harmless beyond a reasonable doubt.

C. *Analysis*

1. *No forfeiture*

A defendant does not forfeit the right to obtain a reversal based on an instructional error when the defendant's substantial rights have been affected by the error. (§ 1259.) We consider Pascual's argument on its merits because "[a]scertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)[4]

2. *The standard of review*

We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "'[T]he correctness of jury instructions is to be determined from the entire charge of the court . . . .'" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

3. *No error*

CALCRIM No. 361 applies "only when a defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge and it appears from the

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4 Therefore, it is unnecessary to address Pascual's alternative argument that trial counsel was ineffective in failing to object.

evidence that the appellant could reasonably be expected to have that knowledge." (*People v. Cortez* (2016) 63 Cal.4th 101, 117.) "Even if the defendant's testimony conflicts with other evidence or may be characterized as improbable, incredible, unbelievable, or bizarre, it is not . . . 'the functional equivalent of no explanation at all.'" (*Ibid.*) "[T]he focus of CALCRIM No. 361, as its language indicates, is not on the defendant's credibility as a witness, but on the role of a testifying defendant's failure to explain or deny incriminating evidence in how jurors 'evaluat[e] that evidence,' i.e., the evidence the defendant has failed to explain or deny." (*Id.* at p. 118.)

The court properly instructed the jury with CALCRIM No. 361 because Pascual did not explain all of her aberrant behavior at the cash register. For example, surveillance video repeatedly showed Pascual putting blank receipt tape on top of that part of the cash drawer containing high denomination bills, placing both hands in that part of the till, and then removing the glove on her right hand and placing it in her pocket or on the floor to retrieve later. Although Pascual testified that the contents of her discarded glove was "most probably" trash—she never explained why she was putting the blank receipt tape (the so-called trash) on top of the large denomination bills.

In her reply brief, Pascual contends that her silence on this issue does not justify instructing with CALCRIM No. 361 because counsel never specifically asked her why she repeatedly put blank receipt tape on top of the large bills. However, on direct examination Pascual's lawyer asked her, "Why are you wrapping the blank receipt tape in the gloves?" The scope of that question reasonably called for an explanation of why Pascual put the receipt tape on top of the large bills. That key fact was singularly within

Pascual's knowledge, which she never explained nor denied. Accordingly, the court did not err in giving CALCRIM No. 361.

4. *If error, not prejudicial*

In any event, even if instructing with CALCRIM No. 361 was error, it was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Saddler* (1979) 24 Cal.3d 671, 683 [applying *Watson* standard to similar instruction, CALJIC No. 2.62].) The evidence of Pascual's guilt was overwhelming. The jury saw surveillance video showing Pascual moving the price code chart to obstruct the camera's view of the large bills, putting blank receipt tape on top of the large denomination bills, fiddling around with both hands in the till, removing her glove inside-out, putting the glove in her pocket, and money missing from that portion of the till. By the end of Pascual's shift, the large denomination bill slots were empty. Pascual's explanations were feeble, and she was impeached with her prior inconsistent statements to Walmart management. The evidence was so compelling, the jury deliberated only 22 minutes before returning guilty verdicts.

Moreover, the impact of CALCRIM No. 361 was mitigated by the language of the instruction itself and the jury instructions as a whole. That instruction does not direct the jury to draw adverse inferences against the defendant. Rather, it instructs that the failure to explain or deny alone is not a sufficient basis upon which to infer guilt by stating, "Any such failure is not enough by itself to prove guilt." The instruction also emphasizes the People's burden to prove guilt beyond a reasonable doubt and leaves the meaning and importance of the defendant's failure to explain or deny up to the jury ("[i]f the defendant

failed to explain or deny, it is up to you to decide the meaning and importance of that failure"). Additionally, CALCRIM No. 361 does not instruct that Pascual failed to explain or deny any evidence against her. The instruction states: "If the defendant failed in her testimony to explain or deny evidence against her . . . ." Thus, if Pascual is correct that based on the questions asked she explained all the evidence against her, the jury would not apply the instruction. Moreover, the court also instructed with CALCRIM No. 200, which states in part: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts." In light of the strong evidence of guilt and the instructions as a whole, it is not reasonably probable that Pascual would have obtained a more favorable verdict had CALCRIM No. 361 not been given.

We also reject Pascual's contention that if error occurred it was federal constitutional error requiring reversal unless the error was harmless beyond a reasonable doubt. In support of her constitutional argument, Pascual contends that CALCRIM No. 361 violates due process by lessening the prosecution's burden of proof. However, in *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471 (*Lamer*), this court rejected a due process argument directed at the similar CALJIC version of this instruction.[5] In *People*

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[5] In *Lamer*, the trial court instructed with CALJIC No. 2.62 as follows: "In this case defendant has testified to certain matters. If you find that the defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonabl[y] be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonabl[y] be drawn therefrom

v. Rodriguez (2009) 170 Cal.App.4th 1062, the court held that CALCRIM No. 361 does not violate due process because the instruction informs the jury that a defendant's failure to explain or deny incriminating evidence "'is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt.'" (*Rodriguez*, at pp. 1066-1067.)

II. *PASCUAL CANNOT BE CONVICTED OF BOTH GRAND THEFT AND EMBEZZLEMENT*

A. *Additional Background*

The original complaint charged Pascual with two felonies, grand theft and embezzlement. In count 1 (grand theft), the People alleged that *between* July 16 and September 17, Pascual stole more than $950. However, for reasons unexplained on the record, in count 2 (embezzlement), the People did not allege the crime occurred over several months. Rather, count 2 alleged that on July 16, Pascual embezzled more than $950. At the preliminary hearing, although there was evidence that Pascual stole over $13,000 between July and September, the magistrate reduced count 2 to a misdemeanor because the evidence showed that Pascual took only $850 on July 16.

After the preliminary hearing, the People filed an amended information that charged count 2 as a misdemeanor, but alleged that Pascual embezzled more than $950 between July 16 and September 17. The jury convicted Pascual of both grand theft and grand theft by embezzlement.

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those unfavorabl[e] to the defendant are the more probable.'" (*Lamer*, *supra*, 110 Cal.App.4th at p. 1468.)

B. *Pascual's Contention*

Citing *People v. Vidana* (2016) 1 Cal.5th 632 (*Vidana*), Pascual contends that she cannot validly be convicted for both grand theft and grand theft by embezzlement based on the same conduct and, therefore, her conviction for grand theft should be stricken. The Attorney General concedes that *Vidana* compels that one of the convictions be stricken, but asserts it should be the misdemeanor embezzlement count.

C. *Analysis*

In *Vidana*, *supra*, 1 Cal.5th 632, the court held that larceny and embezzlement are not separate offenses, but rather two ways of committing the single offense of theft. (*Id.* at pp. 648-649.) Therefore, only one such conviction based on the same conduct may be sustained. In *Vidana*, the court did not address which conviction should remain, stating, "[W]e express no opinion on whether striking the larceny conviction or the embezzlement conviction or consolidating the two convictions is the proper remedy." (*Id.* at p. 651, fn. 18.)

Here, the parties agree that in analogous cases where one of two duplicative convictions must be vacated, courts have affirmed the conviction that appears to "more completely cover[]" (*People v. Ryan* (2006) 138 Cal.App.4th 360, 371) the defendant's acts or the one that is "more commensurate with [the defendant's] culpability." (*People v. Bautista* (2005) 129 Cal.App.4th 1431, 1438.) These are not two different standards. The common theme is that the court should uphold the conviction that most accurately reflects the evidence and the jury's assessment of the defendant's culpability.

"[L]arceny is the trespassory taking and carrying away of personal property of another with the intent to permanently deprive the owner of possession." (*People v. Kaufman* (2017) 17 Cal.App.5th 370, 379-380.) "Embezzlement occurs where 'the owner entrusted property to the defendant, the owner did so because he or she trusted the defendant, the defendant fraudulently converted the property for his or her own benefit and, in doing so, the defendant intended to deprive the owner of its use.'" (*Id.* at p. 380.) More specifically, section 508, the embezzlement statute Pascual violated, provides that "[e]very clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."

Pascual asserts that her grand theft conviction should be vacated because theft by embezzlement "more closely reflects the misdeeds" she committed. She further contends that the conduct proscribed by section 508—taking money as a Walmart cashier—"better reflects her culpability than the more general offense of theft . . . ."

Embezzlement more specifically defines the type of theft that Pascual committed. However, in less than three months Pascual stole over $13,000. The court instructed the jury on the distinction between grand and petty theft, and the jury convicted her of grand theft and grand theft by embezzlement. Dismissing the felony grand theft conviction and allowing only the misdemeanor embezzlement conviction to stand would not be commensurate with Pascual's culpability nor the evidence. Accordingly, Pascual's conviction on the misdemeanor count 2 is vacated.

Disagreeing with this result, in her reply brief Pascual contends that the distinction between her felony and misdemeanor conviction should be "given little weight" because the "disparity in how these charges were presented to the jury resulted entirely from the prosecution's charging error . . . ." This argument fails because the jury determined that Pascual committed grand theft by embezzlement and, therefore, only the felony theft conviction is commensurate with her criminal conduct.

III. *PROBATION CONDITIONS*

A. *Residence Approval Not Facially Unconstitutional*

Probation is "'an act of clemency in lieu of punishment.'" (*People v. Moran* (2016) 1 Cal.5th 398, 402.) In granting probation, a court has broad discretion to impose "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . ." (§ 1203.1, subd. (j).)

Pascual challenges the condition of probation requiring her to obtain her probation officer's "approval as to residence." She contends that this condition is (1) "facially unconstitutional" as overbroad and (2) is an abuse of discretion because her residence had no relation to her theft, nor is the condition designed to deter future criminal conduct.

Pascual acknowledges that her attorney did not object to this condition. Challenges to probation conditions ordinarily must be raised in the trial court or appellate review of those conditions will be deemed forfeited. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235.) This rule encourages parties to bring errors to the trial court's attention so

the court may "modify or delete an allegedly unreasonable condition or explain why it is necessary in the particular case." (*Id.* at p. 235.)

To avoid forfeiture, Pascual asserts that the residence condition is reviewable under section 1259 because it "implicates [her] substantial rights." However, this one-sentence conclusory assertion, without any legal analysis or citation to authority other than section 1259, "constitutes a waiver of the point on appeal." (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1364, fn. 6 [conclusory claims of error "constitutes a waiver of the point"].)

In any event, section 1259 actually undercuts Pascual's argument. Except in a challenge to a jury instruction that affects the defendant's substantial rights, that statute dispenses with the requirement of excepting to a trial court's ruling, but *requires* an objection to have been made:

> "Upon an appeal taken by the defendant, the appellate court may, *without exception* having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done *after objection made in and considered by the lower court*, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, *even though no objection was made* thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259, italics added.)[6]

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6 "The exception is a formal protest against a ruling of the court which was of considerable importance when the record consisted of a bill of exceptions. Its purpose was to 'cause the question of law, which was presented to and decided by the Court, to be made a matter of record, so that it may be re-examined by the Court on motion for a new trial, or be reviewed by the appellate Court.' [Citations.] The widespread use of the reporter's transcript as the record on appeal and the modernization of the bill of exceptions into a narrative statement of the proceedings . . . have resulted in the practical

Alternatively, to avoid forfeiture Pascual contends that her trial attorney was constitutionally ineffective by failing to challenge the residency condition. However, an ineffective assistance claim on appeal "must be rejected" if "'the record on appeal sheds no light on why counsel . . . failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .'" (*People v. Wilson* (1992) 3 Cal.4th 926, 936.) Pascual asserts "there could have been no tactical purpose" in failing to object to the residency condition. However, defense counsel could reasonably have decided to forgo an objection on the grounds that demanding an option to change residences at will might have raised legitimate concerns about Pascual's suitability for probation and the necessary supervision that probation entails. Moreover, imposing a limitation on a probationer's movement as a condition of probation is common because it facilitates supervision and rehabilitation and helps ensure probationers are complying with the terms of their conditional release. (*People v. Moran* (2016) 1 Cal.5th 398, 406.) Accordingly, the record is inadequate to adjudicate Pascual's ineffectiveness claim on appeal and, therefore, her challenge to the reasonableness of the residency condition as-applied is forfeited.

Nevertheless, to the extent Pascual raises a *facial* overbreadth challenge to the constitutional validity of the challenged probation condition that can be resolved """without reference to the particular sentencing record developed in the trial court,""" her

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disappearance of the formal exception in appellate procedure in this state." (*People v. Mitchell* (1946) 27 Cal.2d 678, 685-686.)

claims are not forfeited by her failure to raise the issue in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) However, we focus solely on the constitutionality of the challenged condition, not whether it is reasonable as applied to Pascual. (*Id.* at p. 878.)[7]

"[A] facial overbreadth challenge is difficult to sustain." (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 577.) "A restriction 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.' [Citations.] 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 defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

The residency-approval condition is not facially overbroad. "[T]he environment in which a probationer serves probation is an important factor on the likelihood that probation will be successfully completed" and, therefore, directly impacts the likelihood

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[7] Accordingly, we do not consider Pascual's argument that the court abused its discretion in applying the condition "in this case" on the grounds that "[n]one of the criminal conduct for which [she] was convicted implicated her residence . . . ." For the same reason, Pascual's reliance on *People v. Bauer* (1989) 211 Cal.App.3d 937 is unavailing because that court did not consider a facial challenge, but instead held that the residency condition was unconstitutional as applied to the particular defendant in that case. (*Id.* at p. 944 [referring to the probation report and sentencing record].) *Bauer* holds that a residency-approval condition may not be constitutionally applied to a defendant where the record demonstrates that the defendant's rehabilitation would not be served by placing restrictions on residency in light of the nature of the offender and the criminal conduct.

of effective rehabilitation. (*People v. Robinson* (1988) 199 Cal.App.3d 816, 818.) Additionally, "[a]lthough conditions requiring prior approval of a probationer's residence may affect the constitutional rights to travel and freedom of association [citation], courts have the authority to do so if there is an indication the probationer's living situation contributed to the crime or would contribute to future criminality." (*People v. Arevalo* (2018) 19 Cal.App.5th 652, 657 [upholding probation condition requiring defendant to maintain a residence approved by her probation officer].)

We acknowledge that a residence-approval condition could be overbroad *as applied* in certain cases. As-applied challenges are fact-driven inquiries that examine whether the manner or circumstances in which the condition has been applied was constitutional. (E.g., *Bauer*, *supra*, 211 Cal.App.3d at p. 944.) Because Pascual failed to raise an as-applied challenge in the trial court, we must resolve her claim without reference to the sentencing record.

Moreover, "[a] probation condition should be given 'the meaning that would appear to a reasonable, objective reader.'" (*People v. Olguin* (2008) 45 Cal.4th 375, 382 (*Olguin*).) We view the residence approval condition in light of *Olguin* and presume that Pascual's probation officer will not withhold approval for irrational, arbitrary, or capricious reasons. (*Id.* at p. 383.)

B. *Warrantless Search of Electronic Devices*

Pascual also challenges a condition of probation requiring her to submit to warrantless searches of her "computers, and recordable media." Again, she concedes that trial counsel did not object to this condition and to avoid forfeiture contends counsel

could have had "no tactical purpose" in failing to object. However, defense counsel could have reasonably concluded that the electronic search condition allows the probation department to effectively supervise Pascual's compliance with other conditions of her probation, including those requiring her to participate in treatment, therapy, and counseling. "A condition of probation that enables a probation officer to supervise his or her charges effectively is . . . 'reasonably related to future criminality.'" (*Olguin*, *supra*, 45 Cal.4th at pp. 380-381.) Accordingly, for the reasons explained *ante*, Pascual has forfeited all but a facial overbreadth challenge to the constitutional validity of this probation condition that can be resolved """without reference to the particular sentencing record developed in the trial court."""" (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 889.)

The state has an interest in the close supervision of probationers to further their rehabilitation and protect public safety. (*Olguin*, *supra*, 45 Cal.4th at p. 378.) Because the state has an obligation to monitor a broad range of probationers with varying needs of supervision, there are numerous circumstances in which courts may validly impose the type of electronic search condition challenged here. (See *People v. Trujillo* (2017) 15 Cal.App.5th 574, 583-584, review granted Nov. 29, 2017, S244650; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, 1130, review granted Dec. 14, 2016, S238210; *In re J.E.* (2016) 1 Cal.App.5th 795, 805, review granted Oct. 12, 2016, S236628.) Accordingly, Pascual's facial challenge fails.[8]

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8 There is a split of authority among the courts of appeal on the propriety of electronic search conditions. In addition to the cases cited *ante*, the California Supreme Court has granted review in several cases addressing this issue, including but not limited

DISPOSITION

Pascual's conviction on count 2 is reversed. Although Pascual has not raised this issue, where the amount of a fine or fee imposed as a condition of probation was based on her having suffered two convictions, such fine(s) and/or fee(s) should be recalculated based on her one conviction. In all other respects, the judgment is affirmed. The trial court is directed to prepare a new order granting formal probation that is consistent with this opinion.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.

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to *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted June 28, 2017, S241937; *People v. Valdivia* (2017) 16 Cal.App.5th 1130, review granted February 14, 2018, S245893; *People v. Acosta* (2018) 20 Cal.App.5th 225, review granted April. 25, 2018, S247656; and *People v. Maldonado* (2018) 22 Cal.App.5th 138, review granted June 20, 2018, S248800.