SUPREME COURT COPY

SUPREME COURT
FILED
NOV 04 2016
Jorge Navarrete Clerk
Deputy

Case No. S230923

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

RICARDO P.

Defendant and Appellant,

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION ONE, CASE NO. A144149
FILED DECEMBER 1, 2015
ALAMEDA COUNTY SUPERIOR COURT CASE NO. SJ14023676
THE HONORABLE LEOPOLDO E. DORADO, JUDGE

APPLICATION OF THE PACIFIC JUVENILE DEFENDER CENTER FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT RICARDO P.

Kate Weisburd
State Bar No. 242020
East Bay Community Law Center
2921 Adeline Street
Berkeley, CA 94703

L. Richard Braucher, Esq.
State Bar No. 173754
475 Fourteenth Street, Suite 650
Oakland, CA 94612

Attorneys for Amicus Curiae
Pacific Juvenile Defender Center
On Behalf of Petitioner

OCT 27 2016

CLERK SUPREME COURT

TABLE OF CONTENTS

APPLICATION TO FILE AMICUS CURIAE BRIEF v

BRIEF OF AMICUS CURIAE 3

I. INTRODUCTION 3

II. THE ELECTRONIC SEARCH CONDITION IN THIS CASE WAS NOT REASONABLE 4

A. An Electronic Search Condition Should Not Be Deemed "Related To Future Criminality" Unless The Underlying Offense Directly Involved Electronic Devices 5

B. Because Youth, Unlike Adults, Do Not Consent To Probation Search Conditions, The Searches Must Be More Circumscribed. 8

C. Imposing an Electronic Search Condition in This Case Will Set a Dangerously Sweeping Precedent 10

III. ELECTRONIC SEARCH CONDITIONS UNDERMINE, RATHER THAN FACILITATE, THE REHABILITATIVE PURPOSE OF JUVENILE PROBATION 10

A. Electronic Search Conditions Incentivize Hyper-Surveillance Over Rehabilitation 11

B. Electronic Search Conditions Fail to Account for The Unique Nature of Adolescent Development 15

C. Electronic Search Conditions Are Not Likely to Lead to Better Outcomes for Youth 20

IV. OTHER LEGAL MECHANISMS ALLOW FOR CELL PHONE SEARCHES 22

V. CONCLUSION 23

TABLE OF AUTHORITIES

CASES

People v. Burton, 117 Cal.App.3d 382 (1981)....................................6

In re Bushman, 1 Cal.3d 767 (1970)..5

In re Erica R., 240 Cal.App.4th 907 (2015)...6

Griffin v. Wisconsin, 483 U.S. 868 (1987)......................................12

In re Jamie P., 40 Cal.4th 128 (2006)..13

People v. Lent, 15 Cal.3d 481 (1975).................................... *passim*

In re Mark C., 244 Cal.App.4th 520 (2016)(rev. granted April 13, 2016)..6, 7, 8, 9

People v. Olguin, 45 Cal.4th 375 (2008).................................5, 6, 7

People v. Petty, 213 Cal.App.4th 1410 (2013)...................................6

Riley v. California, 134 S. Ct. 2473 (2014)..............................10, 23

In re Tyrell J., 8 Cal.4th 68 (1994)...5, 9

People v. Woods, 31 Cal.4th 668 (1999)......................................4, 8

STATUTES, RULES AND REGULATIONS

California Welfare & Institutions Code

§ 202(b)...10

§ 730(b)..7

SECONDARY AUTHORITIES

Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in Youth on Trial: Developmental Perspective on Juvenile Justice, 33, 47 (Thomas Grisso & Robert G. Schwartz eds., 2000)...17

Andrew Horwitz, *The Costs of Abusing Probationary Sentences Over Incarceration and the Erosion of Due Process*, 75 BROOK. L. REV. 753, 761 (2010)...11

Ashley Nell and Richard Hooks Wayman, *Back on Track: Supporting Youth Reentry from Out-of-Home Placement to the Community*, Washington, DC: Youth Reentry Task Force of the Juvenile Justice and Delinquency Prevention Coalition, 2009..14

Barry Holman & Jason Ziedenberg, Justice Policy Inst., *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, 2–16 (2011)..14

Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1035 (2013)...............................12

Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 439 (2011)......................11

Craig Dowden and Don A. Andrews, *What Works in Young Offender Treatment: A Meta-Analysis*, Forum on Corrections Research 11, no. 2 (1999): 21-24...20

Dick Mendel, *Case Now Strong for Ending Probation's Place as Default Disposition in Juvenile Justice,* April 14, 2016, Juvenile Justice Information Exchange Blog, avail. at: http://jjie.org/case-now-strong-for-ending-probations-place-as-default-disposition-in-juvenile-justice/227322/..........8

Edward P. Mulvey et al., Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders, DEVELOPMENT AND PSYCHOPATHOLOGY 22, no. 2 (2010): 453–75...21

Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 165 (1997)...17

Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 38 (2008)...17

Elizabeth Seigle, Nastassia Walsh, Josh Webber, *Core Principles for Reducing Recidivism and Improving Other Outcomes for Youth in the Juvenile Justice System, Council of State Governments*, 2014 at 2, avail. at: https://csgjusticecenter.org/wp-content/uploads/2014/07/Core-Principles-for-Reducing-Recidivism-and-Improving-Other-Outcomes-for-Youth-in-the-Juvenile-Justice-System.pdf...*passim*

Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291 (2016)......... ....4, 8

Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990* (1993) 11

Judge George Timberlake, Ret., *Op-Ed: The Makings of a Good Juvenile Probation Officer*, June 4, 2014, Juvenile Justice Information Exchange. http://jjie.org/op-ed-the-makings-of-a-good-juvenile-probation-officer/107000/..14, 15

Juvenile Justice in California, California Dep't of Justice, 2015, avail. at: https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/misc/jj15/jj15.pdf..... 10

Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297 (2015)..................................15

Kathleen R. Skowyra and Joseph J. Cocozza, *Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System,* Washington, DC: National Center for Mental Health and Juvenile Justice, PRA Associates, Inc., 2006, available at ncmhjj.com/wp-content/uploads/2013/12/Blueprint.pdf..20

Kathryn Lynn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 L. & HUM. BEHAV. 78, 79-80 (2008)...18

Kristan Glasgow Erickson et al., *A Social Process Model of Adolescent Deviance: Combining Social Control and Differential Association Perspectives*, 29 J. YOUTH & ADOLESCENCE 395, 420-21 (2000)...17

Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003)...17

Mark W. Lipsey et al., *Improving the Effectiveness of Juvenile Justice Programs: A New Perspective on Evidence-Based Practice*, Washington, DC: Center for Juvenile Justice Reform, 2010...................................22

McCarthy, Patrick, Vincent Schiraldi, and Miriam Shark. *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model,* New Thinking in Community Corrections Bulletin. Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 2016. NCJ 250142..........14, 19, 20

National Juvenile Defender Center, Issue Brief, *Promoting Positive Youth Development: The Critical Need to Reform Youth Probation Orders,* 2016, 3..........11

Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270, 1270-71 (2007)........18

Nirej S. Sekhon, *Punitive Injunctions*, 17 U. PA. J.L. & SOC. CHANGE 175, 204 (2014)..........13

Richard J. Bonnie et al., *Nat'l Research Council, Reforming Juvenile Justice: A Developmental Approach* (2013)..........16, 17, 19, 20

Richard A. Mendel, Annie E. Casey Found., *No Place for Kids: The Case for Reducing Juvenile Incarceration,* 9–22 (2011)..........14

Thomas A. Loughran et al., *Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders*, CRIMINOLOGY 47, no. 3 (2009): 699–739..........21

U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Bank, State Data, 2103, avail at: http://www.ojjdp.gov/ojstatbb/corrections/qa08301.asp?qaDate=2013.....12

APPLICATION TO FILE AMICUS CURIAE BRIEF

The Pacific Juvenile Defender Center applies to this Court for permission to file an amicus brief in support of Ricardo P. under Rule of Court 8.520(f).

Proposed **Amicus Pacific Juvenile Defender Center (PJDC)** is a regional affiliate of the Washington, D.C.-based National Juvenile Defender Center. PJDC works to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. PJDC provides support to more than 500 juvenile trial lawyers, appellate counsel, law school clinical programs and non-profit law centers to ensure quality representation for children throughout California and around the country. Collectively, PJDC members represent thousands of youth in juvenile court delinquency cases and youth being tried as adults in California.

PJDC also engages in policy work and involvement in appellate cases aimed at assuring fairness and appropriate treatment of young people in the justice system. In this regard, PJDC has long been concerned about the handling of youth in the criminal justice system. Last year, PJDC filed an amicus brief in *In re R.V.*, 61 Cal.4th 181(2015), in which this court decided several issues relating to juvenile competence. PJDC also participated with other amici curiae in the cases of *People v. Franklin*, 63 Cal.4th 261(2016), *In re Alatriste*, S214652, and *In re Bonilla*, S214960,

filing an amicus brief in *Bonilla* regarding whether a total term of imprisonment of 50 years to life for a 16-year-old offender is the functional equivalent of life without possibility of parole within the meaning of *Miller v. Alabama*, 132 S.Ct. 2455 (2012). PJDC also participated with other amici curiae in *People v. Gutierrez,* 58 Cal.4th 1354 (2014), in which this Court held that the Eighth Amendment forbids a presumption in favor of life without parole at sentencing hearings under Penal Code section 190.5. PJDC also participated in *People v. Caballero,* 55 Cal.4th 262 (2012), in which this Court struck down the imposition of "de facto" life sentences on juveniles tried as adults. PJDC is knowledgeable about the relevant law, the impact of age and immaturity on behavior, adjudicative competence, and capacity for rehabilitation. PJDC is interested in this case because the decision in this case will affect thousands of youth on probation in the juvenile court throughout California.

October 27, 2016 Respectfully submitted

Kate Weisburd
State Bar No. 242020
East Bay Community Law Center
2921 Adeline Street
Berkeley, CA 94703

L. Richard Braucher, Esq.
State Bar No. 173754
475 Fourteenth Street, Suite 650
Oakland, CA 94612

Attorneys for Amicus Curiae
Pacific Juvenile Defender Center
On Behalf of Petitioner

BRIEF OF AMICUS CURIAE

I. INTRODUCTION

Upholding the electronic search condition in this case sets a dangerous precedent by expanding the scope of juvenile probation and incentivizing technical compliance over meaningful rehabilitation. The electronic search condition here fails the third prong of *People v. Lent*, 15 Cal.3d 481 (1975) because it is unrelated to Ricardo P.'s offense and only increases the level of surveillance against Ricardo P., leading to a greater chance of future criminality, not less. To uphold this electronic search condition as being reasonably related to future criminality suggests that any probation condition, no matter how intrusive or unconnected to the underlying offense, could be justified.

This brief argues that rather than minimizing future criminality, electronic searches contribute to it. Warrantless electronic search conditions, such as the one at issue in this case, incentivize a juvenile probation regime to focus more on surveillance, technical compliance and punishment, at the expense of probation support programs informed by adolescent development and concentrated on positive youth development.

Amici concur with Appellant's position that the electronic search condition in this case is also not reasonable because of the unique, and heightened, privacy concerns associated with electronic devices. *See* Attorney's Opening Brief on the Merits (AOBM) at 10. This brief expands

on Appellant's position by situating electronic search conditions within the context of juvenile probation and adolescent development. This brief explains the significant consequences of imposing electronic search conditions as a routine condition of juvenile probation.

This brief makes three general claims: (1) The court of appeals erred in upholding the electronic search clause as being reasonably related to future criminality because it facilitates probation supervision; (2) Electronic search conditions undermine the rehabilitative function of juvenile court; and (3) There are other mechanisms to search probationers' cell phones and social media accounts.

II. THE ELECTRONIC SEARCH CONDITION IN THIS CASE WAS NOT REASONABLE

The electronic search condition in this case was not reasonable because it was unrelated to Ricardo's underlying offense or prior offenses, and it undermines, rather than promotes, rehabilitation. Although adults often waive their Fourth Amendment rights in accepting probation, and adult probation is viewed as a privilege and not a right,[1] those legal principles do not apply in juvenile court. In juvenile court, probation is

---

[1] *See People v. Woods*, 21 Cal.4th 668, 674, 981 P.2d 1019, 1023 (1999) (noting that in "California, probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term."); *see also* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291 (2016) (observing that courts justify "limiting the rights of probationers by emphasizing that probation is a privilege.").

imposed as an order of the court and youth have no legal right to reject or decline to consent to a probation search condition.[2] As such, juvenile probation terms must be narrowly defined and circumscribed so as to not unduly burden the constitutional rights of youth.

A. An Electronic Search Condition Should Not Be Deemed "Related to Future Criminality" Unless The Underlying Offense Directly Involved Electronic Devices

The Court of Appeal's holding eviscerates the limiting principles articulated in *Lent* and dangerously expands the holding in *People v. Olguin*, 45 Cal.4th 375 (2008). While there are certainly offenses that involve electronic devices, the purely speculative connection between all future criminality and electronic devices is not, without more, sufficient justification for the imposition of such a far-reaching and intrusive condition.[3] As Appellant appropriately concedes, if there were a direct nexus between the underlying offense or prior offenses and electronic devices, a search condition might be permissible – but that is not the case here. *See* AOBM at 23.

---

[2] *See In re Tyrell J.*, 8 Cal.4th 68, 82 (1994), as modified on denial of reh'g (Oct. 20, 1994) ("Although an adult may choose to reject probation and accept incarceration, no such choice is offered a juvenile offender").

[3] *See, e.g., In re Bushman*, 1 Cal.3d 767, 777 (1970) disapproved of by *People v. Lent*, 15 Cal.3d 481 (1975) (finding no nexus between underlying offense and probation condition requiring psychiatric treatment).

The third prong of *Lent* must be narrowly interpreted to avoid the slippery slope of justifying any condition on the grounds that it facilitates rehabilitation. As the Court of Appeal in *Mark C.* correctly concluded: "We do not read *Olguin* to hold that *every* condition that might enable a probation officer to supervise his or her minor charges more effectively is necessarily 'reasonably related to future criminality.' Such a reading would effectively eliminate the reasonableness requirement that the court in *Olguin* discusses at some length." *In re Mark C.*, 244 Cal.App.4th 520, 533 (2016) (rev. granted April 13, 2016.). Indeed, the Courts of Appeal have routinely invalidated probation conditions that are not reasonably related to future criminality where there was no nexus between the underlying offense and the condition.[4]

The *Mark C.* court observed that absurd results follow an unduly expansive interpretation of what is related to probation supervision: "Requiring Mark to copy his probation officer on all his emails, and forward all his postings on social media to his probation officer might also

---

[4] *See, e.g., People v. Burton*, 117 Cal.App.3d 382, 392 (1981) (invalidating search condition when underlying offense did not involve concealment); *People v. Petty*, 213 Cal.App.4th 1410, 1417 (2013) (invalidating probation condition requiring defendant to take medication when mental state of defendant was not part of underlying offense); *In Re Erica R.*, 240 Cal.App.4th 907, 913 (2015) (invalidating electronic search clause when underlying offense had no relation to cell phone use).

facilitate his probation officer's supervision of him, as would requiring him to wear a body camera." *In re Mark C.*, 244 Cal.App.4th at 533.

The touchstone of the third prong of *Lent* is reasonableness. 15 Cal.3d at 487. As the *Olguin* Court explained, conditions of probation, including those that promote supervision, should "assure that the probation serves as a period of genuine rehabilitation." 45 Cal.4th at 382 (citation omitted); *see also* Welf. & Inst. Code, § 730(b) (probation conditions must be "reasonable" and "fitting and proper to the end that...the reformation and rehabilitation of the ward [is] enhanced.") Not only is there no nexus between Ricardo's underlying offense and the search condition, the condition is also not reasonable because there is no evidence to suggest that greater search power improves outcomes in terms of future criminality and "genuine rehabilitation." *Olguin*, 45 Cal.4th at 380.

The Justice Center of the Council of State Governments, in partnership with the Office of Juvenile Justice and Delinquency Prevention, as well as the MacArthur Foundation, recently published guidance on reforming juvenile justice systems. The report observes that too often juvenile justice policy is implemented and imposed with little reliance on research.[5] There is no research, much less any other evidence, to support

---

[5] Elizabeth Seigle, Nastassia Walsh, Josh Webber, *Core Principles for Reducing Recidivism and Improving Other Outcomes for Youth in the Juvenile Justice System, Council of State Governments*, 2014 at 2, avail. at:

the premise that expanding the search powers of juvenile probation leads to lower recidivism or improved outcomes for youth.[6] As explained herein, given what is now known about adolescent development, juvenile probation methods that focus on surveillance and rule-following are largely ineffective.[7]

B. Because Youth, Unlike Adults, Do Not Consent to Probation Search Conditions, The Searches Must Be More Circumscribed

Carefully tailoring probation search conditions is especially important in juvenile cases because youth, unlike adults, do not consent to probation or probation conditions. For adults, invasive search conditions are partly justified on the grounds that probationers waive their Fourth Amendment right in exchange for the privilege of being on probation, instead of prison or jail.[8]

For youth, probation is not a choice or a privilege, which, as the court in *Mark C.*, concluded, is reason to more narrowly tailor and impose

---

https://csgjusticecenter.org/wp-content/uploads/2014/07/Core-Principles-for-Reducing-Recidivism-and-Improving-Other-Outcomes-for-Youth-in-the-Juvenile-Justice-System.pdf.

[6] *See* Dick Mendel, *Case Now Strong for Ending Probation's Place as Default Disposition in Juvenile Justice,* April 14, 2016, Juvenile Justice Information Exchange Blog, avail. at: http://jjie.org/case-now-strong-for-ending-probations-place-as-default-disposition-in-juvenile-justice/227322/.

[7] Seigle, *supra* note 5, at 17.

[8] *See People v. Woods*, 21 Cal.4th 668, 674, 981 P.2d 1019, 1023 (1999) (Noting that in "California, probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term."); *see also* Doherty, *supra* note 1.

search conditions. 244 Cal.App.4th at 530. Unlike adults, youth do not, and cannot, consent to waive their Fourth Amendment rights while on probation. "For adults, probation is a privilege and adults may waive their Fourth Amendment rights by consenting to warrantless searches 'in exchange for the opportunity to avoid service of a state prison term.'" *In re Mark C.*, 244 Cal.App.4th at 530. For youth, on the other hand, probation "is an ingredient of a final order for the minor's reformation and rehabilitation." *In re Tyrell J.,* 8 Cal.4th at 81. A young person cannot refuse probation nor can they refuse a particular condition of probation, like a search condition.

The court in *Mark C.* correctly observed that "[c]ourts have recognized that a 'minor cannot be made subject to an automatic search condition; instead, such condition must be tailored to fit the circumstances of the case and the minor.'" 244 Cal.App.4th at 530. It was partially based on this logic that the *Mark C.* court invalidated the electronic search clause in that case. *Id.*

The inability of youth to consent to an electronic search condition, such as the one at issue in this case, is why these conditions must be imposed in only limited circumstances. Because probation is not a privilege for youth, and they have no option but to accept probation as an order of the juvenile court, this Court must guard against the imposition of broad-sweeping search terms.

C. Imposing an Electronic Search Condition in This Case Will Set a Dangerously Sweeping Precedent

In 2015, there were almost 30,000 youth on probation in California.[9] Upholding the electronic search condition in this case, where the underlying offense was unrelated to Ricardo's use of electronic devices, will mean that all of these youth could soon be subject to electronic search conditions, regardless of their underlying offense.

This expanded search power, combined with the massive amount of personal and private information contained on electronic devices,[10] means that probation officers will have unprecedented access to what is a *de facto* constant wiretap.[11] This represents a significant expansion of the juvenile probation regime, which will result in a substantial increase of probation youth cycling in and out of detention on technical probation violations and remaining involved in the juvenile court system longer than necessary.

///

///

---

[9] *Juvenile Justice in California,* California Dep't of Justice, 2015, avail. at: https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/misc/jj15/jj15.pdf.

[10] *See* AOBM at 29-30.

[11] *See Riley v. California*, 134 S. Ct. 2473, 2490 (2014) (detailing the many ways that cell phones contain a digital record of nearly every aspect of users' lives).

III. ELECTRONIC SEARCH CONDITIONS UNDERMINE, RATHER THAN FACILITATE, THE REHABILITATIVE PURPOSE OF JUVENILE PROBATION

Rehabilitation and the best interest of the child are the hallmarks of the juvenile court system. *See* Cal. Welf. & Inst. Code, § 202(b). Yet indiscriminate imposition of electronic search conditions will certainly impede these goals.

A. Electronic Search Conditions Incentivize Hyper-Surveillance Over Rehabilitation

Expansive search powers coupled with the vast quantity of information stored on electronic devices incentivizes strict monitoring and surveillance over interactive and dynamic probation supervision.[12] Electronic search conditions conflate the role of probation officer and

[12] *See* Andrew Horwitz, *The Costs of Abusing Probationary Sentences Over Incarceration and the Erosion of Due Process*, 75 BROOK. L. REV. 753, 761 (2010) (explaining that "[t]wo things have happened over the past few decades: caseloads for probation officers have grown exponentially, and the level of actual support and supervision has declined nearly to the point of non-existence."); Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 439 (2011) ("Parole officers today spend more time monitoring conditions than providing services. In how they carry out their jobs, parole officers look less like social workers and more like police officers"); Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990* (1993) (describing how the adult parole function has moved from a casework-focused model to one that simply attempts to manage risk through increased surveillance).

police officer, undermining the rehabilitative goals of juvenile court and the need to build trusting relationships with youth.[13]

Eliminating the warrant requirement and allowing for constant electronic surveillance does little to promote a meaningful relationship between probation officer and probationer. In *Griffin v. Wisconsin,* one of the first Supreme Court cases to uphold warrantless probation searches, Justice Blackmun expressed this concern in his dissent:

> I fail to see how the role of the probation agent in "foster[ing] growth and development" of the client is enhanced the slightest bit by the ability to conduct a search without the checks provided by prior neutral review. If anything, the power to decide to search will prove a barrier to establishing any degree of trust between agent and client.[14]

Electronic search conditions allow probation officers to have less interaction with youth and to more easily document technical non-compliance with probation.[15] For youth, probation violations are often

---

[13] National Juvenile Defender Center, Issue Brief, *Promoting Positive Youth Development: The Critical Need to Reform Youth Probation Orders,* 2016, 3 (describing how random searches undermine youths' trust in legal system).

[14] *Griffin v. Wisconsin*, 483 U.S. 868, 886 (1987) (Blackmun, J., dissenting).

[15] *See* Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1035 (2013) (Quoting a probation officer: "[M]ost of our violations are technical. . . . I mean, if you can't write up a report, and cite at least a technical violation, you're not really struggling very hard, because there are so many conditions. There's got to be something that the guy didn't do right, right?").

unrelated to criminal behavior and reflect impulsive, but typical, adolescent behavior.

In California, roughly 25 percent of youth in juvenile correctional facilities are confined for technical probation or parole violations.[16] That number could increase exponentially if probation officers are afforded greater authority to search for, document and punish probation violations recorded on electronic devices. In short, an electronic search condition intensifies the "revolving door" of incarceration, which, as Professor Nirej Sekhon explains, is "less about criminals' pathology than just a predictable consequence of net widening and strengthening. Any population subject to intensive policing/prosecution will regularly move between supervised release and incarceration over time."[17]

The shift towards probation focused more on surveillance is particularly concerning in the juvenile court setting. As a retired judge who now chairs the Federal Advisory Committee on Juvenile Justice observed of juvenile probation: "When a probation officer crosses the line into behaving as a police officer, the probationer may lose the confidence needed to pay attention to the officer's advice and choice of services and

---

[16] U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Bank, State Data, 2103, avail at: http://www.ojjdp.gov/ojstatbb/corrections/qa08301.asp?qaDate=2013.

[17] Nirej S. Sekhon, *Punitive Injunctions*, 17 U. PA. J.L. & SOC. CHANGE 175, 204 (2014).

programs."[18] With expanded search authority there is also the noted risk of "repeated harassment and arbitrary searches."[19]

The greater the ability to document violations, the greater the chance that young people will be confined on technical probation violations. This is especially alarming for youth because of the documented harm associated with incarceration.[20] The dangers of juvenile incarceration are extensively reviewed and documented in a recently released report by the Harvard Kennedy School and the National Institute of Justice.[21] The harm of incarceration is so severe that this report recommends replacing all youth prisons with community-based alternatives.

---

[18] Judge George Timberlake, Ret., *Op-Ed: The Makings of a Good Juvenile Probation Officer*, June 4, 2014, Juvenile Justice Information Exchange. http://jjie.org/op-ed-the-makings-of-a-good-juvenile-probation-officer/107000/.

[19] *In re Jamie P.*, 40 Cal.4th 128, 138 (2006).

[20] *See* Barry Holman & Jason Ziedenberg, Justice Policy Inst., *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, 2–16 (2011) (describing the ways in which juvenile detention mirrors adult prison and the associated risks); Richard A. Mendel, Annie E. Casey Found., *No Place for Kids: The Case for Reducing Juvenile Incarceration,* 9–22 (2011) (documenting how juvenile incarceration is enormously costly, often puts youth at risk for abuse, and is largely ineffective in reducing recidivism).

[21] McCarthy, Patrick, Vincent Schiraldi, and Miriam Shark. *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model,* New Thinking in Community Corrections Bulletin. Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 2016. NCJ 250142.

Additionally, each time a young person is detained on a probation violation, even if just for a short time, their lives and efforts at rehabilitation are disrupted. School districts quickly unenroll students, making it that much harder to return to school upon release.[22] Detained youth lose their jobs, miss interview and training opportunities, fall behind in school, struggle to maintain familial relationships, and are cut off from counseling or support they may be getting in the community.[23] In short, it is not an inferential leap to see that a real unintended consequence of electronic search conditions are more frequent probation violations and more frequent detention.[24]

It is precisely this danger that prompted the Justice Center Report to recommend against increased surveillance of youth. The Report specifically recommends that juvenile justice systems should enable probation officers to "spend less time monitoring the conditions of

---

[22] Ashley Nell and Richard Hooks Wayman, *Back on Track: Supporting Youth Reentry from Out-of-Home Placement to the Community*, Washington, DC: Youth Reentry Task Force of the Juvenile Justice and Delinquency Prevention Coalition, 2009 (documenting the challenges of reenrolling in school post-incarceration).

[23] *Id.;* Seigle, *supra* note 5, at 32.

[24] *See* Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297 (2015) (describing the unintended consequences of electronic monitoring leading to more frequent probation violations and incarceration).

supervision and more time helping to address the primary causes of youth's delinquent behaviors."[25]

B. Electronic Search Conditions Fail to Account for The Unique Nature of Adolescent Development

The reasonableness of an electronic search condition must be viewed in the context of adolescent development. Youth are not mini-adults, and what might be reasonable for an adult is not necessarily reasonable for a young person. As noted by Appellant, an electronic search condition chills productive, pro-social communication and expression.[26] Young people subject to a search condition may decline to reach out for support or rehabilitative services because they fear the surveillance inherent in electronic probation searches.

However, there are additional aspects of adolescent development that should be considered. An electronic search condition allows probation officers to more easily monitor, document and punish behavior that is typical for adolescents – behavior that youth grow out of. Expansive electronic searches will reveal youthful behavior that, while constituting a technical probation violation, is also typical of adolescents in general, is not criminal, and is best addressed outside of the juvenile court system.

---

[25] Seigle, *supra* note 5, at 37.

[26] AOBM at 31.

The National Research Council has made clear that a developmentally appropriate approach to working with youth should be the guiding principle for juvenile court intervention, including juvenile supervision.[27] More expansive search and surveillance power is not developmentally appropriate. Electronic surveillance does little to help youth and instead simply reflects, and unnecessarily punishes, typical adolescent behavior.

Youth, unlike adults, do not yet have the fully formed ability to process information and think hypothetically about future outcomes, including what alternative options might extricate them from the current situation.[28] This is significant because it means that youth are also less likely to be deterred by hypothetical future ramifications.[29]

Youth are also more susceptible to peer pressure.[30] Research shows that young people are less able to resist peer pressure and the fear of

---

[27] Richard J. Bonnie et al., *Nat'l Research Council, Reforming Juvenile Justice: A Developmental Approach,* 4 (2013).

[28] Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 165 (1997).

[29] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003).

[30] Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in Youth on Trial: Developmental Perspective on Juvenile Justice, 33, 47 (Thomas Grisso & Robert G. Schwartz eds., 2000).