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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MIKE H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. MIKE H., Defendant and Appellant.	D069391 (Super. Ct. No. J237170)

APPEAL from an order of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed in part, reversed in part, and remanded with directions.

Renée Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric Swenson, Lynne G. McGinnis, and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Mike H. appeals a dispositional order adjudging him a ward of the juvenile court (Welf. & Inst. Code, § 602) and placing him on probation after he admitted to sodomy of a minor in violation of Penal Code section 286, subdivision (b)(1). He challenges certain conditions of his probation that limit and facilitate searches of his Internet and computer activity, arguing the conditions are invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) or unconstitutionally overbroad encroachments on his First Amendment rights. We vacate some of the challenged conditions, modify others, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2014, 14-year-old Mike started dating 15-year-old C.C. They met at church and attended the same school. In July 2014, C.C. started sneaking out of her house around midnight to meet Mike. The two would hug and kiss, and Mike would touch her vagina. Mike told C.C. he loved her. C.C. told Mike she wanted sexual intercourse, but Mike refused due to religious convictions and pregnancy concerns. They had oral sex the day before the instant offense.

On July 25, 2014, Mike and C.C. met after dark. Mike kissed her and touched her vagina. He turned her around, leaned her against a wall, and had anal sex with her. C.C. told Mike to stop, but he continued until he ejaculated. Mike claimed C.C. had specifically agreed to anal sex before the incident and that he assumed during the act it was consensual. He admitted C.C. told him "No" once but thought it was okay to keep going because she did not tell him to stop during intercourse. Mike later told a psychologist C.C. had agreed to sex and likely panicked later, when confronted by her father.

Mike stated he had anal sex with C.C. because she was his girlfriend; he denied bribing her, telling her not to tell anybody, or keeping her from calling for help. There is no indication Mike used the Internet, a computer, or social media to contact or lure C.C. or otherwise plan his offense. Mike and C.C. communicated by text message, and Mike denied planning or fantasizing about the offense ahead of time.

Afterwards, Mike felt it was the "stupidest thing" he had ever done. The probation officer believed Mike was at "low risk for recidivism"; the psychologist agreed, stating Mike's "[r]isk factors for sexual acting out appear to be low." He had never committed a sex crime before and had not reoffended at the time of sentencing.

On May 21, 2015, the San Diego County District Attorney filed a juvenile delinquency petition under Welfare and Institutions Code section 602 seeking to have Mike declared a ward of the court. The petition alleged Mike committed forcible sodomy (Pen. Code, § 286, subd. (c)(2), count 1) and sodomy on a minor (Pen. Code, § 286, subd. (b)(1), count 2). On October 2, 2015, Mike pled guilty to count 2, and count 1 was dismissed.

On October 29, 2015, the juvenile court placed 15-year-old Mike on formal probation. Among the conditions of probation were conditions that restricted his Internet, social media, and computer use; restricted his access to pornography and sexually explicit content; and limited his anonymous, password-protected, or encrypted Internet or computer use. Other probation conditions facilitated searches of Mike's electronic devices and Internet browser history. Defense counsel objected to nearly all of these conditions. The only connection between Mike's admitted offense of sodomy on a minor

and computers or the Internet was Mike's admission to the probation officer he masturbated approximately once per week while viewing Internet pornography on his smartphone. Although the court acknowledged Mike's offense did not involve a computer or the Internet, it found the restrictions warranted because Mike had used his smartphone to access inappropriate websites.

Mike timely appealed; he filed an amended notice of appeal on December 21, 2015.

DISCUSSION

On appeal, Mike challenges several probation conditions restricting his use of computers, social media and the Internet, and facilitating searches of his electronic devices and online activity. He argues the conditions he objected to below (39, 40, 41, 42, 43, 44, 45, 53, 54, 58, 59, 61 & 63)[1] are not reasonably related to the offense or to his future criminality and are therefore invalid under *Lent, supra,* 15 Cal.3d 481. He also argues certain conditions (38, 39, 42, 43, 45, 53, 54, 56, 58 & 59) are unconstitutionally overbroad. "Consistent with established law, we first address whether the probation condition[s] [were] permissible under state law before turning to resolve any potential federal constitutional issue posed in the case." (*People v. Moran* (2016) 1 Cal.5th 398, 401-402 (*Moran*), fn. omitted.)

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1 For ease of reference, we number the probation conditions as they were numbered in the probation report. To avoid repetition, we list and analyze these conditions in the Discussion.

I. LEGAL PRINCIPLES

Mike raises *Lent* (*Lent, supra*, 15 Cal.3d 481) and constitutional challenges to various probation conditions. These challenges rest on distinct legal principles and standards of review.

A. *Validity under State Law:* Lent, supra, *15 Cal.3d 481*

Juvenile courts have broad discretion to impose probation restrictions on minors to serve the goals of reformation and rehabilitation. (Welf. & Inst. Code, § 730, subd. (b); *In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*).) When the state asserts jurisdiction over a minor, it stands in the shoes of the parents, thereby occupying a unique role in caring for the minor's well-being. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 909-910 (*Victor L.*).) "The permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults. . . . [Citation.] This is because juveniles are deemed to be 'more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed.' " (*Id.* at p. 910.) "In fashioning the conditions of probation, the juvenile court should consider the minor's entire social history in addition to the circumstances of the crime." (*In re Walter P.* (2009) 170 Cal.App.4th 95, 100.)

"While the juvenile court's discretion is broad, it is not unlimited." (*In re Erica R.* (2015) 240 Cal.App.4th 907, 912 (*Erica R.*).) Conditions restricting use of electronic devices and the Internet must comply with the three-part analysis set forth in *Lent, supra,* 15 Cal.3d 481. (*Erica R.,* at p. 912.) Under *Lent,* " '[a] condition of probation will not be held 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 . . . ." ' " (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*), quoting *Lent,* at p. 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, at p. 379.)

On appeal, we review the juvenile court's probation conditions for abuse of discretion and will not disturb such discretion absent manifest abuse. (*Erica R., supra,* 240 Cal.App.4th at p. 912.)

Mike argues probation conditions 39, 40, 41, 42, 43, 44, 45, 53, 54, 58, 59, 61 and 63 are invalid under *Lent*. These conditions limit Mike's Internet, social media, and computer use; restrict his access to pornography and sexually explicit content; prevent him from anonymous Internet use or encrypted use of electronic devices; and facilitate searches of his electronic devices and Internet history. As discussed *post*, the parties dispute whether the restrictions were reasonably related to deterring future criminal behavior by the minor so as to be valid under *Lent*.

B. *Constitutional Overbreadth*

Even if the probation conditions withstand *Lent,* it is a different question whether they are unconstitutionally overbroad. (*In re P.O.* (2016) 246 Cal.App.4th 288, 297 [striking condition as overbroad despite validity under *Lent*] (*P.O.*).) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K., supra*, 40 Cal.4th at p. 890.) "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.)

Conditions that impinge on constitutional rights must be closely or narrowly tailored and reasonably related to a compelling state interest, such as reformation and rehabilitation of the juvenile probationer. (*Victor L., supra,* 182 Cal.App.4th at p. 910.) In restricting speech, " ' "[t]he government may enforce reasonable time, place, and manner regulations so long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.' " ' " (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1237 (*Stevens*).) Because a minor's constitutional rights are more circumscribed (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941), a probation condition that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a juvenile probationer. (*Sheena K., supra,* 40 Cal.4th at p. 889.)

We review constitutional challenges to probation conditions de novo. (*In re J.B.* (2015) 242 Cal.App.4th 749, 754 (*J.B.*); *People v. Appleton* (2016) 245 Cal.App.4th 717, 723.)

On appeal, Mike challenges probation conditions 38, 39, 42, 43, 45, 53, 54, 56, 58 and 59 as unconstitutionally overbroad, arguing they are not narrowly tailored to limit

their impact on his First Amendment rights.[2] The challenged conditions limit Mike's Internet, social media, and computer use; restrict his access to pornography and sexually explicit content; and prevent anonymous Internet use or encrypted use of electronic devices.[3] By contrast, the People argue that the minor is in need of close supervision, and the aforementioned probation conditions are carefully tailored to promote his rehabilitation and protect the public.

II. FORFEITURE

The People argue Mike forfeited his appeal as to any probation condition other than condition 39 by failing to make a specific objection on the record below. As a general rule, failure to challenge a probation condition on *Lent* or constitutional grounds results in forfeiture on appeal. (*In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.) However, there is no forfeiture where an objection would have been futile. (*Ibid.*) The

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2 " 'Computers and Internet access have become virtually indispensable in the modern world of communications and information gathering.' " (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1348.) The Internet "provides relatively unlimited, low-cost capacity for communication of all kinds," and " 'the content on the Internet is as diverse as human thought.' " (*Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 870 (*Reno*).) As such, "restrictions on 'access to the Internet necessarily curtail First Amendment rights.' " (*Pirali*, at p. 1348; *Stevens, supra,* 119 Cal.App.4th at p. 1236.) "It therefore follows that probation conditions restricting or prohibiting the use of a computer, or restricting or prohibiting access to the Internet, 'must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' " (*Pirali*, at p. 1348; see *Sheena K., supra,* 40 Cal.4th at p. 890 [same].)

3 Although Mike challenges other probation conditions like the Fourth Amendment waiver (condition 63) on *Lent* grounds, he does not challenge those conditions as unconstitutionally overbroad. Mike's constitutional arguments also center on his free speech rights rather than on privacy interests. (Cf. *P.O., supra,* 246 Cal.App.4th at p. 298 [rejecting electronics search condition as unconstitutionally overbroad on privacy grounds]; *People v. Appleton, supra,* 245 Cal.App.4th at p. 727 [same].)

juvenile court rejected Mike's objection to condition 39 that his crime did not involve the Internet or a computer. Although Mike's counsel did not restate that argument each time he subsequently objected to conditions 40, 41, 42, 43, 44, 45, 53, 54, 58, 59, 61 and 63, there is no forfeiture because doing so would have been futile given the court's prior statements rejecting it. Thus, Mike preserved his arguments on appeal as to each of those conditions.

Mike did not object to conditions 38 or 56 below but argues on appeal those conditions are unconstitutionally overbroad. Although Mike objected to condition 53, which prohibited accessing sexually explicit content via phone or Internet services, he did not object to conditions 38 or 56, which prohibit *possessing* pornography and/or sexually explicit content.

In *Sheena K., supra,* 40 Cal.4th 875, the Supreme Court addressed whether a juvenile could raise for the first time on appeal the claim a probation condition was *facially* unconstitutional because it was vague or overbroad. (*Id.* at p. 885.) The court concluded a facial challenge that "does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts" may be considered for the first time on appeal. (*Ibid.*) However, *Sheena K.* cautioned that its "conclusion does not apply in every case in which a probation condition is challenged on a constitutional ground . . . 'since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." ' " (*Id.* at p. 889.) For example, where a constitutional challenge requires a review of facts set forth in the record, it is not a pure

facial challenge. (*People v. Kendrick* (2014) 226 Cal.App.4th 769, 777-778 [defendant forfeited constitutional challenge where he argued "that, given the evidentiary specifics of the crimes, his criminal history, and the probation department's policy, the probation condition [was], *as applied to him*, unconstitutional"].)

Here, Mike argues conditions 38 and 56 are overbroad because the term "sexually explicit content" sweeps too broadly. He contends those conditions would, if read literally, "prohibit owning, for instance, a photo of Michelangelo's David, or of Gauguin's Two Tahitian Women." This is a facial constitutional challenge that can be evaluated using abstract or general legal principles (cf. *People v. Kendrick, supra,* 226 Cal.App.4th at p. 778); Mike's arguments as to these conditions present "a pure question of law, easily remediable on appeal by modification of the condition." (*Sheena K., supra,* 40 Cal.4th at p. 888.) Thus, Mike did not forfeit on appeal the constitutional challenge to conditions 38 and 56, despite his failure to object to those conditions below.

III. ANALYSIS OF PROBATION CONDITIONS

The probation conditions Mike challenges on appeal can be grouped into four broad categories: conditions restricting Mike's Internet, social media, and computer use (39, 54, 58, 59); conditions restricting pornography and/or sexually explicit content (38, 53, 56); conditions preventing anonymous or encrypted Internet or computer use (42, 43, 45); and conditions facilitating searches of Mike's electronic devices and Internet activity (40, 41, 44, 61, 63). Mike argues these probation conditions are invalid under *Lent* and/or unconstitutionally overbroad. We agree as to certain probation conditions, which we vacate or modify, and disagree as to others.

A. *Conditions Restricting Mike's Internet, Social Media, and Computer Use*

Four probation conditions restrict Mike's use of the Internet, social media, and electronic devices. *Condition 39* prohibits Mike from knowingly accessing the Internet or any online service without supervision by a parent, legal guardian, or teacher. *Condition 54* prohibits him from having a social media page or using MySpace, Facebook, or similar social media programs. *Condition 58* prohibits Mike from knowingly using any electronic device (such as a computer or smartphone) "for any purpose other than school-related assignments, or legitimate work or personal purposes," as defined by the probation officer, and requires Mike's use of electronic devices to be supervised "by a responsible adult over the age of 21 who is aware that the minor is on probation, is aware of the minor's charges, and is aware of the limits on the minor's computer use." Finally, *condition 59* prohibits Mike from using a computer "for any purpose other than school related assignments" and requires supervision of computer use in school and in the common area of his home.

Mike argues these computer and Internet use restrictions are invalid under the three-part *Lent* test and unconstitutionally overbroad. We agree as to both contentions.[4]

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[4] As both parties note, condition 58 conflicts with the court's stated intention at the sentencing hearing. The juvenile court indicated teachers did not have to be notified of the minor's charges. Therefore, condition 58 would need to be modified to reflect the court's stated intention. (See *People v. Mesa* (1975) 14 Cal.3d 466, 471 [any conflict between a court's oral pronouncement of judgment and the clerk's minutes recording the judgment must be resolved in favor of the oral pronouncement].) Even as modified, however, the condition is invalid under *Lent* and unconstitutionally overbroad for reasons explained herein.

1. *Validity under Lent*

A probation condition will not be held invalid under *Lent* unless it: (1) has no relation to the crime; (2) relates to conduct that is not itself criminal; and (3) is not reasonably related to future criminality. (*Olguin, supra*, 45 Cal.4th at p. 379; *Lent, supra,* 15 Cal.3d at p. 486.) "[A]ll three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, at p. 379.)

The first two prongs are unambiguously met. Using a computer or the Internet is not inherently criminal, and the court acknowledged the crime did not involve a computer or the Internet. Mike did not use the Internet, social media, or a computer to communicate with C.C. or otherwise facilitate his offense. The only connection to the Internet or electronic devices is Mike's statement to the probation officer that he masturbated approximately once per week while viewing online pornography on his smartphone. There is no evidence his weekly viewing of pornography influenced his having anal sex with C.C.; Mike denied planning or fantasizing about the offense ahead of time.

The parties disagree as to whether the third *Lent* prong is met. Mike argues the Internet and computer use restrictions do not reasonably relate to deterring future criminality. The People argue they do, by facilitating his supervision.

The courts of appeal are divided in evaluating probation conditions with broad Internet and computer restrictions. In *P.O., supra,* 246 Cal.App.4th 288, the court upheld electronics search conditions under *Lent*, concluding the conditions were reasonably related to deterring future criminality. (*P.O.*, at p. 295.) The minor in *P.O.* admitted to

misdemeanor public intoxication, and the court concluded the conditions would enable effective supervision for indications he had drugs or was violating other terms of his probation. (*Ibid.*)[5] Likewise, in *In re George F.* (2016) 248 Cal.App.4th 734 (*George F.*), this court upheld conditions restricting a child sex offender's computer and Internet use as reasonably related to deterring future criminality, concluding the conditions would deter the minor from accessing child pornography and facilitate his supervision. (*Id.* at pp. 740-741.)

By contrast, several courts have struck probation conditions relating to Internet and computer use as invalid under *Lent*. In *Erica R., supra,* 240 Cal.App.4th 907, the court reasoned that nothing connected the minor's use of electronic devices or social media to her possession of illegal drugs; therefore, a condition requiring the minor to submit electronic devices to search was not reasonably related to preventing future criminality. (*Id.* at pp. 912-913.) In *J.B., supra,* 242 Cal.App.4th 749, the court concluded an electronic search restriction bore no relation to the minor's offense of petty theft and therefore was not reasonably related to deterring future criminal acts. In *In re Malik J.* (2015) 240 Cal.App.4th 896, the court upheld a condition requiring the minor, who admitted to cell phone theft, to turn over passwords to his electronic devices, reasoning this would allow officers to determine whether he had stolen those devices. (*Id.* at pp. 902, 904.) However, the court invalidated a condition requiring the minor to turn over passwords to his social media accounts, concluding unfettered searches of the

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[5] The court ultimately struck the probation conditions as unconstitutionally overbroad, despite their validity under *Lent.* (*P.O., supra,* 246 Cal.App.4th at p. 297.)

minor's online *communications* would encroach on his and potentially third parties' constitutional rights to free speech and privacy and was not sufficiently linked to deterring future criminality. (*Id.* at p. 902.)

The cases appear to diverge on their reading of the California Supreme Court's ruling in *Olguin, supra,* 45 Cal.4th 375, which upheld a probation condition requiring a defendant to notify his probation officer about any pets at his residence. (*Id.* at p. 378.) The Supreme Court found this condition satisfied the third prong of *Lent* because it "reduce[d] the possible threat to the probation officer's safety" and facilitated unannounced searches by probation. (*Olguin,* at pp. 381-382.) The court concluded, "[a] condition of probation that enables a probation officer to supervise his or her charges effectively is . . . 'reasonably related to future criminality.' " (*Id.* at pp. 380-381.) *P.O.* cited this language in *Olguin* to uphold an electronics search condition that had no connection to the minor's drug offense, as it would facilitate effective supervision of the minor. (*P.O., supra,* 246 Cal.App.4th at p. 295.) *George F.* took the same approach, citing *Olguin* for the proposition that "effective supervision of a probationer deters, and is therefore related to, future criminality." (*George F., supra,* 248 Cal.App.4th at p. 741.) By contrast, *J.B.* explained that *Olguin* focused on whether probation restrictions were *reasonable*. (*J.B., supra,* 242 Cal.App.4th at p. 757.) *J.B.* held that the mere fact a search condition would facilitate supervision was *insufficient* under *Olguin* "to justify an

open-ended search condition permitting review of all information contained or accessible on the minor's smart phone or other electronic devices." (*J.B.*, at p. 758.)[6]

We find *J.B.*'s approach more persuasive. *Olguin* and *Lent* both ask whether the challenged probation condition forbids conduct that is not "reasonably related to future criminality." (*Lent, supra,* 15 Cal.3d at p. 486; *Olguin, supra,* 45 Cal.4th at p. 380.) While measures that facilitate enhanced supervision are no doubt *related* to deterrence, the question is whether such measures are *reasonably* related to deterrence. *P.O.* and *George F.* appear to overlook the reasonableness requirement altogether.[7] Moreover, there is a qualitative difference between the pet notification requirement in *Olguin* and

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6 Recognizing the split in appellate authority interpreting *Olguin*, the California Supreme Court certified the following issue for review: "Did the trial court err by imposing an 'electronics search condition' on [minor] as a condition of his probation when that condition had no relationship to the crimes he committed but was justified on appeal as reasonably related to future criminality under [*Olguin, supra,* 45 Cal.4th 375] because it would facilitate [his] supervision?" (*In re Ricardo P.*, review granted February 17, 2016, S230923.) Following its grant of review in *Ricardo P.*, the Supreme Court granted review in the following related cases: *In re Patrick F.*, review granted February 17, 2016, S231428; *In re Alejandro R.*, review granted March 9, 2016, S232240; *In re Mark C.*, review granted April 13, 2016, S232849; *In re A.S.*, review granted May 25, 2016, S233932; *In re J.E.*, review granted October 12, 2016, S236628; *People v. Nachbar*, review granted December 14, 2016, S238210.

7 *George F.* tried to distinguish *J.B.* and *Erica R.* on grounds those cases did not involve sex crimes. (*George F., supra,* 248 Cal.App.4th at pp. 741-742.) However, that reasoning suggests *any* sex crime warrants blanket restrictions on Internet and computer use under *Lent*. We see no reason to differentiate sex crimes in this manner; many forms of criminality could be furthered through the Internet. We also find *George F.* to be factually distinguishable. Whereas the minor in that case molested a young child, Mike admitted to sodomy of someone his age, whom he had dated for five months. Whereas *George F.* was concerned about limiting the minor's access to child pornography, Mike was attracted to "either same-age females or adult females" and had only viewed adult pornography on the Internet.

the broad restrictions on Internet and computer use at issue here. (See, e.g., *Riley v. California* (2014) 134 S.Ct. 2473, 2490 [distinguishing smartphones as "qualitatively different" from other physical objects subject to search; among other things, smartphone data can reveal "an individual's private interests or concerns"]; *Reno, supra,* 521 U.S. at p. 853 [comparing the Internet "to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services"].)

As the court noted in *Erica R.*, " '[n]ot every probation condition bearing a remote, attenuated, tangential, or diaphanous connection to future criminal conduct can be considered reasonable.' " (*Erica R., supra,* 240 Cal.App.4th at p. 913.) The mere fact a condition "would facilitate general oversight of the individual's activities is insufficient to justify an open-ended search condition permitting review of all information contained or accessible on the minor's smart phones or other electronic devices." (*J.B., supra,* 242 Cal.App.4th at p. 758.) Here, as in *J.B.* and *Erica R.*, there is no relationship between the minor's admitted conduct of sodomy of a minor and his use of the Internet or electronic devices. There is little reason to believe broad Internet and electronics use restrictions like the ones imposed here will serve a rehabilitative function by deterring Mike from future criminal activity. (*Erica R.,* at p. 913; *J.B.*, at p. 756.)

Significantly, both the probation officer and clinical psychologist concluded Mike bore a low risk for future criminal activity. Mike had never been a truant from school. He had good grades and aspired to be a doctor. He was not in a gang and did not use or sell drugs or alcohol. By contrast, in *In re J.E.* (2016) 1 Cal.App.5th 795, a case currently pending review (S236628), electronic restrictions were deemed valid under

Lent because the minor had a "constellation of issues," including drug use, gang association, truancy and behavioral problems at school, and an unstable home life, all of which necessitated "intensive supervision." (*J.E.,* at pp. 801, 805-806.)

Where, as here, there is no link between the admitted sex act and use of the Internet or computers, broad probation conditions restricting Internet and computer use are invalid under the third prong of *Lent*, as they bear only a "remote, attenuated, tangential, or diaphanous connection to future criminal conduct." (*Erica R., supra,* 240 Cal.App.4th at p. 913.) We therefore strike probation conditions 39, 54, 58 and 59 as invalid under *Lent*; these conditions are unrelated to the offense, do not involve conduct that is itself criminal, and bear no reasonable relationship to preventing future criminality. (*Lent, supra,* 15 Cal.3d at p. 486; *Olguin, supra,* 45 Cal.4th at p. 379.)

2. *Constitutionality*

Even if conditions 39, 54, 58 and 59 were valid under *Lent*, constitutionality would be a separate question. (*P.O., supra,* 246 Cal.App.4th at p. 297.) On appeal, Mike argues these conditions are overbroad encroachments on his constitutional rights to free speech. "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K., supra,* 40 Cal.4th at p. 890.)

As drafted, we agree that conditions 39 and 54, requiring supervised Internet use and prohibiting social media access, are unconstitutionally overbroad. Uncontested conditions of Mike's probation required Mike to refrain from contacting the victim, C.C., by e-mail, text or electronic means (Nos. 32, 34); stalking, intimidating, harassing,

threatening, or impersonating C.C. on the Internet (No. 33); and posting negative comments about C.C. on any social media site (No. 37). *These* restrictions are narrowly tailored and reasonably related to compelling state interests of protecting the public and deterring Mike from further criminality, by keeping Mike away from C.C. Mike and C.C. attended the same school and church, and after the incident, C.C. alleged Mike harassed her. Keeping Mike away from C.C. online, through social media, e-mail, or other means, reasonably served compelling state interests of protecting C.C. and rehabilitating Mike. By contrast, there is no basis in the record to conclude sweeping Internet or social media restrictions would serve the same rehabilitative purpose. Absent any connection between Mike's social history and the Internet and social media restrictions imposed, there appears to be no support for the People's claim they are narrowly tailored to deterring future criminality.[8]

In *Stevens, supra,* 119 Cal.App.4th 1228, the court rejected a parole condition prohibiting a child molester from accessing a computer or the Internet.[9] The court found the broad prohibition "bore no relation to Stevens's conviction for child molestation and imposed a greater restriction of his rights than was reasonably necessary to accomplish

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8 With 90 percent of young adults between the ages of 18 and 29 using social media, a blanket ban affects a considerable amount of speech. Social media has affected the way people get and share information about topics as diverse as health, employment, communities, civic life, hobbies, sports, the news, religion, academics, teenage life, parenting, and dating. (See Andrew Perrin, *Social Media Usage: 2005-2015*, Pew Research Center (2015) pp. 2-3, http://www.pewinternet.org/files/2015/10/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf.)

9 "The criteria for assessing the constitutionality of conditions of probation also appl[y] to conditions of parole." (*Stevens, supra,* 119 Cal.App.4th at p. 1233.)

the state's legitimate goal." (*Id.* at p. 1239.) The court noted the government could instead conduct "unannounced inspections" of the defendant's computers or use software to review and monitor his Internet use. (*Ibid.*) Similarly, here, more targeted conditions limiting Mike's ability to contact C.C. through the Internet or social media and facilitating searches of his online activity are adequate to ensure Mike does not use the Internet to contact C.C. (*Ibid.*; see *United States v. Freeman* (3d Cir. 2003) 316 F.3d 386, 392 ["There is no need to cut off . . . access to email or benign Internet usage when a more focused restriction . . . can be enforced by unannounced inspections of material stored on [the defendant's] hard drive or removable disks."].)

The People cite *In re Hudson* (2006) 143 Cal.App.4th 1, which distinguished *Stevens* on factual grounds and upheld a parole condition prohibiting a child molester from accessing a computer or the Internet. (*Id.* at pp. 4-5, 10-11.) However, the defendant in *Hudson* had used the Internet to download instructions on how to respond if accused of child molestation; encrypted his computer while on probation for a previous offense; and displayed photos of two young boys on his computer. (*Id.* at pp. 9-11 & fn. 6.) There was plainly a connection between the defendant's social history and the computer restrictions imposed. Similarly, in in *People v. Harrisson* (2005) 134 Cal.App.4th 637, the court upheld a probation condition completely banning Internet use where the defendant had used the Internet to send pornographic images and solicit sex with a minor and violated probation by viewing pornography online while looking for a job. (*Id.* at pp. 646-647.) The defendant had also expressed a desire to seek violent

revenge against the prosecutor, which the court found could be facilitated through Internet research. (*Id.* at p. 647.)

We conclude this case is more akin to *Stevens.* Absent a connection between Mike's offense and his use of the Internet, conditions limiting his social media and Internet use impose greater restrictions than necessary to rehabilitate Mike or protect C.C. (*Stevens, supra*, 119 Cal.App.4th at p. 1239.)

A similar analysis applies to condition 58, which requires supervised computer and electronic device use and limits such use to "school-related assignments, or legitimate work or personal purposes," as defined by the probation officer. The probation officer and psychologist concluded Mike had a low likelihood of recidivism, and his offense did not involve a computer or electronic device. Absent any connection between Mike's social history and the computer use restrictions imposed, there is no support for the People's claim they are narrowly tailored and reasonably related to deterring future criminality.

Condition 59 is even more extreme. A blanket restriction forbidding Mike from using a computer for anything other than school-related assignments precludes his extracurricular use of a computer to write letters, create art, use software to learn a foreign language, read the news, check sports scores or movie times, research medical information, and obtain other legitimate information wholly unrelated to his criminal conduct in this case. Such a broad restriction is not narrowly tailored or reasonably related to the state's interest in rehabilitating Mike.

In short, even if conditions 39, 54, 58 and 59 were valid under *Lent*, they are unconstitutionally overbroad because they are not narrowly tailored or reasonably related to a compelling state interest. We therefore strike these probation conditions.

B. *Conditions Restricting Access to and Possession of Sexually Explicit Content*

Three probation conditions restrict Mike's access to and possession of pornography and/or sexually explicit content. *Condition 38* prohibits Mike from knowingly possessing sexually explicit material, as defined by title 15, section 3006 of the California Code of Regulations (hereafter, section 3006).[10] *Condition 53* prohibits Mike from knowingly accessing phone or Internet services or subscribers he reasonably should know contain sexually explicit content, as defined by section 3006. Finally, *condition 56* prohibits Mike from, inter alia, purchasing or possessing pornography or sexually explicit materials.[11] Mike challenges probation condition 53 as invalid under *Lent* and unconstitutionally overbroad. He did not object to conditions 38 or 56 below but challenges both as facially overbroad on appeal.

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10 That statute defines "[s]exually explicit material" as personal photographs, drawings, magazines, or other pictorial formats showing "the frontal nudity of either gender, including the fully exposed female breast(s) and/or the genitalia of either gender." (Cal. Code Regs., tit. 15, § 3006, subd. (c)(17)(A).)

11 In full, condition 56 reads: "The minor shall not knowingly frequent websites or adult bookstores or any other place the minor knows or reasonably should know contain pornographic materials. The minor shall not knowingly purchase or possess any pornography or sexually explicit materials, having been informed by the probation officer that such items are pornographic or sexually explicit. The probation officer shall provide the minor and the minor's parent/guardian with a written notice that defines what are considered 'pornographic' or 'sexually explicit' materials or images."

At the sentencing hearing, the court expressed concern that Mike had visited inappropriate websites on the Internet. Mike told the probation officer he masturbated approximately once per week while viewing Internet pornography on his smartphone. Although Mike denied planning or fantasizing about the offense ahead of time, the court stated, "unfortunately Mike utilized his smart phone to access inappropriate websites, and I don't know to what extent that played a role."

We review a *Lent* challenge for abuse of discretion and will not disturb the juvenile court's discretion absent manifest abuse. (*Erica R., supra,* 240 Cal.App.4th at p. 912.) Under this standard, we are unable to say the court abused its discretion in imposing condition 53. The court may have believed restricting Mike's access to sexually explicit online content would further the statutory goals of Mike's reformation and rehabilitation. (Welf. & Inst. Code, § 730, subd. (b).) Some studies suggest a "causal link between pornography and sex crimes," although there is an "array of academic authority on the other side." (*Amatel v. Reno* (D.C. Cir. 1998) 156 F.3d 192, 199-200.) It is not our job to resolve the conflict in the academic literature. Because juveniles are deemed to be more in need of guidance and supervision than adults and courts have greater leeway in formulating the terms of juvenile probation than adult probation (*Victor L., supra,* 182 Cal.App.4th at p. 910), we cannot say the juvenile court abused its discretion in restricting Mike's access to pornography and sexually explicit content.

Constitutionality is a different question, subject to independent review. (*In re J.B., supra,* 242 Cal.App.4th at p. 754.) Because First Amendment interests are at stake, the

probation condition must be narrowly tailored and reasonably related to a compelling governmental interest to survive an overbreadth challenge. (*Sheena K., supra*, 40 Cal.4th at p. 890; *Victor L., supra,* 182 Cal.App.4th at p. 910.)

We conclude restrictions on pornography and sexually explicit content are not reasonably related to the state's interest in rehabilitating Mike. There is no apparent connection between the crime and Mike's viewing of Internet pornography or sexually explicit material. (Cf. *People v. Turner* (2007) 155 Cal.App.4th 1432, 1436-1437.)

In re D.H. (2016) 4 Cal.App.5th 722 (*D.H.*) is instructive. In that case, a 16-year-old minor who admitted to indecent exposure on a public bus was placed on probation. (*Id.* at p. 724.) As a condition of probation, the minor was prohibited from accessing pornography. (*Id.* at p. 725.) The minor appealed, arguing the no-pornography condition was unconstitutionally vague. (*Id.* at p. 728; see *Sheena K., supra,* 40 Cal.4th at p. 890 [vagueness challenge asks whether condition is sufficiently precise for probationer to know what is required and for court to evaluate compliance].) As a matter of first impression, the court agreed with the minor that the term was "pornography" was inherently vague and directed the trial court on remand "to define more precisely the material the court intends to prohibit." (*D.H.,* p. 729.)[12] Although not faced with an overbreadth challenge, the court suggested the juvenile court carefully consider on remand "what purpose this condition is intended to serve, as it is far from clear to us how

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12 The court concluded the constitutional infirmity could not be remedied by requiring the probation officer to notify the minor in advance what materials would be considered pornographic because the term "pornography" was itself subjective and capable of multiple interpretations. (*D.H., supra,* 4 Cal.App.5th at pp. 728-729.)

restricting D.H.'s access to *any* materials that might be considered pornographic will help him avoid the behavior he exhibited in committing his offense or aid more generally in his rehabilitation." (*Ibid.*) Likewise, here, we conclude restrictions on pornography and sexually explicit material are not reasonably related to Mike's rehabilitation.

Instead, conditions 38, 53 and 56 may reasonably relate to a *different* governmental interest—that of protecting minors from *obscene* material. (See *Stevens, supra,* 119 Cal.App.4th at p. 1236 ["Society has a strong interest in protecting its youth from the harmful effects of obscene material."], citing *Reno, supra*, 521 U.S. at pp. 869-870 & *Ginsberg v. New York* (1968) 390 U.S. 629.) Mike admitted to periodically watching Internet pornography on his smartphone, and the court expressed concern about that behavior at sentencing. Conditions 38, 53 and 56 reasonably relate to the compelling governmental interest of protecting Mike from accessing obscene material online.

As drafted, however, conditions 38, 53 and 56 are not narrowly tailored to serve that compelling state interest. As Mike argues on appeal, read literally, condition 53 bars him from accessing Internet services like Netflix that contain movies with nudity. Conditions 38 and 56 arguably prohibit him from "owning, for instance, a photo of Michelangelo's David or, of Gauguin's Two Tahitian Women."

"[M]inors are entitled to a significant measure of First Amendment protection." (*Erznoznik v. City of Jacksonville* (1975) 422 U.S. 205, 212.) "Clearly all nudity cannot be deemed obscene even to minors. [Citation.] Nor can such a broad restriction be justified by any other governmental interest pertaining to minors." (*Id.* at p. 213, fn. omitted.) Although a state no doubt possesses legitimate power to protect children from

harm, that does not encompass "a free-floating power to restrict the ideas to which children may be exposed. 'Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a [state] thinks unsuitable for them.' " (*Brown v. Entertainment Merchants Association* (2011) 564 U.S. 786, 794-795; see *Interactive Digital Software Assn. v. St. Louis Co.* (8th Cir. 2003) 329 F.3d 954, 959-960 ["Nowhere in *Ginsberg* (or any other case that we can find, for that matter) does the Supreme Court suggest that the government's role in helping parents to be the guardians of their children's well-being is an unbridled license to governments to regulate what minors read and view."].) As drafted, conditions 38, 53 and 56 are broader than permissible.

An unconstitutional probation condition may be remedied through modification on appeal. (*Sheena K.*, *supra*, 40 Cal.4th at p. 892.) We remedy the constitutional infirmity in conditions 38, 53 and 56 by deleting references to pornography and sexually explicit material and replacing them with restrictions on "obscene material, as defined by title 15, section 3006, subdivision (c)(15) of the California Code of Regulations." Under that provision, "[o]bscene material" is defined as "material taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest; and is material which taken as a whole, depicts sexual conduct; and which, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Cal. Code Regs., tit. 15, § 3006, subd. (c)(15)(A) [adopting standard set forth in *Miller v. California* (1973) 413 U.S. 15, 24]; see *Jenkins v. Georgia* (1974) 418 U.S. 153 ["nudity alone does not render material obscene under *Miller's* standards"].) "Obscene material" may encompass

visual depictions of anal or vaginal contact and nudity/sexual conduct involving a minor, but it excludes text-only material. (Cal. Code Regs., tit. 15, § 3006, subds. (c)(15)(C)-(D).) We believe this modification addresses the minor's valid overbreadth concerns while serving the compelling state interest of protecting him from the harmful effects of obscene material.

C. *Conditions Preventing Anonymous or Encrypted Internet or Computer Use*

Three probation conditions prevent Mike from anonymizing his presence on the Internet or using encryption. *Condition 42* prohibits Mike from knowingly using "any tool, site, software, device, or procedure that will tend to hide the minor's identity or Internet or computer activity, such as Anonymizer, remailers, Zeroknowledge, wipe or file shredder, or similar program." *Condition 43* requires Mike to use his first and last name when sending electronic communications and registering online accounts and prohibits him from knowingly providing false information about his identity to any communications service provider when purchasing, subscribing to, or agreeing to purchase any service that allows electronic communications. *Condition 45* prohibits Mike from knowingly using or possessing tools designed to test system security vulnerabilities and from knowingly using or possessing electronic devices that contain "any encryption, hacking, cracking, keystroke monitoring, security testing, or steganography, Trojan or virus software."

Mike challenges conditions 42, 43 and 45 as invalid under *Lent*. Unlike the blanket Internet and computer use restrictions in conditions 39, 54, 58 and 59, we conclude this set of conditions satisfies *Lent's* requirements. On review for abuse of

discretion, we cannot say these conditions do not satisfy the third prong of the *Lent* test. The juvenile court could reasonably conclude that requiring Mike to use his true identity online and avoid encryption or hacking tools could help the probation department assess whether Mike was communicating with C.C., in violation with other uncontested conditions of his probation. (*George F., supra,* 248 Cal.App.4th at pp. 740-741 [upholding under *Lent* conditions that "provide[d] the probation department with the practical information necessary to enforce the uncontested conditions"].) Thus, these conditions may serve to deter future criminality by preventing further contact with the victim. (See *Moran, supra,* 1 Cal.5th at p. 404 [condition prohibiting defendant from entering any branch of a hardware store chain following robbery was "reasonably directed at curbing his future criminality by preventing him from returning to the scene of his past transgression"].)

Mike also challenges conditions 42, 43 and 45 as unconstitutionally overbroad. As to conditions 42 and 43, Mike argues the First Amendment protects anonymous speech. While Mike is correct that anonymous speech is protected (*McIntyre v. Ohio Elections Comm'n* (1995) 514 U.S. 334, 342), we conclude conditions 42 and 43 are narrowly tailored to serve the compelling state interest of assisting Mike's reformation and rehabilitation. Put simply, because uncontested probation conditions require Mike to refrain from directly or indirectly contacting, harassing, or stalking C.C. online or through an electronic device, conditions 42 and 43 reasonably enable the probation officer to confirm Mike is not breaching those restrictions through anonymous Internet use. (See *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1175 [probation condition

requiring defendant to hand over passwords to devices and social media accounts held constitutional on grounds it enabled the probation officer "to assess defendant's compliance with the unchallenged association and gang insignia conditions"].) Thus, conditions 42 and 43 are constitutionally sound.

Condition 45 requires a different analysis. That condition prohibits Mike from knowingly using or possessing an electronic device with encryption. On appeal, Mike argues encryption tools are present on virtually every electronic device and smartphone application. He contends condition 45 is overbroad because, if read literally, it would prohibit him from using the Internet or possessing a modern smartphone. We agree.

Given the ubiquity of encryption technology, condition 45 is overbroad as formulated. As Mike notes, "encryption is standard-issue on every iPhone and Mac, with Google requiring new Android phones to be encrypted; every web page that begins 'https' uses encryption, including, for instance, every page on Netflix.com, every page on Wikipedia, and every page created by the federal government." (Fns. omitted.) "While it may not be apparent to the everyday user, encryption technology is now a fact of everyday life." (McCarthy, *Decoding the Encryption Debate: Why Legislating to Restrict Strong Encryption Will Not Resolve the "Going Dark" Problem* (2016) 20 No. 3 J. Internet Law 1, 21.) In recent years, Apple, Google, Facebook, WhatsApp, and Blackberry have all "announced plans to implement end-to-end encryption on a *default basis*. This means that encryption is applied automatically without a user needing to switch it on." (*Id.*, pp. 21-22, italics added.)

In *Ana C.*, a case currently pending review, the court invalidated a condition prohibiting a minor from using or possessing any program that could automatically delete data because, read literally, it would prevent the minor from using or possessing a smartphone or computer. (*In re Ana C.* (2016) 2 Cal.App.5th 333, 350-351 (*Ana C.*) review granted Oct. 19, 2016, S237208.) The court acknowledged the juvenile court may have wanted to prevent the minor from using applications like Snapchat that "allow electronic communications to be sent, received, and automatically deleted after they are read, thus effectively destroying all evidence that any communications occurred," or from using cloud-based programs to remotely delete data from an electronic device. (*Id.* at p. 351.) As formulated, however, the court found the restriction was unconstitutionally vague and/or overbroad. (*Ibid.*)

Here, the juvenile court may have reasonably sought to prevent Mike from concealing his online activity or electronic communications through encrypted programs or applications. However, as formulated, condition 45 effectively prohibits Mike from using the Internet or a smartphone. By virtue of accessing certain websites or even turning his smartphone on, he would risk violating the condition. As drafted, condition 45 is therefore unconstitutionally overbroad. It is also impermissibly vague, given other probation conditions *allowing* Internet and smartphone use. (See *Victor L., supra,* 182 Cal.App.4th at p. 926 [condition deemed unconstitutionally vague where it conflicted with other conditions].) "Rather than modify this condition on appeal in an effort to save it based on surmise" (*Ana C., supra,* 2 Cal.App.5th at p. 351), we vacate it and invite modification on remand to narrow it to its intended purpose.

D. *Conditions Facilitating Searches of Mike's Electronic Devices and Internet Use*

Finally, five probation conditions require Mike to hand over passwords, maintain Internet browser activity, and subject his electronic devices to search at any time. *Conditions 40 and 41* require Mike to hand over all passwords to any Internet site, social media account, electronic device, or file and submit those devices, sites, and files to a warrantless search at any time. Condition 41 additionally prohibits Mike from knowingly cleaning or deleting his Internet browsing history. *Condition 44* requires Mike to consent to any internet service provider or communications provider providing data to law enforcement. *Condition 61* prohibits Mike from knowingly using the password protect function on any file or electronic device, such as a computer, electronic notepad, or cell phone. Finally, *condition 63* extends Mike's Fourth Amendment waiver to any electronic device or remote storage to which Mike has access and requires him to submit to a warrantless search at any time. Mike challenges these conditions under *Lent*, arguing they are not reasonably related to his rehabilitation and reformation. He does not raise a separate constitutional challenge.

We uphold conditions 40, 41, 44 and 63 as valid under *Lent*. "Trial courts have broad discretion to prescribe probation conditions to foster rehabilitation and protect public safety." (*People v. Moore* (2012) 211 Cal.App.4th 1179, 1184.) Like the previous set of probation conditions, these conditions facilitate searches of Mike's Internet and computer activity and reasonably assist the probation officer in evaluating Mike's compliance with uncontested probation restrictions requiring him to stay away from C.C. (*George F., supra,* 248 Cal.App.4th at pp. 740-741; *Moran, supra,* 1 Cal.5th at p. 404.)

Because Mike is allowed to access the Internet and use computers but may not contact the victim through e-mail, text, or electronic means, his probation officer must be able to confirm whether Mike is complying with those restrictions.

As both parties note, condition 61 conflicts with the court's stated intention at sentencing to allow password protection on files and devices so long as passwords are disclosed to his parents and the probation officer. Condition 61 also conflicts with condition 40, which reads:

> "The minor shall provide all passwords and pass phrases to unlock or unencrypt any file, system, or data of any type, on any electronic devices, such as a computer, electronic notepad, or cell phone, to which the minor has access. Minor shall submit those devices to a search at any time without a warrant by any law enforcement officer, including a probation officer. THE MINOR IS TO PROVIDE FULL ACCESS TO ALL PASSWORDS TO HIS PARENTS AND PROBATION OR NOT BE PASSWORD PROTECTED."

Because any conflict between the court's oral pronouncement and the clerk's minutes recording the judgment must be resolved in favor of the oral pronouncement (*People v. Mesa, supra,* 14 Cal.3d at p. 471), we could modify condition 61 to condition password protection on Mike providing passwords to his parents and probation. However, that modification would render condition 61 redundant in light of condition 40. Therefore, we strike condition 61.

DISPOSITION

The October 2015 dispositional order is modified as follows:

1. The probation conditions restricting the minor's Internet, social media, and computer use (conditions 39, 54, 58 & 59 herein) and prohibiting password protection of files and electronic devices (condition 61 herein) are vacated.

2. The conditions relating to the minor's access to pornography and sexually explicit content (conditions 38, 53 & 56 herein) are modified to state as follows:

a. "The minor shall not knowingly possess obscene material, as defined by the California Code of Regulations, title 15, section 3006, subdivision (c)(15)."

b. "The minor shall not knowingly access phone/Internet services or subscribers, including 1-900 numbers, which he or she knows, or reasonably should know, contain obscene material, as defined by the California Code of Regulations, title 15, section 3006, subdivision (c)(l5), and the minor's parents/guardians will be required to provide the probation department with copies of phone bills upon request."

c. "The minor shall not knowingly frequent websites or adult bookstores or any other place the minor knows or reasonably should know contain obscene materials, as defined by the California Code of Regulations, title 15, section 3006, subdivision (c)(l5). The minor shall not knowingly purchase or possess materials he knows, or reasonably should know, to be obscene."

3. The probation condition restricting the minor from knowingly using or possessing any electronic device that "contains any encryption" (condition 45

herein) is vacated. On remand, the juvenile court may reinstate the condition in a narrower form, consistent with this opinion.

Except as so modified, the dispositional order is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.