In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JEFFREY MICHAEL MORAN,

Defendant and Appellant.

Case No.
S215914

SUPREME COURT
FILED

MAY 23 2014

Frank A. McGuire Clerk

Deputy

Sixth Appellate District, Case No.
Santa Clara County Superior Court, Case No.
The Honorable Ron Del Pozzo, Judge

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ISSUE PRESENTED

May a court, as a condition of probation for theft from one store of a retail chain, bar the probationer from entering any of the chain's stores in California, or is the order unconstitutionally overbroad in violation of the defendant's right to travel?

INTRODUCTION

A probation condition prohibits appellant Jeffrey Moran, a convicted burglar, from entering the California properties of Home Depot, the retail chain that he burglarized. The Sixth District Court of Appeal struck the condition as an overbroad infringement on his right to travel.

However, the doctrine of facial overbreadth protects First Amendment rights like freedom of speech and association. This court's probation jurisprudence reflects such analysis is limited to that context.

Appellant's probation condition does not impact the constitutional right to travel. Stay-away orders by their nature are contact restrictive, and any impingement on travel from such orders are incidental to the objective of protecting the victim of or witnesses to the crime. This condition lacks the attributes of a restriction on movement inviting heightened scrutiny. It does not impose a curfew or house arrest. Nor does it render appellant ineligible from seeking or benefiting from government services.

The terms of the condition are reasonably related to appellant's crime and to the prevention of future criminality. In this regard, the Court of Appeal erred in concluding that the corporate entity from which appellant stole cannot be deemed a victim entitled to protection under such a probation condition. Even if the condition is evaluated for overbreadth, the probation condition should be upheld, because the restriction not to enter the victim's property is narrowly tailored based on appellant's crime.

STATEMENT

On October 19, 2012, appellant Moran entered a Home Depot store located at 2181 Monterey Highway in San Jose. (Aug. CT 11.) Asset Protection Specialist Tom Nguyen observed appellant conceal merchandise with a value of $128.46 in his backpack. (*Ibid.*) Subsequently, appellant passed all points of sale and exited the store without paying for the merchandise. (*Ibid.*) Nguyen stopped appellant and recovered the items. (*Ibid.*) Appellant told Nguyen that he was sent into Home Depot to steal items in exchange for money, and that he had hoped to received half the value of the merchandise he stole. (*Ibid.*)

The Santa Clara County District Attorney charged appellant with second degree burglary. (Pen. Code, §§ 459, 460, subd. (b); CT 2.) In a negotiated disposition, appellant pleaded no contest to commercial burglary and admitted a prior conviction. (CT 7; RT 3, 4-16, 17-18.)

The trial court suspended imposition of sentence and placed appellant on probation for three years. (CT 8, 12.) The court imposed a probation condition requiring appellant not to enter "the premises, parking lot adjacent or any store of Home Depot in the State of California." (CT 12; RT 24-25.) Appellant did not object to the condition. (RT 24-25.)

In the Sixth District Court of Appeal, appellant contended the probation condition unconstitutionally restricted his constitutional right to travel. (Typed opn. at pp. 2-3.) Relying on *In re Sheena K.* (2007) 40 Cal.4th 875, 878-879, 888-889, the Court of Appeal agreed. The appellate court evaluated the claim as one of constitutional facial overbreadth requiring no objection in the trial court, because the alleged defect was capable of correction without reference to the sentencing record in the trial court. (Typed opn. at p. 3.)

On the merits, the Court of Appeal found that while it is "quite apparent that the purpose of the probation condition at issue here is to

prevent appellant from entering Home Depot stores and taking merchandise without paying for it," the condition lacks the close tailoring constitutionally needed for that purpose to avoid overbreadth. (Typed opn. at p. 4.) In an apparent critique of the condition's efficacy, the court said that the condition would have only "minimal effect appellant's rehabilitation as he could simply decide to take merchandise from an endless list of other stores." (*Ibid.*) The court added, "although [the restriction] might relate to avoiding recurrences of appellant's criminal conduct in Home Deport stores, it does not prevent him from engaging in his criminal conduct elsewhere." (*Ibid.*)

The court observed further that "stay away" orders generally are imposed because they "relate to the nature or cause" of the crime like gang or drug activity, or "to the class of persons who would be a source of temptation to the probationer such as gang members and drug users," or they "are imposed to protect actual victims of the probationer's crime." (Typed opn. at pp. 4-5.) Categorically distinguishing the order requiring appellant to stay away from Home Depot stores and parking lots, the appellate court observed that those "stores . . . belong to a business corporation, not a person or class of persons related to the probationer's crime." (*Id.* at p. 5.) The court also found the condition was so broad that it "prevented activities unrelated to criminal activity," by reading that condition as "effectively . . . prohibit[ing] appellant from entering any store that shares a parking lot with a Home Depot." (*Ibid.*, fn. omitted.)

Though finding "an obvious nexus" between appellant's crime and the condition as it relates to the Home Depot store that was the locus of the crime, the court also concluded that the stay-away order "should contain an exception that would allow appellant to be on Home Depot property on legitimate business for the condition to pass constitutional muster." (*Id.* at pp. 5-6.) The court added, in footnote dictum, that "[f]rankly" it believed

"a much better way to achieve what seems to be the purpose of the probation condition" is the express or implicit condition of every grant of probation that the defendant "refrain from engaging in criminal practices, i.e., obey all laws." (*Id.* at p. 6, fn. 5.) The court did not remand for reformation of the condition in the manner it suggested. Instead, it struck the condition requiring appellant not to enter the premises or adjacent parking lot of any Home Depot store in California and, as modified, affirmed the judgment. (*Id.* at p. 6.)

SUMMARY OF ARGUMENT

The Court of Appeal erred in evaluating the probation condition for facial overbreadth. Only probation conditions impinging on First Amendment rights, such as freedom of speech or freedom of association, are subject to the higher level of overbreadth scrutiny identified in *In re Sheena K., supra*, 40 Cal.4th 875. Probation conditions restricting other constitutional rights are evaluated for reasonableness, pursuant to *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*).

In any event, the stay-away condition does not impermissibly impinge the constitutional right to travel. The condition precludes appellant's physical presence on his corporate victim's properties. In the same way, a stay-away condition could order a burglar not to be on any real property of an individual victim during the term of probation. It is highly questionable that the validity of a stay-away order can depend upon mere fortuities of property ownership, e.g., whether a retail outlet owner holds ownership of the burgled premises individually rather than through a corporation; whether the premises are the corporation's sole asset or, instead, one among other outlets; or whether the premises are part of a closely- or publicly-held corporate entity.

Avoidance of Home Depot property during the term of probation does not unconstitutionally deprive appellant of the right to travel. The

condition contains none of the attributes of a banishment order. For example, it does not require appellant to implement broad-based geographical or temporal restrictions on his day-to-day movements or to alter his residence. It does not exile him beyond any court's jurisdictional boundary. It does not exclude him from the geographical limits of any governmental subdivisions like cities or counties. Nor does it preclude him from accessing government agencies or services. It does not even limit his transit into or between neighborhoods or streets. A no-physical-contact-with-the-victim condition of probation does not unconstitutionally burden the right to travel.

Even if evaluated for overbreadth, the condition should be upheld. The probation restriction in this case does not irrationally preclude efforts to rehabilitate and to avoid further criminality. Restrictions on the probationer's general movement might invite scrutiny under *Lent* if a no-physical-contact condition absolutely precluded such rehabilitative efforts. For example, a home-arrest condition, as applied, might be shown to preclude the probationer from earning a living except through crime.

This condition has no such effect. Indeed, it facially has only a slight incidental impact on appellant's legitimate contacts even with Home Depot itself. Appellant can shop for or purchase any product or service that Home Depot makes available by mail, phone, or online sales, so long as he does not take delivery of goods himself by physically entering its stores or parking lots. The condition is reasonably related both to appellant's crime and to the prevention of future criminality and is closely tailored to those legitimate purposes based on the identity of the crime victim.

ARGUMENT

I. THE COURT OF APPEAL ERRED IN EVALUATING THE PROBATION CONDITION FOR CONSTITUTIONAL OVERBREADTH AS ONLY PROBATION CONDITIONS THAT LIMIT FIRST AMENDMENT RIGHTS MUST BE NARROWLY TAILORED

The Court of Appeal, under the authority of *In re Sheena K.*, *supra*, 40 Cal.4th at page 890, concluded that the restriction on appellant against entry of Home Depot stores and parking lots is a facially overbroad infringement on his right to travel while on probation. But *Sheena K.* does not support the application of overbreadth analysis and its narrow-tailoring requirement to the probation condition in this case. That analysis is reserved for the very few conditions of release that actually impinge on First Amendment rights retained by a probationer despite his criminal conviction.

A. Only Conditions Limiting First Amendment Rights Must Be Narrowly Tailored to Avoid Overbreadth

In re Sheena K. involved a probation condition that limited a juvenile probationer's freedom of association. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 878.) Specifically, the condition provided that the juvenile "not associate with anyone disapproved of by probation." (*Ibid.*)

As the condition restricted a First Amendment right of association that the juvenile would otherwise retain during the term of probation, this court entertained her facial challenge, holding that the claim was not subject to forfeiture for failure to object. (*Id.* at p. 889.) Because the condition did not require the minor to receive advance notification of the individuals with whom association was forbidden, the Court found the restriction on First Amendment rights vague and overbroad. (*Id.* at pp. 891-892.) Although the decision mentions "constitutional rights" generally, the only claim raised by the juvenile and decided by this court related to the minor's

associational right, and significantly, the court relied on First Amendment precedent in reaching its conclusion. (*Id.* at pp. 891-892 [citing *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117-1118; *People v. Lopez* (1988) 66 Cal.App.4th 615, 629].)

As reflected by *Sheena K.*, the First Amendment plays a unique role in the functioning of our democratic government. (See *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 269-270.) The protections that amendment provides to expression have been characterized as "the Constitution's most majestic guarantee," that are "essential to intelligent self-government in a democratic system." (Tribe, American Constitutional Law (2d ed. 1988) § 12–1, at pp. 785-86.) "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." (*Cohen v. California* (1971) 403 U.S. 15, 24.)

Because First Amendment rights are crucial in the functioning of our democracy, laws which touch on those rights may not be overly broad and must not sweep in a substantial amount of constitutionally protected conduct. (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 612-615; *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 432-433 ["Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"].)

This constitutional concern with the "breathing space" needed for free expression and associational rights to secure the liberty of the people explains the significant difference in treatment accorded by courts to a claimed infringement of the First Amendment as opposed to other constitutional rights. (See *Broadrick v. Oklahoma*, *supra*, 413 U.S. at pp. 612-613.) Under traditional rules of constitutional adjudication, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."

(*Broadrick, supra*, 413 U.S. at p. 610.) These traditional rules on standing have been relaxed when the claim of statutory overbreadth is alleged to impinge upon the First Amendment. (*Id.*, at p. 612.) For example, claims of facial overbreadth have been considered in cases involving statutes which seek to regulate "only spoken words." (*Ibid.*) Thus, courts have heard First Amendment claims of overbreadth not necessarily applicable to the conduct of the party who brings the claim. (*United States v. Raines* (1960) 362 U.S. 17, 22-23.)

> The [First Amendment overbreadth] doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." [Citations.] It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity. [Citations.]
>
> The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort."

(*New York v. Ferber* (1982) 458 U.S. 747, 767-769, quoting *Broadrick, supra*, 413 U.S. at p. 612.)

As the Supreme Court emphasized in *Broadrick*, "the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function [under the First Amendment], a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct . . . ." (413 U.S. at p. 615.)

An overbreadth claim asks a court to speculate as to the deterrent impact on hypothetical conduct significantly different from that involved in the case to determine whether or not the challenged restriction would cause persons who might wish to engage in otherwise constitutionally protected activity to refrain from speech or association for fear of prosecution. Overbreadth analysis does not work where the restriction has no impact on First Amendment rights.

B. Conditions Affecting Constitutional Rights Apart from the First Amendment are Tested for Reasonableness

In *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, plaintiffs argued that a city ordinance targeting vagrancy was an overbroad infringement on the constitutional right to travel. While the court ultimately declined to decide the applicability of overbreadth analysis to that claim, it noted United States Supreme Court decisions suggesting that criminal statutes cannot be attacked for overbreadth outside of the First Amendment context. (*Id.* at pp. 1095-1096, fn. 15.)

Similarly, in *People v. Rubalcava* (2000) 23 Cal.4th 322, 323, this court rejected an overbreadth challenge to a criminal statute, while openly questioning the doctrine's general applicability beyond First Amendment claims. (*Ibid.* ["Second, *Rubalcava*'s overbreadth challenge fails, even assuming arguendo that the overbreadth doctrine applies outside the First Amendment context"].)

Sheena K. teaches that a probation condition's vagueness and lack of notice may present an unacceptable risk of chilling First Amendment association rights. The constitutionally significant harm of the condition in *Sheena K.* making overbreadth analysis relevant was that not just defendant, but also friends or associates, could and probably would curtail an indefinite amount of constructive contact, much of it perhaps pure speech with full First Amendment protection, in order to avoid

compromising the minor and placing her in jeopardy of violating her probation in unpredictable ways and settings. The individuals so deterred presumably could include persons whose foregone contacts with the minor could have been instrumental in ensuring that she did not reoffend during her term of probation. *Sheena K.* makes sense as a First Amendment overbreadth case, particularly with regard to third persons who might have associated appropriately and constructively with the probationer in the exercise of their own rights but, who would be arbitrarily deterred from doing so by the vagueness of the probation restriction. That case does not vindicate at all the proposition that no-victim-contact or even actual "banishment" conditions are subject to "overbreadth" analysis, let alone that such conditions fail absent narrow tailoring to the least possible restraint on the general constitutional liberties of the probationer apart from the First Amendment.

The contrary reading of *Sheena K.* adopted by the Court of Appeal runs afoul of this court's probation jurisprudence. This court affirms that probation conditions broadly permitting warrantless searches do not run afoul of the Fourth Amendment, and it does so without analyzing the scope of the searches allowed by the condition for constitutional overbreadth. (*People v. Mason* (1971) 5 Cal.3d 759, 764, disapproved on other grounds by *People v. Lent*, *supra*, 15 Cal.3d at p. 486, fn. 1.) Instead, this court reviews the probation search conditions for reasonableness under state law. *Mason* found "beyond dispute" that a broad search condition validly related to the probationer's past criminal conduct and was appropriately aimed at deterring future offenses. Therefore, the search condition in *Mason* was found valid under Penal Code section 1203.1. (*Id.* at p. 764.) Notably, this court rejected the rule advocated by the dissent, which would have required all conditions touching on constitutional rights to be narrowly tailored. (Compare *ibid.* with *id.* at pp. 766-768 (dis. opn. of Peters, J.).)

More recently, in *People v. Olguin* (2008) 45 Cal.4th 375, 383-384, this court rejected a probationer's claim that a condition requiring him to notify the probation officer if he possessed any pets was constitutionally overbroad and had to be narrowly tailored to avoid interfering with his Fourteenth Amendment right to own property. The court rejected defendant's attempt to "constitutionalize" a right to pets, and instead evaluated the condition for reasonableness. The court observed that the cases requiring narrow tailoring of probation conditions, cited by defendant, related to conditions which limited freedom of speech and association, as protected by the First Amendment. (*Id.* at p. 384.)

As discussed in more detail in Argument II. C., *post*, other probation conditions arguably implicating constitutionally-secured property rights, such as prohibitions on the possession of gang-related clothing, or the possession or consumption of alcohol, are regularly upheld as reasonable, and are not evaluated for overbreadth. The same is true of the right to travel. (See *In re White* (1979) 97 Cal.App.3d 141, 150-152 [recognizing the constitutional right to intrastate right to travel applied to probation conditions, but evaluating the condition for reasonableness, not overbreadth].) To subject to overbreadth analysis probation conditions that touch on a constitutionally-secured right is stringent medicine. When such analysis not itself constitutionally compelled, as demonstrated by this court's cases, it is bad medicine. It is contrary to the express intent of the Legislature, and it improperly diminishes the discretion afforded to the trial court by statute.

Penal Code section 1203.1 provides that the trial court may impose "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation

of the probationer." (See Cal. Rules of Court, rule 4.414.) This court's precedent confirms the trial court is vested with broad discretion to determine whether probation is appropriate, and if so, to impose and supervise compliance with appropriate conditions. (*People v. Welch* (1993) 5 Cal.4th 228, 233; *People v. Warner* (1978) 20 Cal.3d 678, 682-683.)

An expansive rule requiring all probation conditions touching upon any of the probationer's general liberties to be narrowly tailored to achieve an important government interest, in order to avoid invalidation of the condition based on hypothetical conduct not shown to be applicable to the defendant himself as applied, would severely restrict the statutory discretion afforded to the trial court to protect the public, deter recidivism, and encourage reformation.

Moreover, that rule would inappropriately shift responsibility for crafting appropriate probation conditions to the appellate court. It is clear that trial courts are more familiar with the factual details of the probationer's offense and better equipped to craft the details of probation conditions from its qualitative judgments about the defendant's conduct, demeanor, and prospects. Finally, such a rule would increase the reluctance of trial courts in marginal cases to grant probation in the first instance. That is particularly true given that overbreadth analysis invites ad hoc distinctions and uncabined results—as in the decision below that strikes the probation condition despite the appellate court's suggestions for tailoring it. The court acted as though overbreadth were a synonym for a philosophy that nothing is preferable to less. To make that mistake is to discourage trial courts from extending probation in cases where probation makes no sense unless the conditions retain bite.

Limiting the scope of overbreadth review and narrow tailoring of probation conditions to First Amendment claims would maintain the proper balance. It protects core speech and associational rights while allowing the

trial court broad discretion to impose conditions that will protect victims and further the probationer's reform. This court should reject overbreadth analysis outside the context of the First Amendment.

II. APPELLANT'S PROBATION CONDITION DOES NOT IMPLICATE THE CONSTITUTIONAL RIGHT TO TRAVEL AND, THEREFORE, SHOULD BE UPHELD BECAUSE IT IS REASONABLY RELATED TO HIS OFFENSE AND TO THE PREVENTION OF FUTURE CRIMINALITY

Even if constitutional overbreadth analysis applies outside of First Amendment rights, the probation condition at issue does not impinge the constitutional right to travel. Therefore, it need not be narrowly tailored to an important governmental interest.

The instant condition is a no-physical-contact-with-the-victim order. The condition bars appellant from a retail chain's property in the state. The fact the underlying crime is a burglary of a corporate retailer's property and not of an individual proprietor's property is not a constitutional difference in terms of overbreadth analysis. It is no different than any other no-contact probation conditions routinely imposed and upheld by the courts. It is not the type of restriction that amounts to a banishment, exile, curfew, or house arrest. Furthermore, because the condition is clearly related to appellant's offense and to the prevention of future criminality, it should be upheld.

A. Standard of Review for Probation Conditions

Trial courts have broad discretion to set conditions of probation in order to "foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; see Pen. Code, § 1203.1, subd. (j)[1]; Cal. Rules of Court, rule 4.410.) If a

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[1] Penal Code section 1203.1, subdivision (j) provides in pertinent part:

(continued...)

probation condition serves these dual purposes, it may impinge upon a right otherwise enjoyed by the probationer, who is "'not entitled to the same degree of constitutional protection as other citizens.' [Citation.]" (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355.) "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. . . .' [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent*, *supra*, 15 Cal.3d at p. 486.)

B. Broad-Based Exclusions Amounting to Banishment, Exile, and Home Arrest etc. Implicate the Constitutional Right to Travel, Whereas Prohibiting Physical Entry of a Specific Location Connected to the Crime Does Not

The United States Supreme Court has long recognized a right to interstate travel. (See, e.g., *Crandall v. Nevada* (1867) 73 U.S. (6 Wall.) 35 [holding the right of interstate travel is a right of national citizenship essential for a citizen to pass freely through another state to reach the national or a regional seat of the federal government]; *Shapiro v. Thompson* (1969) 394 U.S. 618, 630 [holding a state residency requirement for welfare

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(...continued)

> The court may impose and require . . . [such] reasonable conditions[] as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . .

benefits violated the right to travel].) California also recognizes a right to intrastate travel. (*Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1100, citing *In re White*, *supra*, 97 Cal.App.3d at p. 148 ["We conclude that the right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole. Such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law"].)

Courts have consistently held that restrictions that bar a person from a large geographic area violate the right to travel. *White* held that a probation condition requiring a woman convicted of soliciting an act of prostitution to stay out of certain "control areas" of the City of Fresno violated her right to travel. (*In re White*, *supra*, 97 Cal.App.3d at p. 144.) The "control areas" encompassed the Greyhound bus station, several public transit stops, several restaurants defendant had previously patronized, a local park and zoo that her children liked to go to, as well as the homes of several friends and relatives. (*Id.* at pp. 144-145.) *White* held the restrictions, which required defendant to stay out of the control areas 24 hours a day and contained no exception allowing her to attend to legitimate business in the area, were too broadly drawn and also lacked a sufficient nexus to her crime. (*Id.* at pp. 147-148.) The appellate court contrasted the broad geographic scope of the ban with commonly upheld restrictions prohibiting entry into particular places or types of establishments (such as bars or pool halls). (*Id.* at p. 150.) While invalidating the broad exclusionary zone set out in the probation condition, the Court of Appeal refused to strike the condition as facially invalid in all possible applications. Instead, it remanded for the trial court to "set[] out a specific list of particular places (such as bars, pool rooms, motels and the like) from which the probationer may specifically be prohibited from entering." (*Id.* at p. 151.)

Conditions which amount to banishment or exile may also violate the right to travel. (*People v. Beach* (1983) 147 Cal.App.3d 612, 622-623.) In *Beach*, the elderly defendant became embroiled in a confrontation culminating in a shooting that resulted in her conviction for involuntary manslaughter. (*Id.* at p. 618.) The Court of Appeal found a violation of the right to travel where a probation condition required the defendant to relocate from the neighborhood where she had lived for 24 years. (*Id.* at pp. 621-623.)

Similarly, in *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1085, the Court of Appeal found that a probation condition requiring a minor defendant to live with his father in Iran for the duration of his probation violated his right to travel, free association, and assembly, and effectively banned him from the entering the United States. (See also *In re Alex O.* (2009) 174 Cal.App.4th 1176, 1183 [probation condition preventing entry into the United States except for work, school, and to visit family was unconstitutional]; *In re James C.* (2008) 165 Cal.App.4th 1198, 1204 [probation condition banning minor, a United States citizen, from entering the United States while on probation was unconstitutional].)

The right to travel does not confer an unfettered "'right to live or stay where one will.'" (*Tobe v. City of Santa Ana, supra*, 9 Cal.4th at p. 1103.) "Indirect or incidental burdens on travel resulting from otherwise lawful governmental action have not been recognized as impermissible infringements on the right to travel." (*Id.* at p. 1101.) While exclusions from large geographic areas and banishments may violate the right to travel in some cases, it is well settled that courts may place reasonable limitations on travel as a condition of probation. (Cf. *In re E.J.* (2010) 47 Cal.4th 1258, 1282, fn. 10 [noting that a court may place reasonable limitations on a parolee's right to travel].) For example, probation conditions requiring a defendant to stay out of specific establishments or types of places have

often been sustained. (See, e.g., *People v. Patel* (2011) 196 Cal.App.4th 956, 960 [upholding probation condition prohibiting defendant from knowingly entering store where alcohol is the chief item for sale]; *People v. Urke* (2011) 197 Cal.App.4th 766, 774-775 [upholding condition requiring defendant convicted of lewd acts on a child to stay away from places children are known to congregate]; *People v. Barajas* (2011) 198 Cal.App.4th 748, 755 [upholding condition requiring defendant to stay away from areas where gang members are known to congregate].)

Apart from the decision below, we find no case holding even one of the following three propositions: (1) probationers enjoy a constitutional right to travel into their victim's commercial retail properties during the term of probation; (2) the right can be limited, if at all, only to the extent of the physical locus of the crime itself; and (3) the right extends to actual commercial burglars.

It is clear that a condition prohibiting a commercial burglar from being physically present on the victim's property is not analogous to the kind of broad geographic restrictions on residence, work, or travel that courts have characterized as exile or banishment. Orders like the instant one clearly have more limited scope than the routine restrictions like nighttime curfew and weekend home arrest that are virtually never found to substantially burden the right to travel even as applied, let alone facially.

The instant restriction is similar to conditions regularly upheld by courts, such as banning a gang member from known gang territory, or preventing a child molester from entering parks and playgrounds. Unlike the condition struck down in *White*, appellant is not barred from a large geographic region of a city, thereby restricting his access to important public services. Nor does the condition banish him from a community in which he had deep roots. (See *People v. Beach*, *supra*, 147 Cal.App.3d at pp. 622-623.) It does not exile him from any judicial jurisdiction or

political subdivision of the state. It does not make it impossible for him to travel public streets. It does not restrict travel into or between neighborhoods generally, only his ability to enter the private property of the corporate entity that he victimized. (Cf. In re *White*, *supra*, 97 Cal.App.3d at pp. 144-145.) The condition requiring appellant to stay out of California Home Depot stores and parking lots does not implicate the constitutional right to travel.

C. The Probation Condition Is Reasonable

The condition plainly relates directly to appellant's crime, as it prevents him from entering the premises of the store he stole from. (*People v. Lent*, *supra*, 15 Cal.3d at p. 486.) As the Court of Appeal below acknowledged, "[i]t is quite apparent that the purpose of the probation condition at issue here is to prevent appellant from entering Home Depot Stores and taking merchandise without paying for it." (Typed opn. at p. 4.)

Furthermore, the condition relates to future criminality because it prevents appellant from victimizing the Home Depot again. (*People v. Lent, supra*, 15 Cal.3d at p. 486.) Additionally, as discussed in more detail below, the inclusion of other locations of the retail chain is likewise related to prevention of future criminality because it prevents appellant from increasing the scale of his crimes or shifting his activities to a nearby location of the same store.

The Court of Appeal criticized the condition because under its terms, appellant could simply steal from another chain of stores. (Slip. Opn. at 4.) The Court of Appeal appeared at that point to be suggesting the probation condition should apply to all chain stores or else to none of them, though the basis for such a conclusion is unexplained. Ultimately, it found that limiting the condition to only one store chain (i.e., the corporate victim's) was too broad a restriction, and it dispensed with narrow tailoring of the condition altogether by striking it.

Probation conditions need not be perfect, they need only be reasonable. (*People v. Lent*, *supra*, 15 Cal.3d at p. 486.) It is unclear which of the Court of Appeal's analyses was intended to be controlling and how any one of those analytic propositions results in its striking of the condition. Considered as a whole, the analysis ignores the nature of the offense. Appellant burgled from a Home Depot retail outlet. He may have done so because he had familiarity with the retailer's typical layout or security practices. He may have done so without regard to the particular location because he was part of a crime ring engaged in theft from the Home Depot retail chain. Regardless of why the store was appellant's target, it was a Home Depot store, not some other retailer. The trial court properly took appellant's target into account in setting the scope of the probation condition. Because the condition is reasonably related to appellant's crime as well as to the prevention of future criminality, it is not an abuse of discretion.

The Court of Appeal relied on *People v. Perez* (2009) 176 Cal.App.4th 380, in striking the probation condition. That case is readily distinguishable. *Perez* struck a probation condition barring the defendant from coming within 500 feet of any courthouse unless he was the defendant in a case or under subpoena as a witness. Perez's conviction for robbery, unlike a conviction for witness intimidation or interfering with court proceedings, had no connection to the courthouse. (*Id.* at p. 383.) Additionally, *Perez* noted courthouses are often located in government centers that house offices for important public services and public forums, and that the condition would prevent the defendant's entry into such places. (*Id.* at p. 385.) Moreover, a courthouse is a public facility used to vindicate a host of rights and protections unrelated to the offense. Home Depot bears

no resemblance to a government courthouse located adjacent to government offices providing essential public services.[2] Moreover, unlike in *Perez*, appellant is not banned from doing business with public entities, only with a particular retail chain, which has many competitors. Barring his access to Home Depot stores does not prevent him from accessing other retail services, or preclude him from participation in public discourse.

D. The Trial Court Properly Deemed Home Depot Corporation to Be the Crime Victim in Excluding Appellant from Its Property in California

The trial court did not abuse its discretion in imposing a statewide prohibition on entry into Home Depot stores and adjacent parking lots. Banning appellant from all locations of the Home Depot in the state, as opposed to the single location that was the locus of his crime, is reasonably related to appellant's offense and to the prevention of future criminality.

Banning appellant from Home Depot stores is obviously and clearly related to his crime. The condition is akin to one preventing a defendant convicted of robbing a liquor store from entering other similar stores. (See, e.g., *People v. Monterroso* (2004) 34 Cal.4th 743, 775 [noting defendant previously ordered to stay away from Circle K stores after robbing one location of the store].) And by banning appellant from all Home Depot locations within the state, the condition prevents future criminality. It accounts for the likelihood that appellant targeted Home Depot because of a

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[2] This court has recognized that private shopping centers may in some cases function as quasipublic forums for certain First Amendment activities. (See *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 910-911.) However, it has also found that property owners may impose reasonable restrictions on activities. (*Golden Gateway Center v. Golden Gateway Tenants Association* (2001) 26 Cal.4th 1013, 1022-1031 [noting that private property owners retain the right to exclude when property is not a quasi public forum].) The quasipublic forum cases are not implicated here.

particular feature of that corporation's stores, such as the layout, the difficulty of monitoring such a large facility, the ease of access to multiple exits, its security methods, or some other factor that caused appellant to select a Home Depot retailer as his target. It prevents appellant from broadening the scope of his thefts by stealing from other locations of the same store. It also prevents him from participating in a scheme whereby he steals goods from one Home Depot store, and returns them at another for a cash refund or a store credit.

In finding the probation condition overbroad, the appellate court said "the probation condition here is akin to an order directing a defendant to stay away from all persons with blonde hair because he assaulted a man with blonde hair." (Typed opn. at p. 4.) To make any sense of this statement seemingly requires one to presume that the only connection between Home Depot stores is the quirk that each outlet shares the same name. But that, again, overlooks the fact that the stores are owned by the same victim—Home Depot. Under the appellate court's logic, a trial court would exceed its authority by making a stay-away order against a burglar in some or all of the following situations: a residential victim's primary home if the burglary was from a vacation home; an individual merchant's retail shop if the burglary was from the merchant's lower-priced outlet store; a closely-held family corporation's retail store if the burglary was from the family's other retail store. In truth, it is hard to say what scenarios come within the rule below and what ones do not. And to say that the rule is just for Home Depot or for box stores or for big corporations is to admit it is no rule at all.

The Sixth District's analogy might have relevance if the trial court had ordered appellant to stay away from all retail stores that are painted yellow or all stores with the word "Home" in their name. Of course, the trial court did not. It ordered the defendant to stay away from the *victim*'s

stores. A trial court acts well within its discretion in fashioning a probation condition that protects the victim of a crime at all the victim's property locations, regardless of whether the victim has one home or two, one mom-and-pop store or 200 retail outlets. The court's "blonde hair" analogy only demonstrates how far off the mark its analysis is with respect to the trial court's tailoring of the probation condition.

Moreover, corporate entities are properly considered victims for purposes of probation and restitution. The Court of Appeal's conclusion that only the burgled Home Depot store, not the parent corporation, can be considered the victim of appellant's crime, is contrary to precedent. In *People v. Anderson* (2010) 50 Cal.4th 19, 33-34, this court held a defendant was properly subjected to a condition of probation under Penal Code section 1203.1 requiring he pay restitution to a hospital corporation that incurred expenses treating victim of defendant's crime. Recognizing the broad discretion of trial courts to fashion probation and restitution orders under Penal Code section 1203.1 in order to promote justice and encourage rehabilitation, this court in *Anderson* found it appropriate for the probationer to make restitution payable to the hospital corporation, even though it was not the direct victim of the offense. (*Id.* at pp. 33-34.)

Such a probation condition furthers rehabilitation by impressing upon the probationer the impact of the crime on corporate entities, including those not immediately associated with the named victim of the defendant's crime. By logical extension, a court is authorized to protect a parent corporation from a defendant who victimized one of its named retail stores and further the goal of defendant's rehabilitation by imposing a condition of probation that forbids the defendant from entering corporate retail premises during the term of probation.

This conclusion is supported by statute. Specifically, corporations are listed among the victims protected in Proposition 8, passed by ballot

initiative in 1982, also known as the Victim's Bill of Rights. Among its several provisions, the initiative added Penal Code section 1202.4, subdivision (k). That statute provides for restitution to "[a]ny corporation, business trust, . . . partnership, association, joint venture, . . . or any other legal or commercial entity when that entity is a direct victim of a crime. . . ." Thus, the electorate has recognized that the corporate entity itself—not merely a particular locus where that corporation does business—is properly considered to be a "victim" under California law.

Because the statewide ban from Home Depot stores is reasonably related to appellant's offense and the prevention of future crimes, the Court of Appeal erred in striking the condition. Moreover, the Court of Appeal's cramped view of the status of Home Depot as a crime victim is inconsistent with the existing California Supreme Court precedent and the Victim's Bill of Rights.

III. THE CONDITION IS NOT OVERBROAD

Even were the court to conclude that the probation condition in this case impinges on the constitutional right to travel, the condition should nonetheless be upheld because it is narrowly tailored. (See *People v. Olguin*, *supra*, 45 Cal.4th at p. 384; *In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

A probation condition should only be set aside as overbroad if it prohibits a substantial amount of constitutionally protected conduct. (See generally *Village of Hoffman Estates v. Flipside* (1982) 455 U.S. 489, 495; *People v. Rubalcava*, *supra*, 23 Cal.4th at p. 333.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will

justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

The trial court's probation condition is narrowly tailored to serve several legitimate objectives. First and foremost, the condition helps to prevent appellant from committing future thefts from the Home Depot Corporation by allowing police to intervene before a crime actually occurs. Second, the condition reduces the cost on Home Depot of policing to secure their properties from appellant, who otherwise might be tempted to case or appear to case any one of them.

Third, the condition aids in appellant's rehabilitation by linking his future behavior to the harm he inflicted on his actual victim, the corporate retailer. The condition bars appellant from the Home Depot's chain, not from all retail establishments, indeed, not even from all home improvement stores. Unlike the probation condition at issue in *White*, the condition does not prevent appellant from accessing essential public services.

Nor does keeping him out of Home Depot encourage him to commit theft from other companies, another purported inadequacy of the condition posited, in passing, by the Court of Appeal. Obviously, during the term of appellant's probation, his theft of property from some other retail chain would violate his probation conditions, just not this one. (See Pen. Code, § 1203.2, subd. (a).) But the condition's limitation to Home Depot is not proof of a need for tailoring. The condition does useful work. For example, it deters appellant from bringing items into Home Depot to fraudulently exchange them for cash or store credit.

Finally, contrary to the Court of Appeal's reasoning, the condition is limited in geographical scope. It does not preclude him from entering retail outlets apart from the Home Depot, nor from entering the parking lots, streets, or sidewalks adjacent to other retail outlets. The Court of Appeal said requiring appellant to stay out of parking lots adjacent to Home Depots

"effectively. . . prohibits appellant from entering any store that shares a parking lot with a Home Depot store." (Typed opn. at p. 5.) To the contrary, appellant does not violate the condition by entering a parking lot adjacent to another store that shares a parking lot with a Home Depot outlet. If the defendant has business in the other store, he can park on the street, in another parking lot, or in the portion of the shared lot adjacent to the other store, and walk on the public sidewalk to that store.

The probation condition does not impact a substantial amount of constitutionally protected conduct. Moreover, it is closely related to the wholly legitimate purpose of preventing appellant from continuing to steal from Home Depot. It is not overbroad and should be upheld.

CONCLUSION

Accordingly, the judgment of the Court of Appeal should be reversed.

Dated: May 23, 2014

Respectfully submitted,

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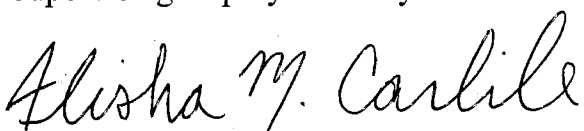

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Opening Brief on the Merits** uses a 13 point Times New Roman font and contains 7,623 words.

Dated: May 23, 2014

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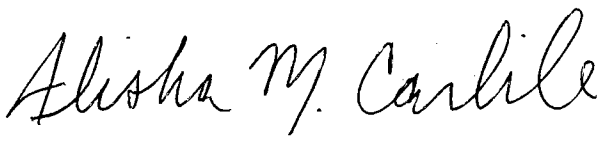

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Jeffrey Michael Moran*** No.: **S215914**
Sixth District Appellate Court No. H039330

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 23, 2014, I served the attached **Opening Brief on the Merits** by placing true copies enclosed in sealed envelopes in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 23, 2014 at San Francisco, California.

J. Espinosa
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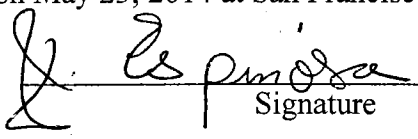
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