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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. _____ **SUPREME COURT FILED**

JAN 16 2014

Frank A. McGuire Clerk

Deputy

Sixth Appellate District, Case No. H039330
Santa Clara County Superior Court, Case No. C1243366
The Honorable Ron Del Pozzo, Judge

PETITION FOR REVIEW

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COURT RULES

California Rules of Court,

Rule 8.500(e) 1

Respondent respectfully petitions for review of the decision of the Court of Appeal for the Sixth Appellate District. The unpublished decision, attached as Exhibit A, was filed on December 16, 2013. Neither party sought rehearing. This petition is timely. (Cal. Rules of Court, rule 8.500(e).)

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?

STATEMENT OF THE CASE AND FACTS

On October 19, 2012, appellant Jeffrey Moran entered a Home Depot store located at 2181 Monterey Highway in San Jose. (Aug. CT 11.) Asset Protection Specialist Tom Nguyen observed appellant as he concealed merchandise with a value of \$128.46 in his backpack. (*Ibid.*) Subsequently, appellant passed all points of sale and exited the store without attempting to pay for the merchandise. (*Ibid.*) Nguyen stopped appellant and recovered the items. (*Ibid.*) Appellant admitted to Nguyen that he was sent into Home Depot to steal in exchange for money, and that he was hoping to collect half of what the merchandise was worth. (*Ibid.*)

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

The trial court suspended imposition of the 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 appealed to the Sixth District Court of Appeal. He contended that the probation condition unconstitutionally restricted him from entering “at least 14 Home Depot stores within 20 miles of his home zip code,” as well as “any other Home Depot store or adjacent parking lot in California,” and “would also keep him away from dozens of other stores located in Home Depot parking lots [*sic*] in violation of his fundamental right to travel.” (Slip opn. at pp. 2-3.) Relying on *In re Sheena K.* (2007) 40 Cal.4th 875, 878-879, 888-889, the Court of Appeal entertained 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 particular sentencing record in the trial court. (*Id.* at p. 3.)

Citing general principles from *Sheena K.* at page 980 and decisions by lower courts, the Court of Appeal agreed with appellant that the condition was unconstitutionally overbroad, by infringing on appellant’s right to travel in parking lots and shops, and was invalid as not closely tailored to the purpose of the condition. (Slip opn. at pp. 1, 3-4.) The Court of Appeal began its analysis of the merits by finding it “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,” but found the condition lacked the close tailoring constitutionally needed for that purpose. (Slip 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.*) Furthermore, the court said, “although [the restriction] might relate to avoiding recurrences of appellant’s criminal conduct in Home Depot stores, it does not prevent him from engaging in his criminal conduct elsewhere.” (*Ibid.*) The court

found that condition “akin to an order directing a defendant to stay away from all persons with blonde hair because he assaulted a man with blonde hair.” (*Ibid.*)

The court next observed 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.” (Slip opn. at pp. 4-5.) By contrast, the court found the order to stay away from Home Depot stores and their parking lots categorically distinguishable because the “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 stated the condition was so broad 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 particular Home Depot outlet that was the locus of the crime, the court next found that the condition “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 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. Instead, it struck the condition requiring appellant to not enter the premises or adjacent parking lot of any Home Depot store in California and, as modified, affirmed the judgment. (*Id.* at p. 6.)

REASONS FOR GRANTING REVIEW

I. REVIEW IS REQUIRED BECAUSE PROHIBITING APPELLANT FROM ENTERING OTHER RETAIL OUTLETS OF THE STORE HE STOLE FROM DOES NOT VIOLATE THE RIGHT TO TRAVEL AND IS CONSISTENT WITH THIS COURT'S HOLDING THAT CORPORATE ENTITIES ARE CONSIDERED CRIME VICTIMS WHEN IMPOSING PROBATION CONDITIONS

A. Review Is Necessary to Settle an Important Question of Law

The Sixth District Court of Appeal struck a probation condition that bars a thief from frequenting a retail goods chain from which he stole. It found the probation restriction violated appellant's constitutional right to enter commercial property during the term of felony probation. It found the probation restriction overbroad because it bars a thief from entering stores belonging to the retail chain apart from the location identified as the crime's locus. The court also declared such a probation restriction must contain a "legitimate business exception" to pass review under constitutional overbreadth analysis.

Although the decision is unpublished, the state is compelled to seek review in this case. The broad language of the opinion indicates that it represents the Court of Appeal's approach to overbreadth challenges to probation conditions generally and to "stay away" orders specifically. The opinion logically calls into question the constitutionality of a broad variety of stay away conditions in cases of shoplifting, commercial theft, and fraud, especially those which as in the present case extend to any of the victim's retail property and omit a "legitimate business" exception like the one the Court of Appeal believes is constitutionally required.

The Court of Appeal's conclusion that the probation condition can constitutionally restrict appellant only from entering the Home Depot store where he stole merchandise ignores the fact that a corporate entity is the

victim of the crime for purposes of probation orders under Penal Code section 1203.1. The quixotic analysis of the right to travel as conceived and applied by the Court of Appeal below holds that a court granting probation is helpless to bar a thief from the retail chain he victimized apart the particular store he stole from. That is inconsistent with this court's precedent holding that corporations, not outlets or storefronts, are considered a victim of crime for purposes of probation conditions. The decision below is also inconsistent with Penal Code section 1202.4, subdivision (k), added by the Victim's Bill of Rights. Therefore, although unpublished, the opinion raises significant questions of law worthy of review.

B. The Probation Condition Does Not Impinge on Appellant's State or Federal Constitutional Right to Travel

This court should grant review to determine whether the right to travel precludes a trial court from imposing a probation condition banning a probationer from the outlets of a retail chain from which the probationer stole. 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 benefits violated the right to travel].) California also recognizes a right to intrastate travel. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1100, citing *In re White* (1979) 97 Cal.App.3d 141, 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”].)

In re White, supra, 97 Cal.App.3d at p. 144, 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. 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.) In rejecting this probation condition, 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.) The appellate court 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 overbroad. (*Id.* at pp. 147-148.)

In *People v. Beach* (1983) 147 Cal.App.3d 612, 622-623, the Court of Appeal found a violation of the right to travel where a probation condition required an elderly defendant to relocate from the neighborhood where she had lived for 24 years and become embroiled in a confrontation culminating in a shooting that resulted in her conviction of involuntary manslaughter.

While exclusions from large geographic areas and banishments from a given community 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. (See *In re E.J.* (2010) 47 Cal.4th 1258, 1282, fn. 10). For example, probation conditions requiring a defendant to stay out specific establishments or types places of are regularly upheld. (See, e.g., *People v. Patel* (2011) 196 Cal.App.4th 956, 960 [upholding 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].)

In holding unconstitutional the broad protected zone condition in *In re White, supra*, 97 Cal.App.3d 141, the Court of Appeal refused to strike the condition. Instead, it remanded with the suggestion that the trial court “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.) The inconsistency between the remand directions in *White* and the holding below in this case is obvious. It is reason alone to grant review. That is particularly true since the decision below raises potential arguments that (1) corporate entities in California are not entitled to be free from thieves in their commercial retail outlets the way the government in *White* was entitled to bar a purveyor of vice from a potentially much longer and more varied list of identified locations within a swath of the city’s borders, or (2) the disposition in *White* was incorrect and should be disapproved.

At any rate, unlike the condition struck down in *In re White, supra*, 97 Cal.App.3d 141, appellant is not barred from a large geographic region of a city, preventing him 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.) Rather, the condition is similar to the types of conditions which are regularly upheld by the court, such as banning a gang member from known gang territory, or preventing a child molester from going near parks and playgrounds. The condition does not infringe appellant’s right to travel into particular areas or

neighborhoods generally, only his ability to enter the property of the Home Depot, the corporation that he victimized. (Cf. *In re White*, *supra*, 97 Cal.App.3d at pp. 144-145.) The condition is clearly related to appellant's theft and to his future rehabilitation, as it aims to prevent him from re-victimizing the Home Depot. (*In re Sheena K.*, *supra*, 40 Cal.4th at 890.)

Additionally, it is limited in geographical scope, and does not in fact preclude him from entering any 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." (Slip Opn. at 5.) This analysis is flawed. Contrary to the court's assertion, appellant cannot 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 only needs to 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 Court of Appeal inappositely relied on *People v. Perez* (2009) 176 Cal.App.4th 380, which struck down 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. That case is clearly distinguishable. *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.) Here, in contrast, the condition barring appellant from Home Depot stores is closely related to his crime against that retailer. 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 385.) Home Depot bears no

resemblance to a government courthouse located adjacent to government offices providing essential public services. Moreover, appellant is not banned from doing business with public entities, only with a particular retail goods 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.

C. The Decision Below Is Inconsistent Both with This Court's Holding That Corporations Are Considered Victims When Imposing Probation Conditions under Penal Code Section 1203.1 and with the Victim's Bill of Rights

The Court of Appeal deemed appellant constitutionally entitled to enter Home Depot stores throughout the state except his crime's locus, because the chain of "stores belong to a business corporation, not a person or class of persons related to the probationer's crime." (Slip Opn. at 5.) To recognize that a particular store in a commercial retail chain was the locus of a given crime is neither the logical nor the legal equivalent of a conclusion that the store, and not the parent corporate entity, is the crime victim. Nor can it be logically said that courts may exclude the financial victimizer of a corporate entity during a term of probation only from the crime's locus and/or only when the victimizer can claim no legitimate business on corporate property. If left unreviewed, the opinion will cloud similar legitimate probation conditions imposed in the Sixth Appellate District.

The conclusion of the Court of Appeal is inconsistent with the decision in *People v. Anderson* (2010) 50 Cal.4th 19, 33-34. *Anderson* held a defendant properly subjected to a condition of probation under Penal Code, section 1203.1 rendering him liable for payment of restitution to a hospital corporation that incurred expenses treating the defendant's crime victim. (*Ibid.*) 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.) It is apparent from *Anderson* that under this court's probation jurisprudence a corporation can be recompensed through restitution as directed by a probation condition. That 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. Surely then, an actual corporate victim can be protected from its victimizer, and the probationary goal of rehabilitation furthered, by 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. The Court of Appeal's cramped view of the status of Home Depot as a crime victim is inconsistent with the Victim's Bill of Rights and should be corrected through a grant of review.

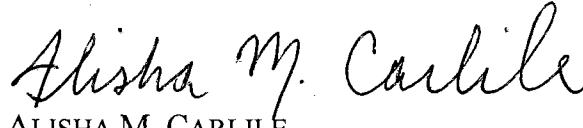
CONCLUSION

For the reasons stated, respondent respectfully requests that review be granted.

Dated: January 16, 2014

Respectfully submitted,

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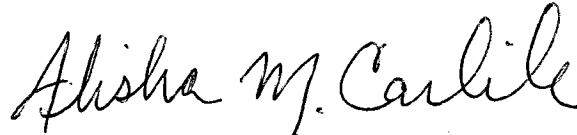
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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 3,167 words.

Dated: January 16, 2014

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in cursive script that reads "Alisha M. Carlile". The signature is written in black ink and is positioned above the printed name and title.

ALISHA M. CARLILE
Deputy Attorney General
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EXHIBIT A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY MICHAEL MORAN,

Defendant and Appellant.

H039330

(Santa Clara County

Super. Ct. No. C1243366)

In this appeal, appellant Jeffrey Moran challenges as overbroad a condition of probation that requires him to not "go on the premises, parking lot adjacent or any store of Home Depot in the state of California." For reasons that follow we agree with appellant that the condition is overbroad.

Facts and Proceedings Below¹

On October 19, 2012, appellant took batteries and other merchandise from a display rack in the Home Depot store located at 2181 Monterey Road. Appellant concealed the merchandise in his backpack and then walked out of the store past all the points of sale without paying for the items.

¹ There was no preliminary hearing in this case. Accordingly, we summarize the facts from the police report and the Home Depot asset protection specialist's reports that were the stated factual basis for appellant's plea in this case. On July 9, 2013, we granted appellant's request to augment the record with these reports.

Tom Nguyen, the store's asset protection specialist, confronted appellant outside the store and instructed appellant to accompany him back inside. Appellant complied. All the merchandise was recovered. When appellant was asked why he did not pay for the merchandise, appellant said he was sent into the store to steal items in exchange for money. Nguyen contacted the police and an officer took appellant into custody and booked him into jail.

The Santa Clara County District Attorney charged appellant by felony complaint with one count of second degree burglary. (Pen. Code, §§ 459-460, subd. (b).) The complaint contained an allegation that appellant had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b).

On November 6, 2012, appellant entered a no contest plea and admitted the prison prior in exchange for a promised disposition of one year in county jail top/bottom. On December 21, 2012, the court suspended imposition of sentence and placed appellant on felony probation for three years on the condition that he serve one year in county jail. The court imposed various other terms and conditions of probation including that appellant not "go on the premises, parking lot adjacent or any store of Home Depot in the state of California."

Appellant filed a timely notice of appeal based on the sentence imposed.

On appeal, appellant contends that the probation condition requiring him to not enter the premises or parking lot of any Home Depot store is overbroad and must be modified.

Discussion

Appellant argues that the condition here is "clearly overbroad" because there are at least 14 Home Depot stores within 20 miles of his home zip code. Appellant contends that restricting him from entering these or any other Home Depot store or adjacent parking lot in California not only would prohibit him from shopping at such stores, but

would also keep him away from dozens of other stores located in Home Depot parking lots in violation of his fundamental right to travel.

The right to travel "is simply elementary in a free society. Freedom of movement is basic in our scheme of values [citation]." (*In re White* (1979) 97 Cal.App.3d 141, 149.) "The right of intrastate travel has been recognized as a basic human right" of constitutional dimension. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1100.) Furthermore, "other fundamental rights such as free speech, free assembly, and free association are often tied in with the right to travel." (*In re White, supra*, 97 Cal.App.3d at p. 149.) A plurality of the United States Supreme Court has recognized that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 53, fn. omitted (plur. opn. of Stevens, J.).)

A claim that a probation condition is unconstitutionally overbroad may be reviewed on appeal without an objection in the trial court if it is capable of correction without reference to the particular sentencing record in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 878-879, 888-889 (*Sheena K.*).

"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.) "[W]here an otherwise valid condition of probation impinges on constitutional rights; such conditions must be carefully tailored, 'reasonably related to the compelling state interest in reformation and rehabilitation. . . ." [Citations.]" (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942.)

"Under the overbreadth doctrine, 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" [Citations.] 'A law's overbreadth represents the failure of draftsmen to focus narrowly on

tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference.' [Citation.]" (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497 [discussing challenges to a preliminary injunction].)

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 essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction [preventing appellant from entering Home Depot stores to take merchandise] 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.)

Keeping appellant out of all Home Depot stores will have minimal effect on appellant's rehabilitation as he could simply decide to take merchandise from an endless list of other stores. Thus, although it might relate to avoiding recurrences of appellant's criminal conduct in Home Depot stores, it does not prevent him from engaging in his criminal conduct elsewhere. Thus, it is not closely tailored to appellant's rehabilitation. As appellant points out, 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. As such it casts too wide a net, and thus fails the requirement that it be narrowly tailored to the state interest in reformation and rehabilitation.

Generally, probation conditions requiring a probationer to "stay away" from certain people or places are commonly used in drug cases, gang cases, and certain other types of cases such as domestic violence cases or criminal threats cases.² As such, these

² Penal Code section 136.2 authorizes a trial court, exercising jurisdiction over a criminal matter, to issue stay away orders to protect victims of violent crime from all communication or contact by the defendant. (Pen. Code, § 136.2, subs.(a)(4), (7)(A);

conditions relate to the nature or cause of the probationer's crime such as gang activity or drug possession, 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 the actual victims of the probationer's crime.

Here, however, the condition requires appellant to stay away from all Home Depot stores and their parking lots in the state of California—stores that belong to a business corporation, not a person or class of persons related to the probationer's crime.

In *People v. Perez* (2009) 176 Cal.App.4th 380 (*Perez*), the Second District Court of Appeal struck down a probation condition that provided: " 'The defendant shall not attend any Court hearing or be within 500 feet of any Court in which the defendant is neither a defendant nor under subpoena. The defendant shall inform the probation officer prior to any Court appearance.' " (*Id.* at pp. 383, 386.) The court observed that the condition was neither "limited to protecting specific witnesses or parties" nor "confined to trials involving gang members" and, as written, it was "so broad" that it prevented activities unrelated to future criminality. (*Id.* at p. 384.)³ The same is true of the condition at issue here. As written, effectively, the condition prohibits appellant from entering any store that shares a parking lot with a Home Depot store.⁴

Although we find that there is an obvious nexus between appellant's crime and the probation condition as it relates to the specific Home Depot store from which he took the merchandise, we believe that the condition should contain an exception that would allow

see *People v. Selga* (2008) 162 Cal.App.4th 113, 118 [authority does not extend to keep a defendant away from persons who are not victims or witnesses].)

³ Although *Perez* concerned the constitutional right to access the courts (*Perez, supra*, 176 Cal.App.4th at p. 385), the constitutional right to travel is no less important. In fact, the "right is so important that it is 'assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.' [Citation.]" (*Saenz v. Roe* (1999) 526 U.S. 489, 498.)

⁴ Respondent suggests that appellant may enter any store that shares a parking lot with a Home Depot store as long as he abstains from entering through the parking lot. Respondent fails to explain how this is possible.

appellant to be on Home Depot property on legitimate business for the condition to pass constitutional muster. "[E]ven where probation access restrictions are appropriate, 'provision should be made to allow for lawful travel through the area of restriction *and for access to the area for legitimate purposes . . .*' (*Oyoghok v. Municipality of Anchorage* (1982) 641 P.2d 1267, 1270, fn. 4, italics added; *In re White, supra*, 97 Cal.App.3d at p. 150 . . . ; *In re J.W.* (2003) 204 Ill.2d 50, 272 Ill.Dec. 561, 787 N.E.2d 747, 765; see also *State v. Churchill* (N.C.App.1983) 62 N.C.App. 81, 302 S.E.2d 290, 293 [probation provision restricting defendant's access to a transportation facility was valid because '[t]he court allowed defendant access to the terminal premises for the legitimate business purpose of traveling by bus'.])" (*Perez, supra*, 176 Cal.App.4th at p. 386.)⁵

Disposition

We strike the probation condition requiring appellant to not enter the premises or adjacent parking lot of any Home Depot store in California. As so modified, the judgment is affirmed.

⁵ Frankly, we believe a much better way to achieve what seems to be the purpose of the probation condition at issue here is a condition of probation that is implicit in every order granting probation (*People v. Campos* (1988) 198 Cal.App.3d 917, 921; *People v. Cortez* (1962) 199 Cal.App.2d 839, 844) that appellant refrain from engaging in criminal practices, i.e. obey all laws.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Jeffrey M. Moran*

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 January 16, 2014, I served the attached **Petition for Review** by placing a true copy 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:

Joshua H. Schraer
Attorney at Law
5173 Waring Road, #247
San Diego, CA 92120 (2 copies)

Santa Clara Superior Court
Criminal Division - Hall of Justice
Attention: Criminal Clerk's Office
191 North First Street
San Jose, CA 95113-1090

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Michael A. Kresser
Executive Director
Sixth District Appellate Program
100 North Winchester Blvd., Suite 310
Santa Clara, CA 95050

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 January 16, 2014, at San Francisco, California.

J. Espinosa
Declarant


Signature

AMENDED DECLARATION OF SERVICE BY U.S. MAIL

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100 North Winchester Blvd., Suite 310
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JAN 16 2014

Further, on January 16, 2014, I served the attached **Petition for Review** by placing a true copy enclosed in a sealed envelope 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:

California Court of Appeal
Sixth Appellate District
333 West Santa Clara St., Suite 1060
San Jose, California 95113

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Signature

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