IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	No. S215914
	)	
v.	)	
	)	
JEFFREY MICHAEL MORAN,	)	
	)	
Defendant and Appellant.	)	
	)	

APPELLANT'S ANSWER BRIEF ON THE MERITS

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

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 6

ARGUMENT 6

THE CONDITION OF PROBATION BARRING APPELLANT FROM ALL HOME DEPOT STORES IN CALIFORNIA AND ALL PARKING LOTS ADJACENT TO ALL HOME DEPOT STORES IN CALIFORNIA AFTER HE WAS CONVICTED OF SHOPLIFTING AT A SINGLE HOME DEPOT STORE VIOLATES APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO TRAVEL, IS UNCONSTITUTIONALLY OVERBROAD, AND ALSO IS INVALID UNDER STATE LAW 6

A. The Issue Under Review 6

B. Principles of Law Related to Probation Conditions 7

1. Principles of California Law 7

2. General Principles of Federal Constitutional Law as Articulated by this Court and the United States Supreme Court 8

C. The Right to Travel 13

D. Cases Discussing the Validity of Probation Conditions Affecting the Right to Travel 14

E. Analysis of Appellant's Case 22

F. Responses to Legally and Factually Erroneous Assertions in the Attorney General's Brief 28

1. Respondent's Discussion of the Overbreadth Doctrine Is Unsound 28

2. Probation Conditions Affecting Fundamental Constitutional Rights Other than First Amendment Rights Must be Narrowly Tailored . . . 31

3. Probation Conditions Affecting Fundamental Constitutional Rights Must Be Strictly Scrutinized and Closely Tailored 33

4. Respondent's Characterization of this Court's Decision in *Tobe* Is Incorrect 34

5. This Case Involves a Fundamental Constitutional Right, Not Mere Property Rights . . . 35

6. Respondent's Medical Metaphor 36

7. Respondent Improperly Recognizes No Heightened Test to Protect Fundamental Constitutional Rights 38

8. The Issue before the Court Is Legal, Not Factual, and Therefore Not Entitled to Deference . . 39

9. The Probation Condition Is Unreasonable under California Law 40

10. The Probation Condition Is Overbroad 45

CONCLUSION 47

CERTIFICATE OF COMPLIANCE 48

TABLE OF AUTHORITIES

CASES

Bernardo v. Planned Parenthood Federation of America (2004) 115 Cal.App.4th 322 ..... 10, 14

Broadrick v. Oklahoma (1973) 413 U.S. 601 ..... 29, 30

Dunn v. Blumstein (1972) 405 U.S. 330 ..... 10, 13

In re Sheena K. (2007) 40 Cal.4th 875 ..... 9, 22, 31, 37

In re White (1979) 97 Cal.App.3d 141 ..... 7, 13, 14, 15, 16, 31, 32, 35

Johnson v. California (2005) 543 U.S. 499 10

Kent v. Dulles (1958) 357 U.S. 116 13

King v. New Rochelle Municipal Housing Authority (2d Cir. 1971) 442 F.2d 646 14

People v. Brandao (2012) , 210 Cal.App.4th 568 8

People v. Burden (1988) 205 Cal.App.3d 1277 ..... 11, 31, 32

People v. Carbajal (1995) 10 Cal.4th 1114 8

People v. Cluff (2001) 87 Cal.App.4th 991 44

People v. Cromer (2001) 24 Cal.4th 889 ..... 37, 39

People v. Fritchey (1992) 2 Cal.App.4th 829 ..... 7, 8

People v. Hofsheier (2006) 37 Cal.4th 1185 10

People v. Keller (1978) 76 Cal.App.3d 827 ..... 8, 14, 27

People v. Lent (1975) 15 Cal.3d 481 ..... 4, 7, 8

People v. Leon (2010) 181 Cal.App.4th 943 ..... 9, 22

People v. Mantraga (1969) 275 Cal.App.2d 328 7

People v. Martinez (2000) 22 Cal.4th 106 39

People v. Moses (2011) 199 Cal.App.4th 374 ..... 12, 31, 32

People v. Olguin (2008) 45 Cal.4th 375 ..... 8, 9, 11, 22, 37

People v. Perez (2009) 176 Cal.App.4th 380 ..... 19, 43, 44

People v. Petty (2013) 213 Cal.App.4th 1410 ..... 20, 21, 23, 42

People v. Pirali (2013) 217 Cal.App.4th 1341 ..... 9, 22

People v. Pointer (1984) 151 Cal.App.3d 1128 ..... 12, 31, 32

People v. Rose (2014) 226 Cal.App.4th 996 ..... 17, 18

People v. Smith (2007) 152 Cal.App.4th 1245 16

People v. Welch (1993) 5 Cal.4th 228 8

People v. Zaring (1992) 8 Cal.App.4th 362 ..... 12, 31, 32

Shapiro v. Thompson (1969) 394 U.S. 618 ..... 13, 36

Tobe v. City of Santa Ana (1995) 9 Cal.4th 1069 ..... 10, 13, 14, 34

United States v. Consuelo-Gonzalez
(9th Cir. 1975) (en banc) 521 F.2d 259 14

United States v. Guest (1965) 383 U.S. 745 13

Wygant v. Jackson Board of Education (1986) 476 U.S. 267 10

STATUTES

Evidence Code section 664 39

Penal Code sections 459-460 5

Penal Code section 667.5 5

Penal Code section 1203 7

Penal Code section 1203.1 8

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment ..... passim

United States Constitution, Fifth Amendment 13

United States Constitution, Fourteenth Amendment 10, 13

RULES

California Rules of Court, rule 8.520(c)(1) 48

MISCELLANEOUS

Chemerinsky, *Constitutional Law, Principles and Policies* (4th ed. 2011) 9, 13, 36, 44

Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* (1972) 86 Harv.L.Rev. 1 10

Universal Declaration of Human Rights (1948), article 13, section 1 14

SUMMARY OF ARGUMENT

Established case law requires courts to tread cautiously when making orders that restrict fundamental rights such as the right to travel. Appellate courts closely scrutinize such orders to assure that they are closely tailored, not overbroad, and limit the fundamental right in the least restrictive way that promotes a countervailing important state interest. In this case, the trial court imposed a probation condition that improperly restricted appellant's right to travel. The Court of Appeal correctly ruled that the condition was overbroad and had to be stricken.

Appellant shoplifted less that $130 worth of merchandise from a Home Depot store in San Jose. The trial court placed appellant on probation, and, as a condition of probation, prohibited appellant from entering all of the 232 Home Depot stores in California[1] and the parking lots adjacent to those stores. This condition precludes appellant from entering large areas of the state, and prevents him from shopping or working in any store that shares a parking lot with a Home Depot. Respondent characterizes the condition as an ordinary probation condition that has no constitutional implications and is viewed deferentially for reasonableness. Respondent is incorrect.

Respondent's argument fails to appreciate that both the United States Supreme Court and this Court have recognized that there exists a fundamental constitutional right to travel. Both Courts have recognized that the right to travel applies anywhere, and is connected to fundamental notions of liberty which are inherent to the structure and function of our democracy, as well as the fundamental principles upon which our government was founded. As with

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[1]Http://www.sec.gov/Archives/edgar/data/354950/000035495013000008/hd-232013x10xk.htm, on page 11 of Home Depot's 10K SEC filings for the fiscal year ended February 3, 2013.

any fundamental constitutional right, courts carefully scrutinize restrictions on the right to travel to ensure the restriction is necessary and its scope does not exceed the purpose that justifies it. Under established case law, a probation condition that imposes limitations on a person's constitutional right to travel must narrowly tailor those limitations to the purpose of the condition. The fit need not be perfect, but case law makes clear that courts must not put 40-inch sleeves on a defendant with 30-inch arms.

Sometimes the necessity for a travel restriction for a probationer is narrowly tailored and necessary to achieve the government interests in fostering rehabilitation, preventing recidivism, and protecting vulnerable crime victims from incurring additional harm through subsequent interaction with the probationer. An example is where the defendant has committed a crime against a particular victim whom he knows and who knows him, such as when a defendant assaults a spouse or girlfriend who does not live with him. In such cases, the crime involves force, and there is a danger that if the defendant is in the vicinity of the victim's residence, he may engage in additional acts of force against the victim, and the victim may re-experience the psychological trauma that the original crime engendered. In such cases involving force, danger, and psychological trauma against an identified victim, the justification for the travel restriction is high, and the area which the defendant cannot enter, and hence the travel restriction, is small.

Appellant's case is different. Appellant shoplifted less than $130 worth of property (consisting of batteries and one Sharpie pen) from Home Depot – a large retail corporation, and the world's largest home improvement retailer,

with 1,976 stores in the United States and its territories,[2] and 232 stores in California alone. There is nothing in the record indicating that appellant had any history with Home Depot that caused him to choose it rather than any one of a large number of similar corporate retail stores such as Lowe's, Sears, Costco, Target, or Walmart. He was not, for example, a disgruntled former employee with a vendetta against Home Depot. Yet the trial court imposed a probation condition that he not enter the premises of any of the 232 Home Depots in California, or any parking lot adjacent to any of these 232 Home Depot stores.

This restriction is improper under the United States and California Constitutions because it is overbroad, not narrowly tailored, and not even reasonably related to the nature of appellant's crime. Appellant's crime of stealing less than $130 of merchandise concerned Home Depot only incidentally, as it just as easily could have been committed against any of dozens of other similar large retail businesses. The condition is overbroad because it is not narrowly tailored to the state's interest in promoting appellant's rehabilitation or preventing appellant from shoplifting again. This offense does not involve a crime of violence against an individual victim, and thus does not carry with it the need to protect the victim from further physical or psychological harm. The overbreadth is apparent from the fact that the restriction applies not only to the Home Depot where the offense occurred, but to all 232 Home Depots in California, and also to all 232 parking lots adjacent to those Home Depots. This unreasonably restricts appellant's access to thousands of businesses who share a parking lot with Home Depot, because

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[2]See citation in footnote 1, at pages 1 and 11 of the Home Depot SEC 10-K filing for fiscal year 2013.

the only way to enter those adjacent stores is through the parking lot.

There is nothing in the record showing a need for such broad restrictions on appellant's right to travel to places where everyone else has the right to be. There is no evidence in the record showing that appellant targets Home Depots. Nor is the restriction necessary, because if appellant should engage in activities near a Home Depot that give rise to reasonable suspicion justifying a detention, an officer could detain him on that basis. Further, the probation condition constitutes a substantial restriction on the right to travel. It bars appellant from large areas, although any restriction on the right to travel, no matter how limited, is a constitutional violation in the absence of a strong showing of necessity, as it violates his right to be in places where everyone else can lawfully be. Moreover, as a practical matter, the condition imposed adds nothing to the requirement that a probationer obey all laws, other than a chilling effect on constitutionally protected travel and social activity.

In sum, the probation condition casts far too wide a net, and is therefore unconstitutionally overbroad in violation of appellant's fundamental right to travel. Moreover, in addition to failing to satisfy the heightened scrutiny analysis that applies to probation conditions that restrict the exercise of a fundamental constitutional right, the condition also fails to satisfy the less exacting reasonableness requirement articulated in *People v. Lent* (1975) 15 Cal.3d 481, that applies to all probation conditions under California law. This is because the probation condition imposed here bears no reasonable relationship to the crime appellant committed, to appellant's rehabilitation, or to preventing future criminality, and because the probation condition relates to conduct which is not in itself criminal.

STATEMENT OF THE CASE

On October 23, 2012, the District Attorney of Santa Clara County filed

a felony complaint, charging appellant with second degree burglary – entering with intent to commit theft, in violation of Penal Code sections 459-460, subdivision (b), based on an October 19, 2012 incident at a Home Depot store. The complaint further alleged that appellant had sustained a prior conviction, within the meaning of Penal Code section 667.5, subdivision (b). (CT 2.)

On November 6, 2012, appellant entered a plea of no contest and admitted the prior conviction allegation in exchange for probation with a year of county jail. (CT 7; RT 3 [terms of bargain], 4-16 [advisements and waivers], 17-18 [entry of plea and admission of prior].)

On December 21, 2012, the court pronounced judgment pursuant to the plea agreement. Imposition of sentence was suspended and appellant was placed on probation for three years, on the condition he serve one year in county jail, with credit for 128 days served. One of the conditions of probation imposed was that appellant not enter "the premises, parking lot adjacent or any store of home depot in the State of California . . . ." (RT 24-25.)

On February 15, 2013, appellant filed a timely notice of appeal, which specified that the appeal was based on sentencing or other matters occurring after the plea. (CT 13.)

On appeal, appellant contended that the probation condition that prohibited him from entering "the premises, parking lot adjacent or any store of home depot in the State of California . . ." is unconstitutionally overbroad, violates principles of California law related to probation conditions, and violates appellant's constitutional right to travel. The Court of Appeal agreed that the condition is unconstitutionally overbroad and violated the right to travel, and ordered the judgment modified to strike it. The Court did not discuss or determine whether the probation condition was valid under California law, which applies a reasonableness standard to all probation

conditions, not just ones that restrict fundamental constitutional rights.

This Court granted respondent's petition for review in order to address the Court of Appeal's finding that the probation condition was overbroad.

STATEMENT OF FACTS

Since appellant pled no contest, there was no trial by jury. (RT 18.) Since there was no trial by jury, the police report served as the factual basis for the plea. (RT 22.) Appellant has augmented the record to include the police report. The relevant facts are that on October 19, 2012, at the Home Depot store located at 2181 Monterey Road, appellant concealed $128.46 worth of batteries and a Sharpie marker in his backpack and walked past all points of sale without paying for the items. (Police Report, pp. 6, 9-10.)

ARGUMENT

THE CONDITION OF PROBATION BARRING APPELLANT FROM ALL HOME DEPOT STORES IN CALIFORNIA AND ALL PARKING LOTS ADJACENT TO ALL HOME DEPOT STORES IN CALIFORNIA AFTER HE WAS CONVICTED OF SHOPLIFTING AT A SINGLE HOME DEPOT STORE VIOLATES APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO TRAVEL, IS UNCONSTITUTIONALLY OVERBROAD, AND ALSO IS INVALID UNDER STATE LAW

A. The Issue Under Review

This Court's online docket for this case describes the issue under review as follows: "This case presents the following issue: Was the condition of probation barring defendant from all Home Depot stores and their parking lots after he was convicted of shoplifting at a single Home Depot store unconstitutionally overbroad as impinging on his constitutional right to

travel?"[3] Appellant will focus on this issue in this brief.

Appellant notes, however, that respondent argues in their brief that the probation condition should be affirmed not only because it is constitutional, but also because it is valid under California law. Because respondent addresses this additional legal issue of whether the condition is valid under California law, appellant will discuss it as well in order to show that respondent's argument lacks merit. This Court can either decide this additional issue itself, or remand the case to the Court of Appeal to decide it because that Court did not address it.

B. Principles of Law Related to Probation Conditions

1. Principles of California Law

The Penal Code defines probation as "the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer." (Penal Code §1203, subd. (a).) "The primary purpose of granting probation instead of the imposition of sentence to an incarcerating institution is to help the defendant rehabilitate himself." (*People v. Mantraga* (1969) 275 Cal.App.2d 328, 332; accord *In re White* (1979) 97 Cal.App.3d 141, 150 ["the purpose of probation is rehabilitation."].) "The major goal of probation is to rehabilitate the criminal: probation is not a form of punishment." (*People v. Fritchey* (1992) 2 Cal.App.4th 829, 837.)

"The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof." (*People v. Lent*, *supra*, 15

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[3]Http://appellatecases.courtinfo.ca.gov/search/cse/mainCaseScreen.cfm?dist=0&doc_id=2066604&doc_no=S215914.

Cal.3d at p. 486.) Accordingly, when granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) This broad discretion, however, has limits. (*Id.* at p. 1121.) First, the condition of probation must be reasonable. (Penal Code §1203.1, subd. (j).) "[A] reasonable condition of probation is not only fit and appropriate to the end in view but it must be a reasonable means to that end. Reasonable means are moderate, not excessive, not extreme, not demanding too much, well-balanced." (*People v. Keller* (1978) 76 Cal.App.3d 827, 840, citation omitted, overruled on other grounds in *People v. Welch* (1993) 5 Cal.4th 228, 237; quoted with approval in *People v. Fritchey*, *supra*, 2 Cal.App.4th at pp. 837-838.) In addition:

> 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.) "This test is conjunctive – all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379.)

2. General Principles of Federal Constitutional Law as Articulated by this Court and the United States Supreme Court

In addition, there are constitutional limitations that apply to probation conditions that affect a defendant's civil liberties. (*People v. Brandao* (2012)

210 Cal.App.4th 568, 573.) "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." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890, quoted with approval in *People v. Olguin*, *supra*, 45 Cal.4th at p. 384.) In addition, it is unlawful to impose a probation condition that is vague and does not give fair warning to the probationer of what the condition requires. (*In re 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. (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.) A probation condition is overbroad if it sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of protected conduct. (*People v. Leon* (2010) 181 Cal.App.4th 943, 951.)

As appellant will show, although overbreadth challenges often are made against limitations on First Amendment rights, cases consistently hold that probation conditions which limit other fundamental constitutional rights, including the right to travel, must also be narrowly tailored in a manner that protects those rights. Accordingly, a probation condition which adversely affects any fundamental constitutional right is closely examined and must be narrowly tailored so as to protect the right in issue.

Stated in other terms, courts strictly scrutinize state action which interferes with "fundamental [constitutional] rights such as the right to vote, the right to travel, the right to privacy, and [ ] freedom of speech." (Chemerinsky, *Constitutional Law, Principles and Policies* (4th ed. 2011),

§6.5, p. 554.)[4] Both this Court and the United States Supreme Court have recognized that the right to travel is a fundamental constitutional right. (*Dunn v. Blumstein* (1972) 405 U.S. 330, 338; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1098-1099.) Strict scrutiny analysis is the applicable standard for determining whether state action has unconstitutionally infringed the fundamental right to travel. (See section D, below.)

Under strict scrutiny analysis, the state bears the burden of showing its action was necessary as a means of accomplishing its purpose. That is, "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly [tailored] to accomplish that purpose." (*Wygant v. Jackson Bd. of Education* (1986) 476 U.S. 267, 280.) If the state action is not the least restrictive alternative, then it is not necessary or narrowly drawn to accomplish the end. (See e.g. *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200; see also *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 365.) The burden is on the state to prove the restriction is necessary and specifically and narrowly tailored. (*Johnson v. California* (2005) 543 U.S. 499, 505.) Under this exacting test, government action is generally found unconstitutional. Application of this test is "strict in theory and fatal in fact." (Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* (1972) 86 Harv. L. Rev. 1, 8.) Although, as the above-cited cases show, strict scrutiny analysis is triggered in a variety of contexts, including through the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as when state

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[4]Other fundamental rights include rights protecting family autonomy, procreation, sexual activity, sexual orientation, medical care decision making, access to the courts, and the right to bear arms, among others. (*Id.* at §10.1.1, p. 812.)

action impinges a fundamental constitutional right (as is the case here with the right to travel), the language and general legal principles of strict scrutiny analysis apply the same test in all those contexts, and the test operates as a general safeguard against government infringements on constitutional rights. Whenever state action limits a fundamental constitutional right, the state bears the burden of showing its action was necessary, narrowly tailored, and the least restrictive means of achieving the government interest.

This Court agrees that a heightened standard of review applies to probation conditions that limit constitutional rights. This Court applies "close scrutiny" to probation conditions that infringe upon a constitutional right, rather than simply reviewing them for an abuse of discretion. (*People v. Olguin*, *supra*, 45 Cal.4th at p. 384.)

The fact that these severe restrictions on state action apply to limitations of any fundamental right refutes respondent's central contention that the narrow tailoring of constitutional overbreadth analysis applies only in the context of rights expressly enumerated in the First Amendment. Limitations on all fundamental rights, including the right to travel, are strictly scrutinized, must be narrowly tailored, must be necessary to achieve the state's purpose, and must be worded in the manner that is least restrictive of the right in issue. Appellant's position finds support not only in established principles governing state action that infringes fundamental constitutional rights, but also in California cases analyzing probation conditions that limit fundamental rights such as the right to employment, the right to conceive and the right to marry.

One such case is *People v. Burden* (1988) 205 Cal.App.3d 1277. There, the Court of Appeal struck a probation condition that prohibited the defendant from engaging in certain employment. (*Id.* at p. 1279.) In reaching this result, the Court of Appeal found that the defendant had a constitutional

right to employment. It further ruled: "If available alternative means exist which are less violative of a constitutional right and are narrowly drawn so as to correlate more closely with the purpose contemplated, those alternatives should be used." (*Id.* at p. 1281, citation and internal quotation marks omitted.)

Another example is *People v. Pointer* (1984) 151 Cal.App.3d 1128. There, the probation condition prohibited the defendant from conceiving a child. (*Id.* at p. 1131.) The Court of Appeal found that this probation condition infringed the exercise of a fundamental right to privacy that both the United States and California Constitutions protect. (*Id.* at p. 1139.) The court held that "where a condition of probation impinges upon the exercise of a fundamental right and is challenged on constitutional grounds we must additionally determine whether the condition is impermissibly overbroad." (*Ibid.*, footnote omitted.) The court further held that a condition that restricted the exercise of a constitutional right "must be subjected to special scrutiny to determine whether the restriction is entirely necessary to serve the dual purposes of rehabilitation and public safety." (*Ibid.*) The court ruled that such a condition must be "narrowly drawn" and cannot be upheld if it is overbroad. (*Ibid.*, accord, *People v. Zaring* (1992) 8 Cal.App.4th 362, 371-373 [concluding that a "no pregnancy" probation condition was unconstitutionally overbroad].)

Yet another example is *People v. Moses* (2011) 199 Cal.App.4th 374. There, one of the conditions of probation prohibited the defendant from dating or marrying anyone who had children under the age of 18 unless the probation officer gave written approval. (*Id.* at p. 378.) The Court of Appeal found the condition to be unconstitutionally overbroad because it violated the defendant's constitutional right to marry and was not narrowly tailored to meet

the goals of public safety and rehabilitation of the defendant. (*Ibid.*)

C. The Right to Travel

More than 50 years ago, the Supreme Court recognized that freedom of movement is "part of our heritage" and "basic in our scheme of values." (*Kent v. Dulles* (1958) 357 U.S. 116, 126.) That Court has recognized the right to interstate travel in cases dating back more than 100 years. (*Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at pp. 1097-1098.) But the roots of the right go much deeper. "In Anglo-Saxon law, [the right to travel] was emerging at least as early as the Magna Carta." (*Kent*, *supra*, 357 U.S. at p. 125, footnote omitted.) The right was recognized in the United States before the adoption of the Constitution. "Ever since the Articles of Confederation, the right to free movement among the states has been acknowledged as a basic liberty." (Chemerinsky, *Constitutional Law, supra*, §10.7.1, p. 882.) "Although no provision of the federal Constitution expressly recognizes a right to travel among and between the states, that right is recognized as a fundamental aspect of the federal union of states." (*Tobe*, *supra*, 9 Cal.4th at pp. 1096-1097.) The right to travel is thus a fundamental constitutional right. (*Dunn v. Blumstein*, *supra*, 405 U.S. at p. 338; *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at pp. 1098-1099.)

The constitutional bases for the right to travel are far-reaching and include the commerce clause, the privileges and immunities clause of the Fourteenth Amendment, and the due process clause of the Fifth Amendment. (*Shapiro v. Thompson* (1969) 394 U.S. 618, 630.) In addition: "Many 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.) The right to travel "has been firmly established and repeatedly recognized." (*United States v. Guest* (1965) 383 U.S. 745, 757.) It has been

suggested that the reason the right to travel finds no explicit mention in the Constitution "is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." (*Id.* at p. 758, footnote omitted.)

The right to *intrastate* travel is a basic human right which the California Constitution protects. (*Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1100.) Also, both the United States Constitution and the California Constitution protect the basic human right to both intrastate and intra-municipal travel. (*Ibid.*; *In re White*, *supra*, 97 Cal.App.3d at p. 148.) "It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." (*King v. New Rochelle Municipal Housing Authority* (2d Cir. 1971) 442 F.2d 646, 648, footnote omitted.) The right to travel also has international recognition. "Everyone has the right to freedom of movement and residence within the borders of each state." (Universal Declaration of Human Rights (1948), article 13, section 1.)

When state action jeopardizes the exercise of a fundamental constitutional right, that state action is subject to strict scrutiny analysis. (*Bernardo v. Planned Parenthood Federation of America*, *supra*, 115 Cal.App.4th at p. 365.) To pass constitutional muster under strict scrutiny, such state action must be suitably tailored to serve a compelling state interest. (*Ibid.*) This applies in the context of probation conditions. (*United States v. Consuelo-Gonzalez* (9th Cir. 1975) (en banc) 521 F.2d 259, 265; *People v. Keller*, *supra*, 76 Cal.App.3d at p. 839.)

D. Cases Discussing the Validity of Probation Conditions Affecting the Right to Travel

There are a number of California cases that discuss the validity of a

probation condition affecting the right to travel. None of them holds or indicates that the probation condition barring appellant from every one of the 232 Home Depot stores in California and every parking lot adjacent to all those stores is valid.

The seminal California case discussing a probation condition limiting the right to travel is *In re White*, *supra*, 97 Cal.App.3d 141. There, the defendant filed a habeas corpus petition challenging certain conditions of probation imposed after she pleaded guilty to soliciting an act of prostitution. (*Id.* at p. 143.) The conditions barred her from being present in three areas of the city of Fresno that constituted the major areas of arrest for prostitution activity in the city. (*Id.* at pp. 143-144.) The defendant claimed that she had friends or relatives who lived in the prohibited areas, patronized three restaurants in those areas, and frequently took the Greyhound bus whose depot was in one of the areas. (*Id.* at p. 144.) She argued that the probation condition violated her rights to free speech, free association, privacy, to be free of unreasonable seizures, to travel, and to be free of banishment. (*Id.* at p. 145.)

The Court of Appeal found that the probation condition barring her from areas of the city was unreasonable, even though it may have had some relationship to the crime of soliciting. (*In re White*, *supra*, 97 Cal.App.3d at p. 147.) The Court noted that there were innumerable situations in which a probationer could be in the designated areas which are unrelated to prostitution, including traveling through those areas. The Court thus found the condition to be too broad and unreasonable. (*Id.* at pp. 147-148.) The Court further found that the condition violated the right to intrastate travel under the United States Constitution and the California Constitution. (*Id.* at pp. 148-149.)

The Court recognized that, like all constitutional rights, the right of free movement is not absolute and may in certain circumstances be restricted in the public interest. (*In re White*, *supra*, 97 Cal.App.3d at p. 149.) Nevertheless, the Court stated that restrictions on the right to travel should be regarded with skepticism. Accordingly: "If available alternative means exist which are less violative of the constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used." (*Id.* at p. 150.) The Court further cautioned: "Particularized conditions of probation should be directed toward rehabilitation rather than reliance upon some general condition which utilizes a mechanized mass treatment approach." (*Id.* at p. 151.) For the guidance of the lower court, the Court of Appeal made suggestions concerning the sorts of limitations on the right to travel that might be acceptable, depending on the evidence presented at a hearing. These included establishing times and circumstances when the defendant could enter the areas in question; barring her from only certain sorts of establishments in the areas such as bars, pool rooms and motels; and barring her from engaging in certain activities consistent with soliciting for prostitution. (*Id.* at pp. 151, 148, fn. 2.)

White is a straightforward application of the principles of constitutional law discussed above which require courts to closely scrutinize probation conditions that limit a fundamental constitutional right and to closely tailor those conditions to allow only those restrictions that are plainly necessary to promote an important societal value.

People v. Smith (2007) 152 Cal.App.4th 1245 is another case in which the Court of Appeal found a travel restriction condition of probation to be an unconstitutional violation of the right to travel. There, the defendant was convicted of committing a lewd act on his stepdaughter. (*Id.* at p. 1245.) One

condition of probation was that he not leave Los Angeles County. The trial court rejected the defendant's request for permission to leave the county on a day-to-day basis when required by his employer. (*Id.* at pp. 1247-1248.) The Court of Appeal found the condition to be constitutionally infirm. (*Id.* at p. 1251.) The Court noted that the condition applied to all probationers who had been convicted of a registered sex offense without regard to their performance on probation or the reason they might need to leave Los Angeles County. (*Ibid.*) The Court concluded that the trial court gave no consideration to the defendant's opportunity to work or the benefits to public safety and the rehabilitative effect of steady employment. (*Id.* at pp. 1251-1252.) The Court further found that the condition bore no reasonable relation to the crime in that it provided no meaningful deterrent since the defendant was not monitored on a day-to-day basis. (*Id.* at p. 1252.) The Court ordered the trial court to fashion less restrictive travel limitations based on the defendant's particularized circumstances, or to eliminate the travel restriction with respect to the defendant's work. (*Id.* at pp. 1252-1253.)

A case upholding a travel restriction probation condition is *People v. Rose* (2014) 226 Cal.App.4th 996, in which a petition for review is currently pending. There, the defendant hit an Oakland police officer with a folding chair during a confrontation between officers and participants in a vigil at Frank Ogawa Plaza (the plaza) which was associated with the "Occupy Oakland" protest. (*Id.* at pp. 999-1000.) Based on the incident, a jury convicted the defendant of resisting an executive officer and misdemeanor assault on a peace officer. (*Id.* at p. 999.) The trial court imposed a probation condition requiring the defendant to stay out of an area of downtown Oakland that included the plaza and city hall. (*Id.* at p. 1002.) On appeal, the defendant challenged the probation condition as overbroad because it restricted his right

to travel. The Court of Appeal rejected the challenge, concluding the stay-away condition was narrowly tailored to promote the defendant's rehabilitation. (*Id.* at p. 1008.)

The Court of Appeal observed that although the trial court had agreed that the stay-away condition touched upon the defendant's constitutional rights, the trial court found that barring the defendant from the stay-away area would help him avoid further unlawful activity. This is because it was there that the defendant assaulted an officer and also had threatened to kill the officer's family and other officers. Also, the area was the focal point of unrest during the Occupy Oakland movement, and the defendant's offenses directly related to his participation in that movement. Of particular concern to the trial court, in light of the defendant's mental illness, was that the defendant might be unable to successfully complete probation if he were allowed in the stay-away area. (*Rose*, *supra*, 226 Cal.App.4th at p. 1009.) In upholding the challenged condition, the Court of Appeal noted that a probation condition which imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition in order to avoid being overbroad. (*Ibid.*) The Court of Appeal concluded that the condition was adequately tailored because it was carefully designed to promote rehabilitation since it was limited to the area where the offenses occurred and, given the defendant's volatile criminal history at the specific location and his mental illness, exclusion from the area would help the defendant successfully complete probation. (*Id.* at p. 1010.) The Court of Appeal concluded that the condition did not restrict the defendant's right to travel because it allowed him to travel through the restricted area on certain modes of public transportation. (*Id.* at p. 1010-1011.)

Rose is different than appellant's case. In *Rose*, the crime occurred at

a specific and unique location where activities that led to the crime were occurring on an ongoing basis. Here, although the crime occurred at a specific location, the probation condition covers numerous other locations – every Home Depot and all parking lots adjacent to every Home Depot in California. Also, here appellant did not suffer from a mental illness that might be triggered if he found himself in a prohibited location. Most importantly, although the condition in *Rose* did not affect the right to travel, in that the defendant could travel through the prohibited area, the condition in appellant's case amounts to an actual travel restriction. It bars appellant from being in any Home Depot and in any parking lot adjacent to a Home Depot. It bars appellant from driving or walking through the parking lot even if he does not plan to stop at any store that uses the parking lot. It bars appellant from a host of businesses that share a parking lot with a Home Depot, including stores, restaurants, banks, and doctor's offices. It bars him from seeking employment at these establishments. And it bars him from taking his wife, child, parent, or grandparent to these places.

A more instructive case than *Rose* is *People v. Perez* (2009) 176 Cal.App.4th 380. There, the trial court imposed a probation condition that prohibited the defendant from attending any court hearing or being within 500 feet of any court in which the defendant was neither a defendant nor under subpoena. (*Id.* at p. 382.) The defendant in that case tagged for a gang and some of his friends were members of the gang. (*Id.* at pp. 382-383.) The Attorney General argued that the restriction was justified to prevent future gang-related criminality. (*Id.* at p. 383.) The Court of Appeal noted that the probation condition was not confined to crimes involving gang members and concluded it was so broad that it restricted the defendant from engaging in activities that are unrelated to future criminality. (*Id.* at p. 384.) The Court

observed that many courts are located in government complexes that house a variety of public agencies, including a county law library, a public defender's office, a board of supervisors, a city council, a tax collector and a health department. (*Id.* at p. 385.) The Court further stated: "A narrow condition that achieves rehabilitation should be used in place of broad conditions that prevent otherwise lawful conduct and necessary activities." (*Ibid.*)

In appellant's case, as in *Perez*, the probation condition is so broad that it restricts appellant from engaging in activities unrelated to future criminality and prevents otherwise lawful conduct and necessary activities. The condition prevents appellant from buying light bulbs at Home Depots. It prevents appellant from shopping at stores that share a parking lot with a Home Depot. If the closest supermarket or dentist, or the closest branch of appellant's bank, shares a parking lot with a Home Depot, appellant cannot shop at the supermarket, see the dentist or deposit checks at the bank. There is no showing that there was some unique nexus between the crime and Home Depot. Instead, the crime could have occurred at dozens of similar large stores. Nothing in the record shows that this was anything other than a garden-variety shoplifting of less than $130 worth of merchandise. There is nothing in the record showing that appellant had some sort of vendetta against Home Depot or that there was something indicating there was any particularized risk he would shoplift there again. Unlike more violent conduct, such as robbery or assault, it can hardly be the case that petty theft is something that would cause personal anxiety or further physical or psychological harm to Home Depot as an entity.

Also instructive is *People v. Petty* (2013) 213 Cal.App.4th 1410, another case that involves a theft-related crime. The defendant in that case had a long history of mental health issues. (*Id.* at p. 1413.) He pleaded guilty to

grand theft and the court imposed a condition that he stay at least 50 yards from the victim's home. (*Id.* at p. 1412.) The crime occurred when the victim's daughter hosted a party at her parents' residence while the victim and her husband were away on business trips. The guests included the defendant, who confessed to stealing 10 items of jewelry worth about $9,500. About a month after the theft the defendant came to the victim's home and told her he had taken the jewelry. In a later phone call, the defendant admitted he had taken the jewelry to pay off a drug debt. He also admitted to the police that he was addicted to OxyContin. (*Ibid.*)

The Court of Appeal upheld the probation condition. (*Petty*, 213 Cal.App.4th at pp. 1421-1422.) The Court noted that the theft was different than others because the victim had known the defendant since he was in preschool. In addition, the defendant admitted going to the victim's house on several later occasions without being invited. It thus appeared to the Court that the defendant had tried to make himself welcome where he was not. The Court observed: "The victim may rightly feel violated by his unannounced approaches to her home and his middle-of-the-night visits. She might worry that he will steal from her home again." (*Id.* at p. 1421.)

Appellant's case is readily distinguishable from *Petty*. Here, the defendant did not have a long history of mental health issues, and there thus was nothing indicating appellant was an unstable person who might not be able to control his actions. Also, appellant did not steal from someone who knew him. In addition, there is no evidence that appellant went back to the Home Depot after the theft. Moreover, appellant's theft involved taking property from a large retail store, not from an individual. There was no danger that the victim – in this case, a large corporation with 1,976 stores nationwide – would feel violated by appellant going into the store or might worry that appellant

would commit another theft.

E. Analysis of Appellant's Case

As explained earlier, when a probation condition impinges a fundamental right, in this case the right to travel, the constitutionality of the condition is assessed under strict scrutiny, and the condition is unconstitutionally overbroad if it is not narrowly tailored and necessary to achieve the state interests in promoting rehabilitation and public safety. Such a probation condition must closely tailor the limitations on constitutional rights to the purpose of the condition. (*People v. Olguin*, *supra*, 45 Cal.4th at p. 384; *In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) It must be the least restrictive means for achieving the purpose of the condition. There must be a close fit between the purpose of the restriction and the burden it imposes on the defendant's constitutional rights. (*People v. Pirali*, *supra*, 217 Cal.App.4th at p. 1346.) The probation condition cannot sweep within its ambit other activities that in ordinary circumstances constitute an exercise of protected conduct. (*People v. Leon*, *supra*, 181 Cal.App.4th at p. 951.) Courts closely scrutinize probation conditions that affect a constitutional right, rather than reviewing them for an abuse of discretion. (*People v. Olguin*, *supra*, 45 Cal.4th at p. 384.)

For purposes of analysis, the probation condition in appellant's case can be divided into three components of different breadth. The first and narrowest component bars appellant from the specific Home Depot store where the theft occurred. The second bars appellant from all other 231 Home Depot stores in California. The third and broadest bars appellant from the parking lots adjacent to all Home Depot stores in California. Applying the above-stated principles, all three components of the probation condition were unconstitutionally overbroad in violation of appellant's right to travel.

The Court of Appeal described as follows the purpose of the probation condition here in issue: "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." (Slip opn., p. 4.) The condition, however, is not closely tailored to that purpose and sweeps within its ambit other activities that ordinarily constitute an exercise of protected conduct.

This is not a case like *People v. Petty*, *supra*, 213 Cal.App.4th 1410, where the defendant had a long history of mental health issues and where the victim of the crime was an individual whom the defendant knew, whom the defendant kept visiting after the crime, who might have felt violated by his unannounced visits, and who might worry that the defendant will steal from her again. Instead, this case involves a shoplifting from a large retail outlet that is part of a large corporation and that has a large number of employees at each store. Nor does such shoplifting involve targeting a specific and vulnerable victim. Instead, one would respect that a recidivist shoplifter might commit the crime at any one of dozens of large stores. All these stores are fungible locations for the crime of shoplifting. As the Court of Appeal noted in its opinion: "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." (Slip opn., p. 4.)

Even more troubling is the portion of the probation condition that prevents appellant from being in a parking lot of a Home Depot store. This prohibition precludes appellant from shopping at a large number of

establishments since the entrances of such stores face the parking lot.[5] For example, the condition prohibits appellant from shopping at a supermarket that shares a parking lot with a Home Depot, and from banking at a bank that shares a parking lot with a Home Depot. It also prohibits appellant from seeking employment at these stores or from taking a shortcut by driving through their parking lot. The probation condition thus sweeps within its ambit activities that in ordinary circumstances constitute an exercise of protected conduct and does not closely tailor the limitations on the right to travel to the purpose of the travel limitation. There is no legitimate reason to prohibit appellant from banking and shopping at convenient locations or from seeking employment there.

An analysis of the stores that share a parking lot with the Home Depot where the offense occurred in this case highlights the overbreadth of the probation condition. That Home Depot is located in a large parking lot called "The Plant," which consists of a total of 59 stores other than Home Depot.[6] These stores include a credit union, a bank, a T-Mobile store, a Target, a Ross, an Office Max, a Kinko's, a PetSmart, a Toys "R" Us, 16 restaurants, an optometrist, and two dental offices. Under the probation condition the Court of Appeal struck down, if appellant's closest bank or credit union branch was this location, and he did not have access to a car, this would substantially hamper his right to travel. Moreover, the condition would preclude appellant

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[5]Of the 232 Home Depots in California, 14 are within 20 miles of appellant's zip code of 95113. See http://www.homedepot.com/StoreFinder/, based on search for zip code 95113.

[6]http://www.theplantsanjose.com/directory/. This link also provides a useful visual of the parking lot and each store's location within the parking lot.

from seeking gainful employment in any of these stores.

This Home Depot parking lot alone illustrates the overbreadth of the probation condition. But even more telling is that fact that it is but one of the 232 parking lots the probation condition covers. This indicates that appellant is barred from thousands of stores providing a wide range of commercial products and personal services.

In addition to being unconstitutionally overbroad, the "parking lot" component of the probation condition is unreasonable under California law.

A hypothetical shows one reason why. Assume there is a large parking lot with a Home Depot at one corner and a grocery store at the opposite corner, 300 yards away. Assume further that there is a second grocery store across the street, 50 feet from the Home Depot, but not contiguous to the Home Depot's parking lot. Under the probation condition, appellant could buy coffee at the second grocery store but not at the first, even though the second is 850 feet closer to the Home Deport.

Indeed, the part of the probation condition barring appellant from Home Depot stores and their parking lots in California is unreasonable. As a resident of Santa Clara County, appellant lives roughly 500 miles from San Diego and is barred from being in a Home Depot and it parking lot there. But appellant is less than half that distance from a Home Depot in Reno, but can be in a Home Depot and its parking lot there.

Even the narrowest aspect of the probation condition – the prohibition against appellant entering the Home Depot where he shoplifted – is both overbroad and unreasonable. That aspect is the prohibition against appellant entering the Home Depot where he shoplifted. As noted above, the theft occurred in a large retail store – it did not involve a violation of someone's home or person. (See slip opn., at p. 5, noting that the condition requires

appellant to stay away from stores "that belong to a business corporation, not a person or class of persons related to the probationer's crime.") There is nothing in the record indicating any likelihood that appellant will commit another crime at the same Home Depot. If there were any chance that appellant might shoplift again, it is probably less likely he would do so at the store where he had already been caught shoplifting.

But more important for purposes of an analysis of overbreadth is the fact that although a defendant would not have any legitimate reason for visiting the home of a private person he burgled, a defendant would have legitimate reasons for shopping at a store like the Home Depot where the shoplifting occurred. Appellant might need a large piece of wood to temporarily put over a broken window in his home. He might need tools to deal with a water leak. As the Court of Appeal noted below when discussing the probation condition as it relates to the Home Depot where appellant committed the shoplifting, "we believe 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." (Slip opn., at pp. 5-6.)

Even more significantly, the challenged probation condition adds nothing of practical significance to the standard probation condition that appellant "obey all laws." This is not a case in which the victim of the crime was a private individual who knew appellant, or the proprietor of a small business who would recognize appellant and suffer anxiety or fear if he re-entered the store. Home Depot stores are huge.[7] Hundreds, perhaps thousands

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[7]The average Home Depot is 105,000 square feet with approximately 23,000 addtional square feet of outside garden area. https://corporate.homedepot.com/OurCompany/StoreProdServices/Pages/d

of customers enter each store each day, and dozens, perhaps hundreds of employees work at each store. There is no reason to conclude that anyone at the store would recognize appellant if he entered the store, and the only way appellant would come to anyone's attention would be to shoplift. There are no employees at the door who screen customers to make sure they are not subject to a probation condition prohibiting them from shopping at Home Depot.

The probation condition in this case is unlawful under the less stringent test described in *Lent* that applies to all probation conditions under California law, because the challenged condition bears no reasonable relationship to fostering rehabilitation and preventing future criminality. In this context, "a reasonable condition of probation is not only fit and appropriate to the end in view but it must be a reasonable means to that end. Reasonable means are moderate, not excessive, not extreme, not demanding too much, well-balanced." (*People v. Keller*, *supra*, 76 Cal.App.3d at p. 840.)

As to the first *Lent* element, the condition has no relationship to the crime for which appellant was convicted because there is no evidence that appellant targeted Home Depot rather than simply stealing from a large retail store. As to the second *Lent* element, the condition relates to conduct which is not in itself criminal, namely entering a Home Depot or a parking lot adjacent to a Home Depot. And as to the third *Lent* element, the condition forbids conduct which is not reasonably related to future criminality, namely entering a Home Depot or a parking lot adjacent to a Home Depot.

More importantly, the probation condition is unconstitutional. The condition prohibits appellant from entering all 232 Home Depot Stores in

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efault.aspx. This means that a single Home Depot is more than twice the size of a football field.

California, from entering the parking lots adjacent to those stores, and from entering all stores that share those parking lots with Home Depot. This is a broad restriction on the right to travel. Strictly scrutinizing the probation condition, it is clear that all three components of that condition are overbroad and not closely tailored to the purpose of preventing appellant from committing future shopliftings at Home Depot, and are not the least restrictive means to achieve that end.

F. Responses to Legally and Factually Erroneous Assertions in the Attorney General's Brief

Respondent has file an opening brief on the merits (RBOM) arguing that the probation condition in this case is not overbroad. Although appellant has shown that the condition is overbroad, he wishes to respond squarely to some of the Attorney General's assertions to explain why they are legally and factually erroneous.

1. Respondent's Discussion of the Overbreadth Doctrine Is Unsound

Preliminarily, there is a fundamental flaw in respondent's brief concerning the nature of the constitutional issue of overbreadth that is before the Court. Respondent repeatedly and incorrectly says that appellant has argued, and the Court of Appeal has found, that the probation condition here in issue is "facially" overbroad. Based on this mistake, respondent argues that the Court of Appeal erred because facial overbreadth applies only to probation conditions that violate a right that is expressly listed in the First Amendment, such as freedom of speech or association, and does not apply to the right to travel. (RBOM 1, 2, 4, 6, 8, 17.) Respondent's argument fails to appreciate that there are two sorts of overbreadth doctrines. Appellant will call them facial overbreadth and ordinary overbreadth. As appellant will explain, facial

overbreadth, which applies to First Amendment infringements, is a very narrow exception to the general federal rule that only a party whose legal rights are directly affected has standing to bring a claim in federal court. It allows a litigant to challenge a statute as written, rather than as applied to the litigant, because the statute, by its very existence, has a chilling effect on the free exercise of an enumerated First Amendment right such as freedom of speech. In contrast to facial overbreadth, ordinary overbreadth applies more broadly to all infringements on fundamental constitutional rights, including the right to travel among many others. It challenges a state action as that action applies to the litigant making the challenge. This case involves an ordinary overbreadth challenge, and an "as applied" challenge, not a facial overbreadth one.

Before discussing authorities which explain the difference between the two types of overbreadth, appellant wishes to point out that the Court of Appeal never uses the words "facial" or "facially" in its opinion and does not hold that the probation condition is facially overbroad. Instead, it simply holds the condition is overbroad. (Slip opn., at pp. 1, 2, 3.) And in the opening brief he filed in the Court of Appeal, appellant did not argue that the probation condition was facially overbroad. The word facial does appear once at AOB 8, but only in a quotation from a portion of this Court's opinion in *Sheena K.*, *supra*, describing the nature of the contention the defendant made in that case.

Broadrick v. Oklahoma (1973) 413 U.S. 601 describes the distinction between the two types of overbreadth. It explains that facial overbreadth is a narrow principle of constitutional law that only arises in the context of facial challenges to statutes as violating the First Amendment, and is often related to a narrow exception to the general standing requirement in federal court. The usual rule of constitutional adjudication is that a person cannot challenge a

statute on the ground that it may conceivably be applied in an unconstitutional manner to people who are not parties to the suit. (*Id.* at p. 610.) The doctrine of facial overbreadth allows a litigant to challenge a statute on the ground that it may be unconstitutionally applied in situations that are not actually before the court. (*Id.* at pp. 610-611.) Facial overbreadth applies to First Amendment issues. (*Id.* at p. 611.) It applies where a statute's overbreadth is not only real, but also is substantial when judged in relation to the statute's plainly legitimate sweep. (*Id.* at p. 615.) As the Supreme Court explained in *Broadrick*, the doctrine allows litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." (*Id.* at p. 612.)

Broadrick explains that facial overbreadth results in a statute being held void on its face. (*Broadrick v. Oklahoma*, *supra*, 413 U.S. at p. 615.) It is an exception to the traditional requirement that the litigant show that the statute affects him. In the ordinary situation, courts find overbreadth on a case-by-case analysis and basis. (*Id.* at pp. 615-616.)

In this case, we are not concerned with a statute that broadly applies to a large group of citizens. Appellant has not brought a facial challenge to a statute as violating the First Amendment. Instead, we deal with a probation condition that applies to appellant alone. Appellant has not argued that the probation condition should be stricken to protect the rights of third parties who are not litigants in this lawsuit. Instead, he argues that a probation condition imposed upon him should be stricken because it violates *his* rights. This case does not involve an infringement of a right expressly listed in the First Amendment, but, as explained above, it involves an infringement of a fundamental right that is based, in part, on the rights listed in the First

Amendment and necessary to the full enjoyment of that right. We are not only entitled to freedom of speech or assembly in our homes, we are entitled to enjoy those rights in the same locations as all other citizens. Even if we were to view the right to travel as having nothing to do with the First Amendment, it is still a fundamental constitutional right. Under established case law which appellant has already discussed, any limitations on the right to travel – like limitations on the right to employment in *People v. Burden*, *supra*, 205 Cal.App.3d 1277, on the right to conception in *People v. Pointer*, *supra*, 151 Cal.App.3d 1128 and *People v. Zaring*, *supra*, 8 Cal.App.4th 362, and on the right to marry in *People v. Moses*, *supra*, 199 Cal.App.4th 374 – must be strictly scrutinized and closely tailored in order to avoid being unconstitutionally overbroad.

Having discussed the global flaw in respondent's overbreadth analysis, appellant turns to a point-by-point refutation of the contentions respondent makes in its brief.

2. Probation Conditions Affecting Fundamental Constitutional Rights Other than First Amendment Rights Must be Narrowly Tailored

Relying primarily on *In re Sheena K.*, *supra*, 40 Cal.4th 875, respondent argues that the only probation conditions that must be narrowly tailored to avoid overbreadth are conditions that violate the First Amendment. (RBOM 6-9.) Respondent is incorrect.

In *Sheena K.*, this Court stated: "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. (See *White*, *supra*, 97 Cal.App.3d at pp. 149–150.)" (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890, italics added.) If instead of saying "constitutional rights" the Court had said "First Amendment

rights" respondent might have a point. But by saying constitutional rights, the Court was referring to *all* rights having a constitutional basis.

Reinforcing appellant's position is the citation to *White* in *Sheena K.* At the cited pages of *White*, the Court of Appeal discussed the constitutional right to travel, which is the right involved in appellant's case. In addition, the Court of Appeal stated: "Many 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.) We may infer from this two important things that undercut respondent's position. The first is that the prohibition against overbroad probation conditions apply to all constitutional rights, not just First Amendment rights. As explained above, the prohibition against overbreadth applies to probation conditions infringing any fundamental constitutional right. The second is that the right to travel is based in part on rights listed in the First Amendment such as free speech, free assembly and free association. If overbreadth applies to First Amendment rights, it applies to the right to travel, which is based, at least in part on First Amendment rights.

Also reinforcing appellant's position are *People v. Burden*, *supra*, 205 Cal.App.3d 1277, which found a limitation on the right to employment to be overbroad, *People v. Pointer*, *supra*, 151 Cal.App.3d 1128, and *People v. Zaring*, *supra*, 8 Cal.App.4th 362, which found limitations on the right to conception to be overbroad, and *People v. Moses*, *supra*, 199 Cal.App.4th 374, which found a limitation on the right to marry to be overbroad. Respondent's argument that the prohibition against overbroad probation conditions does not apply to appellant's case is without merit.

3. Probation Conditions Affecting Fundamental Constitutional Rights Must Be Strictly Scrutinized and Closely Tailored

Respondent next argues that probation conditions affecting constitutional rights are tested for reasonableness, and this test applies here. (RBOM 9-13.) This argument is based on two incorrect premises. The first is that the prohibition against overbroad probation conditions applies only to probation conditions that infringe First Amendment rights. As explained above, the prohibition against overbreadth applies to probation conditions infringing any fundamental constitutional right. The second incorrect premise is that the right travel does not relate to First Amendment rights. As shown in the previous paragraph, it does. For these reasons, probation conditions affecting the right to travel are not tested for reasonableness. Instead, the test is the strict scrutiny test described at the end of subsection B, above, and applied in subsection E above, which requires narrow tailoring.

Respondent's argument is, in effect, that all probation conditions, regardless of whether they limit conduct with no constitutional basis or limit conduct that is protected by constitutional provisions other than the First Amendment, are viewed the same. This is a troubling premise. The United States Constitution is the supreme law of this country and the California Constitution is the supreme law of California. Under respondent's argument, courts only ask if a probation condition limiting a fundamental constitutional right is reasonable. Under the case law discussed above, courts must apply strict scrutiny analysis and determine whether a probation condition limiting a fundamental constitutional right is necessary, closely tailored, and the least restrictive possible limitation on the right. Although a court may impose any reasonable condition that restricts conduct that is not constitutionally protected, this Court and the Court of Appeal have ruled that a court's power

is much more circumscribed when the probation condition limits a constitutional right.

4. Respondent's Characterization of this Court's Decision in *Tobe* Is Incorrect

Respondent says that in *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at pages 1095-1096, footnote 15, this Court noted that the United States Supreme Court suggested that a criminal statute cannot be attacked for overbreadth outside the First Amendment context. (RBOM 9.) This is incorrect for four related reasons.

First, appellant's case does not involve attacking a statute for overbreadth. It involves attacking for overbreadth a probation condition that infringes appellant's fundamental right to travel.

Second, as noted above, the right to travel is based in part on rights listed in the First Amendment such as free speech, free assembly and free association.

Third, footnote 15 in *Tobe* also contains the following language whose presence respondent fails to acknowledge: "Other decisions of the United States Supreme Court suggest that this limitation [to the First Amendment context] is not invariably observed. (See *Kolender v. Lawson*, *supra*, 461 U.S. 352, 358-359, fn. 8 [75 L.Ed.2d 903, 909-910.) We will assume arguendo that the overbreadth doctrine may be applied outside the First Amendment context." This language indicates that both the United States Supreme Court and, more importantly, this Court will apply overbreadth analysis to constitutional issues other than those involved in pure First Amendment challenges.

Fourth, in the *Burden*, *Pointer*, *Zaring* and *Moses* cases, the Courts of Appeal struck down as overbroad probation conditions that were outside the

First Amendment context.

5. This Case Involves a Fundamental Constitutional Right, Not Mere Property Rights

Respondent also contends that like probation conditions limiting property rights, such as the right to possess gang-related clothing, or the possession or consumption of alcohol, conditions which impinge on the right to travel are evaluated for reasonableness, not overbreadth. Respondent cites for this proposition *In re White*, *supra*, 97 Cal.App.3d at pages 150-152. (RBOM 11.) Respondent's reliance on *White* for this proposition is misplaced.

Although *White*, discussed in detail above, found the travel restriction in that case to be unreasonable because it was so sweeping and so punitive that it became unrelated to rehabilitation (*White*, *supra*, 97 Cal.App.3d at p. 148), the key holding in that case is based on the application of the heightened scrutiny analysis for probation conditions which affect constitutional rights. Immediately after making the finding emphasized by respondent, the Court made the following pertinent observation: "In this case the matter of reasonableness is intertwined with constitutional issues. We conclude that the condition does not pass constitutional muster." (*Ibid.*) The Court explained that the constitutional issue is the right to travel. (*Id.* at pp. 148-149.) The Court then explained that reasonableness in the context of the right to travel requires, at the least, that the intrusion on that right be "required by legitimate governmental demands." (*Id.* at pp. 149-150.) The Court went on to explain: "If available alternative means exist which are less violative of the constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used." (*Id.* at p. 150, footnote omitted.) The Court found the condition before it to be too broad under this strict scrutiny. (*Ibid.*)

Respondent's characterization of *White* as upholding a deferential reasonableness standard for restrictions on the right to travel is not based on a fair reading of the above-described language in *White*. Fairly read, *White* stands for the proposition that probation restrictions on the right to travel must be narrowly drawn and cannot survive if they are overbroad.

Respondent miscasts the right to travel as the equivalent to property rights, such as the right to possess gang clothing or alcohol. (RBOM 11.) The right to travel is different. The right to travel stems in part from the commerce clause and the privileges and immunities clause of Article IV. (*Shapiro v. Thompson*, *supra*, 394 U.S. at p. 630.) These constitutional protections "concern ensuring the free flow of goods and services throughout the United States and the *full access of every person to the markets of every state*." (Chemerinsky, *Constitutional Law*, §10.7.1, p. 882, italics added.) The probation condition in this case limits appellant's access to markets in California. It bars him from all Home Depot stores, the parking lots serving those stores, and the stores sharing those parking lots. This is more than a limitation on property rights. It is a limitation on the right to travel and the commercial conduct the right to travel protects, as well as preventing appellant from seeking employment in the thousands of stores that share a parking lot with Home Depot's 232 stores in California.

6. Respondent's Medical Metaphor

In an argument based on a medical metaphor, respondent says that using overbreadth analysis for constitutionally-secured rights is stringent medicine, is "bad medicine" under this Court's cases, is contrary to the express intent of the Legislature, and improperly diminishes the statutory discretion of the courts. (RBOM 11.) Respondent's argument is unpersuasive for several reasons.

First, overbreadth analysis in the context of constitutional rights is good medicine. The Constitution protects rights of fundamental importance, rights that secure they protect individual liberties and act as checks against governmental overreach. The use of overbreadth analysis simply assures that the infringement of a constitutional right is narrowly drawn so that it limits a right only to the degree necessary to achieve an overriding governmental need. State action that unduly infringes a constitutional right is a cancer that must be excised. Overbreadth analysis is a scalpel that courts use to perform the required surgery.

Second, there is no language in this Court's cases characterizing the overbreadth protection of constitutional rights as bad medicine. In fact, the language in this Court's cases has stated that in the context of probation conditions, overbreadth analysis *applies* to the violation of constitutional rights in general. "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." (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890, quoted with approval in *People v. Olguin*, *supra*, 45 Cal.4th at p. 384.) And when saying this, *Sheena K.* cites *White*, a right to travel case.

Overbreadth analysis is good medicine. It inoculates the criminal justice system against violations of constitutional rights.

Third, it is well recognized that in the context of constitutional rights, the discretion of trial courts is limited. For example, although a trial court's state-law based evidentiary rulings are reviewed for abuse of discretion, when the evidentiary ruling implicates a constitutional guarantee, an appellate court reviews the ruling de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 893-901.)

In the context of probation conditions, using the overbreadth test to protect constitutional rights is good medicine. It strengthen and protects those rights by requiring the state to show that any infringement is necessary to protect an important countervailing public interest. Unless probation conditions that limit constitutional rights are narrowly drawn, there is a danger that these rights might be improperly and unnecessarily restricted.

7. Respondent Improperly Recognizes No Heightened Test to Protect Fundamental Constitutional Rights

As appellant has explained, although facial overbreadth applies in the context of First Amendment rights, ordinary overbreadth applies to state action that infringes any fundamental right, including the right to travel. Respondent offers no alternative test for constitutional challenges to probation conditions that ban defendants from broad geographic regions. Nor does a better standard than overbreadth exist in a case like this, as overbreadth is the most logical standard for analysis when dealing with the breadth of a geographic restriction on the right to travel and whether the breadth of the restriction is narrowly tailored to the government interest.

Respondent says that narrowly tailoring probation conditions affecting a defendant's liberties would "severely restrict" the statutory discretion of courts to protect the public, deter recidivism and encourage reformation. (RBOM 12.) Appellant disagrees.

The degree of restriction involved in the prohibition against unconstitutional overbreadth is not severe. The restriction requires tailoring, not necessarily an unraveling of the entire fabric of the probation condition. The court must simply analyze the condition to make sure it in fact promotes the purposes of probation it is designed to protect. The garment of the probation condition must be tailored to fit the characteristics of the person the

state mandates must wear it. If the garment is too loose, it must be taken in so that it serves its purpose.

8. The Issue before the Court Is Legal, Not Factual, and Therefore Not Entitled to Deference

Respondent says that trial courts are more familiar with the factual details of a case and are therefore better equipped to craft the details of probation conditions. (RBOM 12.) Viewed abstractly, the point might be valid, but it is without meaningful significance to the present case. The issue here is not a purely factual one such as who did what or who told the truth when testifying. It instead involves application of constitutional principles. This Court has held that the deliberative and collegial decision-making process of appellate courts are better suited than trial courts when it comes to determining if a constitutional right is being infringed. (See, e.g., *People v. Cromer*, *supra*, 24 Cal.4th at p. 894, fn. 1.) When facts must fit within a constitutional standard, yielding a ruling involving a mixed question of law and fact, this Court and the United States Supreme Court have concluded that the appellate court should review the trial court's ruling de novo, not deferentially. (*Id.* at pp. 894-896.)

Respondent further suggests that if the appellate courts do not defer to the trial court's judgment, trial courts would be reluctant to grant probation in marginal cases. (RBOM 12.) Appellant disagrees.

Trial courts are required to grant probation when the relevant factors warrant it. We must presume, in the absence of actual evidence to the contrary, that the trial courts will faithfully and fairly decide when probation is warranted. (Evidence Code §664; *People v. Martinez* (2000) 22 Cal.4th 106, 125.) There is no reason to assume that trial courts will deny probation to a worthy defendant in order to prevent an appellate court from modifying

a condition involving a travel restriction. Indeed, it demeans the trial courts to imply that they make a ruling based on the thought process that says "if I cannot impose an overbroad restriction on your constitutionally guaranteed right to travel, I am going to deny you probation."

9. The Probation Condition Is Unreasonable under California Law

Respondent argues that because appellant's probation condition does not implicate the constitutional right to travel, it should be upheld because it is reasonably related to the offense and to the prevention of future criminality. (RBOM 13-23.) Appellant disagrees that the probation condition does not implicate the right to travel. He also disagrees that the condition is reasonably related to the offense and to the prevention of future criminality. In addition, this Court did not grant review to determine if the probation condition in this case is reasonably related to the offense and the future of criminality and the Court of Appeal did not decide this issue. The Court therefore may deem it appropriate to remand the case to the Court of Appeal to decide this issue.

Respondent characterizes the decision of the Court of Appeal in this case as based on three propositions: (1) probationers enjoy a constitutional right to travel into their victim's commercial property; (2) the right can be limited only to the extent of the physical location of the crime itself; and (3) burglars have a right to travel. (RBOM 17.) Propositions one and three do not accurately reflect the decision of the Court of Appeal.

With respect to proposition 1, the travel restriction goes beyond the commercial property of the Home Depot where the shoplifting occurred. It extends, as well, to all 232 Home Depot stores in California and to all 232 parking lots adjacent to those Home Depot stores. As the Court of Appeal noted, this restriction prohibits the defendant from entering any store (or bank, market or restaurant) that shares the parking lot with a Home Depot. (Slip

opn., p. 5.)[8] The probation condition in this case goes far beyond prohibiting appellant from being in the Home Depot store where the shoplifting occurred.

With respect to proposition 3, the Court of Appeal recognized that every defendant who is not incarcerated enjoys the right to travel. Respondent cites no case holding that people who have committed commercial burglary and are not incarcerated do not enjoy that right. The real question in this case is not the blanket question of whether those convicted of commercial burglary do or do not have the right to travel; it is whether the restriction on the right to travel that the probation condition in this case imposes is permissible.

Respondent argues that the right to travel applies only to broad geographical restrictions that are the equivalent of exile or banishment, and that the restrictions in appellant's case are not sufficiently extensive to constitute an infringement on the right to travel. (RBOM 17-18.) But respondent cites no case that defines the right to travel in terms of the size of the geographical area from which the defendant is excluded. Any provision that prevents a defendant from being in a place where everyone else can be restricts the defendant's right to travel. The question is whether the specific ban that the travel restriction imposes is permissible. For the reasons appellant has discussed, here the travel restriction is overbroad and impermissible.

Respondent argues that the probation condition is reasonable because it prevents appellant from again entering a Home Depot and stealing merchandise from it. (RBOM 18-20.) Appellant disagrees.

Respondent's argument is based on the premise that the test for

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[8]In the Court of Appeal, respondent argued that appellant may enter any store that shares a parking lot with a Home Depot as long as he does not enter through a parking lot. The Court of Appeal rejected this contention, noting: "Respondent fails to explain how this is possible." (Slip opn., p. 5, fn. 4.)

reviewing the probation condition is reasonableness rather than overbreadth. Assuming for the sake of argument that the applicable test is reasonableness, the true focus would be on whether the restriction in appellant's case serves the purpose it seeks to promote. Here, the travel restriction went far beyond promoting the purpose of stealing again from Home Depot.

Here, the travel restriction prevented appellant from entering the 231 Home Depot stores in California other than the one from which he shoplifted. It also prevented him from entering the parking lot adjacent to all 232 Home Depots in California. It thus prevented him from being in thousands of other locations that did not include the store from which he shoplifted. It further prevented him from entering the stores whose businesses shared a parking lot with Home Depots since the entrances to such stores face the parking lot. This was thus a broad travel restriction that went far beyond the confines of the store where the shoplifting occurred.

An important consideration in the reasonableness calculus is that in terms of its practical effect, the travel restriction in this case added nothing of value to the common probation condition prohibiting future criminality. There was nothing in the record from which it could be inferred that appellant had any specific reason to target Home Depot rather than any of dozens of other large commercial corporations who conduct business using large stores. Nor does the record contain any indication of a pattern of crimes against Home Depot. Instead, there only exists evidence of a single instance of shoplifting at a Home Deport.

Nor is appellant's case similar to *People v. Petty*, *supra*, 213 Cal.App.4th 1410 where the defendant, who had longstanding mental health issues, kept coming back to the victim's home after the crime but before conviction, causing the victim to suffer the anxiety associated with contact

with someone who committed a crime against her. Unlike *Petty*, there is no reason to believe that employees at a Home Depot or people in the parking lots outside Home Depots would feel anxious about appellant's presence or have any idea who he was. There was, in short, nothing in the record to show that appellant was likely to steal again from Home Depot or that the standard probation condition requiring him to abide by the law would not be just as effective as the travel restriction in preventing future criminality.

Respondent postulates that appellant may have shoplifted from Home Depot because he was familiar with its security practices or layout, or because he may have been part of a crime ring engaged in thefts from Home Depot. (RBOM 19.) The record contains nothing supporting these speculations. There is nothing to indicate that appellant was anything more than a garden-variety shoplifter who stole merchandise that had little value.

Respondent argues that *People v. Perez*, *supra*, 176 Cal.App.4th 380, on which the Court of Appeal in part relied, is distinguishable from appellant's case. (RBOM 19-20.) Naturally, no two cases are ever identical. The Court of Appeal did not rely on *Perez* based on factual identity, but rather because of similarities between that case and appellant's with respect to the overbreadth of the probation condition's infringement on the right to travel. In *Perez* the overbreadth related to the condition preventing the defendant from engaging in activities unrelated to future criminality. Here, the Court of Appeal found that the probation condition was overbroad because it prohibited appellant from entering any store that shares a parking lot with a Home Depot store. (Slip opn., p. 5.)

Respondent says that *Perez* is based on the probation condition barring access to governmental centers that provide essential public services, and that barring access to a commercial establishment is significantly different.

(RBOM 19-20.) Respondent fails to note that in *Perez*, the Court noted that "courts have struck conditions that are so broad they prevent lawful conduct in public places: going to restaurants, parks or zoos . . . ." (*People v. Perez*, *supra*, 176 Cal.App.4th at p. 384.) People thus have a right to access in commercial establishments and markets. (Chemerinsky, *Constitutional Law*, §10.7.1, p. 882.) The central question is whether the probation condition is narrowly drawn, not whether it bars the defendant from a government building or a place the public otherwise can enter.

In an argument that repeats an earlier one, respondent contends that the probation condition prohibits future criminality because there is a likelihood that appellant targeted a Home Depot because of features peculiar to Home Depot such as its layout, the difficulty in monitoring such a large store, etc. (RBOM 20-21.) The record contains no evidence supporting this speculation. This may be why respondent does not tell us what about Home Depot differs from other large stores of a similar nature such as Lowe's, Sears, Costco Walmart or Target. There is nothing in the record indicating that appellant studied several large stores and selected Home Depot because it was an easier target. It is, moreover, well settled that a reasonable inference cannot be based on mere speculation or possibilities without evidence. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002.)

Respondent further criticizes the Court of Appeal for saying the probation condition here is akin to an order directing a defendant to say away from all persons with blond hair because he assaulted a man with blond hair. According the respondent, the Court of Appeal overlooked that all 232 stores from which appellant has been banned are owned by the same entity – Home Depot. Respondent treats this case as being similar to a stay-away order following a crime occurring in a residence or a small business. (RBOM 21.)

Respondent fails to appreciate that Home Depot is a huge corporation with almost 2,000 separate stores that does billions of dollars in business and has thousands of employees. Although the impact on a crime is great when it involves a person's home or small business, the personal anxiety in such a situation does not extend to Home Depot. People working at a Home Depot Store in San Diego are not personally affected by a shoplifting at the Home Depot in San Jose. Respondent's treating Home Depot's victimhood of a $130 commercial theft of a multinational corporation as similar to the residential burglary of a person's home or small business, which inherently carries a risk of physical danger or psychological violation of the individual's personhood, is unconvincing.

Also, respondent's focus on Home Depot ignores the fact that the probation condition also barred appellant from all parking lots adjacent to Home Depot, something which effectively barred appellant from all stores sharing that parking lot. Respondent offers no justification for banning appellant from parking lots, or for banning him from the numerous sorts of other businesses that share a parking lot with a Home Depot, such as coffee shops, restaurants, banks, dentists and supermarkets. Even if we accept for the sake of argument that there are characteristics that make Home Depots easy targets for shoplifters, respondent offers no explanation that parking lots or businesses such as coffee shops, restaurants, and banks share these characteristics. Yet the probation condition bars appellant from these places so long as they share a parking lot with a Home Depot.

10. The Probation Condition Is Overbroad

Respondent further argues that the condition is not overbroad because it is narrowly tailored. (RBOM 23-25.) Appellant disagrees. As appellant has already explained at length, there is nothing in the record indicating that

appellant has targeted Home Depot stores or has committed repeated crimes there. Instead, the record shows a single shop lifting at a single Home Depot. Home Depots are indistinguishable from numerous other large retail stores. Also, as a practical matter, the probation condition adds nothing to the standard probation condition prohibiting the commission of criminal acts. This is because no one at a Home Depot has any way of knowing who appellant is, and there is no practical way to enforce the condition.

Respondent says the condition prevents appellant from committing future thefts by allowing the police to intervene before a crime occurs. (RBOM 24.) But respondent does not explain how this works in practice. An officer seeing appellant would not know who he is or that he has a probation condition barring him from Home Depots. Employees at Home Depots would not know who appellant is either.

Respondent says that unlike the probation condition in *White*, the condition here does not prevent appellant from accessing essential public services. (RBOM 24.) But the probation condition bars him from accessing any business that shares a parking lot with a Home Depot. Because the ostensible purpose of the condition relates to Home Depot, barring appellant from these other business renders the condition both unconstitutionally overbroad, and unreasonable.

Respondent lastly argues that the prohibition from being in parking lots adjacent to a Home Depot store does not preclude appellant from shopping at other stores that share the parking lot because appellant can park in another location and walk on the public sidewalk to the store. (RBOM 25.) Parking lots shared by several stores are private property, as are the sidewalks that are contiguous to the parking lots. Public sidewalks are those which run down a public thoroughfare. Under the probation condition as written, there is no way

appellant can lawfully access the stores that share a parking lot with a Home Depot.

CONCLUSION

For the reasons explained in this brief, the probation condition prohibiting appellant from being in any of the 232 Home Depot stores in California, or in the parking lots serving those stores, is overbroad, not closely tailored and unreasonable. Accordingly, the judgment of the Court of Appeal striking the probation condition should be affirmed.

DATED: September 5, 2014

Respectfully submitted,

Joshua H. Schraer

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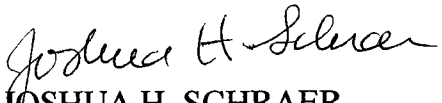
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that this brief contains 13,942 words, based on the word-count feature of my word-processing program.

DATED: September 5, 2014

Respectfully submitted,



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PROOF OF SERVICE

I, Joshua H. Schraer, declare under penalty of perjury that I am a member of the State Bar of California and not a party to this cause. My business address is 5173 Waring Road, #247, San Diego, California 92120. On September 5, 2014, I served the attached APPELLANT'S ANSWER BRIEF ON THE MERITS as follows:

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