No. 123643

IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee,<br><br>-vs-<br><br>CONRAD ALLEN MORGER<br><br>Petitioner-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 4-17-0285.<br><br>There on appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois, No. 12-CF-1330.<br><br>Honorable Scott D. Drazewski, Judge Presiding. |

# BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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## ORAL ARGUMENT REQUESTED

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# POINT AND AUTHORITIES

**A complete ban on accessing "social networking websites" as a condition of probation is unreasonable and unconstitutional under the First Amendment.**



**A.**

**A condition banning all access to social networking websites is overbroad, unreasonable, and unconstitutional under the First Amendment.**

**B.**

**Illinois law does not give probation officers the authority to modify the condition banning access to social networking websites.**

**C.**

**The decision in *Packingham v. North Carolina* is not limited only to registered sex offenders, probationers should also enjoy its protection of First Amendment freedoms.**

## NATURE OF THE CASE

Conrad Allen Morger appeals from a judgment revoking his probation for criminal sexual abuse and aggravated criminal sexual abuse and sentencing him to probation until April 4, 2018.

No issue is raised challenging the pleadings.

## ISSUE PRESENTED FOR REVIEW

Whether a complete ban on accessing "social networking websites" as a condition of probation is unreasonable and unconstitutional under the First Amendment.

## STATUTES AND RULES INVOLVED

**730 ILCS 5/5-6-3(a) (2012)**:

> "The conditions of probation and of conditional discharge shall be that the person: ... (8.9) if convicted of a sex offense ... refrain from accessing or using a social networking website as defined in Section 17-0.5 ... [.]"

**730 ILCS 5/5-6-3(b) (2012)**:

> "The Court may in addition to other reasonable conditions relating to the nature of the offense or the rehabilitation of the defendant as determined for each defendant in the proper discretion of the Court require that the person: ... (18) if convicted for an offense ... that would qualify as a sex offense as defined in the Sex Offender Registration Act: (i) not access or use a computer or any other device with Internet capability without the prior written approval of the offender's probation officer, except in connection with the offender's employment or search for employment with the prior approval of the offender's probation officer[.]"

**720 ILCS 5/17-0.5 (2012)**:

Section 17-0.5 in turn defines "social networking website" as:

> "[A]n Internet website containing profile web pages of the members of the website that include the names or nicknames of such members, photographs placed on the profile web pages by such members, or

any other personal or personally identifying information about such members and links to other profile web pages on social networking websites of friends or associates of such members that can be accessed by other members or visitors to the website. A social networking website provides members of or visitors to such website the ability to leave messages or comments on the profile web page that are visible to all or some visitors to the profile web page and may also include a form of electronic mail for members of the social networking website."

## STATEMENT OF FACTS

Conrad Morger was charged with aggravated criminal sexual abuse and criminal sexual abuse for incidents involving his younger sister; the incidents occurred between August 1, 2010, and November 30, 2012. *People v. Morger*, 2018 IL App (4th) 170285, ¶ 3. Mr. Morger was convicted of both counts following a bench trial. *Morger*, 2018 IL App (4th) 170285, ¶ 4. The court sentenced Mr. Morger to 48 months of probation with a suspended term of 180 days of jail time. *Id*. The appellate court vacated the sentence, found that an improper delegation of sentencing authority had occurred, and remanded for resentencing. *Id*., at ¶¶ 5-6.

On remand, the circuit court resentenced Mr. Morger to the same term of probation and imposed probation conditions. *Id*. The court imposed a mandatory condition that Mr. Morger must "[n]ot access or use a social networking website as defined in Section 17-0.5 of the Criminal Code of 2012." *Id*., at ¶ 33 (citing 730 ILCS 5/5-6-3(a)(8.9) (2012)). Mr. Morger did not use the internet or a computer in the commission of the crime. *Id*., at ¶¶ 35, 37.

On appeal, Mr. Morger argued that the probation condition was unreasonable and overly broad and that the statute requiring it was facially unconstitutional under the first amendment, citing *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017) (striking down a ban preventing people on the state sex offender registry from accessing social networking websites as unconstitutional under the First Amendment); *Morger*, 2018 IL App (4th) 170285, ¶ 9. The appellate court concluded "that the probation conditions in question are constitutional[.]" *Morger*, 2018 IL App (4th) 170285, ¶ 81.

The appellate court quoted its recent decision in *In re Dustyn W.*, 2017 IL App (4th) 170103, in which it explained that a probation condition that imposed a geographical limitation on a probationer's movement was "'narrowly drawn because it contains exemptions for legitimate access to the University campus and does not categorically ban respondent.'" *Morger*, 2018 IL App (4th) 170285, ¶ 81 (quoting *Dustyn W.*, 2017 IL App (4th) 170103, ¶ 29).

The appellate court then stated that "the probation conditions in this case also contain provisions whereby the defendant's probation officer temporarily could lift or modify a condition if the probation officer believed doing so would be appropriate, given both defendant's need to have that condition temporarily lifted or modified, as well as the need to protect the public, particularly children." *Id.*, at ¶ 82.

The appellate court concluded that "this case is different from *Packingham* in two important respects: (1) defendant's access to social media is not foreclosed *altogether*, as was the case in *Packingham*, and (2) defendant has not yet completed his sentence and his probation conditions cannot 'endure for 30 years or more.'" *Id.*, at ¶ 83 (quoting *Packingham*, 137 S.Ct. at 1734).

This Court allowed leave to appeal.

## ARGUMENT

**A complete ban on accessing "social networking websites" as a condition of probation is unreasonable and unconstitutional under the First Amendment.**

The sentencing court required that Mr. Morger "refrain from accessing or using a social networking website..." as a condition of probation. *People v. Morger*, 2018 IL App (4th) 170285, ¶ 33 (citing 730 ILCS 5/5-6-3(a)(8.9) (2012)). This condition violates his First Amendment right to freedom of speech. The appellate court disagreed because it believed the probation officer could modify this condition. *Id.*, at ¶ 82. The appellate court interpreted *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017), to apply only to registered sex offenders, as different from probationers, and therefore determined it was inapplicable in this case. *Morger*, 2018 IL App (4th) 170285, ¶ 83. The appellate court is incorrect on both counts and this Court should vacate the facially unconstitutional statutory condition banning access to social networking websites.

This issue involves questions of law, including constitutional law and statutory construction; thus, *de novo* review applies. *People v. Goossens*, 2015 IL 118347, ¶ 9. Also, a constitutional challenge to a criminal statute can be raised at any time. *In re J.W.*, 204 Ill. 2d 50, 61 (2003).

The purpose of probation is to restore the offender to useful citizenship. *People v. Lowe*, 153 Ill.2d 195, 205 (1992). The penal system achieves this goal by imposing reasonable conditions on probationers. The reasonableness of a probation condition is measured by:

> "'consider[ing] whether the restriction is related to the nature of the offense or the rehabilitation of the probationer.' Other considerations

> include (1) whether the probation condition reasonably relates to the rehabilitative purpose of the legislation, (2) whether the public value in imposing the probation condition 'manifestly outweighs the impairment to the probationer's constitutional rights,' and (3) 'whether there are any alternative means that are less subversive to the probationer's constitutional rights, but still comport with the purposes of conferring the benefit of probation.' Whether a condition of probation violates a probationer's constitutional rights is a question of law and our review is, therefore, *de novo*. *See People v. Burns*, 209 Ill.2d 551, 560 ... (2004)[.]"

*In re J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 11 (citing *In re J.W.*, 204 Ill.2d at 79.). While not completely free from their rehabilitative restrictions, probationers still maintain constitutional rights. *See In re J.W.*, 204 Ill.2d at 77. The legislature has broad power to establish criminal penalties, but due process requires that penalty provisions be reasonably designed to remedy the particular evil which the legislature has selected for treatment under the statute in question. *See People v. Fuller*, 187 Ill.2d 1, 15 (1999).

Mr. Morger's probation condition number five, that he "[n]ot access or use a social networking website as defined in Section 17-0.5 of the Criminal Code of 2012[,]" is based on unconstitutional Illinois law. 730 ILCS 5/5-6-3(a)(8.9); *Morger*, 2018 IL App (4th) 170285, ¶ 33. A social networking website is defined as:

> "an Internet website containing profile web pages of the members of the website that include the names or nicknames of such members, photographs placed on the profile web pages by such members, or

> any other personal or personally identifying information about such members and links to other profile web pages on social networking websites of friends or associates of such members that can be accessed by other members or visitors to the website. A social networking website provides members of or visitors to such website the ability to leave messages or comments on the profile web page that are visible to all or some visitors to the profile web page and may also include a form of electronic mail for members of the social networking website."

720 ILCS 5/17-0.5 (2012).

This probation condition is unconstitutional under the First Amendment, applicable to the states through the Fourteenth Amendment, because the Constitution provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const., amends. I, XIV. "The government may violate this mandate in many ways, but a law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (citations omitted).

"The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *U.S. v. Stevens*, 559 U.S. 460, 470 (2010). "In the First Amendment context, ... a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (internal quotation marks omitted).

The ban at issue in this case is even more overbroad than the ban struck down by the U.S. Supreme Court as unconstitutional under the First Amendment in *Packingham*, 137 S.Ct. at 1735-36. The appellate court affirmed on the grounds that *Packingham* was inapplicable because Mr. Morger was a probationer and not a post-imprisonment sex offender required to register. *Morger*, 2018 IL App (4th) 170285, ¶¶ 4-6, 72, 83. The appellate court also incorrectly held that the probation officer could allow for an exception; this is contradicted by the letter of the law and the probation condition. *Id*., at ¶¶ 33, 44, 83. This Court should find that the statutory probation condition upon which Mr. Morger's probation condition number five is based, 730 ILCS 5/5-6-3(a)(8.9), is facially unconstitutional as a violation of the First Amendment.

**A.**

**A condition banning all access to social networking websites is overbroad, unreasonable, and unconstitutional under the First Amendment.**

The appellate court was mistaken in finding the *Packingham* opinion inapplicable in this case. The opinion is directly applicable to the facts of this case. As the Court explained in *Packingham*:

> "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular. Seven in ten American adults use at least one Internet social networking service. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. This is about three times the population of North America.
>
> Social media offers 'relatively unlimited, low-cost capacity for communication of all kinds.' On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'"

*Packingham*, 137 S.Ct. at 1735-36 (citations omitted). The Court then continued that "... the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens." *Id.*, at 1737. The North Carolina statute made

it "... unlawful for a sex offender... to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site." N.C. GEN. STAT. § 14-202.5(a) (2009); *see Packingham*, 137 S.Ct. at 1733. The Court explained that:

> "By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'"

*Id*., at 1737 (citations omitted). Finally, the Court concluded that "... to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id*.

If the North Carolina statute in *Packingham* was unreasonable and overbroad, so too is this statute. The North Carolina statute was more limited and less broad than the one at issue here, lending further credence to the opinion's applicability. That statute in *Packingham* prohibited access only to social networking websites that permitted minor children to become members or to create or maintain personal web pages. *See* N.C. GEN. STAT. § 14-202.5(a);

*Packingham*, 137 S.Ct. at 1733. The statute at issue here, 730 ILCS 5/5-6-3(a)(8.9), does not limit social networking websites to only those in which minor children are permitted to become members; it is instead very broad, applying to all social networking websites, even sites where minors' profiles would not be expected, like LinkedIn.

Additionally, this Court must consider that Mr. Morger's offense did not involve any use of computers or the internet. *Morger*, 2018 IL App (4th) 170285, ¶¶ 35, 37. This fact influences the consideration of whether the probation condition was reasonably related to the rehabilitative purpose of the law. Restrictions on internet access are not categorically appropriate in cases where the defendant did not use the internet to facilitate the crime; a sufficient nexus between using the internet and committing the crime should be required. *Compare U.S. v. Burroughs*, 613 F.3d 233, 243 (D.C. Cir. 2010) (computer restriction inappropriate when offense lacked any connection to computers or to the internet) *with U.S. v. Legg*, 713 F.3d 1129 (D.C. Cir. 2013) (computer restriction appropriate where defendant used a computer to facilitate his crime); *see also U.S. v. Albertson*, 645 F.3d 191, 198-99 (3d Cir. 2011) (restricting internet access is too sweepingly broad unless defendant used the internet as an instrument of harm); *U.S. v. Perazza-Mercado*, 553 F.3d 65, 70-71 (1st Cir. 2009) (discussing that restricting internet use must be related to the underlying offense or must relate to defendant's history of improper use or other characteristics warranting a restriction); *U.S. v. Boston*, 494 F.3d 660, 668 (8th Cir. 2007) (court considered defendant's history and held restriction on computer access was not too broad because it was not absolute– probation officer could approve use of computers); *U.S. v. Johnson*, 446 F.3d 272,

283 (2d Cir. 2006) (court should consider whether restriction is reasonably necessary and the hazard of recidivism); *U.S. v. Holm*, 326 F.3d 872, 878 (7th Cir. 2003) (important to consider whether defendant made outbound use of the internet to initiate and facilitate the crime); *U.S. v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001) (internet restriction upheld where defendant used the internet to commit the crime).

Even if this Court finds a sufficient nexus here between a crime that did not involve a computer or the internet, and a condition entirely prohibiting all social networking websites, the condition should still be viewed as overbroad because the law does not provide for any exceptions. *See, e.g.*, *Boston*, 494 F.3d at 668 (court held restriction on computer access was not too broad because it was not absolute– probation officer could approve use of computers). The probation condition in this case is similar to that of *In re Omar F.*, where the restrictive condition on social media access did not allow for a way to obtain an exception for legitimate purposes; there was no exclusion for connecting to familial, employment, or educational contacts on social networking websites. *In re Omar F.*, 2017 IL App (1st) 171073, ¶¶ 66-68. The condition was struck down in that case, and similarly should be struck down here, because it:

> "... is simply too general and overbroad to provide... clear parameters about how to comply with the conditions of his probation. That is, if the parameters are so vague, overbroad, or general that [he] could be inadvertently caught violating probation in a number of scenarios, including when conducting himself in a constitutionally protected manner, then the judicial process is not functioning as intended."

*Id.*

Blanket restrictions on social networking website use should be treated like broad geographic restrictions. Restrictions on a probationer's travel into a specified area is reasonable and constitutional if there is a valid purpose for the restriction and if there is a means to obtain an exemption. *See In re J.W.*, 204 Ill.2d at 80-81. In *In re J.W.*, the defendant was prohibited from residing in or going to the community where he lived and where the aggravated criminal sexual assaults occurred. *Id.*, at 54. This Court vacated the condition as overbroad because the statute allowed for exceptions to the geographic restriction, but the actual probation condition did not provide for any exceptions. *Id.*, at 76, 80-82.

While Mr. Morger argues the condition is not reasonably related to his offense, if this Court nonetheless finds a nexus Mr. Morger still has no way to obtain a limited exception because the law does not allow it. The probation condition at issue here is similar to the unconstitutional condition in *In re J.W.*, because the sentencing court provided for no exceptions in both cases. *Id.*, at 80-82; *Morger*, 2018 IL App (4th) 170285, ¶ 33. However, the cases differ because the statute at issue in *In re J.W.*, had a codified scheme to provide for legitimate, reasonable exceptions to geographic restrictions, whereas the statute at issue here does not; it is instead a non-discretionary ban. *Compare* 705 ILCS 405/5-715(2)(r) (2000) *with* 730 ILCS 5/5-6-3(a)(8.9).

"Because the net is so novel, powerful and protean, it may seem to have a kind of magic. But pen, paper and literacy (or at least their widespread availability) once enjoyed all three characteristics, yet we would laugh at criminologists who advocated banning access for prisoners[.]" *U.S. v. Malenya*, 736 F.3d 554, 560 (D.C. Cir. 2013). Nor should social networking websites be banned in probation

or parole conditions. Internet bans are draconian. *U.S. v. Holena*, 906 F.3d 288, ___, 2018 WL 4905748, p. 3 (3d Cir. 2018). Therefore, Mr. Morger asks that this Court find the mandatory probation condition in 730 ILCS 5/5-6-3(a)(8.9) to be facially unconstitutional under the First Amendment because "Congress shall make no law ... abridging the freedom of speech." U.S. Const., amends. I, XIV. Mr. Morger asks this Court to vacate the appellate court opinion and probation condition number five.

**B.**

**Illinois law does not give probation officers the authority to modify the condition banning access to social networking websites.**

The appellate court incorrectly interpreted state law, as applied in a probation condition, to find that a probation officer could modify the ban on social networking websites. *Morger*, 2018 IL App (4th) 170285, ¶¶ 82-83. While it is true that some of Mr. Morger's probation conditions allowed for modifications, the law clearly delegated that authority to the probation officer in those instances. For example, compare the language in probation condition number eight, with that of the challenged condition number five: "8. ... Not access or use a computer or any other device with Internet capability without the prior written approval of the probation officer[,]" and "5. Not access or use a social networking website[.]" *Id.*, at ¶¶ 33, 42. Probation condition eight, which allows for a probation officer granted exception to use a computer, tracks the language of the statue which also grants an exception. *See* 730 ILCS 5/5-6-3(a)(8.8) (2012) ("not access or use a computer or any other device with Internet capability without the prior written approval of the offender's probation officer[.] ...") As to condition number five, the law upon which it is based

clearly does not provide a probation officer with the authority to modify the condition in any way. *See* 730 ILCS 5/5-6-3(a)(8.9) ("if convicted of a sex offense ... refrain from accessing or using social networking website[.] ...") Both the probation condition and the statute upon which it is based require blanket bans on using all social networking websites for any reason.

Therefore, the appellate court's conclusion that Mr. Morger's "... access to social media is not foreclosed *altogether*, as was the case in *Packingham*[,]" is simply incorrect. *Morger*, 2018 IL App (4th) 170285, ¶ 83. The appellate court relied on *In re Dustyn W.*, 2017 IL App (4th) 170103, in which it explained that a probation condition that imposed a geographical limitation on a probationer's movement was "'narrowly drawn because it contains exemptions for legitimate access to the University campus and does not categorically ban respondent.'" *Morger*, 2018 IL App (4th) 170285, ¶ 81 (quoting *Dustyn W.*, 2017 IL App (4th) 170103, ¶ 29). Because the condition at issue here is not narrowly drawn and does not contain exemptions, it is violative of the First Amendment.

**C.**

**The decision in *Packingham v. North Carolina* is not limited only to registered sex offenders, probationers should also enjoy its protection of First Amendment freedoms.**

The *Packingham* decision is not limited as interpreted by the appellate court. *Id.*, at ¶ 83. The appellate court incorrectly injected an issue into the *Packingham* decision that was not before that Court. If the *Packingham* Court had meant to limit its holding to only post-imprisonment registered sex offenders, it would have clearly stated that limitation. Therefore, that decision should be applied without limitation even to cases involving probation conditions; to do otherwise would lead to incomprehensible and inconsistent results.

The appellate court quoted in full the following segment from *Packingham* to support the argument that the decision should not apply to probationers:

> "In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives."

*Id.*, at ¶ 70 (quoting *Packingham*, 137 S.Ct. at 1737). But that paragraph does not limit the applicability of the decision as interpreted by the appellate court; it clearly applies to the broad category of "convicted criminals" like Mr. Morger.

Two paragraphs earlier, the *Packingham* Court made the only other reference in the opinion that might lead a reader to believe that the decision was limited to a specific type of "convicted criminal." The Court stated that, "([o]f importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.)" *Packingham*, 137 S.Ct. at 1737.

However, this statement does not limit the decision's applicability. It is significant that the statement is presented in parentheses. Parentheses are used to signify an explanation or afterthought into a passage that is grammatically correct without it. The dictionary defines "parenthesis" as "a remark or passage

that departs from the theme of discourse[; a] digression[.]" Merriam-Webster Dictionary, "parenthesis", https://www.merriam-webster.com/dictionary/parenthesis (last visited Nov. 7, 2018). An opinion should not be interpreted as limited when the proposed limitation is rooted in *dicta*, and not clearly communicated as part of the controlling opinion. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (court not bound to follow *dicta* in case where point was not fully debated); *see also*, *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill.2d 217, 236 (2010) ("*Orbiter dictum*,' ... is a remark or opinion that a court uttered as an aside. *Exelon Corp. v. Dep't of Revenue*, 234 Ill.2d 266, 277 ... (2009).").

The comments just discussed from the *Packingham* opinion merely addressed the considerations of whether a condition is reasonable, not whether the decision applies to a specific group of convicted criminals. The U.S. Supreme Court considered whether the North Carolina statute was reasonable throughout its opinion. In addition to the segments just addressed, it considered the scope of the law and determined that "... given the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites [like Facebook, LinkedIn, and Twitter,] but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com." *Packingham*, 137 S.Ct. at 1736. The Court also recognized the State's interest that the "... First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." *Id.*, at 1737. After considering the scope of the statute and the State's interest in protecting the public from sex crimes, the Court considered several factors affecting whether the statute was reasonable and narrowly tailored:

> "By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."

*Id*.

For these reasons, the *Packingham* decision should not be applied to only a limited subset of convicted criminals, but should apply to anyone facing a similar restriction of social networking websites. The sweeping First Amendment language of *Packingham* that protects the rights of convicted sex offenders to access social networking websites conflicts with a rule that probationers can be entirely barred from those same websites because their rights are reduced. It is true that "probationers do not enjoy the absolute liberty to which every citizen is entitled." *U.S. v. Knights*, 534 U.S. 112, 119 (2001) (internal quotation marks omitted). But, because probation is one of the lightest punishments on a continuum of possible punishments, the diminishment of constitutional rights should be minimal and this Court should extend the holding of *Packingham* to probationers. *See Id*.

In absence of clear directions to limit the *Packingham* holding to parolees, the decision should apply broadly because probationers are not more deserving of stringent restrictions or punishment than parolees:

> "Probation is less restrictive than parole, though it is still on the continuum of state-imposed punishments. [*See Samson v. California*, 547 U.S. 843, 850 (2006)] ('[P]arole is more akin to imprisonment than probation is to imprisonment.'); *id.* ('[O]n the Court's continuum of possible punishments, parole is the stronger medicine; ergo, parolees enjoy even less of the average citizen's absolute liberty than do probationers.') Unlike parole, which is imposed in addition to imprisonment, probation is 'meted out ... in lieu of[ ] incarceration.'"

*Doe v. Harris*, 772 F.3d 563, 571 (9th Cir. 2014) (alterations in original) (citations omitted). It would not make sense to allow parolees and post-imprisonment sex offender registrants to enjoy the protections of *Packingham*, but prohibit probationers from doing the same.

Therefore, because probation condition number five and the statute upon which it is based do not provide for exceptions, they are not narrowly tailored and are unreasonable and overbroad. Mr. Morger asks that this Court find the mandatory probation condition in 730 ILCS 5/5-6-3(a)(8.9) to be facially unconstitutional under the First Amendment because "Congress shall make no law ... abridging the freedom of speech." U.S. Const., amends. I, XIV. Mr. Morger also asks this Court to vacate the appellate court opinion and probation condition number five.

## CONCLUSION

For the foregoing reasons, Mr. Conrad Allen Morger, petitioner-appellant, respectfully requests that this Court vacate the probation condition and statute prohibiting access to social media websites and find that condition to be facially unconstitutional.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I, Zachary A. Rosen, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 22 pages.

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No. 123643

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| CONRAD ALLEN MORGER | ) | Honorable Scott D. Drazewski, |
| Petitioner-Appellant. | ) | Judge Presiding. |

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 5, 2018, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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## APPENDIX TO THE BRIEF

# INDEX TO THE RECORD

**Supplemental Report of Proceedings**



**Exhibits**

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FILED
April 25, 2018
Carla Bender
4th District Appellate
Court, IL

2018 IL App (4th) 170285

NO. 4-17-0285

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
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| PEOPLE OF THE STATE OF ILLINOIS,<br>Plaintiff-Appellee,<br>v.<br>CONRAD ALLEN MORGER,<br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the<br>Circuit Court of<br>McLean County<br>No. 12CF1330<br><br>Honorable<br>Scott D. Drazewski,<br>Judge Presiding. |

JUSTICE STEIGMANN delivered the judgment of the court, with opinion.
Justices DeArmond and Turner concurred in the judgment and opinion.

OPINION

¶ 1 After defendant, Conrad Allen Morger, was convicted in 2014 of criminal sexual abuse and aggravated criminal sexual abuse, he challenged on appeal various conditions of his probation. This court vacated defendant's sentence and remanded for a new sentencing hearing. The trial court again sentenced defendant to probation, and he now appeals, challenging certain conditions of probation as (1) an improper increase in his sentence and (2) unconstitutional because they are overly broad and unreasonable. For the reasons that follow, we affirm the trial court's judgment.

¶ 2 I. BACKGROUND

¶ 3 In January 2013, the State charged defendant with aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2010)) and criminal sexual abuse (*id.* § 11-1.50(a)(1)). *People v. Morger*, 2016 IL App (4th) 140321, ¶ 5, 59 N.E.3d 219. Each charge alleged that

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defendant's criminal acts, which were committed against his sister, K.M., who was born September 22, 1997, occurred between August 1, 2010, and November 30, 2012. *Id.* ¶ 5.

¶ 4 In February 2014, following a bench trial, defendant was convicted of both counts. *Id.* ¶ 1. In April 2014, the trial court sentenced him to 180 days in jail and probation for 48 months. *Id.* ¶¶ 1, 21.

¶ 5 In defendant's initial appeal, he argued that the State failed to prove him guilty beyond a reasonable doubt of either charge. *Id.* ¶ 2. Defendant also argued his probation conditions were unreasonable, overly broad, and unrelated to his conviction or rehabilitation. In addition, defendant argued that the trial court erred by delegating its judicial discretion to the McLean County court services department to determine his sentence. *Id.* In August 2016, this court agreed with only defendant's last argument, so we affirmed defendant's convictions, vacated his sentence, and remanded for the trial court to use its discretion to determine his sentence. *Id.* ¶ 61.

¶ 6 On remand, the trial court resentenced defendant to the same term of probation and imposed various probation conditions. Defendant challenged some of those conditions in a motion to reconsider sentence, but the court denied that motion.

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant raises two contentions. First, he argues that the trial court's imposition of probation conditions on remand amounts to an improper increase of his sentence. Second, defendant argues probation condition Nos. 4, 5, 6, 8, 11, and 14 should be vacated because they are unconstitutional, overly broad, and unreasonable. We will address these arguments in turn.

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¶ 10 A. The Probation Conditions Imposed on Remand

¶ 11 Defendant argues that the probation conditions purportedly imposed by the McLean County court services department previously cannot be imposed by the trial court on remand because doing so would impermissibly increase his sentence. Accordingly, defendant asks this court to vacate all of the probation conditions the trial court imposed on remand.

¶ 12 The State responds that (1) the trial court retained authority and discretion during defendant's probationary period to revoke or modify defendant's probation and (2) the court properly imposed probation conditions on remand. We agree with the State that the trial court's imposition of probation conditions on remand was proper.

¶ 13 In support of defendant's claim that the trial court's imposition of probation conditions on remand amounted to an impermissible increase in his sentence, he relies upon *People v. Castleberry*, 2015 IL 116916, ¶¶ 20-26, 43 N.E.3d 932, and *People v. Daily*, 2016 IL App (4th) 150588, ¶ 30, 74 N.E.3d 15. We reject defendant's *Castleberry* and *Daily* analysis because those cases are inapposite to defendant's situation.

¶ 14 In *Daily*, the circuit clerk purportedly imposed fines upon the defendant that the trial court never imposed. *Daily*, 2016 IL App (4th) 150588, ¶ 30. This court vacated the fines but declined the State's request that we remand so that the trial court could impose the mandatory fines. *Id.* In so concluding, we stated our agreement with the Third District's decision in *People v. Wade*, 2016 IL App (3d) 150417, ¶ 13, 64 N.E.3d 703, that such a remand would result in an impermissible increase in defendant's sentence on appeal, which would violate the supreme court's decision in *Castleberry*. *Id.* As the *Wade* court noted, the supreme court in *Castleberry* held that the appellate court may not increase a sentence on appeal, even one that is illegally low. *Id.*

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¶ 15 Defendant's situation in the present case is different because, here, the *trial court* sentenced defendant to probation but then delegated the imposition of specific probation conditions to the McLean County court services department. *Morger*, 2016 IL App (4th) 140321, ¶¶ 1, 57. We held in the first appeal of this case that the trial court's delegation to the court services department was erroneous. *Id.* ¶ 54. "Because the imposition of probationary conditions is part of sentencing, the trial court must impose any such conditions at the sentencing hearing and may not delegate that authority to any third party, including the court services department." *Id.* ¶ 57. We then remanded the defendant's case for the trial court to judicially impose the specific probation conditions. *Id.* ¶ 58.

¶ 16 On remand, the trial court did just that—namely, the court resentenced defendant and imposed probation conditions. Thus, this case differs from *Daily* because, here, it was the *trial court* that initially imposed the erroneous sentence, not the circuit clerk. Thus, our remand directed the trial court to sentence defendant again without engaging in any improper delegation to the court services department to determine probation conditions. The trial court complied with our remand, and we see no error in the court's doing so. Because the trial court resentenced defendant and imposed probation conditions, the trial court exercised its judicial function and these conditions were properly imposed on remand.

¶ 17 B. Defendant's Challenge to Specific Probation Conditions

¶ 18 Next, defendant argues that probation condition Nos. 4, 5, 6, 8, 11, and 14 imposed by the trial court should be vacated because they are unconstitutional, overly broad, and unreasonable. These contentions on appeal appear based on two separate claims: (1) the probation conditions are inappropriate, excessive, and unreasonable as a matter of Illinois law, and (2) even if they might be permitted under Illinois law, they violate defendant's constitutional

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rights. Consistent with directions from the Illinois Supreme Court regarding how lower courts should handle cases in which both constitutional and nonconstitutional claims are raised, we will first address defendant's nonconstitutional claims. See *People v. Chairez*, 2018 IL 121417, ¶ 13 (courts should "decide constitutional questions only to the extent required by the issues in the case" (internal quotation marks omitted)); see also *In re Dustyn W.*, 2017 IL App (4th) 170103, ¶ 24, 81 N.E.3d 88 ("Only if we conclude that the trial court did not abuse its discretion by imposing the probationary condition at issue should we then consider whether this condition violated respondent's constitutional rights."). Nonetheless, our consideration of a defendant's contention that a probation condition violated his constitutional rights can help inform this court's analysis regarding the overall reasonableness of that condition.

¶ 19 1. *Defendant's Claim That the Probation Conditions Imposed On Him Were Not Permitted Under Illinois Law*

¶ 20 In analyzing the probation conditions, we need to "first determine whether the court's discretion was exercised in a reasonable manner." *Dustyn W.*, 2017 IL App (4th) 170103, ¶ 24. "To be reasonable, a condition of probation must not be overly broad when viewed in the light of the desired goal or the means to that end." *In re J. W.*, 204 Ill. 2d 50, 78, 787 N.E.2d 747, 764 (2003).

¶ 21 Trial courts have broad discretion to impose probationary conditions to achieve the goals of fostering rehabilitation and protecting the public. *Dustyn W.*, 2017 IL App (4th) 170103, ¶ 24. "[T]he trial court's discretion is limited by constitutional safeguards and must be exercised in a reasonable manner." *Id.*

¶ 22 For the reasons that follow, we conclude that probation condition Nos. 4, 5, 6, 8, 11, and 14 are reasonable.

¶ 23 a. Probation Condition No. 4

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¶ 24 Probation condition No. 4 requires that defendant

> "[n]ot reside at the same address, in the same condominium unit or complex, or in the same apartment unit or complex, with another person defendant knows or reasonably should know is a convicted sex offender. (730 ILCS 5/5-6-3(a)(8.6)) This includes any mobile home park in which the homes are addressed by lot number, with or without a designated street address."

¶ 25 Defendant argues that probation condition No. 4 prohibits him "from living in any mobile home parks that use lot numbers if another convicted sex offender lives there." He further argues that probation condition No. 4 is overly broad and unreasonable "because mobile home parks are substantially different than apartment and condominium complexes in that they consist of entirely separate physical dwellings, just like subdivisions of houses." Defendant cites *People v. Meyer*, 176 Ill. 2d 372, 680 N.E.2d 315 (1997), to argue that a probation condition can veer so far in the direction of protecting the public that it unreasonably hampers the goal of rehabilitation, which he contends probation condition No. 4 does by arbitrarily limiting his access to some mobile homes, but not small houses. We disagree with all of these contentions.

¶ 26 Probation condition No. 4 does not prohibit defendant "from living in any mobile home parks that use lot numbers if another convicted sex offender lives there." Instead, that condition prohibits defendant from residing at "any mobile home park in which the homes are addressed by lot number, with or without a designated street address" where defendant knows or reasonably should know another convicted sex offender resides. Thus, probation condition No. 4 restricts defendant's housing choices *only* if defendant knows, or should reasonably know, that a sex offender resides within the mobile home park, condominium, apartment unit, or complex.

¶ 27 Defendant misinterprets and misapplies *Meyer*, in which the Illinois Supreme

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Court had before it a probation condition requiring the defendant to erect a sign reading "Warning! A Violent Felon lives here. Enter at your own Risk!" The supreme court deemed this condition unreasonable because it contained a strong element of public humiliation or ridicule. *Id.* at 382. The court also struck down this probation condition because the sign was likely to have an adverse effect on innocent individuals who might have resided with, or intended to visit, the defendant, explaining that "[c]onditions which label a defendant's person or property have a stigmatizing effect and are considered shaming penalties." *Id.* at 383. The court added that "[a]though a probationer may experience a certain degree of shame from a statutorily identified condition of probation, shame is not the primary purpose of the enumerated conditions." *Id.*

¶ 28 *Meyer* is inapposite from this case. Probation condition No. 4 does not shame or publicly ridicule defendant, nor does it require defendant to erect a sign, display, or formally and publicly announce that he is a sex offender. Additionally, probation condition No. 4 will not cause an adverse effect on others who may happen to reside with or intend to visit defendant, nor does it label defendant's person or property.

¶ 29 In *People v. Johnson*, 174 Ill. App. 3d 812, 813, 528 N.E.2d 1360, 1360 (1988), the trial court ordered the defendant to place an advertisement in the local daily newspaper, which contained her booking picture and an apology for driving under the influence of alcohol. This court struck down that probation condition and cautioned against allowing trial courts to impose unconventional conditions, which may have unknown consequences. *Id.* at 815.

¶ 30 Nothing is unconventional about probation condition No. 4. The Illinois legislature authorized a geographic limitation in section 5-6-3(a)(8.6) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-6-3(a)(8.6) (West 2012)) to prevent sex offenders from living in close proximity to each other. The purpose of this statute is to protect the public,

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to treat and rehabilitate sex offenders, and to prevent sex offenders from influencing or enabling each other to commit sexual offenses. Because section 5-6-3(a)(8.6) prohibits defendant from residing "at the same address, or in the same condominium unit or apartment unit or in the same condominium complex or apartment complex, or with another person [defendant] knows or reasonably should know is a convicted sex offender," the addition of mobile home parks to probation condition No. 4 is within the scope and intent of the statute.

¶ 31 For the reasons stated, we conclude that probation condition No. 4 was properly and reasonably imposed.

¶ 32 b. Probation Condition No. 5

¶ 33 Probation condition No. 5 requires that defendant

> "[n]ot access or use a social networking website as defined in Section 17-0.5 of the Criminal Code of 2012. (730 ILCS 5/5-6-3(a)(8.9))."

¶ 34 Under section 17-0.5, "Social networking website" is defined as follows:

> "[A]n Internet website containing profile web pages of the members of the website that include the names or nicknames of such members, photographs placed on the profile web pages by such members, or any other personal or personally identifying information about such members and links to other profile web pages on social networking websites of friends or associates of such members that can be accessed by other members or visitors to the website. A social networking website provides members of or visitors to such website the ability to leave messages or comments on the profile web page that are visible to all or some visitors to the profile web page and may also include a form of electronic mail for members of the social networking website." 720 ILCS 5/17-

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0.5 (West 2012).

¶ 35 In *People v. Crabtree*, 2015 IL App (5th) 130155, ¶ 1, 37 N.E.3d 922, the defendant was convicted of aggravated criminal sexual abuse of a minor who was under 13 years old, and one of the defendant's probation conditions prohibited him from accessing or using a social networking website. On appeal, defendant argued that this condition was overly broad because he did not use a computer to commit that offense. *Id.* ¶ 12.

¶ 36 The Fifth District concluded that the trial court did not abuse its discretion by imposing this probation condition, explaining that "[a] condition of probation is permissible so long as there is some connection between the condition and the underlying offense." *Id.* ¶ 16. The Fifth District further wrote that "although defendant's crime did not include use of a computer or a social networking website, it involved the sexual abuse of a young girl. Thus, the conditions of probation appear reasonably related to the goals of deterrence, protection of the public, and rehabilitation of defendant." *Id.* ¶ 17. Additionally, "[g]iven the nature of the offense of which defendant was convicted, we do not believe these mandatory conditions are unreasonable." *Id.* ¶ 18.

¶ 37 We agree with the Fifth District's analysis and deem it pertinent to this case. Although defendant's criminal sexual abuse and aggravated criminal sexual abuse did not include use of a computer or a social networking website, his offenses involved the sexual abuse of a young girl. Probation condition No. 5 is permissible because there is a connection between the condition and his sexual assault offenses—specifically, defendant could otherwise access social networking sites often used by minors.

¶ 38 We further view probation condition No. 5 as imposed for "the protection of the public" (*People v. Goossens*, 2015 IL 118347, ¶ 11, 39 N.E.3d 956), because it is reasonably

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related to (1) deterring defendant from sexually assaulting another minor ,and (2) protecting the public by preventing him from (a) contacting anyone under the age of 18, and (b) accessing social networking sites often used by minors.

¶ 39 For the reasons stated, we conclude that probation condition No. 5 was reasonably and properly imposed.

¶ 40 c. Probation Condition Nos. 6 and 8

¶ 41 Probation condition No. 6 requires that defendant

> "[n]ot knowingly use any computer scrub software on any computer that the defendant uses. (730 ILCS 5/5-6-3(a)(11))."

¶ 42 Probation condition No. 8 requires that defendant

> "[n]ot access or use a computer or any other device with Internet capability without the prior written approval of the probation officer; submit to periodic unannounced examinations of defendant's computer or any other device with Internet capability by the probation officer, a law enforcement officer, or assigned computer or information technology specialist, including the retrieval and copying of all data from the computer or device and any internal or external peripherals and removal of such information, equipment, or device to conduct a more thorough inspection; submit to the installation on the offender's computer or device with Internet capability, at the offender's expense, of one or more hardware or software systems to monitor the Internet use; and submit to any other appropriate restrictions concerning the defendant's use of or access to a computer or any other device with Internet capability imposed by the probation officer. (730 ILCS 5/5-6-3(a)(8.8) and (b)(18))."

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¶ 43 Defendant points out that his offenses did not involve any use of computers or the Internet and argues therefore that bans on various aspects of computer usage are not reasonable. Defendant additionally contends that probation condition Nos. 6 and 8 (1) unreasonably bar him from "engaging with a wide swath of protected speech" and (2) do not bear a reasonable relationship to protecting the public and punishing and rehabilitating him.

¶ 44 Defendant also argues that sections 5-6-3(a)(8.8) and 5-6-3(b)(18) of the Unified Code (730 ILCS 5/5-6-3(a)(8.8), (b)(18) (West 2016)), which grant a probationer Internet use with the prior written approval of the probation officer, give the probation officer blanket authority to deny or allow Internet use, "without providing any standards whatsoever on how to decide what internet use is permissible." As a result, defendant contends that a probation officer's unconstrained authority to deny him all Internet access without any statutory guidance as to how the probation officer should exercise that authority is unreasonable and unconstitutional.

¶ 45 We disagree with defendant. The Illinois legislature enacted sections 5-6-3(a)(8.8) and 5-6-3(b)(18) (*id.*) to limit a sex offender's access to a computer, the Internet, and computer scrub software for the protection of the public. *Goossens*, 2015 IL 118347, ¶ 11. Probation condition Nos. 6 and 8 protect the public, in particular minors, by (1) limiting defendant's computer and Internet access so that he cannot attempt to contact a minor, (2) preventing him from using computer scrub software to hide any of his attempts to contact a minor, and (3) preventing him from attempting to sexually abuse a minor.

¶ 46 "[W]hen deciding the propriety of a condition of probation imposed in a particular case, whether explicitly statutory or not, the overriding concern is reasonableness." *J. W.*, 204 Ill. 2d at 78. Although defendant's criminal sexual offenses did not involve use of a computer, the

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Internet, or computer scrub software, his offenses involved the sexual abuse of a minor. Probation condition Nos. 6 and 8 are reasonable and permissible because a connection exists between those conditions and his sexual assault offenses, given that the question is whether defendant should have access to the Internet and social networking sites that minors often use.

¶ 47 Probation condition No. 6 places no restriction on defendant's ability to engage in protected speech. The purpose of probation condition No. 6 is to prevent defendant from using computer scrub software to "delete information from the computer unit, the hard drive, or other software, which would eliminate and prevent discovery of browser activity" and "which would over-write files in a way so as to make previous computer activity, including but not limited to website access, more difficult to discover." 730 ILCS 5/3-1-2(c-5) (West 2010).

¶ 48 Probation condition No. 8 does not unreasonably restrict defendant's ability to communicate or engage in protected speech. Under probation condition No. 8, defendant may still access or use a computer or any other device with Internet capability as long as he first obtains the prior written approval of the probation officer.

¶ 49 We strongly disagree with defendant's contention that a probation officer's unconstrained and guidance-less authority to deny or allow defendant Internet use is somehow improper. One of the duties of a probation officer is

> "[t]o take charge of and watch over all persons placed on probation under such regulations and for such terms as may be prescribed by the court, and giving to each probationer full instructions as to the terms of his release upon probation and requiring from him such periodical reports as shall keep the officer informed as to his conduct." 730 ILCS 110/12(5) (West 2016).

Probation officers are the eyes and ears of the court, and to make probation a meaningful

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sentence, they must have—and must exercise—vast discretion in their dealings with probationers. Determining whether a probationer may have Internet access (and, if so, under what circumstances and restrictions) is but merely one of the many judgments the courts expect their probation officers to make when supervising the life and behavior of probationers.

¶ 50 For the reasons stated, we conclude that probation condition Nos. 6 and 8 were reasonably and properly imposed.

¶ 51 d. Probation Condition No. 11

¶ 52 Probation condition No. 11 requires that defendant

> "[n]ot have contact with, or attempt to have contact with, any person under the age of 18, regardless of familial relationship, either in person, by third party, by phone, by mail, in writing or electronically, or by internet communication in any form, unless approved by the probation officer and treatment provider."

¶ 53 Defendant argues that this probation condition is unreasonable and overly broad, contending that (1) it is not related to his offenses (which occurred at home and did not involve any communication), (2) it is not related to his rehabilitation, and (3) it exposes him to strict liability for nonintentional communications. We disagree.

¶ 54 The Illinois Supreme Court has consistently held that "any additional condition [of probation] not expressly authorized by statute 'may be imposed as long as it is (1) reasonable and (2) relates to (a) the nature of the offense or (b) the rehabilitation of the defendant as determined by the trial court.' " *Goossens*, 2015 IL 118347, ¶ 13 (quoting *Meyer*, 176 Ill. 2d at 378). Because defendant's offenses involved the sexual abuse of his younger sister, who was a minor, probation condition No. 11 is reasonable to prohibit defendant from having contact with a minor, unless first approved by the probation officer and treatment provider. The value to the

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public in imposing probation condition No. 11 is to prevent defendant from committing sexual abuse against a minor and to protect minors, which is achieved by prohibiting defendant from having contact or attempting to have contact with minors.

¶ 55 In *People v. Cozad*, 158 Ill. App. 3d 664, 670, 511 N.E.2d 211, 216 (1987), this court wrote that one of the primary purposes of probation is "to protect the public from the type of conduct that led to the placement of the defendant on probation." In *Meyer*, the supreme court cited our opinion in *Cozad* approvingly and wrote the following: "Protection of the public from the type of conduct that led to a defendant's conviction is one of the goals of probation." *Meyer*, 176 Ill. 2d at 379. Protection of the public, in particular minors, by preventing defendant from having contact with minors is one of the goals of defendant's probation and is reasonable.

¶ 56 Further, we view probation condition No. 11 as relating to the nature of defendant's offenses, which involved the sexual abuse of his younger sister, who was a minor. Thus, it is appropriate to prohibit defendant from having contact with a minor unless approved by a probation officer and treatment provider. Probation condition 11 also relates to defendant's rehabilitation, in that his compliance with it will make difficult his committing further sexual abuses against a minor.

¶ 57 For the reasons stated, we conclude that probation condition No. 11 was reasonable and properly imposed.

¶ 58 e. Probation Condition No. 14

¶ 59 Probation condition No. 14 requires that defendant

> "[n]ot purchase, view, or possess any pornographic material including but not limited to magazines, videos, DVD's, photographs, digital media, or any other material depicting or describing persons in a state of undress or engaging in

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sexual activities; not access any such material through the Internet; not solicit a prostitute or access any telephone numbers providing sexually stimulating services; and not enter any adult bookstores, strip clubs, gentlemen's clubs, or any other establishment which provides sexually stimulating services or sells sexual materials."

¶ 60 Defendant argues that probation condition No. 14 is unreasonable and overly broad because it is plainly unconstitutional under the first amendment and bans him from "engaging with many of the creations of popular-culture entertainment and works of art that humanity has ever produced." Defendant also contends that probation condition No. 14 bans him from watching many television shows and movies, reading many novels, or attending art museums, among other things. We disagree.

¶ 61 We deem probation condition No. 14 to be a reasonable restriction to punish and rehabilitate defendant due to his criminal sexual abuse and aggravated criminal sexual abuse convictions. Defendant may still purchase, view, or possess any creations of popular-culture entertainment and works of art as long as they are not pornographic and do not depict or describe persons in a state of undress or engaging in sexual activities.

¶ 62 We reject defendant's claim that the phrase "state of undress" in probation condition 14 includes "a person wearing a swim suit, or pajamas, or just underwear, or no shoes." That claim is a gross misreading and misinterpretation of probation condition No. 14, which prohibits defendant from viewing any pornographic material "depicting or describing persons in a state of undress or engaging in sexual activities."

¶ 63 "When assessing the reasonableness of a condition of probation it is appropriate to consider whether the restriction is related to the nature of the offense or the rehabilitation of

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the probationer." *J.W.*, 204 Ill. 2d at 79. Because the nature of defendant's sexual assault offenses is sexual, restricting defendant's access to pornographic material, which is sexually stimulating, is reasonable. Probation condition No. 14 serves the purpose of probation, which is to benefit society by restoring defendant "to useful citizenship, rather than allowing a defendant to become a burden as an habitual offender." *Meyer*, 176 Ill. 2d at 379.

¶ 64 For the reasons stated, we conclude that probation condition No. 14 was reasonably and properly imposed.

¶ 65 2. *Defendant's Claim that the Probation Conditions Imposed Upon Him Were Unconstitutional*

¶ 66 As we noted earlier, this court should consider defendant's claim that probation conditions violated his constitutional rights only if we first conclude that the trial court did not abuse its discretion by imposing the probation conditions at issue. *Dustyn W.*, 2017 IL App (4th) 170103, ¶ 24. Because we have now so concluded, we will now address whether any of those conditions violated defendant's constitutional rights.

¶ 67 a. Defendant's Constitutional Arguments

¶ 68 Defendant contends that although a trial court is generally given wide discretion in determining the conditions of probation (*People v. Harris*, 238 Ill. App. 3d 575, 579, 606 N.E.2d 392, 395 (1992)), probationers still possess basic constitutional rights, with the result that a court's discretion is limited by constitutional safeguards and must be exercised in a reasonable manner. *J.W.*, 204 Ill. 2d at 77. Defendant further cites *United States v. Lara*, 815 F.3d 605, 609 (9th Cir. 2016), for the proposition that "there is a limit on the price the government may exact in return for granting probation."

¶ 69 Defendant places major reliance upon the recent decision of the United States Supreme Court in *Packingham v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730 (2017), in which

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the defendant, who was a registered sex offender, was convicted of accessing a commercial social networking website. The defendant in that case had pleaded guilty to taking indecent liberties with a child because, when he was 21 years old, he had sex with a 13-year-old girl. He was required to register as a sex offender—"a status that can endure for 30 years or more." *Id.* at ___, 137 S. Ct. at 1734. As a registered sex offender, defendant was barred from gaining access to commercial social networking websites. Nonetheless, after a traffic ticket against him was dismissed, he logged onto Facebook and posted a statement pertaining to that dismissal on his personal profile. *Id.* at ___, 137 S. Ct. at 1734.

¶ 70 The defendant appealed his conviction for accessing a commercial social website, and the Supreme Court reversed, concluding that the statute in question "enacts a prohibition unprecedented in the scope of [f]irst [a]mendment speech it burdens." *Id.* at ___, 137 S. Ct. at 1737. The Supreme Court concluded as follows:

> "In sum, to foreclose access to social media *altogether* is to prevent the user from engaging in the legitimate exercise of [f]irst [a]mendment rights. It is unsettling to suggest that only a limited set of websites can be used *even by persons who have completed their sentences*. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." (Emphases added.) *Id.* at ___, 137 S. Ct. at 1737.

¶ 71 Justice Alito, with whom Chief Justice Roberts and Justice Thomas joined, wrote a special concurrence in which he noted that the statute at issue

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"has a staggering reach. It makes it a felony for a registered sex offender simply to visit a vast array of websites, including many that appear to provide no realistic opportunity for communications that could facilitate the abuse of children. Because of the law's extraordinary breadth, I agree with the Court that it violates the Free Speech Clause of the First Amendment." *Id.* at ___, 137 S. Ct. at 1738 (Alito, J., specially concurring, joined by Roberts, C.J. and Thomas, J.).

¶ 72 Defendant appropriately concedes that the difference between his case and *Packingham* is that he is a probationer, while *Packingham* dealt with a person who had the status of a registered sex offender. However, defendant argues that this is a distinction without a difference, and that this court should hold some of the probation conditions imposed upon defendant unconstitutional under the first amendment. Defendant acknowledges that he has not yet completed his sentence of probation and that probationers "retain somewhat diminished constitutional rights," in that "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *United States v. Knights*, 534 U.S. 112, 119 (2001).

¶ 73 Defendant also concedes that the Fifth District in *Crabtree* has held that probation conditions limiting a probationer's use of the Internet was not improper, writing that "[d]efendant fails to identify and we fail to find any protected constitutional right of a person to use a computer, the Internet, or a social networking website." *Crabtree*, 2015 IL App (5th) 130155, ¶ 17. However, defendant asserts that this "position is untenable following *Packingham*," and this court should now reach a result different than that reached by the Fifth District in *Crabtree*.

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¶ 74 In support of this argument, defendant cites decisions of federal courts of appeal that deemed restrictions imposed upon convicted defendants that barred them from Internet usage improper, and defendant contends these decisions should guide this court's analysis in the present case. For instance, in *United States v. Goodwin*, 717 F.3d 511, 513-14 (7th Cir. 2013), the court found it was improper to require the defendant, who was convicted of failing to register as a sex offender and received a life term of supervised release, to install software and to permit his computer to be examined because the computer played no role either in the original offense or in the defendant's failure to register as a sex offender. In *United States v. Riley*, 576 F.3d 1046, 1048-49 (9th Cir. 2009), the court found that a special condition of the defendant's supervised release (he had been convicted of possessing child pornography) that he not use a computer to access any information relating to minors was overly broad and imposed a far greater deprivation of liberty than reasonably necessary to achieve legitimate goals of supervised release. Similarly, in *United States v. Perazza-Mercado*, 553 F.3d 65 (1st Cir. 2009), the defendant pleaded guilty to a sex offense involving a young girl in his care and challenged a special condition of his supervised release that banned him from accessing the Internet in his home. The appellate court concluded that the ban would not protect the public or deter crime because he had never used the internet improperly and it would hinder his chance at rehabilitation.

¶ 75 Although defendant cites these three federal court of appeal cases in support of his claim that the probation conditions in question are unconstitutional because they were so overly broad they denied him due process, we note that none of the decisions in those cases was based on a finding that the conditions the federal trial courts imposed were unconstitutional. Instead, the appellate courts concluded that the conditions in question were not reasonably

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imposed. See *Goodwin*, 717 F.3d at 524; *Riley*, 576 F.3d at 1049; *Perazza-Mercado*, 553 F.3d at 78.

¶ 76 b. The State's Response to Defendant's Constitutional Claims

¶ 77 In response to defendant's constitutional claims, the State points out that the Supreme Court in *Packingham* struck down a North Carolina statute that banned registered sex offenders from accessing commercial social networking cites, but that is completely silent regarding whether its holding applies to probationers. The State asserts this is significant because "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Knights*, 534 U.S. at 119. Further, "[I]t is always true of probationers *** that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only *** conditional liberty properly dependent on observance of special [probation] restrictions.' " *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

¶ 78 Based upon this authority, the State asserts the following: "Clearly, as a result of a probationers' conditional liberty—unlike individuals who have completed their sentence—*Packingham* is distinguishable from this case." The State further maintains that the conditional liberty that probationers are granted is exactly what allows probationers to be barred from those same websites. "Notably, unlike the convicted sex offenders in *Packingham*[,] who had served their sentences, here, defendant's probationary period was not yet completed and was only for a predetermined[,] definite period of time."

¶ 79 In support of its position, the State cites the Illinois Supreme Court's decision in *J.W.*, in which that court wrote that "[e]ven fundamental constitutional rights are not absolute and may be reasonably restricted in the public interest," further noting that "a condition of

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probation which impinges on fundamental constitutional rights is not automatically deemed invalid." *J. W.*, 204 Ill. 2d at 78.

¶ 80 c. This Court Concludes the Probation Conditions Are Constitutional

¶ 81 Without repeating the State's arguments, we agree that the probation conditions in question are constitutional for essentially the reasons the State provides. In so concluding, we note that this court in *In re Dustyn W.* recently addressed a challenge based on constitutional grounds to a probation condition brought by a juvenile who had been found delinquent and sentenced to probation. The respondent in that case argued on appeal that a geographical limitation the trial court imposed as a probationary condition was constitutionally overbroad, and this court rejected that challenge. *Dustyn W.*, 2017 IL App (4th) 170103, ¶ 29. We explained our conclusion, as follows:

> "The condition is narrowly drawn because it contains exemptions for legitimate access to the University campus and does not categorically ban respondent. The ban does not apply when either (1) respondent is in the presence of his parent, guardian, or custodian or (2) respondent has received advance permission from his probation officer. Those two exceptions distinguish the present case from *J. W.*, where the prohibition on the respondent's travel *** was absolute." *Id.*

¶ 82 Similarly, the probation conditions in this case also contain provisions whereby the defendant's probation officer temporarily could lift or modify a condition if the probation officer believed doing so would be appropriate, given both defendant's need to have that condition temporarily lifted or modified, as well as the need to protect the public, particularly children.

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¶ 83 Thus, this case is different from *Packingham* in two important respects: (1) defendant's access to social media is not foreclosed *altogether*, as was the case in *Packingham*, and (2) defendant has not yet completed his sentence and his probation conditions cannot "endure for 30 years or more." *Packingham*, 582 U.S. at ___, 137 S. Ct. at 1734.

¶ 84 III. CONCLUSION

¶ 85 For the reasons stated, we affirm the trial court's judgment. The trial court's imposition of additional probation conditions on remand was proper and imposition of probation condition Nos. 4, 5, 6, 8, 11, and 14 was reasonable and proper.

¶ 86 Affirmed.

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IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-17-0285 |
| Respondent-Appellee, | ) | |
| -vs- | ) | There heard on Appeal from the Circuit Court of McLean County, Illinois, No. 12-CF-1330. |
| CONRAD ALLEN MORGER, | ) | |
| Petitioner-Appellant. | ) | Honorable Scott D. Drazewski, Judge Presiding. |

# PETITION FOR LEAVE TO APPEAL

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IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee,<br><br>-vs-<br><br>CONRAD ALLEN MORGER,<br><br>Petitioner-Appellant. | ) | Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-17-0285<br><br>There heard on Appeal from the Circuit Court of McLean County, Illinois, No. 12-CF-1330.<br><br>Honorable Scott D. Drazewski, Judge Presiding. |

## PETITION FOR LEAVE TO APPEAL

## PRAYER FOR LEAVE TO APPEAL

Conrad Allen Morger, petitioner-appellant, hereby petitions this Court for leave to appeal, pursuant to Supreme Court Rules 315 and 612, from the judgment of the Appellate Court, Fourth Judicial District, affirming the circuit court's imposition of probation conditions.

## PROCEEDINGS BELOW

The appellate court affirmed Conrad Allen Morger's conviction in a published opinion on April 25, 2018. No petition for rehearing was filed. A copy of the appellate court's opinion is appended to this petition.

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## COMPELLING REASONS FOR GRANTING REVIEW

In *Packingham v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730, 1737 (2017), the United States Supreme Court held the first amendment does not allow the State to ban people on a sex offender registry from accessing internet social networking websites. Yet in its published opinion in this case, the Fourth District of the appellate court upheld the exact same kind of ban as a condition of probation. *People v. Morger*, 2018 IL App (4th) 170285, ¶ 83. App. 22.

The Fourth District offered two reasons for this different outcome. First, the Court asserted that the social networking ban in this case is not absolute: "defendant's access to social media is not foreclosed *altogether*, as was the case in *Packingham*[.]" (Emphasis in original.) App. 22. This is simply incorrect. Probation condition number 5, a mandatory statutory probation condition, contains no wriggle room; it is a flat ban on accessing social networking websites. 730 ILCS 5/5-6-3(a)(8.9) (2012). App. 23. It has no exceptions.

The Fourth District reached its contrary conclusion by pointing to provisions from different probation conditions that do specifically allow the probation officer to grant exceptions. The Court did this by simply lumping all the probation conditions together, as if they are interchangeable: "the probation conditions in this case *** contain provisions whereby the defendant's probation officer temporarily could lift or modify a condition if the probation officer believed doing so would be appropriate[.]" App. 21. To the extent the Fourth District's holding stands on this basis, it is unsound. A probation officer does not have the authority to add new exceptions that do not exist.

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Second, the Court noted Conrad Morger had not yet completed his sentence and probation conditions are temporary in time, while the provisions in *Packingham* applied to those who had completed their sentences and could " 'endure for 30 years or more.' " App. 22 (quoting *Packingham*, 137 S. Ct. at 1734).

The Supreme Court explained in *Packingham* that social networking "websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. *** [T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Packingham*, 137 S. Ct. at 1737.

Although their rights may be somewhat diminished, probationers do retain basic constitutional rights. See *United States v. Knights*, 534 U.S. 112, 119-20 (2001); *United States v. Lara*, 815 F. 3d 605, 609 (9th Cir. 2016). As this Court has explained: "[W]here a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn; to the extent it is overbroad it is not reasonably related to the compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights." (Internal quotation marks omitted.) *In re J.W.*, 204 Ill. 2d 50, 78-79 (2003).

Under that test, it is difficult to square the statute's total ban on probationers' social networking use with the strong language in *Packingham*. *Packingham*, 137 S. Ct. at 1737. This probation condition is overly broad—and therefore unreasonable—because it completely bars Conrad and other probationers from "exploring the vast realms of human thought and knowledge" made accessible

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through social networking websites, while on probation. *Packingham*, 137 S. Ct. at 1737.

Imposing such a blanket ban as a probation condition is unreasonable because it is not narrowly drawn. Contrary to the appellate court's conclusion, App. 21-22, the condition does not allow for any exceptions for reasonable use of social networking websites: such as use for a job search, or to engage in political or religious speech.

This Court should thus grant leave to appeal to determine whether a total statutory ban on social networking website access as a condition of probation, 730 ILCS 5/5-6-3(a)(8.9), is facially unconstitutional under the first amendment.

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# STATUTES INVOLVED

**730 ILCS 5/5-6-3(a) (2012):**

"The conditions of probation and of conditional discharge shall be that the person:

* * *

(8.9) if convicted of a sex offense as defined in the Sex Offender Registration Act committed on or after January 1, 2010 ***, refrain from accessing or using a social networking website as defined in Section 17-0.5 of the Criminal Code of 1961[.]"

**730 ILCS 5/5-6-3(b) (2012):**

"The Court may in addition to other reasonable conditions relating to the nature of the offense or the rehabilitation of the defendant as determined for each defendant in the proper discretion of the Court require that the person:

* * *

(18) if convicted for an offense committed on or after June 1, 2009 *** that would qualify as a sex offense as defined in the Sex Offender Registration Act:

> (i) not access or use a computer or any other device with Internet capability without the prior written approval of the offender's probation officer, except in connection with the offender's employment or search for employment with the prior approval of the offender's probation officer[.]"

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## STATEMENT OF FACTS

Conrad Morger was charged with aggravated criminal sexual abuse and criminal sexual abuse for incidents involving his younger sister, K.M. that happened between August 1, 2010 and November 30, 2012, and was convicted of both counts following a bench trial. App. 1-2. Use of the internet or computers did not form any part of the case. The court sentenced Conrad to 48 months of probation with a suspended term of 180 days of jail time. App. 2. The appellate court vacated the sentence, finding an improper delegation of sentencing authority had occurred, and remanded for resentencing. App. 2.

On remand, the circuit court resentenced Conrad to the same term of probation and imposed a number of probation conditions. App. 2. The court first imposed a number of mandatory conditions, including, among other restrictions, that Conrad must:

> "5. Not access or use a social networking website as defined in Section 17-0.5 of the Criminal Code of 2012." App. 23 (citing 730 ILCS 5/5-6-3(a)(8.9) (2012)).

The court also added check marks to impose a number of listed discretionary conditions, including, among other restrictions, that Conrad must:

> "8. *** Not access or use a computer or any other device with Internet capability without the prior written approval of the probation officer[.]" App. 24 (citing 730 ILCS 5/5-6-3(a)(8.8), (b)(18) (2012)).

On appeal, Conrad made a number of arguments, including that probation condition number 5 was unreasonable and overly broad and the statute requiring it was facially unconstitutional under the first amendment, citing *Packingham*

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*v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730 (2017) (striking down a ban on access of social networking websites by people on the state sex offender registry as unconstitutional under the first amendment). App. 16. The appellate court concluded "that the probation conditions in question are constitutional[.]" App. 21.

The appellate court quoted its recent decision in *In re Dustyn W.*, 2017 IL App (4th) 170103, in which it explained that a probation condition that imposed a geographical limitation on a probationer's movement was " 'narrowly drawn because it contains exemptions for legitimate access to the University campus and does not categorically ban respondent.' " App. 21 (quoting *Dustyn W.*, 2017 IL App (4th) 170103, ¶ 29).

The appellate court then stated that "the probation conditions in this case also contain provisions whereby the defendant's probation officer temporarily could lift or modify a condition in the probation officer believed doing so would be appropriate, given both defendant's need to have that condition temporarily lifted or modified, as well as the need to protect the public, particularly children." App. 21.

The appellate court concluded that "this case is different from *Packingham* in two important respects: (1) defendant's access to social media is not foreclosed *altogether*, as was the case in *Packingham*, and (2) defendant has not yet completed his sentence and his probation conditions cannot 'endure for 30 years or more.' " App. 22 (quoting *Packingham*, 137 S. Ct. at 1734).

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## ARGUMENT

**A complete ban on accessing "social networking websites" as a condition of probation is unreasonable and unconstitutional under the first amendment.**

### Standard of Review

This issue involves questions of law, including constitutional law and statutory construction; thus, *de novo* review applies. *People v. Goossens*, 2015 IL 118347, ¶ 9. Also, "a constitutional challenge to a criminal statute can be raised at any time. *In re J.W.*, 204 Ill. 2d 50, 61 (2003).

### Authorities and Analysis

Probation is an alternative to incarceration and thus is punishment. *People v. Meyer*, 176 Ill. 2d 372, 379 (1997), citing *In re G.B.*, 88 Ill. 2d 36 (1981). The purpose of probation is to restore the offender to useful citizenship. *People v. Lowe*, 153 Ill. 2d 195, 205 (1992); *People v. Broverman*, 4 Ill. App. 3d 929, 932-33 (5th Dist. 1972). Probation serves a dual function to protect the public while simultaneously punishing and rehabilitating the offender. *Meyer*, 176 Ill. 2d at 379.

The legislature has defined mandatory probation conditions that "shall be" imposed in 730 ILCS 5/5-6-3(a) (2012). But a probationer does maintain basic constitutional rights. *J.W.*, 204 Ill. 2d at 77); see *United States v. Lara*, 815 F.3d 605, 609 (9th Cir. 2016) (explaining that "there is a limit on the price the government may exact in return for granting probation").

The first amendment, applicable to the states through the fourteenth amendment, provides that "Congress shall make no law *** abridging the freedom of speech." U.S. Const., amend. I. "The government may violate this mandate in

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many ways, [citations], but a law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).

"The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010). "In the First Amendment context, *** a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." (Internal quotation marks omitted). *Stevens*, 559 U.S. at 473.

The ban on using social networking websites at issue in this case is closely related to one that was recently struck down by the U.S. Supreme Court as unconstitutional under the first amendment in *Packingham v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730, 1735-36 (2017). The main difference is that Conrad is a probationer, and *Packingham* did not address whether its holding applies to probationers. This Court should hold that it does, and conclude that the mandatory statutory probation condition upon which probation condition number 5 is based, 730 ILCS 5/5-6-3(a)(8.9) (2012), is facially unconstitutional under the first amendment.

Probation condition number 5—and the mandatory statutory condition on which it is based—require that Conrad:

> "5. Not access or use a social networking website as defined in Section 17-0.5 of the Criminal Code of 2012." App. 23 (citing 730 ILCS 5/5-6-3(a)(8.9) (2012)).

Section 17-0.5 in turn defines "social networking website" as:

> "[A]n Internet website containing profile web pages of the members of the website that include the names or nicknames of such members,

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> photographs placed on the profile web pages by such members, or any other personal or personally identifying information about such members and links to other profile web pages on social networking websites of friends or associates of such members that can be accessed by other members or visitors to the website. A social networking website provides members of or visitors to such website the ability to leave messages or comments on the profile web page that are visible to all or some visitors to the profile web page and may also include a form of electronic mail for members of the social networking website." 720 ILCS 5/17-0.5 (2012).

"All statutes are presumed to be constitutional. The party challenging the constitutionality of a statute has the burden of clearly establishing its invalidity. A court must construe a statute so as to uphold its constitutionality, if reasonably possible." *People v. Minnis*, 2016 IL 119563, ¶ 21.

As the Supreme Court explained in *Packingham*:

> "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.
>
> * * *
>
> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, [citation], and social media in particular. Seven in ten American adults use at least one Internet social networking service. [Citation].
>
> * * *
>
> Social media offers 'relatively unlimited, low-cost capacity for communication of all kinds.' [Citation]. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work,

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> advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. [Citation]. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.' [Citation]." *Packingham*, 137 S. Ct. at 1735-36.

The Court made an assumption that applies equally to this case. The Court noted that, given "the broad wording of the North Carolina statute[,]" it could apply to many websites other than those commonly thought of as social networking websites. *Id.* at 1736. But the Court concluded that it "need not decide the precise scope of the statute[,]" because it "is enough to assume that the law applies *** to social networking sites 'as commonly understood'—that is, websites like Facebook, LinkedIn, and Twitter." *Id.* at 1736-37.

The Court also noted that "the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court." *Id.* at 1737.

The Court then concluded that "the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens." *Id.* The Court explained that:

> "By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square,

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> and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.' [Citation]." *Packingham*, 137 S. Ct. at 1737.

Finally, the Court concluded that:

> "[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." *Id.*

The ban at issue in this case applies as part of a sentence of probation. This Court should conclude, however, that the Supreme Court's sweeping holding in *Packingham* also applies to probationers. The U.S. Supreme Court has stated that probationers retain somewhat diminished constitutional rights, such that "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *United States v. Knights*, 534 U.S. 112, 119 (2001); see *United States v. Lara*, 815 F.3d 605, 609 (9th Cir. 2016) (noting in the context of fourth amendment privacy rights that, "while the privacy interest of a probationer has been 'significantly diminished,' [citation], it is still substantial").

By analogy, geographic restrictions on travel and banishments from certain

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areas are limits on the constitutional rights of liberty and travel. *In re J.W.*, 204 Ill. 2d 50, 77-78 (2003). A probationer maintains basic constitutional rights and probation conditions imposing geographic restrictions on travel implicate liberty interests. *Id.* at 77, citing *People v. Pickens*, 186 Ill. App. 3d 456, 460 (4th Dist. 1989). A court's "discretion is limited by constitutional safeguards and must be exercised in a reasonable manner." *J.W.*, 204 Ill. 2d at 77. Banishment from a certain geographic area may be a constitutionally valid condition, if narrowly drawn and if it provides a means for the probationer to obtain an exemption for lawful and legitimate access. *J.W.*, 204 Ill. 2d at 80-81, citing *Pickens*, 186 Ill. App. 3d at 461-62.

It would be difficult to square the sweeping first amendment language of *Packingham*, protecting the right of convicted sex offenders to access social networking websites, with a rule saying that probationers can be *entirely* barred from those same websites, because their rights are somewhat reduced. It is true that "probationers do not enjoy the absolute liberty to which every citizen is entitled." (Internal quotation marks omitted.) *Knights*, 534 U.S. at 119. But, considering that probation represents one of the lightest "point[s] . . . on a continuum of possible punishments" available, (internal quotation marks omitted) *Knights*, 534 U.S. at 119—where the diminishment of constitutional rights should be minimal—this Court should extend the holding of *Packingham* to probationers such as Conrad.

The appellate court lumped Conrad's various probation conditions together to state that "the probation conditions in this case *** contain provisions whereby the defendant's probation officer temporarily could lift or modify a condition if

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the probation officer believed doing so would be appropriate[.]" App. 21. That is indeed true for some of the probation conditions that were imposed, such as probation condition number 8, which includes specific language allowing the probation officer to grant exceptions from the probation condition. App. 24.

But notably, probation condition number 5 (and the mandatory statutory language on which it is based) do not contain any such language allowing for a probation officer to grant exceptions to the rule; instead, they simply say that Conrad must "refrain from accessing or using a social networking website[.]" App. 23. 730 ILCS 5/5-6-3(a)(8.9). It is unclear what authority would authorize a probation officer to suspend or create new exceptions from such a flat ban in a probation condition.

And yet, the appellate court held that on this basis, "defendant's access to social media is not foreclosed *altogether*, as was the case in *Packingham*[.]" App. 22. This is simply incorrect. The appellate court relied on a geographical limitations analogy, noting such a ban that contained no exceptions would be unconstitutional. App. 21 (quoting *In re Dustyn W.*, 2017 IL App (4th) 170103, ¶ 29). So too here: the appellate court's holding that the probation condition is constitutional under the first amendment is flawed for this reason. App. 21-22.

This Court should grant leave to appeal, reject the appellate court's analysis, and hold the mandatory probation condition in 730 ILCS 5/5-6-3(a)(8.9) is facially unconstitutional under the first amendment and vacate probation condition number 5.

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## CONCLUSION

Conrad Allen Morger, petitioner-appellant, respectfully requests that this Court grant leave to appeal.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I, Daaron V. Kimmel, certify that this petition conforms to the requirements of Supreme Court Rule 341(a) and 315(d). The length of this petition, excluding pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and those matters to be appended to the petition under Rule 315(c) is fifteen pages.

/s/Daaron V. Kimmel
DAARON V. KIMMEL
Assistant Appellate Defender

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IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee,<br><br>-vs-<br><br>CONRAD ALLEN MORGER,<br><br>Petitioner-Appellant. | ) | Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-17-0285<br><br>There heard on Appeal from the Circuit Court of McLean County, Illinois, No. 12-CF-1330.<br><br>Honorable Scott D. Drazewski, Judge Presiding. |

## NOTICE AND PROOF OF SERVICE

Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

Mr. Conrad Allen Morger, 403 S. Prospect Rd. Apt. 1, Bloomington, IL 61704

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 30, 2018, the Petition for Leave to Appeal was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. On that same date, we electronically served the Attorney General of Illinois and opposing counsel by transmitting a copy from an agency email address to the email addresses of the persons named above. One copy is being mailed to the petitioner in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Petition for Leave to Appeal to the Clerk of the above Court.

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**STATE OF ILLINOIS**
**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT**
**COUNTY OF McLEAN**

THE PEOPLE OF THE
STATE OF ILLINOIS,

VS. 12 CF 1330

Conrad Morger

## ORDER REGARDING ADDITIONAL CONDITIONS OF SEX OFFENDER PROBATION

The defendant herein having been placed on a term of probation for a sex offense, the Court does hereby order that in addition to the conditions of probation outlined in the probation order entered this date, the defendant shall comply with the following additional conditions of probation:

1. Register as directed by the Illinois Sex Offender Registration Act. Defendant shall become familiar with statutes pertaining to sex offenders including, but not limited to, 720 ILCS 5/11-9.3 (presence of sex offender within school zone prohibited), 720 ILCS 5/11-9.4-1 (presence of sexual predator or child sex offender in or near public parks prohibited), and 730 ILCS 150/1 et seq., (sex offender registration act).

2. Not have contact with, or attempt to have contact with, either directly or indirectly, the victim of this offense, either in person, by third party, by phone, by mail, in writing or electronically, or by internet communication in any form, unless approved by the probation officer and treatment provider. He/she shall not reside within 500 feet of the named victim herein.

3. Undergo and successfully complete sex offender treatment by a treatment provider approved by the Sex Offender Management Board and conducted in conformance with standards developed under the Board, at his/her expense, fully complying with every condition of the treatment contract including but not limited to polygraphs, penile plethysmographs, and any other testing deemed appropriate by the treatment provider, and pay for any cost associated with such required testing. (730 ILCS 5/5-6-3(a)(8.5))

4. Not reside at the same address, in the same condominium unit or complex, or in the same apartment unit or complex, or with another person defendant knows or reasonably should know is a convicted sex offender. (730 ILCS 5/5-6-3(a)(8.6)). This includes any mobile home park in which the homes are addressed by lot number, with or without a designated street address.

5. Not access or use a social networking website as defined in Section 17-0.5 of the Criminal Code of 2012. (730 ILCS 5/5-6-3(a)(8.9))

6. Not knowingly use any computer scrub software on any computer that the defendant uses. (730 ILCS 5/5-6-3(a)(11)

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✓ 7. (Mandatory if convicted of child sex offense) Not have contact or communication, by means of the Internet, with any person who is not related to the defendant (spouse, brother, sister, descendant, first or second cousin, step-child or adopted child) and whom defendant reasonably believes to be under 18 years of age. (730 ILCS 5/5-6-3(a)(8.7)

✓ 8. (Mandatory if convicted of indecent solicitation of a child, sexual exploitation of a child, promoting juvenile prostitution involving soliciting for a juvenile prostitute, child pornography, or harmful material, or attempt to commit any of these offenses) Not access or use a computer or any other device with Internet capability without the prior written approval of the probation officer; submit to periodic unannounced examinations of the defendant's computer or any other device with Internet capability by the probation officer, a law enforcement officer, or assigned computer or information technology specialist, including the retrieval and copying of all data from the computer or device and any internal or external peripherals and removal of such information, equipment, or device to conduct a more thorough inspection; submit to the installation on the offender's computer or device with Internet capability, at the offender's expense, of one or more hardware or software systems to monitor the Internet use; and submit to any other appropriate restrictions concerning the defendant's use of or access to a computer or any other device with Internet capability imposed by the probation officer. (730 ILCS 5/5-6-3(a)(8.8) and (b)(18))

✓ 9. (Mandatory if convicted of a sex offense as defined in 730 ILCS 5/3-1-2(a-5)) Unless defendant is a parent or guardian of a person under 18 years of age present in the home and no non-familial minors are present, not participate in a holiday event involving children under 18 years of age, such as distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, being employed as a department store Santa Claus, or wearing an Easter Bunny costume on or preceding Easter. (730 ILCS 5/5-6-3(a)(10)

✓ 10. (If convicted of child sex offense) Not have contact or communication, by means of the Internet, with any person whom defendant reasonably believes to be under 18 years of age. (730 ILCS 5/5-6-3(b)(17)

✓ 11. Not have contact with, or attempt to have contact with, any person under the age of 18, regardless of familial relationship, either in person, by third party, by phone, by mail, in writing or electronically, or by internet communication in any form, unless approved by the probation officer and treatment provider. (730 ILCS 5/5-6-3(b)(15))

_____ 12. Not attend, work at, or participate in any event intended primarily for persons under 18 years of age.

_____ 13. Not attend, work at or participate in any county fair, state fair, local fair, festival or carnival at which persons under 18 years of age are expected or reasonably expected to attend.

✓ 14. Not purchase, view, or possess any pornographic material including but not limited to magazines, videos, DVD's, photographs, digital media, or any other material depicting or describing persons in a state of undress or engaging in sexual activities; not access any such material through the Internet; not solicit a prostitute or access any telephone numbers providing sexually stimulating services; and not enter any adult bookstores, strip clubs, gentlemen's clubs, or any other establishment which provides sexually stimulating services or sells sexual materials.

_____ 15. Not leave McLean County without prior permission from the probation officer.

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✓ 16. If granted permission to leave the State of Illinois, comply with any registration requirements imposed by the State travelling to.

_____ 17. Submit to curfew restrictions and/or any electronic monitoring or GPS tracking device as directed by the probation officer, and pay the cost of such devices.

_____ 18. Submit to the probation officer, on a monthly basis, records of all telephone calls made by the defendant, if requested by the probation officer.

_____ 19. Other:

SO ORDERED.

DATE: 2-2-17

JUDGE

Defendant signature I acknowledge receiving a copy of this signed order.

C00151

No. 4-17-0285

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>-vs-<br><br>CONRAD ALLEN MORGER,<br><br>Defendant-Appellant. | ) | Appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois<br><br>No. 12-CF-1330<br><br>Honorable Scott D. Drazewski, Judge Presiding. |

# AMENDED NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

| | |
|---|---|
| Appellant(s) Name: | Conrad Allen Morger |
| Appellant's Address: | 403 S. Prospect Rd. Apt. 1<br>Bloomington, IL 61704 |
| Appellant(s) Attorney: | Office of the State Appellate Defender |
| Address: | 400 West Monroe Street, Suite 303<br>P.O. Box 5240, Springfield, IL 62705-5240 |
| Offense of which convicted: | Criminal Sexual Abuse and Aggravated Criminal Sexual Abuse |
| Date of Judgment or Order: | April 4, 2017 |
| Sentence: | Probation until April 4, 2018 |
| Nature of Order Appealed: | Probation Revocation, Sentence, and Denial of Motion to Reconsider Sentence |

CATHERINE K. HART
Supervisor
Office of the State Appellate Defender
Fourth Judicial District
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