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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIANO SOSOTORRES,

Defendant and Appellant.

G045898

(Super. Ct. No. 11HF2370)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert C. Gannon, Judge. Affirmed.

David L. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Charles Ragland, and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Mariano Sosotorres¹ appeals from a judgment after he pled guilty to possession of a controlled substance. Sosotorres argues: (1) the trial court erred in not awarding him additional conduct credits under the amendment to Penal Code section 4019² that became operative October 1, 2011; and (2) the court erred in imposing a probation condition that required his probation officer to approve his residence. Neither contention has merit, and we affirm the judgment.

FACTS

On September 16, 2011, Sosotorres possessed methamphetamine. He was arrested that day and remained in jail until October 11, 2011, the day he pled guilty to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and was sentenced. The factual basis for his plea was as follows: “Sept[ember] 16, 2011, I did unlawfully possess a usable quantity of a controlled substance to wit: methamphetamine.”

The trial court sentenced him to three years of formal probation and 38 days in jail. The court awarded him 26 days of actual credits and 12 days of conduct credits for a total of 38 days. One of Sosotorres’s probation conditions was to “maintain residence as approved by [a] probation officer.” Defense counsel preserved for appeal the custody credits issue.

¹ We refer to appellant by his last name as listed on the felony complaint and in the superior court file. We note, however, the notice of appeal lists appellant’s name as Mariano Sosa Torres.

² All further statutory references are to the Penal Code, unless otherwise indicated.

DISCUSSION

I. Section 4019

In his opening brief, Sosotorres argues the trial court erred in failing to award him day-for-day credit for all time served from the date of his arrest, September 16, 2011, to the date of his sentencing, October 11, 2011. Alternatively, he contends the court should have awarded him day-for-day credit for the time he served after amended section 4019's effective date, October 1, 2011, to the date he was sentenced, October 11, 2011. In his reply brief, Sosotorres acknowledges the California Supreme Court's recent decision in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), which held an earlier iteration of section 4019 was not fully retroactive and did not violate equal protection principles, suggests he is not entitled to day-for-day credits for the entire period. In so recognizing, Sosotorres concedes that insofar as the *Brown* court's analysis is applicable to a differently worded statute, *Brown* is controlling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Sosotorres continues to maintain, however, that under statutory construction and equal protection principles, he is entitled to day-for-day credit for the time he served from October 1, 2011, to October 11, 2011. As we explain below more fully, he is incorrect.

A. Statutory Construction

A defendant is entitled to actual custody credit for "all days of custody" in county jail and residential treatment facilities, including partial days. (§ 2900.5, subd. (a); *People v. Smith* (1989) 211 Cal.App.3d 523, 526.) Calculation of custody credit begins on the day of arrest and continues through the day of sentencing. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 735.)

Section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for performing assigned labor (§ 4019, subd. (b)), and for complying with applicable rules and regulations (§ 4019, subd. (c)). These presentence credits are collectively referred to as conduct credits. (*People v. Dieck*

(2009) 46 Cal.4th 934, 939.) The purpose of conduct credits is to affect inmates' behavior by providing them with incentives to work and behave. (*Brown, supra*, 54 Cal.4th at pp. 327-329.) A trial court awards presentence credits at the time of sentencing. (See Cal. Rules of Court, rules 4.310, 4.472.)

Before January 25, 2010, under section 4019, defendants were entitled to one-for-two conduct credits, which is two days for every four days of actual time served in presentence custody. (Former § 4019, subd. (f), as amended by Stats. 1982, ch. 1234, § 7, pp. 4553, 4554.) Effective January 25, 2010, the Legislature amended section 4019 to accelerate the accrual of presentence conduct credit such that certain defendants earned one-for-one conduct credits, which is two days of conduct credit for every two days in custody. (Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50.) The Legislature increased the accrual rate to reduce expenditures in response to Governor Arnold Schwarzenegger's declaration of a fiscal emergency. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d Reading analysis of Sen. Bill No. 3X 18 (3rd Ex. Sess. 2009-2010) Jan. 12, 2009; *People v. Garcia* (2012) 209 Cal.App.4th 530, 535.)

Effective September 28, 2010, the Legislature again amended section 4019. (Stats. 2010, ch. 426, §§ 1, 2, 5.) Subdivisions (b) and (g) restored the less generous one-for-two presentence conduct credit calculation that had been in effect prior to the January 25, 2010, amendment. Thus, all local prisoners could earn two days of conduct credit for every four days in jail. The Legislature restored the conduct credits to one-for-two because the increased conduct credits reduced available jail time and undercut the effort to provide an adequate custodial alternative to prison. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d Reading analysis of Sen. Bill No. 76 (2009-2010 Reg. Sess.) as amended Aug. 20, 2010.)

The Legislature next amended section 4019 in Assembly Bill No. 109 (2011-202 Reg. Sess.) (hereafter referred to as Assembly Bill No. 109), which was part of the Criminal Justice Realignment Act of 2011 (Realignment Act). The Legislature's

stated purpose for the Realignment Act “is to reduce recidivism and improve public safety, while at the same time reducing corrections and related criminal justice spending.” (*People v. Cruz* (2012) 207 Cal.App.4th 664, 679 (*Cruz*); § 17.5.) Assembly Bill No. 109 authorized conduct credit for all local prisoners at the rate of two days for every two days spent in local presentence custody. (§ 4019, subds. (b) & (c), as amended by Stats. 2011, ch. 15, § 482, eff. April 4, 2011, op. Oct. 1, 2011.) The Legislature declared, “It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody.” (§ 4019, subd. (f), as amended by Stats. 2011, ch. 15, § 482.) Assembly Bill No. 109 described its prospective nature and effective date of the new presentence conduct credit calculations standards: “The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after July 1, 2011. Any days earned by a prisoner prior to July 1, 2011, shall be calculated at the rate required by the prior law.” (Stats. 2011, ch. 15, § 482.) The Legislative Counsel’s Digest states Assembly Bill No. 109 was to take effect immediately. (Legis. Counsel’s Dig., Assem. Bill No. 109 (2011-2012 Reg. Sess.) p. 7.) Governor Edmund G. Brown, Jr., signed Assembly Bill No. 109 on April 4, 2011.

Before Assembly Bill No. 109’s operative date of July 1, 2011, Governor Brown signed Assembly Bill No. 117. Assembly Bill No. 117 (2011-2012 Reg. Sess.) (hereafter referred to as Assembly Bill No. 117) retained the enhanced conduct credit provision but it changed the effective date to October 1, 2011. (Former § 4019, subd. (h), as amended by Stats. 2011-2012, ch. 39, § 53.)

On September 20, 2011, Governor Brown signed Assembly Bill No. 1X 17 (2011-2012 1st Ex. Sess.) (hereafter referred to as Assembly Bill No. 1X 17), which was enrolled by the Secretary of State on September 21, 2011. (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 35.) Assembly Bill No. 1X 17 is the current version of

section 4019. Assembly Bill No. 1X 17 again retained the enhanced conduct credit provision—four days is deemed to have been served for every two days spent in actual custody. (§ 4019, subd. (f).) As relevant here, section 4019, subdivision (h), provides: “The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.”

In *Brown, supra*, 54 Cal.4th at 314, the California Supreme Court addressed the issue of whether the amendment to section 4019 that became operative on January 25, 2010, should be given retroactive effect to permit prisoners who served time in local custody before that date to earn conduct credits at the increased rate. The court stated: “Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear with respect to a particular statute, the Legislature’s generally applicable declaration in section 3 provides the default rule: ‘No part of [the Penal Code] is retroactive, unless expressly so declared.’ We have described section 3, and its identical counterparts in other codes [citation], as codifying ‘the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.’ [Citations.] In applying this principle, we have been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes. [Citations.] Consequently, “a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.” [Citations.]” (*Brown, supra*, 54 Cal.4th at p. 319.)

The court later reiterated: “[T]he language of section 3 erects a strong presumption of prospective operation, codifying the principle that, ‘in the absence of an

express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.’ [Citations.] Accordingly, “‘a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.’” [Citation.] . . . Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent.’ [Citation.]” (*Brown, supra*, 54 Cal.4th at p. 324.)

Despite the fact the Legislature included no statement of intent in that regard in the amendment (see Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50, eff. Jan. 25, 2010), the *Brown* court held the amendment applied prospectively only, meaning qualified prisoners in local custody first became eligible to earn conduct credit at the increased rate beginning on the amendment’s operative date. (*Brown, supra*, 54 Cal.4th at p. 318.) We turn now to the current version of section 4019.

Section 4019, subdivision (h)’s first sentence states: “The changes to this section enacted by the act that added this subdivision shall apply *prospectively* and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp *for a crime committed on or after October 1, 2011.*” (Italics added.) After declaring itself to operate “prospectively,” the first sentence explicitly states the conduct credit amendment applies only to defendants whose crimes were committed “on or after October 1, 2011.” (§ 4019, subd. (h).) By the first sentence’s plain language, section 4019 would not apply to Sosotorres because he committed his crime *prior* to October 1, 2011. Thus, the first sentence leads unmistakably to the conclusion Sosotorres is not entitled to conduct credit at the enhanced rate. Section 4019, subdivision (h)’s second sentence, however, is not the model of clarity. But the application of well settled principles of statutory construction confirms our conclusion Sosotorres is not entitled to

enhanced conduct credits for time served on or after October 1, 2011, because he committed his crime before the effective date.

Section 4019, subdivision (h)'s second sentence provides: "Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).) Arguably the statement "[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law[]" implies any days earned by a defendant *after* October 1, 2011, shall be calculated at the rate required by the current law, *regardless of when the offense was committed*. But to read the second sentence in this manner renders meaningless the first sentence. This we cannot do.

““It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.” A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.” (*Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1269 (*Rodriguez*); 2A Sutherland, *Statutory Construction* (7th ed. 2007) § 46.6, pp. 230-244, fns. omitted.) Therefore, we cannot read the second sentence to imply any days earned by a defendant *after* October 1, 2011, shall be calculated at the enhanced conduct credit rate for an offense committed before October 1, 2011, because that would render the first sentence superfluous.

Instead, another well established rule of statutory construction supports our interpretation of subdivision (h). “A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.” (*Rodriguez, supra*, 14 Cal.App.4th at p. 1268; 2A Sutherland, *Statutory Construction, supra*, § 46.5, pp. 189-201, fn. omitted.)

As we explain above, subdivision (h)'s first sentence reflects the Legislature intended the enhanced conduct credit provision to apply only to those defendants who committed their crimes on or after October 1, 2011. Subdivision (h)'s second sentence does not extend the enhanced conduct credit provision to any other group, namely those defendants who committed offenses before October 1, 2011, but are in local custody on or after October 1, 2011. Instead, subdivision (h)'s second sentence attempts to clarify that those defendants who committed an offense before October 1, 2011, are to earn credit under the prior law. However inartful the language of subdivision (h), we read the second sentence as reaffirming that defendants who committed their crimes before October 1, 2011, still have the opportunity to earn conduct credits, just under prior law. (*People v. Ellis* (2012) 207 Cal.App.4th 1546, 1553.) To imply the enhanced conduct credit provision applies to defendants who committed their crimes before the effective date but served time in local custody after the effective date reads too much into the statute and ignores the Legislature's clear intent in subdivision (h)'s first sentence.³

We recognize the Legislature in drafting subdivision (h)'s second sentence used the word "earned." And it is impossible to earn presentence credits for an offense that has not yet been committed. But reading the first and second sentences together, the implication is the enhanced conduct credit provision applies to defendants who committed crimes before October 1, 2011, but who served time in local custody after that date. To isolate the verbiage of the second sentence would defy the Legislature's clear

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Brown, supra, 54 Cal.4th at page 322, includes language that supports the conclusion the Supreme Court approved earning conduct credits at two different rates and thus the date when a defendant committed an offense is not dispositive. But in *Brown* the Legislature did not expressly declare whether the January 25, 2010, amendment was to apply retroactively or prospectively. (*Id.* at p. 320.) Here, the Legislature did expressly state the current version of section 4019 is to apply prospectively only to defendants who commit their offenses on or after October 1, 2011.

intent in subdivision (h)'s first sentence and contradict well settled principles of statutory construction. In conclusion, we find the enhanced conduct credit provision applies *only* to those defendants who committed their crimes on or after October 1, 2011.

B. Equal Protection

The first prerequisite to a meritorious claim under the equal protection clause is a showing the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*)). Under the equal protection clause, we do not inquire whether persons are similarly situated for all purposes, *but whether they are similarly situated for purposes of the challenged law*. (*Id.* at pp. 1200-1201, italics added.) If the first prerequisite is satisfied, we proceed to judicial scrutiny of the classification. Where, as here, the statutory distinction at issue neither touches upon fundamental interests nor is based on gender, there is no equal protection violation if the challenged classification bears a rational relationship to a legitimate state purpose. (*Id.* at p. 1201; *Cruz, supra*, 207 Cal.App.4th at pp. 677-679.) Under the rational relationship test, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. (*Hofsheier, supra*, 37 Cal.4th at p. 1202.)

Here, the two affected classes are as follows: (1) those defendants who are in jail on and/or after October 1, 2011, who committed an offense on or after October 1, 2011; and (2) those defendants who are in jail on and/or after October 1, 2011, who committed the same offense *before* October 1, 2011.

These two groups are similarly situated for purposes of the October 1, 2011, amendment to section 4019, which increased conduct credits from two days of conduct credit for every four days spent in local presentence custody to two days of conduct credit for every two days spent in local presentence custody. These two groups

committed the same offenses and are serving time together in local presentence custody but the current version of section 4019 treats them differently by awarding them different conduct credits based entirely on the dates they committed their offense. Nothing distinguishes the efforts of a prisoner who committed a crime after October 1, 2011, to earn conduct credits from the efforts of one who committed the same crime before that date. Both classifications of prisoners, pre- and post-October 1, 2011, offense defendants, are aware of the conduct credit provision and have an incentive to perform assigned work and comply with rules and regulations because both classifications have the opportunity to earn conduct credit, just at different rates. To argue that a defendant who committed an offense before October 1, 2011, but was in local custody on or after that date was not aware of the conduct credit provision and did not have an incentive to work and behave is unpersuasive. Both classes have an incentive to work and behave but a defendant who committed a crime before the effective date is rewarded less. Thus, based on the facts before us, the current version of section 4019 creates a classification that affects two similarly situated groups in an unequal manner.

At oral argument, the Attorney General relied on *Brown, supra*, 54 Cal.4th at page 314, to argue the classes of defendants are not similarly situated because they are not similarly encouraged to alter their behavior to earn credits. In *Brown*, the court addressed whether the amendment to section 4019 that became operative on January 25, 2010, should be given *retroactive* effect to permit prisoners who served time in local custody before that date to earn conduct credits at the increased rate. (*Brown, supra*, 54 Cal.4th at pp. 317-318.) In addressing the issue of whether defendant was similarly situated to those defendants who served time after the operative date, the court explained: “As we have already explained, the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners

who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.” (*Brown, supra*, 54 Cal.4th at pp. 328-329.)

Brown is inapposite on this point as it did not involve a situation where a defendant sought enhanced conduct credit for time served after the amendment’s operative date. Instead, *Brown* concerned whether the amendment was retroactive, i.e., whether a defendant who served time before the operative date was entitled to enhanced conduct credits. Here, we are faced with the issue of whether the current version of section 4019 operates prospectively as to a defendant who committed an offense before the amendment’s effective date. We read the language of *Brown, supra*, 54 Cal.4th at page 329, “[t]hat prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows[.]” as limited to the facts in that case—that there is no incentive for defendants who served time before the amendment’s effective date to work and behave. *Brown* is not instructive on the issue of whether there is an incentive for defendants who served time after the amendment’s effective date to work and behave. Because we conclude the two groups in question are similarly situated for purposes of the October 1, 2011, amendment, we must determine whether the classification bears a rational relationship to a legitimate state purpose.

With respect to the judicial scrutiny of the classification, we must determine whether there is any reasonably conceivable state of facts that could provide a rational basis for the classification. It is undisputed the purpose of section 4019’s conduct credits generally is to affect inmates’ behavior by providing them with incentives to work and behave. (*Brown, supra*, 54 Cal.4th at pp. 327-329.) But that was not the purpose of Assembly Bill No. 109, which is commonly referred to as the Realignment Act. As explained above, Legislature’s stated purpose for the Realignment Act “is to reduce recidivism and improve public safety, while at the same time reducing corrections

and related criminal justice spending.” (*Cruz, supra*, 207 Cal.App.4th at p. 679; § 17.5.) Section 17.5, subdivision (a)(7), puts it succinctly: “The purpose of justice reinvestment is to manage and allocate criminal justice populations more *cost-effectively*, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable.” (Italics added.)

Thus, we must determine whether the amendment to section 4019 awarding less conduct credits to those defendants who committed their offenses between September 28, 2010, and September 30, 2011, than those defendants who committed their offenses on or after October 1, 2011, bears a rational relationship to the Legislature’s legitimate state purpose of reducing costs. We are mindful the rational relationship test is highly deferential. (*People v. Turnage* (2012) 55 Cal.4th 62, 77 [“[w]hen conducting rational basis review, we must accept any gross generalizations and rough accommodations that the Legislature seems to have made. A classification is not arbitrary or irrational simply because there is an ‘imperfect fit between means and ends’”].)

We conclude the classification in question does bear a rational relationship to cost savings. Preliminarily, we note the California Supreme Court has stated equal protection of the laws does not forbid statutes and statutory amendments to have a beginning and to discriminate between rights of an earlier and later time. (*People v. Floyd* (2003) 31 Cal.4th 179, 188 (*Floyd*) [“[d]efendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense”].) Although *Floyd* concerned punishment, we discern no basis for concluding differently here.

More importantly, in choosing October 1, 2011, as the effective date of Assembly Bill No. 109, the Legislature took a measured approach and balanced the goal of cost savings against public safety. The effective date was a legislative determination

that its stated goal of reducing corrections costs was best served by granting enhanced conduct credits to those defendants who committed their offenses on or after October 1, 2011. To be sure, awarding enhanced conduct credits to everyone in local confinement would have certainly resulted in greater cost savings than awarding enhanced conduct credits to only those defendants who commit an offense on or after the amendment's effective date. But that is not the approach the Legislature chose in balancing public safety against cost savings. (*Floyd, supra*, 31 Cal.4th at p. 190 [Legislature's public purpose predominate consideration].) Under the very deferential rational relationship test, we will not second guess the Legislature and conclude its stated purpose is better served by increasing the group of defendants who are entitled to enhanced conduct credits when the Legislature has determined the fiscal crisis is best ameliorated by awarding enhanced conduct credit to only those defendants who committed their offenses on or after October 1, 2011. We conclude Sosotorres's equal protection rights were not violated.

II. Probation Condition

Conceding he did not object to the probation condition in question, i.e., that a probation officer must approve his residence, Sosotorres contends his claim the probation condition is vague and overbroad is reviewable on appeal because it presents a pure question of law. We will address the merits of his claim (*In re Sheena K.* (2007) 40 Cal.4th 875, 882 (*Sheena K.*)), which we conclude is meritless.⁴

“A sentencing court has ‘broad discretion’ to determine what conditions should be imposed in granting probation. [Citation.] Even conditions which regulate conduct not in itself criminal are valid as long as they are “‘reasonably related to the

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This issue is presently before the California Supreme Court in *People v. Schaeffer* (2012) 208 Cal.App.4th 1 [145 Cal.Rptr.3d 29], review granted October 31, 2012, S205260.

crime of which the defendant was convicted or to future criminality.” [Citation.]”
(*People v. Peck* (1996) 52 Cal.App.4th 351, 362; see also § 1203.1.)

“If a probation condition serves to rehabilitate and protect public safety, the condition may ‘impinge upon a constitutional right otherwise enjoyed by the probationer, who is “not entitled to the same degree of constitutional protection as other citizens.”’ [Citation.] ¶] The court’s discretion, however, is not unlimited. A probation condition is unreasonable if it: ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.’ [Citation.] But ““a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.” [Citation.] “As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or ““exceeds the bounds of reason, all of the circumstances being considered.”” [Citation.]” (*People v. O’Neil* (2008) 165 Cal.App.4th 1351, 1355-1356 (*O’Neil*).

“Judicial discretion to set conditions of probation is further circumscribed by constitutional considerations. [Citation.] ‘The . . . test of the validity of a condition of probation may be supplemented by a second level of scrutiny: where an otherwise valid condition of probation impinges on constitutional rights, such conditions must be carefully tailored, ““reasonably related to the compelling state interest in reformation and rehabilitation”’ [Citation.]” (*O’Neil, supra*, 165 Cal.App.4th at p. 1356.)

The court’s discretion in ordering conditions of probation is not boundless: it must not order conditions that are unconstitutionally vague or overbroad. (*Sheena K., supra*, 40 Cal.4th at p. 890.) The underpinning of a vagueness challenge is the due process concept of fair warning. (*Ibid.*) In contrast, a probation restriction is unconstitutionally overbroad if it impinges on constitutional rights, and is not tailored

carefully and reasonably related to the compelling state interest in reformation and rehabilitation. (*Ibid.*) “The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Sosotorres contends the probation condition he “maintain residence as approved by probation officer” is overbroad because it infringes on his federal constitutional rights of freedom of association and freedom to travel. We disagree.

Sosotorres pled guilty to possessing methamphetamine. To aid in Sosotorres’s rehabilitation, the probation department has a legitimate interest in ensuring Sosotorres does not plan to reside in an area known for high drug activity or live with drug users or others known to have a prior history of drug-related offenses. The probation department has a legitimate interest in approving where a defendant lives to minimize the opportunity and likelihood the defendant will reoffend. Approving where Sosotorres resides is clearly necessary to properly supervise and aid in his rehabilitation and does not unnecessarily infringe on his constitutional rights. (*People v. Jungers* (2005) 127 Cal.App.4th 698, 703 [“Because probation conditions foster rehabilitation and protect the public safety, they may infringe the constitutional rights of the defendant, who is ‘not entitled to the same degree of constitutional protection as other citizens’”].)

In arguing that the probation condition in question is overbroad, Sosotorres relies on *People v. Bauer* (1989) 211 Cal.App.3d 937 (*Bauer*). In that case, defendant was found guilty of false imprisonment and assault and he was placed on probation with a condition he “obtain his probation officer’s approval of his residence” (*Id.* at p. 940.) The *Bauer* court held this condition failed the requirements for probation conditions, as it was not related to defendant’s crime and was not related to future criminality. (*Id.* at p. 944.) The court went on to hold the probation condition was “all

the more disturbing” because it impermissibly impinged on the defendant’s constitutional rights to travel and of freedom of association because the condition gave the probation officer the power to forbid defendant with living near or with his parents. (*Ibid.*) The condition was not narrowly tailored to interfere as little as possible with these important rights, but rather gave the probation officer broad power over the defendant's living situation. (*Id.* at pp. 944-945.)

Unlike in *Bauer*, here as we explain above, possessing methamphetamine was directly related to Sosotorres’s living situation. Thus, the probation condition was both narrowly tailored to interfere with Sosotorres’s rights only as much as necessary, and was related to the crime he committed and his future criminality. Based on the limited record before us, we conclude the probation condition Sosotorres “maintain residence as approved by probation officer” was proper.

DISPOSITION

The judgment is affirmed.

O’LEARY, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J