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3 Modesto, CA 95354
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5 FRANK C. CARSON (CSB #136261)

6 Attorney for: **CARL KUBICEK**

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF STANISLAUS

9 PEOPLE OF THE STATE OF CALIFORNIA,)

10 Plaintiff,)

11 v)

12 CARL KUBICEK,)

13 Defendant.)

Case No.: 1242074

NOTICE OF MOTION
AND MOTION TO
MODIFY PROBATION

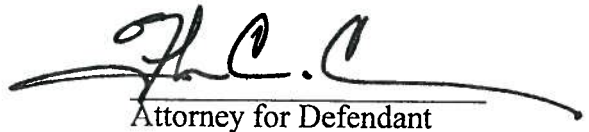
Date:
Time: 8:30 A.M.
Dept: 3

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15 TO THE DISTRICT ATTORNEY OF STANISLAUS COUNTY OR HER
16 REPRESENTATIVE:

17 PLEASE TAKE NOTICE that on date, at the hour of 8:30 a.m., or as soon thereafter as
18 counsel may be heard in the courtroom of Department 3 of the above-entitled court, the defendant
19 will move for an order modifying an order modifying the terms and conditions of probation imposed
20 by the court in this case; to rescind the stayaway order from Jane Doe, an adult.

21 The motion will be based on the attached declaration and memorandum of points and
22 authorities served and filed herewith, on all the papers and records on file in this action and on such
23 oral and documentary evidence as may be presented at the hearing of the motion.

24 Dated: 11/18/08

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26 
27 Attorney for Defendant
28

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6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
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8 PEOPLE OF THE STATE OF CALIFORNIA,)
9)

Case No.: 1242074

10 Plaintiff,)

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION TO
MODIFY PROBATION

11 v)

12 CARL KUBICEK,)

Date:

13 Defendant.)

Time: 8:30 a.m.

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15 STATEMENT OF FACTS

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17 On November 17, 2008 the defendant was arrested on an alleged violation of probation
18 having had contact with the Jane Doe in this case, an adult female.

19 On a Sunday evening, November 16, 2008, the defendant was seated in Jane Doe's car in the
20 passenger seat with Jane Doe in the driver's seat. The defendant resides in Modesto and their talking
21 occurred within approximately 3 blocks of Mr. Kubicek's residence. They were talking and were
22 accosted by law enforcement. He identified himself and his status on probation.

23 Defendant submits the following points and authorities in support of the motion to modify
24 probation:

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I
THE STAYAWAY ORDER SHOULD BE CHANGED

The stayaway order that the Court imposed was not a recommendation by the Probation Department. It was imposed by the Court who reasoned that the defendant was "a married man" and therefore shouldn't be in contact with Jane Doe.

Jane Doe, an adult, has testified that she doesn't fear Mr. Kubicek and, in fact, has a deep affection for him.

Their relationship has always been consensual. Other than the stayaway order their relationship is legal and appropriate.

II
THERE HAS BEEN A MATERIAL CHANGE IN CIRCUMSTANCES SINCE THE COURTS
ORDER WAS IMPOSED

The defendant's marriage is kaput and in the divorce courts.

III
THE STAYAWAY ORDER VICTIMIZES JANE DOE

The defendant was comforting Jane Doe when they were sitting in the car. Jane Doe is and has been estranged from her family. She lives independently and is a competent adult in every way. Jane Doe was victimized by a Turlock Police Officer. She was traumatized by that situation and has had almost no one to turn to. Jane Doe trusts and desires contact with Mr. Kubicek.

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IV

THE COURT'S STAYAWAY ORDER IS UNCONSTITUTIONAL

The Court's prohibition of lawful consensual contact between the defendant and Jane Doe is unconstitutional and an abuse of discretion under the circumstances. I believe the Court's intention was laudable but the situation has changed.

Although it is not specifically listed in the First Amendment, freedom of association is nonetheless protected by the Supreme Court. Some legal scholars argue that it is implied by other rights in the First Amendment such as the freedoms of assembly and petition. In *NAACP v. Alabama* (1958), the Court first recognized freedom of association, overturning a law that required civil rights organizations to turn over their membership lists. It has been expanded to protect other classes of behavior including interracial marriage and homosexual lifestyles.

V

THE COURT HAS AUTHORITY TO MODIFY PROBATION AT ANY TIME DURING THE PROBATIONARY TERM

Pen C §1203.3 provides in part:

- (a) The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence.

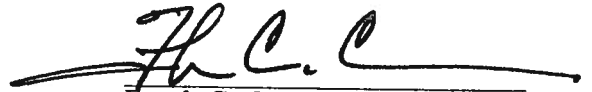
The trial court is therefore authorized, during the time of probation, upon proper showing, to modify probation. *People v. Cookson*, 54 Cal. 3d 1091, 1098-1099, 2 Cal. Rptr. 2d 176, 820 P.2d 278 (1991); *People v. Marin*, 147 Cal. App. 2d 625, 627, 305 P.2d 659 (4th Dist. 1957).

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CONCLUSION

For the foregoing reasons the motion should be granted.



Frank C. Carson

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9 PEOPLE OF THE STATE OF CALIFORNIA,)

Case No.: 1242074

10 Plaintiff,)

DECLARATION OF FRANK
CARSON IN SUPPORT
OF MOTION TO MODIFY
PROBATION

11 v)

12 CARL KUBICEK,)

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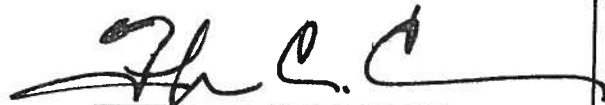
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15 I am counsel for the defendant.

16 After the defendant's sentence was imposed on October 16, 2008 in this case, I was asked
17 both by Jane Doe and the defendant to do something about the Court's stayaway order concerning
18 Carl Kubicek and Jane Doe. I assured both that I would do a motion to modify probation and try
19 to get the contact prohibition rescinded. I stated my confidence that I could persuade the Court to
20 change the order after the heat of the October hearing had died down and that I felt that as
21 consenting adults, not committing crimes, that the order was inappropriate.

22 I have been told that approximately 3 weeks ago there was a divorce filing between the
23 defendant and his wife and that they have lived apart and separate for quite some time. I am told,
24 and believe to be correct, that the marriage is over and has been for quite some time.

25 I certify under penalty of perjury that the foregoing is true and correct.

26
27 

28 Frank C. Carson