IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **LAQUINCY HALL,** Defendant and Appellant.	No. S227193 (First District Court of Appeal Case No. A141278)

APPELLANT'S OPENING BRIEF ON THE MERITS

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF CONTRA COSTA THE HONORABLE LESLIE G. LANDAU, JUDGE CASE NO. 51315225

PATRICK MCKENNA, ESQ.
State Bar No. 274959
P.O. Box 1130
Santa Clara, CA 95052
(408) 482-5309
pmckenna10@gmail.com

Attorney for Defendant and Appellant
La Quincy Hall

By Appointment of the Supreme Court
Under the First District Appellate Program

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

California Cases

Federal Cases

CONSTITUTIONS

California States Constitution

United States Constitution

STATUTES

Health and Safety Code

Penal Code

Welfare and Institutions Code

COURT RULES

California Rules of Court

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **LAQUINCY HALL,** Defendant and Appellant.	No. S227193 (First District Court of Appeal Case No. A141278)

APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

This court granted review in the present case to consider the following issues:

(1) Are probation conditions prohibiting appellant from: (a) "owning, possessing or having in his custody or control any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on his person;" and (b) "using or possessing or having in his custody or control any illegal drugs, narcotics, narcotics paraphernalia without a prescription," unconstitutionally vague?

(2) Is an explicit knowledge requirement constitutionally mandated?

STATEMENT OF APPEALABILITY

This appeal is from a final judgment following a jury trial and is authorized by Penal Code section 1237, subdivision (a).[1]

[1] Unless otherwise specified, all future statutory references are to the Penal Code.

STATEMENT OF THE CASE

On August 1, 2013, the prosecution filed an information charging appellant with possessing cocaine base for sale (Health & Saf. Code, § 11351.5; count one). (1 CT 78.)

Appellant proceeded to jury trial. On October 1, 2013, he was convicted of possession for sale of cocaine base, as charged. (1 CT 140, 208; 2 RT 413-414.)

On February 14, 2014, imposition of sentence was suspended; appellant was granted a three-year probationary term, including 180 days in county jail. (1 CT 217-218; 2 RT 434-435.)

On March 5, 2014, a timely notice of appeal was filed. (1 CT 220.) On May 14, 2015, the appellate court issued a published decision, modifying two written probation conditions to comport with the oral pronouncement of those conditions; the court rejected appellant's contention that express knowledge requirements should be added to the conditions. (Slip Opin. at p. 14.) No petition for rehearing was filed.

STATEMENT OF FACTS

A. Events Occurring on May 6, 2013.

On May 6, 2013, Richmond police officer Brian Hoffman was patrolling the Santa Fe area in the city of Richmond. (1 RT 159-160.) At approximately 3:40 P.M., he saw an individual, later identified as appellant, standing on the west curb line of South Second Street, just south of Maine Avenue. (1 RT 161-162.) Officer Hoffman saw appellant reach forward and drop a red and white container into a gap in the adjoining fence. (1 RT 164-165.)

After appellant informed him that he had just dropped some trash, Officer Hoffman walked towards the fence and saw a red and white canister located on the other side of the fence on top of some grass. (1 RT 168-169, 171.) Officer Hoffman reached through the fence and picked up the canister, which was an Altoids container. (1 RT 171, 183.) He opened it up and found 18 Ziploc bags, each of which contained a white chunky substance. (1 RT 171-172.) Officer Hoffman believed that the substance was cocaine base, and he subsequently detained and handcuffed appellant. (1 RT 173.)

Upon searching appellant's person, Officer Hoffman found a cell phone and $166 in cash. (1 RT 175.) The money was located in appellant's front right pocket inside of a billfold and was ordered

sequentially. (1 RT 181, 191, 219.) Appellant did not appear to be under the influence, and Officer Hoffman located no paraphernalia on his person. (1 RT 206.)

The substances located inside two of the 18 Ziploc bags were later tested by the Contra Costa County Sheriff's Crime Lab, and both came back positive for cocaine base. (1 RT 254-255.) The total weight of the substances inside all 18 bags was approximately 2.096 grams. (1 RT 256-257.)

B. Narcotics Expert Testimony.

Thomas Peterson, a detective and member of the Richmond Police Department's Narcotics Division, testified as an expert witness on the use and possession of cocaine base for sale. (1 RT 260-261, 278-279.) After being presented a hypothetical with facts mirroring those in the present case (1 RT 285; see also 2 RT 328-329), Detective Peterson testified that he believed the individual in the hypothetical possessed the cocaine base for sale; this conclusion was based on the number of packages found in the container, the amount of cash found on the individual's person, the lack of user paraphernalia, and his presence in a high narcotics area. (1 RT 285-286; see also 2 RT 331.) He noted that the size and number of packages would allow the individual to engage in quick transactions consistent with "street-level" dealing. (1 RT 286; 2 RT 332.)

SUMMARY OF ARGUMENT

The present case focuses on whether two probation conditions are unconstitutionally vague and must be modified to include express knowledge requirements. Specifically, the trial court ordered that appellant "may not own, possess or have in [his] custody or control any handgun, rifle, shotgun, or any firearm whatsoever or any weapon that can be concealed on [his] person" (2 RT 435 [hereinafter referred to as "the weapons probation condition"]); additionally, appellant may not "use or possess or have [in his] custody or control any illegal drugs, narcotics, [or] narcotics paraphernalia without prescription" (2 RT 436-437 [hereinafter referred to as "the drug probation condition"]).[2]

The appellate court below erred in deeming that neither condition was unconstitutionally vague in violation of appellant's Fifth and Fourteenth Amendment rights. (Slip Opin. at pp. 11-14.) As presently phrased, the conditions are flawed in two respects. First, the conditions do not adequately convey the mens rea necessary for appellant to be found in violation of probation – that is, that he must *knowingly* commit the prohibited conduct. Second, neither condition requires that appellant *know*

---

[2] The written versions of the conditions slightly differed from the oral pronouncements of the conditions. Both parties agreed below that the oral pronouncements controlled. The appellate court ordered that the written versions of the conditions be modified to comport with the pronouncements. (Slip Opin. at p. 2, fn. 2.)

what types of items fall into the conditions' specified categories. (See *People v. Leon* (2010) 181 Cal.App.4th 943, 949-952 [probationer can only be punished if he or she knows of the item's presence as well as its qualifying nature].)

To cure these problems, this Court should modify the conditions to read: "[Appellant] may not *knowingly* own, possess or have in [his] custody or control any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on [his] person," and "[Appellant] shall not *knowingly* use or possess or have in [his] custody or control any illegal drugs, narcotics, narcotics paraphernalia without a prescription." Only by adding express knowledge requirements to the conditions will appellant, law enforcement, and the trial court sufficiently comprehend their scopes as required under the Fifth and Fourteenth Amendments. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

ARGUMENT

THE WEAPONS AND DRUG PROBATION CONDITIONS ARE UNCONSTITUTIONALLY VAGUE IN VIOLATION OF APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS; THE CONDITIONS SHOULD BE MODIFIED TO INCLUDE EXPRESS KNOWLEDGE REQUIREMENTS.

A. Introduction.

In the past decade, appellate courts across the state have frequently been confronted with constitutionally-based challenges to probation conditions. Many of these challenges have been premised on this Court's ruling in *Sheena K., supra*, 40 Cal.4th 875, where a probation condition prohibiting a juvenile from associating with anyone "disapproved of by probation" was found unconstitutionally vague for failing to contain an express knowledge requirement. (*Id.* at pp. 891-892.)

While the decision in *Sheena K.* was certainly not the first time this Court considered a vagueness challenge (see, e.g., *People v. ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090 [hereinafter referred to as "*Acuna*"]), the decision there sparked an increase in litigation as to a very specific type of vagueness challenge – the failure of probation conditions to include express knowledge requirements. (See *People v. Patel* (2011) 196 Cal.App.4th 956, 960 [noting "dismaying regularity" of such challenges].)[3]

[3] *Sheena K.* was not the first published case to deal with express knowledge requirements in probation conditions. Many courts largely attribute *People*

With this increased litigation came conflicting opinions on the application of *Sheena K.* to a variety of different probation conditions. (Compare, e.g., *People v. Rodriguez* (2013) 222 Cal.App.4th 578, 592-594 [court found that knowledge that drugs are "controlled substances" implicit in condition] and *People v. Moore* (2012) 211 Cal.App.4th 1179, 1186 [no express knowledge requirement added to condition prohibiting possession of "dangerous or deadly weapon[s]"] with *Patel, supra*, 196 Cal.App.4th at p. 961 [modifying condition to prohibit the defendant from "knowingly drinking alcohol, possessing it, or being in any place where it is the chief item of sale"] and *People v. Freitas* (2009) 179 Cal.App.4th 747, 751-753 [modifying condition to prohibit the defendant from "knowingly own[ing], possess[ing], or hav[ing] custody or control of any firearms or ammunition"].) Indeed, this court is presently considering whether a victim no-contact order necessitates an express knowledge requirement. (*In re A.S.*, review granted Sept. 24, 2014, S220280.)

The conditions at issue in the present case are emblematic of those most commonly litigated. Specifically, the trial court ordered that appellant "may not own, possess or have in [his] custody or control any handgun, rifle, shotgun, or any firearm whatsoever or any weapon that can be

---

v. Garcia (1993) 19 Cal.App.4th 97 as being the first case to consider the issue. (See *People v. Kim* (2011) 193 Cal.App.4th 836, 843.) Nonetheless, as indicated by the cases discussed throughout this brief, the vast majority of published decisions on the topic occurred after the ruling in *Sheena K.*

concealed on [his] person" (2 RT 435); additionally, appellant may not "use or possess or have [in his] custody or control any illegal drugs, narcotics, [or] narcotics paraphernalia without prescription" (2 RT 436-437).

Both conditions, as phrased, are unconstitutionally vague and, for the reasons provided below, should be modified to include express knowledge requirements.

B. Applicable Legal Principles.

It is well-established that a probationary grant is an act of grace and clemency and not a matter of right. (*People v. Anderson* (2010) 50 Cal.4th 19, 32.) "The declared purpose of a grant of probation is that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer. . . ." (*People v. Rojas* (1962) 57 Cal.2d 676, 682-683, internal quotations omitted; accord § 1203.1, subd. (j); Cal. Rules of Ct., rule 4.410 (a).) In accordance with this purpose, a trial court has broad discretion to set terms and conditions of probation to "foster rehabilitation and to protect public safety. . . ." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.)

This discretion, however, is not without its limits. As relevant here, "[a] probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the

condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K., supra*, 40 Cal.4th at p. 890.)

The present case focuses only on the former type of challenge – that is, whether the challenged probation conditions are unconstitutionally vague. "The underpinning of a vagueness challenge is the due process concept of 'fair warning'" (*People v. Castaneda* (2000) 23 Cal.4th 743, 751, citations omitted), as protected by the California and federal constitutions (see U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 7). This concern is intended to ensure that "a person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.) Vague probation conditions "may trap the innocent" (see *Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 498 [considering vagueness challenge to a statute]) and "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [Citation.]" (*Acuna, supra,* 14 Cal.4th at p. 1115; see also *Grayned, supra,* 408 U.S. at pp. 108-109).

In determining the adequacy of a condition, a court should look at whether the language is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. [Citation.]" (*Acuna, supra,* 14 Cal.4th at p. 1115.) The meaning of the language need not rise to a level of "mathematical certainty," though it must have "reasonable specificity." (*Id.* at pp. 1116-1117, emphasis omitted.) No objection is required to preserve constitutional challenges to probation conditions on appeal (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143), and an appellate court employs a de novo standard of review in considering such claims (*Sheena K., supra*, 40 Cal.4th at pp. 888-889).

C. The present probation conditions are unconstitutionally vague and should be modified to include express knowledge requirements.

The aforementioned principles are not in dispute among California's appellate courts. What is in dispute is the application of these principles following this court's ruling in *Sheena K.* There, this court considered a probation condition prohibiting a juvenile from associating with anyone "disapproved of by probation." (*Sheena K., supra*, 40 Cal.4th at p. 890.) Though the condition was challenged as being both unconstitutionally vague and overbroad, this court only considered the first of these two challenges, determining that the condition was, in fact, vague since it "did not notify the defendant in advance with whom she might not associate

through any reference to persons whom the defendant knew to be disapproved of by her probation officer." (*Id.* at pp. 891-892.) Hence, this court modified the probation condition to only prohibit the juvenile from associating with anyone "known to be disapproved of" by her probation officer or other person having authority over her. (*Id.* at p. 892.)

Since *Sheena K.*, appellate courts have regularly been confronted with vagueness challenges to various probation conditions (see *Patel, supra,* 196 Cal.App.4th at p. 960), with courts reaching a variety of conclusions as to *Sheena K.*'s application. The conflicting decisions have generally been focused on three concerns, each of which was addressed by the appellate court in the present case. The first of these is whether an express knowledge requirement is needed to prevent unwitting probation violations even though, generally-speaking, such violations can only be premised on *willful* conduct. Related to this is whether, when dealing with already unlawful conduct, the mens rea implicit in statutes generally prohibiting such conduct is applicable when construing the scope of an associated condition of probation. An example of this latter point occurred in *Kim, supra*, 193 Cal.App.4th 836 where the court found that the implicit knowledge requirements in statutes prohibiting the possession of weapons were also applicable in construing probation conditions barring the same conduct.

The second concern stems from challenges to conditions that impose restrictions on a probationer's conduct with respect to a category whose members may not be evident to a probationer – for example, in *Sheena K.*, where the condition prevented the juvenile from associating with "anyone disapproved of by probation." In such cases, the issue is the clarity of the specified categories and whether, as phrased, a probation condition provides a probationer notice of the prohibited items, associations, or places.

The third concern is directly related to the first two and occurs when a court finds that an express knowledge requirement is lacking. In such cases, courts have come to conflicting conclusions as to whether, when modifying a probation condition, the express knowledge requirement should be added as an adverb modifying the prohibited conduct or as an adjective modifying the specified categories.

In taking these considerations in turn, it becomes evident that, in the present case, express knowledge requirements are needed and should be added as adverbs modifying the prohibited conduct itself.

1. Express knowledge requirements are necessary to specify the requisite mens rea.

Of the three concerns listed above, *Sheena K.* dealt most explicitly with the second – that is, the potential necessity for a knowledge requirement when imposing restrictions on a probationer's conduct with

respect to a category of items, associations, or places that may not be evident to the probationer [hereinafter referred to as "category conditions"]. (*Sheena K., supra*, 40 Cal.4th at pp. 891-892 [adding in knowledge requirement to condition prohibiting juvenile from associating with anyone "disapproved of by probation"].) The question that many appellate courts have subsequently considered is whether such a requirement is only necessary in category conditions or whether *Sheena K.* is more broadly applicable in specifying the mens rea governing the prohibited conduct.

Two main rationales have been adopted by courts that have refused a broad application of the holding in *Sheena K.* The appellate court's opinion below is illustrative of the first. Here, the court concluded that *Sheena K.* – and the principles underlying vagueness concerns more generally – did not require a broad application since probationers were already protected from unwitting violations of probation. (Slip Opin. at p. 9.) The court reasoned that, in general, an individual can only be punished if he or she has "some form of guilty intent, knowledge, or criminal negligence. . . ." (*In re Jorge M.* (2000) 23 Cal.4th 866, 872) and that, in the context of probation violations, the prosecution must always prove *willful* conduct (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295). (Slip Opin. at pp. 8-9.) The court concluded that, as to the conditions challenged here, express knowledge requirements were redundant, as they were implied in the

conditions' phrasing. (*Ibid.*; see also *Moore, supra*, 211 Cal.App.4th at p. 1189 [refusing to modify probation condition prohibiting defendant from owning, possessing, or using deadly or dangerous weapons on same basis].)

The second rationale has been applied in cases where the prohibited conduct is already unlawful, and the statutes governing such conduct contain an implicit knowledge requirement. These courts have reasoned that there is no basis to differently interpret probation conditions barring certain conduct from statutes that prohibit the same conduct. In *Kim*, *supra*, 193 Cal.App.4th 836, for example, the court concluded that the implicit knowledge requirements in statutes prohibiting the possession of firearms or ammunition by a convicted felon were "coextensive with...a probation condition specifically implementing those statutes." (*Id.* at p. 847.) And while the condition in *Kim* explicitly referred to the statutes already prohibiting such conduct, other decisions have applied the same rationale to uphold the constitutionality of probation conditions that prohibit illegal conduct, even if no specific statutes are referenced. (See *Rodriguez*, *supra*, 222 Cal.App.4th at p. 592.) In *Rodriguez, supra*, 222 Cal.App.4th 578, for example, the court considered various probation conditions, including one substantially similar to the condition in *Kim*; as with that condition, the defendant was prohibited from possessing firearms or weapons, though the specific statutes governing this conduct were not

explicitly referenced. (*Id.* at pp. 590-591.) Nonetheless, the court found no need to add an express knowledge requirement, concluding that the implied knowledge requirements in the statutes already prohibiting this conduct were applicable in construing the scope of the conditions. (*Ibid.*)

The conclusions in each of these cases, however, are flawed and are premised on a fundamental misunderstanding of vagueness challenges in that they either: (1) conclude that mens rea principles have little application to vagueness challenges, or (2) presuppose that the mens rea requirement for probation violations, e.g., for willful conduct, is easily ascertainable by probationers. (See Slip Opin. at pp. 8-9; *Rodriguez*, *supra*, 222 Cal.App.4th at p. 592; *Moore, supra*, 211 Cal.App.4th at p. 1189; *Kim, supra*, 193 Cal.App.4th at p. 847.) Neither premise is true.

As a starting point, "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." (*Colautti v. Franklin* (1979) 439 U.S. 379, 395.) Indeed, vagueness challenges are premised on ensuring that a probationer has fair notice of the prohibited conduct so that he or she can act in accordance with the condition. (*Sheena K., supra*, 40 Cal.4th at pp. 891-892.) Implicit in this policy is the notion that a defendant should not be punished for unwittingly or unknowingly violating probation. (*Ibid.*) Such a notion aligns with the overall policies governing grants of probation more

generally. After all, the rehabilitation and reformation of a probationer cannot be achieved if he or she is punished for unwitting conduct. (See *Rojas, supra*, 57 Cal.2d at pp. 682-683 [listing the primary objectives of probationary grants].)

While many courts have found that only a willful violation of probation can result in revocation (see *Cervantes, supra,* 175 Cal.App.4th at p. 295), this belief does not, in fact, stem from the statute governing probation revocations. Section 1203.2, subdivision (a) provides that probation may be revoked "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation ... officer or otherwise that the person has violated any of the conditions of his or her supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses." (See also Welf. & Inst. Code, § 777 [governing revocations of probation in juvenile proceedings].) Accordingly, the statutory language only provides that the decision to revoke probation is in the sound discretion of the trial court (*People v. Zaring* (1992) 8 Cal.App.4th 362, 378); there is *no* requirement that it be premised on a willful violation of probation. Indeed, it need not be based on a violation of probation at all. (See § 1203.2, subd. (a).)

Instead, the notion that only a willful violation can result in revocation appears to be a judicial construction, premised on the view that it is an abuse of discretion to punish a probationer for conduct over which her or she has no control. (See, e.g., *People v. Galvan* (2007) 155 Cal.App.4th 978, 982-984.) While such a construction has been consistently adopted by courts around the state and aligns with the overall goals of probationary grants (see *Rojas, supra*, 57 Cal.2d at pp. 682-683), there has been little consistency as to what "willful" actually means (compare, e.g., *Zaring, supra*, 8 Cal.App.4th at p. 379 [conduct not willful without "irresponsibility, contumacious behavior or disrespect for the order and expectations of the court"] with *People v. Lewis* (2004) 120 Cal.App.4th 837, 852 ["The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute"]).

Indeed, the United States Supreme Court itself has stated that "willful is a word of many meanings, its construction often being influenced by its context." (*Spies v. United States* (1943) 317 U.S. 492, 497, citation omitted.) Thus, courts have found, in a variety of circumstances, that it was necessary to adopt limiting constructions of the term in order to better clarify a statute's mens rea. In many of these cases, the limitations were necessary to require actual knowledge of certain facts

so that the statutes at issue did not punish unwitting conduct. (See, e.g., *People v. Garcia* (2001) 25 Cal.4th 744, 752; *People v. Simon* (1995) 9 Cal.4th 493, 507, 522; *Liparota v. United States* (1985) 471 U.S. 419, 426.)

Because section 1203.2, subdivision (a) does not explicitly include a mens rea requirement and because "willful" – to the extent it applies in proving probation violations – has a variety of meanings, an express knowledge requirement is necessary in the probation conditions challenged here. As it presently stands, there is no clarity as to the mens rea necessary to prove an alleged violation, and therefore, it cannot be argued that appellant has the fair notice required under due process as to the conduct prohibited under the conditions. (*Sheena K., supra*, 40 Cal.4th at pp. 891-892.) Accordingly, the analysis by the appellate court below – as well as other appellate courts reaching similar conclusions (see, e.g., *Moore, supra*, 211 Cal.App.4th at p. 1189) – is flawed since it is premised on the notion that the meaning of "willfully" is easily understood and consistently applied.[4] The case law provided above belies such a claim.

It is not only the ambiguity of the term "willfully" that necessitates this conclusion. For the sake of argument, appellant will presuppose that, in the context of probation violations, the meaning of "willfully" is defined

[4] For these same reasons, it is of no bearing that the trial court had orally advised appellant against "[a]ny willful violation of [his] probation." (Slip Opin. at p. 10.)

as set forth in the Penal Code – that is, "impl[ying] a purpose or willingness to commit the act or make the omission referred to." (§ 7, subd. 1; see also Webster's 3d Internat. Dict. (1993) p. 2617 [defining "willful" as "done deliberately" and "not accidental"].) Such a definition of "willfully" does *not* require that an individual know all the salient facts regarding the specified conduct, but only that he intentionally commits it.

In contrast, the Penal Code provides that "unless otherwise apparent from the context," the term "'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code." (§ 7, subd. 5.) Thus, the meanings of "willfully" and "knowingly" are distinct. Appellant, for example, could act *willfully* by wearing a backpack or jacket, but he may not *know* that a firearm or methamphetamine is located inside these items. Accordingly, even under section 7's definition of "willfully," appellant is not protected from unwitting violations as required under *Sheena K.*[5] Only the inclusion of express knowledge requirements can provide such assurance. In short,

[5] Appellant observes that a potential solution to this problem is to construe the term "willfully," in the context of probation violations, to require actual knowledge, as the courts did, in other contexts, in *Simon* and *Garcia*. By mandating express knowledge requirements, however, this court can ensure that, at the time of sentencing, defendants are made fully aware of the precise scope of probation conditions and need not rely on a judicial construction of the term "willfully" if a probation violation is ever alleged. This will ensure fair notice of the prohibited conduct from the onset of the probationary term.

potential vagueness concerns are not alleviated by the fact that a defendant can only be found in violation of probation if he commits willful conduct.

Nor does the second common rationale for refusing to insert express knowledge requirements eliminate vagueness concerns. As noted above, some courts have concluded that when probation conditions prohibit already unlawful conduct, the mens rea provided by statutes prohibiting the conduct should also be implied in associated probation conditions. (*Rodriguez, supra,* 222 Cal.App.4th at p. 592; *Kim, supra,* 193 Cal.App.4th at p. 847.)

While much of the aforementioned analysis also belies the validity of those Court's conclusions, they are also flawed because they do not account for the fundamental distinction between statutes and probation conditions. Appellant acknowledges that, generally-speaking, the statutes prohibiting the conduct specified in the challenged probation conditions have commonly-accepted mens rea requirements, even though the statutes themselves do not specify them. (See, e.g., *People v. Rubalcava* (2000) 23 Cal.4th 322, 332 [in order to prove unlawful possession of a dirk or dagger, prosecution must prove that a defendant "knowingly and intentionally carry concealed upon his or her person an instrument 'that is capable of ready use as a stabbing weapon'"]; *People v. Horn* (1960) 187 Cal.App.2d 68, 74-75 [prosecution must prove that defendant knows narcotic nature of substance

possessed to prove simple possession].) Under these cases, it is clear that a defendant can only be found guilty if he knows of the item's presence as well as its qualifying nature.

In the context of these statutes, defendants are protected against punishment for unwitting conduct due to judicial interpretation of the required mens rea. Probation conditions, however, are individualized on a case-by-case basis. While some conditions may be commonly imposed – as is true of the conditions here – the precise wording of these conditions may vary case-by-case, and therefore a defendant does not have fair notice of a condition's scope since there is no overarching precedent interpreting it. Judicial interpretation of probation conditions can only be done *after* a defendant is granted probation or found in violation.

The fact that only "willful" conduct can underlie probation violations or revocations only compounds this problem. As discussed above, the meaning of "willful" is not commonly accepted and, even if the definition as set forth in section 7 is applied, it does not require knowledge of an item's presence or its qualifying nature. Accordingly, in the absence of an express knowledge requirement, a defendant is left with two conflicting interpretations of his probation conditions: does he have to know of an item's presence and its qualifying nature as implied by the case law interpreting statutes governing the prohibited conduct, or does he only

need to "willfully" engage in said conduct? Given this potential conflict, a defendant certainly does not have the "fair notice" required under *Sheena K.* in order to ensure compliance with the terms and conditions of his probation.

In sum, the challenged probation conditions should be modified to read as follows: "You may not *knowingly* own, possess or have in your custody or control any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on your person," and "You shall not *knowingly* use or possess or have in your custody or control any illegal drugs, narcotics, narcotics paraphernalia without a prescription." While the court in *Sheena K.* only added in the express knowledge requirement as an adjective modifying the groups specified in the condition – a point that will be discussed more below – the policies underlying its holding more broadly demand express knowledge requirements to adequately convey the requisite mens rea. (See, e.g., *Freitas, supra*, 179 Cal.App.4th at p. 752 [modifying a weapons condition for similar reasons].) As the aforementioned analysis indicates, neither the presently-accepted standard governing probation violations nor judicial interpretation of related statutes alleviates potential vagueness problems. Adding in express knowledge requirements will provide the necessary clarity as required under the Fifth and Fourteenth Amendments.

2. Express knowledge requirements are necessary to specify knowledge of the prohibited nature of the items.

The appellate court below concluded that, in most instances, an express knowledge requirement is unnecessary to specify the requisite mens rea but that, as in *Sheena K.*, such a requirement may be appropriate to clarify that a defendant must know that "a particular association, place, or item falls within" the category of objects prohibited by a probation condition. (Slip Opin. at pp. 6-7; see also *Leon, supra,* 181 Cal.App.4th at p. 952 [modifying condition to prohibit "visit[ing] or remain[ing] in any specific location which you know to be or which the probation officer informs you is an area of criminal-street-gang-related activity"]; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816 [modifying condition to forbid associations "with any person known to [the] defendant to be a gang member].) In the present case, the appellate court found that the categories of prohibited objects were sufficiently clear, and therefore no express knowledge requirements were needed on this basis. (Slip Opin. at pp. 12-13.) The court erred in reaching this conclusion.

Both of the challenged conditions suffer from vagueness concerns not only in failing to specify the requisite mens rea, but also in failing to require that appellant knows of an item's prohibited nature. Hypothetically, under the present phrasing of the weapons condition, appellant could be in

violation of probation if he physically possesses a gun that he genuinely believes is a toy, even though it is, in fact, an actual gun. Additionally, appellant could violate probation if he is handed a bag of cocaine that he genuinely believes to be flour. Accordingly, the concern addressed by this court in *Sheena K.* would be present in these scenarios: appellant would be in violation of probation without being on notice that his conduct was prohibited by the conditions of his probation. (*Sheena K., supra*, 40 Cal.4th at pp. 891-892.)

This problem is not limited to scenarios where appellant may be mistaken as to the object's identity. As to the drug condition, this conclusion is compounded by the ambiguity of the term "paraphernalia." Our country's high court has, in fact, noted that this term may implicate vagueness concerns. In *Posters 'N' Things, Ltd. v. United States* (1994) 511 U.S. 513, the court inferred a scienter requirement as part of the Mail Order Drug Paraphernalia Control Act and then determined whether the act was unconstitutionally vague as applied. (*Id.* at p. 526.) The court observed that "[t]he objective characteristics of some items establish that they are specifically for use with controlled substances." (*Id.* at p. 518.) It also recognized, however, that vagueness concerns might arise with respect to "multiple-use items – such as scales, razor blades, and mirrors" since such "items may be used for legitimate as well as illegitimate purposes, and

'a certain degree of ambiguity necessarily surrounds their classification.' [Citation.]" (*Id.* at p. 526.) The court concluded, however, that it did not have to resolve this issue because the petitioners "operated a full-scale 'head shop,' a business devoted substantially to the sale of products that clearly constituted drug paraphernalia." (*Ibid.*) Though the holding in *Posters 'N' Things, Ltd.* may not be directly applicable in analyzing the drug probation condition here, our high court's discussion of the meaning of "paraphernalia" indicates that this term is not readily defined and therefore could suffer from vagueness concerns.[6]

Neither California case law nor statutes cure the ambiguity of the term. Even though possession of drug paraphernalia is prohibited by several statutes (see, e.g., Health & Saf. Code, §§ 11014.5, 11364, 11364.5), the phrasing of these statutes does not provide a uniform definition of "paraphernalia." For instance, Health and Safety Code sections 11014.5 and 11364.5 provide lists of items that may qualify as paraphernalia, and while these lists have some overlap, they are not identical. Thus, an express knowledge requirement is also necessary

[6] Appellant also notes that the concern expressed by the high court as to the word "paraphernalia" – that common everyday objects could, at times, constitute paraphernalia – is also true as to the term "weapons" as provided in the weapons condition. For example, appellant could possess a baseball bat, an item that could be used for legitimate purposes (to play baseball), but that could also be used as a weapon. Accordingly, this concern is not limited to the drug probation condition.

because the meaning of the term "paraphernalia" has no consistent definition within the context of the California codes, and it should not be appellant's burden to guess which definition or list applies to the terms of his probation.

Accordingly, express knowledge requirements are needed not only to specify the requisite mens rea, but also to ensure that appellant can only be found in violation if he knows that an item falls within the scopes of the conditions.

3. Modifying the conditions to include express knowledge requirements as adverbs modifying the prohibited conduct will alleviate both of the aforementioned concerns.

Appellant briefly addresses one final point. The court below expressed a preference for adding in knowledge requirements as adjectives modifying the category of prohibited items, associations, or places. (Slip Opin. at p. 9.) The court concluded that appellant's proposed modifications – adding in the express knowledge requirements as adverbs modifying the prohibited conduct – were unnecessary since the potential vagueness of a probation condition did not rest on its failure to specify the applicable mens rea. As shown above, however, this premise is flawed. Vagueness concerns are frequently interconnected with mens rea principles, and it is therefore appropriate to expressly include the requisite mens rea in probation conditions. In doing so – that is, by prohibiting the probationer

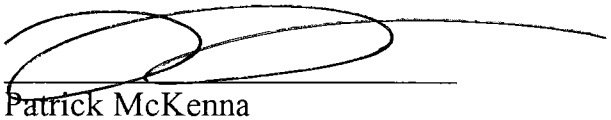
from *knowingly* engaging in the prohibited conduct – a court will also ensure that the probationer is adequately advised that he can only be found in violation if he knows an item, association, or place falls within a specified category. Indeed, numerous appellate courts have followed this practice. (See, e.g., *Patel, supra*, 196 Cal.App.4th at p. 961; *Freitas, supra*, 179 Cal.App.4th at p. 753.) Because such a modification cures both potential vagueness concerns, this Court should do the same.

CONCLUSION

For the aforementioned reasons, the challenged probation conditions should be modified to read as follows: "You may not *knowingly* own, possess or have in your custody or control any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on your person," and "You shall not *knowingly* use or possess or have in your custody or control any illegal drugs, narcotics, narcotics paraphernalia without a prescription."

Dated: October 20, 2015

RESPECTFULLY SUBMITTED:



Patrick McKenna
Attorney for Appellant
LaQuincy Hall

CERTIFICATE OF WORD COUNT

I, Patrick McKenna, hereby certify in accordance with California Rules of Court, rule 8.360(b)(1), that this brief contains 6,860 words as calculated by the Microsoft Word software in which it was written.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Dated: October 20, 2015

Respectfully submitted,

~~Patrick~~ McKenna
SBN 274959

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action, and my business address is P.O. Box 1130, Santa Clara, CA 95052. On the date shown below, I served the within ***APPELLANT'S OPENING BRIEF ON THE MERITS*** to the following parties hereinafter named thereby:

BY ELECTRONIC TRANSMISSION: I transmitted a PDF version of this document by the TrueFiling System and electronic mail to the following parties:

Attorney General's Office
SFAG.Docketing@doj.ca.gov
[attorney for respondent]

First District Appellate Program
Attn: Paula Rudman
eservice@fdap.org

First District Court of Appeal
first.district@jud.ca.gov
[appellate court]

BY MAIL: I placed a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Clara, CA, addressed as follows:

LaQuincy Hall
Address on File

Appeals Clerk
Contra Costa County Sup. Court
725 Court Street
P.O. Box 911
Martinez, CA 94533

Contra Costa DA's Office
100 37th St., Rm 200
Richmond, CA 94805

Contra Costa PD's Office
3811 Bissell Avenue
Richmond, CA 94805

I declare under penalty of perjury the foregoing is true and correct.
Executed this 20th day of October, 2015 at Santa Clara, CA.

Patrick McKenna