S227193 COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
LaQUINCY HALL,
Defendant and Appellant.

Case No. S227193

First Appellate District, Division One, Case No. A141278
Contra Costa County Superior Court, Case No. 51315225
The Honorable Leslie Landau, Judge

RESPONDENT'S BRIEF ON THE MERITS

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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?

INTRODUCTION

Since *People v. Garcia* (1993) 19 Cal.App.4th 97, defendants have attacked probation conditions without explicit knowledge requirements as unconstitutionally vague and overbroad. Among the more common probation conditions targeted in such litigation are prohibitions against contacting or associating with certain categories of persons, frequenting or remaining in certain areas or establishments, and possessing or using items like restricted drugs, alcohol, or weapons.

Some appellate courts have inserted, more or less routinely, an explicit requirement of scienter (e.g., "knowingly") into probation orders, or have remanded for inclusion of such modifiers. As a result, and despite the "repetitive nature" of these claims, such cases appear in state courts with "dismaying regularity." (*People v. Patel* (2011) 196 Cal.App.4th 956, 960 (*Patel*).)

This case is representative of a "growing trend"—"perhaps . . . inspired by *In re Sheena K.* [(2007) 40 Cal.4th 875 (*Sheena K.*)]" (*In re Victor L.* (2010) 182 Cal.App.4th 902, 907)—of a defendant withholding objection to a probation condition in the lower court, then insisting in the appellate court that he cannot be expected to understand the condition and that the specter of arbitrary enforcement compels modifying the condition

with an explicit knowledge requirement. (See *People v. Moore* (2010) 211 Cal.App.4th 1179, 1184 (*Moore*); *People v. Kim* (2011) 193 Cal.App.4th 836, 842 (*Kim*); *People v. Leon* (2010) 181 Cal.App.4th 943, 949 (*Leon*).)

Forfeiture rules ordinarily preclude consideration for the first time on appeal of challenges to the language of probation conditions. (See *People v. Scott* (1994) 5 Cal.4th 331, 336 ["[D]efendants cannot challenge the terms of their probation for the first time on appeal"]; accord, *People v. Welch* (1993) 5 Cal.4th 228, 237 (*Welch*).) Here, the Court of Appeal reached the claim as a facial challenge to the constitutionality of two conditions prohibiting appellant's possession of firearms, concealable weapons, and illegal drugs, and applied de novo review. (Typed Opn., p. 11; *Sheena K.*, *supra*, 40 Cal.4th at pp. 885-887.)

The Court of Appeal correctly concluded that a modification of the challenged probation conditions in this case was not constitutionally required. The absence of an express knowledge requirement in a probation condition, standing alone, is neither a denial of adequate notice of the probationer's obligations, nor a facially vague restriction on the probationer's conditional liberty.

STATEMENT OF THE CASE

A. Trial Proceedings

Appellant dropped a container on a street and told a police officer that it was trash. (1 RT 159-165, 168.) The officer opened the container and discovered over two grams of cocaine base in 18 bags. (1 RT 171-173, 254-257.)

An information charged appellant with possessing cocaine base for sale (Health & Saf. Code, § 11351.5). (CT 78.)

A jury found appellant guilty as charged. (CT 140.)

The trial court placed appellant on three years' formal probation. (CT 217-218.) The conditions of probation include the following: "You may not 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 may not use or possess or have [in] your custody or control any illegal drugs, narcotics, narcotics paraphernalia without a prescription."[1] (2 RT 435-437.)

B. The Court of Appeal's Decision

The Court of Appeal affirmed. (Typed Opn., p. 14.) The court rejected appellant's claim that the challenged conditions are unconstitutionally vague absent an express knowledge requirement which he asserts is the required mens rea for a violation of the conditions—that he commit the prohibited conduct knowingly and that he be aware of the true nature of the items he is possessing or using. (Typed Opn., pp. 2-3, 11, 13-14.) The court held the weapon and drug conditions "do not need to be modified in the manner [appellant] proposes because the mens rea generally applicable to probation conditions precludes the finding of unwitting violations." (Typed Opn., p. 14.)

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[1] The conditions are indicated in the felony order of probation by checked boxes. The first reads, "Not use or possess any dangerous drugs, narcotics, marijuana, or narcotic paraphernalia without prescription." The second reads, "Do not own or possess or control any firearm or weapon." (CT 218.) The parties agreed, and the Court of Appeal held, that to the extent the sentencing minute's recital of the conditions differs from the trial court's oral pronouncement at sentencing, the oral pronouncement controls. (Typed Opn., p. 2, fn. 2.) The Court of Appeal modified the minute order to conform to the trial court's oral pronouncement of the two probation conditions. (Typed Opn., p. 14.)

SUMMARY OF ARGUMENT

Asserting that the weapon and drug conditions of his probation are unconstitutionally vague, appellant insists that enforcement is impermissible absent the insertion by the court of an express knowledge requirement into those conditions. (ABOM 20-21.) Appellant contends that without an express knowledge requirement, he could violate probation by unwitting or accidental conduct. Appellant's contentions should be rejected.

This court should adopt a commonsense approach to vagueness challenges and construe both of the conditions as containing an implied knowledge requirement. Insertion of an explicit scienter requirement is superfluous since a knowledge requirement in each condition is already implied by law. A knowledge requirement is implicit because a probationer must engage in willful conduct to violate the condition. (*Moore*, *supra*, 211 Cal.App.4th at pp. 1186-1187.) The willfulness requirement ensures adequate notice and guards against arbitrary enforcement with or without an explicit knowledge requirement in the probation order.

Further, the challenged conditions in this case were obviously designed to reinforce statutory prohibitions against possessing and using deadly weapons and illegal drugs. The corresponding criminal statutes here contain an implied knowledge requirement. "It follows that [each] condition has the same implicit scienter requirements as the statutes it implements. The mental element is constitutionally clear without being explicit." (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 592 (*Rodruiguez*).)

The terms of the probation conditions are set forth with reasonable specificity. There is no ambiguity of what is prohibited here. Appellant is given adequate notice of what he is prohibited from doing—possessing or using weapons or illegal drugs.

For these reasons, modification of the challenged conditions with a knowledge requirement is neither necessary nor constitutionally required.

Nevertheless, should this court resolve to modify the weapon and drug conditions, the required knowledge may be actual or imputed.

ARGUMENT

I. VAGUENESS CHALLENGES TO PROBATION CONDITIONS CALL FOR A COMMONSENSE APPROACH

The Courts of Appeal have taken divergent approaches toward claims that injunctive or prohibitory types of probation conditions are unconstitutionally vague without express knowledge requirements. The practical and commonsense approach is that such conditions contain an implied knowledge requirement. (See *Patel*, *supra*, 196 Cal.App.4th at p. 960 [incorporating, by operation of law, a blanket knowledge requirement into so-called category conditions].) The opposite is a case-by-case approach. The mass of decisions following it reflect only occasional consistency in whether a knowledge requirement is found necessary or even what knowledge requirement is inserted. Some insert a knowledge requirement where the description of a prohibited category itself is viewed as potentially ambiguous, others when a constitutional avoidance principle akin to construing a penal statute is at work, and still others when supervisory oversight of probation offices and trial courts appears to be the operative principle. Some appellate courts redraft conditions more or less routinely, while others remand for rewrites by the trial court. Indicative of the fact that this judicial labor has proven recondite, appellate findings that the wording of the condition actually could not be understood by persons of common intelligence and that the defendant truly had no ready means of determining what the challenged condition requires short of a judicial rewrite are rarities. (See *People v. Gaines* (Dec. 3, 2015, A141836) __Cal.App.4th__ [2015 Cal.App.LEXIS 1079, *8] [knowledge requirement

added to the no-alcohol condition for "any establishment where alcohol is the chief item of sale"]; *In re Kevin F.* (2015) 239 Cal.App.4th 351, 360 [adding a knowledge requirement to "possess[ing] anything that [he] could use as a weapon" as it did not provide adequate notice of the prohibited conduct]; *Moore*, *supra*, 211 Cal.App.4th at 1188 [choosing to modify probation conditions on a case-by-case basis rather than adopting *Patel* approach].) Where conditions have been modified with an express knowledge requirement, many courts simply insert the adverb "knowingly" without considering if the remedy is needed to cure purported ambiguity in the condition. Others insert both actual and constructive knowledge into the conditions. (See *People v. Moses* (2011) 199 Cal.App.4th 374, 381-382 (*Moses*) [modified an association condition to read: "Do not associate with any persons you know or reasonably should know to be minors, or frequent places where you know or should reasonably know minors congregate . . ."].)

In light of the unnecessarily repetitive nature of these claims and the lack of instances where a defendant has acted unwittingly to violate a condition and had his probation revoked as a result, we urge this court to take the commonsense approach advanced by *Patel*. It should hold both these conditions already have an implied knowledge requirement. From a practical standpoint, applying a scienter requirement by implication to these probation conditions negates the need for unnecessary review of probation challenges in the future and saves considerable judicial resources expended in, frankly, a trivial pursuit. It preserves the rights of probationers generally and encourages them to work with their probation officers and trial courts if and when individualized issues arise. And it ensures that appellate courts will only apply the void-for-vagueness doctrine to probation conditions that ordinary persons truly cannot understand.

In this state, the demands of counseled appellate litigants for the insertion of express knowledge requirements into probation conditions has been for years the activity of a cargo cult: superfluous but busy. It is time to stop. Rather than encourage needless and repetitive litigation over such matters, it is sufficient for this court to recognize that a violation of the probation condition requires willful conduct and that proof of knowledge by the probationer requisite to meet that standard is needed if and when enforcement of the condition is sought. The constitution does not obligate courts to include scienter requirements in prohibitory or injunctive type conditions of probation when such conditions are described with reasonably specificity. The constitution does not dictate the particular wording of those conditions. Rather, probation conditions should be read in a commonsense fashion and in light of applicable legal principles.

The commonsense meaning of the weapon and drug conditions, as the Court of Appeal held, is that appellant must be aware that he is engaging in the prohibited conduct. Appellant is, thus, patently aware of what he must refrain from doing: not possess or control any firearm or concealable weapon, and not use or possess any illegal drug, narcotics, or narcotics paraphernalia without a prescription.

More specifically, the vagueness doctrine as applied in *Sheena K.* does not provide a right of written advance notice of the required mental states or mens rea needed to enforce a particular condition whether or not it is of the prohibitory type restricting access or use of specific categories of things or persons or places. "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." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890, italics added.) With respect to knowledge of what a condition prospectively requires of the probationer, that is a matter

altogether different from an assertion that a condition makes it impossible for a judge to determine retrospectively whether a violation of probation has occurred. A court plainly can determine whether prohibitory conditions like the ones in this case are violated without an express knowledge requirement. The court has only to look to the law.

Contrary to appellant's claim, insertion of an express knowledge requirement does not provide more fair warning of the prohibited conduct than what the condition already provides. "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions.'" (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Indeed, probationers have special assistance in ensuring their conditional liberty is not revoked. The probationer can ask questions at sentencing. The probationer can ask the probation officer to explain probations conditions, and the court can do likewise on a motion for modification or clarification. Hence, it is hardly unfair to conclude that probationers can understand what is "required" despite the absence of a catechism of mental elements written into the conditions.

Appellant was granted the clemency of probation and is obligated to use the judgment of a reasonable person both to comprehend and to abide by the terms attendant to his conditional liberty. He is deemed to be aware of the law of probation as he is deemed to be aware of the criminal law in general. Hence, he is deemed to know that possessing a firearm or concealable weapon, and using or possessing illegal drugs can result in a finding that he willfully violated a condition of probation. Conversely, he is deemed to know he is not exposed to incarceration and revocation of

probation by possessing weapons or drugs without actual or imputed knowledge of the presence or the prohibited nature of the item.

Based on these principles, the challenged conditions should be construed in a commonsense manner as containing an implied knowledge requirement.

II. THE WEAPON AND DRUG PROBATION CONDITIONS ARE NOT UNCONSTITUTIONALLY VAGUE AND AN EXPRESS KNOWLEDGE REQUIREMENT IS NOT CONSTITUTIONALLY MANDATED

A. The Challenged Conditions Contain an Implied Knowledge Requirement

Appellant argues the challenged conditions are unconstitutionally vague because they do not contain a knowledge requirement and can only be cured by inserting "knowingly" into the language of the conditions. (ABOM 9, 23.) Specifically, appellant claims the conditions (1) fail to specify the requisite mens rea for finding a violation of the conditions; and (2) fail to specify that knowledge of the prohibited nature of the items is required. (ABOM 13-27.) No modification is constitutionally compelled given that a knowledge requirement is already implicit in the conditions. This implied knowledge encompasses both an awareness of possession or use, and knowledge of the item's prohibited nature. Thus, the conditions give adequate notice to appellant, as an ordinary person of reasonable intelligence, of what he is prohibited from doing under the terms of his probation.

1. Knowledge is implied by law where probation violations can only be based on witting conduct

It is well established that a probation violation can only be found where a probationer acts willfully or purposefully to violate a condition. (*Moore*, *supra*, 211 Cal.App.4th at pp. 1186-1187.) Willfulness is the mens rea that is implicitly required for a probation violation. (*People v.*

Cervantes (2009) 175 Cal.App.4th 291, 295.) Put another way, probation may not be revoked unless the evidence shows the probationer's conduct constituted a willful violation of the terms of his or her probation. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 983.) Consequently, probation cannot be revoked for an individual's inadvertent or accidental conduct. (*Moore*, *supra*, 211 Cal.App.4th at pp. 1186-1187.) Here, a knowledge requirement is already implied in the challenged probation conditions. The trial court made this exact point at the sentencing hearing. The court told appellant that "[a]ny willful violation of your probation can result in you being brought back to court and the maximum sentence being imposed." (2 RT 434.)

One is entitled to ask: how much more notice can a probationer have of what mental state is needed to violate a probation condition than to be told it by the judge at the time of sentencing? The fact that appellant wants a written notice suggests his contention conflates the vagueness doctrine with an insistence on form over substance.

Appellant's contention that "willfulness" and "knowledge" are two distinct concepts such that a willful or intentional act can still be done (e.g., putting on a backpack) without knowledge of the prohibitive nature of the act (e.g., putting on a backpack he does not know contains a firearm) misses the point. (ABOM 19-20.) A "willful *violation*" of the terms of probation implicitly includes both awareness of an intentional act and knowledge that the nature of the act violates a condition of probation. As such, the mental state required to violate a condition is the same as the knowledge which appellant demands must be explicitly stated in the conditions to avoid punishment for unwitting violations. Thus, "[t]he addition of an express knowledge requirement would add little or nothing to the probation condition." (*Moore*, *supra*, 211 Cal.App.4th at p.1188.)

In rejecting appellant's reasoning, the Court of Appeal held that "there is nothing that requires sentencing courts to include, or appellate courts to incorporate, a requirement that the probationer 'knowingly' violate a condition in order to protect against enforcement of unwitting violations." (Typed Opn., p. 10.) The Court of Appeal explained:

> [Appellant's] concerns are misplaced and arise out of his misunderstanding of the distinctions between mens rea and the rationale for modifying vague category conditions. The implied mens rea of willfulness must be established to find a probation violation, and this protects [appellant] from being punished for an unwitting failure to comply with a condition. If he borrows a jacket but does not know it contains a weapon or eats a brownie but does not know it contains marijuana, he will lack the necessary mens rea to be found in violation of probation. As *Moore* explained, in the unlikely event probationers find themselves in "unknowing and inadvertent" possession of a weapon or unwittingly using a drug, their "lack of knowledge would prevent a court from finding [them] in violation of probation." (*Moore*, *supra*, 211 Cal.App.4th at pp. 1186-1187.) In short, the weapons and drug conditions are sufficiently precise, and they do not need to be modified in the manner [appellant] proposes because the mens rea generally applicable to probation conditions precludes a finding of unwitting violations.

(Typed Opn., pp. 13-14.)

Similarly, the court in *Patel*, *supra*, 196 Cal.App.4th 956, held that since the law was clear that a probationer cannot be punished absent proof of knowledge, it would no longer entertain complaints on appeal of probation conditions that do not expressly include a knowledge requirement as vague. (*Id.* at pp. 960-961.) *Patel*'s holding is justified in light of the requirement that a finding of a probation violation requires proof that the probationer's conduct was willful. (*Moore*, *supra*, 211 Cal.App.4th 1179; *People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1129; *In re Victor L.* (2010) 182 Cal.App.4th 902, 913; *People v. Cervantes* (2009) 175 Cal.App.4th 291, 295; *People v. Galvan* (2007) 155 Cal.App.4th 978, 982

[failure to appear for review hearing because defendant was in federal custody did not support revocation]; *People v. Zarig* (1992) 8 Cal.App.4th 362, 379 [abuse of discretion to revoke probationer 22 minutes late to court despite unforeseen circumstances].)

To compel a court to order appellant to refrain from "knowingly" possessing weapons, or from "knowingly" possessing or using illegal drugs would achieve nothing except to add to the burden of trial judges and expend limited appellate resources to no purpose. In light of the knowledge requirement already in place for probation violations in general, and the trial court's actually informing this particular appellant that his conduct must be willful to constitute a violation, appellant has been placed on notice of what is required of him. The constitution does not require more. Nothing in the record even remotely suggests, nor does appellant claim, the trial court sought to impose a strict liability probation condition. Therefore, the inclusion of an explicit knowledge requirement is unnecessary because it is implied by law.

2. Due process does not require an explicit knowledge requirement in probation conditions where knowledge is already implied in corresponding criminal statutes

Requiring an explicit knowledge requirement here would impose a due process limitation on probation conditions not required by laws imposing punishment for crime. When the Legislature enacts a penal statute, it does so against a background of legal principles. For example, persons who commit an act through misfortune or accident with no evil design, intention or culpable negligence are not criminally responsible for the act. (Pen. Code, § 26.)[2] Ordinarily, a criminal offense must occur

[2] All statutory references are to the Penal Code, unless otherwise specified.

within California. (*People v. Webber* (1901) 133 Cal.623, 624 [defendant may demur for lack of territorial jurisdiction].) No authority requires lawmakers to cross-reference those principles in defining crimes. They are implicit unless lawmakers provide otherwise. Moreover, persons are deemed to be on notice of the code and the construction given to it. (See *Walker v. Superior Court* (1988) 47 Cal.3d 112, 143 ["We thus require citizens to apprise themselves not only of statutory language but also of legislative history, subsequent judicial construction, and underlying legislative purposes"].)

Similarly, when a trial court imposes probation conditions, it does so against the background of legal principles that need not be explicit in each condition. (See *Rodriguez*, *supra*, 222 Cal.App.4th at p. 590 ["Probation conditions are analyzed according to the same standards for determining whether penal statutes are unconstitutionally vague, as discussed [*Sheena K.*, *supra*, 40 Cal.4th at p. 890]"].)

Section 20 provides, "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." Where substantial penalties are involved, section 20 "can fairly be said to establish a presumption against criminal liability without mental fault or negligence, rebuttable only by compelling evidence of legislative intent to dispense with mens rea entirely. [Citations.]" (*In re Jorge M.* (2000) 23 Cal.4th 866, 879.) These principles relative to general intent and knowledge are routinely implied in the definition of crimes. "That [a] statute contains no reference to knowledge or other language or mens rea is not itself dispositive . . . [T]he requirement that, for a criminal conviction, the prosecution prove some sort of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure to expressly state it." (*Id.* at p. 872.)

Objections of lack of notice or of vagueness cannot be sustained here for the same reason they do not lie as to penal statutes that are construed to require the requisite element of knowledge. This court already has held that, in absence of a particularized scienter requirement, prohibitory injunctions are reasonably understood to imply a knowledge requirement. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117-1118 (*Acuna*) [element that the defendant's own knowledge is in question "fairly implied" into injunctive order limiting association with "any other known [gang] member"]; see *Sheena K.*, *supra*, 40 Cal.4th at p. 892 [discussing *Acuna*]; *Patel*, *supra*, 196 Cal.App.4th at p. 960.) As *Acuna* made clear, a case where the order prohibits a defendant from engaging in defined conduct without explicit language requiring the defendant's knowledge is far from a "'classic instance of constitutional vagueness.'" (*Acuna*, *supra*, 14 Cal.4th at p. 1117.) The court in *Acuna* explained that the condition already implied the element of knowledge in the absence of any contrary language and that the trial court can, if the probationer insists, insert an explicit requirement into the condition "should an attempt be made to enforce" it. (*Ibid.*) Thus, trial courts can await enforcement efforts and a specific objection before they need to consider modifying an injunctive or prohibitory order that does not specify the personal knowledge required of an individual subject to its terms.

There is a separate and individual reason why due process does not require making the knowledge requirement in these probation conditions an aspect of written notice before enforcement. The required mens rea in both

instances is implicit in the corresponding criminal statutes.[3] "[W]here a probation condition implements statutory provisions that apply to the probationer independent of the condition and does not infringe on a constitutional right, it is not necessary to include in the condition an express scienter requirement implied in the statute." (*Kim*, *supra*, 193 Cal.App.4th at p. 843.) In *Kim*, the court held that a no-firearms or ammunition condition, which lacked an express knowledge requirement, needed no modification to render it constitutional:

> Further, [w]rongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. [Citation.] A person who commits a prohibited act through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence has not committed a crime. (§ 26.) Thus, a felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent. [Citation.] Implicit in the crime of possession of a firearm is that a person is aware both that the item is in his or her possession and that it is a firearm. We believe the same is true of a probation condition prohibiting possession of a firearm, and, by logical extension, possession of ammunition.

(*Kim*, *supra*, 193 Cal.App.4th at p. 846, internal quotations omitted; see also *Moore*, *supra*, 211 Cal.App.4th at p. 1188 [rejecting claim that condition prohibiting possession of weapons lacked express knowledge requirement, noting that in unlikely event defendant found himself in

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[3] Both conditions prohibit illegal activity: it is a crime for convicted felons to own or possess firearms (§ 29800), and it is a crime under various statutes for anyone to possess or use illegal drugs, narcotics, or drug paraphernalia (e.g., Health & Saf. Code, §§ 11364 [possession of narcotics paraphernalia], 11377 [possession of a controlled substance], 11378 [possession of a controlled substance for sale]; 11379 [transportation of a controlled substance].)

advertent and unknowing possession of firearm or weapon, defendant's "lack of knowledge would prevent a court from finding him in violation of probation. When a probationer lacks knowledge that he is in possession of a gun or weapon, his possession cannot be considered a willful violation"].)

The same has been held true for conditions banning illegal drug possession given the corresponding statutes prohibiting drug use or possession that contain an implied knowledge requirement. In *Rodriguez*, *supra*, 222 Cal.App.4th at page 592, the defendant claimed that a probation condition ("condition 8") prohibiting his use or possession of "alcohol, intoxicants, narcotics, or other controlled substances without the prescription of a physician" was "'impermissibly vague or overbroad in that in [*sic*] fails to require that [defendant] have conscious awareness of the act of use or possession.'" *Rodriguez* rejected this claim, reasoning as follows:

> Division 10 of the Health and Safety Code is the California Uniform Controlled Substances Act. (Health & Saf. Code, § 11000, et seq.) Case law has construed these statutes as including implicit knowledge elements. [A]lthough criminal statutes prohibiting the possession, transportation, or sale of a controlled substance do not expressly contain an element that the accused be aware of the character of the controlled substance at issue, such a requirement has been implied by the courts.

(*Id.* at p. 593, internal quotations and citations omitted.)

> To the extent condition 8 reinforces defendant's obligations under California's Uniform Controlled Substances Law, the same knowledge element which has been found to be implicit in those statutes is reasonably implicit in the condition. What is implicit is that possession of a controlled substance involves the mental elements of knowing of its presence and its nature as a restricted substance.

(*Ibid.*)

Here, the Court of Appeal correctly observed that "vagueness concerns are often alleviated when probation conditions restrict unlawful activity." (Typed Opn., p. 12, fn. 6; see, e.g., *Rodriguez*, *supra*, 222

Cal.App.4th at pp. 582, 592-594 [knowledge that substances are "controlled substances" implicit in condition, based on statutes criminalizing such substances' possession, transportation, or use, although portion of condition referring to "intoxicants" modified to include "express knowledge requirement" because that category "susceptible of different interpretations" and not "regulated by statute"]; *Moore*, *supra*, 211 Cal.App.4th at p. 1186 [reference to "'dangerous or deadly weapon'" not unconstitutionally vague based on legal definitions of that phrase].) Thus, because the challenged weapons and drug conditions reinforce corresponding statutory obligations, a knowledge requirement is already implied by law, and no modification of the language in the conditions is constitutionally required.

B. The Prohibited Conduct Is Described with Reasonable Specificity

"The vagueness doctrine bars enforcement of '"a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." [Citation.]' [Citation.] A vague law 'not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates 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.]' [Citation.] In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that 'abstract legal commands must be applied in a specific *context*,' and that, although not admitting of 'mathematical certainty,' the language used must have '"*reasonable* specificity."'" (*Sheena K.*, *supra*, 40 Cal.4th at p. 890; see also *Moore*, *supra*, 211 Cal.App.4th at p. 1184 ["'A probation condition which . . . forbids . . . the doing of an act in terms so vague that persons of

common intelligence must necessarily guess at its meaning and differ as to its application, violates due process'"].)

Here, the categories of prohibited items—weapons and illegal drugs —are described with reasonable specificity and require no modification. "You may not 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 "[Y]ou may not use or possess or have [in] your custody or control any illegal drugs, narcotics, narcotics paraphernalia without a prescription." These words are sufficiently precise in that they notify appellant of what he is prohibited from using or possessing. Appellant is told in understandable terms that he must not possess any weapons and must not use or possess any illegal drugs, narcotics, or narcotics paraphernalia without a prescription. The conditions thus provide appellant with fair notice of what is required of him and gives the trial court an objective standard for determining whether the condition has been violated. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

The Court of Appeal observed that a knowledge requirement can in some cases cure unconstitutional vagueness by narrowing a prohibited category in an understandable and meaningful way so a probationer can know that the association, place, or item falls within the category. (Typed Opn., p. 6; see, e.g., *Sheena K.*, *supra*, 40 Cal.4th at pp. 878, 892 [condition prohibiting defendant from associating with anyone "'disapproved of by probation'" modified to require that "defendant have knowledge of who was disapproved of by her probation officer"]; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816 [condition barring gang associations modified to forbid association "'with any person known to [the defendant] to be a gang member'"]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 624, fn. 5 [similar condition modified to forbid associations "'with any person known to [the] defendant to be a gang member'"]; *People v. Garcia* (1993) 19 Cal.App.4th

97, 100, 103 [condition barring association with drug users or sellers modified to forbid association with "persons [the defendant] knows to be users or sellers of [drugs]"].)

The Court of Appeal clarified that the challenged conditions do not suffer from the same vagueness concerns as conditions prohibiting certain associations, stating:

> This is not to say, however, that every category condition is vague just because it does not explicitly require a probationer to know that the association, place, or item is within the prohibited category. In general, a probation condition is not unconstitutionally vague when it spells out with """reasonable specificity""" (*Sheena K.*, *supra*, 40 Cal.4th at p. 890, italics omitted) what is prohibited in such a way that persons of common intelligence need not "'guess at its meaning and differ as to its application.'" (*Moore*, *supra*, 211 Cal.App.4th at p. 1184.) Yet even when perfectly clear, category conditions have sometimes been needlessly modified. For example, after stating that "it is unnecessary to specify that [a] defendant must know a gun is a gun," the court in [*People v. Freitas* (2009) 179 Cal.App.4th 747, 751 (*Freitas*)] nonetheless modified the probation condition to specify that the defendant must "'not knowingly own, possess or have custody or control of any firearms or ammunition.'" [*Id.* at pp. 752-753], italics added.) Similarly, the court in *Patel*, *supra*, 196 Cal.App.4th 956 modified a condition to specify that the probationer not "'knowingly'" drink "'alcoholic beverage[s]'" or "'possess alcohol'" even though, in our view, people know that alcohol is alcohol. (*Id.* at p. 961.) Prohibiting probationers from possessing guns or drinking alcohol is simply not nebulous, and it is unlike prohibiting them from activity involving an ambiguous category of associations, places, or items, such as associating with a gang member (whether known or unknown). In our view, there is no need to explicitly require a probationer to know that something falls within a prohibited category when the category is essentially clear.

(Typed Opn., pp. 7-8.)

Appellant contends that the term "paraphernalia" in the drug condition is ambiguous as it is not consistently defined by drug statutes and

not readily understood. (ABOM 25-27.) The Court of Appeal rejected that contention, finding that to the extent the phrase "narcotics, narcotics paraphernalia without a prescription" is inexact, it is not constitutionally vague given that the drug condition is not a generally applicable enactment but a probation condition that applies to only one person and it does not restrict any activities protected by the First Amendment. (Typed Opn., pp. 12-13; see *Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 495 [a party "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others"]; see also *Bamboo Brothers v. Carpenter* (1982) 133 Cal.App.3d 116, 126 [considering nature of enactment in upholding anti-drug paraphernalia ordinance].) Indeed, "a person of common intelligence in [appellant's] position—i.e., someone who has been convicted of possessing cocaine base for sale—would understand what was meant when told not to use or possess 'narcotics, narcotics paraphernalia without a prescription' while on probation." (Typed Opn., p. 13.)

Application of the principle of reasonable specificity and the principle that trial courts are not required to write individualized knowledge requirements into probation conditions in advance of an actual, timely objection upon enforcement is fatal to appellant's vagueness argument.

C. Appellant's Vagueness Concerns Lack Constitutional Significance

Appellant's argument that the absence of an express written knowledge requirement constitutes unconstitutional vagueness proves both too little and too much. It proves too little because he asserts the omission of a knowledge or mens rea requirement in the probation conditions could give rise to enforcement efforts involving unwitting or inadvertent violations of the prohibited conduct. He fails to supply that observation with constitutional significance, despite the fact that countless penal

statutes defining crimes do not employ the word "knowingly" and do not specify a mens rea requirement either. The potential need to interpret and apply a probation condition in an enforcement action in the future hardly renders the prohibition condition facially vague in the present, any more than the hypothetical prospect of construing a statute to particular conduct is enough to nullify a penal law. Appellant's assertion is not a facial attack. To the contrary, it is an acknowledgment that interpretation of prohibitory conditions like his is necessarily contextual and depends on particular facts.

His argument proves too much because the focus on the absence of a knowledge requirement in the conditions is arbitrary and elides the argument's sweeping implications. Appellant could as easily assert unconstitutional vagueness for lack of specification in the conditions of whether a firearm must be fully operable and immediately available for use, or whether transitory firearm possession for self-defense purposes in the home is exempted, or whether a weapon must be wholly or only partially concealable, or whether an illegal drug may be possessed in trace quantities, to name just a few examples. What aspect of the vagueness doctrine might provide a unique safe harbor from probation conditions as respects potential defensive claims of lack of knowledge or of an inadvertent violation—and only such claims? The answer is none: appellant's argument translates into a general proposition, supported by no authority, that probation conditions to be constitutional must specify the prohibited conduct in terms sufficient to alert the probationer to potential defenses to future enforcement, e.g., accident, acts of nature, governmental authorization, or duress. But that level of detail is not demanded of any prohibitory-type order, and appellant presumably would not claim otherwise. The absence of any such details is irrelevant under the vagueness doctrine. That is because individuals subject to such orders can know the particulars of what is expected by consulting the probation

officer, seeking independent legal advice, moving the court for clarification, and demanding due process with respect to enforcement.

As is true in essentially all such probation cases, no substantial dispute exists here that appellant's prohibitory conditions can be reasonably understood by ordinary persons. Nor is there actual doubt that a court is capable of knowing whether a violation of the conditions has occurred.

In sum, the challenged conditions are not unconstitutionally vague and an explicit knowledge requirement is not constitutionally mandated. California law affords trial courts broad discretion to set conditions of probation to "foster rehabilitation and to protect public safety." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; see § 1203.1, subd. (j).) Nothing in the constitution constrains that discretion by dictating particular words of scienter (i.e., a mens rea "element" meeting proof requirements for a probation violation) to be inserted in prohibitory or injunctive conditions of probation generally or in these weapon and drug conditions specifically.

III. IF EXPLICIT KNOWLEDGE REQUIREMENTS ARE NECESSARY, THE CONDITIONS SHOULD BE MODIFIED TO SPECIFY ACTUAL OR CONSTRUCTIVE KNOWLEDGE IS SUFFICIENT FOR A VIOLATION

Appellant contends that the weapon and drug probation conditions should be modified to prohibit only "knowing" possession or use. (ABOM 23.) Appellant's proposed modification would confer a windfall benefit. If modification of a probation condition is necessary to cure a constitutional defect, a reviewing court may modify the condition on appeal. (*In re Sheena K., supra*, 40 Cal.4th at p. 892.) However, no more is required than the constitutional cure. Appellant's proposed modifications to the conditions are underinclusive. His constructive knowledge would be sufficient to support a finding of a violation of either condition.

A constitutional obligation to insert express knowledge requirements into probation conditions does not equate to a prohibition against evaluating

a probationer's obedience to the conditions in light of the circumstances the probationer subjectively did not know but reasonably should have known.

Cases after *Sheena K.* have added a constructive knowledge element to eliminate vagueness. In *People v. Turner* (2007) 155 Cal.App.4th 1432, the court modified a condition "to require that defendant must either know or reasonably should know that persons are under 18 before he is prohibited from associating with them." (*Id.* at p. 1436.) Similarly, in *Moses*, *supra*, 199 Cal.App.4th at pages 381 to 382, the court modified probation conditions to include both actual and constructive knowledge requirements: "Do not associate with any persons you know or reasonably should know to be minors, or frequent places where you know or should reasonably know minors congregate . . . . " Thus, constructive knowledge provisions in probation conditions create no unconstitutional vagueness. (*Rodriguez*, *supra*, 222 Cal.App.4th at p. 589 [gang stay-away order]; *People v. Mendez* (2013) 221 Cal.App.4th 1167, 1170 [probationer/parolee stay-away order].)

Appellant is required to abide by the conditions of probation and "[w]illful ignorance of warning signs should not be rewarded by the conclusion that a probation condition was not violated because the probationer did not actually, subjectively recognize [that the he is possession of a firearm or illegal drug]." (*Mendez*, *supra*, 221 Cal.App.4th at p. 1177.) As the *Mendez* court observed, "[W]e foresee no difficulty either with a probationer understanding what is required by such a condition or with a court determining whether such a condition has been violated. It may in fact be easier to establish what a probationer reasonably should know than to delve into the epistemological depths of what the probationer actually knows." (*Id.* at p. 1178.) Here, were a modification to the challenged conditions is compelled, insertion of a requirement of imputed or actual knowledge into the conditions would suffice. The constructive knowledge element is necessary in the weapon and drug

conditions to advance the purpose of the conditions which is to prevent the probationer from engaging in future criminal activity and to aid in his rehabilitation. The challenged conditions would lose their effectiveness if a probationer could be in possession of a firearm and claim that he did not know it was a real gun, or be using an illegal drug and claim that he did not the know the substance was cocaine.

Thus, if necessary to eliminate a constitutional defect, the challenged probation conditions should be modified to state that appellant is not to possess any item he knows or reasonably should know is a weapon or possess or use any item he knows or should reasonably know is an illegal drug, narcotics, or narcotics paraphernalia without a prescription.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: December 18, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7,035 words.

Dated: December 18, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. LaQuincy Hall**
No.: **S227193**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 18, 2015, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 18, 2015, at San Francisco, California.

Tan Nguyen
Declarant

Tan Nguyen
Signature

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