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 REPLY 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

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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.

The present appeal focuses on whether two probation conditions – one prohibiting the possession of weapons (hereinafter referred to as the "weapons probation condition"), and the second prohibiting the possession or use of drugs or related paraphernalia (hereinafter referred to as the "drug probation condition") – are unconstitutionally vague and necessitate the inclusion of explicit knowledge requirements under the Fifth and Fourteenth Amendments.

In his opening brief on the merits (hereinafter abbreviated as "ABOM"), appellant answered this inquiry in the affirmative, contending that knowledge requirements should be added in as adverbs modifying the prohibited conduct. (See ABOM 13-28.) In respondent's brief on the merits (hereinafter abbreviated as "RBM"), she argues that the conditions, as presently phrased, are not constitutionally deficient and do not require modification. In short, she contends that this Court "should adopt a commonsense approach to vagueness challenges and construe both of the conditions as containing...implied knowledge requirement[s]." (RBM 4; see also RBM 5-12.) Moreover, she argues that "because the challenged weapons and drug conditions reinforce corresponding statutory obligations,...knowledge requirement[s are] already implied by law." (RBM 17; see also RBM 12-16.) Finally, she requests that if this Court decides to modify the conditions, they should include constructive knowledge requirements. (RBM 22-24.)

Respondent's claims should be rejected. The conditions do not contain implicit knowledge requirements, either as to the prohibited conduct or to the prohibited items. Even assuming that only willful violations of probation can premise a revocation – something not required under Penal Code section 1203.2, the statute governing such proceedings – the meaning of "willful" is neither easily understood nor is it consistently

applied; it does not necessarily include knowledge of the prohibited conduct within its scope.[1] As explained more below, appellant's suggested modifications will provide all parties, including appellant, the trial court, and the probation department, with clarity as to the mens rea governing the conditions. Modification of the conditions is constitutionally mandated.

B. Respondent's alleged "commonsense approach" to vagueness challenges will not result in the practical benefits she suggests.

Respondent spends much of her argument urging this court to adopt a "commonsense approach" in determining whether probation conditions, including those challenged here, are unconstitutionally vague. (RBM 5-9.) In so doing, respondent attempts to reframe the analysis as laid out in the opening brief, focusing, at least initially, on the practical implications of this Court's ruling, rather than on the constitutional necessity in including express knowledge requirements in probation conditions. (See RBM 5-9.)

Respondent posits several positive benefits of her position that knowledge requirements are implied in the conditions, the first being that future litigation on this issue would be curbed under her approach. In reaching this conclusion, respondent initially compares the variety of appellate court opinions considering this issue, implying that the appellate

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

courts adopting her "commonsense approach" have been more uniform in their decisions than those adopting appellant's alleged "case-by-case approach." (RBM 5.) According to respondent, courts taking the latter view have premised their holdings on differing rationales, resulting in inconsistent modifications and remedies. (RBM 5-6.) Thus, in order to save judicial resources in the future, she urges this Court to rule that knowledge requirements are fairly implied in the conditions. (RBM 6.)

Even taking apart the constitutionally unsound basis for respondent's claim, her conclusion – that litigation over this issue would necessarily decrease if knowledge requirements are implied – does not distinguish it from the approach taken by appellant. Assuming that this court adopts appellant's position, then trial courts, probation departments, and attorneys around the state will be aware that, in drafting and construing similar probation conditions, knowledge requirements must be expressly included. To the extent that this is not done at the trial court level, state appellate courts will have guidance as to how they should be modified. Simply put, regardless of how this court ultimately rules on the issue, there will be agreement around the state as to how probation conditions must be drafted. Accordingly, adopting respondent's "commonsense approach" will not necessarily result in any less litigation than by adopting appellant's view.

Moreover, appellant takes issue with respondent's premise that litigation over express knowledge requirements is "frankly, a trivial pursuit." (RBM 6.) A probationer has a due process right to be clearly and adequately informed of the conduct prohibited by the terms of his or her probation. (See *People v. Castaneda* (2000) 23 Cal.4th 743, 751.) Respondent suggests there have been a "lack of instances where a defendant has acted unwittingly to violate a condition and had his probation revoked as a result." (RBM 6.) This view, however, is unfounded – respondent cites no basis for this claim – but it also misses the mark. Vagueness challenges are premised on the due process concept of "fair warning," and while unclear probation conditions can result in revocations, the true import of vagueness challenges is so that probationers, from the onset of their terms, know what is required. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) Simply put, for thousands of probationers around the state, such litigation is anything but a trivial pursuit.

Respondent's argument to the contrary is indicative of an undercurrent of her entire brief – that, in considering the alleged vagueness of a probation condition, a trial court's comprehension of the condition's scope at the time a violation is alleged is equally, if not more, important than a probationer's understanding of the condition at the onset of the probationary term. (See RBM 7-8, 20-21 [contending that a probationer

can seek clarity from his or her probation officer regarding the scope of the conditions and that trial courts "can look to the law" in interpreting the condition at the time of an alleged violation].) This theme, however, is reflective of a fundamental misunderstanding of vagueness challenges – that the true import in examining the clarity of a probation condition is to ensure, with reasonable specificity, that a probationer knows what is required of him or her from the onset of the probationary term. (See *Sheena K., supra*, 40 Cal.4th at pp. 891-892 [finding that the condition there was vague since it did not warn the probationer in advance of whom she may not associate].)

As this court noted in *People v. ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090 (hereinafter referred to as "*Acuna*"), it is only of more recent vintage that vagueness challenges also focused on the potential for arbitrary and discriminatory enforcement. (*Id.* at p. 1116, citations omitted.) While enforcement concerns are relevant in determining a condition's vagueness, the true import of such challenges still lies in the due process concept of "fair warning," which includes clarity as to the applicable mens rea. (See *Sheena K., supra*, 40 Cal.4th at p. 890.) Even so, if a probation condition is unclear to a probationer, then a trial court will not be in any better position to adequately consider it, particularly when, at present, appellate courts around the state have considered vagueness claims in such disparate

fashion. Accordingly, respondent's attempt to distinguish between the notice and enforcement concerns of vagueness challenges is without relevance.

In short, at the onset of respondent's brief, she argues that the practical implications of this Court's holding favor her "commonsense approach" to interpreting probation conditions. The alleged benefits from her "commonsense" approach do not exist. Vagueness challenges are not a trivial pursuit and, regardless of how this Court rules, litigation on this issue will inevitably decrease.

C. The general requirement that a probation violation must be committed willfully does not include a knowledge requirement within its scope.

In arguing that knowledge requirements are implied in the probation conditions at issue here, respondent relies on two basic premises. The first is that a probationer can only be found in violation if his conduct is willful, which, according to respondent, includes "both awareness of an intentional act and knowledge that the nature of the act violates a condition of probation." (RBM 10.) According to respondent, express knowledge requirements would be superfluous since the willfulness requirement for probation violations includes knowledge within its scope. (RBM 9-12.)

Appellant addressed this same line of reasoning in his opening brief, and respondent's analysis does nothing to disturb those conclusions.

(ABOM 16-21.) Indeed, respondent fails to discuss many of the flawed assumptions upon which her argument depends. She does not address the fact that section 1203.2, which governs revocations of probation, does not provide that violations of probation can only be premised on willful conduct. (See ABOM 17.) She does not address the fact that there are a wide range of definitions for "willfully," and therefore its meaning has not been consistently applied. (See ABOM 18, comparing *People v. Zaring* (1992) 8 Cal.App.4th 362, 379 [conduct is not willful without "irresponsibility, contumacious behavior or disrespect for the order and expectation of the court"] with *People v. Lewis* (2004) 120 Cal.App.4th 837, 852 [defining "willfully" as a synonym for "intentionally"].) She does not address the fact that, as provided in the Penal Code, the meaning of "willfully" expressly does *not* include knowledge within its scope. (See ABOM 19-21, citing § 7, subd. (1) [defining "willfully" as "impl[ying] a purpose or willingness to commit the act or make the omission referred to"].) And, beyond a citation to the lower appellate court's opinion (RBM 11), she provides little authority – statutory or otherwise – for her claim that the meaning of "willfully" encompasses knowledge.

This collective set of problems is fatal to respondent's argument, which mistakes the simplicity in implying a knowledge requirement with the constitutional demand that the scope of a probation condition must be

sufficiently clear. A probationer cannot reasonably be expected to infer a knowledge requirement in conditions like those here when such an inference is premised on the meaning of a term ("willfully") that has been defined in numerous ways and, under the most pertinent definition (section 7, subdivision (1)), does *not* require knowledge of all the salient facts of the prohibited conduct.

While the willfulness requirement of probation violations may encompass *some* types of inadvertent or unwitting conduct, it does not protect against *all* such conduct. An individual can *willfully* wear a jacket, but he may not *know* that it contains a prohibited weapon. Similarly, he may *willfully* eat a brownie, but he may not *know* that it contains a prohibited controlled substance. Accordingly, such examples indicate why express knowledge requirements are necessitated: the willfulness requirement of probation violations simply does not prevent against all inadvertent conduct. In order to provide clarity to probation departments, trial courts, and defendants, express knowledge requirements are necessary to cure the inherent ambiguity in the meaning of "willfully" (see *Spies v. United States* (1943) 317 U.S. 492, 497 ["willful is a word of many meanings, its construction often being influenced by its context"]) and ensure compliance with the due process concept of "fair warning" (see *Sheena K., supra*, 40 Cal.4th at p. 890 ["[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"].)

A main premise of respondent's argument is that her viewpoint encompasses a "commonsense" understanding of the laws of probation. The appeal of this view is its apparent simplicity and straightforwardness. But once its basic premises are viewed under prevailing statutory and constitutional standards, its vitality falls apart. It is telling that respondent fails to address these problems in her analysis; there is no true response for them and the apparent straightforwardness of her position begins to unravel once they are pointed out.

This Court's decision in *Acuna* does not dictate otherwise. While respondent relies on *Acuna* as authority supporting her position (RBM 14), she fails to note that the portions of the injunction being challenged in *Acuna* already contained explicit knowledge requirements. (*Acuna, supra*, 14 Cal.4th at pp. 1117-1119 [discussing provision (a), which prohibited contact with any "*known*" VST or VSL gang member, and provision (k), which prohibited certain retaliatory acts against individuals "*known* to have complained about gang activities"].) The issue presented to this Court in *Acuna* was whether the word "*known*" was vague – a position not taken by either party in the present case; accordingly, the holding there has little relevance since the *Acuna* court essentially ruled that there were no

vagueness concerns when considering the type of language that appellant is, in fact, requesting in his proposed modifications.

Appellant does not contend that probation conditions require absolute certainty as to their meaning; indeed, that is not the standard. (*Acuna, supra*, 14 Cal.4th 1090, 1116-1117.) A probation condition is not sufficiently clear, however, when the mens rea governing it is ambiguous. (See *Colautti v. Franklin* (1979) 439 U.S. 379, 395.) The mens rea governing the challenged conditions suffers from such ambiguity, and therefore express knowledge requirements are constitutionally mandated. (See, e.g., *People v. Freitas* (2009) 179 Cal.App.4th 747, 752.)

D. The implied mens rea in criminal statutes has no bearing as to whether the present probation conditions necessitate express knowledge requirements.

Respondent also advances a second argument as to why knowledge requirements are implicit in the challenged conditions: the mens rea governing the corresponding criminal conduct can be imputed as also governing the scope of the challenged conditions. (See RB 12-17.) This view was discussed in appellant's opening brief, and nothing in respondent's analysis warrants departure from that discussion. (See ABOM 21-23.)

As with her argument regarding the willfulness requirement of probation violations, respondent makes a number of assumptions without

considering whether these assumptions are valid. They are not. For example, a major premise of her argument is that probation conditions and penal statutes are similarly situated, and standards governing the latter should therefore govern the former. (See RBM 14-17.) As noted in appellant's opening brief, statutes and probation conditions are distinct in that judicial interpretations of statutes are well-established prior to the commission of the prohibited conduct. Probation conditions, however, may correspond with criminal statutes – as is true of the challenged conditions here – but they are phrased on a case-by-case basis. There is no overarching precedent interpreting those particular conditions at the onset of the probationary term. Accordingly, unlike penal statutes – even those corresponding with the conduct proscribed under certain probation conditions – there is no fair notice of the conditions' scope.

This problem is only magnified by another issue that respondent fails to address – the inherent contradiction between inferring knowledge requirements from corresponding criminal statutes with the general principle that probation violations are only valid when they are committed willfully. As noted above, the meaning of "willfully" is inconsistently defined and is not coextensive with a knowledge requirement. Accordingly, respondent's view essentially asks for probationers, trial courts, and probation departments to guess as to the mens rea governing

particular probation conditions: must the conduct be committed willfully or knowingly? Express knowledge requirements will alleviate any such ambiguity, putting all parties on notice as to the mens rea governing the probation conditions.

Because respondent fails to address these problems in her brief, her analysis should not be followed by this Court. There is simply no basis to conclude that the mens rea defined in criminal statutes are inherently applicable to corresponding probation conditions.

E. The categories of prohibited items are also vague, thereby further necessitating express knowledge requirements in the challenged conditions.

The challenged probation 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. (ABOM 24-27.) Respondent contends that the categories of prohibited items are sufficiently clear and do not warrant inclusion of an express knowledge requirement on this basis. (RBM 17-20.)

The primary point of the parties' contention is the clarity of the term "paraphernalia" as included in the drug probation condition.[2] While

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[2] In his opening brief, appellant also noted that the meaning of "weapons" was also vague. (AOB 26, fn. 6.) Respondent does not address this, thereby providing no reason to depart from appellant's analysis. (See also *In re Kevin F.* (2015) 238 Cal.App.4th 351, 358-361.)

throughout her brief, respondent emphasized that the true point of inquiry is whether a trial court could adequately comprehend the scope of a condition at the time a violation is alleged (see RBM 7-8, 20-21), she takes the opposite approach in arguing that the meaning of "paraphernalia" is clear – that appellant, as an individual convicted of a drug offense, would reasonably understand the meaning of the term. (See RBM 19-20.)

As with her analysis above, respondent seems to misunderstand the nature of a vagueness challenge. Ultimately, what matters is whether a condition is facially clear and whether, with reasonable specificity, a trial court and probationer can understand its meaning. (See *Sheena K., supra*, 40 Cal.4th at pp. 888-890.) Respondent's conflicting methods of analysis indicate that her "commonsense approach" is not as straightforward as she would like.

Ultimately, respondent's argument does nothing to disturb the analysis in the opening brief, in that "paraphernalia" is described in multiple ways throughout the Penal Code and therefore, absent an express knowledge requirement, appellant is left to guess which definition applies to the terms of his probation.[3] This same problem would be present for a

[3] Another inherent contradiction in respondent's claim to the contrary is that while she promotes inferring mens rea requirements from penal statutes into corresponding probation conditions, she rejects any notion that the inconsistency in penal statutes as to the meaning of "paraphernalia" has any relevance.

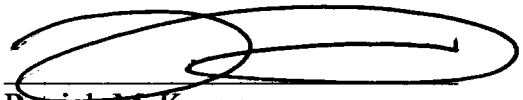
CONCLUSION

For the reasons provided above as well as those in the opening brief, 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."

Respondent's "commonsense" approach – arguing that knowledge requirements are already implied in the conditions – should be rejected since it rests on several flawed assumptions and inherent contradictions. Express knowledge requirements will ensure absolute clarity as to the conditions' scope, both for probationers at the onset of their probationary terms and trial courts if a violation is ever alleged. Only under the approach promoted by appellant can appellant's due process rights under the Fifth and Fourteenth Amendments be protected, and therefore modification is required.

Dated: January 26, 2016

RESPECTFULLY SUBMITTED:



Patrick McKenna
Attorney for Appellant
LaQuincy Hall

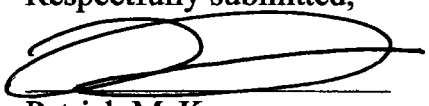
CERTIFICATE OF WORD COUNT

I, Patrick McKenna, hereby certify in accordance with California Rules of Court, rule 8.360(b)(1), that this brief contains 4,634 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: January 26, 2016

Respectfully submitted,



Patrick McKenna
SBN 274959

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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]

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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

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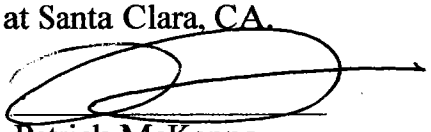

Patrick McKenna