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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re ADRIAN B., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN B.,

Defendant and Appellant.

A131529

(Alameda County  
Super. Ct. No. SJ10015780)

Adrian B. was declared a ward of the court under Welfare and Institutions Code section 602<sup>1</sup> and placed on probation in his parents’ home with certain conditions of probation. The petitions stemmed from two burglaries in which 14-year-old Adrian participated. Because he challenges only a condition of probation, we need not recite the circumstances of his offenses.

Adrian’s sole claim on appeal concerns one of the conditions of probation, one where the court ordered him to “be of good conduct. That includes no gang activity, gang-related activities.” He claims the condition was unconstitutionally vague in two respects: (1) that “good conduct” is unconstitutionally vague, as are the terms “gang

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<sup>1</sup> Statutory citations are to the Welfare and Institutions Code unless otherwise specified.

activity” and “gang-related activities”; and (2) that a knowledge requirement must be added to bring the condition within constitutional bounds. We disagree, and we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On October 18, 2010, a petition was filed under section 602 alleging Adrian had committed a residential burglary in Fremont on October 15, 2010. The petition was amended on October 21, 2010 to charge a misdemeanor second-degree burglary violation. (Pen. Code, §§ 459, 460.) Adrian admitted the allegation on the same date.

After Adrian was fingerprinted, it was discovered that his prints matched those at the scene of an earlier burglary of the house next door to his on September 8, 2010. A second section 602 petition was filed on December 10, 2010, relating to the earlier burglary, alleging both burglary and receipt of stolen property. (Pen. Code, §§ 459, 496.)

Adrian’s mother reportedly told the probation officer that most of Adrian’s friends were Norteños gang members. According to the dispositional reports, Adrian himself also admitted his friends were gang members.

As a result, on December 14, 2010, the court imposed interim conditions of probation that included certain gang conditions, including that Adrian must not “be a member of, or associate with, any person [he] knows, or should reasonably know, to be a member or to be involved in the activities of a criminal street gang”; that he not wear or display “items or emblems reasonably known to be associated with or symbolic of gang membership”; and that he not acquire any new tattoos or gang-related piercings.

As the court told him at that time: “I am going to order today that you’ve got to stay away from the gangs. The gang stuff is going to get you taken out of your home. So it’s kind of up to you. If you hang out with them, depending what happens with the [second] petition, you might be looking at out-of-home placement.”

At the jurisdictional hearing on February 18, 2011, the court found Adrian had committed the September burglary, but found insufficient evidence to support the additional allegation of receiving stolen property. At the dispositional hearing on March 7, 2011, the court adjudged Adrian a ward of the court, but allowed him to remain

in his parents' home on probation with certain conditions. The court orally imposed the condition now under review: that Adrian "[o]bey all laws of the community and be of good conduct. That includes no gang activity, gang-related activities."

Before the court imposed that condition there was a substantial discussion of the "good conduct" provision in association with gang behavior:

"THE COURT: Do you have any notes in your file that indicate why Judge Hayashi imposed the interim gang conditions? I'm looking at the minute order from December [14th]." The probation officer directed the court to page five of the dispositional report.

There the probation officer had reported:<sup>2</sup> "This officer spoke with David Hernandez who runs Bridges Group Home that works with gangs who has been working with the minor's mother to try to make sure he stays away from the gangs. Unfortunately, Adrian has not been as attentive to what Mr. Hernandez is trying to do for him. He is willing to counsel the minor when he is on probation. The recommendation he made was for the family to either move out of the Decoto area or move the minor out of the area. He is fearful for the minor being dragged into the gang or being injured if he refuses." These same observations had been made in the dispositional report on the first petition.

The discussion at disposition continued: "[DISTRICT ATTORNEY]: Precautionary? [¶] THE COURT: Obviously, in front of Judge Hayashi on the 14th that led to him making these orders. [¶] THE COURT OFFICER: And I think through Ms. Santos's investigation, I think that these are put in as a precautionary measure, not [that] this young man might be actively participating at this point. So we would [leave] that to the discretion of the Court. Those orders were already in there, but I think it wouldn't hurt the recommendation at all. [¶] THE COURT: Okay. It doesn't look like it would prohibit him from normal activities."

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<sup>2</sup> The probation officer in court (William Leno) was not the same person who had prepared the report (Geraldine Santos).

Adrian's attorney then said: "The other thing that I'm concerned with is that he's not a gang member. There's no indication he is a gang member. Unfortunately, he's in a neighborhood that's riddled with gang membership. And the mother has taken precautionary measures to try to get him in contact with Mr. Hernandez. That is a gang prevention expert, I guess. He's been running that program for many, many years. So everybody is doing all they can to avoid that, and so I don't think that that's needed at this point. [DISTRICT ATTORNEY]: I do have some—one section where—this was a dispo report back in December<sup>3</sup> where, I guess, it was mentioned by the mother, all his friends are Norteños, so worry about him associating with them. . . .

[¶] . . . [¶] [MINOR'S COUNSEL]: The mother is saying that's not the case, all his friends are Norteño gang members. So I don't know where that came from. . . ."

The court then complained: "[I] [d]on't know why this Probation Officer didn't speak to this. This is always a substantial issue. All I get is the comment, 'Adrian has not been as attentive to what Mr. Hernandez is trying to do for him.' [DISTRICT ATTORNEY]: It was Mr. Hernandez. That's what I read. I think everything is coming from Mr. Hernandez. [¶] THE COURT: So is it the Probation Department's recommendation to make this a part of the disposition or not? So is this going to come under the general heading of counseling? [¶] THE COURT OFFICER: . . . . I think the concern has been noted, so let's just—we don't need to make an exact order at this time, but we can keep him on—"

The court clarified: "It's not just a concern about gangs. It's a concern that the Minor is not listening to the gang expert, Mr. Hernandez, who runs the Bridges group home. [¶] [MINOR'S COUNSEL]: What does that mean, Judge? I don't know what I think about 'listening.' [¶] THE COURT: That's right. That's why I'm turning to [the probation officer]. [¶] [MINOR'S COUNSEL]: I'm bringing that up. 'Listening' could mean that he's brushing him off, or 'listening'—'not listening' could mean he's still

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<sup>3</sup> The same information was contained in the dispositional report for the March 7, 2011 hearing.

associating with someone. So that's pretty vague. [¶] THE COURT: You're right. It is. [¶] [MINOR'S COUNSEL]: If we want to send it back to the Probation Officer to have it evaluated, I will go along with that. I think that's appropriate. Just on what we have now, I don't think it's appropriate. [¶] THE COURT: I have to agree."

The probation officer then noted, "What he's in court for. I think in the next paragraph, this is an intelligent young man with a lot of potential. He understands if he gets involved in that type of activity, what the consequences—[¶] THE COURT: As long as we know if he does get involved in any gang-related activity, anything that's inappropriate, the PO—because it's going to be . . . of good conduct, obey all laws, I'll consider gang activity to not be of good conduct, the PO will forthwith file a 777 petition. Is that our understanding, Mr. [B.]—do you understand that, sir? [¶] THE MINOR: I understand."

The court then clarified that it would not continue the former gang conditions in effect, saying "they're only interim. [¶] So what happened by me not incorporating them into the disposition, they would not continue. That's why they're called interim. [¶] . . . Without any other connection to criminal activity, then we'll just—I'll put that under the general heading of being of good conduct. [¶] You see our concerns. You got yourself into a substantial amount of trouble. We're trying to keep from placing you; try to keep you from being taken out of your home. [¶] THE MINOR: I understand. [¶] THE COURT: If you get involved in gangs, then they're too dangerous for you and too dangerous for the community, then we're going to take you out. [¶] THE MINOR: I don't associate with no gang members. I'm trying to get my life straight right now. I'm asking for the Court to take a—please take off this GPS, because I want to continue playing soccer. I want to travel."

The court then recited the conditions of probation, including, "No more GPS and no more gang conditions." The minute orders do not include the "good conduct"/"no

gang activity” condition.<sup>4</sup> The formal written “terms and conditions” signed by Adrian and his mother also make no reference to the “good conduct”/“no gang activity” condition.

## **DISCUSSION**

Even though he said he understood what the court required of him, Adrian now claims the “good conduct”/“no gang activity” condition is unconstitutionally vague and fails to include a knowledge requirement. He relies primarily on three cases: *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*), *In re Victor L.* (2010) 182 Cal.App.4th 902 (*Victor L.*), and *People v. Leon* (2010) 181 Cal.App.4th 943 (*Leon*).

The Attorney General argues that the “good conduct” condition of probation imposed orally, when considered in light of the other terms and conditions of probation, the discussion during the dispositional hearing, and the earlier imposed interim conditions, is not unconstitutionally vague. She further contends the knowledge requirement is implicit in the condition and requires no modification.

We find Adrian’s arguments were forfeited by failure to object. We further find the court sufficiently explained the condition in its oral pronouncement. Adrian’s argument is ultimately unconvincing in light of the record.

### **Forfeiture**

Adrian’s counsel did not object to the conditions of probation when they were imposed. *People v. Gardineer* (2000) 79 Cal.App.4th 148, 151-152, held a challenge to a “good conduct” condition of probation was waived by failure to object. *Sheena K.* and similar cases reached the merits of an appeal despite a failure to object below where the appellant raised a pure question of law “capable of correction without reference to the particular sentencing record developed in the trial court.” (*Sheena K.*, *supra*, 40 Cal.4th

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<sup>4</sup> In such circumstances the oral conditions control over the minute order, and we could order the minute order amended to conform to the oral conditions. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Moses* (2011) 199 Cal.App.4th 374, 379-380; *People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.) Neither Adrian nor the Attorney General has requested this precise form of relief, however, and so we will not make such an order.

at p. 887.) The present case, however, is dependent upon a review and consideration of the reporter's transcript. Thus, the claim is not simply a facial attack on a written condition of probation, and the failure to object bars this appeal. (See *In re Luis F.* (2009) 177 Cal.App.4th 176, 181.) The Attorney General does not contend, however, that the claim has been forfeited, and we therefore also address the merits.

### **Legal Principles**

*Sheena K.*, *supra*, 40 Cal.4th at pp. 880, 889, dealt with a claim of vagueness and overbreadth that affected the minor's associational freedom. Specifically, it held unconstitutionally vague a condition of probation that forbade the minor to associate with anyone disapproved of by her probation officer. (*Id.* at pp. 880, 891.) The court in *Sheena K.* corrected the problem by adding a knowledge requirement. (*Id.* at p. 892.)

“[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. (U.S. Const., Amends V, XIV; Cal. Const., art. I, § 7.)’ [Citation.] 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.] 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.” ’ [Citation.]” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) As exemplified by *Sheena K.*, the same rules apply to probation conditions.

*Leon, supra*, 181 Cal.App.4th at p. 946 dealt with a condition of probation that prohibited an adult offender from “frequenting any areas of gang-related activity.” In *Victor L., supra*, 182 Cal.App.4th at p. 913, we were also concerned about a gang condition that prohibited the minor from entering “areas known by [him] for gang-related activity.” In both cases the conditions were found facially invalid, in the former case because no knowledge requirement was incorporated (*Leon, supra*, 181 Cal.App.4th at p. 950), and in the latter because the phrase “areas [of] gang-related activity” was deemed vague and overbroad. (*Victor L., supra*, 182 Cal.App.4th at pp. 915-919.)

Nevertheless, specification of every detail of a phrase used in a condition of probation is not necessary for the condition to pass constitutional muster. Absolute certainty and precision are not required to avoid a claim of unconstitutional vagueness; “reasonable certainty” and “reasonable specificity” are all that is required. (*Victor L., supra*, 182 Cal.App.4th at p. 914.)

### **“Good Conduct”**

Even if the term “good conduct” may in some circumstances be too vague to be enforceable, it was adequately explained to Adrian in this case. “Good conduct” requires at a minimum compliance with all laws, as the court specified both orally and in writing. In addition, for one placed on probation, it implicitly incorporates all other validly imposed conditions of probation. In this case, for instance, the written and oral conditions of probation further required Adrian to obey his parents, to obey school rules, and to report to his probation officer as directed. He was given a 6:00 p.m. curfew, ordered to attend school regularly, and prohibited from using alcohol and drugs.

These specific terms, in part, give substance to the phrase “good conduct.” But if the only implication of the term “good conduct” were to require compliance with other express terms of probation, it would add nothing to the other conditions imposed and would be mere surplusage.

The most significant added factor that “good conduct” imports in the present case is abstinence from gang involvement. This is clear from the court’s interchange with Adrian. As recognized in *Sheena K., supra*, 40 Cal.4th at p. 891, “a probation condition

that otherwise would be deemed vague may be constitutional because the juvenile court offered additional oral or written comments clarifying” its meaning. That is true here.

While the “good conduct”/“no gang activity” provision is subject to some fluidity, we find it is reasonably specific and therefore constitutional. We deal here with a minor who is at risk of becoming a gang member. Of course his conduct is subject to the reasonable and beneficial limits set by adult authorities in his life. The fact that every component of “good conduct” has not been spelled out does not render the condition invalid. If Adrian remains uncertain about what constitutes “good conduct,” the adults in his life—i.e., his parents, school authorities, and probation officer can help to guide him, and their rules become mandatory under the obedience conditions. No further written specification is necessary and, in light of the record, no modification of the condition of probation is required.

The discussion in the dispositional report of Adrian’s mother’s effort to offer him guidance through a gang prevention counselor alerted the court to Adrian’s apparent failure to heed the advice of that counselor. The court was concerned that Adrian was “not listening” to the gang prevention consultant. Nevertheless, the court ultimately agreed with Adrian’s counsel that it lacked sufficient information to impose a condition requiring compliance with the counselor’s advice due in part to the probation officer’s sketchy report.

The court discussed possibly ordering cooperation with Hernandez as a form of counseling, but ultimately elected not to impose a specific requirement in that regard. The probation officer who appeared in court agreed that a condition requiring gang counseling was unnecessary, indicating the court did not “need to make an exact order at this time.” Thus, attending gang counseling and cooperating with the gang counselor were specifically *not* made conditions of probation, though they might become components of the “good conduct” requirement if his parents insist that he comply. Such limited uncertainty is tolerable under the Constitution.

## “Gang Activity”

The court specified that “good conduct” included “no gang activity” or “gang-related activities.” The court expressly declared, “I’ll consider gang activity to not be of good conduct.” This, in fact, is the heart of the good conduct requirement. With respect to the “no gang activity” aspect of the condition, we also conclude the language requires no modification.

Adrian claims the term “gang activity” (1) is vague and overbroad and (2) lacks a knowledge requirement, so that he could unwittingly find himself engaged in an activity that the police, the court or his probation officer would deem to be “gang activity” or “gang-related” activity. We disagree. In light of Adrian’s own prior experience with the standard gang conditions of probation, the reference to “gang activity” was a shorthand reference that was reasonably understood by all concerned.

It is true that in *Victor L.*, *supra*, we commented on the “surpassing breadth” of the word “activity,” but we did so in the context of the condition’s significant restriction on the minor’s right to travel. (*Victor L.*, *supra*, 182 Cal.App.4th at p. 915.) Because of the uncertain scope of the restriction on Victor’s everyday activities, we modified the condition to forbid only the minor’s presence in areas known by him or specified by his probation officer to be areas of “gang-related activity.” The court in this case, by contrast, indicated it did not wish to impose gang conditions that would interfere with Adrian’s “normal activities.” Thus, no geographic restrictions were imposed.

In *Victor L.* no challenge was raised to a probation condition that forbade Victor to actually engage in “gang activity.” Indeed, we left unmodified language that Victor must not “participate in any gang activity.” (*Victor L.*, *supra*, 182 Cal.App.4th at pp. 931-932.) Thus, *Victor L.* does not support Adrian’s position that a prohibition on engaging in “gang activity” is impermissibly vague. (See also, *In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1145 [approving condition including that “minor shall not participate in any gang activity”].)

We conclude modification of the “no gang activity” language is unnecessary in light of the colloquy at disposition. The condition implicitly required Adrian to know

that he was engaged in the behavior in which he was engaged. It is far easier to know when one is actually engaged in “gang activity” than to know when one is entering a geographic area where others participate in gang activity. Indeed, it is presumed that one intends to engage in the behavior in which he in fact engages. (*In re Sergio R.* (1991) 228 Cal.App.3d 588, 601.)

Whether that behavior constitutes “gang activity” should be judged by an objective standard. The Attorney General has suggested that “gang activity” constitutes that which “advances, benefits or promotes” a gang. Such language is not identical to that applicable to criminal gang activity.<sup>5</sup> This is a workable definition, one which would comport with the meaning that would appear to a “reasonable, objective reader.” (*People v. Olguin* (2008) 45 Cal.4th 375, 382.) The condition was intended to apply to “inappropriate” noncriminal as well as criminal gang activity, as is inferable from the record. Stated differently, the condition prohibits conduct in furtherance of or for the benefit of a criminal street gang. The term “no gang activity” is a shorter way of expressing this concept. We may avoid constitutional infirmity by interpreting the condition of probation in a common sense manner. (See *In re Angel J.* (1992) 9 Cal.App.4th 1096, 1102.) No express modification of the condition of probation is required to clarify it.

In *Victor L.*, *supra*, 182 Cal.App.4th at p. 907, we also dealt with the facial validity of gang conditions contained on a preprinted form that had not been explained to the minor at disposition. The condition of probation here under review is not similarly without context. The juvenile court conducted a fairly comprehensive colloquy with Adrian and the other participants in the dispositional hearing concerning the intent of the requirement, and thus its scope.

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<sup>5</sup> The legislative language chosen for criminal gang activity is that the actor “willfully promotes, furthers, or assists in any felonious criminal conduct” (Pen. Code, § 186.22, subd. (a)) or that he or she commits a crime “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (Pen. Code, § 186.22, subds. (b)(1), (d).)

“Gang activity” in the context of this case is partly defined by what it does not include. The standardized terms and conditions of juvenile probation on the preprinted Judicial Council form include three specific “gang” conditions, namely those prohibiting: (1) membership in a gang and association with gang members; (2) gang dress; and (3) tattoos and piercings.<sup>6</sup> We also note that Adrian had been subject to all three of those prohibitions for nearly two months prior to the dispositional hearing, so he was already familiar with formal gang conditions of probation. By limiting the condition to “good conduct” and specifically “no gang activity” the court relieved Adrian of some of the restrictions earlier imposed (restrictions on dress, tattoos and piercings, and association). Instead he was prohibited only to engage in “inappropriate” “gang activity.” We read this as a narrower restriction than that included in the first standard gang condition, but broader than simply a proscription on criminal gang activity.

The condition of probation forbids, at the very least, Adrian’s actual membership in any “criminal street gang” as defined in Penal Code section 186.22, subdivision (f). On the other hand, the court indicated it was not meant to prohibit his “normal activities,” such as his normal travel within the community, or even attendance at rap concerts or other legal activities that gang members may also enjoy. Thus the “areas” of “gang activity” restriction at issue in *Victor L.* and *Leon* are not included in the present dispositional order.

The “no gang activity” aspect of the “good conduct” provision also does not appear to prohibit Adrian’s innocent association with gang members in non-gang-related

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<sup>6</sup> The standard conditions of juvenile probation relating to gangs are that the minor may (1) “[n]ot be a member of, or associate with, any person the child knows, or should reasonably know, to be a member or to be involved in the activities of a criminal street gang”; (2) “[n]ot wear or display items or emblems reasonably known to be associated with or symbolic of gang membership”; and (3) “[n]ot acquire any new tattoos or gang-related piercings and have any existing tattoos or piercings photographed as directed by the probation officer.” (Judicial Council form No. JV-624, box 22 (a)-(c).)

activity.<sup>7</sup> If such an associational restriction were intended, the court could easily have included it by checking box 22 (a) on Judicial Council form no. JV-624. Instead, in light of the probation officer's failure to recommend gang conditions, Adrian's good performance on probation to date, and his assurance that he no longer associated with gang members, the court relieved him of the previously imposed gang association condition. We infer a less restrictive condition was anticipated as part of the "good conduct" requirement.

The court also expressly rejected imposition of the other interim gang-related conditions of probation as final terms. Again, the court easily could have imposed restrictions on gang clothing and tattoos by checking boxes 22 (b) and 22 (c) on the standard conditions form but evidently felt there was not sufficient indication of Adrian's gang involvement to warrant such restrictions.

The Attorney General appears to agree with this analysis and has expressed no opposition to modification of the gang prohibition so that it would read that Adrian not "knowingly participate in any activity which advances, benefits, or promotes the actions of a criminal street gang. A criminal street gang is defined in Penal Code section 186.22, subdivision (e) and (f)." The language proposed by the Attorney General is more precise and would implement the most reasonable interpretation of the probation condition (i.e., "gang activity" is activity that "advances, benefits or promotes" the gang). While probably preferable to a general "good conduct"/"no gang activity" condition, we do not think such a modification is mandated as a matter of constitutional imperative.

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<sup>7</sup> Since the condition was not intended to impose associational restrictions, the same good conduct condition could be have been implemented by deleting the standard associational language on the Judicial Council form so as to read: the minor is "[n]ot to be a member of . . . or to be involved in the activities of a criminal street gang." But according to Adrian's logic, this standard condition would also be unconstitutionally vague because it, too, prohibits involvement in gang "activities," without further clarification. We cannot agree with this analysis. To hold that forbidding a minor to participate in gang "activities" is unconstitutionally vague would be to invalidate all gang conditions imposed throughout the state using the Judicial Council form. This we will not do, at least in this case where the restriction was discussed with the minor.

We would have expected Adrian to welcome the narrow condition suggested by the Attorney General. He does not. Nor does he suggest specific alternative language that he believes would more closely correspond to the court’s intention. We conclude that modification is unnecessary because the court clearly explained the purpose and objective of the challenged condition. As we interpret the condition, it required Adrian to refrain from joining a gang or engaging in activities that advance, benefit or promote a gang.

Adrian told the court he understood what was required of him under the “good conduct”/“no gang activity” condition. We believe he does understand, his attorney’s briefing notwithstanding. If he has remaining uncertainty, this opinion should help to set some guidelines for him, which may be fleshed out by his parents, teachers, school administrators, and probation officer. It is not necessary to send the case back to the trial court for further specificity.

**DISPOSITION**

The dispositional order is affirmed.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.