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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

IN RE GERARDO M., a Person Coming
Under the Juvenile Court Law.

H036279
(Monterey County
Super. Ct. No. J42802)

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO M.,

Defendant and Appellant.

1. INTRODUCTION

On appeal, minor Gerardo M. objects to five out of 34 probation conditions imposed after he was determined to be a ward of the juvenile court. He claims that each of these conditions, mostly requiring him to avoid certain types of people, locations, and intoxicants, violates due process for failing to include an explicit knowledge requirement.

The Attorney General initially argued that this court should follow the approach recently adopted by the Third District Court of Appeal in *People v. Patel* (2011) 196 Cal.App.4th 956 (*Patel*) and “construe every probation condition proscribing a probationer’s presence, possession, association, or similar action to require the action be

undertaken knowingly.” (*Id.* at p. 960.) Alternatively, in response to our request for supplemental briefing, the Attorney General asks us to find some knowledge conditions implicit as this court did in *People v. Kim* (2011) 193 Cal.App.4th 836 (*Kim*).

Minor disputes the applicability of *Patel* and *Kim* and contends that we must explicitly add “knowingly” or its variants to all of these conditions. For the reasons stated below, we will add an explicit knowledge requirement to most of the challenged conditions and strike one sentence, and will affirm the judgment as so modified.

2. PROCEEDINGS

A wardship petition filed on August 24, 2010, charged minor with the misdemeanor of possessing cocaine on August 20, 2010 in violation of Health and Safety Code section 11350. At a hearing the following day, the juvenile court ordered him detained and placed on house arrest on the Temporary Electronic Monitoring Program.

On September 1, 2010, a probation officer investigated an apparent curfew violation by the minor and found him at school in possession of a pocket knife and two compact discs the officer recognized as gang-related. Minor said that he carried the knife for protection from rival gang members. While he denied associating with any gang, three green dots tattooed on one of his hands signified allegiance with Sureños. Minor was taken into custody.

A second wardship petition was filed on September 13, 2010, charging minor with the felony of bringing a knife onto school grounds in violation of Penal Code section 626.10.

On September 28, 2010, minor admitted the cocaine possession charge in exchange for the prosecutor dismissing the knife-carrying charge “with facts.”

A dispositional hearing was conducted on October 15, 2010. When the court asked if minor had anything to say, he said, “No. I don’t want gang terms.” His attorney elaborated that minor used to associate with Sureños, but he has avoided them in efforts to turn his life around. The court officer pointed out that minor was recently found in possession of gang compact discs and, when he was a ward of the juvenile court between January 18, 2008 and January 18, 2010, he was subject to gang terms.

The court agreed to follow the written recommendation of the probation officer, adopting items 1 through 34 by reference and continuing minor in his mother's custody.

3. THE CHALLENGED PROBATION CONDITIONS

On October 15, 2010, the juvenile court signed a minute order that incorporated by reference the terms and conditions stated in the probation report, which the court also signed. The report had recommended a number of "GANG TERMS AND CONDITIONS OF PROBATION." Thirty-four separate items were listed.

On appeal minor objects to the following five conditions.

"11. Your associates are to be approved by your parents/guardians, and you shall not associate/communicate with any individuals identified by your Probation Officer as a threat to your successful completion of Probation. You are not to associate with anyone known to you to be a member of any gang as directed by your Probation Officer. You are not to associate with any individuals known by you to be on Probation or Parole (adult or juvenile).

"12. You shall not be in any locations known by you to be identified as gang gathering areas, areas where gang members or associates are congregating or areas specified by your Probation Officer as involving gang related activity, nor shall you participate in any gang activity."¹

¹ The court did not orally recite any of the 34 conditions, other than to state, "You do have gang terms where you are not to possess gang paraphernalia, not to associate with persons know by you to be gang members, and you're not to be in an area that is known to you as a gang-gathering area, or your Probation Officer tells you is a gang-gathering area."

On appeal minor characterizes this as a clarification of condition 12 of the written order, but we do not perceive the court as intending to modify the phrasing of any particular part of the written order. Accordingly, we will confine our analysis to the written minute order signed by the judge. (Cf. *People v. Thrash* (1978) 80 Cal.App.3d 898, 901-902 ["conditions need not be spelled out in great detail in court as long as the defendant knows what they are; to require recital in court is unnecessary in view of the fact the probation conditions are spelled out in detail on the probation order"].)

“16. You are not to consume or possess any intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana. You are not to be with anyone known to you who is using or possessing any illegal intoxicants, narcotics or drugs. Do not inhale or attempt to inhale or consume any substance of any type or nature, used as paint, glue, plant material, or any aerosol product. You are not to inject anything into your body unless directed to do so by a medical doctor. You are not to consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package.

“17. You are not to possess or consume any prescription medications unless directed to do so by a medical doctor. You must notify any treating physician of your substance abuse problems before accepting any medication. You must notify your Probation Officer within 24 hours of receiving any prescription medications and identify all medications.”

“29. You shall not be on any school campus or within a one block radius of any school campus unless enrolled or with prior administrative permission from school authorities.”

4. SCOPE OF REVIEW

This court recently summarized the applicable scope of review in *People v. Barajas* (2011) 198 Cal.App.4th 748, 753 (*Barajas*) as follows.

“An appellate court generally will not find that a trial court has abused its broad discretion to impose probation conditions so long as a challenged condition relates either generally to criminal conduct or future criminality or specifically to the probationer’s crime. (*People v. Lent* (1975) 15 Cal.3d 481, 486; *People v. Olguin* (2008) 45 Cal.4th 375, 379-380.) A court of appeal will review the reasonableness of a probation condition only if the probationer has questioned it in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 237; see *In re Sheena K.* (2007) 40 Cal.4th 875, 882 (*Sheena K.*))

“A court of appeal may also review the constitutionality of a probation condition, even when it has not been challenged in the trial court, if the question can be resolved as

a matter of law without reference to the sentencing record. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.)

“Inherent in the very nature of probation is that probationers “do not enjoy ‘the absolute liberty to which every citizen is entitled.’” [Citations.] Just as other punishments for criminal convictions curtail an offender’s freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.’ (*U. S. v. Knights* (2001) 534 U.S. 112, 119.) Nevertheless, probationers are not divested of all constitutional rights. ‘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 [constitutional] challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as constitutionally overbroad.’ (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)”

5. ADDING AN EXPLICIT KNOWLEDGE ELEMENT TO PROBATION CONDITIONS

Beginning with the Fifth District Court of Appeal’s decision in *People v. Garcia* (1993) 19 Cal.App.4th 97 (*Garcia*), California appellate courts have routinely added explicit knowledge elements to adult and juvenile probation conditions that prohibit associating with certain types of people,² possessing certain types of items,³ and remaining in certain locations.⁴

² *Garcia*, *supra*, 19 Cal.App.4th 97, 102 [felons, ex-felons, and narcotics users]; *People v. Lopez* (1998 [Fifth App. Dist.]) 66 Cal.App.4th 615, 638 (*Lopez*) [gang members]; *In re Justin S.* (2001 [Second App. Dist., Div. Four]) 93 Cal.App.4th 811, 816 [gang members and those disapproved by parents]; *People v. Turner* (2007 [Third App. Dist.]) 155 Cal.App.4th 1432, 1436 [persons under the age of 18]; *In re Vincent G.* (2008 [Third App. Dist.]) 162 Cal.App.4th 238, 247-248 [gang members]; *In re Ramon M.* (2009 [Fourth App. Dist., Div. Three]) 178 Cal.App.4th 665, 679 [gang members]; *In re Victor L.* (2010 [First App. Dist., Div. Two]) 182 Cal.App.4th 902, 931 (*Victor L.*) [gang members and those disapproved by parents and probation officer]; *People v. Moses* (2011 [Fourth App. Dist., Div. Three]) 199 Cal.App.4th 374, 381 (*Moses*) [minors].

Knowledge conditions have been added to probation conditions restricting association with other persons to avoid unconstitutional overbreadth (*Garcia, supra*, 19 Cal.App.4th 97, 102; *Lopez, supra*, 66 Cal.App.4th 615, 628) and vagueness. *Lopez* explained the difference in the doctrines. “The concept of unconstitutional vagueness is related to the concept of unconstitutional overbreadth, but ‘there are important differences.’” (*People ex rel. Gallo v. Acuna* [(1997)] 14 Cal.4th [1090] at p. 1115.) “‘A clear and precise enactment may nevertheless be ‘overbroad’ if in its reach it prohibits constitutionally protected conduct.’” (*Ibid.*) The underlying concern of the vagueness doctrine is the core due process requirement of adequate *notice*.” (*Lopez, supra*, 66 Cal.App.4th at p. 630.)⁵ The court explained: “Without at least the insertion in this aspect of the condition of a knowledge element, *Lopez* was subject to being charged with an unwitting violation of the condition because nothing in it required the police or the probation office to apprise *Lopez* of the ‘identified’ items of gang dress before he was charged with a violation. In this respect, then, the unmodified condition was inconsistent with the rule that a probation condition ‘must be sufficiently precise for the probationer to know what is required of him’” (*Id.* at p. 634.)

³ *Lopez, supra*, 66 Cal.App.4th 615, 622, 638 [clothing and jewelry with gang significance]; *In re Vincent G., supra*, 162 Cal.App.4th 238, 247-248 [gang clothing and symbols]; *People v. Freitas* (2009 [Third App. Dist.]) 179 Cal.App.4th 747, 753 (*Freitas*) [stolen property, firearms, and ammunition].)

⁴ *Victor L., supra*, 182 Cal.App.4th 902, 931 [where there are dangerous or deadly weapons, firearms, and ammunition]; *Moses, supra*, 199 Cal.App.4th 374, 381-382 [where minors congregate].)

⁵ As this court explained in *Barajas, supra*, 198 Cal.App.4th 748, the constitutional overbreadth doctrine applied to probation conditions is not the same as applied to criminal statutes. The federal overbreadth doctrine is concerned with the statute’s restriction on the free speech rights of third parties. The state’s overbreadth concern about probation conditions is undue restriction of the probationer’s constitutional rights and is not limited to free speech. (*Id.* at p. 754, fn. 4.)

In *Sheena K.*, the California Supreme Court confronted a probation condition requiring a minor to “‘not associate with anyone disapproved of by probation.’” (*Sheena K.*, *supra*, 40 Cal.4th 875, 878.) The court concluded: “We agree with the Court of Appeal that in the absence of an express requirement of knowledge, the probation condition imposed upon defendant is unconstitutionally vague. . . . [It] did not notify defendant in advance with whom she might not associate through any reference to persons whom defendant knew to be disapproved of by her probation officer.” (*Id.* at pp. 891-892.) Having concluded that the probation condition was unconstitutionally vague, the Supreme Court did not consider whether the association condition was also unconstitutionally overbroad. (*Id.* at p. 891, fn. 8.)

In *People v. Leon* (2010) 181 Cal.App.4th 943 (*Leon*), this court similarly modified three probation conditions, adding the underlined language. “‘You are not to associate with any person you know to be or the probation officer informs you is a member of a criminal street gang.’” (*Id.* at p. 950.) “‘You are not to possess, wear or display any clothing or insignia, tattoo, emblem, button, badge, cap, hat, scarf, bandanna, jacket, or other article of clothing that you know or the probation officer informs you is evidence of, affiliation with, or membership in a criminal street gang.’” (*Id.* at p. 951.) “‘You are not to visit or remain in any specific location which you know to be or which the probation officer informs you is an area of criminal-street-gang-related activity.’” (*Id.* at p. 952.) The Attorney General did not object to any of these modifications. (*Id.* at pp. 949-952.)

In *Kim*, *supra*, 193 Cal.App.4th 836, however, this court noted that “[t]he function served by an express knowledge requirement should not be extended beyond its logical limits.” (*Id.* at p. 847.) When a probation condition does not infringe on a constitutional right—in *Kim* it was the right of a convicted felon to possess firearms—“*Garcia*’s concern about an implicit knowledge requirement is inapplicable.” (*Ibid.*) *Kim* concluded that due process did not require adding an explicit knowledge requirement to a condition that prohibited owning, possessing, or having within his control “any firearm or

ammunition . . . pursuant to Sections 12021 and 12316[, subdivision] (b)(1) of the Penal Code.’” (*Id.* at p. 841.) *Kim* reasoned that courts had already construed Penal Code section 12021 and related firearm possession statutes as including an implicit mental state, so that the challenged probation condition should be given the same construction. (*Id.* at pp. 845-847.) *Kim* disagreed with the conclusion in *Freitas* that an express knowledge requirement must be added to a probation condition prohibiting the possession of firearms and ammunition. (*Id.* at p. 847.)

In *Patel, supra*, 196 Cal.App.4th 956, the Third District went further than *Kim* and construed “every probation condition proscribing a probationer’s presence, possession, association, or similar action to require the action be undertaken knowingly.” (*Id.* at p. 960.) In other words, the Third District construes all probation conditions as including an implicit knowledge requirement.

In reaching this conclusion, the court noted how frequently, since the *Garcia* decision in 1993, appellate courts have modified probation conditions to include an explicit knowledge element and what a drain on the public fisc it has been.⁶ (*Patel, supra*, 196 Cal.App.4th 956, 960.) The court also observed that *Garcia* had led to “a substantial uncontradicted body of case law establishing, as a matter of law, that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter.” (*Ibid.*) In view of this principle becoming established, the

⁶ The court itself raised the issue it proceeded to resolve in the course of reviewing a *People v. Wende* (1979) 25 Cal.3d 436 appeal raising no issues. (*Patel, supra*, 196 Cal.App.4th at pp. 958-959.) The court found itself “compelled to address the repetitive nature of this appellate issue,” “[i]n the interests of fiscal and judicial economy.” (*Id.* at p. 960.) Apparently also in the interests of judicial economy, the court did not invite the parties to brief the issue, instead observing, “If the People are aggrieved by this minor modification, they may petition for rehearing. (Gov. Code, § 68081.)” (*Patel, supra*, 196 Cal.App.4th 956, 959, fn. 3.) The modification in *Patel* was that the court did add express knowledge elements to a probation condition prohibiting the possession and consumption of alcohol and presence in locations where alcohol is the chief item of sale. (*Id.* at p. 961.)

Third District rejected “the conclusions reached in *Victor L. and Garcia*, and now g[a]ve notice of [its] intent to henceforth no longer entertain this issue on appeal, whether at the request of counsel or on our own initiative. . . . It will no longer be necessary to seek a modification of a probation order that fails to expressly include such a scienter requirement.” (*Patel, supra*, 196 Cal.App.4th at p. 960.)

As we continue to believe that an express knowledge requirement is constitutionally compelled for some probation conditions, like the Fourth District (*Moses, supra*, 199 Cal.App.4th 374, 381), we decline the Attorney General’s invitation to adopt *Patel*’s blanket approach and will continue to address this issue when it is raised on a case by case and condition by condition basis.

6. APPLYING THE LAW

A. Prohibited associations

Only one of the challenged probation conditions in this case prohibits associations. Condition 11 states: “Your associates are to be approved by your parents/guardians, and you shall not associate/communicate with any individuals identified by your Probation Officer as a threat to your successful completion of Probation. You are not to associate with anyone known to you to be a member of any gang as directed by your Probation Officer. You are not to associate with any individuals known by you to be on Probation or Parole (adult or juvenile).”

As the second and third sentences already include knowledge conditions, minor requests the following italicized modification of the first sentence. “*You are not to associate with individuals you know your parents have disapproved of. You shall not associate or communicate with any individuals you know your Probation Officer has identified as a threat to your successful completion of Probation.*” The Attorney General has no objection to these modifications if we decline to follow *Patel*.

As this court stated in *Kim, supra*, 193 Cal.App.4th 836, “We are not required to accept the Attorney General’s concession (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1021).” (*Kim, supra*, at p. 847.)

In *Sheena K.*, *supra*, 40 Cal.4th 875, the California Supreme Court has already proposed that an approval/disapproval probation condition be modified to direct that the probationer not “associate with anyone ‘known to be disapproved of’ by a probation officer or other person having authority over the minor.” (*Id.* at p. 892.) Because the Supreme Court has already concluded that this phrasing satisfies due process, we will not attempt to improve on it. We will order the first sentence of condition 11 rewritten to state: “You are not to associate with any individuals known to be disapproved of by your parents. You shall not associate/communicate with any individuals identified to you by your Probation Officer as a threat to your successful completion of Probation.”⁷

B. Prohibited locations

Two of the challenged conditions require minor to avoid particular types of locations. Condition 12 states in pertinent part, “You shall not be in any locations known by you to be identified as gang gathering areas, areas where gang members or associates are congregating or areas specified by your Probation Officer as involving gang related activity” Condition 29 states, “You shall not be on any school campus or within a one block radius of any school campus unless enrolled or with prior administrative permission from school authorities.”

While condition 12 includes an express knowledge requirement, minor asserts that the requirement is nevertheless vague because what the minor must know about a location in order to avoid it is that it has been “identified” as a forbidden area, but it does not say who is to make the identification. Minor proposes the following italicized modifications. “You shall not be in any location *you know has been identified by your Probation Officer* as gang gathering areas, areas where gang members or associates are

⁷ This modification does not state “known to you” because *Sheena K.* treated “known” as having this implicit meaning. The identification requirement in the second sentence is an approved method of ensuring that the probationer has knowledge of whom to avoid. (Cf. *In re Vincent G.*, *supra*, 162 Cal.App.4th 238; *Leon*, *supra*, 181 Cal.App.4th 943.)

congregating or areas *you know your Probation Officer has specified* as involving gang related activity, nor shall you participate in any gang activity.” The Attorney General does not oppose these modifications if we decline to follow *Patel*.

We agree that leaving “to be identified” without a subject renders the knowledge condition fatally imprecise. However, we do not agree with minor’s contention that due process requires limiting the probationer’s source of knowledge to the probation officer. (Cf. *Barajas, supra*, 198 Cal.App.4th 748, 759-760.) Instead, deletion of the vague phrase will create a sufficiently certain mental element. We will order condition 12 to be rewritten as “You shall not be in any locations known by you as gang gathering areas, areas where gang members or associates are congregating or areas specified by your Probation Officer as involving gang related activity, nor shall you participate in any gang activity.”⁸

As to condition 29, minor proposes the following italicized modification. “You shall not *knowingly* be on any school campus or within a one block radius of any school campus unless enrolled or with prior administrative permission from school authorities.” The Attorney General has no objection to this modification, and we will order it so modified, essentially the same modification this court ordered in *Barajas, supra*, 198 Cal.App.4th 748, 763.

C. Possession and consumption of prohibited items

The remaining two challenged conditions pertain to the possession and consumption of a diverse compilation of items primarily of three types, controlled substances, prescription medications, and over the counter medications. Condition 16

⁸ The phrase “locations known by you as” must be understood to modify all the area descriptions, including “gang gathering areas,” “areas where gang members or associates are congregating,” and “areas specified by your Probation Officer as involving gang related activity.” Therefore each type of location is subject to an express knowledge requirement and it is only the areas involving gang related activity that must be specified by the probation officer.

states: “You are not to consume or possess any intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana. You are not to be with anyone known to you who is using or possessing any illegal intoxicants, narcotics or drugs. Do not inhale or attempt to inhale or consume any substance of any type or nature, used as paint, glue, plant material, or any aerosol product. You are not to inject anything into your body unless directed to do so by a medical doctor. You are not to consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package.”

Condition 17 states in pertinent part: “You are not to possess or consume any prescription medications unless directed to do so by a medical doctor.”

Minor “contends that condition 16 must be modified to include an explicit knowledge requirement for both the knowing possession of the prohibited items as well as knowledge of the character of the prohibited substance.” Minor proposes the following italicized modification. “*Do not knowingly possess or consume anything you know are* intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana. You are not to be with anyone known to you *to be*^[9] using or possessing any illegal intoxicants, narcotics or drugs. Do not *knowingly* inhale or attempt to inhale or consume any substance of any type or nature which you know is used as paint, glue, plant material, or which is an aerosol product. You are not to inject anything into your body unless directed to do so by a medical doctor. You are not to *knowingly* consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package.”

⁹ Minor suggests that it was a typographical error for the original condition to say “who is” using instead of “to be” using. We are unconvinced. In any event, this modification is not constitutionally compelled.

Minor proposed the following italicized modification of condition 17. “You are not to *knowingly* possess or consume any prescription medications unless directed to do so by a medical doctor.”

After we invited supplemental briefing on the applicability of *Kim*, among other topics, the Attorney General has argued that conditions 16 and 17 should be understood as including implicit knowledge requirements, specifically the same knowledge requirements implicit in the statutes prohibiting the possession and use of controlled substances.

The California Uniform Controlled Substances Act (Health & Saf. Code, § 11000 et seq.; sometimes “the Act”), specifically in Health and Safety Code section 11350, subdivision (a), makes it a felony to possess without a written prescription certain controlled substances listed in the Schedules in that Act.¹⁰ Health and Safety Code section 11377 makes it either a felony or a misdemeanor to possess yet other controlled substances listed in the Schedules without a prescription.¹¹ Unlawful possession of “not more than 28.5 grams of marijuana” is a misdemeanor offense. (Health & Saf. Code, § 11357, subd. (b).)

¹⁰ Five sections of the Act each contain a numbered Schedule (I-V) listing a variety of controlled substances. (Health & Saf. Code, §§ 11054-11058.) For example, marijuana is listed in Schedule I as a controlled hallucinogenic substance. (Health & Saf. Code, § 11054, subd. (d)(13).) The Act provides a definition of “narcotic drug” (Health & Saf. Code, § 11019) and it defines “narcotics” in other statutes as listed controlled substances (Health & Saf. Code, § 11032). Various narcotic drugs are listed in Schedules II (Health & Saf. Code, § 11055, subd. (b)), III (Health & Saf. Code, § 11056, subd. (e)), IV (Health & Saf. Code, § 11057, subd. (c)), and V (Health & Saf. Code, § 11058, subd. (c)).

¹¹ Having a valid prescription authorizes its owner to possess and use the prescribed drug and constitutes a defense to a criminal charge of possession. (*People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [“Health and Safety Code section 11350 does not prohibit possession of a controlled substance with a prescription.”]; see *People v. Mower* (2002) 28 Cal.4th 457, 479; Health & Saf. Code, § 11362.5, subd. (d) [Compassionate Use Act].)

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 ([Health & Saf. Code,] §§ 11350-11352, 11357-11360, 11377-11379), such a requirement has been implied by the courts.” (*People v. Coria* (1999) 21 Cal.4th 868, 878.) “The essential elements of unlawful possession of a controlled substance are ‘dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character.’ ” (*People v. Martin* (2001) 25 Cal.4th 1180, 1184.) “Although the possessor’s knowledge of the presence of the controlled substance and its nature as a restricted dangerous drug must be shown, no further showing of a subjective mental state is required.” (*Id.* at pp. 1184-1185.)

One difficulty with applying *Kim* in this context is that probation condition 16 does not simply prohibit possession of controlled substances as defined in any particular Health and Safety Code section, or even as defined by the Controlled Substances Act. The first sentence of the condition states: “You are not to consume or possess any intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana.”

While the Controlled Substances Act may define the terms “narcotics,” “controlled substances,” and “marijuana” (cf. *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [“controlled substance” in Penal Code, § 286, subd. (i) is a term of art referring to the Act]), the Act does not either define or proscribe possession or consumption of other items listed in condition 16. While a number of controlled substances may be said to cause an intoxicated state, the Act provides no definition or description of

“intoxicant.”¹² Neither is alcohol listed as a controlled substance in the Controlled Substances Act. Indeed, some possession and consumption of alcohol is legal in our society, though it is highly regulated and subject to significant state control. (E.g., Veh. Code, § 23152, subd. (a) [“It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.”]; Pen. Code, § 647, subd. (f) [it is a misdemeanor to be “found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way”].) The possession and consumption by those under the age of 21 is even more regulated. (E.g., Bus. & Prof. Code, § 25658, subd. (b) [it is a misdemeanor if an underage person “consumes any alcoholic beverage in any on-sale premises”]; Bus. & Prof. Code, § 25662 [it is a misdemeanor for an underage person to have “any alcoholic beverage in his or her possession” in a place open to the public]; (Veh. Code, § 23224 [it is a misdemeanor for an underage motor vehicle passenger to “knowingly¹³ possess or have under that person’s control any alcoholic beverage,” subject to certain exceptions].)

Finding meanings for “poisons” and other “illegal drugs” may require reference to yet another statutory scheme, the Pharmacy Law (Bus. & Prof. Code, §§ 4000-4426),

¹² Indeed, the only definition of “intoxicant” we find in a current California statute is “‘Intoxicant’ means any form of alcohol, drug, or combination thereof.” (Harb. & Nav. Code, § 651, subd. (j).)

¹³ “Knowingly” was an express element of the precursor of Vehicle Code section 23224 when it was enacted in 1965. (Stats. 1965, ch. 1622, § 2, p. 3772; former Veh. Code, § 32123.5; *People v. Superior Court (Fuller)* (1971) 14 Cal.App.3d 935, 945-946.)

which defines “drug,” “dangerous drug,” and “poison.”¹⁴ With one apparent exception (Bus. & Prof. Code, § 4324 [“possession” of “any drugs secured by a forged prescription” is alternatively a felony or misdemeanor]), these statutes provide no criminal sanctions. Since 1984, the criminal sanctions for such conduct have been located in the Controlled Substances Act. (See *People v. Alexander* (1986) 178 Cal.App.3d 1250, 1254-1258.)¹⁵

¹⁴ Business and Professions Code section 4025 states: “‘Drug’ means any of the following:

“(a) Articles recognized in the official United States Pharmacopoeia, official National Formulary or official Homeopathic Pharmacopoeia of the United States, or any supplement of any of them.

“(b) Articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals.

“(c) Articles (other than food) intended to affect the structure or any function of the body of humans or other animals.

“(d) Articles intended for use as a component of any article specified in subdivision (a), (b), or (c).”

Health and Safety Code section 11014 of the Controlled Substances Act contains a similar definition. “‘Drug’ means (a) substances recognized as drugs in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; (b) substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals; (c) substances (other than food) intended to affect the structure or any function of the body of man or animals; and (d) substances intended for use as a component of any article specified in subdivision (a), (b), or (c) of this section. It does not include devices or their components, parts, or accessories.”

A “dangerous drug” is one that is “unsafe for self-use in humans.” (Bus. & Prof. Code, § 4022.)

“‘Poison’ as used in this chapter refers to a category of hazardous substances defined in Section 108125 of the Health and Safety Code.” (Bus. & Prof. Code, § 4240, subd. (c).) A former statutory definition of “poison” was held unconstitutionally vague in *People v. Barben* (1979) 88 Cal.App.3d 215, 221-222.

¹⁵ We asked the parties whether as a matter of law all prescription medications are controlled substances. The Attorney General claims that the answer is “yes,” according
(Continued)

Condition 16 does not explicitly reference any of these statutory schemes prohibiting possession, nor does its language closely parallel that of any statute that includes an implicit mental element. Instead, we have shown that the first sentence of condition 16, to the extent it derives from any statute, is a composite of at least three different sets of statutes. Only one of those statutory schemes does the Attorney General assert to include an explicit mental element.

It is even more of a challenge to find a statutory underpinning for prohibiting consumption of a listed item, other than an underage person consuming alcohol in an on-sale location. (Bus. & Prof. Code, § 25658, subd. (b).) It is more common to find a statute prohibiting either using or being under the influence of a substance than its consumption. (E.g., Health & Saf. Code, § 11550, subd. (a) [“No person shall use, or be under the influence of any controlled substance”]; Pen. Code, § 1203.1ab [for certain convictions, probation condition shall specify “that the defendant shall not use or be under the influence of any controlled substance”]; Pen. Code, § 381 [a person “who knowingly and with the intent to do so is under the influence of toluene or any material containing toluene, or any combination of hydrocarbons is guilty of a misdemeanor.”]; Pen. Code, § 381b [a person “who knowingly and with the intent to do so is under the influence of nitrous oxide or any material containing nitrous oxide is guilty of a misdemeanor.”])

to the definition of “prescription” in the Uniformed Controlled Substances Act. (Health & Saf. Code, § 11027, subd. (a).) Naturally, a definition in that Act would pertain to controlled substances. Minor is correct that an actual comparison of the lists of controlled substances in the Controlled Substances Act with drugs recognized in the official United States Pharmacopoeia and the official Homeopathic Pharmacopoeia of the United States is a daunting task and one we would not expect trial courts, probationers, and their attorneys to undertake.

Whatever the statutory correspondence between controlled substances and prescription medications, the challenged probation conditions make a clear distinction, authorizing possession and consumption of prescription medications when directed by a medical doctor.

The Attorney General makes no argument that there is an implicit mental state involved in consuming. We will not extend *Kim* to a probation condition that neither references, parallels, nor obviously implements a statute containing an implicit knowledge requirement. Given the inclusive scope of the first sentence of probation condition 16, we cannot derive an implicit knowledge condition from related statutes, and we conclude that it therefore must be modified. For the same reasons, we reach the same conclusion about condition 17, restricting the possession and consumption of prescription medications, and the fifth sentence of condition 16, restricting the consumption of over the counter medications. We are unaware of a statute that makes consumption of over the counter medications unlawful, and it should not violate this probation condition unless done knowingly.

The remaining challenged sentence in condition 16 states: “Do not inhale or attempt to inhale or consume any substance of any type or nature, used as paint, glue, plant material, or any aerosol product.”

We asked the parties whether this condition implements any criminal statutes. They agree that the statute most closely related to this condition appears to be Penal Code section 381, which prohibits both possessing substances containing toluene and its analogs, including glue and paint, “with the intent to breathe, inhale or ingest for the purpose of causing a condition of intoxication, elation, euphoria, dizziness, stupefaction, or dulling of the senses or for the purpose of, in any manner, changing, distorting or disturbing the audio, visual, or mental processes” and being under their influence “knowingly and with the intent to do so.”¹⁶ In much the same language, Penal Code

¹⁶ In full, Penal Code section 381 states: “(a) Any person who possesses toluene or any substance or material containing toluene, including, but not limited to, glue, cement, dope, paint thinner, paint and any combination of hydrocarbons, either alone or in combination with any substance or material including but not limited to paint, paint thinner, shellac thinner, and solvents, with the intent to breathe, inhale or ingest for the purpose of causing a condition of intoxication, elation, euphoria, dizziness, stupefaction, or dulling of the senses or for the purpose of, in any manner, changing, distorting or

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section 381b prohibits possessing and being under the influence of nitrous oxide.¹⁷ The Attorney General suggests that this condition also implicates statutes prohibiting the consumption of alcohol, without explaining how alcohol is “used as paint, glue, plant material, or any aerosol product.”

A comparison of the probation condition with Penal Code sections 381 and 381b reveals two stark differences. The probation condition is not limited to sources of toluene or nitrous oxide, but includes “any aerosol product” and “plant material.”¹⁸ More significantly, the statutes contain express mental elements. Possessing toluene and nitrous oxide includes a specific intent, namely the intent to become intoxicated or otherwise mentally altered. Likewise, being under their influence is a crime only if done

disturbing the audio, visual, or mental processes, or who knowingly and with the intent to do so is under the influence of toluene or any material containing toluene, or any combination of hydrocarbons is guilty of a misdemeanor.

“(b) Any person who possesses any substance or material, which the State Department of Health Services has determined by regulations adopted pursuant to the Administrative Procedures Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code) has toxic qualities similar to toluene, with the intent to breathe, inhale, or ingest for the purpose of causing a condition of intoxication, elation, euphoria, dizziness, excitement, irrational behavior, exhilaration, satisfaction, stupefaction, or dulling of the senses or for the purpose of, in any manner, changing, distorting or disturbing the audio, visual, or mental processes, or who is under the influence of such substance or material is guilty of a misdemeanor.”

¹⁷ Penal Code section 381b states in part: “Any person who possesses nitrous oxide or any substance containing nitrous oxide, with the intent to breathe, inhale, or ingest for the purpose of causing a condition of intoxication, elation, euphoria, dizziness, stupefaction, or dulling of the senses or for the purpose of, in any manner, changing, distorting, or disturbing the audio, visual, or mental processes, or who knowingly and with the intent to do so is under the influence of nitrous oxide or any material containing nitrous oxide is guilty of a misdemeanor.”

¹⁸ In response to our inquiry, the parties were likewise unable to find a statutory definition of “plant material.” The Attorney General cites Health and Safety Code section 11018, which defines “marijuana” as “all parts of the plant *Cannabis sativa* L.” The word “material” does not appear in that statute, let alone the phrase “plant material.”

“knowingly and with the intent to do so.” “The United States Supreme Court has emphasized the value of a specific intent requirement in mitigating potential vagueness of a statute. ([Citation], citing *Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 499; *Dennis v. United States* (1951) 341 U.S. 494, 515 [‘[A] claim of guilelessness ill becomes those with evil intent.’]; *Screws v. United States* [(1945)] 325 U.S. 91, 104 [‘“A mind intent upon willful evasion is inconsistent with surprised innocence.”’].)” (*In re M.S.* (1995) 10 Cal.4th 698, 718.)

In response to our question, the Attorney General acknowledges that “the apparent objective of this condition is to prevent minors from intending to become intoxicated by intentionally breathing or inhaling prohibited intoxicants,” and not to prohibit their merely breathing. Unlike the statutes, however, this specific intent is not mentioned in the probation condition. As the statutes contain express mental elements, we cannot find the same mental state implicit in the challenged condition.

Arguably, to the extent that the probation condition prohibits “the attempt to inhale or consume” a listed substance, it does include a mental state. “An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.” (Pen. Code, § 21a.) The Attorney General argues that as to this part of the probation condition, “knowledge is implied in the volitional act.”

While minor originally argued that adding “knowingly” would clarify this condition, minor’s supplemental brief asserts that it should also be modified to preclude only inhalation and attempted consumption with an intent to become intoxicated. We agree. We do not believe that merely adding the word “knowingly” to this sentence would import the specific intent to either cause intoxication or to otherwise subject oneself to the item’s influence. “Knowing” inhalation might distinguish the proscribed behavior from the normal nonvolitional breathing that is a function of the autonomic nervous system, but it does not necessarily limit the scope of the prohibited behavior to acting with the intent to become intoxicated. The same is true of attempted consumption of “plant material.” Unless further limited, this probation condition could substantially

interfere with minor's breathing and eating. Merely adding "knowingly" would not cure the overbreadth of this condition.

In view of its multiple deficiencies and uncertain scope, we believe that this sentence must be stricken from probation condition 16 as unconstitutionally vague and overbroad. The trial court is free to clarify the intended reach of this sentence to avoid the defects we have identified if there is a petition to modify the probation conditions.

6. DISPOSITION

We order the trial court to make the following modifications to the challenged written probation conditions.

"11. You are not to associate with any individuals known to be disapproved of by your parents. You shall not associate/communicate with any individuals identified to you by your Probation Officer as a threat to your successful completion of Probation. You are not to associate with anyone known to you to be a member of any gang as directed by your Probation Officer. You are not to associate with any individuals known by you to be on Probation or Parole (adult or juvenile).

"12. You shall not be in any locations known by you as gang gathering areas, areas where gang members or associates are congregating or areas specified by your Probation Officer as involving gang related activity, nor shall you participate in any gang activity."

"16. You are not to knowingly consume or possess any intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana. You are not to be with anyone known to you who is using or possessing any illegal intoxicants, narcotics or drugs. You are not to inject anything into your body unless directed to do so by a medical doctor. You are not to knowingly consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package.

"17. You are not to knowingly possess or consume any prescription medications unless directed to do so by a medical doctor. You must notify any treating physician of your substance abuse problems before accepting any medication. You must notify your

Probation Officer within 24 hours of receiving any prescription medications and identify all medications.”

“29. You shall not knowingly be on any school campus or within a one block radius of any school campus unless enrolled or with prior administrative permission from school authorities.”

As so modified, the judgment is affirmed.

WALSH, J.*

I CONCUR:

BAMATTRE-MANOUKIAN, ACTING P.J.

I CONCUR IN THE JUDGMENT ONLY:

MIHARA, J.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.