No. 19-120741-A

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**IN THE**
**COURT OF APPEALS OF THE**
**STATE OF KANSAS**

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**STATE OF KANSAS**
Plaintiff-Appellee

vs.

**ZIYABH HAYES**
Defendant-Appellant

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# BRIEF OF APPELLANT

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Appeal from the District Court of Sedgwick County, Kansas
Honorable Deborah Hernandez Mitchell, Judge
District Court Case No. 18 CR 03030

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Oral Argument Requested: 30 Minutes.

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## I. NATURE OF THE CASE

This is a criminal appeal. Mr. Hayes was charged with criminal possession of a weapon and pled guilty to that offense in Sedgwick County District Court. He was found guilty and was sentenced to probation. As a requirement of his probation, the Court imposed Sedgwick County's probation conditions for gang members on Mr. Hayes. Mr. Hayes is appealing these conditions on constitutional grounds.

## II. STATEMENT OF THE ISSUE

Several of Sedgwick County's standard probation conditions for gang members are constitutionally invalid both on their face and as applied to Mr. Hayes because they are impermissibly overbroad and vague in violation of the First and Fourteenth Amendments, and bear no reasonable relationship to the crime for which Mr. Hayes was convicted; a crime that had nothing to do with gang activity.

## III. STATEMENT OF THE FACTS

Ziyabh Hayes is twenty-three years old. On December 21, 2018, Mr. Hayes pled guilty to one count of criminal possession of a weapon by a convicted felon which is a severity level 8, non-person, non-drug felony. (R. I, 20). On January 29, 2019, Mr. Hayes was sentenced to probation for this offense. At sentencing, the prosecutor requested the imposition of gang conditions (R. II, 3), which are a set of 16 standardized probation conditions drafted by Sedgwick County and imposed on all people presumed or documented to have a gang affiliation. (R. I, 17).

Mr. Hayes' conviction resulted from a routine traffic stop when he failed to signal a right turn at least 100 feet before reaching a stop sign on October 27, 2018. (R. V, 1). When Mr. Hayes was taken into custody, he was found with a handgun near his person. (R. V, 1). Officer Joshua R. Hutchins of the Wichita Police Department (WPD) prepared a detailed affidavit describing Mr. Hayes' arrest and its circumstances. Notably, nothing in the report suggests that Mr. Hayes was in any way involved in gang-related criminal activity at the time of his arrest. (R. V, 1). He was pulled over for a traffic violation, alone, and there is no other information indicating he was in the process of carrying out another crime, participating in any gang activity, or bore any indicia of gang membership. (R. V, 1).

Nonetheless on the day of his arrest, Mr. Hayes was entered into the Wichita Police Department's gang database— for the first time— as a "Piru Blood" gang member. (R. V, 2). The WPD's affidavit makes the bare assertion that, apparently as of Mr. Hayes' arrest on October 28, 2018, he satisfied the statutory requirements to be considered a criminal street gang member.

In the absence of self-identification as belonging to a gang, K.S.A. 21-6313(b)(2) requires law enforcement to demonstrate that an individual satisfies *three or more* of the following factors:

> (A) is identified as a criminal street gang member by a parent or guardian;
> (B) is identified as a criminal street gang member by a state, county or city law enforcement officer or correctional officer or documented reliable informant;
> (C) is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information;
> (D) frequents a particular criminal street gang's area;
> (E) adopts such gang's style of dress, color, use of hand signs or tattoos;
> (F) associates with known criminal street gang members;

(G) has been arrested more than once in the company of identified criminal street gang members for offenses which are consistent with usual criminal street gang activity;
(H) is identified as a criminal street gang member by physical evidence including, but not limited to, photographs or other documentation;
(I) has been stopped in the company of known criminal street gang members two or more times; or
(J) has participated in or undergone activities self-identified or identified by a reliable informant as a criminal street gang initiation ritual.

K.S.A. 21-6313(b)(2).

None of these factors were satisfied based on the circumstances of Mr. Hayes' most recent arrest. (R. V, 1). Despite the clear absence of any documented relationship between the circumstances underlying Mr. Hayes' conviction and any supposed gang activity, the sentencing court imposed the standardized gang conditions as a part of Mr. Hayes' probation requirements. (R. II, 7). These conditions included the following:

1. I shall not associate with anyone affiliated with any gang.
2. I shall not knowingly associate with anyone having a conviction for the sale or possession of drugs.
3. I shall not knowingly be around any person who is currently on pretrial supervision, probation, and parole or has active criminal case. […]
5. I will not attend any court hearing unless I am required by a judge or attorney to attend.
6. I will not wear any clothing with the primary colors being RED.
7. I shall not acquire any more tattoos than I currently have.
8. I will have a curfew of 9:00 P.M. to 5:00 A.M. and I must be in my home during these times unless permission is otherwise granted.
9. I shall not be around any school and/or school parking lot without obtaining prior permission. […]
11. I shall not visit or have telephone conversations with any person who is in the jail or other correctional facilities without permission.
12. I shall not ride in a car with more than one (1) person unless those people are my parents, siblings or my children.
13. I shall not engage in throwing or showing gang hand signs.
14. I shall not be in possession of any sharp instruments, bats, or anything that could be considered a weapon.
15. I shall not associate with family member or extended family who is a documented gang member. (Exception would be immediate family only, i.e. brother, sister parents - NO cousins.)

16. I shall not share or post via any electronic means including but not limited to text message, picture or video message, picture or video message via cell phone, public or social networking websites such as Facebook, Myspace, Twitter or any other internet use, statements having any relationship to […] any gang whatsoever, nor shall I share or post via any electronic means any photos or images that can in any way be associated with […] any gang.

(R. I, 17).

The sentencing court confirmed that Mr. Hayes had a "right to appeal this sentence." (R. II, 8). The plea agreement Mr. Hayes signed also preserved his right to appeal his sentence. (R. I, 2, 15) ("I know I have a limited right to appeal the sentence that is imposed").

## IV. ARGUMENTS AND AUTHORITIES

### A. Sedgwick County's standard probation conditions for gang members are constitutionally invalid both on their face and as applied to Mr. Hayes because they are impermissibly overbroad and vague in violation of the First and Fourteenth Amendments, and bear no reasonable relationship to the crime for which Mr. Hayes was convicted.

1. Standard of Review

Probation conditions that restrict constitutional rights must bear a reasonable relationship to the rehabilitative goals of probation, the protection of the public, and the nature of the offense. *See State v. Evans*, 14 Kan. App. 2d 591, 592, 796 P.2d 178 (Kan. App. 1990). Whether conditions of probation violate a defendant's constitutional rights is a question of constitutional law and this Court's review is unlimited and *de novo*. *State v. Bennett*, 288 Kan. 86, 91, 200 P.3d 455 (Kan. 2009) (applying unlimited review to invalidate a probation condition as unconstitutional); *see also State v. Gile*, Case No. 108,279, 2014 Kan. App. Unpub. LEXIS 209, at*25 (Kan. App. Mar. 28, 2014) (same) (as

this is an unpublished case, a copy of the case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04).

2. Jurisdiction/Standing

This court has jurisdiction to decide a challenge by a defendant to the specific conditions of probation imposed on him by the sentencing court. *State v. Schad*, 41 Kan. App. 2d 805, 206 P.3d 22, Syl. ¶ 5 (Kan. App. 2009). Furthermore, a criminal defendant has standing to mount a facial challenge for constitutional overbreadth or vagueness on behalf of all potentially impacted defendants. *Wichita v. Wallace*, 246 Kan. 253, 268, 788 P.2d 270 (Kan. 1990).

That Mr. Hayes agreed to the gang conditions as part of his plea agreement does not limit his ability to challenge the constitutionality of the district court's imposition of those conditions at sentencing. *See State v. Bennett*, 39 Kan. App. 2d 890, 891, 185 P.3d 320 (Kan. App. 2008) (noting that "defendant is appealing his sentence that was the result of an agreement between the State and the defendant, which the sentencing court approved on the record," but refusing to accept the State's waiver argument because no language in the plea agreement provided for waiver of the right to appeal his sentence). Although Mr. Hayes' plea agreement precludes a challenge to his conviction, the face of the agreement expressly allows for Mr. Hayes to challenge the sentence ultimately imposed and never forces him to waive that right. (R. I, 2, 15). Furthermore, the Kansas Supreme Court has found that although presumptive sentences may not ordinarily be challenged on appeal, "[T]his court has allowed an appeal from a presumptive sentence where the appeal was a challenge to an imposed condition of probation." *Bennett*, 39 Kan. App. 2d at 891. Mr. Hayes' standing to challenge the constitutionality of his sentence notwithstanding his plea

agreement is also fully consistent with this Court's declaration that even "invited error cannot trump a defendant's constitutional rights." *State v. Dean*, Case No. 116,207, 2018 Kan. App. Unpub. LEXIS 91, at *7 (Kan. App. Feb. 9, 2018) (internal citations and quotations omitted) (as this is an unpublished case, a copy of the case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04).

The constitutional issue argued in this appeal was not raised below before the district court. Nonetheless, it is properly before this Court because it: (1) involves exclusively questions of law based on admitted facts in the record and would be determinative of the case; and (2) is necessary to serve the ends of justice and to prevent clear intrusion on Mr. Hayes' First and Fourteenth Amendment rights. *See State v. Hawkins*, 285 Kan. 842, 845, 176 P.3d 174 (Kan. 2008) (noting the three judicial exceptions to the general rule that issues must be raised in the district court in order to be preserved on appeal).

As noted, the Kansas Supreme Court has made clear that whether probation conditions are constitutional is purely a question of law. *Bennett*, 288 Kan. at 91 ("This is a question of law over which we have unlimited review"); *Gile*, 2014 Kan. App. Unpub. LEXIS 209, at*25 ("Whether a condition of probation imposed by a district court violates a defendant's constitutional rights is a question of law over which an appellate court exercises unlimited review"). Because this is the only issue raised on appeal, a resolution of this question of law will be fully determinative of Mr. Hayes' sentence. Furthermore, the only facts necessary to this appeal are already admitted in the record. They consist of the underlying facts surrounding Mr. Hayes' conviction presented by the State, the fact of the conviction, and the probation conditions assigned. Kansas appellate courts have found that satisfaction of this first exception alone is enough to permit consideration of an appeal.

*See*, *e.g.*, *State v. Ellmaker*, 289 Kan. 1132, 1153, 221 P.3d 1105 (Kan. 2009) ("[M]atters of statutory interpretation are questions of law [...] [T]he issue is determinative of Ellmaker's [...] sentence. Consequently, we determine the first exception is satisfied and the issue may be raised for the first time on appeal"); *see also State v. Bryant*, 40 Kan. App. 2d 308, 314-15, 191 P.3d 350 (Kan. App. 2008) (reviewing a departure sentencing on appeal despite a lack of challenge below because the issue of whether a departure sentence is appropriate is a question of law over which the appellate court has unlimited review); *State v. Stuart*, Case No. 118,818, 2018 Kan. App. Unpub. LEXIS 939, at *4 (Kan. App. Dec. 7, 2018) (in a case related to revocation of probation, "[Defendant] claims our court may consider this matter on appeal because this issue presents a question of law arising on proved or admitted facts and it is finally determinative of the case. Despite [defendant]'s lack of objection in the district court, we will consider his argument for the first time on appeal"); *State v. Brooks*, Case No. 109,245, 2013 Kan. App. Unpub. LEXIS 797, at *5 (Kan. App. Aug. 23, 2013) (finding that although defendant did not preserve an issue for appeal during her sentencing hearing, her appeal should be considered because it involved only questions of law and admitted facts) (as these are unpublished cases, a copy of the cases are attached to this brief in compliance with Kansas Supreme Court Rule 7.04).

As described more fully throughout the remainder of this brief, the issues raised in this appeal seek to vindicate Mr. Hayes' First Amendment expressive and associational rights, Fourteenth Amendment due process rights, and related fundamental rights. The Kansas Supreme Court regularly holds that the potential violation of these fundamental rights is sufficient to entertain challenges on appeal that were not raised below. *See*, *e.g.*, *State v. Foster*, 290 Kan. 696, 702, 233 P.3d 265 (Kan. 2010) (taking up a new issue on

appeal and noting "[Defendant's] challenge raises due process concerns [...] we believe this warrants review"); *State v. Poulton*, 286 Kan. 1, 5, 179 P.3d 1145 (Kan. 2008) (reversing a panel of the Court of Appeals and concluding "[t]he second exception applies because the suppression of evidence based on the violation of [defendant]'s rights under the Fourth Amendment to the United States Constitution implicates a fundamental right"); *State v. Nguyen*, 285 Kan. 418, 433, 172 P.3d 1165 (Kan. 2007) (considering a multiplicity challenge to defendant's sentencing not raised at the district court and noting that issues "may be raised for the first time on appeal in order to serve the ends of justice and prevent a denial of fundamental rights") (internal citation omitted); *State v. Puckett*, 230 Kan. 596, 598, 640 P.2d 1198 (Kan. 1982) (affirming a decision of the Court of Appeals to take on an appellate issue that was not raised in the district court because it implicated procedural due process rights); *see also State v. Frye*, Case No. 101,292, 2010, Kan. App. Unpub. LEXIS 137, at *3 (Kan. App. Feb. 26, 2010) ("We are convinced the denial of the right to a jury trial falls within the second exception of the general rule that new legal theories may not be asserted for the first time on appeal") (as this is an unpublished case, a copy of the case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04), *aff'd State v. Frye*, 294 Kan. 364, 277 P.3d 1091, Syl. ¶ 2 (Kan. 2012) (stating that "the general preservation rule, which prevents the assertion of a new legal theory for the first time on appeal, is a prudential rule, rather than a jurisdictional requirement").

Because the first two exceptions to the preservation rule apply to Mr. Hayes' appeal, this Court should return a decision on the merits notwithstanding the fact that he did not raise these issues below. It is also important to note that many of the probation conditions Mr. Hayes seeks to challenge apply not only to him, but to many people who have been

identified as belonging to a gang and who are currently serving on probation in Sedgwick County. To the extent any of these probation conditions are unconstitutional, the rights of each of these individuals is likely being violated and review from this Court would therefore also serve the ends of justice. *See Poulton*, 286 Kan. at 5.

3. Probation Overview

Kansas offers probation as an alternative to incarceration for more minor crimes for which incarceration is deemed to be generally unnecessary. *See 2018 Sentencing Ranges,* KANSAS SENTENCING COMMISSION (2018), *available at* https://sentencing.ks.gov/docs/default-source/2018-forms/2018-nondrug-and-drug-grid-quick-reference-guide.pdf?sfvrsn=6ed4fd3f_0. But alarmingly, 40.6% (2,655/6,542) of new prison admissions in Fiscal Year 2018 were the result of people violating technical probation rules as opposed to the actual commission of any new criminal offenses. *See Fiscal Year 2018 Annual Report*, KANSAS DEPARTMENT OF CORRECTION (2018), at 7, *available at* https://www.doc.ks.gov/publications/Reports/2018. That means that 32.7% of all people on probation in 2018 (2,655/~8,122) had their probation revoked for a rule violation. *Id.* at 7, 45. Parole and probation violations together comprised a staggering 69.1% of all prison admissions in 2018. *Id.* at 7. The reality then is that more than two-thirds of people who are sent to prison in the State of Kansas are sent there for behavior that is not criminal and would be inconsequential for anyone not under community supervision.

The consequences of this system of over-supervision are well-documented. *See Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, THE PEW CHARITABLE TRUSTS (Sept. 2018), at 12 & nn. 17-18, *available at* https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marke

d_by_high_stakes_missed_opportunities_pew.pdf ("Research has consistently shown that over-supervising low-risk individuals can do more harm than good by disrupting supportive elements of their lives, such as family, education, and employment, and mixing them in with people who are higher-risk").

Over-supervision also runs contrary to the purposes of probation in this State. *See Schad*, 41 Kan. App. 2d at 805, Syl. ¶ 7 ("The primary purpose of probation is the successful rehabilitation of the offender."). The Kansas Department of Correction has recently acknowledged and sought out help to rectify this serious problem. *See* Julia A. Laskorunsky, Ebony L. Ruhland, and Edward E. Rhine, *Kansas Prisoner Review Board: Parole and Post-Release Supervision and Revocation Technical Assistance Report*, ROBINA INST. OF CRIM. LAW & CRIM. JUST. (2018), at 23, *available at* https://robinainstitute.umn.edu/publications/kansas-prisoner-review-board-parole-and-post-release-supervision-and-revocation (reporting that the Prisoner Review Board believes that "standard conditions are too burdensome and create unnecessary opportunities for violations to occur").

Restrictive conditions of probation such as those addressed in this appeal therefore present significant prudential problems beyond their constitutional infirmities. They are needlessly restrictive and actually hinder rehabilitative success when they are aggressively enforced.

4. Controlling Law

a. First Amendment Speech and Associational Rights.

Probation conditions cannot restrict First Amendment rights to freedom of speech and association unless those conditions are reasonably necessary to protect the public and rehabilitate the defendant. *Johnson v. Owens*, 612 Fed. Appx. 707, 712-14 (5th Cir. 2015); *U.S. v. Schoenherr*, 504 Fed. Appx. 663, 670 (10th Cir. 2012); *U.S. v. Neeley*, 420 Fed. App'x. 228, 231-32 (4th Cir. 2011); *U.S. v. Nixon*, 664 F.3d 624, 627 (6th Cir. 2011); *U.S. v. Johnson*, 626 F.3d 1085, 1090 (9th Cir. 2010). Federal courts have invalidated conditions of probation that restrict a defendant's freedom of speech and association when those conditions do not bear a reasonable relationship to the person's offense or these goals of probation. *Owens*, 612 Fed. Appx. At 712-14; *Johnson*, 626 F.3d at 1090; *U.S. v. Loy*, 237 F.3d 251, 264 (3d Cir. 2001).

The reasonableness of a given probation condition under the First Amendment is closely tied to the doctrine of overbreadth. If a probation condition limits significantly more conduct than necessary, or has a chilling effect on constitutionally protected conduct, it cannot be reasonably related to the state's compelling interests and must be invalidated. *See Owens*, 612 Fed. Appx. at 714; *Johnson*, 626 F.3d at 1091; *Loy*, 237 F.3d at 264-65, 266-67. The demand for a connection between the breadth of a probation condition and the state's legitimate interest in rehabilitation and public safety prevents a situation where "every conceivable deprivation of rights would be constitutionally permissible." *Owens*, 612 Fed. Appx. at 714.

Kansas courts have consistently recognized that a district court has no authority to impose conditions of probation that would restrict a probationer's constitutional rights unless the restrictions bear a "reasonable relationship to the rehabilitative goals of probation, the protection of the public, and the nature of the offense." *Gile*, 2014 Kan. App. Unpub. LEXIS 209, at*28; *see Bennett*, 288 Kan. at 92; *Evans*, 14 Kan. App. 2d at 592.

Kansas appellate courts have applied this rule to invalidate probation conditions that impose too great a burden on probationers' First Amendment and other constitutional rights, or that are insufficiently related to the state's interest in preventing crime and reducing recidivism. *See, e.g.*, *Bennett*, 288 Kan. at 99 (invalidating a probation condition allowing unlimited, suspicionless searches as violating the Fourth Amendment); *Evans*, 14 Kan. App. 2d at 593 (determining that a condition of probation requiring attendance at church was unconstitutional because it was not sufficiently related to public safety or the probationer's offense); *State v. Mosburg*, 13 Kan. App. 2d 257, 258, 768 P.2d 313 (Kan. App. 1989) (invalidating a condition of probation mandating that probationer refrain from becoming pregnant on the basis that it was an undue intrusion on a constitutional right and not clearly related to the state's interest in probationer's rehabilitation); *Gile*, 2014 Kan. App. Unpub. LEXIS 209, at*31-32 (finding a probation condition unconstitutional under the First Amendment and Section 11 of the Kansas Constitution Bill or Rights because it was not "reasonably related" to probationer's crime); *State v. Cupp*, Case No. 68,532, 1993 Kan. App. Unpub. LEXIS 387, at *6 (Kan. App. Sept. 24, 1993) (invalidating a probation condition prohibiting family contact where the condition was overbroad and not reasonably related to the probationer's crime) (as this is an unpublished case, a copy of the case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04).

b. Due Process and Fair Notice.

Probation conditions that do not give fair notice of the conduct they prohibit are unconstitutionally vague under the Fifth and Fourteenth Amendments and are therefore invalid. *Johnson*, 626 F.3d at 1090; *Loy*, 237 F.3d at 264; *U.S. v Gallo*, 20 F.3d 7, 12 (1st Cir. 1994); *see also LoFranco v. United States Parole Comm'n*, 986 F. Supp. 796, 810 (S.D.N.Y. 1996). This is because probation conditions, just like criminal statutes, must be written so that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *U.S. v. Llantada*, 815 F.3d 679, 683 (10th Cir. 2016) (internal quotations and citations omitted).

Under the Kansas Supreme Court's two-prong inquiry for unconstitutional vagueness, here applied to probation conditions, a probation condition is unconstitutional if either: (1) an ordinary person would not have fair notice of what is prohibited; or (2) the condition cannot protect against arbitrary enforcement. *See State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003 (Kan. 2015). To the extent a particular enactment is vague, but there is a reasonable way to construe it that would be constitutionally valid, Kansas courts have a duty to do so. 302 Kan. at 318. However, an enactment must be struck down if there is no reasonable construction or modification that would make it constitutional. *City of Lincoln Center v. Farmway Co-Op, Inc.*, 298 Kan. 540, 549, 316 P.3d 707 (Kan. 2013).

5. Argument

Several of the probation conditions assigned to Mr. Hayes violate First Amendment speech and associational rights as well as Fourteenth Amendment due process rights because they are constitutionally overbroad and vague. Mr. Hayes asserts both facial and

as applied challenges to these probation conditions. We discuss each condition and its constitutional infirmities in turn below. It should be noted that many of the probation conditions challenged in this appeal are also regularly assigned as pretrial release conditions prior to conviction. To the extent the Court facially invalidates any of the conditions challenged in this appeal as to probationers, these same conditions are patently invalid as applied to pre-trial releasees. This is because the permissible degree of intrusion on a person's constitutional rights is directly tied to where the person falls on the continuum of criminal punishment. *See Owens*, 612 Fed. Appx. at 711 ("Parole is on the continuum of state-imposed punishments, falling between imprisonment and probation […] It follows that parolees' First Amendment Rights may be restricted to a degree intermediate to those of prisoners and probationers") (internal quotations omitted). Surely the rights restrictions that are impermissible for those convicted of a crime are equally impermissible for those who still benefit from the presumption of innocence.

a. Condition 1: I shall not associate with anyone affiliated with any gang.

*i. Facial Challenge*

This condition is both vague on its face and facially overbroad. Federal courts have spoken with clarity on the permissibility of such probation conditions under constitutional law. In *U.S. v. Johnson*, the 9th Circuit invalidated a supervised release condition preventing the supervised releasee from associating with "anyone associated with the Rollin' 30s gang" on the basis that the restriction was overbroad and vague to the extent that people who associate with gangs are not necessarily connected to criminal activity and the prohibition could be read to limit interactions with any family members, ministers, or friends of people who are gang members. 626 F.3d at 1090. Precisely the same is true for

this condition imposed on Mr. Hayes. By placing a prohibition on associating with gang affiliates, as opposed to gang members themselves, the state would seem to prevent probationers from interacting with law-abiding individuals who do not participate in gangs including the family members, friends, or co-workers of gang members. It is unclear how this severe limitation on a probationer's First Amendment associational rights is reasonably related to any state goals of preventing criminal activity. *Id.* at 1091 ("[t]here is a considerable difference . . . between forbidding a defendant from associating with gang members and precluding him from associating with *persons who associate with* gang members"); *cf. Schoenherr*, 504 Fed. Appx. at 672 (distinguishing the *Johnson* case to affirm a supervised release condition because it only prevented the releasee from association specifically with the *members* of "the Iron Horsemen or allied gangs").

Furthermore, this condition imposed on Mr. Hayes is even broader than the condition invalidated by the 9th Circuit. The condition in *Johnson* prevented the supervised releasee from associating with gang members and gang associates *from one specific gang* of which they were a member. *See Johnson*, 626 F.3d at 1090-9. The condition at issue would prevent probationers from associating with any person who is somehow affiliated with any gang, whether or not the probationer has any connection to that gang. Thus, the sweep of this limitation on associational rights is overly broad on its face in violation of the First Amendment, and vague to the extent that an affiliate could be anyone with some connection to a gang member.

Finally, unlike other gang probation conditions that the district court assigned to Mr. Hayes, this condition would appear to impose strict liability. Where other probation conditions clarify that a probationer can only violate the condition if they *knowingly* fail to

meet its requirements, this condition contains no such clarification. To the extent that probationers would be held responsible for associating with gang affiliates without their knowledge, the condition fails to give fair notice to probationers and is unconstitutionally vague on its face. *Bollinger*, 302 Kan. at 318; *see U.S. v. Jimenez*, 642 Fed. Appx. 906, 908-09 (10th Cir. 2016) (noting that associational limitations will not be read to impose strict liability, and that a knowledge requirement will be construed into the condition); *Llantada*, 815 F.3d at 684 (reading a probation condition to prevent probationer from interacting only with people whom he *knows* to be felons); *cf. U.S. v. Thompson*, 777 F.3d 368, 380 (7th Cir. 2015) (refusing to imply any requirement to save a probation condition, because the lack of specificity in the original condition still deters people and fails to properly inform them of their obligations).

Given the multiple constitutional infirmities from which this condition suffers, it should be invalidated on its face and cannot be limited or construed as constitutional.

*ii. As-Applied Challenge*

Mr. Hayes' conviction for criminal possession of a weapon had nothing to do with gang participation. He was arrested alone after a routine traffic stop. Neither the elements of his crime nor the underlying circumstances of his conviction included speaking or socializing with gang members, people affiliated with gang members, or indeed anybody else at all. A condition barring him from associating with anyone remotely affiliated with a gang is therefore wholly unrelated to his offense. This condition is "not reasonably related to the crime of conviction" in violation of constitutional requirements. *Gile*, 2014 Kan. App. Unpub. LEXIS 209, at *30-*31; *see Evans*, 14 Kan. App. 2d at 592 ("restrictions on constitutional rights "must bear a reasonable relationship to […] the nature of the offense");

*Cupp*, 1993 Kan. App. Unpub. LEXIS 387, at *6; *see also State v. Aikman*, Case No. 82,621, 1999 Kan. App. Unpub. LEXIS 790, at *5 (Kan. App. Dec. 23, 1999) ("Membership in a gang, the indication of admiration for the principles of such an organization, or the simple fancying of gang insignia is not per se admissible evidence unless it bears a relationship to the issues before the sentencing court. The fact a group is viewed as (and may be) obnoxious, is not necessarily sufficient to make the evidence probative of a relevant issue."); *State v. Stripling*, Case No. E2015-01554-CCA-R3-CD, 2016 WL 3462134, at *21 (Tenn. Crim. App. June 16, 2016) (striking down a sentencing enhancer for gang members as unconstitutional where the statute did not require the underlying crime to be gang-related, because it "advance[d] only the objective of harsher treatment of criminal offenders who also happen to be members of a criminal gang") (internal quotations and citations omitted) (as these are unpublished cases, a copy of the cases are attached to this brief in compliance with Kansas Supreme Court Rule 7.04).

The non-association condition is particularly problematic in light of the fact that gang membership is squarely protected by First Amendment associational rights. *See U.S. v. Acosta*, 110 F. Supp. 2d 918, 931 (E.D. Wis. 2000) ("Gang membership is not a crime. The right of free association is impinged upon even by laws prohibiting gang membership plus certain kinds of conduct, for example, gang membership plus loitering.) (*citing City of Chicago v. Morales*, 527 U.S. 41, 53 (1999)); *Enoch v. State*, 95 So. 3d 344, 358 (Fla. 1st DCA 2012) (invalidating a criminal provision that prevented people from expressing gang membership and participation on the Internet because this was protected speech and the law was overbroad).

If this condition, bearing no relationship to Mr. Hayes' offense and yet substantially infringing on his established First Amendment associational rights, is constitutionally valid, then it is difficult to imagine any probationary restriction that would not be upheld. *See Owens*, 612 Fed. Appx. at 714 ("Simply stating that these restrictions relate to Texas's protection and reintegration goals does not make it so, in the absence of logical or factual connections.")

b. Condition 2: I shall not knowingly associate with anyone having a conviction for the sale or possession of drugs.

*i. Facial Challenge*

The condition barring association with those who have a conviction for the sale or possession of drugs is facially unconstitutional because it provides no express exemption to the rule for close family members of the probationer. Other gang conditions, meanwhile, explicitly indicate that intimate family associations are not subject to the rule. (R. I, 17).

Substantive due process protects even a probationer's intimate family relationships from government intrusion unless the government can articulate a specific justification for the restriction. *See Cupp*, 1993 Kan. App. Unpub. LEXIS 387, at *3-*4, *6 (where the Court of Appeals struck down a probation condition preventing defendant from contacting his wife and son because the condition was insufficiently related to defendant's crime against his daughter); *see also Tremper v. Ulster County Dep't of Prob.*, 160 F. Supp. 2d 352, 358 (N.D.N.Y. 2001) ("While ordinarily a general prohibition on consorting with disreputable persons may be related to a probationer's rehabilitation, something more indicative that a specific association [...] would tend to lead toward criminality is required when the prohibition infringes the fundamental right to family life"). In potentially

restricting family relationships without a specific, proper inquiry into whether forcing non-association with family members is reasonably related to a person's crime of conviction, the condition is invalid. The lack of an exception is particularly problematic given that gang conditions are indiscriminately applied to gang members without any exploration into the appropriateness of those conditions to a particular defendant. Because Kansas incarcerates black people at seven times the rate of white people, the unconstitutional burdens of a condition that bars association with family members with a criminal history also falls disproportionately on black communities. *See State-by-State Data*, THE SENTENCING PROJECT, *available at* https://www.sentencingproject.org/the-facts/#map.

*ii. As-Applied Challenge*

Mr. Hayes' crime did not involve the sale or possession of drugs, or gang activity at all, and so limiting his First Amendment associational rights by preventing him from interacting with people who have been convicted specifically of a drug crime is unrelated to his offense or his rehabilitation for that offense and is therefore unconstitutional. *See Evans*, 14 Kan. App. 2d at 592; *Gile*, 2014 Kan. App. Unpub. LEXIS 209, at *30-*31. The imposition of this non-association condition would indeed only be appropriate for those who have been convicted of a drug-related crime.

c. Condition 3: I shall not knowingly be around any person who is currently on pre-trial supervision, probation, parole or has an active criminal case.

This condition is facially invalid because it does not include an exception for close family members and is therefore violative of substantive due process, as described above in Subsection b(i).

d. Condition 5: I will not attend any court hearing unless I am required by a judge or attorney to attend.

*i. Facial Challenge*

The U.S. Supreme Court has held that one of the First Amendment's most fundamental safeguards is the right of access to the courts—both as a litigant and as a member of the public. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) ("[T]he right [of the public] to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attends such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated") (internal citations and quotations omitted). Indeed, the Supreme Court has declared that restrictions on this fundamental right which apply against a particular class of individuals trigger heightened means-ends scrutiny. *Woodford v. Ngo*, 548 U.S. 81, 122 (2006) ("Moreover, because access to the courts is a fundamental right, [...] government-drawn classifications that impose substantial burdens on the capacity of a group of citizens to exercise that right require searching judicial examination under the Equal Protection Clause") (internal citations omitted). To the extent this court exclusion condition is only imposed on gang members as a class of individuals, it is then facially overbroad. *See People v. Leon*, 181 Cal. App. 4th 943, 953 (Cal. App. 2010) ("the condition was neither limited to protecting specific witnesses or parties nor confined to trials involving gang members and, as written, it was so broad that it prevented activities unrelated to future criminality [...] there can be a variety of legitimate reasons for being at

a court proceeding, other than to intimidate or threaten a party or witness."); *see also Bennett*, 288 Kan. at 91 ("Kansas courts have consistently recognized [] that a district court does not have discretion to impose probationary conditions that violate a probationer's constitutional rights, absent a compelling state interest").

*ii. As-Applied Challenge*

Mr. Hayes' arrest for criminal possession of a weapon after a traffic stop did not involve gang members or any other gang-related activity criminal or otherwise—let alone threatening witnesses or making threats against people attempting to access the courts. As applied to Mr. Hayes, therefore, the court exclusion condition is overbroad and wholly unrelated to his crime of conviction. Because access to and observation in the courts is a fundamental right, the lack of any reasonable relationship between this condition and Mr. Hayes' offense violates the First Amendment. *Evans*, 14 Kan. App. 2d at 592; *Gile*, 2014 Kan. App. Unpub. LEXIS 209, at *30-*31; *see also People v. Perez*, 176 Cal. App. 4th 380, 383-385 (Cal. App. 2009) ("Perez claims that a 500-foot restriction on access to courts is not reasonably related to his crime. His offense did not involve threatening witnesses or interfering with court proceedings. Because of Perez's affiliation with gangs, the Attorney General justifies the restriction to prevent future gang-related criminality. [...] [A] condition of probation which prohibits conduct which is not only legal, but protected by the Constitution and not related to the crimes of which a defendant has been convicted, nor to future criminality, cannot stand") (*citing Dallas Assn. etc. v. Dallas County Hospital Dist.*, 670 F.2d 629, 632 (5th Cir. 1982) ("The First Amendment is violated by unreasonable and unequal restrictions on access to public property").

e. Condition 6: I will not wear any clothing with the primary colors being RED.

Mr. Hayes does not make a facial challenge against this probation condition. However, that is only because the condition was modified to be specific to Mr. Hayes and the Piru Blood gang he is purportedly a part of. This is usually not the case. Ordinarily, the condition reads: "I will not wear any clothing with the primary colors being any gang color/combination." This version of the condition regularly applies not only to probationers but even to pre-trial releasees. (For example, see a copy of the pre-trial bond conditions imposed on the defendant in 2018-CR-001291 in Sedgwick County and filed on June 6, 2018).

To the extent the broader condition remains in use, it is clearly facially invalid. That is because as written, the condition prevents people on probation from wearing primary colors that *any* gang has adopted in its color scheme. But the primary colors gangs adopt are the same colors featured in all clothing (blue, red, green, purple, black, white, etc, and combinations thereof). Effectively, this condition tells a probationer that they cannot wear colors at all without risking a prison term. It is unclear how such a condition would be a reasonable restriction of any probationer's First Amendment rights, no matter the offense, and the ordinary restriction is therefore facially overbroad. *See People v. Lopez*, 66 Cal. App. 4th 615, 627-29 (Cal. App. 1998) (probation condition overbroad to the extent that it prohibited probationer from displaying indicia, including clothes, that he did not know were affiliated with a particular gang). The condition is likewise vague on its face because it cannot be applied in a way that is non-arbitrary: any probationer assigned this condition is likely violating the condition at any time of day whether they realize it or not, and a probationer has no fair notice about how to comply with the condition. *Id.* at 634; *People*

*v. M.M.*, Case No. No. 1-18-0334, 2018 Ill. App. Unpub. LEXIS 1801, at *24-*25 (Ill. App. Oct. 11, 2018) (as this is an unpublished case, a copy of the case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04); *cf. Johnson*, 626 F.3d at 1090-91 (only upholding a prohibition on wearing gang indicia related to one specific gang the defendant admitted belonging to).

At the very least, the standard condition must be modified to include a scienter requirement: the probationer must *knowingly* wear clothing with colors or color combinations that belong to a particular gang before there is a violation of the condition. *See Lopez*, 66 Cal. App. 4th at 629; *M.M.*, 2018 Ill. App. Unpub. LEXIS 1801, at *29-*30. But this alteration is clearly not sufficient. Because all colors have significance for one gang or another, any probationer who is at all familiar with the colors of different gangs would be in violation of the condition for wearing those colors— even without demonstrating membership in those gangs, and without any apparent connection to those gangs. If a probationer in Kansas subject to the standard condition knows that a gang in California wears blue, has no connection to that gang, and wishes to wear blue, preventing him from doing so is unrelated to the state's goals of promoting public safety and supporting rehabilitation and needlessly burdens his First Amendment expressive rights. A knowledgeable probationer could easily exhaust all color options for their clothes if they identify a gang each color belongs to somewhere in the world. The condition therefore remains impermissibly overbroad on its face and vague and should be put out of use.

District courts should only consider assigning a probation condition that identifies the color combinations of the *particular* gangs with which a probationer is associated, so that the probationers know what they can and cannot wear and can exercise their expressive

rights to make other clothing choices as they see fit without the fear of being sent to prison. *Johnson*, 626 F.3d at 1090-91.

But as applied to Mr. Hayes, a restriction on the colors he wears absent any sufficient connection between those colors, gang activity, and the crime he was convicted of, is an unconstitutional infringement of his expressive and liberty interests. Nothing in the record indicates that Mr. Hayes was displaying any indicia of gang activity at the time of his arrest, including any garb having the color red or related to gang membership, nor was the conviction tied to gang activity or Mr. Hayes' participation in a gang. Clothing choices, including the colors one chooses to wear, are constitutionally protected and fundamentally tied to American notions of liberty. *See Stephenson v. Davenport Community Sch. Dist.*, 110 F.3d 1303, 1307 (8th Cir. 1997) (recognizing that a school policy banning gang symbols implicated plaintiff's liberty interest in choosing her own personal appearance); *Rathert v. Village of Peotone*, 903 F.2d 510, 514 (7th Cir. 1990) ("choice of appearance is an element of liberty") (internal quotations and citations omitted); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367 (11th Cir. 1987) (identifying a liberty interest in personal dress); *see also Lesser v. Neosho County Comm. College*, 741 F. Supp. 854, 861 (D. Kan. 1990) ("courts have assumed that there is a liberty interest in personal appearance").

Given the constitutional dimensions of Mr. Hayes' choice of clothing, and the lack of any nexus between his appearance, gang membership, and his underlying crime, this condition is unconstitutional as applied to him. *See Mosburg*, 13 Kan. App. 2d at 258-259 (invalidating a condition of probation that infringed on due process liberty and privacy interests because it was an undue constitutional intrusion and the condition lacked any clear

relationship to the defendant's crime); *Cupp*, 1993 Kan. App. Unpub. LEXIS 387, at *6 (same).

f. Condition 7: I shall not acquire any more tattoos than I currently have.

*i. Facial Challenge*

This categorical ban on tattoos is facially overbroad and impermissible. The ban applies to all tattoos and not just those tattoos that have gang significance. Tattoo art is a medium that can communicate an unlimited number of ideas, statements, images, and designs and is expressive activity fully protected by the First Amendment. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010). The state has no legitimate interest in categorically preventing an adult probationer from using tattoo art as an expressive medium. Tattoo art is not unlawful for adults and is not per se related to criminal activity, and there is therefore no reasonable basis for a ban of this sweep. *Cf. In re Victor L.*, 182 Cal. App. 4th 902, 927 (Cal. App. 2010) (noting that the state can prevent minors from getting tattoos of any kind *only* because the restriction is content neutral and the state has a legitimate interest in protecting children that can logically extend to preventing permanent skin disfigurement before the age of majority).

Furthermore, the State cannot justify a categorical ban on tattoos merely because it is easier to enforce a "no-tattoo" rule rather than a "no gang-related tattoo" rule. It is patently unconstitutional to close off an entire medium of First Amendment protected expression for the sole purpose of preventing a much smaller subset of conduct. By that token, "every conceivable deprivation of rights would be constitutionally permissible." *Owens*, 612 Fed. Appx. at 714.

*ii. As-Applied Challenge*

The no-tattoo condition as applied to Mr. Hayes is illogically overbroad given that his crime had nothing to do with obtaining or exhibiting tattoos. But even if the no-tattoo condition applied only to gang tattoos, which it does not, the condition would be invalid as applied to Mr. Hayes. As previously described above, gang membership and expressions of gang membership are protected by the First Amendment. *Acosta*, 110 F. Supp. 2d at 931; *Enoch*, 95 So. 3d at 358. Gang tattoos are included in the ambit of this protection. Because Mr. Hayes' crime was wholly unrelated to gang activity, there is no reasonable nexus between his crime of conviction and a limitation on his ability to obtain a gang tattoo. *See Gile*, 2014 Kan. App. Unpub. LEXIS 209, at *30-*31.

g. <u>Condition 8: I will have a curfew of 9:00PM to 5:00AM and I must be in my home during these times unless permission is otherwise granted.</u>

Mr. Hayes makes a constitutional challenge to this condition as applied to him. It bears repeating that a condition of probation is improper if it: "(1) has no reasonable relationship to the crime of which the offender was convicted; (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." *State v. Lumley*, 267 Kan. 4, 14, 977 P.2d 914 (Kan. 1999) (*citing People v. Lent*, 15 Cal. 3d 481, 486 (Cal. 1975)). The Kansas Supreme Court adopted this test from the California Supreme Court's decision in *Lent*. Under *Lent*, recent California courts have scrutinized curfew conditions and refused to uphold them where the State has no particularized, defensible position for why the condition satisfies the three-pronged constitutional test:

> First, the curfew condition bears no relationship to the offenses Nassetta was convicted of. Neither possession of cocaine for sale nor driving under the influence requires the offense be committed at night. The mere fact that Nassetta was pulled over at night does not demonstrate a relationship between the curfew condition and the offenses he committed, and the Attorney General does not argue otherwise. Second, it is undisputed that it is not a crime for an adult to be outside between 10:00 p.m. and 6:00 a.m. Having concluded the answer to the first two questions is "no," we consider the third question, whether the curfew condition is reasonably related to preventing future criminality. […] We agree with Nassetta that there is no basis on this record to conclude a curfew is reasonably related to preventing him from driving under the influence. He could be out at night as a pedestrian, a passenger in a car, or on public transportation and pose no risk of committing a DUI. Nothing in the record suggests Nassetta is more likely to use drugs at night or is more likely to drive while under the influence at night.

*People v. Nassetta*, 3 Cal. App. 5th 699, 703-04 (Cal. App. 2016).

The same analysis is well applied to Mr. Hayes. The offense of criminal possession of a weapon does not require the offense to be committed at night, and so there is no relationship between the crime of conviction and a curfew provision even though Mr. Hayes was pulled over at night. Second, it is clear that it is not a crime for Mr. Hayes to be outside the home between 9:00PM and 5:00AM. Third, nothing in the record indicates that preventing Mr. Hayes from being outside at night will prevent him from possessing a weapon unlawfully. Even if Mr. Hayes were housebound, there would be no guarantee he could not criminally possess a weapon.

Conversely, Mr. Hayes could be outside at night to work, meet loved ones and friends, walk outside, or engage in any other number of activities that would not pose any additional risk of him being in criminal possession of a weapon. In fact, Mr. Hayes is interested in supplementing his construction work job with a job in the service industry that would end at 10:00PM. As it stands, he would not be able to take that job unless he got express approval from a probation officer. Requiring the discretionary approval of a

probation officer to do something that Mr. Hayes should have the right to do, is unrelated to his offense, and is consistent with his rehabilitation, is inappropriate. *See Leon*, 181 Cal. App. 4th at 954 ("While the trial court might expect the probation officer to routinely grant permission to defendant […] unless defendant appeared to have an unlawful purpose, a gang-related purpose, or some other purpose related to future criminality, the probation condition does not provide this standard for granting or withholding approval").

If the State's sole claim in support of a curfew is that "gang crime happens at night," that is plainly insufficient. First, one can query whether that unsupported assertion is true. Further, Mr. Hayes' crime was not gang-related. A curfew, meanwhile, implicates significant constitutional liberty interests and First Amendment protected activity. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (acknowledging a constitutional right to freedom of movement and noting the First Amendment implications of a loitering statute); *see also Ramos v. Town of Vernon*, 353 F.3d 171, 172 (2d Cir. 2003) (striking down a curfew provision and noting that "Th[e] right to free movement is a vital component of life in an open society, both for juveniles and adults"); *Nunez v. City of San Diego*, 114 F.3d 935, 944-45 (9th Cir. 1997) (recognizing that a curfew implicated the fundamental right to free movement, triggered strict scrutiny, and was invalid because it was not narrowly tailored to serve the state's interests). The baseless restriction of Mr. Hayes' right of movement makes this curfew unconstitutional. *Bennett*, 288 Kan. at 91 ("a district court does not have discretion to impose probationary conditions that violate a probationer's constitutional rights, absent a compelling state interest"); *Evans*, 14 Kan. App. 2d at 592 ("restrictions on constitutional rights "must bear a reasonable relationship to […] the nature of the offense").

h. <u>Condition 9: I shall not be around any school and/or school parking lot without obtaining prior permission.</u>

*i. Facial Challenge*

This condition is unconstitutionally vague on its face because it fails to give the probationer a specific distance or measure of how far they should stay away from a school or school parking lot. Probationers are left to guess whether they can be 1000 feet from a school, 2000 feet, or 10,000 feet away. Law enforcement officers are similarly empowered to determine for themselves what the permissible distance is in an arbitrary manner. One officer may arrest someone for a probation violation for being 2000 feet from a school, while another officer might arrest someone for being 5000 feet from a school. The lack of fair notice and the potential arbitrariness of the enforcement is sufficient to invalidate the condition. *Bollinger*, 302 Kan. at 318; *cf. U.S. v. Bird*, 124 F.3d 667, 684 (5th Cir. 1997) (affirming condition that required defendant to stay 1000 feet from abortion clinics where defendant had been convicted of violating Freedom of Access to Clinic Entrances Act).

*ii. As-Applied Challenge*

Mr. Hayes' crime did not occur near a school. Nothing about his crime relates to a school. The school buffer condition is rooted in notions of where gang activity is likely to occur, with no actual connection to the reality of Mr. Hayes' offense or its underlying circumstances—a crime that has as much connection to schools as it does to gang activity. None. Such rank and unsupported speculation, even if masked in the guise of public safety, is too nebulous to justify an intrusion on Mr. Hayes' otherwise perfectly lawful conduct. Claims that conditions of probation are tied to rehabilitation must still be calibrated to the crime for which rehabilitation is sought. There must exist a "reasonable relationship to the rehabilitative goals of probation, the protection of the public, *and the nature of the offense*."

*Gile*, 2014 Kan. App. Unpub. LEXIS 209, at*28 (emphasis added). At least as far as public schools are concerned, there is also a First Amendment aspect to groundless government-imposed exclusions. *See Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972) ("we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public"); *Dallas County Hospital Dist.*, 670 F.2d at 632 ("The First Amendment is violated by unreasonable and unequal restrictions on access to public property"). Once again, Mr. Hayes' right to movement is restricted without justification. *See Ramos*, 353 F.3d at 172 ("Th[e] right to free movement is a vital component of life in an open society").

The school buffer condition also presents particular difficulties for Mr. Hayes as the parent of a school-aged child. Mr. Hayes now cannot participate in a wide variety of school-related activities or even pick up his son without prior permission—which can be denied without justification. *See Leon*, 181 Cal. App. 4th at 954.

i. Condition 11: I shall not visit or have telephone conversations with any person who is in the jail or other correctional facilities without permission.

This condition is facially invalid because it does not include an exception for close family members and is therefore violative of substantive due process, as described above in Subsection b(i). Nor is the condition saved merely because a probationer can ask for permission to see or speak to family members. That permission can be denied or withheld without any justification under the current condition, and so is not protective of the right to family association. *See Leon*, 181 Cal. App. 4th at 954 ("the probation condition does not provide this standard for granting or withholding approval").

j. Condition 12: I shall not ride in a car with more than one (1) person unless those people are my parents, siblings or my children.

This restriction is overbroad as applied to Mr. Hayes— and would indeed be overbroad as applied against anyone whose crime was not specifically related to driving and/or having several people in a car. Mr. Hayes' crime of conviction was for criminal possession of a weapon. None of the elements of that offense require that the offense occur at or near a vehicle. Indeed, the crime of criminal possession can occur anywhere and any time where someone convicted of a felony is carrying a weapon. A condition prohibiting access to a vehicle is therefore unrelated to Mr. Hayes' criminal offense. It is true that the underlying circumstances of Mr. Hayes' conviction reveal that he was in a vehicle prior to his arrest. But it is *particularly* odd to assign him a probation condition allowing him to drive, and yet to limit the number of individuals who can be in his car. Such a condition bears absolutely no reasonable relationship to his offense.

The only apparent reason for this condition is the State's assumption that gang activity is likely to occur with multiple people in vehicles, and that Mr. Hayes is purportedly in a gang. Were that sufficient to justify the condition—without any nexus between the crime and gang activity— there would be no limit to its application. We could expect anyone on the gang list to have their ability to drive a car with others suspended for any offense from a traffic ticket to personal marijuana possession, to violations of the tax code. *Cf. Stripling*, 2016 WL 3462134, at *21 (allowing such a result would "advance only the objective of harsher treatment of criminal offenders who also happen to be members of a criminal gang" in violation of constitutional requirements) (internal quotations and citations omitted); *see also Aikman*, 1999 Kan. App. Unpub. LEXIS 790, at *5

("Membership in a gang, […] is not per se admissible evidence unless it bears a relationship to the issues before the sentencing court."). For these reasons, the condition is overly broad as applied to Mr. Hayes and is not reasonably related to the state's rehabilitation and public safety goals. *See Evans*, 14 Kan. App. 2d at 592.

The probation condition at issue here has only been reviewed by a Kansas appellate court once before. *State v. Larios-Alba*, Case No. 98,448, 2008 Kan. App. Unpub. LEXIS 1053 (Kan. App. Nov. 21, 2008) (as this is an unpublished case, a copy of the case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04). There, this Court applied abuse of discretion as the standard of review for the constitutionality of probation conditions. *Id.* at *11. But one year later the Kansas Supreme Court expressly found that the appropriate standard of review for a constitutional challenge to a probation condition is unlimited *de novo* review. *See Bennett*, 288 Kan. at 91. Applying abuse of discretion, the court in *Larios-Alba* determined that a probation condition should be upheld if "reasonable persons could differ about the propriety of the [sentencing court's] decision" and found that the probationer had the burden of proving abuse of discretion in the restriction of his constitutionally protected rights. *Larios-Alba*, 2008 Kan. App. Unpub. LEXIS 1053, at *11-12. As the Supreme Court clarified in *Bennett*, the district court was not entitled to this deference on a constitutional question. 288 Kan. at 91. Following the Supreme Court's clarification on the appropriate standard of review, the Court of Appeals later reviewed a fully-briefed First Amendment challenge to a probation condition and correctly applied a *de novo* standard of review. *See Gile*, 2014 Kan. App. Unpub. LEXIS 209.

In *State v. Gile*, a defendant was convicted of blackmail for threatening to reveal a family's secrets. The district court assigned a probation condition preventing the defendant from communicating any information about the victim's family on the internet. *Gile*, 2014 Kan. App. Unpub. LEXIS 209, at *27. The court correctly held that it was a First Amendment violation to prevent the defendant from revealing his victims' secrets on the internet since it was not a crime to do so and was constitutionally protected activity. *Id.* at *31. The court noted that the condition prohibited more than just blackmail and threats, and proscribed a larger set of legitimate First Amendment speech in a way that was unreasonable. *Id.* Furthermore, the court found that preventing this constitutionally protected conduct did not advance the state's interests in deterring future criminal conduct. *Id.* The same is true for this probation condition as applied to Mr. Hayes. Where a probationer's crime is wholly unrelated to criminal use of an automobile with a group of people, there is simply no constitutionally reasonable relationship between the condition and the state's legitimate goals of probation.

Such a condition would be particularly difficult for Mr. Hayes given that he often must rely on carpooling to get to work and other engagements and is responsible not only for picking up his son and younger siblings when possible, but also his grandmother and other relatives, sometimes at the same time—which under the current condition would be a violation of his probation. Mr. Hayes' ability to go to work and participate in his family life are supportive of his rehabilitation and not counter to it, and yet the condition the district court imposed would cut against these opportunities to participate meaningfully in his home and community life. *Cf. Schad*, 41 Kan. App. 2d 805, Syl. ¶ 7 ("The primary purpose of probation is the successful rehabilitation of the offender").

k. Condition 13: I shall not engage in throwing or showing gang hand signs.

*i. Facial Challenge*

This probation condition can be violated unwittingly and is therefore unconstitutionally vague on its face because it does not give probationers a fair opportunity to regulate their conduct. *Lopez*, 66. Cal. App. 4th at 634. As such, a scienter requirement must be added. A probationer must *knowingly* engage in throwing or showing gang hand signs in order to have violated the condition. Furthermore, hand signs that particular gangs adopt tend to be ordinary hand signs and gestures that individuals use to express themselves. A blanket condition preventing a probationer from making or showing hand signs that they know belong to a particular gang, when the probationer has no connection to that gang and the sign therefore has no participational meaning, is an overbroad restriction on expressive conduct and not sufficiently related to the state's rehabilitative goals. *Cf. Johnson*, 626 F.3d at 1090-91 (only upholding a prohibition on wearing gang indicia because the prohibition specifically related to only one gang defendant was affiliated with and not to any gang) (*citing U.S. v. Soltero*, 510 F.3d 858, 866 (9th Cir. 2007)).

*ii. As-Applied Challenge*

This condition is invalid as applied to Mr. Hayes because his crime of conviction is unrelated to gang activity, and the condition unreasonably restricts his First Amendment expressive and association rights for the reasons explained in depth in Subsections a(ii) and f(ii) above.

l. <u>Condition 14: I shall not be in possession of any sharp instruments, bats, or anything that could be considered a weapon.</u>

This condition is unconstitutionally vague on its face and invites arbitrary enforcement. *See Bollinger*, 302 Kan. at 318. In addition to the specific set of items listed as not permissible, the condition includes a catchall preventing probationers from possessing: "anything that could be considered a weapon." The issue with this definition is that indeed anything can be considered a weapon, and so it does not define a set list of prohibited items at all. A pen could be considered a weapon, as could a slab of wood, or a nail clipper, or any object a law enforcement officer could imagine being used to inflict harm on someone else. These vagaries would subject a probationer to a prison term based on the imagination of law enforcement.

Given that Mr. Hayes is a construction worker (R. II, 5), he customarily uses spades for bricklaying, box cutters, and other common tools to do his work. The probation condition as drafted leaves significant ambiguity as to whether these tools are permissible for use during Mr. Hayes' probation.

Merely banning possession of "weapons," for example, would not suffer from the same infirmity. A weapon, both in common sense understanding and dictionary definition, is a thing *designed* to inflict bodily harm. *See* OXFORD ENGLISH DICTIONARY, *available at* https://en.oxforddictionaries.com/definition/weapon. This would necessarily include guns, certain kinds of knives, and other materials whose clear purpose is to inflict harm. But that is not what the condition states, and it is therefore facially invalid.

m. <u>Condition 15: I shall not associate with family member or extended family who is a documented gang member.</u>

*i. Facial Challenge*

As written, this condition holds probationers responsible for associating with documented gang members without requiring that probationers first *know* those individuals are documented gang members. Absent a knowledge requirement, the condition fails to give fair notice to probationers and is unconstitutionally vague. *Bollinger*, 302 Kan. at 318; *see Jimenez*, 642 Fed. Appx. at 908-09.

*ii. As-Applied Challenge*

The non-association condition is invalid as applied to Mr. Hayes because his crime of conviction is unrelated to gang activity, and the condition unreasonably restricts his First Amendment expressive and association rights for the reasons explained in depth in Subsections a(ii) and f(ii) above. Furthermore, the condition causes confusion in that it appears to conflict with Condition 1, which carries a much broader prohibition preventing Mr. Hayes from associating with not only gang members but also affiliates of any gang, whether documented or otherwise.

n. <u>Condition 16: I shall not share or post via any electronic means including but not limited to text message, picture or video message, picture or video message via cell phone, public or social networking websites such as Facebook, Myspace, Twitter or any other internet use, statements having any relationship to […] any gang whatsoever, nor shall I share or post via any electronic means any photos or images that can in any way be associated with […] any gang.</u>

*i. Facial Challenge*

Mr. Hayes asserts a facial challenge to this probation condition on the basis that it is unconstitutionally overbroad and vague, and therefore chills probationers' constitutionally protected expression and subjects probationers to arbitrary enforcement.

As discussed above, the 9th Circuit in *Johnson* struck down a supervised release condition that prohibited associating with gang members and gang associates from one specific gang of which the defendant was a member. *See Johnson*, 626 F.3d at 1090-9. The basis for that decision was that the broad sweep of the condition could limit constitutionally protected expression and interpersonal interactions that carried absolutely no risk of potential criminal activity. *Id.* The social media condition here goes further. It purports to block any online expression of any kind that relates in any way to *any gang*, and carries no requirement that a person even know that the content they are engaging with is gang-related. This is plainly overbroad. If a gang in New York adopts a gold ring as its symbol of choice, and a probationer in Kansas who has no affiliation with that gang wishes to share a picture of his gold ring on social media, preventing him from doing so is altogether unrelated to the State's goals of rehabilitation and public safety and unreasonably restricts his First Amendment rights. The point is hardly academic: gangs from across the country adopt every day, commonplace symbols to signify membership and individuals can bare indicia of gang membership without intending to communicate gang participation. *See Stephenson*, 110 F.3d at 1311 ("gang activity is not relegated to signs and symbols otherwise indecipherable to the uninitiated. In fact, gang symbols include common, seemingly benign jewelry, words and clothing"). It is for this reason that gang conditions should be limited to the specific gang a defendant is purportedly a part of. *See Johnson*, 626 F.3d at 1090-91 (allowing a release condition that prevented expressing membership in a particular gang, precisely because it was so limited).

But the social media condition goes further. It does not limit itself to conduct or statements online that communicate gang affiliation, and instead includes anything that

"can in any way be associated" with any gang. This would seem to prevent probationers from engaging with innocuous but frequent references to gang activity that occur in every day life and in pop culture, contemporary music and art, including hip hop, country, rock, as well as other genres. Posting a photograph with a Hell's Angels T-shirt, sharing a popular music video, or discussing a Fox News report about gang activity, would all seem to fall within the prohibition. This is clearly not the kind of conduct the State has any legitimate interest in suppressing, and yet the condition as drafted is likely to have a chilling effect on probationers' First Amendment expressive rights because it is massively over-inclusive on its face. *See Loy*, 237 F.3d at 267 (noting that the overbreadth of a condition preventing probationer from possessing pornography, without sufficiently defining that term, "chill[ed] his First Amendment rights in the process").

The social media condition is likewise unconstitutionally vague. First, the condition has no scienter requirement and therefore a probationer can violate the condition unwittingly by making a statement that they do not know could be associated with a gang. This violates Fourteenth Amendment Due Process notice requirements. *See M.M.*, 2018 Ill. App. Unpub. LEXIS 1801, at *24-*25. Second, even in the presence of a scienter requirement, the condition still gives no fair guidance to a probationer about what "can in any way be associated with" any gang. Social media bans in other states have been struck down for similar catch-all language that would empower law enforcement to make arbitrary re-arrests without offering any guidance on how a probationer could avoid re-incarceration under the condition. *See, e.g.*, *People v. Omar F.*, 89 N.E.3d 1023, 1038-39 (Ill. App. 2017) (invalidating a social media condition preventing the defendant from appearing in any social media posts with other gang members because the condition lacked

important exceptions and provided "no explanation as to what type of contact [...] no matter how innocuous, will result in a probation violation"); *People v. Tyreese J.*, Case No. 1-17-1072, 2017 Ill. App. Unpub. LEXIS 2234, at *23-*24 (Ill. App. Nov. 1, 2017) (eliminating a condition that stated the defendant's social media could not include "anything that looks like drugs," because it left too much discretion to law enforcement and "if the parameters are so vague, overboard, or general that a [probationer] could be inadvertently caught violating probation in a number of scenarios, including when conducting himself in a constitutionally protected manner, then the judicial process is not functioning as intended") (as this is an unpublished case, a copy of the case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04). The lack of adequate notice and the susceptibility to arbitrary enforcement are fatal to this condition under constitutional vagueness analysis. *See Bollinger*, 302 Kan. at 318.

*ii. As-Applied Challenge*

This condition is invalid as applied to Mr. Hayes because his crime of conviction is unrelated to gang activity, and the condition unreasonably restricts his First Amendment expressive and association rights for the reasons explained in depth in Subsections a(ii) and f(ii) above.

## V. CONCLUSION

For the foregoing reasons, Mr. Hayes requests that this Court invalidate the gang probation conditions assigned to him at sentencing both facially and as applied to him, and that the Court provide any other relief it deems just or proper.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Zal K. Shroff, do hereby certify that a true and correct copy of the above and foregoing Brief was electronically filed with the Court's electronic filing system and on this 12th day of March, 2019, and on this same day a copy of this document was emailed to Derek Schmidt, at ksagappealsoffice@ag.ks.gov, and Boyd Isherwood, Sedgwick County District Attorney at appeals@sedgwick.gov.

/s/ Zal K. Shroff
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