In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LOUIS LAMBERT MARTIN,

Defendant and Appellant.

Case No. S175356

Appellate District Division Two, Case No. E046579
San Bernardino County Superior Court, Case No. FSB803105
The Honorable John N. Martin, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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QUESTION PRESENTED[1]

Whether the rule set forth by this Court in *People v. Harvey* (1979) 25 Cal.3d 754, 758, applies to conditions of probation. (ABOM 2.)

INTRODUCTION

In *People v. Harvey, supra,* 25 Cal.3d 754, this Court held that a trial court may not consider facts that pertain solely to a charge that has been dismissed pursuant to a plea bargain to aggravate or enhance a defendant's sentence. (*Id.* at p. 758.) The concerns prohibiting an increase in punishment which arise in the context of determining an appropriate prison sentence are not implicated when imposing conditions of probation, however, because probation is not punishment. (See *People v. Howard* (1997) 16 Cal.4th 1081, 1092.)

Indeed, "[p]robation is granted to the end that a defendant may rehabilitate himself, make a responsible citizen out of himself and be obedient to the law." (*People v. Cortez* (1962) 199 Cal.App.2d 839, 843-844.) The primary goal of probation is to ensure the safety of the public through the enforcement of court-ordered conditions of probation. (Pen. Code, § 1202.7; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.)

> A condition of probation will not be held invalid unless it '(1) has no 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.'

(*People v. Lent* (1975) 15 Cal.3d 486.)

Application of the *Harvey* rule to otherwise valid conditions of probation would frustrate the goals of probation because it would prohibit

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[1] Due to this Court's summary grant of review on appellant's petition, the question presented is taken from appellant's petition for review. (Appellant's Pet. For Review, 2.)

the court from imposing any and all reasonable conditions it deems necessary to foster rehabilitation and to protect public safety. (Pen. Code, § 1203.1) It thus follows that the rule set forth in *Harvey* does not apply to probation conditions.

STATEMENT OF THE CASE

On August 7, 2008, pursuant to a plea agreement in San Bernardino County Superior Court, appellant, Louis Lambert Martin, pled guilty to resisting an executive officer (count 1; Pen. Code, § 69). In exchange, count 2, which charged appellant with committing corporal injury to his cohabitant and/or mother of his child (count 2; Pen. Code, § 273.5, subd. (a)), was to be dismissed at the time of sentencing. (CT 1-2, 6-10.)

On September 5, 2008, the trial court placed appellant on three years' probation with specified terms and conditions, including conditions requiring appellant to successfully complete a 52-week domestic violence batterers' program, pay $400 to the domestic violence fund, and pay $400 to a battered women's shelter. (CT 8-14.) Appellant stated that he understood and accepted the announced conditions of probation. (RT 41-42.)[2]

Appellant appealed, challenging the court's imposition of the domestic violence conditions. Within his sole contention on appeal,

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[2] Appellant initially objected to the court's imposition of the domestic violence conditions of probation. In response, the trial court stated it intended to impose the conditions and would set aside the plea if appellant refused to accept them. (RT 34, 36.) Appellant conferred with counsel and then indicated he was willing to accept the domestic violence terms. (RT 41-42.) Accordingly, appellant has waived this claim. Nevertheless, Respondent urges this Court to decide the matter on the merits, as the issue presented is of continuing importance to the criminal justice system. If this Court concludes that the *Harvey* rule applies to conditions of probation, however, appellant should not benefit from the ruling because he accepted the domestic violence conditions.

appellant argued the trial court erred by imposing the domestic violence conditions since the court dismissed the domestic violence count (count 2), and there was no *Harvey* waiver in the plea agreement. (AOB 7-14.) The Court of Appeal, Fourth Appellate District, Division Two, rejected appellant's contention in a published opinion and affirmed the judgment. (Slip opn. at 2.) The Court of Appeal held that *Harvey* does not apply to probation conditions. (Slip opn. at 4-6.) In so holding, the Court of Appeal expressly disagreed with *People v. Beagle* (2004) 125 Cal.App.4th 415, which held that *Harvey* applied to conditions of probation. In reaching this conclusion, the *Beagle* court explained that because the *Harvey* court "did not say" its rule "was limited only to increased prison terms," it saw "no basis for distinguishing conditions of probation from prison sentences." (Slip opn. at 5; see also *People v. Beagle, supra*, 125 Cal.App.4th at p. 421.)

Thereafter, appellant petitioned for review. On October 22, 2009, this Court granted appellant's petition for review to decide whether the rule set forth in *People v. Harvey, supra*, 25 Cal.3d 754, 758, applies to conditions of probation.

STATEMENT OF FACTS[3]

In July 2008, appellant lived with his girlfriend (the victim) in an apartment in San Bernardino. (PR 2-3.) On July 27, 2008, the victim called the police to report a domestic violence incident. Appellant left the apartment before the police arrived. However, when the officers spoke to the victim, she said appellant told her, "You're done, bitch," then struck her

[3] This factual statement is derived from the 13-page probation report, which is filed under separate cover, and is cited here as "PR." Although the factual basis for appellant's guilty to plea to count 1 was that on July 27, 2008, appellant resisted arrest by a police officer (RT 25), the additional facts set forth here are relevant to the argument.

in the face with his fist. Appellant also choked her. The victim had visible redness and swelling on her nose and cheek. She told the officers she was afraid of appellant and did not want him to return to the apartment. The victim also told the officers appellant had struck her several times in the past. (PR 2.)

Appellant returned to the apartment. As appellant walked up the staircase to his apartment, officers ordered him to stop. Appellant ignored the officers and opened the door to his apartment. (PR 2.) When an officer put his foot against the door to keep it open, appellant shut the door on the officer's foot and ankle, which caused the officer to fall on the ground. (PR 2-3.) The officers forced their way into the apartment, but appellant ran out the back door. The officers found appellant a short time later, hiding under a parked car. As appellant laid facedown, he fought with officers as they attempted to handcuff him. (PR 3.)

Appellant told police he initially fled his apartment after his girlfriend called the police because he did not want to go to jail. Appellant also said he closed the door on the officer's foot because he did not want to go to jail. Appellant admitted he grabbed his girlfriend by the neck and that he may have "accidentally" punched her in the face. (PR 3.)

ARGUMENT

I. ALTHOUGH THE RULE SET FORTH IN *HARVEY* PROHIBITS A TRIAL COURT FROM CONSIDERING FACTS RELATING TO A DISMISSED COUNT WHEN IMPOSING A PRISON SENTENCE AS A RESULT OF A PLEA AGREEMENT, THE *HARVEY* RULE DOES NOT LIMIT A TRIAL COURT'S ABILITY TO IMPOSE PROBATION CONDITIONS THAT ARE REASONABLY NECESSARY TO FOSTER A DEFENDANT'S REHABILITATION AND REFORMATION

Appellant ignores the primary goals of probation and urges this Court to follow the Court of Appeal's decision in *Beagle, supra,* 125 Cal.App.4th 415, 421, which is the only authority holding that the *Harvey* prohibition applies to limit otherwise valid conditions of probation, and thus prohibits a trial court from considering any dismissed count for purposes of imposing probation conditions. (ABOM 7-12.) *Beagle* was wrongly decided, however, because by analogizing conditions of probation to "adverse sentencing consequences" as discussed in *Harvey,* the *Beagle* court erroneously extended *Harvey* beyond its intended application and ignored the important distinctions between the imposition of a prison sentence and a grant of probation.

This Court should reject appellant's argument that the rule announced in *Harvey* applies an affirmative limit on the imposition of otherwise valid conditions of probation. First, this Court's decision in *Harvey* applied to the enhancement of the length of a prison sentence and made no reference to probation or conditions of probation. Thus, this Court was not called upon to determine whether the *Harvey* rule applied to the imposition of probation conditions. Second, *Harvey* cannot be read to extend to conditions of probation because probation conditions are not the "adverse sentencing consequences" which concerned this Court in *Harvey*. Indeed, to do so would undermine decisions of this Court holding that a probation condition is valid even if it has no relationship to the crime of which the

defendant was convicted as long as the condition is reasonably related to future criminality. (See *People v. Olguin* (2008) 45 Cal.4th 375, 380; *People v. Lent, supra,* 15 Cal.3d at p. 486.) Third, appellant's concern over the equity considerations underlying the *Harvey* rule fail to support his conclusion that *Harvey* applies to probation conditions, particularly on the facts of this case. (ABOM 10-12.)

A. The Policies And Goals Of Probation

The primary goal of probation is to ensure "the safety of the public . . . through the enforcement of court-ordered conditions of probation." (Pen. Code, § 1202.7.)[4] Probation is neither "punishment" (see § 15) nor a criminal "judgment" (see § 1445). Instead, probation is an act of clemency in lieu of punishment, and its primary purpose is rehabilitative in nature. (*People v. Howard, supra,* 16 Cal.4th at p. 1092; see also *People v. Mancebo* (2002) 27 Cal.4th 735, 754.)

Probation is a privilege and not a right. (*In re York* (1995) 9 Cal.4th 1133, 1150.) Probationers do not enjoy the absolute liberty to which other citizens are entitled. (*Griffin v. Wisconsin* (1987) 483 U.S. 868, 874 [107 S.Ct. 3164, 97 L.Ed.2d 709]; see also *Morrissey v. Brewer* (1972) 408 U.S. 471, 480 [92 S.Ct. 2593, 33 L.Ed.2d 484].) The court can regulate or prohibit noncriminal conduct in appropriate circumstances, and can even fashion conditions of probation that impinge on a defendant's constitutional rights. (*People v. Carbajal, supra,* 10 Cal.4th at pp. 1120-1121.) A person on probation is not entitled to the same rights as a person who is not on probation and forfeits his freedom to the extent necessary to successful

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[4] Unless otherwise indicated, all further statutory references are to the Penal Code.

rehabilitation and protection of the public. (*Porth v. Templar* (10th Cir. 1971) 453 F.2d 330, 334.)

> The defendant cannot be allowed to continue all of his old ways while on release from custody on probation; to allow him to do so undermines the probation system itself and makes a mockery of the law.

(*Ibid.*)

In the granting of probation, the Legislature has declared the primary considerations to be:

> the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant.

(§ 1202.7.) Thus, "[p]robation is granted to the end that a defendant may rehabilitate himself, make a responsible citizen out of himself and be obedient to the law." (*People v. Cortez, supra,* 199 Cal.App.2d at p. 844.)

> Section 1203.1 authorizes the trial court to impose any
>
> reasonable conditions, as it may determine are fitting and proper to the end that justice may be done. . . and generally and specifically for the reformation and rehabilitation of the probationer.

(§ 1203.1, subd. (j).) Trial courts have "'broad discretion to impose restrictive conditions to foster rehabilitation and to protect public safety.'" (*People v. Mason* (1971) 5 Cal.3d 759, 764[5]; see also *People v. Lent, supra,* 15 Cal.3d at p. 486.) A trial court's decision to impose certain terms of

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[5]*People v. Lent* disapproved of *People v. Mason* and *In re Bushman* (1970) 1 Cal.3d 767, to the extent that in *Mason* and *Bushman*, the three-factor test for invalidating a condition of probation — set forth below — was stated in the disjunctive rather than the conjunctive. (*People v. Lent*, *supra*, 15 Cal.3d at p. 486, fn.1.)

probation is reviewed for abuse of discretion. (*People v. Balestra* (1999) 76 Cal.App.4th 57, 63.) A trial court abuses its discretion when its determination is "arbitrary or capricious or '"exceeds the bounds of reason, all of the circumstances being considered."' [Citation.]" (*People v. Carbajal, supra,* 10 Cal.4th at p. 1121.) The trial court's discretion, although broad, nevertheless is not without limits: a condition of probation must serve a purpose specified in section 1203.1. (*People v. Lent, supra,* 15 Cal.3d at p. 486.)

"A condition of probation will not be held invalid unless it '(1) has no 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.'" (*People v. Lent, supra,* 15 Cal.3d at p. 486.) This test is stated in the conjunctive, meaning all three "negative" prongs must exist before a reviewing court can invalidate a probation term. (*Id.* at p. 486, fn. 1; *People v. Wardlow* (1991) 227 Cal.App.3d 360, 366.) As such, even if a probation condition has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to the goal of preventing future criminality. (*People v. Olguin, supra,* 45 Cal.4th at pp. 379-380.) "If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence." (*People v. Mason, supra,* 5 Cal.3d at p. 764 [internal quotation marks and citation omitted].)

In *People v. Osslo* (1958) 50 Cal.2d 75, the defendants were convicted of conspiracy to commit assault and assault by means of force likely to produce great bodily injury. (*Id.* at p. 82.) The trial court imposed a probation condition which prohibited the defendants from holding any union position or receiving payment from any union. (*People*

v. Osslo, *supra*, 50 Cal.2d 75 at p. 103.) Although the condition did not have a direct relationship to the crimes of which the defendants were convicted, this Court upheld the condition explaining:

> [Since] it could be and presumably was found that these defendants are guilty of crimes growing out of union activities, it appears not improper that restrictions be placed upon such activities as a condition of probation.

(*Id.* at p. 103; see also *People v. Balestra, supra,* 76 Cal.App.4th at p. 65; *People v. Lopez* (1998) 66 Cal.App.4th 615, 626 [evidence did not show present crime was gang related but inclusion of gang-based probationary conditions was proper because it promoted section 1203.1's goals of rehabilitation and public safety by forbidding conduct reasonably related to future criminality].)

B. This Court's Holding in *Harvey* And The Effect of the "*Harvey* Waiver"

In *People v. Harvey, supra*, 25 Cal.3d 754, the defendant pleaded guilty to two counts of robbery (counts 1, 2) in exchange for the dismissal of a third count of another, unrelated robbery (count 3). The trial court then used the facts underlying the dismissed count 3 to impose a four-year upper term on the robbery in count 1 pursuant to former rule 421(a) of the California Rules of Court.[6] (*Id.* at p. 757.) The People conceded that evidence regarding the dismissed robbery charged in count 3 could not properly be considered by the trial court as "facts relating to the crime" under rule 421(a) because the rule applied "only to those aggravating circumstances which underlie the offense or offenses for which sentence is imposed, and not to any uncharged or dismissed offenses." (*Id.* at p. 758.)

This Court determined that "under the circumstances," it would be "improper and unfair to permit the sentencing court to consider any of the

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[6] Former California Rules of Court, rule 421, is now rule 4.421.

facts underlying the dismissed count three for purposes of aggravating or enhancing defendant's sentence." (*Harvey, supra,* 25 Cal.3d at p. 758.) In concluding it was necessary to remand the matter for resentencing, this Court reasoned:

> Count three was dismissed in consideration of defendant's agreement to plead guilty to counts one and two. Implicit in such a plea bargain, we think, is the understanding (in the absence of any contrary agreement) that defendant will suffer no *adverse sentencing consequences* by reason of the facts underlying, and solely pertaining to, the dismissed count.

(*Id.* at pp. 758-759, italics added.)

To avoid the restriction set forth by this Court in *Harvey*, prosecutors often condition plea bargains upon the defendant agreeing that a sentencing court may consider the facts underlying dismissed counts when sentencing on the remainder of the counts. (*People v. Munoz* (2007) 155 Cal.App.4th 160, 167.) This agreement, known as a "*Harvey* waiver," permits a sentencing court to consider facts relating to unfiled or dismissed charges to aggravate or enhance a defendant's sentence. (*In re Carl N.* (2008) 160 Cal.App.4th 423, 427, fn. 3; *People v. Munoz, supra,* 155 Cal.App.4th at p. 167; *People v. Simon* (1983) 144 Cal.App.3d 761, 767; see also 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 273, p. 360.)

C. The *Beagle* Court Was Wrong To Conclude That *Harvey* Applies To Conditions of Probation

In *Beagle, supra,* 125 Cal.App.4th at page 421, the Fifth Appellate District Court held that the rule set forth in *Harvey* applied to probation conditions. The conclusion reached by the *Beagle* court, however, is based on an unreasonable extension of this Court's decision in *Harvey.* In addition, in concluding that probation conditions are "adverse sentencing consequences," like those in *Harvey*, the *Beagle* court ignored the

distinctions between enhancing a prison sentence and imposing a condition of probation.

In *Beagle,* the defendant agreed to plead guilty to possessing a weapon (§ 12020, subd. (a)) in exchange for dismissal of a drug charge. (*Beagle, supra,* 125 Cal.App.4th at pp. 417-418.) When the court imposed probation, it included drug-related probation conditions. (*Id.* at p. 418.) The defendant challenged the propriety of the drug-related conditions, claiming they were not related to the weapon possession offense. (*Id.* at p. 419.) The court of appeal determined that the trial court did not abuse its discretion because the drug-related conditions were related to the defendant's future criminality. (*Ibid.*) The defendant's plea agreement, however, did not include a *Harvey* waiver. On suggestion of the People, the *Beagle* court considered whether *Harvey* applied to conditions of probation. (*Beagle, supra,* 125 Cal.App.4th at pp. 419-420.)

The *Beagle* court recognized that in *Harvey* this Court explained that "a plea bargain involving the dismissal of a count contains an implied term that the defendant will suffer 'no adverse sentencing consequences' based on the facts underlying the dismissed count." (*Beagle, supra,* 125 Cal.App.4th at p. 421, citing *Harvey, supra*, 25 Cal.3d at p. 758.) Yet because, as argued by appellant (ABOM 7), this Court did not expressly limit the rule in *Harvey* to using facts from dismissed counts to increasing prison terms, and because it found no cases that distinguished probation conditions from prison sentences, the *Beagle* court saw "no basis for distinguishing conditions of probation from prison sentences in this context." (*Beagle, supra*, 125 Cal.App.4th at p. 421.) As a result, the *Beagle* court concluded that a "condition of probation adding a restriction on the defendant's conduct is an 'adverse sentencing consequence.'" (*Beagle, supra*, 125 Cal.App.4th at p. 421.) Thus, *Beagle* extended *Harvey* beyond its circumstances – an enhanced prison sentence – and concluded

that the *Harvey* rule applied to conditions of probation, and, as such, prevented a trial court from considering dismissed counts in fashioning appropriate probation conditions. (*Beagle, supra*, 125 Cal.App.4th at p. 423.)

Appellant urges this Court to follow *Beagle* and apply the *Harvey* rule to conditions of probation because nothing in *Harvey* suggests its holding should be limited to prison terms. (ABOM 7-9.) In *Harvey,* this Court had no opportunity to address the propriety of a court's consideration of facts that pertained to a dismissed count in the context of determining probation conditions. The Court's sole focus was on considering facts of a dismissed count to enhance a prison sentence. To conclude that *Harvey*, by its terms, applies to probation conditions would violate the axiom that "cases are not authority for propositions not considered therein." (*People v. Toro* (1989) 47 Cal.3d 966, 978, fn. 7; see also *People v. Baragan* (2004) 32 Cal.4th 236, 243.)

Further, as previously noted, the *Beagle* court concluded that probation conditions are "adverse sentencing consequences." Thus, that court reasoned, *Harvey* prohibited a court from considering facts concerning a dismissed count when fashioning probation conditions. (*Beagle, supra*, 125 Cal.App.4th at p. 421.) Appellant argues that because probation is a "sentencing option" under section 1203, subdivision (a), probation conditions are "sentencing consequences" like those in *Harvey*. (ABOM 7, 9-10.) Contrary to both the *Beagle* court's conclusion and appellant's assertion, there are several reasons why conditions of probation cannot be said to be "sentencing consequences."

First, probation is not by definition a "sentence." (See § 1203, subd. (a)[defining probation as "the suspension of the imposition or execution of a sentence"]; see also *People v. Wittig* (1984) 158 Cal.App.3d 124, 127 [jail time ordered as condition of probation does not violate section 654 because

court has not yet imposed a sentence]; § 1203.2a). Instead, probation is a sentencing alternative. (*People v. Goulart* (1990) 224 Cal.App.3d 71, 80.) The "adverse sentencing consequences" that concerned the *Harvey* court pertained to an increase in the defendant's prison sentence from the statutory mid-term to the upper term. (*Harvey, supra*, 25 Cal.3d at p. 757.) A grant of probation is different from a traditional form of punishment, like imprisonment, because probation is an act of clemency in lieu of punishment. (*People v. Howard, supra*, 16 Cal.4th at p. 1092; see also § 15 [defining "punishment" for crime as death, imprisonment, fine, removal from office, or, disqualification to hold office].)

Indeed, where a trial court grants probation under section 1203.1, any county jail term imposed is not punishment. (See *People v. Mauch* (2008) 163 Cal.App.4th 669, 677; see also *Petersen v. Dunbar* (9th Cir. 1966) 355 F.2d 800, 802 ["jail detention ordered as a condition of probation . . . is not regarded as punishment; it is regarded as part and parcel of the supervised effort toward rehabilitation which probation constitutes"].) Because jail time imposed as a condition of probation is not "punishment," a condition of probation cannot be said to be an "adverse sentencing consequence" like that at issue in *Harvey*. (See ABOM 9, citing § 1203.1, subd. (a)(2).)

Furthermore, the term "adverse" means "in opposition to one's interest: Detrimental, Unfavorable." (See *Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, 249, citing Webster's Third New Internat. Dict. (1981) p. 456.) However, pursuant to section 1203.4, subdivision (a), a defendant who first accepts a grant of probation may seek to have his guilty plea changed to a plea of not guilty, and petition to have all proceedings expunged from the record, and the accusations against him dismissed, once the defendant has satisfied the conditions of probation for the entire probationary period. (§ 1203.4, subd. (a); see *People v. Chandler* (1988) 203 Cal.App.3d 782, 788-789 [the expunging of the record of conviction is

a form of legislatively authorized certification of complete rehabilitation based on a prescribed showing of exemplary conduct during the entire period of probation].)

In light of the benefits to a probationer as described above, it can hardly be said that probation is detrimental or "adverse." Accordingly, conditions of probation are not "adverse sentencing consequences," and the *Harvey* rule does not apply to them.

Finally, in *Beagle*, the court specifically stated that a "condition of probation *adding a restriction on the defendant's conduct* is an 'adverse sentencing consequence.'" (*Beagle, supra*, 125 Cal.App.4th at p. 421; italics added.) This statement implies the *Beagle* court would apply *Harvey* to every probation condition, since the domestic violence conditions imposed here (which, as explained above, required appellant to successfully complete a 52-week domestic violence batterers' program, pay $400 to the domestic violence fund, and pay $400 to a battered women's shelter (CT 13-14)) were no more restrictive than other conditions imposed by the court. (See CT 12-14 [other conditions required appellant to: "serve 120 days in a San Bernardino County Jail facility"; "submit to a search and seizure of your person, residence and/or property under your control at any time of the day or night by any law-enforcement officer, with or without a search warrant, and with or without cause"; "submit to and cooperate in a field interrogation by any peace officer at any time of the day or night"; and, "attend NA/AA 3 times per week and show proof of attendance to the probation officer"].) This is further evidence that the *Beagle* court's conclusion that probation conditions are "adverse sentencing consequences" is wrong.

These considerations compel the conclusion that the *Beagle* court's determination that the rule set forth in *People v. Harvey, supra*, 25 Cal.3d 754, which limits a trial court's ability to impose probation conditions

based on dismissed counts, should be rejected by this Court. *Harvey* simply cannot be read to cabin a court's discretion to impose conditions of probation otherwise valid under *Lent*.

D. The *Harvey* Rule Does Not Apply To Conditions of Probation Which are Necessary to Protect the Public, and to Rehabilitate and Reform the Probationer

Pursuant to section 1203.1, subdivision (j),[7] a trial court has broad discretion to impose "any and all" reasonable conditions as it may determine are fitting and proper to the end that justice may be done and for the reformation and rehabilitation of the probationer. The *Harvey* rule, which prohibits a court from considering facts that pertain solely to a charge that has been dismissed pursuant to a plea bargain, cannot be applied to conditions of probation. To do so would effectively divest a court of its statutory duty to impose any and all otherwise valid conditions it deemed necessary to rehabilitate the probationer. Indeed, this Court's jurisprudence argues persuasively that a court's statutory authority should not be limited this way. (See *People v. Olguin, supra,* 45 Cal.4th at p. 380;

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[7] Section 1203.1, subdivision (j) provides, in relevant part:

> The court may impose and require any or all of the above mentioned terms of imprisonment, fine, and conditions, and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer, and that should the probationer violate any of the terms or conditions imposed by the court in the matter, it shall have authority to modify and change any and all the terms and conditions and to reimprison the probationer in the county jail within the limitations of the penalty of the public offense involved . . . .

People v. Lent, supra, 15 Cal.3d at p. 486, fn. 1; *People v. Osslo, supra,* 50 Cal.2d at p. 103.)

Other than *Beagle*, respondent has found no published California decision that concludes that the rule set forth in *Harvey* pertains to probation conditions. As in preceding examples, federal courts have also upheld probation conditions that did not directly relate to the crime of which the defendant was convicted as long as the conditions serve a rehabilitative purpose. (See *United States v. Showalter* (7th Cir. 1991) 933 F.2d 573, 575-576 [district court is empowered to impose "any other condition it considers to be appropriate" citing 18 U.S.C. § 3583(d); see also *Malone v. United States (*9th Cir. 1974) 502 F.2d 554, 555; *Porth v. Templar*, *supra*, 453 F.2d at pp. 330, 334.)

The domestic violence conditions imposed here were essential to the probationary goal of rehabilitation because they would give appellant the tools and incentive to discontinue his abuse of his girlfriend. In addition, the domestic violence conditions here were necessary to help appellant comply with other conditions of his probation. For example, appellant's proclivity to hit his girlfriend shows he is likely to violate the condition requiring that he "violate no law." (CT 12.) The condition requiring appellant to complete a domestic violence batterers' program properly serves to protect the public (including appellant's girlfriend) and aids in appellant's rehabilitation by giving him the tools to deal with the causes of domestic violence and keeping him out of situations that could lead to a violation.[8]

[8] "The goal of a batterer's program under this section shall be to stop domestic violence." (§ 1203.097(c)(1).)

1. Appellant's "Equity" Arguments are not Persuasive

Appellant claims "under *Harvey*, a defendant is denied the benefit of his bargain if a court imposes any restrictive conditions of probation that are based on unrelated dismissed counts." (ABOM 12.) This is not true. As noted above, this Court did not address probation conditions in *Harvey* and cases are not authority for propositions not considered therein. (*People v. Toro, supra,* 47 Cal.3d at p. 978, fn. 7.) Nevertheless, appellant insists that "defendants maintain reasonable expectations that unrelated dismissed counts will not be used as the basis for imposing conditions of probation." (ABOM 11.)

In light of the fact that the purpose of probation is to foster rehabilitation and to protect public safety (*People v. Carbajal, supra*, 10 Cal.4th at p. 1120) and because a court may impose *any and all reasonable* conditions it deems necessary for the reformation and rehabilitation of the probationer and to ensure that justice is done (§ 1203.1, subd. (j); italics added), a probationer cannot reasonably expect that dismissed counts, indeed the very facts surrounding his crime of conviction, will not be considered by the court when the court fashions the appropriate probationary conditions.

Moreover, appellant should have harbored a "reasonable expectation" that the court would impose domestic violence conditions in this case. The record indicates that before appellant entered his guilty plea, the court informed him it would impose conditions that had not been discussed. (RT 19.)[9] The court asked appellant: "You understand when you're put on

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[9] Appellant's plea agreement expressly indicates that he would be granted three years of formal probation with "added terms at" the post-judgment hearing. (CT 9.)

probation there will be other terms and conditions of probation that we haven't talked about here today?" Appellant responded, "Yes," and was subsequently referred to the probation department for a presentence investigation and report. (RT 19, 26; CT 6.)[10] As noted above, appellant initially objected to the court's imposition of the domestic violence conditions and, in response, the trial court stated it would set aside the plea if appellant refused to accept the domestic violence conditions. (RT 34, 36.) After appellant conferred with counsel, he indicated he was willing to accept the domestic violence conditions. (RT 41-42.)

Finally, in stark contrast to the situation confronting a defendant who is sentenced to prison (like the defendant in *Harvey*), a probationer is entitled to refuse probation if he is not satisfied with the conditions imposed. (*People v. Miller, supra,* 256 Cal.App.2d at p. 356.) A probationer can also seek modification of his conditions of probation. (See *People v. Lopez, supra*, 66 Cal.App.4th at p. 629..) As a result, any "equity considerations underlying the *Harvey* rule" do not apply to the probation setting. (ABOM 10.)

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[10] Pursuant to section 1203, subdivision (b)(1),

> If a person is convicted of a felony and is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter to a probation officer to investigate and report to the court, at a specified time, upon the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment.

Section 1203, subdivision (h) directs the probation officer to obtain and include in his report comments of the victim.

2. The United States Supreme Court's Decisions in *Blakely* and *Cunningham* Do Not Support Appellant's Argument that the *Harvey* Rule Applies To Probation Conditions

Appellant claims that "in addition to the *Harvey* rule," the United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], "forbid increasing a defendant's sentence based on charges that were neither adjudicated before a jury or admitted by the defendant in a plea bargain." (ABOM 10.)

In *Blakely, supra,* 542 U.S. 296, the United States Supreme Court held that any circumstance other than the fact of a prior conviction that is relied on by a trial court to increase the penalty for a crime beyond the statutory maximum must be tried before a jury and proved beyond a reasonable doubt. (*Id.* at pp. 301, 303.)

In *Cunningham, supra,* 549 U.S. 270, the United States Supreme Court analyzed California's determinate sentencing law and held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Id.* at p. 274.)[11]

The holdings in *Blakely* and *Cunningham* pertain to increased *penalties*, and restrict a court from increasing a defendant's prison sentence beyond the statutory maximum through judicial fact finding. These decisions have no bearing on a court's discretionary authority to impose probation conditions because such conditions are not *penalties*.

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[11] After this Court's decision in *People v. Sandoval* (2007) 41 Cal.4th 825, 844-852, and the enactment of Senate Bill No. 40, *Harvey* itself is not dictated by *Cunningham* or *Blakely*.

"[P]robation is an act of clemency which imposes no *penalties* unless the conditions of probation are broken." (*People v. Thrash* (1978) 80 Cal.App.3d 898, 901; emphasis added.) Further, as explained above, probation is an act of clemency in lieu of punishment, "and its primary purpose is rehabilitative in nature." (*People v. Howard, supra*, 16 Cal.4th at p. 1092.) It thus follows that conditions of probation do not implicate the holdings in *Blakely* and *Cunningham*.

Even if a probation condition could be considered to be a criminal penalty, there would be no constitutional violation. Under *Blakely, supra,* only facts that increase the punishment for a crime beyond the statutory maximum must be submitted to a jury. (*Blakely v. Washington, supra,* 542 U.S. at pp. 303-304.) Probation conditions do not increase punishment beyond the statutory maximum. As a result, *Blakely* is inapplicable. Moreover, as the United States Supreme Court expressly recognized in *Blakely*, a defendant entering into a plea agreement may waive his right to a jury trial on additional facts used to impose an enhanced sentence. (*Id.* at p. 310.)

Here, appellant waived his right to have a jury make the findings of fact when he entered his plea. (CT 8-9; RT 8-9; see also *People v. Munoz, supra,* 155 Cal.App.4th at p. 166.) Furthermore, the facts of the domestic violence incident were detailed in the probation report, which appellant agreed to allow the court to consider when imposing sentence. Appellant admitted to the probation officer that he had hurt his girlfriend on numerous occasions. (PR 4.) Thus, appellant effectively "stipulate[d] to the relevant facts" necessary to impose the domestic violence conditions, thereby waiving his right to have a jury trial and proof beyond a reasonable doubt on those facts. (*Blakely, supra*, 542 U.S. at p. 310.)

II. EVEN IF THE HARVEY RULE DOES APPLY TO CONDITIONS OF PROBATION, THE TRIAL COURT PROPERLY IMPOSED THE DOMESTIC VIOLENCE CONDITIONS HERE BECAUSE APPELLANT'S DOMESTIC VIOLENCE OFFENSE WAS TRANSACTIONALLY RELATED TO THE OFFENSE TO WHICH HE PLED GUILTY

Appellant concedes that the domestic violence conditions imposed in his case would be valid under section 1203.1 "but for the absence of a *Harvey* waiver." (ABOM 3.) Appellant also correctly observes that *Harvey* provides an exception to the rule prohibiting a trial court from considering counts dismissed in a plea agreement. (ABOM 12.) That exception permits a court to consider dismissed counts that are transactionally related to the admitted offense. (*Harvey, supra*, 25 Cal.3d at pp. 758-759.) In the event this Court concludes *Harvey* does apply to prohibit a court's consideration of dismissed counts when imposing appropriate conditions of probation, the trial court did not commit *Harvey* error in the instant case because the facts underlying the dismissed domestic violence count were transactionally related to the resisting count to which appellant pleaded guilty.

In *Harvey, supra*, 25 Cal.3d at pages 758-759, this Court "recognized an exception permitting consideration of dismissed charges that are transactionally related to the admitted offense." (3 Witkin & Epstein, Cal. Criminal Law, *supra*, Punishment, § 274, p. 361.) While facts relating to an independent count which is dismissed pursuant to a plea bargain may not be considered in aggravation of the crime to which a defendant pleads guilty, such is not the case where the facts regarding the dismissed count are transactionally related to the offense to which the defendant pleads guilty. (*People v. Cortez* (1980) 103 Cal.App.3d 491, 496.) Thus, for two offenses to be transactionally related for purposes of the *Harvey* exception, facts must exist in the record from which it may be reasonably inferred that

some action of the defendant giving rise to the dismissed count was also involved in the count to which the defendant pleaded guilty. (*People v. Beagle, supra*, 125 Cal.App.4th at pp. 420-421.)

For example, in *People v. Bradford* (1995) 38 Cal.App.4th 1733, the defendant was charged with cultivation and possession of marijuana for sale, possession of a deadly weapon (two shotguns), and vehicle theft. (*Id.* at pp. 1735-1736.) Under a plea bargain, the defendant pleaded guilty to cultivation of marijuana and vehicle theft, and the weapons charges were dismissed. (*Id.* at p. 1736.) The trial court imposed the upper term on the cultivation count because the defendant had possessed two firearms. (*Ibid.*) The defendant appealed, contending his sentence violated *Harvey* because his possession of the weapons was not transactionally related to the offense of cultivation of marijuana. (*Ibid.*) The Court of Appeal rejected that contention and held that the trial court had properly used the defendant's possession of the shotguns as an aggravating factor warranting imposition of the upper term. (*Ibid.*) The *Bradford* court reasoned that the crime of cultivation of marijuana was a continuing one, the loaded shotguns were found in his cabin in a compound dedicated to the cultivation of marijuana, he knew of the presence of the weapons in the cabin, and thus his possession of the weapons was transactionally related to the cultivation offense. (*Id.* at pp. 1738-1739.)

Here, appellant's offense of committing corporal injury to his girlfriend gave rise to his offense of resisting the police officer. (See *People v. Bradford, supra*, 38 Cal.App.4th at p. 1739.) Based on the facts as related in the probation officer's report, the trial court could reasonably conclude that before appellant resisted the officers on July 27, 2008, he had struck his girlfriend in the face and that his resistance was prompted by his preceding criminal domestic violence. (PR 2.) Moreover, the record shows that appellant left the apartment when the police were called because he did

not want to go to jail. (PR 2-3.) The victim did not want appellant to return because she feared him. (PR 2.) When appellant returned to his home the same day and saw the police, he forcibly resisted the officers because he did not want to go to jail. Appellant continued to fight with officers even after he was face-down on the ground and the officers were trying to handcuff him. (PR 3.) Had it not been for appellant striking his girlfriend, the police would not have been at the house and appellant would have had no one to resist. As the probation officer noted, "Since the officers were at the defendant's residence due to him assaulting the victim, domestic violence terms will be respectfully submitted." (PR 6.)

Accordingly, the dismissed domestic violence charge was transactionally related to the resisting an officer charge to which appellant pleaded guilty. Indeed, the grant of probation in this case without the imposition of domestic violence conditions would have been hollow and unresponsive to the very conduct which brought appellant before the court. Therefore, the court properly imposed the conditions of probation that related to the domestic violence count.

CONCLUSION

For the reasons stated above, respondent respectfully requests that this Court affirm the judgment below.

Dated: March 22, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains **6163** words.

Dated: March 22, 2010

EDMUND G. BROWN JR.
Attorney General of California

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Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE

Case Name: **People v. Martin** Case No.: **S175356**

I declare:

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

On March 22, 2010, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Conrad Herring Attorney at Law 3525 Del Mar Heights Rd., No. 305 San Diego, CA 92130 *Attorney for Appellant* *Louis Lambert Martin* (two copies)	Court of Appeal Fourth Appellate District, Division Two 3389 Twelfth Street Riverside, CA 92501
Hon. John N. Martin San Bernardino County Superior Court 351 N. Arrowhead San Bernardino, CA 92415-0240	Michael A. Ramos, District Attorney San Bernardino County District Attorney's Office 316 North Mountain View Avenue San Bernardino, CA 92415-0004

and furthermore declare, I electronically served a copy of the above-listed document from the Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on March 22, 2010, to Appellate Defender's, Inc's, electronic notification address, eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 22, 2010, at San Diego, California.

G. Nolan
Declarant

Signature

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