IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff – Respondent,

v.

LOUIS LAMBERT MARTIN,

Defendant –Appellant.

No. S175356

(Court of Appeal No. E046579)

(San Bernardino County Superior Court No. FSB 803105)

Appeal from the San Bernardino County Superior Court

Honorable JOHN N. MARTIN, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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I.

RESPONDENT'S POLICY ARGUMENTS FAIL TO ADDRESS THE SPECIFIC *HARVEY* ISSUE.

Respondent discusses at length the policies underlying probation and the purposes of the conditions that attach when probation is granted. However, the policies underlying probation are not at issue in this appeal.

The issue in this case is whether the imposition of probation conditions should nevertheless be subject to the *Harvey* rule as was held in *People v. Beagle* (2004) 125 Cal.App.4th 415, 421.

A. APPLYING THE *HARVEY* RULE TO CONDITIONS OF PROBATION DOES NOT CONFLICT WITH THE POLICIES UNDERLYING THE PURPOSES OF PROBATION.

Respondent incorrectly suggests that applying the *Harvey* rule to conditions of probation would somehow undermine the entire purpose of probation. To the contrary, there is no conflict between the granting of probation and ensuring that a defendant's reasonable expectations of his plea bargain are protected.

Based on the *Harvey* decision itself, and the numerous cases interpreting it, two factors determine whether the *Harvey* rule should apply in a given probation case. The first factor looks to whether a particular condition of probation constitutes an adverse sentencing consequence. The second factor analyses whether the defendant holds a reasonable expectation that such a condition of probation would not be imposed based on a dismissed count.

1. Adverse Sentencing Consequences.

Respondent attempts to nullify the first factor entirely by taking the most severe probation condition, actual custody, and argues that confinement in a local jail does not constitute punishment. From that novel position, Respondent concludes that in the context of probation, spending up to a year in a county jail is not an adverse sentencing consequence.

In order to support such an extreme and incorrect position, Respondent misrepresents the case law it cites on this issue. (*See People v. Howard* (1997) 16 Cal.4th 1081, 1092)(Respondent's brief at page 1); *People v. Mauch* (2008) 163 Cal.App.4th 669, 677;

Petersen v. Dunbar (9th Cir. 1966) 355 F.2d 800, 802.) (Respondent's brief at page 13)

Neither *People v. Mauch* nor *Petersen v. Dunbar* has any application to the *Harvey* "adverse sentencing consequence" issue. The issue in *Mauch* was whether a trial court could reduce a felony offense to a misdemeanor where the legislature has not authorized misdemeanor punishment, such as in "wobbler" offenses. In this context, the *Mauch* court stated that the granting of probation with a custodial jail sentence was not considered punishment for the purposes of declaring an offense to a misdemeanor where it was proscribed only as a felony by the legislature. (*People v. Mauch*, 163 Cal.App.4th at 677.)

In the *Petersen v. Dunbar* case, the Ninth Circuit Court of Appeals actually agreed with the defendant that "punishment is punishment, no matter what name you apply to it." (*Petersen v. Dunbar*, 355 F.2d at 802.) The issue in *Petersen* involved a habeas corpus double jeopardy claim where the defendant argued that because he was originally sentenced to local custody as condition of probation, his crime was therefore a misdemeanor. The defendant thus contended that the court could not send him to prison after he violated the terms of his probation.

The court rejected the defendant's claim on similar grounds as in *People v. Mauch, supra*, i.e., the granting of probation with a local custodial sentence did not amount to a determination that the offense was a misdemeanor rather than a felony. (*Petersen v. Dunbar*, 355 F.2d at 802.)

Respondent confuses the obvious understanding of a custodial sentence as punishment, with a technical definition of punishment used for the purpose of determining whether an offense is classified as either a felony or misdemeanor. Respondent's untenable position is also completely contrary to the Penal Code itself, which expressly states that imprisonment in the county jail is in fact punishment. (*See* Penal Code sections 15; 16; 17, subdivision (b); and 1203.1, subdivision (a).)

Respondent attempts to misconstrue this Court's decision in *People v. Howard, supra*, to suggest that imprisonment in a county jail is not punishment when imposed as a condition of probation. In *People v. Howard*, this Court did state that probation itself was not considered punishment based on the enumerated punishments for crimes and public offenses listed in Penal Code section 15. (*People v. Howard, supra*, 16 Cal.4th at 1092.)

However, Penal Code section 15, together with section 17, subdivision (b) establishes that custody in a county jail constitutes "imprisonment" (section 17, subd. (b)), and that "imprisonment" constitutes "punishment" (section 15, subsection (2)). Penal Code section 1203.1, subd. (a) further provides that "[t]he court, or judge thereof, in the order granting probation and as a condition thereof, may imprison the defendant in a county jail for a period not exceeding the maximum time fixed by law in the case.")

Based on the foregoing, there can be no real dispute that conditions of probation can and do amount to punishment as the term in generally understood, and as intended throughout the Penal Code. Accordingly, as recognized in *People v. Beagle*, conditions of

probation constitute adverse sentencing consequences where such conditions add a restriction on a defendant's conduct. (*People v. Beagle, supra*, 125 Cal.App.4th at 421.)

2. Reasonable Expectations.

Respondent argues that the *Harvey* rule should not apply to conditions of probation because to do so will undermine the purpose of probation, which is to foster rehabilitation and to protect public safety. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) Respondent believes that such an application of the *Harvey* rule would somehow divest a court of its statutory duty to impose valid conditions that it deems necessary to rehabilitate the probationer. (Respondent's brief at page 15.)

Respondent then concludes in a rather circular argument that because a court may impose reasonable conditions it deems necessary for the reformation and rehabilitation of the probationer and to ensure that justice is done (Penal Code section 1203.1, subd. (j)), "a probationer cannot reasonably expect that dismissed counts . . . will not be considered by the court" in order to impose appropriate probationary conditions. (Respondent's brief at page 17.)

Although persuasively articulating the policies and purposes of probation, Respondent ignores the purposes and policies of plea bargaining. There are equally strong principles underlying plea bargains, which can very easily be undermined by Respondent's blanket rule that *Harvey* can never apply to conditions of probation. (*See People v. Masloski* (2001) 25 Cal.4th 1212, 1216 ("both the state and the defendant benefit from plea bargains, the defendant by

lessened punishment, the state by savings in cost of trial, increased efficiency, and flexibility of the criminal process." (citations omitted); *People v. Shelton* (2006) 37 Cal.4th 759, 767, ("The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.").)

Respondent's unbending position is again undone by the Penal Code. Section 1192.3, subd. (b) requires a *Harvey* waiver in certain circumstances before a court can impose restitution as a condition of probation based on a dismissed count. Section 1192.3, subd. (a) requires a factual basis in order to impose restitution on a transactionally related dismissed count. Under section 1192.5, a defendant cannot be sentenced on a plea to a punishment more severe than is specified in the plea bargain. Section 1192.5 further provides that if a court subsequently withdraws its approval of a plea, the defendant may withdraw his plea.

Sections 1192.3 and 1192.5 recognize that defendants do in fact maintain a number of expectations when entering into plea bargains that do not involve state prison sentences. And in addition to the *Harvey* waiver, defendants also enter into other waivers as part of plea bargains, such as a *Cruz* or a *Vargas* waiver. (*See People v. Cruz* (1988) 44 Cal.3d 1247, 1254 fn. 5; *People v. Vargas* (1990) 223 Cal.App.3d 1107, 1113.)

The court in *People v. Beagle, supra*, recognized that the policies and principles underlying plea bargaining are no less important than those underlying the granting of probation and the conditions attached thereto. Moreover, the *Harvey* rule is quite limited in its application and therefore, would rarely conflict with

policies underlying probation. The obvious resolution to any such conflicts is the utilization of a *Harvey* waiver.

For the *Harvey* rule to even apply, there must first be an adverse sentencing consequence *that is based on a dismissed count* as opposed to some other factual basis. This limitation alone would eliminate most conflicts given the wide discretion of the court to impose conditions of probation.

The additional limitation of *Harvey* requires that the dismissed count not be transactionally related to the admitted count(s). (*People v. Harvey, supra*, 25 Cal.3d at 758-59.)

Thus, contrary to Respondent's argument, the *Beagle* decision would in no way apply *Harvey* to each and every probation condition simply because probation conditions are adverse sentencing consequences. (Respondent's brief at page 14.) The opposite is true; *Harvey* will very infrequently apply to conditions of probation.

In the present case before the Court, the domestic violence conditions of probation were expressly imposed on the dismissed count and for no other reason. The dismissed count of domestic violence was in no way related to the admitted offense of resisting arrest. Appellant was not even at home when the police were first called to the scene. The police came to appellant's home based on a domestic violence report, determined that he was not there, and then left. Sometime after the police departed, appellant returned home, and the police were called back a second time. The police did not return because of any further alleged domestic problems, but only to arrest appellant.

Accordingly, there was no transactional relationship between the admitted offense of resisting arrest and the dismissed count. Neither the trial court nor the appellate court in this case have suggested otherwise.

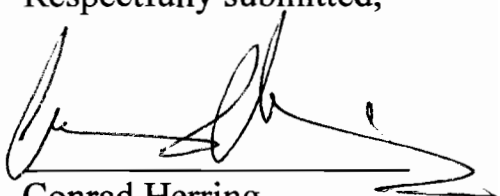
Respondent's argument to the contrary is unavailing and not supported by the relevant case law. For there to be a transactional relationship within the meaning of *Harvey*, there must be facts "from which it could at least be inferred that some action of the defendant giving rise to the dismissed count was also involved in the admitted count." *(People v. Beagle, supra*, 125 Cal.App.4th at 421.) Under this test, the dismissed count and the admitted count are completely unrelated.

CONCLUSION

Based on the foregoing, appellant respectfully requests that this Court reverse the court of appeal and remand the case with directions to dismiss the domestic violence conditions of probation.

DATED: April 12, 2010

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE
WITH APPELLATE RULE 8.204(c)(1)

Counsel for Appellant certifies that Appellant's Reply Brief on the Merits, together with footnotes, contains 1804 words, excluding the parts of the brief exempted by Rule 8.204(c)(3).

Counsel relies on the program, Microsoft Word, 2003 edition, for computing the word count.

Dated: April 12, 2010

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The undersigned, counsel for Appellant, certifies that, on April 12, 2010, he served a copy of Appellant's Reply Brief on the following persons by mail with postage prepaid in Carlsbad, California.

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