

# SUPREME COURT COPY

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

SUPREME COURT  
FILED

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Deputy

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

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## APPELLANT'S OPENING BRIEF ON THE MERITS

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## TABLE OF CONTENTS

<b>I.</b>	<b>ISSUE PRESENTED</b>	1
<b>II.</b>	<b>STATEMENT OF APPEALABILITY</b>	2
<b>III.</b>	<b>PROCEEDINGS IN THE APPELLATE COURT</b>	2
<b>IV.</b>	<b>STATEMENT OF THE CASE</b>	4
<b>A.</b>	<b>PROCEDURAL HISTORY</b>	4
<b>B.</b>	<b>STATEMENT OF FACTS.</b>	5
<b>V.</b>	<b>ARGUMENT</b>	6
<b>A.</b>	<b>STANDARD OF REVIEW</b>	6
1.	<u>The trial court's discretion under Penal Code section 1203.1.</u>	6
2.	<u>Harvey Error.</u>	7
<b>B.</b>	<b>THIS COURT SHOULD EXPRESSLY APPLY THE <i>HARVEY</i> RULE TO CONDITIONS OF PROBATION PURSUANT TO THE REASONING OF <i>PEOPLE V. BEAGLE</i>.</b>	7
1.	<u>Probation Conditions are "Sentencing Consequences"</u>	7
2.	<u>The Equity Considerations Underlying the <i>Harvey</i> Rule also Apply to Conditions of Probation</u>	10

**C. THERE WAS NO VALID EXCEPTION TO THE *HARVEY* RULE.** 12

1. Dismissed Counts Must be Transactionally Related to the Offense of Conviction in Order to Avoid the Harvey Rule . . . . . 12

2. The *Harvey* Error Cannot be Overcome by any Other Facts or Circumstance that Would Allow the Trial Court to Impose Domestic Violence Conditions. . . . . . 15

**CONCLUSION** . . . . . 16

Certification of word count

Proof of Service

## TABLE OF AUTHORITIES

### Cases

<i>Cunningham v. California</i> (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856]	10
<i>Blakely v. Washington</i> (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531]	10
<i>People v. Beagle</i> , (2004) 125 Cal.App.4th 415 . . . . .	2-3, 7-9,12,14,15
<i>People v. Berry</i> (1981) 117 Cal.App.3d 184 . . . . .	13,14
<i>People v. Bradford</i> , (1995) 38 Cal.App.4th 1733 . . . . .	13
<i>People v. Franco</i> , (1996) 181 Cal.App.3d 342 . . . . .	10,11
<i>People v. Gaskill</i> , (1980) 110 Cal.App.3d 1 . . . . .	11,12
<i>People v. Harvey</i> , (1979) 25 Cal.3rd 754 . . . . .	1-4,7-15
<i>People v. Johnson</i> , (1974) 10 Cal.3d 868 . . . . .	8
<i>People v. Junglers</i> , (2005) 127 Cal.App.4th 689, . . . . .	6
<i>People v. Klaess</i> , (1982) 129 Cal.App.3d 820 . . . . .	10

### California Statutes

#### Penal Code

Section 69 . . . . .	4
Section 273.5(a) . . . . .	4
Section 1192.5 . . . . .	8
Section 1203, subdivision (a) . . . . .	9
Section 1203.1 . . . . .	6
Section 1237, subdivision (a) . . . . .	2

### California Rules of Court

Rule 8.304 (b) (4) (B) . . . . .	2
Rule 8.1120(a) . . . . .	2

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**APPELLANT'S OPENING BRIEF ON THE MERITS**

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TO THE HONORABLE RONALD M. GEORGE, CHIEF  
JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES  
OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

**I.**

**ISSUE PRESENTED**

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

## II.

### STATEMENT OF APPEALABILITY

This appeal is from a final judgment granting probation after a felony guilty plea and is authorized by Penal Code section 1237, subdivision (a), and Cal. Rules of Court, rule 8.304 (b) (4) (B)).

Appellant was sentenced on September 5, 2008, wherein the court granted supervised probation. Appellant timely appealed the sentence and terms of probation on September 9, 2008. (CT 15)

## III.

### PROCEEDINGS IN THE COURT OF APPEAL

Defendant and Appellant, LOUIS LAMBERT MARTIN seeks review following the decision of the Court of Appeal, Fourth Appellate District, Division Two (per Hollenhorst, Acting P.J.) to affirm the trial court judgment, originally filed as a non-published opinion on June 24, 2009. On July 17, 2009, upon request of Attorney General pursuant to California Rules of Court, rule 8.1120(a), the court of appeal certified its opinion for publication (per Hollenhorst, Acting P.J.).

In affirming the judgment, the court of appeal disagreed with appellant and with the Fifth Appellate District Court's analysis of the *Harvey* waiver rule in *People v. Beagle*, (2004) 125 Cal.App.4th 415, 421.

In *People v. Beagle, supra*, the court applied the *Harvey* waiver rule to probation conditions:

We see no basis for distinguishing conditions of probation from prison sentences in this context. The Supreme Court held 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. (*People v. Harvey, supra*, 25 Cal.3d at p. 758.) The court did not say that this rule was limited only to increased prison terms. A condition of probation adding a restriction on the defendant's conduct is an "adverse sentencing consequence." We have found no case stating that it is not.

(*People v. Beagle, supra* at p. 421.)

Because the court of appeal disagreed with the *Beagle* decision, it refused to apply the *Harvey* rule to conditions of probation in appellant's case. The court therefore upheld appellant's conditions of probation, finding no abuse of discretion by the trial court in imposing domestic violence conditions on the dismissed count charging domestic violence.

At the outset of this appeal, Appellant agrees that the domestic violence conditions imposed by the trial court on the dismissed count would otherwise be valid under Penal Code section 1203.1 but for the absence of a *Harvey* waiver.

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## IV.

### STATEMENT OF THE CASE

#### A. PROCEDURAL HISTORY.

Appellant was arrested on July 27, 2008, following an alleged domestic dispute and a subsequent attempt to evade police and resist arrest. (CT 1; 49) He was charged in a two count felony complaint on July 29, 2008: Count 1, Resisting executive officer in violation of Penal Code section 69, a felony; and Count 2, Corporal injury to a cohabitant, in violation of Penal Code section 273.5(a), a misdemeanor. (CT 1)

On August 7, 2008, appellant entered a guilty plea to Count 1, felony resisting an executive officer (PC section 69). The misdemeanor domestic violence offense charged in Count 2 was to be dismissed at the time of sentencing pursuant to the plea bargain agreed to by appellant. (CT 6-7; 8-10)

The plea agreement did not include a *Harvey Wavier*. (CT 9)

On September 5, 2008, appellant appeared for sentencing. The court granted supervised probation for a period of three (3) years, and imposed domestic violence terms over appellant's objections. (RT 33-34; 39-40) (CT 12-14)

The court stated specifically that it was imposing domestic violence conditions based on the dismissed charge.

Okay, I am looking at the facts as they occur, not to what he pled. And it's my intention to impose domestic violence terms.

(RT 33: 20-22)

I am not going to let a plea bargain get around somebody who was charged with beating up his wife or beating up a woman.

(RT 34: 15-17)

#### **B. STATEMENT OF FACTS**

At the time of his arrest, appellant was living with his girlfriend. (CT 49) They have a child together. (RT 42: 12)

After an evening of drinking with his girlfriend and her family on July 27, 2008, appellant returned home to his apartment and began arguing and fighting with his girlfriend's brother. (CT 50) According to the girlfriend's statement to police, as reported by the probation officer, appellant and the brother we engaged in a physical brawl. During this fight with the brother, appellant also punched his girlfriend in the face, allegedly saying to her: "you're done, bitch." She further stated that appellant grabbed her by the neck and choked her. (CT 49).

Appellant stated to the probation officer that his girlfriend was accidentally hit in the face while he was fighting with her brother. He further stated that he only grabbed her neck to get her inside the residence. He admitted to being extremely intoxicated. (CT 50, 51)

Appellant fled the apartment prior to the arrival of the police. He returned home after the police and his girlfriend's family left the residence. The police were called again and found him outside his apartment. Upon seeing a police officer, appellant attempted to flee into his apartment. One of the officers attempted to prevent appellant from closing the door to the apartment by placing his foot in the

doorway. Appellant managed to shut the door, which caused the officer to fall backwards. The police then forced entry into the apartment, and appellant fled out the back door. The police found appellant a short time later hiding under a car in the carport area of the apartment complex. Appellant continued to resist officers until they were able to place handcuffs on him with his hands behind his back. (CT 50)

Appellant stated to the probation officer that he fled from the police officers because he did not want to go to jail. Appellant also suggested that the officer hurt himself while kicking the door open, and not when appellant was closing the door. (CT 51)

## V.

### ARGUMENT

#### A. STANDARD OF REVIEW.

##### 1. The trial court's discretion under Penal Code section 1203.1.

Penal Code section 1203.1 gives a trial court broad discretion to impose conditions of probation in order to foster rehabilitation, to protect public and the victim, and ensure that justice is done. 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. Junglers*, (2005) 127 Cal.App.4th 689, 702.)

"Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Id*)

2. Harvey error.

Regardless of otherwise appropriately imposed probation conditions under section 1203.1, the rule set forth in *People v. Harvey*, (1979) 25 Cal.3rd 754, may limit a trial court's ability to impose probation conditions on dismissed counts. (*See People v. Beagle*, (2004) 125 Cal.App.4th 415, 421.)

To the extent that *People v. Beagle* correctly interprets *People v. Harvey*, the trial court was without discretion to impose conditions of probation based on an unrelated dismissed count in the absence of a *Harvey* waiver.

**B. THIS COURT SHOULD EXPRESSLY APPLY THE HARVEY RULE TO CONDITIONS OF PROBATION PURSUANT TO THE REASONING OF PEOPLE V. BEAGLE.**

1. Probation Conditions are "Sentencing Consequences."

In *People v. Beagle*, supra, 125 Cal.App.4th at 421, the court applied the *Harvey* waiver rule to probation conditions finding no basis to distinguish probation conditions from prison sentences.

In *People v. Harvey*, the defendant was sentenced to prison. His prison term was enhanced based on facts underlying and solely relating to a dismissed count. The facts relating to the dismissed

count were not in any way "transactionally related" to the counts of conviction. (*People v. Harvey, supra*, 25 Cal.3rd at 758.)

This Court held that plea bargains involving dismissed count(s) contain an implied term that the defendant will suffer "no adverse sentencing consequences" based on the facts underlying dismissed count(s). It would therefore be "improper and unfair to permit the sentencing court to consider any of the facts underlying the dismissed count . . . for purposes of aggravating or enhancing [the] defendant's sentence." (*Id.* at 758.)

Interpreting *People v. Harvey*, the court in *People v. Beagle* stated that "[a] condition of probation adding a restriction on the defendant's conduct is an "adverse sentencing consequence." (*People v. Beagle, supra*, 125 Cal.App.4th at 421.) Accordingly, the *Beagle* court applied the *Harvey* rule to probation conditions that are imposed based on facts underlying and solely relating to dismissed count(s).

The court of appeal in the present case found no basis to apply the *Harvey* rule to conditions of probation because *Harvey* involved a prison sentence rather than the imposition of probation. Appellant contends that this is a distinction without a meaningful difference.

The *Harvey* decision dealt with the general proposition of "adverse sentencing consequences" based on dismissed counts. As noted by the *Beagle* court, this Court did not limit the *Harvey* rule to increased prison terms. (*People v. Beagle, supra*, 125 Cal.App.4th at 421.)

There is nothing in the *Harvey* decision to suggest that the holding should only apply to sentencing consequences relating

specifically to prison terms. The inquiry, therefore, should be whether a probation condition adding a restriction on a defendant's conduct is an "adverse sentencing consequence." As noted in *People v. Beagle*, appellant is unaware of any case suggesting that probation conditions are not sentencing consequences.

Penal Code section 1203, subdivision (a) defines probation as a sentencing option, and therefore within the purview of *Harvey*:

As used in this code, "probation" means the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer. As used in this code, "conditional sentence" means the suspension of the imposition or execution of a sentence and the order of revocable release in the community subject to conditions established by the court without the supervision of a probation officer. It is the intent of the Legislature that both conditional sentence and probation are authorized whenever probation is authorized in any code as a sentencing option for infractions or misdemeanors. (Emphasis added.)

Penal Code section 1203, subd. (a).

Because probation is a "sentencing option" under section 1203, subdivision (a), conditions of probation would therefore qualify under *Harvey* as "sentencing consequences."

Moreover, a sentencing court may condition the grant of probation on a term of "imprisonment in a county jail . . . ." (Penal Code section 1203.1, subdivision (a)(2).) Certainly, imprisonment in the county jail would qualify as an "adverse sentencing consequence" as contemplated under *Harvey*.

In addition to the *Harvey* rule, more recent United States Supreme Court precedents would 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. (See *Cunningham v. California* (2007) 549 U.S. 270, 274-275 [166 L.Ed.2d 856, 127 S.Ct. 856; *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [159 L.Ed.2d 403, 124 S.Ct. 2531].)

Accordingly, conditions of probation, including incarceration in the county jail, may not be imposed based on unrelated dismissed counts in the absence of a *Harvey* waiver.

## 2. The Equity Considerations Underlying the *Harvey* Rule also Apply to Conditions of Probation.

The *Harvey* rule has generally been interpreted to encompass the "reasonable expectations" of the parties. (See *People v. Franco*, (1996) 181 Cal.App.3d 342, 349 ("The *Harvey* rule, declaring an implied plea bargain term, is based on the reasonable expectations of the parties to the bargain.".)

In *People v. Klaess*, (1982) 129 Cal.App.3d 820, 823, the court interpreted *Harvey* as declaring an "equitable rule applicable to negotiated pleas [wherein] [t]he trial court cannot with one hand give a benefit and with the other take it away."

Consistent with this "equitable rule" however, *Harvey* does not apply in circumstances where a defendant lacks a reasonable expectation of a bargained for exchange. For instance, *Harvey* does not apply to dismissed counts that are "transactionally related" to the

count(s) of conviction. (*People v. Harvey, supra*, 25 Cal.3d at p. 758; *People v. Gaskill*, (1980) 110 Cal.App.3d 1, 5.)

In *People v. Gaskill*, the court found that with respect to transactionally related dismissed counts, "it is unnecessary to admonish a defendant of a proposition so commonplace and self-evident as that the circumstances surrounding his offense will be considered in sentencing him to the appropriate term." (*People v. Gaskill, supra*, 110 Cal.App.3d at 5.)

Similarly, *Harvey* does not apply in a case where a defendant pleads guilty to violating Penal Code section 288 (child molestation). Under Penal Code section 288.1, a conviction under section 288 requires a report on the defendant's mental state to determine his suitability for probation. (See *People v. Franco*, (1986) 181 Cal.App.3d 342, 349-350.) Consequently, a defendant who pleads guilty to violating section 288 can have no reasonable expectation about dismissed counts because section 288.1 requires a comprehensive report, including any similar acts constituting other child molestation crimes. (*People v. Franco, supra*, 181 Cal.App.3d at 5.)

With respect to grants of probation based on negotiated pleas, defendants maintain reasonable expectations that unrelated dismissed counts will not be used as the basis for imposing conditions of probation. Conditions of probation can include imprisonment in county jail or house arrest, both of which are severe restrictions on a defendant's conduct.

Reasonable expectations of a bargained for exchange do not change based the severity or leniency of the restriction imposed.

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.

Based on the foregoing, the court in *People v. Beagle, supra*, correctly held that *Harvey* applies to conditions of probation.

**C. THERE WAS NO VALID EXCEPTION TO THE *HARVEY* RULE.**

Although the Attorney General argued otherwise, none of the exceptions to the *Harvey* rule applied. The court of appeal did not even discuss possible exceptions. Rather, the court focused its opinion on its disagreement with *People v. Beagle, supra*, and on refusing to follow *Beagle*.

**1. Dismissed Counts Must be Transactionally Related to the offense of Conviction in Order to Avoid the *Harvey* Rule.**

The *Harvey* rule provides an exception that permits consideration of dismissed counts that are transactionally related to the admitted offense. (*People v. Harvey, supra* at 758.)

Numerous cases have analyzed the exception for transactionally related dismissed counts. In *People v. Gaskill, supra*, 110 Cal.App.3d 1, the court found no *Harvey* error where the defendant pled guilty to possession of an illegal gun in exchange for the dismissal of a charge of assault with a deadly weapon. The dismissed assault charge was based on brandishing the illegal gun for which the defendant pled guilty to possessing. Accordingly, the dismissed assault charge was part of the same transaction as the admitted offense, and the trial court could properly impose the upper

term of imprisonment based in part on the dismissed assault count. (*People v. Gaskill, supra*, at p. 4.)

In an arguably closer case, *People v. Bradford*, (1995) 38 Cal.App.4th 1733, no *Harvey* error was found where a dismissed gun possession charge was used to impose the upper term on marijuana cultivation conviction. There, illegal shotguns were found in a cabin on property where marijuana was growing. The court held that the dismissed gun possession charge was transactionally related because cultivation was a continuing crime and the guns were found loaded in a cabin in a compound dedicated to the cultivation of marijuana. The court thus concluded that defendant armed himself with illegal weapons during the cultivation offense. (*Id.* at p. 1739.)

*People v. Berry* (1981) 117 Cal.App.3d 184, represents another close case where the court found *Harvey* error and invalidated the portion of a sentence based on a dismissed count that was not transactionally related to the admitted offense. In *Berry*, the defendant was arrested in a stolen care with a gun under the seat. He was charged with car theft, carrying a concealed weapon, and carrying a loaded firearm. He pled guilty to the car theft charge in exchange for a dismissal of the weapon charges. On remand for resentencing the trial court imposed the upper term in part based on the gun possession. (*People v. Berry, supra*, 117 Cal.App.3rd at p. 189-190)

The appellate court vacated the sentence holding that the trial court committed *Harvey* error because the admitted count and the dismissed counts were not transactionally related. The court found that there was nothing to show that the defendant used the gun to

obtain or retain the stolen vehicle. Nor did he brandish the weapon while driving the car. The vehicle served as merely a container for the gun, and such a tenuous connection between the dismissed gun charges and the car theft did not rise to the level of being transactionally related within the meaning of *Harvey*. (*People v. Berry*, supra, at p. 197.)

In *People v. Beagle*, supra, 125 Cal.App.4th 415, 421, the court found no transactional connection between the admitted drug offense and the dismissed count of possessing nunchakus. The drugs were found in the open on top of a plastic plant, and the weapon was found in a closet in another part of the house. The court rejected the People's argument that the offenses were transactionally related because the weapon and drugs were found during the same search. The court stated that the search itself was not a transaction "in the relevant sense - i.e., it is not connected with the offenses." (*Id.* at p. 422.)

In the present case, appellant was charged with felony resisting a police officer and with domestic violence. The dismissed domestic charge occurred earlier in the evening, and appellant had left the scene before the police arrived. After the police departed, appellant returned home. The police were called again, and this time they encountered appellant who fled to the safety of his apartment. After making it into his apartment, appellant ran out the back when police forced entry through the front door. Appellant was apprehended a short time later under a car in the carport of the apartment complex. Appellant later admitted to fleeing because he did not want to go to jail.

There is no transactional relationship between the dismissed domestic charge and the later resisting offense. The two offenses occurred at different times. The resisting offense did not in any way facilitate the earlier domestic offense.

The fact that appellant was resisting arrest for the domestic violence offense does not itself create a transactional relationship between the two offenses. A similar argument was rejected in *People v. Beagle, supra*, 125 Cal.App.3d at p. 421. (A single search where drugs and a weapon are found in different locations does not in and of itself create a transactional relationship between the two possession offenses.)

2. The *Harvey* Error Cannot be Overcome by any Other Facts or Circumstance that Would Allow the Trial Court to Impose Domestic Violence Conditions.

Because the trial court enjoys broad discretion to impose conditions of probation, domestic violence conditions may be appropriate if based on factors other than the dismissed count. (*See e.g., People v. Harvey, supra*, 25 Cal.3d at p. 758; *People v. Beagle, supra*, 125 Cal.App.3d at p. 423.) However, unless it is clear from the record that the challenged conditions of probation would have been imposed independent of the dismissed count, the conditions must be vacated. (*People v. Beagle*, at p. 423.)

Here, the record is devoid of any indication that the domestic violence conditions were imposed based on anything other than the dismissed counts. The trial court made it very clear why it was imposing the domestic violence conditions:

Okay, I am looking at the facts as they occur, not to what he pled. And it's my intention to impose domestic violence terms.

(RT 33: 20-22)

I am not going to let a plea bargain get around somebody who was charged with beating up his wife or beating up a woman.

(RT 34: 15-17)

The court of appeal recognized that the trial court "clearly imposed [domestic violence] conditions because of the dismissed count." (Opinion at page 6)

Based on the foregoing, the domestic violence conditions of probation should be vacated. There is no basis to remand for reconsideration of the domestic violence conditions because nothing in the record supports such conditions.

#### 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: January 20, 2010

Respectfully submitted,



Conrad Herring,  
Attorney for Appellant

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*(San Bernardino County Superior  
Court No. FSB 803105)*

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

Counsel for Appellant certifies that Appellant's Opening Brief on the Merits, together with footnotes, contains 3580 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: January 20, 2009



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*(San Bernardino County Superior  
Court No. FSB 803105)*

The undersigned, counsel for Appellant, certifies that, on January 20, 2010, he served a copy of Appellant's Opening Brief on the Merits on the following persons by mail with postage prepaid in Carlsbad, California.

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Dated: January 20, 2010

