

SUPREME COURT COPY

SUPREME COURT NO. S149303

SUPREME COURT  
FILED

AUG - 8 2007

Frederick K. Ohlrich Clerk  
DEPUTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, )

Plaintiff and Respondent, )

v. )

ALEJANDRO OLGUIN, )

Defendant and Appellant. )

) Court of Appeal No.  
) E039342

) Superior Court No.  
) FSB051372

APPEAL FROM THE SUPERIOR COURT OF  
SAN BERNARDINO COUNTY

Honorable Michael M. Dest, Judge

APPELLANT'S OPENING BRIEF

John L. Staley  
Attorney at Law  
State Bar No. 129624  
11770 Bernardo Plaza Court  
Suite 305  
San Diego, CA 92128

(858) 613-1047

By Appointment of the  
Court of Appeal under  
the ADI independent  
case system

**TABLE OF CONTENTS**

INTRODUCTION ..... ii

PROCEDURAL AND FACTUAL HISTORY ..... 3

ARGUMENT

I. THE PROBATION CONDITION REQUIRING APPELLANT TO KEEP HIS PROBATION OFFICER INFORMED OF ALL PETS IN HIS RESIDENCE AND NOTIFY THE OFFICER TWENTY-FOUR HOURS PRIOR TO ANY CHANGES IS AN INVALID CONDITION BECAUSE IT WAS NOT REASONABLY RELATED TO APPELLANT’S PRESENT CRIME OR FUTURE CRIMINALITY AND BECAUSE IT WAS OVERBROAD IN VIOLATION OF DUE PROCESS ..... 5

A. Introduction ..... 5

B. General Principles Relating To Conditions Of Probation ..... 5

C. The Probation Condition Was Invalid Because (1) It Was Not Reasonably Related To Appellant’s Conviction Of Driving While Intoxicated; (2) Owning A Pet Is Not Criminal Conduct; And (3) The Condition Was Not Reasonably Related To Preventing Future Criminality ..... 6

1. The Pet-Notice Probation Condition Was Not Reasonably Related To Appellant’s Conviction Of Driving While Intoxicated ..... 6

2. Pet ownership, in and of itself, is not criminal ..... 9

3. The Pet-Notice Probation Condition Was Not Reasonably Related To Preventing Future Criminality ..... 11

D. The Pet-Notice Probation Condition Violates Due Process Because It Is Constitutionally Overbroad In That It Limits Appellant’s Right To Own Certain Pets And Is Not Closely Tailored To Rehabilitation Of Appellant ..... 16

CONCLUSION ..... 24

CERTIFICATION OF WORD COUNT ..... 25

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Fuller v. Vines</i> (9 <sup>th</sup> Cir. 1994) 36 F.3d 65 . . . . .	9, 14, 16
<i>Robinson v. Solano County</i> (9 <sup>th</sup> Cir. 2002) 278 F.3d 1007 . . . . .	9, 14, 16
<i>San Jose Charter of The Hells Angels Motorcycle Club v. City of San Jose</i> (9 <sup>th</sup> Cir. 2005) 402 F.3d 962 . . . . .	9, 14, 16
<i>Scott v. Jackson County</i> (D.Or.2005) 403 F.Supp.2d 999 . . . . .	8
<i>United States v. Consul-Gonzalez</i> (1975) 521 F.2d 259 . . . . .	16

### STATE CASES

<i>Hurst v. State</i> (Ind.App.1999) 717 N.E.2d 883 . . . . .	8
<i>In re Stevens</i> (2004) 119 Cal.App.4th 1228 . . . . .	17
<i>Mahan v. State</i> (Alaska App.2002) 51 P.3d 962 . . . . .	8
<i>People v. Arvanites</i> (1971) 17 Cal.App.3d 1052 . . . . .	17
<i>People v. Berry</i> (1991) 1 Cal.App.4th 778 . . . . .	10
<i>People v. Burden</i> (1988) 205 Cal.App.3d 1277 . . . . .	11, 12
<i>People v. Carbajal</i> (1995) 10 Cal.4th 1114 . . . . .	5, 14
<i>People v. Delvalle</i> (1994) 26 Cal.App.4th 869 . . . . .	6, 14
<i>People v. Harrison</i> (2005) 134 Cal.App.4th 637 . . . . .	17
<i>People v. Keller</i> (1978) 76 Cal.App.3d 827 . . . . .	7, 16
<i>People v. Lent</i> (1975) 15 Cal.3d 481 . . . . .	6, 9, 11, 15, 16
<i>People v. Torres</i> (1997) 52 Cal.App.4th 771 . . . . .	6, 9
<i>People v. Wardlow</i> (1991) 227 Cal.App.3d 360 . . . . .	6

*People v. Welch* (1993) 5 Cal.4th 228 ..... 7

*Sea Horse Ranch v. Superior Court* (1994) 24 Cal.App.4th 446 ..... 10

*State v. Barker* (1998) 128 Ohio App.3d 233, 714 N.E.2d 447 ..... 8

*State v. Bodoh* (1999) 226 Wis.2d 718, 595 N.W.2d 330 ..... 8

*State v. Choate* (Mo.App.1998) 976 S.W.2d 45 ..... 8

*State v. Sheets* (1996) 112 Ohio App.3d 1, 677 N.E.2d 818 ..... 8

*Stephens v. State* (2001) 247 Ga.App.719, 545 S.E.2d 325 ..... 8

**STATE STATUTES**

Food & Agricultural Code section 31501 ..... 10

Food & Agricultural Code section 31601. .... 10

Food & Agricultural Code section 31641 ..... 21

Food & Agricultural Code section 31642 ..... 21

Food & Agricultural Code section 31643 ..... 21

Food & Agricultural Code section 31644 ..... 21

Food & Agricultural Code section 31645 ..... 21

Food & Agricultural Code section 31646 ..... 21

Food & Agricultural Code section 31662 ..... 22

Fourteenth Amendment of the United States Constitution ..... 14, 16

Penal Code section 399 ..... 9, 10, 22

Penal Code section 1203.1 ..... 5

Vehicle Code section 23152 ..... 3

**MUNICIPAL ORDINANCES**

Los Angeles County Municipal Code section 53.38. . . . . 11

**SUPREME COURT NO. S149303**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

PEOPLE OF THE STATE OF CALIFORNIA, )  
)  
Plaintiff and Respondent, ) Court of Appeal No.  
) E039342  
v. )  
) Superior Court No.  
ALEJANDRO OLGUIN, ) FSB051372  
)  
Defendant and Appellant. )  
)  
\_\_\_\_\_ )

**APPEAL FROM THE SUPERIOR COURT OF  
SAN BERNARDINO COUNTY**

Honorable Michael M. Dest, Judge

---

**APPELLANT’S OPENING BRIEF**

---

**INTRODUCTION**

The issue to be decided is whether a trial court may impose a condition of probation requiring a probationer to notify his or her probation officer of all pets at the probationer’s residence and to give written notice to the probation officer 24 hours prior to any changes.

A probation condition that encompasses all pets is invalid unless ownership of pets has some direct relationship to the crime for which the offender was convicted. In the

instant case, there was absolutely no nexus between appellant's crime - driving while intoxicated - and owning a pet. In addition to being an invalid probation condition, the probation condition is unconstitutionally overbroad.

## PROCEDURAL AND FACTUAL HISTORY

On August 6, 2005, police officers conducted an emergency stop on appellant's vehicle. The officers observed an open beer can in appellant's vehicle and noticed symptoms indicating appellant was under the influence of alcohol. Appellant was arrested after failing a field sobriety test. (Probation Officer's Report at p. 2.) On July 30, 2004, appellant also drove his vehicle while under the influence of alcohol. The record, however, does not contain information regarding the details of this incident. (RT p. 6; CT pp. 2-3.)

On September 29, 2005, appellant pled guilty to two counts of driving a vehicle with a blood alcohol level in excess of .08 by weight, in violation of Vehicle Code section 23152, subdivision (b), in exchange for a maximum sentence of three years and eight months in state prison, the suspension of execution of the sentence, and a grant of probation. Appellant was required to serve 364 days in county jail as part of the grant of probation. (RT p. 8; CT pp. 11-13.)

At the sentencing hearing on October 31, 2005, defense counsel objected to three of the conditions imposed on appellant as part of his probation. (RT p. 23.) One of the conditions, term 8, required appellant to "[k]eep the probation officer informed of his place of residence, cohabitants and pets, and give written notice to the probation officer twenty-four (24) hours prior to any changes." (CT p. 18.) Defense counsel specifically requested the court strike the term "pets" from term 8. (RT p. 23.) The court denied the request and sentenced appellant in accordance with the plea bargain. (RT pp. 23-27.)



On appeal, appellant argued the trial court erred in failing to modify or delete the three conditions of probation to which defense counsel objected at the sentencing hearing. In an unpublished opinion, dated October 15, 2006, the Court of Appeal, Fourth Appellate District, Division Two, upheld the contested terms of appellant's probation. (Opn. p. 8.) Justice King filed a dissenting opinion as to term 8 because he found the requirement that appellant notify his probation officer prior to acquiring a pet was invalid. (Concurring and dissenting opinion of J. King p. 1.) The Court of Appeal interpreted the probation condition to allow the probation officer authority to exclude appellant from owning pets. (Opn. at p. 7.)

On March 26, 2007, this Court granted review.

## ARGUMENT

### I.

**THE PROBATION CONDITION REQUIRING APPELLANT TO KEEP HIS PROBATION OFFICER INFORMED OF ALL PETS IN HIS RESIDENCE AND NOTIFY THE OFFICER 24 HOURS PRIOR TO ANY CHANGES IS AN INVALID CONDITION BECAUSE IT WAS NOT REASONABLY RELATED TO APPELLANT'S PRESENT CRIME OR FUTURE CRIMINALITY AND BECAUSE IT WAS OVERBROAD IN VIOLATION OF DUE PROCESS.**

#### A. Introduction

The restriction on pet ownership is invalid because it does not satisfy the requirements of a valid probation condition and it is unconstitutionally overbroad.

#### B. General Principles Relating To Conditions Of Probation

Probation is governed by statute. (Pen. Code, § 1203.1.) “The court may impose and require. . . 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. . . .” (Pen. Code, § 1203.1, subd. (j).) Trial courts have broad discretion to set conditions of probation in order to “foster rehabilitation and to protect public safety.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) If a condition serves these dual purposes, a probation condition may impinge upon a constitutional right otherwise enjoyed by the probationer. (*People v. Peck* (1996) 52

Cal.App.4th 351, 362.)

However, a trial court's discretion in setting the conditions of probation is not unbounded. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) Where an otherwise valid condition of probation impinges on constitutional rights, the condition must be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation of the probationer. (*People v. Delvalle* (1994) 26 Cal.App.4th 869, 879.)

C. **The Probation Condition Was Invalid Because (1) It Was Not Reasonably Related To Appellant's Conviction Of Driving While Intoxicated; (2) Owning A Pet Is Not Criminal Conduct; And (3) The Condition Was Not Reasonably Related To Preventing Future Criminality**

A term of probation is invalid if 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 481, 486.) A condition of probation must satisfy all three requirements before it can be declared invalid. (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 365.)

1. **The Pet-Notice Probation Condition Was Not Reasonably Related To Appellant's Conviction Of Driving While Intoxicated**

The restriction on ownership of pets bears no relationship to the crime of which appellant was convicted. Appellant pled guilty to two counts of driving a vehicle with a blood alcohol level in excess of .08 by weight. No animals were involved in the offense. Unlike a conviction for cruelty to animals, the crime appellant committed was factually unrelated to harming or using pets. (See *People v. Torres* (1997) 52 Cal.App.4th 771, 778

[discussing the standard restriction on ownership or possession of pets for defendants convicted of cruelty to animals].) Thus, the prohibition or limitation on pet ownership is unrelated to appellant's crime.

In *People v. Keller*, the defendant was convicted of stealing a ballpoint pen and granted probation with certain conditions. The appellate court found narcotics conditions that included urinalysis testing, restricted travel to Mexico, a standard search condition, and banned association with known drug traffickers had no relationship to the defendant's conviction for petty theft. (*People v. Keller* (1978) 76 Cal.App.3d 827, 838, disapproved on other grounds in *People v. Welch* (1993) 5 Cal.4th 228, 237.) Nothing in the record suggested any relationship between drugs and the theft of a ballpoint pen, and only speculation provided any connection between the two. (*Ibid.*) Thus, the probation condition imposing "the waiver of a precious constitutional right resting solely upon plea to theft of a 49-cent ballpoint pen reaches for parallel, the use of a Mack truck to crush a gnat." (*Id.* at p. 840.) The conditions were therefore stricken. (*Ibid.*)

Just as there was no relation between the narcotics conditions imposed for the defendant's conviction of petty theft in *People v. Keller*, there was no relation between the probation condition restricting appellant's right to own a pet and his conviction for driving while intoxicated. The record does not reveal any history of animal abuse, and no animal was harmed either before, during, or after appellant was arrested. Nothing in the record reveals a nexus between pet ownership and the crime of driving while intoxicated. Absent

any relationship to the crime committed, the restriction on pet ownership satisfies the first prong of the *Lent* criteria necessary for a probation condition to be invalid. (*People v. Keller, supra*, 76 Cal.App.3d 827.)

Cases from foreign jurisdictions which have imposed probation conditions related to pets have involved cases in which the defendant's crime had some nexus to animals, such as animal cruelty or harboring a vicious pet. (See, e.g., *Stephens v. State* (2001) 247 Ga.App. 719, 545 S.E.2d 325 [conviction of cruelty to animals (pit bull dogs used for fighting, kept in unsafe and unhealthy conditions), probation condition forbade the defendant from owning any dogs or to live at a residence where dogs were present]; *State v. Choate* (Mo.App.1998) 976 S.W.2d 45 [one count of animal neglect, the defendant was ordered as conditions of probation to pay for care of the dog while it was in protective custody and not to return the dog to the county]; *State v. Sheets* (1996) 112 Ohio App.3d 1, 677 N.E.2d 818 and *State v. Barker* (1998) 128 Ohio App.3d 233, 714 N.E.2d 447 [animal owner convicted of animal cruelty may be required as condition of probation to forfeit all the animals (horses), even those not specifically the subject of the charges]; *State v. Bodoh* (1999) 226 Wis.2d 718, 595 N.W.2d 330 [defendant convicted of injury by negligent handling of dangerous weapons (rottweiler dogs attacking cyclist) and ordered as a condition of probation not to have any dogs at his residence unless approved by the probation officer]; *Scott v. Jackson County* (D.Or.2005) 403 F.Supp.2d 999 [defendant guilty of animal neglect (rabbits), ordered as a condition of probation not to possess any animals]; *Mahan v. State*

(Alaska App.2002) 51 P.3d 962 [defendant convicted of animal neglect for multiple kinds of animals, ordered as a condition of probation not to own or be the primary caretaker of more than one animal, and not to own or care for any horse]; *Hurst v. State* (Ind.App.1999) 717 N.E.2d 883 [probation condition of suspension of hunting license for violation of fish and game and wild animal laws]; cf. *People v. Torres* (1997) 52 Cal.App.4th 771, 778, 60 Cal.Rptr.2d 803 [commenting in passing that “[p]ersons convicted of cruelty to animals could be ordered not to own or possess pets”].) No such connections exists in this case between appellant’s driving while under the influence of alcohol and owning a pet.

**2. Pet ownership, in and of itself, is not criminal**

A condition of probation is invalid if it relates to conduct which is not criminal. (*People v. Lent, supra*, 15 Cal.3d at p. 486.) Owning a pet, in and of itself, is not criminal. Indeed, pet ownership is lawful as pets are considered property under the 14<sup>th</sup> Amendment. (*Fuller v. Vines* (9<sup>th</sup> Cir. 1994) 36 F.3d 65, 68 overruled on other grounds in *Robinson v. Solano County* (9<sup>th</sup> Cir. 2002) 278 F.3d 1007, 1013; see also *San Jose Charter of The Hells Angels Motorcycle Club v. City of San Jose* (9<sup>th</sup> Cir. 2005) 402 F.3d 962, 977-978.) California does place a restriction on pet ownership, but the restriction is not directed at certain breeds or types of animals, rather the restriction is on those pets that the owner knows are mischievous and have a dangerous propensity to attack another person.

If a person knows his or her animal is mischievous and a human suffers injury or death, a person may be prosecuted pursuant to Penal Code section 399 which provides:

Any person owning or having custody or control of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and the animal, while so at large or while not kept with ordinary care, kills any human being who has taken all the precautions that the circumstances permitted, or which a reasonable person would ordinarily take in the same situation, is guilty of a felony.

(Pen. Code, § 399, subd. (a).) It is a misdemeanor or felony if the animal causes “serious bodily injury.” (Pen. Code, § 399, subd. (b).)

The plain language of section 399 does not criminalize mere possession of a “mischievous animal.” Rather, the statute punishes only those who *know* their animals are “mischievous” but allow them to run free or keep them in a negligent manner and the animal kills or injures another person. (*People v. Berry* (1991) 1 Cal.App.4th 778, 783.) “A ‘mischievous’ animal must be such in the abstract: the very nature of the beast puts the owner on notice that it must be confined lest it injure others.” (*Sea Horse Ranch v. Superior Court* (1994) 24 Cal.App.4th 446, 460.) The legislative purpose of the statute is “to protect people against fatal attacks . . . where the victim is in no way at fault for the attack. [Citation.]” (*People v. Berry, supra*, 1 Cal.App.4th at p. 783.)

California also does not criminalize or restrict ownership of any particular breed of dog. (Food & Agr. Code, § 31601, et. seq.) Section 31602 defines “potentially dangerous dog” and section 31603 defines “vicious dog,” but neither section identifies a specific breed of dog. Rather, a dog is classified as either dangerous or vicious depending on certain criteria. Civil liability may be imposed for certain injuries caused by a dog. (Food & Agr.

Code, § 31501, et seq.) Based on existing law, owning a dog of any breed is lawful, and penalties do not apply unless the dog exhibits certain propensities and specific criteria is met as set forth in the applicable statutes.<sup>1</sup>

Because ownership of a pet, in and of itself, is both lawful and unrelated to the facts involved in the commission of appellant's crime, the first two prongs of the *Lent* criteria have been satisfied for finding the probation condition to be invalid.

**3. The Pet-Notice Probation Condition Was Not Reasonably Related To Preventing Future Criminality**

Finally, a probation condition is invalid if, in addition to satisfying the other two prongs of *People v. Lent*, it requires or forbids conduct which is not reasonably related to future criminality. (*People v. Lent, supra*, 15 Cal.3d at p. 486.) The ownership of a pet is not reasonably related to appellant's future criminality because: (1) pet ownership does not increase the risk of driving while intoxicated; (2) nothing in appellant's background suggests the restriction should apply in his circumstances; and (3) a less restrictive or burdensome alternative exists than a generic restriction on all pets exists.

Conditions prohibiting future conduct have been upheld when the conduct relates to the crime. (See, e.g., *People v. Burden* (1988) 205 Cal.App.3d 1277, 1279-1280 [discussing employment conditions validly imposed when crimes were committed in course of defendant's business].) However, where the probation condition lacks a factual predicate,

---

<sup>1</sup> Local ordinances restrict possession of wild or exotic animals. (E.g., Los Angeles Municipal Code §53.38.)



the reasonable relationship between the condition and future criminal acts is absent. (*Id.* at p. 1280.) In *Burden, supra*, the court held the probation condition prohibiting the defendant from maintaining a checking or charge account or possessing any checks or credit cards was valid because it directly related to the crime of writing bad checks and therefore effectively prevented future criminality. (*Id.* at p. 1282.) However, the condition prohibiting defendant from “working in a position of outside or commissioned sales” was stricken because it unnecessarily infringed upon his right to work. (*Ibid.*)

Similar to *Burden*, the probation condition requiring appellant to keep his probation officer informed of all pets in his residence and notify the officer 24 hours prior to any changes lacked a factual predicate for preventing future crimes because pet ownership does not increase the risk of driving while intoxicated. Where the probation condition lacks a factual predicate, the reasonable relationship between the condition and future criminal acts is absent. (*People v. Burden, supra*, 205 Cal.App.3d at p. 1280.) Because owning a pet will not influence appellant to commit any future crimes, the condition of appellant’s probation that restricted his right to own a pet should be stricken.

In upholding the condition, the Court of Appeal likened the requirement that a probationer notify his probation officer regarding pets with the valid requirement that a probationer notify his probation officer regarding cohabitants. (Opn. p. 7.) The Court stated that the purpose of the notification requirement for cohabitants is to ensure the probationer was not associating with individuals who would negatively affect the probationer’s

rehabilitation. (*Ibid.*, citing *People v. Lopez* (1998) 66 Cal.App.4th 615, 622-625 [holding that a condition forbidding contact with gang members was necessary to rehabilitation and future criminality].) The same reasoning, however, cannot be applied to ownership of pets. Possession of a pet, particularly when a probationer, like appellant, does not have a history of animal cruelty, would not lead to future criminality in the same way that human interpersonal relationships with individuals such as known gang members or ex-felons might. Cohabitants and peers of a probationer, particularly if they are known gang members or known drug users, could influence a probationer to engage in future criminality by providing access to social situations where the probationer would be surrounded by individuals engaging in criminal behavior. Such a situation could influence a probationer with a history of gang relations or drug addiction to choose to engage in criminal behavior. Consequently, a probation condition restricting the individuals with whom a probationer can associate, provided there is a factual nexus between the restriction and the probationer's criminal offense, would be reasonably related to preventing future criminality. However, restricting ownership of pets does not serve the same rehabilitative purpose as restricting the individuals with whom a probationer can associate. Animals cannot exert peer pressure to compel a probationer to commit crimes. Because there was no factual predicate between appellant owning a pet and an increased risk of future criminality, the condition of appellant's probation that restricted his right to own a pet should be stricken.

There is nothing in appellant's background suggesting appellant has committed,

would commit, or would be more likely to commit, any crime in the future as a result of owning a pet. The conjecture that appellant would be likely to engage in future criminality by owning a pet is pure speculation. The trial court provided no reasons in response to appellant's objection to the probation condition and offered no rationale for imposing the condition. (RT p. 23.) The probation report, reviewed and considered by the court, did not provide any evidence suggesting that restricting pet ownership would prevent future criminality or promote appellant's rehabilitation. Because, there was no evidence in the probation officer's report, or offered at the sentencing hearing, supporting imposition of the pet ownership restriction, the probation condition restricting appellant's right to own pets must be stricken.

Finally, a less burdensome alternative than a generic restriction on all pets exists. Ownership of pets, as property, is constitutionally protected by both the federal and California Constitutions. (U.S. Const., 14<sup>th</sup> Amend.; Cal. Const., art. I, §7, subd. (a); see *Fuller v. Vines* (9<sup>th</sup> Cir. 1994) 36 F.3d 65, 68 overruled on other grounds in *Robinson v. Solano County* (9<sup>th</sup> Cir. 2002) 278 F.3d 1007, 1013 [pets are considered property under the 14<sup>th</sup> Amendment]; see also *San Jose Charter of The Hells Angels Motorcycle Club v. City of San Jose* (9<sup>th</sup> Cir. 2005) 402 F.3d 962, 977-978.) As a result, the probation condition restricting appellant's ability to own pets was required to be carefully tailored and reasonably related to the compelling state interests of fostering the reformation and rehabilitation of appellant as a probationer and protecting the public safety. (*People v. Delvalle, supra*, 26

Cal.App.4<sup>th</sup> at p. 879; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) It was not. The probation condition equally limited appellant's rights with respect to all animals. To the extent that the pet-notice requirement was not carefully tailored, it was not reasonably related to appellant's future criminality.

The Court of Appeal found that ownership of a pet was indicative of future criminality because, "[a] pet can enable [the] defendant to conceal alcohol or drugs by either distracting or preventing a probation officer from entering or searching [the] defendant's residence." (Opn. p. 5.) Not all pets could enable a defendant to conceal contraband from a probation officer. In fact, the Court of Appeal in this case conceded that it was not concerned with all types of pets when it stated, "[w]hile certain pets are not dangerous and would not inhibit the duties of a probation officer, to require a trial court to outline the type, nature, temperament of a pet that would fall within the probation term is unreasonable and impractical." (Opn. at pp. 5-6.) However, it would not be as difficult as the court implied to create a probation condition that balanced the state's compelling interests in rehabilitation of the probationer and officer safety with appellant's right to own a pet.

Prior to the probation officer making a compliance visit, the officer could call to determine if appellant had any pets, and depending on the type of pet, require the pet to be restrained during the visit or removed from any area where the probation officer might be. When unannounced probation compliance checks are made, upon arriving at the appellant's residence, the probation officer could ask that all animals be restrained prior to entry. To

the extent that the pet-notice requirement was not carefully tailored to meet the compelling state objective of rehabilitation of the probationer and protection of the probation officer, it was not reasonably related to appellant's future criminality. It therefore fails to meet the third prong of reasonableness under *Lent* and is invalid.

Thus, under *People v. Lent* that the pet condition imposed by the trial court restricting ownership of all pets is invalid because: 1) it was not related to appellant's conviction, 2) it prohibited legal conduct, and 3) it did not prevent future criminality. (*People v. Lent, supra*, 15 Cal.3d 481.) Since the probation condition restricting pet ownership satisfies all three prongs of the *Lent* criteria for an invalid probation condition, it must be stricken.

**D. The Pet-Notice Probation Condition Violates Due Process Because It Is Constitutionally Overbroad In That It Limits Appellant's Right To Own Certain Pets And Is Not Closely Tailored To Rehabilitation Of Appellant**

Even if this Court finds that the probation condition was reasonable under *People v. Lent*, the condition must be stricken or narrowed because it violates the Due Process clause of the United States and California Constitutions. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 626-629 [holding the probation condition that prohibited the defendant from associating with gang members was reasonable under *People v. Lent*, but unconstitutionally overbroad in that it prohibited the defendant from associating with individuals not known to the defendant to be gang members].)

The Due Process Clause of the United States Constitution prohibits states from depriving "any person of life, liberty, or property, without due process of law. . . ." (U.S.

Const., 14<sup>th</sup> Amend.) Similarly, the California Constitution guarantees “[a] person may not be deprived of life, liberty, or property without due process of law. . . .” (Cal. Const., art. I, §7, subd. (a).) Pets are considered property under the 14<sup>th</sup> Amendment. (*Fuller v. Vines* (9<sup>th</sup> Cir. 1994) 36 F.3d 65, 68 overruled on other grounds in *Robinson v. Solano County* (9<sup>th</sup> Cir. 2002) 278 F.3d 1007, 1013; see also *San Jose Charter of The Hells Angels Motorcycle Club v. City of San Jose* (9<sup>th</sup> Cir. 2005) 402 F.3d 962, 977-978.)

Ownership of pets, as property, is constitutionally protected by both the federal and California Constitutions. “When a condition unquestionably restricts otherwise inviolable constitutional rights, it is properly subjected to ‘special scrutiny’ to determine whether the limitation, the condition of probation, does in fact serve the dual purpose of rehabilitation and public safety.” (*People v. Keller, supra*, 76 Cal.App.3d at p. 839, citing *United States v. Consul-Gonzalez* (9<sup>th</sup> Cir. 1975) 521 F.2d 259, 265.) Where a condition of probation impinges upon the exercise of a fundamental right and is challenged on constitutional grounds, the court must additionally determine whether the condition is impermissibly overbroad. (*People v. Pointer* (1984) 151 Cal.App.3d 1128, 1139.)

A probation condition is unconstitutionally overbroad when it substantially limits a person’s rights and those limitations are not closely tailored to the purpose of the condition. (*In re White* (1979) 97 Cal.App.3d 141, 146.) It is not enough to show the government’s ends are compelling; the means must be carefully tailored to achieve those ends. (*People v. Harrison* (2005) 134 Cal.App.4th 637, 641-642.) A state may restrict a constitutional right,

but only when the restriction is narrowly drawn to serve a compelling state interest. Therefore, the state's power to inhibit constitutional rights is limited. (*Ibid.*, citing *In re Stevens* (2004) 119 Cal.App.4th 1228, 1237.) "If available alternative means exist which are less violative of a constitutional right and are narrowly drawn so as to correlate more closely with the purpose contemplated, those alternatives should be used." (*People v. Pointer, supra*, 151 Cal.App.3d at p. 1139, citing *People v. Arvanites* (1971) 17 Cal.App.3d 1052, 1062.)

In *People v. Arvanites, supra*, the defendants were convicted of false imprisonment with violence and conspiracy to falsely imprison an employee of a university as part of a demonstration. The trial court imposed a probation condition prohibiting any attempt by defendants to disseminate any idea by means of picketing, signs, placards, leaflets or pamphlets, even if the particular defendant acted entirely on his own. The Court of Appeal held this condition was overbroad. (*People v. Arvanites, supra*, 17 Cal.App.3d at pp. 1063-1064.) The appellate court concluded found the condition prohibiting planning and engaging in demonstrations was valid because the defendants' own testimony showed a total lack of regret for their actions, and entitled the trial court to believe that any demonstration planned or engaged in by them would turn into a repetition of their prior criminal conduct. (*Ibid.*) Conversely, the prohibition against planning or engaging in picketing, posting or carrying signs or placards and handing out or distributing leaflets or pamphlets was too sweeping and could not stand. (*Ibid.*)

In *People v. Lopez, supra*, the defendant challenged the constitutionality of the probation conditions prohibiting him from associating with any gang members or wearing or possessing clothing or other articles with gang insignias, colors or markings having gang significance, as infringing his rights of free association and free speech. (*People v. Lopez, supra*, 66 Cal.App.4th at p. 627.) The conditions were challenged on the grounds they were so broad that he could be found in violation of these conditions without knowledge that the person or article was gang-related. (*Ibid.*) The appellate court agreed and ordered the conditions modified to pertain only to persons *known* to the defendant to be gang members or articles *known* to him to be gang-related. (*Id.* at pp. 628-629.) Thus, even where the defendant is a known gang member, the probation conditions must be narrowly drawn to pass constitutional muster. (*People v. Lopez, supra*, 66 Cal.App.4th 615.)

In the instant case, the court found that the purpose of the condition requiring notification of the presence of pets was twofold: to assure proper rehabilitation of the defendant and to protect the probation officer. (Opn. p. 7.) Rehabilitation of the defendant and protection of the probation officer are related: to ensure a defendant is complying with the terms of his probation and not reoffending, the probation officer must be able to properly supervise the defendant. Proper supervision includes the ability to search the defendant's residence. The Court of Appeal believed the presence of certain types of pets can threaten the probation officer's safety, inhibit the officer from searching the probationer's residence, and therefore prevent the probation officer from properly supervising the defendant.



However, supervision of the probationer is only one aspect of promoting his or her rehabilitation. Owing a pet is beneficial and can assist probationers in their rehabilitation. Owing a pet has been shown to be conducive to making people happier, more nurturing, and to reducing stress. ([http://www.holisticonline.com/stress/stress\\_pet-therapy.htm](http://www.holisticonline.com/stress/stress_pet-therapy.htm)); [http://www.holisticonline.com/Pets/pets\\_pet-therapy-benefits-of-pets.htm](http://www.holisticonline.com/Pets/pets_pet-therapy-benefits-of-pets.htm)<sup>2</sup>.) Pets of all types provide companionship and help keep people healthy. The National Institutes of Health recognized many of the benefits of pet ownership as early as 1987. These benefits included cardiovascular health, child development, improved health of older owners, and the therapeutic benefits of pets. (National Institutes of Health, Workshop Summary, *The Health Benefits Of Pets* (Sept. 10 - 11, 1987) (<http://consensus.nih.gov/1987/1987HealthBenefitsPetsta003html.htm> .)

Research shows animals help people feel less lonely or depressed, reduce stress-induced symptoms, offer entertainment, bring out a person's nurturing instincts, and make people feel safe and unconditionally accepted. ([http://www.cancerwise.org/May\\_2005/display.cfm?id=75D680EE-3586-4130-A324FED565828E87&color=blue&method=displayFull&color=blue](http://www.cancerwise.org/May_2005/display.cfm?id=75D680EE-3586-4130-A324FED565828E87&color=blue&method=displayFull&color=blue); see also <http://www.pawsandhearts.org/P&Hbenefits.htm>; and [http://en.wikipedia.org/wiki/Animal-Assisted\\_Therapy](http://en.wikipedia.org/wiki/Animal-Assisted_Therapy) .)

In addition, results of several studies and experimental programs reveal that inmates

---

<sup>2</sup> All citations to the internet are as of July 2, 2007.

involved in animal-assisted therapy programs assumed a nurturing role, experienced a sense of autonomy, improved self-esteem and self-confidence; the animals contributed to the inmates' improved emotional and psychological states. Further, inmates involved in such programs were found to be considerably less likely to re-offend. (Deaton, *Humanizing Prisons with Animals: A Closer Look at "Cell Dogs" and Horse Programs In Correctional Institutions* (Mar. 2005) J. of Corr. Ed. [http://findarticles.com/p/articles/mi\\_qa4111/is\\_200503/ai\\_n13634711/print](http://findarticles.com/p/articles/mi_qa4111/is_200503/ai_n13634711/print)) In short, pets are beneficial and can assist probationers in their rehabilitation.

The Court of Appeal believed the presence of certain types of pets could inhibit the ability of the probation officer to supervise the probationer. First, it is speculation that the presence of a pet would in fact inhibit the probation officer's ability to supervise the probationer. With respect to pets that would inhibit the probation officer's ability to search a defendant's residence, less burdensome alternatives are available such as requiring the probationer to secure the animal when the probation officer conducts a search. The trial court's prohibition against appellant owning any pet without the permission of the probation officer was overbroad and unreasonable.<sup>3</sup>

The trial court's principal concern was most likely the presence of vicious dogs in

---

<sup>3</sup> The condition of probation by the trial court only required appellant to "keep the probation officer informed of . . . pets . . . and give written notice to the probation officer twenty-four (24) hour prior to any changes." (CT p. 18.) The Court of Appeal construed the condition to give the probation officer the power to prohibit appellant from owning certain pets, but did not specify what pets the probation officer could prevent appellant from owning. (Opn. at p. 7.)

appellant's residence. However, existing laws largely obviate this concern. Potentially dangerous dogs must be properly licensed and vaccinated. (Food & Agr. Code, § 31641.) The licensing authority must include the potentially dangerous designation in the registration records of the dog and additional dog fees may apply. (*Id.*) A potentially dangerous dog must be kept indoors or in a securely fenced yard from which the dog cannot escape. (Food & Agr. Code, § 31642.) And if the dog dies or is sold, the owner must notify the animal control department of the changed condition and new location of the dog within two days. (Food & Agr. Code, § 31643.) A potentially dangerous dog that has no additional instances of behavior described in section 31602 within a 36-month period must be removed from the list of potentially dangerous dogs. (Food & Agr. Code, § 31644.) Dogs that are deemed vicious may be destroyed, and the owner may be prohibited from owning any dog for up to three years. (Food & Agr. Code, §§ 31645 and 31646.) Thus, a dog is not deemed a potentially dangerous dog for all time. Nor does the law specify any particular breed of dog as "mischievous," "potentially dangerous" or "vicious." Moreover, civil and criminal penalties are already in place for violations involving a potentially dangerous dog or vicious dog if certain criteria is met (Food & Agr. Code, § 31662; Pen. Code, § 399), and a probationer is required to "obey all laws" as a condition of probation. The above regulatory scheme provides a significant degree of protection from vicious dogs for a probation officer who intends to search a probationer's residence. There was no need for the trial court to apply a sweeping and arbitrary restriction on appellant's ability to own a pet simply to

protect the probation officer from an undefined and speculative risk of harm.

Clearly the courts and probation officers are not concerned with harmless animals such as cats, rabbits, hamsters or fish. Yet, appellant could be found in violation of his probation if he failed to inform his probation officer 24 hours prior to getting a cat or adding more fish to his aquarium. Additionally, if a friend from the neighborhood stopped by appellant's residence while walking her dog and was present when the probation officer arrived for an unannounced search, appellant could be found in violation of his probation for having an animal present in his home about which he did not notify his probation officer 24 hours earlier. Under the probation condition as worded, both of these situations could subject appellant to a violation of his probation.

The Court of Appeal acknowledged that many animals are unpredictable and may attack a stranger regardless of whether the animal is considered dangerous or vicious, and hence it would be unreasonable to require a trial court to fashion a probation condition that would outline the type, nature, temperament of a pet that could properly be forbidden as a condition of probation. (Opn. p. 6.) However, the solution is not to provide a condition that is so overbroad as to subject appellant to a probation violation for failing to notify his probation officer of the presence of a completely harmless animal 24 hours prior to its arrival, or to subject appellant to a probation violation for a circumstance out of his control, such as the unexpected arrival of a visitor who brought along their pet. The condition as worded is not only unreasonable, it is impractical, particularly in the situation where

appellant lives with other people and has no control over the animals they or their friends bring into the residence.

Even if this Court is not inclined to strike the condition altogether, a more narrowly worded condition could be imposed that would protect the state interests while insuring that appellant would not be found in violation of his probation circumstances out of his control. The condition should have been worded to require appellant, if indeed he owned a pet, to have a cage or crate where the pet must be placed during any search of appellant's residence. Any pets at the residence not owned by appellant could similarly be required to be placed in a cage or taken out of the residence by the pet's owner. This would eliminate the situations where appellant could be found in violation of his probation due to the pet of another or due to failing to notify his probation officer 24 hours prior to the arrival of a harmless pet.

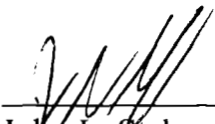
Because the probation condition impinged on appellant's right to own a pet, which is a constitutionally protected right, the probation condition was required to be carefully tailored and reasonably related to the compelling state interests of rehabilitation of the defendant and protection of the probation officer. The condition as worded was not carefully tailored nor reasonably related to the state's interests. Assuming the state has the power to restrict appellant's ownership of a pet as a condition of probation, a more narrowly drawn alternative exists. The condition was overbroad in violation of the due process clauses of the United States and California Constitutions and must be stricken or properly modified.

**CONCLUSION**

Based on the foregoing, appellant requests this Court to strike the probation condition requiring appellant to notify his probation officer of all pets at his residence and to give written notice to his probation officer 24 hours prior to any changes. The condition satisfies the *Lent* criteria for an invalid probation condition and is unconstitutionally overbroad.

Respectfully submitted,

Dated: 8/06/07

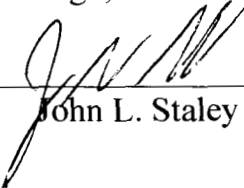
  
\_\_\_\_\_  
John L. Staley  
Attorney for Appellant  
Alejandro Olguin

**CERTIFICATION OF WORD COUNT**

I, John L. Staley, certify that based on the word count of the computer program used to prepare this document, there are 6135 words in this BRIEF ON THE MERITS, excluding the tables, case caption, and certification.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Diego, California.

Dated: 8/06/07

  
\_\_\_\_\_  
John L. Staley

PROOF OF SERVICE  
STATE OF CALIFORNIA, COUNTY OF RIVERSIDE  
(People v. Olguin, appeal No. S149303)

I reside in the county of SAN DIEGO, State of California

I am over the age of 18 and not a party to the within action; My business address is 11770 Bernardo Plaza Court, Suite 305, San Diego, CA 92128. On August 6, 2007, I served the foregoing document described as:

APPELLANT'S OPENING BRIEF

on all parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Court of Appeal  
Fourth App. District  
Division Two  
3389 Twelfth Street  
Riverside CA 92501

Office of the  
Attorney General  
110 West 'A' St.  
P.O. Box 85266  
San Diego, CA 92186-5266

Appellate Defenders, Inc.  
Suite 300  
West Beech St.  
San Diego, CA 92101

Clerk of the Superior Court  
San Bernardino County  
Appeals Section  
401 N. Arrowhead Ave.  
San Bernardino, CA 92415-0063

District Attorney's Office  
316 North Mt. View Ave.  
San Bernardino, CA 92415

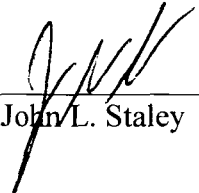
Public Defender's Office  
364 Mountain View Ave.  
San Bernardino, CA 92415-0050



Court of Appeal  
Fourth App. Dist., Div. One  
Suite 300  
750 B St.  
San Diego, CA 92101  
(For filing with the California Supreme Court)

Alejandro Olguin  
BK #0508300260 (M3-73)  
P.O. Box 9490  
San Bernardino, CA 92427

I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Diego, California. Executed on August 6, 2007, in San Diego, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

  
\_\_\_\_\_  
John L. Staley