S175356 **Supreme Court Copy**

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff – Respondent, v. LOUIS LAMBERT MARTIN, Defendant –Appellant.	C.A. No. E046579 S.C. No. FSB 803105

Appeal from the San Bernardino County Superior Court

Honorable JOHN N. MARTIN, Judge

PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO, AFFIRMING THE JUDGMENT OF THE SUPERIOR COURT

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By appointment of the
Court of Appeal under the
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IN THE SUPREME COURT

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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:

Defendant and Appellant, and Petitioner LOUIS LAMBERT MARTIN petitions for review following the published decision of the Court of Appeal, Fourth Appellate District, Division Two (per Hollenhorst, Acting P.J.), filed on June 24, 2009 as a non-published

opinion. 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.). The opinion and order certifying the opinion for publication are attached to the instant petition.

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.

GROUNDS FOR REVIEW

Review is appropriate and necessary in this case to resolve a split of authority among the appellate courts regarding whether the *Harvey* waiver rule applies to conditions of probation as opposed to only prison sentences.

In *People v. Beagle*, (2004) 125 Cal.App.4th 415, 421, 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.*)

Following the Fifth Appellate District Court's decision in *Beagle*, appellant appealed from the trial court's imposition of probation conditions based on a dismissed count. Appellant argued that regardless of otherwise appropriately imposed probation conditions under section 1203.1, the rule set forth in *People v. Harvey,* (1979) 25 Cal.3rd 754, limits a trial court's ability to impose probation conditions based on dismissed counts.

The court of appeal in this case disagreed with appellant and with the Fifth Appellate District Court's analysis of *Harvey*. The court's opinion in this case was non-published. However, based on a request by the Attorney General, the court certified its opinion for publication, thus creating a split of authority among the appellate courts.

Review is therefore appropriate to resolve this important issue regarding the scope of *Harvey* and whether the *Harvey* rule is properly applied to conditions of probation.

III.

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 office hurt himself while kicking the door open, and not when appellant was closing the door. (CT 51)

IV.

ARGUMENT IN THE COURT OF APPEAL

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, limits a trial court's ability to impose

probation conditions based on dismissed counts. (*See People v. Beagle*, (2004) 125 Cal.App.4th 415, 421.)

B. THE LACK OF A *HARVEY* WAIVER INVALIDATES THE CONDITIONS OF PROBATION RELATING TO A DISMISSED CHARGE OF DOMESTIC VIOLENCE.

In the present case, there is little question that the trial court imposed domestic violence conditions of probation based on a dismissed domestic violence charge. (RT 33: 20-22; 34: 15-18) It is undisputed that appellant signed a plea bargain without a *Harvey* waiver, evidencing the intent of the parties to limit appellant's sentencing consequences to the admitted offense. (CT 9)

While appellant agreed to domestic violence conditions at the time of sentencing, he did so only under threat from the trial court to reject the plea. (RT 33-34) However, there was no *Harvey* waiver given at the sentencing hearing, and the trial court later allowed appellant to object to the domestic violence conditions, preserving them for appeal. (RT 39-41)

Consequently, the trial court was without the discretion to impose domestic violence terms based on the dismissed count under *People v. Beagle*, *supra*, 125 Cal.App.4th at 421 [applying *People v. Harvey*, *supra*, 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*.

V.

THE SPLIT OF AUTHORITY CREATED BY THE PUBLISHED OPINION IN THE PRESENT CASE ESTABLISHES APPROPRIATE GROUNDS FOR REVIEW BY THIS COURT.

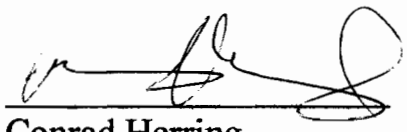
Because the published opinion in this case creates a split of authority, Supreme Court Review is appropriate to resolve this conflict among the appellate courts. While there remains a split of authority, cases will unnecessarily be appealed because of the lack of a definitive rule as to whether the *Harvey* waiver rule applies to conditions of probation.

CONCLUSION

Based on the foregoing, appellant respectfully requests that this Court grant review to resolve the split of authority created by the published opinion in this case.

DATED: August 7 2009

Respectfully submitted,



Conrad Herring,
Attorney for Appellant

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff – Respondent, v. LOUIS LAMBERT MARTIN, Defendant –Appellant.	C.A. No. E046579 S.C. No. FSB 803105 **Word Count Certification** **Petition for Review**

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

Counsel for Appellant certifies that Appellant's Petition for Review, together with footnotes, contains 1648 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: August 7, 2009

Conrad Herring
Attorney for Appellant

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff – Respondent, v. LOUIS LAMBERT MARTIN, Defendant –Appellant.	C.A. No. E046579 S.C. No. FSB 803105 **PROOF OF SERVICE** **PETITION FOR REVIEW**

The undersigned, counsel for Appellant, certifies that, on August 7, 2009, he served a copy of appellant's Petition for Review on the following persons by mail with postage prepaid in Carlsbad, California.

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Conrad Herring,
Attorney for Appellant

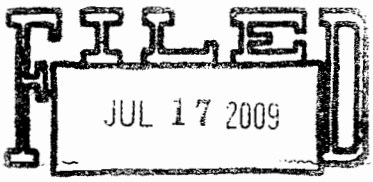
Dated: August 7, 2009

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO



THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIS LAMBERT MARTIN,

Defendant and Appellant.

E046579

(Super.Ct.No. FSB803105)

ORDER CERTIFYING OPINION FOR PUBLICATION

A request having been made to this court pursuant to California Rules of Court, rule 8.1120(a), for publication of a nonpublished opinion heretofore filed in the above-entitled matter on June 24, 2009, and it appearing that the opinion meets the standard for publication as specified in California Rules of Court, rule 8.1105(c);

IT IS ORDERED that said opinion be certified for publication pursuant to California Rules of Court, rule 8.1105(b). The opinion filed in this matter on June 24, 2009, is certified for publication.

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

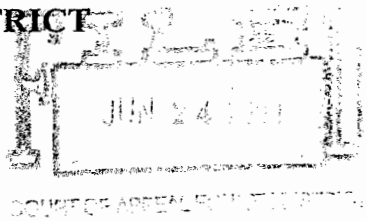
GAUT
J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO



THE PEOPLE,	
Plaintiff and Respondent,	E046579
v.	(Super.Ct.No. FSB803105)
LOUIS LAMBERT MARTIN,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of San Bernardino County. John N. Martin, Judge. Affirmed.

Conrad Herring, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lynne McGinnis and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Louis Lambert Martin was charged with resisting an executive officer (Pen. Code, § 69, count 1)[1] and corporal injury to a spouse or cohabitant (§ 273.5, subd. (a), count 2). Pursuant to a plea agreement, defendant pled guilty to count 1, and count 2 was dismissed at the time of sentencing. The trial court placed defendant on three years' probation with specified conditions.

On appeal, defendant contends the court improperly imposed probation conditions addressing domestic violence, since the court dismissed the corporal injury to a spouse charge, and there was no *Harvey*[2] waiver in the plea agreement. We affirm.

FACTUAL BACKGROUND

On July 27, 2008, police officers were dispatched to the apartment where defendant lived with his girlfriend (the victim) regarding a domestic violence incident. Defendant had already fled the scene before the officers arrived. Upon arrival, the officers observed redness and swelling to the victim's nose and cheek. She advised them that defendant had punched her in the face with a closed fist and choked her. The victim said there was a prior history of domestic violence and that defendant had struck her several times in the past.

Later that day, defendant returned to his apartment. As he walked up the staircase to the apartment, the officers ordered him to stop. He ignored them and went into the apartment. One of the officers put his foot in the doorway of the apartment to keep the

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[1] All further statutory references will be to the Penal Code unless otherwise noted.

[2] *People v. Harvey* (1979) 25 Cal.3d 754, 758 (*Harvey*).

door open, but defendant shut the door on his foot and ankle. The officer yelled for defendant to open the door, but defendant would not listen. The officers forced their way into the apartment, and defendant ran out the back door. The officers located him in the carport trying to wedge himself under a car. Defendant fought with officers as they tried to handcuff him.

Defendant admitted to the police that he had grabbed the victim by the neck and said she "accidentally got punched in the face" when he was fighting with the victim's brother. Defendant said he closed the door on the officer's foot and fled the scene because he did not want to go to jail.

ANALYSIS

The Trial Court Properly Imposed the Domestic Violence Conditions of Probation

Defendant contends that since the court dismissed the count involving domestic violence (count 2), and there was no *Harvey* waiver in the plea agreement, the court erred by imposing probation conditions addressing domestic violence (the domestic violence conditions).[3] We disagree.

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[3] Defendant does not identify which probation conditions are at issue but instead generally refers to them as "domestic violence conditions." We presume the conditions of which he complains are the conditions requiring him 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.

A. *Procedural Background*

Pursuant to a plea agreement, defendant entered a guilty plea to felony resisting an executive officer. (§ 69.) In exchange, count 2 was to be dismissed at the time of sentencing. The plea agreement did not include a *Harvey* waiver.

At the sentencing hearing, defense counsel indicated that defendant objected to the domestic violence conditions. The court said it was "looking to the facts as they occur(red), not to what [defendant] pled." The court then set forth its intention to impose the domestic violence conditions and stated that defendant could either accept them, or it would set aside the plea and "start all over." Defense counsel stated that defendant pled guilty to resisting an officer and signed a plea with no *Harvey* waiver. The court replied that it was "not going to let a plea bargain get around somebody who was charged with beating up his wife or beating up a woman." The court said it was going to set aside the plea but then allowed defense counsel to discuss defendant's options with him. Defendant concluded that, based on the court's indicated sentence and probation terms, he was willing to accept the terms.

B. *Harvey Does Not Apply to Probation Conditions*

In *Harvey*, *supra*, 25 Cal.3d 754, the defendant pled guilty to two counts of robbery. The plea was part of a bargain under which a third count, which charged an unrelated robbery, was dismissed. (*Id.* at p. 757.) On appeal, the defendant complained of the duration of his sentence, contending the sentencing court improperly considered and relied upon the facts underlying the robbery count that was dismissed in selecting the

upper term on one of the robbery counts. (*Ibid.*) The Supreme Court held that *for purposes of sentence enhancement*, a court may not consider facts that pertain solely to a charge that has been dismissed as part of a plea bargain (the *Harvey* rule). (*Id.* at p. 758.) The court specifically concluded that "under the circumstances of this case, it would be improper and unfair to permit the sentencing court to consider any of the facts underlying the dismissed count three for purposes of aggravating or enhancing [the] defendant's sentence. Count three was dismissed in consideration of [the] 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 p. 758.)

In the instant case, defendant relies upon *People v. Beagle* (2004) 125 Cal.App.4th 415 (*Beagle*) in support of his contention that the court erred by imposing the domestic violence conditions, since the corporal injury count was dismissed under a plea agreement that did not contain a *Harvey* waiver allowing the court to consider the dismissed count for purposes of imposing probation conditions. The *Beagle* court concluded that it saw "no basis for distinguishing conditions of probation from prison sentences in this context." (*Beagle, supra,* at p. 421.) The court went on to hold that *Harvey* applied to conditions of probation, stating the *Harvey* court "did not say that this rule was limited only to increased prison terms." (*Beagle, supra,* at p. 421.)

We disagree with the Fifth Appellate District Court's analysis of *Harvey* and its conclusion in *Beagle* and are not bound by that opinion. (*People v. Landry* (1989) 212 Cal.App.3d 1428, 1436.) In *Harvey*, the defendant was sentenced to prison. The court specifically concluded "it would be improper and unfair to permit the sentencing court to consider any of the facts underlying the dismissed count three *for purposes of aggravating or enhancing [the] defendant's sentence.*" (*Harvey, supra*, 25 Cal.3d at p. 758, italics added.) The court further noted that implicit in the defendant's plea bargain was the understanding that he would "suffer no adverse *sentencing consequences* by reason of the facts underlying, and solely pertaining to, the dismissed count." (*Ibid.*, italics added.) Thus, the Supreme Court did not even contemplate whether a court could consider facts that pertained solely to a charge that had been dismissed as part of a plea bargain, in the context of determining conditions of probation. "[I]t is axiomatic that cases are not authority for propositions not considered. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

We conclude *Beagle*'s reasoning is untenable that the *Harvey* rule must apply to probation conditions since the court in *Harvey* "did not say that this rule was limited only to increased prison terms" (*Beagle, supra,* 125 Cal.App.4th at p. 421).

C. *The Domestic Violation Conditions Are Valid*

Defendant argues that the court abused its discretion in imposing the domestic violence conditions, since it clearly imposed those conditions because of the dismissed count. We find no abuse of discretion.

Probation is "an act of grace or clemency, the granting or denial of which is within the court's discretion . . . ." (*People v. Axtell* (1981) 118 Cal.App.3d 246, 256.) A sentencing court is vested under section 1203.1 "with broad discretion to prescribe conditions of probation to foster rehabilitation and to protect the public (citation)." (*People v. Keller* (1978) 76 Cal.App.3d 827, 831, overruled on other grounds as stated in *People v. Welch* (1993) 5 Cal.4th 228, 237.) Section 1203.1, subdivision (j) provides that a court granting probation may 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 . . . ." (Italics added.) "The discretion is not boundless [citation], but '[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. . . ." [Citation.] 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.' [Citation.]" (*People v. Phillips* (1985) 168 Cal.App.3d 642, 646, italics added.) A probationer consents to the probation conditions "in exchange for the opportunity to avoid service of a state prison term. Probation is not a right, but a privilege. '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. [Citations.]' [Citations.]" (*People v. Bravo* (1987) 43 Cal.3d 600, 608-609.)

Initially, we note that, at the sentencing hearing, the court indicated to defendant its intention to impose the domestic violence conditions and stated that defendant could either accept them, or the court would set aside the plea. After discussing the matter with his attorney, defendant informed the court that he was willing to accept the domestic violence terms that are the subject of this appeal. Defendant now claims he only accepted the terms "under threat from the trial court to reject the plea." However, if defendant considered the domestic violence conditions more harsh than the sentence the court would have otherwise imposed, he had the right to refuse probation. (*People v. Bravo*, *supra*, 43 Cal.3d at p. 608.) He chose to accept the probation terms. We do not look favorably upon his complaint concerning the terms now.

In any event, the court was well within its discretion in imposing the domestic violence conditions. As discussed *ante* (see § B.), the court was not barred by *Harvey* from imposing them. The domestic violence conditions were fitting and proper for defendant's rehabilitation, in light of the victim's statement that he struck and choked her. (§ 1203.1, subd. (j).) The police observed redness and swelling to her nose and cheek. In addition, the probation officer's report indicated there was a prior history of domestic violence between defendant and the victim in that he had struck her several times in the past. The court properly considered the probation officer's report and followed the recommendation to impose the domestic violence conditions. (§ 1203.)

Furthermore, even though the corporal injury to a cohabitant count was dismissed under the plea agreement, the domestic violence conditions were valid since they were reasonably related to defendant's future criminality. (*People v. Phillips*, *supra*, 168 Cal.App.3d at p. 646.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

GAUT
J.