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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E040617
v.	(Super.Ct.No. FSB039894)
MARK ANTHONY DODSON,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of San Bernardino County. Michael M. Dest, Judge. Affirmed with directions.

Lizabeth Weis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry Carlton, Supervising Deputy Attorney General, and Marissa A. Bejarano, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Mark Anthony Dodson appeals following his guilty plea to a domestic violence offense. Defendant was placed on probation for three years subject to a number of terms and conditions. On appeal, defendant argues that three of the probation conditions are invalid and unconstitutional as applied to him. We agree with defendant's claim that the probation condition requiring him to notify his probation officer of any pets violates all three of *Lent's*[1] probation criteria and is unconstitutionally overbroad. However, we reject defendant's other contentions, as we find that the field interrogation term and the search term are valid. Consequently, we direct the trial court to modify the pet condition and in all other respects affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On May 18, 2003, police responded to an activated panic alarm. When they arrived at the alarm location, they spoke to defendant and another male witness who was standing nearby.[2] Police were advised defendant had been in an argument with the woman living there, but she left on foot to cool down. Defendant assured police the argument was over, and he was leaving. Police searched the area for the woman but were unable to find her, so defendant and the witness were released. Police then received a dispatch informing them of an emergency call from a woman reporting she had just been the victim of an assault by her ex-husband.

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[1] *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*)

[2] The facts and circumstances of the offense relevant to our analysis were taken from the probation report unless otherwise noted.

When police contacted the victim, she stated she and defendant had been married but were divorced about ten years. At the time of the incident, defendant was living out of state but staying at the victim's home to visit their daughter. During an argument, defendant blocked the victim's path to prevent her from leaving, so she shoved him to get by. In response, he struck her with his fist, knocking her down on a bed. Although she was able to grab her keys and hit the panic alarm, defendant eventually obtained the keys, got into the victim's vehicle, and put it in gear. The struggle continued, and the victim was dragged down the street in the vehicle. At some point she was able to climb into the vehicle to talk to defendant. Defendant did park the vehicle to talk, but the victim was afraid and jumped out. Defendant then drove the vehicle into the house, hitting the victim on her left hip causing her to spin around. The record does not include information about any injuries or property damage. The victim was contacted about restitution but did not respond by the deadline.

A felony complaint was filed on June 19, 2003, charging defendant with two counts of assault with a deadly weapon in violation of Penal Code[3] section 245, subdivision (a)(1). The alleged deadly weapon was a motor vehicle. Defendant was not arrested until February 16, 2006. Pursuant to a plea agreement, defendant pled guilty on April 12, 2006, to one count of corporal injury to a spouse or cohabitant in violation of section 273.5, subdivision (a). As part of the plea bargain, the People agreed to dismiss the assault charges and amend the complaint to include only a single count of corporal

[3] All further statutory references will be to the Penal Code unless otherwise indicated.

injury to his ex-wife. Defendant was released pending sentencing and credited with time served in jail. The agreed sentence was probation plus completion of a domestic violence program. The People also agreed not to oppose a reduction of the offense to a misdemeanor after 18 months if defendant did not violate the terms of his probation.

When defendant was interviewed by a probation officer on May 9, 2006, he denied committing the offense and claimed he had been in close contact with the victim and his daughter since the incident but was unaware there was a warrant. According to defendant, he was living out of state and did not find out charges had been filed against him until he was told by the Social Security office he could not receive benefits because of an outstanding warrant. At that time, defendant claims he sold his belongings and returned to California to face the charges. He told the probation officer he agreed to plead guilty because he had been in jail about 50 days and was tired of it. He admitted moving out of state in 1998 without completing domestic violence classes that were ordered at that time.

DISCUSSION

A. The Probation Terms and Conditions Were Properly Preserved for Appellate Review.

The People argue defendant has forfeited his right to appeal the reasonableness and constitutionality of his probation conditions because he failed to make adequate objections at the time of sentencing. Defendant contends his objections below were sufficient to preserve the issues for appeal. Alternatively, he claims he received

ineffective assistance of counsel under the Sixth Amendment if his attorney did not make an adequate record.

We conclude that the "pet" condition, field interrogation condition, and the search condition were preserved on appeal and not forfeited, because (1) proper objections were raised below, and (2) defendant's claim that the pet condition is constitutionally vague and overbroad is not subject to the forfeiture rule. As we find that defendant's complaints against the probation terms and conditions were properly preserved either by an appropriate objection or by operation of law, we need not decide whether defense counsel rendered ineffective assistance of counsel.

At the time of sentencing, the court and the parties reviewed the list of probation conditions recommended by the probation department. Defense counsel went through the list of conditions and registered an objection to each term she found unacceptable.

Probation Condition No. 7[4] stated: "Keep the Probation Officer informed of place of residence, cohabitants and pets, and give written notice to the Probation Officer twenty-four (24) hours prior to any changes. . . ."

Probation Condition No. 9[5] required defendant to: "Submit to a search and seizure of [his] person, residence and/or property under [his] control at any time of the day or night by any law enforcement officer, with or without a search warrant, and with or without cause . . . ."

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[4] This is listed as Probation Condition No. 6 in the court's minute order.

[5] This is listed as Probation Condition No. 8 in the court's minute order.

Probation Condition No. 20[6] stated: "Submit to, and cooperate in, a field interrogation by any peace officer at any time of the day or night."

During sentencing, the court and counsel engaged in the following colloquy:

"[Defense Counsel]: Your Honor, and on No. 7, we would object to 'pets.'

"The Court: Once again, that's a public safety issue. I will overrule your objection.

"[Defense Counsel]: All right, your Honor. We'd object to No. 9 and ask it be narrowly construed for this case.

"The Court: I'm going to keep it as is. [¶] . . . [¶]

"[Defense Counsel]: Our standard objection to No. 20.

"The Court: Overruled."

A defendant's failure to timely challenge the reasonableness of a probation condition on grounds set forth in *Lent*, *supra*, 15 Cal.3d at p. 486,[7] is forfeited on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237 (*Welch*).) "A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case." (*Id.* at p. 235.)

The People assert that defendant's "fail[ure] to object to the probation conditions on *Lent* grounds . . . challeng[ing] only a term in the pet condition" was insufficient to preserve his claim that the pet condition was unreasonable. We disagree.

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[6] This is listed as Probation Condition No. 16 in the court's minute order.

[7] Superseded on another ground by Proposition 8 as stated by *People v. Wheeler* (1992) 4 Cal.4th 284, 290-295

Defense counsel stated with particularity that she objected to that portion of the "notice to probation officer" condition requiring him to inform the officer about pets. It was unnecessary to object with the specific words "*Bushman/Lent*" or to the unreasonableness of the pet condition. The prosecution has failed to cite any authority requiring that the specific term "*Bushman/Lent*" be used. Similarly, our research has failed to find any precedent requiring the objection be "*Bushman/Lent.*" An objection is sufficient "if it fairly apprises the trial court of the issue [and is] deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented." (*People v. Scott* (1978) 21 Cal.3d 284, 290.)

Here, defense counsel lodged a specific enough objection calling the court's attention to that portion which defendant claims is objectionable in order for the court to decide whether the probation condition is unreasonable using the *Bushman/Lent* test. This is what the defense counsel properly did here- she objected to the "pet" condition. Thus, the reasonableness of the pet condition was preserved for appellate review.

The same holds true with the field interrogation condition. The public defender stated, "Our standard objection to No.20." We agree with defendant that this is "a shorthand reference understood by the trial court and trial counsel, to [be] an objection on the grounds that the condition violates appellant's constitutional rights against self-incrimination and his rights to privacy, security, and liberty."[8] This is a reasonable

[8] We note it is the local custom in many courts (especially those with large calendars) to abbreviate matters in order to get through the calendar more quickly and efficiently.

inference from the record as the probation condition requires defendant *to speak to* a peace officer at any time. This would entail issues regarding defendant's Fifth Amendment right to remain silent, his Fourth Amendment rights to be secure in his person and against unreasonable search and seizure, and his Fourteenth Amendment due-process right to privacy. We conclude the "standard objection" language was sufficiently specific to preserve the reasonableness and unconstitutionality objections to the field interrogation term.

With respect to the search and seizure term, the public defender objected to it and asked that it be "narrowly construed for this case." Again, this objection was sufficient to preserve the claim on appeal. Defense counsel's objection, coupled with a request to narrowly construe the search term, maintained defendant's claim for later review. Counsel's reference to "narrowly construe" the search term refers to a request similar to one made in *People v. Bravo* (1987) 43 Cal.3d 600, 603-604 (*Bravo*): that peace officers be limited to search only if they have reasonable cause to suspect criminal activity.[9]

Finally, the California Supreme Court in *In re Sheena K.* (2007) 40 Cal.4th 875 held that probation conditions that are unconstitutionally vague and overbroad need not be objected to below in order to preserve their review on appeal. (*Id.* at pp. 888-889.) Defendant's claim that the pet condition was unconstitutionally vague (because it was uncertain whose "pets" the condition refers to) and overbroad (because it encompassed tame animals as well as vicious animals) falls squarely within the "vague and overbroad"

[9] This is a fair comment based upon the record.

exception to the forfeiture rule. Consequently, defendant need not have objected on constitutional grounds below in order to raise the constitutional claim for the first time on appeal as it is preserved by operation of law.

B. *The Probation Condition Concerning Pets Must Be Modified.*

"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 . . . conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*Lent*, *supra*, 15 Cal.3d at p. 486, fn. omitted.)

Here, probation condition No. 7 states that defendant must keep his probation officer informed of ownership of pets. That portion of the probation condition violates all three criteria set forth in *Lent*. Defendant's ownership or contact with a pet of any kind had nothing to do with the crime of which he was convicted. Having a pet is not in itself criminal. Pet ownership is not indicative of or related to future criminality.

The People argue that the probation condition is related to the third *Lent* standard, future criminality. The concern apparently addressed is whether defendant might have a dangerous animal, such as a vicious attack dog, at her residence. However, it is already unlawful to keep vicious or dangerous animals, and defendant's probation conditions already require him to violate no law. (See Food & Agr. Code, § 31601 et seq.; § 399.)

As noted, the offense of which defendant was convicted had nothing to do with any pets. His conviction involved possession of stolen property. The ownership of pets is a lawful activity; indeed, "the harboring of pets" has been recognized as "an important

part of our way of life." (Cf. *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 514; *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 163.)

We have conducted a thorough search of hundreds of cases concerning probation conditions related to pets. Virtually all the cases of pet probation conditions involve convictions of animal cruelty, harboring a vicious pet, or some other offense in which an animal was actually involved. (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 [commenting in passing that "[p]ersons convicted of cruelty to animals could be ordered not to own or possess pets"].)

We have found two cases that mention a condition of parole (not probation) involving pets, where the condition is related to officer safety. *United States v. Crew* (D.Utah 2004) 345 F.Supp.2d 1264 refers to a defendant's release on parole, including as a parole condition: "4. HOME VISITS: I will permit visits to my place of residence by agents of Adult Probation and Parole for the purpose of ensuring compliance with the conditions of my parole. I will not interfere with [this] requirement, i.e. having vicious dogs, perimeter security doors, refusing to open the door, etc." *United States v. Pyeatt* (D.Utah, June 15, 2006, 2:05-CR-890 TC) 2006 U.S.Dist. Lexis 40337 referred to an identical parole condition.

The genuine concern to be addressed by the probation condition, as suggested by the parole conditions in *Crew* and *Pyeatt*, is whether a probation officer making a home visit or conducting a probation search will be able to do so without being at risk from a dangerous animal, such as a vicious dog. The probation condition here is not tailored to meet that objective. "A probation condition is constitutionally overbroad when it substantially limits a person's rights and those limitations are not closely tailored to the purpose of the condition." (*People v. Harrisson* (2005) 134 Cal.App.4th 637, 641, citing *In re White* (1979) 97 Cal.App.3d 141, 146 ["'The Constitution, the statute, all case law,

demand and authorize only "reasonable" conditions, not just conditions "reasonably related" to the crime committed.' [Citation.] [¶] Careful scrutiny of an unusual and severe probation condition is appropriate"].) "[C]onditions of probation that impinge on constitutional rights must be tailored carefully and 'reasonably related to the compelling state interest in reformation and rehabilitation . . . .' [Citation.]" (*People v. Delvalle* (1994) 26 Cal.App.4th 869, 879.) To the extent that the generic "pet" condition here is not tailored to meet that legitimate objective, it is not related to defendant's offense or to his future criminality. It therefore fails to meet the test of reasonableness under *Lent* and is invalid.

Whether defendant owns a pet is not reasonably related to his future criminality. No one had any reason to think that defendant owned a pet that could endanger a probation officer's life. If facts could have been brought to bear to show that a defendant is likely to have, or to live on premises that have, a dangerous animal, then there might be some justification for a probation condition narrowly tailored to avoid the anticipated danger. But the portion of the condition imposed which related to all pets, without limitation, is overbroad.[10]

C. The Field Interrogation Condition is Valid.

During the sentencing hearing, defense counsel stated only: "Our standard objection" to this condition. The trial court responded: "Overruled." Probation

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[10] See concurring and dissenting opinion of King, J., *post*, supporting the finding probation condition No. 7 (listed as No. 6 in the court's minute order) is overbroad.

condition No. 20[11] requires defendant to "[s]ubmit to and cooperate in a field interrogation by any peace officer at any time of the day or night." Based on *Lent*, defendant argues the field interrogation condition is unreasonable because it is not related to his spousal abuse offense or to future criminality, and it does not limit conduct which is itself criminal. In addition, defendant argues this condition is unconstitutional because it "undermines" his Fifth Amendment privilege against self-incrimination.

The field interrogation condition is like the standard probation search condition because it is a tool which can be used to determine whether defendant is complying with the other terms of his probation or is disobeying the law. (See *People v. Reyes* (1998) 19 Cal.4th 743, 752 [acknowledging unexpected searches can be useful to determine whether parolees are complying with conditions of parole and can provide a "valuable measure" as to the effectiveness of parole supervision].) Similar to the threat of a warrantless search, the ability of a probation or other law enforcement officer to question a probationer at any time in the field is a deterrent to future criminality and a strong incentive to comply with any and all probation conditions. (*See People v. Adams* (1990) 224 Cal.App.3d 705, 712 ["a warrantless search condition is intended and does enable a probation officer '"to ascertain whether [the defendant] is complying with the terms of probation; to determine not only whether [the defendant] disobeys the law, but also whether he obeys the law. Information obtained . . . would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to

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[11] The challenged field interrogation condition was renumbered to 16 at the time of sentencing on May 25, 2006.

rehabilitation.”””].) Therefore, in our view, the field interrogation condition satisfies *Lent* because it relates to future criminality and amenability to probation supervision. As we noted in the previous discussion, the factual record suggests a need for close supervision on probation.

The Fifth Amendment “permits a person to refuse to testify against himself at a criminal trial in which he is a defendant [and] also ‘privileges him not to answer official questions put to him in any other proceeding . . . where the answer might incriminate him in future criminal proceedings.’ [Citation.]” (*Minnesota v. Murphy* (1984) 465 U.S. 420, 426 (*Murphy*).) Except in “certain well-defined situations,” such as custodial interrogations, a witness confronted with incriminating questions must assert the privilege or his answers will be considered voluntary and may be used against him. (*Id.* at pp. 429-430.) The privilege is not lost when a defendant is on probation. (*Id.* at p. 426.) As a result, a state cannot “constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege.” (*Id.* at p. 438.) According to the Supreme Court in *Murphy*, a probation condition is not invalid under the Fifth Amendment unless there is a reasonable basis for concluding it attaches an impermissible penalty to the exercise of the privilege. (*Id.* at pp. 436-437.)

In the seminal case of *Murphy*, *supra*, 465 U.S. 420, the defendant argued his Fifth Amendment privilege was violated when incriminating statements he made to his probation officer were used against him at his trial for another crime. (*Id*. at p. 426.) As a condition of his probation, the defendant was under a legal compulsion to attend meetings with a probation officer. He “was informed that he was required to be truthful

with his probation officer in all matters and that failure to do so could result in revocation of probation." (*Id.* at p. 436.) The United States Supreme Court held these conditions were "insufficient to excuse [the defendant's] failure to exercise the privilege in a timely manner." (*Id.* at p. 437.) The Supreme Court reasoned the conditions of probation did not on their face say anything even suggesting probation was conditioned on the defendant waiving the Fifth Amendment privilege. (*Ibid*.) Nor was there any direct evidence the defendant was "expressly informed during the crucial meeting . . . that an assertion of the privilege would result in the imposition of a penalty." (*Id.* at p. 438.) Finally, there was no evidence the defendant gave incriminating statements to the probation officer because he feared his probation would be revoked if he asserted the privilege. (*Id.* at p. 437.) As a result, the Supreme Court concluded there was no Fifth Amendment violation. (*Id.* at p. 440.)

In the contrasting case of *United States v. Saechao* (9th Cir. 2005) 418 F.3d 1073 (*Saechao*), the Ninth Circuit concluded there had been a violation of the Fifth Amendment, and upheld the trial court's suppression of incriminating statements made by a probationer to his probation officer. (*Id.* at p. 1081.) The Ninth Circuit concluded the probation condition at issue violated the probationer's Fifth Amendment privilege by creating "a classic penalty situation." (*Id.* at p. 1078.) The probationer was compelled as a condition of his probation to "'promptly and truthfully answer all reasonable inquiries.'" (*Id.* at p. 1079.) The Ninth Circuit reasoned as follows: "The condition did not simply require a prompt statement of some kind—such as a statement setting forth a reason for *not* answering the question. Rather, the condition expressly requires an

answer to the question being asked. A verbal invocation of the right to remain silent followed by the act of *not* responding to incriminating questions is, by definition, not answering a question. . . . A refusal to answer, even if it could somehow be called an answer, constitutes neither a truthful nor an untruthful response. It is non-substantive in nature. For that reason alone, invoking the privilege, asking for clarification, or seeking legal advice, could not satisfy the requirement for a prompt and *truthful* answer." (*Id.* at p. 1080.)

Here, we conclude there is no reasonable basis for a determination that the field interrogation condition places an impermissible penalty or burden on defendant's Fifth Amendment privilege against self-incrimination. On its face, this condition is no more burdensome than the general probation conditions found acceptable by the Supreme Court in *Murphy* which required the defendant to meet with his probation officer and be truthful in all matters. The field interrogation condition is distinguishable from the condition at issue in *Saechao*, which could only be satisfied by a "prompt and truthful answer." Unlike the condition at issue in *Saechao*, the field interrogation condition does not expressly require defendant to provide a substantive or "truthful answer" to any and all questions in the event he is subjected to a field interrogation. Nothing on the face of condition No. 20 either expressly or by implication suggests defendant would be considered insufficiently submissive or uncooperative to a peace officer in the field if he were to invoke his Fifth Amendment privilege, in the event he is questioned about a matter which could incriminate him in another crime.

We are also unconvinced by defendant’s argument the field interrogation condition is written so broadly it could be interpreted to mean defendant faces arrest and revocation of his probation if he validly claims the Fifth Amendment privilege and refuses to answer incriminating questions. Defendant essentially contends the condition is vague and ambiguous. He would have us amend the condition to explicitly state he is not required to answer potentially incriminating questions during any field interrogation. First, as the Supreme Court reiterated in *Murphy*, *supra*, 465 U.S. at page 430, the “extraordinary safeguard” of an express warning about the right to be silent is not required “outside the context of . . . inherently coercive custodial interrogations.” Under *Miranda v. Arizona* (1966) 384 U.S. 436, 478-479, defendant is protected should any custodial interrogation follow a field interrogation. However, unless the facts of particular circumstances establish a probationer is “‘in custody’ for purposes of receiving *Miranda* protection,” an express warning about the right to remain silent is unnecessary. (*Murphy*, *supra*, 465 U.S. at p. 430.)

Second, a probation condition satisfies the demands of due process if it is “sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.” (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.) A violation need only be described with a ““““‘reasonable degree of certainty’”. . . so that “ordinary people can understand what conduct is prohibited.”. . . .’ ” [Citation.]’ [Citation.]” (*In re Byron B*. (2004) 119 Cal.App.4th 1013, 1018.) Defendant merely speculates without support that the field interrogation condition as worded is ambiguous and reasonably could be interpreted to

foreclose his right to claim the Fifth Amendment privilege. In our view, the field interrogation condition is sufficiently precise to advise defendant what is required of him should he be approached and questioned by a peace officer while he is on probation and to allow the court to determine if a violation of the condition has occurred. Based on the common understanding of the terms "submit to" and "cooperate in," it would be unreasonable to interpret the field interrogation condition as foreclosing a valid invocation of the Fifth Amendment in response to questions asked by a peace officer in the field.

Also, there is nothing to indicate the field interrogation condition is vague or ambiguous as it applies to defendant's case. Defense counsel did not object to the field interrogation condition on grounds of ambiguity or vagueness and did not request any clarification. Defendant could have presented any facts particular to his case and then requested clarification or modification. Defendant stated on the record he had reviewed the probation conditions with his attorney, understood them, and found them acceptable. "Oral advice at the time of sentencing . . . afford[s] defendants the opportunity to clarify any conditions they may not understand and intelligently to exercise the right to reject probation granted on conditions deemed too onerous." (*Bravo*, *supra*, 43 Cal.3d at p. 610, fn.7.) Therefore, to the extent he is arguing the condition is vague and ambiguous as it applies to the facts of his case, defendant waived any such objection. (*Ibid*.)

We must also reject defendant's conclusory and speculative argument that the field interrogation condition is unconstitutional under the Fourth Amendment because it affords him no protection against "unreasonable questioning by the police at an

unreasonable time," thereby subjecting him to "arbitrary, capricious, or harassing" interrogations. Probationers are not without some constitutional protections against unreasonable or arbitrary conduct by governmental officials. (See, e.g., *United States v. Knights* (2001) 534 U.S. 112 [finding a warrantless search authorized by a probation condition satisfied the Fourth Amendment because it was supported by "reasonable suspicion"]; *People v. Clower* (1993) 16 Cal.App.4th 1737, 1741 [indicating parole and probationary searches may not be conducted arbitrarily to harass a defendant or for purposes unrelated to proper supervision].) In our view, it would be unreasonable to interpret the condition broadly enough to allow law enforcement officials to barge into defendant's home or work to question him arbitrarily or unnecessarily.

Finally, defendant's argument is essentially that the field interrogation condition is invalid as written because it possibly could be enforced by government officials in an arbitrary manner in his particular case. He contends the condition should be modified to prevent potential harassment rather than address it after the fact. In our view, this argument is premature. As a general rule, reviewing courts do not "'adjudicate hypothetical claims or render purely advisory opinions'" in the absence of an adequate factual record. (*People v. Slayton* (2001) 26 Cal.4th 1076, 1084.) As defendant acknowledges in his reply brief by citation to *People v. Kern* (1968) 264 Cal.App.2d 962,

965, a trial court has authority to amend a condition if defendant is needlessly harassed by law enforcement.[12]

D. The Search Term is Reasonably Related to the Present Offense and to Future Criminality.

Defendant argues the probation search condition is not rationally related to his spousal abuse conviction as required by *Lent* because there is no evidence the circumstances of the offense involved drugs, alcohol, or concealed weapons. He also claims the probation search condition is not warranted by his personal history, future criminality, or rehabilitation.

"Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled."' [Citation.] Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*United States v. Knights*, *supra*, 534 U.S. at p. 119.) In this regard, trial courts are given broad discretion under section 1203.1 to impose reasonable conditions of probation "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." (§ 1203.1, subd. (j).) An abuse of discretion will not be found unless a trial

[12] See concurring and dissenting opinion of Ramirez, P.J., *post*, supporting the finding that probation condition No. 20 (renumbered to No. 16 at sentencing) is a valid probation condition.

court's decision is "arbitrary or capricious" or "'"'exceeds the bounds of reason, all of the circumstances being considered.'" [Citations.]' [Citation.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

In *Lent*, *supra*, the California Supreme Court set forth the following test for determining the validity and reasonableness of a probation condition: "A condition of probation will not be held invalid [as an abuse of discretion] 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.'" (*Lent*, *supra*, 15 Cal.3d at p. 486, fn. omitted, italics added.) Because the test set forth in *Lent* is in the conjunctive, a probation condition will not be found invalid unless all three factors are present. (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65, fn. 3 (*Balestra*).)

"[A] warrantless search condition is intended to ensure that the subject thereof is obeying the fundamental condition of all grants of probation, that is, the usual requirement (as here) that a probationer 'obey all laws.' Thus, warrantless search conditions serve a valid rehabilitative purpose, and because such a search condition is necessarily justified by its rehabilitative purpose, it is of no moment whether the underlying offense is reasonably related to theft, narcotics, or firearms." (*Balestra*, *supra*, 76 Cal.App.4th at p. 67.) Our Supreme Court has acknowledged probation

searches are reasonable "whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose." (*People v. Woods* (1999) 21 Cal.4th 668, 681 (*Woods*).) The search condition is a tool which not only serves as a deterrent, but also helps the probation officer determine whether the defendant is complying with the law and the other terms of his probation and provides a """valuable measure of the effectiveness"'" of probation supervision. (*People v. Reyes* (1998) 19 Cal.4th 743, 752; see also *Woods*, *supra*.)

Based on the foregoing, we conclude the trial court did not abuse its discretion in imposing a probation search condition in this case. In his plea agreement, defendant signed item 6g acknowledging "Federal and state law prohibit a convicted felon from possessing a firearm and ammunition." He also agreed to the probation department's recommendation that he not possess or control any dangerous or deadly weapons.

The search term allows peace officers to determine whether defendant is complying with these probation conditions. (*Balestra*, *supra*, 76 Cal.App.4th at p. 67.) Although there was no evidence that firearms were involved in the commission of the present offense, possession of a firearm by a felon and possession of a firearm within 10 years of a misdemeanor spousal abuse conviction are felonies. (§ 12021, subd. (c)(1).) A warrantless search condition would deter unlawful possession of deadly weapons, firearms, and ammunition, thereby potentially preventing further spousal abuse. It also assists a peace officer to enforce section 12028.5, subdivision (b) by searching for and removing firearms or other deadly weapons which could be at the scene of any future domestic violence incidents.

Clearly, the search term is reasonably related to future criminality. (*Lent*, *supra*, 15 Cal.3d at p. 486.) The prevention of future spousal abuse is particularly relevant in the instant case: defendant has suffered two prior convictions for corporal injury to a cohabitant/spouse/child's parent and one prior conviction for battery.

Defendant possesses little, if any, insight regarding his conduct, despite driving his car into the victim causing her body to spin around when hit her left hip. In the probation report, defendant denies committing the offense, but only accepted the plea because he was tired of being in jail.

Finally, the search term is reasonably related to the present offense in which defendant inflicted corporal injury on his ex-wife. Defendant took the victim's car keys and used her car as a deadly weapon by driving the victim's car into her. The search term would allow peace officers to remove the victim's car keys, if defendant again retains possession of her car keys on or about his person. (*Lent*, *supra*, 15 Cal.3d at p. 486.)

DISPOSITION

The trial court is directed to strike the reference to "pets" in probation term No. 7. The trial court may, however, modify the terms of probation to include a condition narrowly tailored to address legitimate concerns about dogs and/or animals which pose a foreseeable risk of injury to probation officers when they conduct home visits. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ MILLER
J.

RAMIREZ, P.J., Concurring and Dissenting

Forfeiture

I disagree with Justice Miller's conclusion that defense counsel's objections to the challenged probation conditions at the time of sentencing were specific enough to preserve for appeal all of defendant's reasonableness arguments based on the criteria set forth in "*Bushman/Lent*" (i.e., *In re Bushman* (1970) 1 Cal.3d 767, 776-777 (*Bushman*), and *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*), superseded on another ground by Proposition 8 as stated by *People v. Wheeler* (1992) 4 Cal.4th 284, 290-295.)

"[A] court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*United States v. Knights* (2001) 534 U.S. 112, 119 [122 S.Ct. 587].) A trial court's discretion to impose probation conditions is broad but limited by Penal Code section 1203.1. Under section 1203.1, a trial court has discretion to impose reasonable conditions of probation "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." (*Id*., subd. (j).) An abuse of discretion will not be found unless a trial court's decision is "arbitrary or capricious" or "'"'exceeds the bounds of reason, all of the circumstances being considered.'" [Citations.]' [Citation.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

In *Bushman* and later in *Lent*, our Supreme Court set forth the following test for determining the reasonableness of a probation condition: "A condition of probation will

not be held invalid [as an abuse of discretion] 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.'" (*Lent, supra*, 15 Cal. 3d. at p. 486.) Because the test set forth in *Lent* is in the conjunctive, a probation condition will not be found invalid unless all three factors are present. (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65, fn. 3.)

In 1993, our Supreme Court in *People v. Welch* (1993) 5 Cal.4th 228 (*Welch*), prospectively extended traditional objection and forfeiture rules to claims challenging the reasonableness of probation conditions under *Bushman/Lent*. (*Welch, supra,* at pp. 231-232, 237.) The Supreme Court in *Welch* reasoned it would be fair and appropriate to prospectively impose an objection and forfeiture rule on this type of claim based on two well-established justifications. First, objection and forfeiture rules "encourage development of the record and a proper exercise of discretion in the trial court." (*Id.* at p. 236.) Second, appellate courts are not well suited to deciding issues based on the particular facts of a case when the trial court record is undeveloped. (*Id*. at pp. 236-237.) The Supreme Court explained that a challenge to the reasonableness of a probation condition is essentially an argument that "the court exercised its otherwise lawful authority in an erroneous manner under the particular facts." (*Id*. at p. 236.) Therefore,

reasonableness challenges to probation conditions under *Lent* should be fully litigated in the sentencing court before being raised on appeal. In reaching its conclusion, the Supreme Court distinguished reasonableness challenges to probation conditions from those based on other arguments involving "pure questions of law," which are more conducive to resolution on appeal whether there was an objection at the time of sentencing. (*Welch, supra,* at pp. 235-237.)

More recently, while this case was pending, our Supreme Court issued its decision in the case entitled *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*), and held that objection and forfeiture rules do not apply when a defendant challenges a probation condition for the first time on appeal arguing it is unconstitutionally vague or overly broad on its face. (*Id*. at pp. 883-889.). In *Sheena K*, the Supreme Court reaffirmed its pronouncement in *Welch* that the objection and forfeiture rules do apply to reasonableness challenges to probation conditions "when the defendant fails to object *on that ground* in the trial court." (*Sheena K, supra*, at p. 882, italics added.) As in *Welch*, the Supreme Court in *Sheena K.* stated that the forfeiture rule is appropriate under these circumstances because "the trial court is in a considerably better position than the Court of Appeal to review and modify a . . . probation condition that is premised upon the facts and circumstances of the individual case." (*Sheena K., supra*, at p. 885.) Once again, the court distinguished this type of factually based challenge to probation conditions from claims "amounting to a 'facial challenge'" to the language of the probation condition as unconstitutionally vague or overly broad. (*Id*. at pp. 884-885.)

Here, for example, the record indicates defense counsel knew how to make a specific but concise reasonableness objection based on the particular facts of the case without even using the words "reasonable," "unreasonable" or *Bushman/Lent*. Counsel objected to the condition requiring defendant to maintain gainful employment or attend school because he "is on SSI and has a disability [so] is not able to be employed or attend school at this time." Under these particular circumstances, imposing a work or school requirement would probably not satisfy the *Lent* criteria. By contrast, defense counsel did not make similarly specific objections on the record at the time of sentencing as to the three probation conditions now challenged on appeal.

"An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide." (*People v. Scott* (1978) 21 Cal.3d. 284, 290.) "In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented." (*Ibid*.) However, boilerplate or general objections made at the time of sentencing do not sufficiently explain why the defendant believes the trial court's sentencing choice is incorrect and therefore do not give the trial court a "meaningful opportunity" to correct errors. (*People v. de Soto* (1997) 54 Cal.App.4th 1, 8-9.) In this regard, it is up to defense counsel at the time of sentencing to "formulate specific objections," and the trial court, which is "charged with efficient management of a busy trial calendar," has no obligation "to inquire further into the specific bases for defendant's generalized objections." (*Id*. at p. 9.)

With respect to the pet condition, defense counsel merely stated "we would object to 'pets.'" Defendant only asked for the probation search condition to be "narrowly construed for this case." As to the field interrogation condition, defense counsel stated only: "Our standard objection." As a result, it was unclear at the time of sentencing whether defendant objected to the challenged conditions because they were unreasonable under the particular facts of his case based on the *Lent* criteria, because they were unconstitutionally overbroad as worded or applied, or because they were inappropriate for some other legal or factual reason.

The factual and legal bases for defendant's objections are more specifically articulated on appeal. Defendant argues on appeal that all three of the challenged conditions are unreasonable in that they do not satisfy the *Lent* criteria under the particular facts of his case. However, defendant's generalized and ambiguous objections to these conditions at the time of sentencing did not give the trial court a "meaningful opportunity" to address reasonableness on an individualized factual basis. As a result, I would consider these arguments forfeited pursuant to *Welch*. In my view, it would "disregard and usurp the role of the trial courts" (*People v. de Soto*, *supra*, 54 Cal.App.4th at p. 9), if we simply reviewed the newly stated factual bases for defendant's reasonableness claims under *Lent* on appeal.

Anticipating forfeiture, defendant argues alternatively that he received ineffective assistance of counsel under the Sixth Amendment, because his attorney failed to make appropriate objections to the challenged probation conditions. In support of his

ineffective assistance of counsel claims, defendant relies on *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L Ed. 2d 674] (*Strickland*). Because they are based on the particular facts of his case, I would consider defendant's appellate challenges to the reasonableness of all three probation conditions under *Lent* only in the context of his claims of ineffective assistance of counsel.

Claims of ineffective assistance of counsel under *Strickland* require a different and more difficult showing of deficient performance by counsel considering all of the circumstances at the time without the benefit of hindsight. *Strickland* also requires a showing of prejudice based on a demonstration "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at p. 694.) "Because we accord great deference to trial counsel's tactical decisions, counsel's failure to object rarely provides a basis for finding incompetence of counsel." (*People v. Lewis* (2001) 25 Cal.4th 610, 661.)

Based on our Supreme Court's recent decision in *Sheena K.*, I would consider the merits of defendant's argument that the pet and field interrogation conditions are overly broad and ambiguous on their face. Pursuant to *Sheena K.*, this type of constitutional challenge is a pure question of law, which we may consider on appeal even if there was no specific objection on this ground at the time of sentencing.

Pet Condition

Based on the record before us, I also disagree with Justice Miller's conclusion that defendant is entitled to have the pet condition stricken or modified to make it more

narrowly tailored. Condition No. 6 requires defendant to "[k]eep the probation officer informed of place of residence, cohabitants and pets, and give written notice to the probation officer twenty-four (24) hours prior to any changes . . . ."[1] In objection to this condition, defense counsel stated only "we would object to 'pets.'" The trial court responded as follows: "Once again, that's a public safety issue. I will overrule your objection." Thus, the specific factual or legal basis for this objection was not clearly stated on the record at the time of sentencing.

Citing the facts as set forth by the probation officer in the probation report, defendant now argues on appeal that the pet condition is unreasonable under the *Lent* criteria. He contends the facts of his case as set forth in the probation report demonstrate the condition is unrelated to his spousal abuse offense because there is nothing to indicate a pet was present or involved in the offense. He also argues the condition is unreasonable under *Lent* because it regulates conduct which is not criminal, and because the record does not suggest pet ownership or contact with a pet is related to future criminality. In addition, defendant disagrees with the trial court's "public safety" justification for the pet condition. As noted above, my view is that defendant forfeited any arguments based on the *Lent* criteria by failing to present them at the time of sentencing.

Defendant also believes the language of the condition is unconstitutionally overbroad and not narrowly tailored to meet the objective of public safety, because it is

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[1] At the sentencing hearing, defendant objected to the term "pets in "No. 7." This condition was originally proposed in the probation report at number seven but renumbered to eight in the minutes of the sentencing hearing held May 25, 2006.

not limited to pets which could pose a danger to probation officers who may visit his home. "'[C]onditions of probation that impinge on constitutional rights must be tailored carefully and "reasonably related to the compelling state interest in reformation and rehabilitation . . . ." [Citation.]' [Citation.]" (*In re Byron B.* (2004) 119 Cal.App.4th 1013, 1016 [Fourth Dist., Div. Two], quoting *People v. Delvalle* (1994) 26 Cal.App.4th 869, 879, quoting *People v. Mason* (1971) 5 Cal.3d 759, 768 (dis. opn. of Peters, J.).) However, there is no constitutional right to keep a pet. (See *Nahrstedt v. Lakeside Village Condominium Assn*. (1994) 8 Cal.4th 361, 388.) Defendant cites no authority for a constitutional right to keep a pet without advance notice to a probation officer during probation. Because the pet condition does not impinge on an established constitutional right, it meets constitutional standards if it is reasonable.

"[Probation conditions] are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. [Citation.] These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed. Recent research suggests that more intensive supervision can reduce recidivism, [citation], and the importance of supervision has grown as probation has become an increasingly common sentence for those convicted of serious crimes, [citation]." (*Griffin v. Wisconsin* (1987) 483 U.S. 868, 875 [107 S.Ct. 3164, 97 L.Ed.2d 709].) Accordingly, a probation condition is reasonable if it "enable[s] the [probation] department to supervise compliance with the specific conditions of probation." (*People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240.)

Here, the trial court imposed the pet condition to address legitimate supervision and public safety concerns. The condition does not prohibit the probationer from owning a pet of any kind and does not even require approval of the pet. The pet condition satisfies *Lent* because it is related to future criminality and amenability to probation supervision. For example, defendant's probation conditions require him to obey all laws and not to leave California without obtaining the permission of his probation officer. The probation report suggests defendant attempted to injure his ex-wife with a motor vehicle, so the trial court reasonably prohibited defendant from possessing dangerous or deadly weapons as a condition of his probation. Defendant agreed to a probation search term. Therefore, the conditions of defendant's probation may require the probation officer to visit defendant's home unannounced to ensure compliance. It is a matter of common knowledge animals can be unpredictable when confronted with a stranger in their territory. Thus, prior knowledge of pets in the home safeguards the probation officer against injury and undue surprise by a pet while visiting defendant's home or conducting an authorized search. Therefore, I would uphold the condition as constitutionally reasonable on its face, notwithstanding defendant's forfeiture under *Welch* of reasonableness challenges based on the *Lent* criteria.

A probation condition also may be challenged as overly broad and "excessively vague" on its face (*In re Byron B., supra*, 119 Cal.App.4th at p. 1018). Pursuant to *Sheena K.*, *supra*, 40 Cal.4th at pages 881 through 889, these constitutional claims are not forfeited for failure to object during sentencing. Probation conditions "must be

sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

The term "pets" is easy to understand because it has a commonly known and accepted meaning. Although it is true some pets are harmless, it would be unreasonable to expect the trial court to delineate at great length what breeds, species or temperaments do not require advance notice to the probation officer. The same sentence of this condition further requires defendant to keep the court advised of any cohabitants, and petitioner made no claim of ambiguity as to this portion of the condition. I would therefore uphold the condition against defendant's claims of facial overbreadth and ambiguity.

I would also reject defendant's alternative argument that he received ineffective assistance of counsel under *Strickland* because his attorney did not make more specific arguments against the pet condition at the time of sentencing. First, there is nothing to indicate the pet condition is vague or ambiguous as it applies to defendant's case. In this regard, defendant could have presented any facts particular to his own case and then requested clarification of the pet condition at the time it was imposed. Defendant does not state what facts his counsel should have presented in this regard at the time of sentencing. Defendant stated on the record he had reviewed the probation conditions with his attorney, understood them, and found them acceptable. "Oral advice at the time of sentencing . . . afford[s] defendants the opportunity to clarify any conditions they may

not understand and intelligently to exercise the right to reject probation granted on conditions deemed too onerous." (*People v. Bravo* (1987) 43 Cal.3d 600, 610, fn. 7.)

Second, there is nothing to suggest deficient performance by counsel or prejudice under *Strickland*. Given the state of the law at the time of sentencing, and the facts in the record which suggest a need for close supervision during probation, it is highly unlikely the trial court would have agreed to delete or even modify the pet condition if counsel had objected more vigorously. Therefore, I would also uphold the condition because defendant cannot demonstrate on the record before us that he received ineffective assistance based on his attorney's failure to state more specific objections to this condition at the time of sentencing.

Field Interrogation Condition

I agree with Justice Miller's analysis and conclusion that the field interrogation condition is constitutionally valid and disagree with Justice King's dissent on this issue. However, I would add that pursuant to *Welch*, defendant forfeited any challenge to the reasonableness of this condition to the extent it is based on the particular facts of his case. In addition, because the condition is constitutionally sound and because the factual record suggests a need for close supervision on probation, defendant cannot establish his claim of ineffective assistance of counsel under *Strickland*.

Probation Search Condition

I agree with Justice Miller's conclusion that the probation search condition should be upheld. However, I would uphold the condition for different reasons.

Probation Condition No. 8 requires defendant to: "Submit to a search and seizure of [his] person, residence and/or property under [his] control at any time of the day or night by any law enforcement officer, with or without a search warrant, and with or without cause." During the sentencing hearing, defense counsel only asked that this condition "be narrowly construed for this case."[2] The court responded: "I'm going to keep it as is." This objection does suggest defense counsel was attempting to make a *Lent* challenge to the reasonableness of the condition under the particular facts of the case. However, counsel did not state any specific facts to support deletion or modification of the condition on this basis.

Defendant now argues on appeal that the probation search condition should be stricken because it does not satisfy the *Lent* criteria. He contends the condition is not related to his spousal abuse conviction as required by *Lent*, because there is no evidence the circumstances of the offense involved drugs, alcohol, or concealed weapons. He also claims the probation search condition is not warranted under *Lent* by his personal history, future criminality, or rehabilitation. In my view, these arguments were waived under *Welch*, because defendant did not present a specific factual basis for his objection to this condition at the time of sentencing.

Anticipating forfeiture under *Welch*, defendant alternatively argues his counsel was ineffective because it is likely the court would have modified or deleted the

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[2] At the sentencing hearing, defendant made this objection to "No. 9." The search condition was originally proposed in the probation report at "No. 9" but renumbered to eight in the minutes of the sentencing hearing held May 25, 2006.

probation search condition if his attorney had clearly articulated the basis of his objection under *Lent*. However, established precedents at the time defendant was sentenced supported the trial court's decision to impose a probation search condition in this case. "[A] warrantless search condition is intended to ensure that the subject thereof is obeying the fundamental condition of all grants of probation, that is, the usual requirement (as here) that a probationer 'obey all laws.' Thus, warrantless search conditions serve a valid rehabilitative purpose, and because such a search condition is necessarily justified by its rehabilitative purpose, it is of no moment whether the underlying offense is reasonably related to theft, narcotics, or firearms." (*Balestra*, *supra*, 76 Cal.App.4th at p. 67.)

Our Supreme Court has acknowledged probation searches are reasonable "whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose." (*People v. Woods* (1999) 21 Cal.4th 668, 681 (*Woods*).) The search condition is a tool which not only serves as a deterrent, but also helps the probation officer determine whether the defendant is complying with the law and the other terms of his probation and provides a """valuable measure of the effectiveness""" of probation supervision. (*People v. Reyes* (1998) 19 Cal.4th 743, 752; see also *Woods*.)

In recognition of established precedents justifying the use of probation search conditions, it is possible counsel made a reasonable tactical decision not to challenge this condition. Nor is there anything to suggest the trial court would have modified or deleted the probation search condition if defendant's counsel objected to the condition more vigorously. Defendant has not indicated what other facts or arguments counsel should

have presented in this regard at the time of sentencing. In addition, as noted above, the probation report demonstrates a need for defendant to be closely monitored while on probation. Therefore, I would also uphold the condition because defendant is unable on the record before us to establish either of the elements of deficient performance or prejudice under *Strickland*.

/s/ RAMIREZ
P.J.

KING, J., Concurring and Dissenting.

I concur with the majority in all respects save and except as to the condition requiring defendant to submit and cooperate in field interrogations. I believe the condition is overbroad.

Trial courts have broad discretion to set conditions of probation in order to "foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; see Pen. Code, § 1203.1, subd. (j).) "If it serves these dual purposes, a probation condition may impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional protection as other citizens.' [Citation.]" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.)

However, the trial court's discretion in setting the conditions of probation is not unbounded. "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.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486.) A condition of probation must satisfy all three requirements before it may be declared invalid. (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 365-366.)

Term 16 of the probation conditions should be limited to allow field interrogation of the probationer only as it relates to the probationer's criminality and compliance with the other terms and conditions of probation.

Term 16 provides: "Submit to and cooperate in a field interrogation by any peace officer at any time of the day or night."

I believe the provision is overbroad. The general propriety of such a term has been recognized. (See *Minnesota v. Murphy* (1984) 465 U.S. 420 [104 S.Ct. 1136, 79 L.Ed.2d 409].) It must nonetheless be tailored, so that it is reasonably related to the crime of which defendant was convicted, or to defendant's future criminality. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121; *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321.)

By its provision, term 16 allows for the probationer to be interrogated as to any subject matter, whether related or unrelated to the conduct of the probationer.

/s/ KING
J.