No. _____

In The
Supreme Court of the United States

SHAWN GEMENTERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the imposition of a condition of supervised release intended publicly to humiliate an offender by forcing him to stand in front of a United States Post Office wearing a sign board advertising his conviction violate the Sentencing Reform Act, 18 U.S.C. § 3583 *et seq*.?

Does the imposition of such a shaming condition violate the Eighth Amendment's prohibition of cruel and unusual punishments?

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The published opinion of the Ninth Circuit Court of Appeals (App. 1-31) is reported at *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004) (Hawkins, J., dissenting).

The district court orally imposed at sentencing the condition of supervised release that is the subject of this petition (App. 32-40). The district court reconsidered its initial order and imposed an amended condition at a subsequent hearing, issuing a written order on that date specifically addressing the condition of supervised release in question (App. 47-64). Those orders are unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on August 9, 2004. Petitioner thereafter requested and obtained an extension of time to file a petition for rehearing and/or petition for hearing en banc. The Ninth Circuit denied petitions for panel rehearing and for rehearing en banc in an order dated May 13, 2005 (App. 65). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 3583(d) provides, in relevant part:

Conditions of supervised release.

[Mandatory conditions of supervised release, not relevant to the instant petition.]

The court may order, as a further condition of supervised release, to the extent that such condition–

(1) is reasonably related to the factors set forth in 18 U.S.C. §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in 18 U.S.C. §§ 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a) any condition set forth as a discretionary condition of probation in 18 U.S.C. §§ 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate.

* * *

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

On November 27, 2001, the United States filed a two-count indictment in the Northern District of California charging defendant Gementera and co-defendant Andrew Choi with mail theft (18 U.S.C. § 1708) and receipt of a stolen United States Treasury check (18 U.S.C. § 641). On

May 21, 2002, defendant entered a guilty plea to count one. On February 25, 2003, the district court sentenced defendant to a term of two months' incarceration and a period of three years' supervised release. Without prior notice to the parties, the district court imposed the following supervised release condition:

> And he shall perform 100 hours of community service under the direction of the probation officer that will include standing in front of a postal facility in the City and County of San Francisco for 100 hours with a sandwich board which in large letters declares quote: "I stole mail. This is my punishment."
>
> He shall report in to the postmaster of the facility who will keep time records to make sure that the defendant has complied with this directive.

(App. 38).

On March 3, 2003, defendant filed a motion to correct his sentence, pursuant to Federal Rule of Criminal Procedure 35. Defendant challenged the imposition of the sandwich board condition and proposed alternative supervised release conditions. The district court denied the Rule 35 motion, but reduced the number of hours it would require defendant to wear the sandwich board from 100 to eight.

Judgment was entered on March 4, 2003. Gementera appealed from the order imposing the shaming condition on the grounds that the condition violated both the Sentencing Reform Act (18 U.S.C. § 3583 *et seq*.) and the Eighth Amendment. The Office of the Federal Public Defender for the Northern District of California submitted a brief as *amicus curiae*, urging reversal of the shaming

condition. On August 9, 2004, a majority of the panel affirmed the district court's imposition of the shaming condition. Circuit Judge Michael Daly Hawkins authored a dissenting opinion.

Gementera subsequently sought and obtained a thirty-day extension of time, to and including September 22, 2004, to request panel rehearing and/or rehearing en banc. A consortium of law professors received the consent of the parties and approval of the Ninth Circuit to submit a brief as *amicus curiae*, supporting Gementera's petition for review and/or rehearing en banc (App. 66-70). Timely petitions requesting panel rehearing and for rehearing en banc were denied in a Ninth Circuit order issued on May 13, 2005. Judge Hawkins would have granted panel rehearing. After a judge of the Ninth Circuit requested a vote on whether to rehear en banc, the matter failed to receive a majority of the votes of the non-recused active judges.

With its submission ninety days from the date of that order, the instant petition is timely before this court.

STATEMENT OF FACTS

A. The Underlying Facts.

The following is a summary of the essential facts underlying defendant's conviction for mail theft, as set forth in the majority opinion of the Ninth Circuit panel (*United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004)): Shawn Gementera pilfered letters from several mailboxes along San Francisco's Fulton Street on May 21, 2001. A police officer who observed the episode immediately

detained Gementera and his associate, Andrew Choi, who had been stuffing the stolen letters into his jacket as Gementera kept watch. After indictment, Gementera entered a plea agreement pursuant to which he pled guilty to mail theft, 18 U.S.C. § 1708, and the government dismissed a second count of receiving a stolen United States Treasury check. *See* 18 U.S.C. § 641.

B. The Shaming Condition.

After imposing two months' incarceration in the custody of the Bureau of Prisons and three years supervised release, the district court proceeded to impose a "scarlet letter" supervised release condition. This condition required defendant to wear a sandwich board for 100 hours in front of a United States Post Office. The district court ordered, over objection, that there would appear in "large letters" on the board the following statement: "I STOLE MAIL. THIS IS MY PUNISHMENT." In its oral remarks at sentencing, the district court indicated that the purpose for the imposition of the requirement that defendant advertise his conviction was humiliation. (App. 35).

REASONS FOR GRANTING THE PETITION

Rule 10(c) of the Rules of the Supreme Court identifies the following as a special and important reason why this Court may choose to review a decision of a United States court of appeals on certiorari:

> When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way

> that conflicts with applicable decisions of this Court.

See also Schlude v. Commissioner, 372 U.S. 128, 130 (1968) (Certiorari granted where court of appeals has misapplied or misconstrued relevant Supreme Court precedent).

Prior to the Ninth Circuit's affirmation of the shaming condition, no federal court had ever condoned a punishment involving the type of public humiliation imposed upon defendant in this case. As Judge Hawkins pointed out in dissent:

> There is precious little federal authority on sentences that include shaming punishments, perhaps indicative of a recognition that whatever legal justification may be marshaled in support of sentences involving public humiliation, they simply have no place in the majesty of an Article III courtroom.

Gementera, supra, 379 F.3d at 611 (Hawkins, J., dissenting) (App. 28).

In this case, petitioner Gementera seeks a writ of certiorari to the Ninth Circuit on the grounds that the panel majority's approval of the district court's use of a supervised release condition designed to publicly shame and humiliate Mr. Gementera contravenes circuit court precedent and congressional intent, and violates the Sentencing Reform Act by imposing an unauthorized punishment. Specifically, as has been acknowledged by the Ninth Circuit and other circuit courts, the Sentencing Reform Act expressly omits punishment of the offender as a purpose to be served by any condition of release. *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003); *United*

States v. Jackson, 189 F.3d 820, 823 (9th Cir. 1999); *United States v. Balogun*, 146 F.3d 141, 146 (2d Cir. 1998) (citing legislative history in support of congressional disavowal of punishment as a purpose of supervised release conditions).

Beyond the fact that the Ninth Circuit's decision conflicts with its own precedent and that of other circuits with respect to the propriety of the imposition of a punitive sanction as a condition of supervised release, the decision raises an important question of law that should be settled by this Court. The decision permits district courts to fashion special conditions of supervised release that are both cruel and unusual, in violation of the Eighth Amendment. Although this Court has yet to address a case directly on point, the Court has clearly indicated that sentences that aim at humiliating offenders in public no longer comport with the dignity of the offender or of society. *See, e.g., Smith v. Doe*, 538 U.S. 84, 97-99 (2003). Because the shaming punishment imposed in this case does not comport with modern standards of proportionate, rational punishment, it violates the Eighth Amendment.

Moreover, the Ninth Circuit's decision will have a grave impact on sentencing throughout the circuit courts. The approval of this kind of supervised release condition will encourage the proliferation of "creative" forms of punishment designed to humiliate defendants and satisfy the public's lust for spectacle in criminal law, and will undoubtedly result in a flood of litigation over the imposition of such creative sanctions. That trend undermines the goals of uniformity and proportionality that prompted the enactment of the Sentencing Reform Act, and threatens to deprive defendants of the basic right of human dignity

enshrined in the Eighth Amendment. For each of these reasons, this Court's writ of certiorari should issue.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S APPROVAL OF A SUPERVISED RELEASE CONDITION WHOSE PRIMARY PURPOSE IS TO HUMILIATE DEFENDANT VIOLATES ITS OWN PRECEDENT AND THE SENTENCING REFORM ACT OF 1984.

The Ninth Circuit majority's conclusion that the shaming condition was not punishment contradicts this court's own prior holdings and congressional intent. The primary purpose of Congress in enacting the Sentencing Reform Act of 1984 was to create uniformity and regularity in federal sentencing. Prompted by perceptions that broad judicial discretion in sentencing had resulted in "federal judges meting out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances," the Act created the Sentencing Commission and charged it with developing a comprehensive set of sentencing guidelines, *see* 28 U.S.C. § 994, designed to reduce "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." *United States v. Bonnet-Grullon*, 212 F.3d 692, 698 (2d Cir. 2000) (internal citations omitted). The Ninth Circuit's approval of the district court's imposition of a unique supervised release condition forcing defendant to publicly humiliate himself flies in the face of Congress' central mandate in creating the Act.

A. The District Court's Express Purpose In Imposing The Sandwich Board Condition Was To Punish Defendant By Publicly Humiliating Him.

Although the Ninth Circuit's majority opinion claimed that the district court imposed the special condition for a rehabilitative purpose, for general deterrence and for the protection of the public, the district court's own statements at sentencing belied that conclusion:

> He needs to understand the disapproval that society has for this kind of conduct, and that's the idea behind the humiliation. And it should be humiliation of having to stand and be labeled in front of people coming and going from a post office as someone who has stolen mail.
>
> I suspect that in the course of that, the defendant will get a taste of just exactly what the consequences are to people of the offense conduct that he has committed.

(App. 54).

It was only at the hearing on Gementera's motion to correct his sentence that the district court changed its characterization of the shaming punishment, "remarking that the punishment was one of deterrence and rehabilitation and not merely humiliation." *Gementera*, *supra*, 379 F.3d at 611 (App. 30) (Hawkins, J., dissenting). As Judge Hawkins noted: "Clearly, the shaming punishment at issue in this case was intended to humiliate Gementera. And that is all it will do. Any attempt to classify the goal of the punishment as anything other than humiliation would be disingenuous." *Id*. at 610 (Hawkins, J., dissenting) (internal citation omitted) (App. 27-28).

Even the majority tacitly admitted that the sandwich board condition amounts to a shaming punishment, describing the condition as "crude" and stating that it "could entail the risk of social withdrawal and stigmatization." *Id.* at 606 (App. 18). The majority nonetheless concluded that the condition was acceptable because it was "coupled with more socially useful provisions." *Id.* However, as Judge Hawkins pointed out, "the majority cites to no provision in the Sentencing Reform Act and to no case law indicating that conditions on supervised release should be reviewed as a set and not individually, or that humiliation somehow ceases to be humiliation when combined with other punishment." *Id.* at 612 (App. 30). An illegally imposed supervised release condition cannot be salvaged by reference to the other conditions imposed: it must stand or fall on its own merit. *See United States v. Eyler*, 67 F.3d 1386, 1393-94 (9th Cir. 1995) ("Any discretionary condition must meet each of the three broad conditions set forth in the [Sentencing Reform Act].")

B. The Majority's Position That The Shaming Condition Is Not Punishment Contradicts Precedent And Congressional Intent.

A sentencing court's authority to set conditions of supervised release is governed by 18 U.S.C. § 3583(d). This provision sets out certain mandatory supervised release conditions, and states that a court may impose additional discretionary conditions that are reasonably related to deterrence, the rehabilitation of the defendant, and the protection of the public. *Eyler*, *supra*, 67 F.3d at 1393. The conditions must involve no greater deprivation of liberty than is reasonably necessary for those three purposes and

must be consistent with pertinent policy statements of the Sentencing Commission. *Id*.

Although no federal court had previously addressed the specific issue of a shaming supervised release condition, the Ninth Circuit has held that punishment is not a permissible purpose of a supervised release condition. *Eyler, supra*, 67 F.3d at 1393. That court has also recognized, in the context of analyzing the remedial or punitive nature of a sex offender registration statute, that shaming sanctions such as public humiliation are, in fact, punishment. *Russell v. Gregoire*, 124 F.3d 1079, 1091 (9th Cir. 1997). In *Russell*, the court differentiated sex-offender notification provisions from shaming provisions by observing that notification provisions merely disclosed information about the offender, while noting that public shaming had a more punitive effect: it "generally required the physical participation of the offender, and typically required a direct confrontation between the offender and members of the public." *Id.* at 1091. The court found that shaming had a punitive purpose: "More importantly, the Washington [notification] law is not intended to be punitive – it has protective purposes – while shaming *punishments* were intended to and did visit society's wrath directly upon the offender." *Id.* at 1092. (Emphasis added.)

There is general agreement among state appellate courts that shaming conditions are punitive and are not reasonably related to legitimate rehabilitative purposes. *People v. Hackler*, 13 Cal.App.4th 1049 (1993) (invalidating probation condition requiring defendant to wear t-shirt advertising his crime); *People v. Letterlough*, 655 N.E.2nd 146 (N.Y. 1995) (striking a probation condition forcing repeat DWI offender to place a fluorescent sign on his bumper saying "Convicted DWI" because the condition was

not reasonably related to the defendant's rehabilitation); *People v. Johnson*, 528 N.E.2d 1360 (Ill. App. Ct. 1988) (invalidating probation condition requiring defendant to publish newspaper ad including her mug shot and an apology for her crime). But *see, Ballenger v. State*, 436 S.E.2d 793 (Ga. Ct. App. 1993) (approving a condition that a convicted drunk driver wear a fluorescent pink bracelet identifying him as such).

In *Hackler*, the California Court of Appeal held that a condition of probation requiring the defendant to wear a t-shirt that advertised his status as a convicted felon was invalid. In striking the shaming condition, the California court held that "the relationship between the required conduct (wearing the t-shirt) and the defendant's crime (stealing beer) was so incidental that it was not reasonable and that the true intent behind the condition was to expose Hackler to 'public ridicule and humiliation' and not 'to foster rehabilitation.'" *Gementera*, 379 F.3d at 611 (App. 28-29) (Hawkins, J., dissenting, citing 13 Cal.App.4th at 686-87.) Similarly, in this case, as Judge Hawkins recognized, "the purpose behind the sandwich board condition was not to rehabilitate Gementera, but rather to turn him into a modern day Hester Prin." *Id.*

Such conditions also raise both practical and fairness concerns, given the nature of the wound that shaming seeks to inflict. According to modern scholarship reviewing the psychological implications of shaming punishment:

> When it works, it redefines a person in a negative, often irreversible, way. Effective shame sanctions strike at an offender's psychological core. To allow government officials to search for and manipulate this vulnerable core is worrisome, to say the least. Moreover, nothing in the

> psychological materials on shame, or in the available literature on the stigmatic aspect of punishment indicates that a judge or any other person can reconstruct that core after a defendant has "done her time" in the "public stocks." Certainly, nothing in contemporary criminal punishment practices suggests that judges have adopted procedures for rebuilding this core.

Toni Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1920-21 (1991).

While acknowledging that one of the purposes of the Sentencing Guidelines was to promote greater uniformity in federal sentencing and sanctions such as the sandwich board sanction "may lead to less regularized sentences," the Ninth Circuit majority cited with approval the district court's order that the condition would be withdrawn "if the defendant showed that the condition would inflict psychological harm." *Gementera, supra*, at 603, n.9 (App. 12). However, inviting defendant to present the court with proof that the shaming condition will inflict psychological harm further undermines Congress's intent to create a regular sentencing scheme applicable to all offenders. As the Ninth Circuit previously has plainly stated, quantifying an issue such as "emotional trauma" is simply not within the competence of a sentencing court. *See United States v. Koon*, 34 F.3d 1416, 1454 (9th Cir. 1994), *citing United States v. Walker*, 27 F.3d 417 (9th Cir. 1994) (refusing to hold that post-arrest emotional trauma is a valid ground for departure and noting that if it did, every arrestee would request a departure on that basis and that courts would be powerless to separate the valid claims from the invalid.)

C. As Demonstrated By *Amici Curiae* In The Ninth Circuit, The Applicable Academic Literature Holds That Shaming Is Punitive, Rather Than Rehabilitative.

The panel majority in the Ninth Circuit held that the shaming condition was rehabilitative rather than punitive, and referenced current academic scholarship regarding the use of shaming sanctions. The committee of legal scholars who united as friends of the court to urge the Ninth Circuit to reconsider the panel's affirming of the shaming punishment in this case are law professors who teach and publish in the areas of criminal law, criminal procedure, penal policy, as well as American Constitutional law. (App. 67-70). Many of the *amici* have published law review articles on the legality and propriety of shaming punishments, a number of which are cited in the underlying opinion. (App. 70). The *amici* all agree that the supervised release condition in issue is inconsistent with judicial precedent, the applicable statute, and the constitution. (App. 70).

A thorough review of the current debate within the academy by *amici curiae* over such punishment, presented in support of the petition for rehearing and/or hearing en banc, is summarized below.

While the *amicus* committee acknowledged that "uncertainty exists" over how rehabilitation is best achieved (*Gementera*, 379 F.3d at 603-04), it noted that careful scrutiny is warranted in cases like this one. *See United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (cautioning that the court must "carefully scrutinize unusual and severe conditions"). As *amici* stated:

In fact, convincing psychological studies indicate that efforts to humiliate or debase a person actually may thwart the community's interest in rehabilitating or incapacitating the offender.[1] Studies show that the public loss of "face" can inspire anger, defiance, and a transformation of one's sense of belonging in the community in ways that promote, rather than inhibit, further misconduct.[2] A person who is shamed is likely to feel redefined by the experience – a process referred to as "labeling" in some criminal justice literature. *See, e.g.*, Walter R. Gove, *The Labeling of Deviance: Evaluating A Perspective* (2d ed. 1980). Post-labeling, an offender may have little incentive to obey the applicable laws because he or she has already become, in a highly publicized way, identified as a criminal. *See* Charles E. Frazier & Thomas Meisenholder, *Explanatory Notes on Criminality and Emotional Ambivalence*, 8 Qualitative Sociology 266 (1985). That is, the shamed offender subsequently will have no status or self-conception as a law-abiding citizen,

[1] *See* Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 Psych. Pub. Pol. and L. 645, 672 (1997); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733, 757 (1998) (arguing that rehabilitation associated with shaming punishments is largely illusory).

[2] *See*, *e.g.*, June Price Tangney, Patricia Wagner, Carey Fletcher & Richard Gramzow, *Shamed Into Anger? The Relation of Shame and Guilt to Anger and Self-Reported Aggression*, 62 J. Personality and Social Psych. 669, 673 (1992) (noting that an "initial sense of shame fosters subsequent anger and hostility"); June Price Tangney, Rowland S. Miller, Laura Flicker & Deborah Hill Barlow, *Are Shame, Guilt and Embarrassment Distinct Emotions?*, 70 J. Personality and Social Psych. 1256, 1267 (1996) (noting that shaming results in an "externalization of blame").

should he recommit the offense in question.[3] These unintended consequences are greatly exacerbated when, as here, a punishment is designed *precisely to produce this stigma*. Indeed, it is difficult to think of a purpose of the shaming punishment inflicted on Mr. Gementera other than to make him feel debased, much in the way that colonial "stocks" and pillories and the Communist Chinese walls of infamy achieved the same ends.

Oddly, the [Ninth Circuit panel] majority condoned the shaming condition in the absence of empirical support that it is rehabilitative, finding solace in the ongoing scholarly debate over the propriety of shaming sanctions. *See Gementera*, 379 F.3d at 605 (citing Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J. L. & Econ. 365, 371 (1999); Stephen P. Garvey, 65 U. Chi. L. Rev at 738-39; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591 (1996)). The majority's reliance on these sources, however, is misplaced.

First, Kahan and Posner themselves express doubt that the use of shaming sanctions would be consistent with the goals of the current Sentencing Guidelines:

> Devised on a largely ad hoc basis and implemented through state court judges'

[3] This is not the case with fines or imprisonment because, although those sanctions are matters of public record, the object of such punishments is not ordinarily thrust into the public eye in such a leering fashion.

> discretion to set conditions on probation, existing shaming penalties assume a rich diversity of forms. . . . Were individual federal district judges permitted the same latitude to fashion such *penalties*, shaming could revive the variability in sentencing that the Guidelines were meant to eliminate.

42 J. L. & Econ. at 384 (emphasis added). Second, Kahan and Posner defend shaming punishments expressly as punitive measures, not as rehabilitation. Indeed, they are adamant that any effective shaming alternative must include this public humiliation component to work as a politically feasible alternative to incarceration. *Id.* at 383. While such a goal may be crucial for a shaming punishment to "work" as punishment, it is impermissible as a condition of supervised release, as explained *supra*, because such conditions may not be punitive. Third, they argue that shaming punishments for some offenders are desirable because they offer a cheap way of conveying social condemnation without incurring the steep social costs imposed by incarceration. In other words, shaming is best employed as a substitute for incarceration, not a supplement. Here, Mr. Gementera got both.

The [Ninth Circuit] court also relied on Professor Stephen Garvey's article, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733 (1998). But far from endorsing the kind of shaming punishment at issue here, Garvey writes that such a shaming punishment "menaces certain ideals that any morally respectable mode of punishment should honor, not the least of which is human dignity." *Id.* at 739. Instead Garvey defends

what have been variously called "guilt punishments" or "educative" punishments.[4] These punishments do not involve public humiliation; rather they occur in relative privacy and are designed to induce contrition and moral education. In sum, the articles by Kahan, Posner, and Garvey offer little support for the supervised release condition in this case.

The [Ninth Circuit] majority's reasoning was similarly flawed when it claimed that the combination of an impermissible shaming sanction with other potentially rehabilitative conditions would somehow suffice to "reintegrate" the offender into society. *Gementera*, 379 F.3d at 606 n.13. The majority fundamentally misunderstood the nature of "reintegrative shaming." According to Professor John Braithwaite, the leading advocate of reintegrative shaming cited by the majority, reintegrative shaming sanctions involve officially imposed rituals for *reintegrating* the offender back into the community. *See* John Braithwaite, *Crime, Shame, and Reintegration* 74 (1989). The [Ninth Circuit] majority claimed that coupling Gementera's public shaming with "more socially useful" sanctions, such as the high school lectures and letters of apology, would satisfy this reintegrative requirement. *Gementera*, 379 F.3d at 606.

Braithwaite's position, however, is not that a shaming sanction magically becomes reintegrative merely by coupling it with more proper sanctions. Rather, there must be some positive

[4] *See* Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. at 765; Dan Markel, *Are Shaming Punishments Beautifully Retributive?,* 54 Vand. L. Rev. 2157 (2001).

> affirmation *by the community* after the shaming so that the offender once again becomes an integral part of that community. *See* Braithwaite, *Crime, Shame and Reintegration* at 74. The [Ninth Circuit] majority does not explain how the added sanctions will somehow fulfill this affirmative reintegration. This is precisely because there are no such reintegrative rituals in place through which Mr. Gementera can rehabilitate his spoiled reputations after he has served his time with the sandwich board. The letters and lectures are merely further forced "contrition" on the part of the offender; they do not invite or require the community to once again accept Mr. Gementera as one of them. Indeed, the lectures before adolescents might invite even further scorn, derision, and humiliation. In sum, the shaming condition at issue is illegal because it is not plausibly, let alone reasonably, related to the purpose of rehabilitation.

(App. 71-75).

Amicus curiae also argued that the supervised release condition at issue is illegal because it is excessive. Noting that both the Ninth Circuit and Congress have made clear that if a given condition of supervised release is found to reasonably relate to a non-punitive purpose, such as rehabilitation, amicus pointed out that the condition still must "involve no greater deprivation of liberty than is reasonably necessary for the purposes" of supervised release. *T.M., supra*, 330 F.3d at 1240 (quoting 18 U.S.C. § 3583(d)(2)). The Guidelines reinforce this requirement, *see* U.S.S.G. § 5D1.3(b), yet it clearly was not satisfied here. The district court imposed, in addition to the sandwich board shaming condition, three additional special conditions, each possessing rehabilitative potential. Mr.

Gementera was required to: (1) spend four days at a postal facility window observing postal patrons inquiring about lost or missing mail; (2) compose and address personal letters to each of his victims, expressing his remorse; and (3) deliver lectures at three high schools, in which he was to describe his offense and express his remorse (App. 62-63). These three conditions plausibly serve the rehabilitative goals of forcing Mr. Gementera to realize the consequences of his crime and to acknowledge its wrongfulness. In light of these three other conditions, the shaming condition amounted to nothing more than the piling on of an additional and quite gratuitous requirement – designed simply to publicly humiliate defendant – in contravention of federal law.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S APPROVAL OF THE SHAMING PUNISHMENT CONFLICTS WITH OTHER CIRCUITS AND THIS COURT'S PRECEDENT INTERPRETING THE EIGHTH AMENDMENT'S PROSCRIPTION OF CRUEL AND UNUSUAL PUNISHMENTS.

This Court has long held that the Eighth Amendment's proscription of cruel and unusual punishments limits the types of sentences that may be imposed. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.") Also, the legal imposition of a public stigma or sign on an individual who is weak, or offensive, or even despised, has been antithetical to American sensibilities, at the very least, since our experience in Europe beginning

in the 1930s. In *Trop*, Chief Justice Warren spoke eloquently of the purpose of the Eighth Amendment, stating that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man" and that the Amendment ensures that the government wields its power to punish only within the bounds of "civilized standards." *Id*. at 100. The meaning of the Eighth Amendment is not static but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id*. at 101. As this Court explained in *Weems v. United States*, 217 U.S. 349, 378 (1910), what constitutes cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice." More recently, this Court has noted that the Eighth Amendment conception of dignity includes the "dignity of society itself." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

The Ninth Circuit majority's decision upholding a punishment that serves no purpose but to humiliate the defendant violates the bedrock value of individual dignity upon which the Supreme Court's analysis rested. The majority faulted the parties for failing to cite a case invalidating a shaming punishment on constitutional grounds. However, Gementera submits that the absence of federal precedent demonstrates that federal courts in the modern era have seen little, if any, of the type of cruel social experimentation typified by this shaming condition.

Modern jurisprudence has continued to acknowledge the concept of individual dignity that forms the basis of the Eighth Amendment's proscription of cruel and unusual punishments. Punishments aimed at imposing shame and humiliation are inconsistent with a constitutional requirement that punishments, even for heinous crimes, be

consistent with human dignity. *See Furman v. Georgia*, 408 U.S. 238, 272 (1972) (Brennan, J., concurring) ("The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.").

As the *amicus curiae* below stated:

> Although shaming punishments may have been acceptable in 1791 when the Eighth Amendment was adopted, [this] Court has clearly indicated since then that sentences that aim at humiliating offenders in public no longer comport with the dignity of the offender or of society. For example, last year, in *Smith v. Doe*, 538 U.S. 84 (2003), in upholding a state law requiring sex offenders to register, [this] Court stressed that it was not adopted with the sole goal being to shame violators. The Court noted that "[s]ome colonial punishments indeed were meant to inflict public disgrace." *Id.* at 97. But the Court said that the registration of sex offenders was different because "the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." *Id.* at 98. The Court concluded that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Id.* at 99.

(App. 75).

There is however, a clear difference between the possible secondary effect of shame derived from a legitimate sentence and the use of shame as a tool to humiliate an offender. The Ninth Circuit, in upholding a state's community notification law for sex offenders, expressly

contrasted that statute to public shaming. *See Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997). As that court explained: "Public shaming, humiliation and banishment all involve more than the dissemination of information. . . . [T]he potential ostracism and opprobrium that may result from [notification] is not inevitable, as it was with the person whipped, pilloried or branded in public." *Id.* at 1091-92. This Court has echoed that position: "Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community." *Smith*, 538 U.S. at 98.

Recently, the Ninth Circuit upheld the issuance of a preliminary injunction prohibiting a county sheriff from broadcasting images of pretrial detainees over the Internet. *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004). Although that case was not decided on Eighth Amendment grounds, because it involved detainees, the Ninth Circuit's analysis made clear that humiliating the arrestees served no legitimate governmental purpose:

> [W]e fail to see how turning pretrial detainees into the unwilling objects of the latest reality show serves any . . . legitimate goals. [Citation.] As the Supreme Court has recognized, "inmates . . . are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others."

Id., citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978) (plurality opinion).

If the Eighth Amendment prohibits the intentional stripping of individual prisoners' dignity by subjecting them to constant public scrutiny, surely that protection extends to the dignity of a defendant required to adhere to conditions of supervised release. Because the shaming condition does not comport with modern standards of proportionate, rational punishment, it violates the Eighth Amendment. A writ of certiorari to the Ninth Circuit is therefore in order.

CONCLUSION

For the reasons stated, the Court should grant the instant petition and order briefing and argument in the case.

Respectfully submitted,

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHAWN GEMENTERA, Defendant-Appellant.

No. 03-10103

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

379 F.3d 596; 2004 U.S. App. LEXIS 16349

May 11, 2004, Argued and Submitted, San Francisco, California
August 9, 2004, Filed

COUNSEL: Arthur K. Wachtel, San Francisco, California, argued the case for the appellant and was on the briefs. Maitreya Badami was also on the briefs.

Kelley Brooke Snyder, U.S. Department of Justice, Washington, DC, argued the case for the appellee and was on the briefs. Kevin Ryan, United States Attorney, and Hannah Horsley and Anne-Christine Massullo, Assistant United States Attorneys, were also on the briefs.

Elizabeth M. Falk, Office of the Federal Public Defender, San Francisco, California, argued the case for amicus curiae Federal Public Defender for the Northern District of California and was on the briefs. Barry J. Portman, Federal Public Defender, was also on the briefs.

JUDGES: Before: Diarmuid F. O'Scannlain, Eugene E. Siler, Jr.,* and Michael Daly Hawkins, Circuit Judges. Opinion by Judge O'Scannlain; Dissent by Judge Hawkins.

OPINION BY: Diarmuid F. O'Scannlain

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* The Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

OPINION: O'SCANNLAIN, Circuit Judge:

We must decide the legality of a supervised release condition that requires a convicted mail thief to spend a day standing outside a post office wearing a signboard stating, "I stole mail. This is my punishment."

I

Shawn Gementera pilfered letters from several mailboxes along San Francisco's Fulton Street on May 21, 2001. A police officer who observed the episode immediately detained Gementera and his partner in crime, Andrew Choi, who had been stuffing the stolen letters into his jacket as Gementera anxiously kept watch. After indictment, Gementera entered a plea agreement pursuant to which he pled guilty to mail theft, *see* 18 U.S.C. § 1708, and the government dismissed a second count of receiving a stolen U.S. Treasury check. *See* 18 U.S.C. § 641.

The offense was not Gementera's first encounter with the law. Though only twenty-four years old at the time, Gementera's criminal history was lengthy for a man of his relative youth, and it was growing steadily more serious. At age nineteen, he was convicted of misdemeanor criminal mischief. He was twice convicted at age twenty of driving with a suspended license. At age twenty-two, a domestic dispute led to convictions for driving with a suspended license and for failing to provide proof of financial responsibility. By twenty-four, the conviction was misdemeanor battery. Other arrests and citations listed in the Presentence Investigation Report included possession of drug paraphernalia, additional driving offenses (most of which involved driving on a license suspended for his

failure to take chemical tests), and, soon after his twenty-fifth birthday, taking a vehicle without the owner's consent.

On February 25, 2003, Judge Vaughn Walker of the United States District Court for the Northern District of California sentenced Gementera. The U.S. Sentencing Guidelines range was two to eight months incarceration; Judge Walker sentenced Gementera to the lower bound of the range, imposing two months incarceration and three years supervised release.[1] He also imposed conditions of supervised release.

One such condition required Gementera to "perform 100 hours of community service," to consist of "standing in front of a postal facility in the city and county of San Francisco with a sandwich board which in large letters declares: 'I stole mail. This is my punishment.'"[2]

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[1] The court explained that, while it would have been strongly inclined to impose home confinement had Gementera's criminal history been better, the court felt that "given the unpromising road that the defendant has been following, that he needs to have a taste of federal custody, to be sure a brief one, but he needs to understand that if he continues on the course that he has set for himself at his age he's going to be facing a lot more serious charges in the future."

[2] At sentencing, the judge addressed Gementera: "[W]e've also discussed the fact that you need to be reminded in a very graphic way of exactly what the crime you committed means to society. That is, the idea of you standing out in front of a post office with a board labeling you as somebody who has stolen mail." Gementera replied, "If that's the case, I would stand in front of a post office with a board as my penalty for the crime that I did commit. And as long as I can get home detention so I can get my family back together, get back on track and rehabilitation myself." After the court imposed incarceration, rather than home detention, Gementera's counsel asked that the 100 hours be changed to "up to 100 hours at the discretion of the probation officer." That request was denied. Though the court had acknowledged explicitly that the

(Continued on following page)

Gementera later filed a motion to correct the sentence by removing the sandwich board condition. *See* Fed.R.Crim.P. 35(a).

Judge Walker modified the sentence after inviting both parties to present "an alternative form or forms of public service that would better comport with the aims of the court." In lieu of the 100-hour signboard requirement, the district court imposed a four-part special condition in its stead. Three new terms, proposed jointly by counsel, mandated that the defendant observe postal patrons visiting the "lost or missing mail" window, write letters of apology to any identifiable victims of his crime, and deliver several lectures at a local school.[3] It also included a scaled-down version of the signboard requirement:

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condition would cause humiliation, Gementera did not challenge the condition's legality nor did he ask the court to explain or elaborate its purpose at the first hearing.

[3] The first three parts of the four-part special condition mandated:

a. The defendant shall, at the direction of the probation officers, spend 4 days of 8 total hours each at a postal facility where there is a lost and found window, observing postal patrons who visit that window to inquire about lost or missing mail;

b. The defendant shall, with the assistance of counsel, carefully examine all Rule 16 discovery materials in the possession of the United States to determine the identity of all ascertainable victims of the defendant's crime; having identified those persons, the defendant shall compose and address a personal letter to each of these persons individually expressing defendant's remorse for the specific conduct that harmed that person; the defendant shall provide each such victim with the address of his counsel, through whom any victim who wishes to contact the defendant directly may do so.

(Continued on following page)

> The defendant shall perform 1 day of 8 total hours of community service during which time he shall either (i) wear a two-sided sandwich board-style sign or (ii) carry a large two-sided sign stating, "I stole mail; this is my punishment," in front of a San Francisco postal facility identified by the probation officer. For the safety of defendant and general public, the postal facility designated shall be one that employs one or more security guards. Upon showing by defendant that this condition would likely impose upon defendant psychological harm or effect or result in unwarranted risk of harm to defendant, the public or postal employees, the probation officer may withdraw or modify this condition or apply to the court to withdraw or modify this condition.

On March 4, 2003, the court denied the Rule 35 motion and amended the sentence as described above. Gementera timely appealed.[4]

II

We first address Gementera's argument that the eight-hour sandwich board condition violates the Sentencing Reform Act.[5] *See* 18 U.S.C. § 3583(d).

> c. The defendant shall deliver three educational lectures at three San Francisco high schools, to be identified by the probation officer and under the probation officer's direction, in which the defendant shall describe the crime he has committed, express his remorse for his criminal conduct and articulate to the students in attendance how his conviction and sentence have affected his life and future plans.

[4] Gementera was ordered to surrender on March 31, 2003. On March 12, 2003, prior to his surrender, Gementera was arrested for possession of stolen mail, for which he was convicted and received a twenty-four month sentence.

The Sentencing Reform Act affords district courts broad discretion in fashioning appropriate conditions of supervised release, while mandating that such conditions serve legitimate objectives. In addition to "any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20)," the statute explicitly authorizes the court to impose "*any other condition it considers to be appropriate.*" 18 U.S.C. § 3583(d) (emphasis added). Such special conditions, however, may only be imposed "to the extent that such condition –

> (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
>
> (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
>
> (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

18 U.S.C. 3583(d). Thus, to comply with this requirement, any condition must be "reasonably related" to "the nature and circumstances of the offense and the history and

[5] The court generally reviews supervised release conditions for abuse of discretion, *see United States v. Williams,* 356 F.3d 1045, 1052 (9th Cir. 2004), though we review de novo the interpretation of the Sentencing Guidelines, *see United States v. Garcia,* 323 F.3d 1161, 1164 (9th Cir. 2003), and "[w]hether the sentence imposed was 'illegal,'" *see United States v. Fowler,* 794 F.2d 1446, 1449 (9th Cir. 1986), for example, by exceeding "the permissible statutory penalty for the crime [ ] or [by being] in violation of the Constitution." *United States v. Johnson,* 988 F.2d 941, 943 (9th Cir. 1993).

characteristics of the defendant." *See* 18 U.S.C. 3553(a)(1). Moreover, it must be both "reasonably related" to and "involve no greater deprivation of liberty than is reasonably necessary" to "afford adequate deterrence to criminal conduct," *see id.* at 3553(a)(2)(B), "protect the public from further crimes of the defendant," *see id.* at 3553(a)(2)(C), and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *See id.* at 3553(a)(2)(D).[6] Accordingly, the three legitimate statutory purposes of deterrence, protection of the public, and rehabilitation frame our analysis. *E.g., United States v. Rearden,* 349 F.3d 608, 618 (9th Cir. 2003); *United States v. T.M.,* 330 F.3d 1235, 1240 (9th Cir. 2003).[7]

Within these bounds, we have recognized the flexibility and considerable discretion the district courts exercise to impose conditions of supervised release, up to and including limits upon the exercise of fundamental rights. *See* 18 U.S.C. § 3583(d) (granting authority to impose "any other condition it considers to be appropriate"); *United*

[6] Any condition must also be consistent with the Sentencing Commission's policy statements. *See* 18 U.S.C. § 3583(d); 28 U.S.C. § 994(a). The parties have not raised arguments with respect to this requirement.

[7] Though the statutory authorities underlying conditions of probation and supervised release are distinct, *compare* 18 U.S.C. § 3583 (authorizing supervised release conditions) *with* 18 U.S.C. § 3563 (authorizing probation conditions), the court's supervised release jurisprudence has often relied upon authority from the probation context. *See, e.g., United States v. Hurt,* 345 F.3d 1033, 1035 (9th Cir. 2003); *United States v. Pinjuv,* 218 F.3d 1125, 1131 (9th Cir. 2000); *United States v. Bee,* 162 F.3d 1232, 1234-35 (9th Cir. 1998). In that context, the court probes the extent to which probation conditions serve the "dual objectives of rehabilitation and public safety." *See United States v. Consuelo-Gonzalez,* 521 F.2d 259, 265 (9th Cir. 1975) (en banc).

States v. Hurt, 345 F.3d 1033, 1036 (9th Cir. 2003) ("The district court . . . has wide discretion to act in the interest of the defendant and the public."); *United States v. Bolinger,* 940 F.2d 478, 480 (9th Cir. 1991) ("The sentencing judge has broad discretion in setting probation conditions, including restricting fundamental rights."). This reflects, in part, their greater knowledge of and experience with the particular offenders before them. We have, for example, upheld conditions barring possession of sexually stimulating material, *United States v. Bee,* 162 F.3d 1232, 1234 (9th Cir. 1998), contact with minors, *id.,* association or membership in "motorcycle clubs," *Bolinger,* 940 F.2d at 480, and access to the internet, *Rearden,* 349 F.3d at 620.

Of course, the district court's discretion, while broad, is limited – most significantly here, by the statute's requirement that any condition reasonably relate to a legitimate statutory purpose.[8] "This test is applied in a two-step process; first, this court must determine whether the sentencing judge imposed the conditions for permissible purposes, and then it must determine whether the conditions are reasonably related to the purposes." *United*

[8] Gementera points to several cases in which our sister circuits found that conditions did not reasonably relate. *See United States v. Abrar,* 58 F.3d 43 (2d Cir. 1995) (repayment of unrelated debts); *United States v. Prendergast,* 979 F.2d 1289 (8th Cir. 1992) (abstinence from alcohol for wire fraud conviction); *United States v. Smith,* 972 F.2d 960, 961-62 (8th Cir. 1992) (not siring children except by wife for a narcotics conviction); *Fiore v. United States,* 696 F.2d 205, 208-10 (2d Cir. 1982) (making reparations for crime to which only a co-defendant had pled guilty). He also cites *Springer v. United States,* 148 F.2d 411, 415-16 (9th Cir. 1945), in which this court vacated a condition that a convicted draft-dodger donate a pint of blood to the Red Cross. *Id.* In each of these cases, however, the condition was unrelated to the nature and substance of the offense. Here, there is no reasonable dispute that the signboard declaration is related to the offense.

States v. Terrigno, 838 F.2d 371, 374 (9th Cir. 1988). Gementera's appeal implicates both steps of the analysis.

A

Gementera first urges that the condition was imposed for an impermissible purpose of humiliation. *See* 18 U.S.C. § 3553(a). He points to certain remarks of the district court at the first sentencing hearing:

> He needs to understand the disapproval that society has for this kind of conduct, and that's the idea behind the humiliation. And it should be humiliation of having to stand and be labeled in front of people coming and going from a post office as somebody who has stolen the mail.

According to Gementera, these remarks, among others, indicate that the district court viewed humiliation as an end in itself and the condition's purpose.

Reading the record in context, however, we cannot but conclude that the district court's stated rationale aligned with permissible statutory objectives. At the second sentencing hearing, when the sentence was amended to what is now before us, the court explained: "Ultimately, the objective here is, one, to deter criminal conduct, and, number two, to rehabilitate the offender so that after he has paid his punishment, he does not reoffend, and a public expiation of having offended is, or at least it should be, rehabilitating in its effect." Although, in general, criminal punishment "is or at least should be humiliating," the court emphasized that "humiliation is not the point." The court's written order similarly stresses that the court's goal was not "to subject defendant to humiliation for

humiliation's sake, but rather to create a situation in which the public exposure of defendant's crime and the public exposure of defendant to the victims of his crime" will serve the purposes of "the rehabilitation of the defendant and the protection of the public."

The court expressed particular concern that the defendant did not fully understand the gravity of his offense. Mail theft is an anonymous crime and, by "bringing home to defendant that his conduct has palpable significance to real people within his community," the court aimed to break the defendant of the illusion that his theft was victimless or not serious. In short, it explained:

> While humiliation may well be – indeed likely will be – a feature of defendant's experience in standing before a post office with such a sign, the humiliation or shame he experiences should serve the salutary purpose of bringing defendant in close touch with the real significance of the crime he has acknowledged committing. Such an experience should have a specific rehabilitative effect on defendant that could not be accomplished by other means, certainly not by a more extended term of imprisonment.

Moreover, "it will also have a deterrent effect on both this defendant and others who might not otherwise have been made aware of the real legal consequences of engaging in mail theft."

Read in its entirety, the record unambiguously establishes that the district court imposed the condition for the stated and legitimate statutory purpose of rehabilitation and, to a lesser extent, for general deterrence and for the protection of the public. *See* 18 U.S.C. § 3553(a); *see*

generally United States v. Clark, 918 F.2d 843, 848 (9th Cir. 1990) (affirming public apology condition when "the record supports the conclusion that the judge imposed the requirement of a public apology for rehabilitation."), *overruled on other grounds by United States v. Keys,* 133 F.3d 1282 (9th Cir. 1998) (en banc). We find no error in the condition's purpose.

B

Assuming the court articulated a legitimate purpose, Gementera asserts, under the second prong of our test, *see Terrigno,* 838 F.2d at 374, that humiliation or so-called "shaming" conditions are not "reasonably related" to rehabilitation. In support, he cites our general statements that conditions must be reasonably related to the statutory objectives, *see Consuelo-Gonzalez,* 521 F.2d at 262 ("Even though the trial judge has very broad discretion in fixing the terms and conditions of probation, such terms must be reasonably related to the purposes of the Act."), several state court decisions,[9] and several law review articles that were not presented to the district court.

[9] In *People v. Hackler,* 13 Cal.App.4th 1049, 16 Cal. Rptr. 2d 681 (Cal. Ct. App. 1993), a California court vacated a condition requiring a defendant during his first year of probation to wear a t-shirt whenever he was outside his home. The t-shirt read, "My record plus two-six packs equal four years," and on the back, "I am on felony probation for theft." Noting with disapproval the trial court's stated intention of "going back to some extent to the era of stocks" and transforming the defendant into "a Hester Prin [sic]," *id.* at 1058, the court held that the t-shirt could not serve the rehabilitative purpose because it would render the defendant unemployable. By contrast, Gementera's condition was sharply limited temporally (eight hours) and spatially (one post office in a large city), eliminating any risk that its effects would similarly spill over into all aspects of the defendant's life. Indeed, the

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district court's imposition of the condition in lieu of lengthier incarceration enables Gementera to enter the private labor market.

People v. Johnson, 174 Ill. App. 3d 812, 528 N.E.2d 1360, 124 Ill. Dec. 252 (Ill. App. Ct. 1988), involved a condition that a DWI offender publish a newspaper advertisement with apology and mug shot. Interpreting the state supervision law as intended "to aid the defendant in rehabilitation and in avoiding future violations," and for no other purpose, the court held that the publication requirement "possibly, adds public ridicule as a condition" of supervision and could inflict psychological harm that disserves the goal of rehabilitation. *Id.* at 1362 (noting that the Illinois statute does not "refer to deterrent to others"). Relying on the fact that defendant was a young lady and a good student with no prior criminal record, had injured no one, and otherwise had no alcohol or drug problem, it found the condition impermissible, given the perceived mental health risk. *Id.* By contrast, we have specifically held that mandatory public apology may be rehabilitative. *Clark,* 918 F.2d at 848 ("[A] public apology may serve a rehabilitative purpose."). Moreover, the condition specifically provided that the signboard requirement would be withdrawn if the defendant showed that the condition would inflict psychological harm.

The defendant's third case, *People v. Letterlough,* 86 N.Y.2d 259, 655 N.E.2d 146, 631 N.Y.S.2d 105 (N.Y. 1995), also involved a probation condition imposed upon a DWI offender. If he regained driving privileges, the offender was required to affix a fluorescent sign to his license plate, stating "CONVICTED DWI". *Id.* at 147. The court imposed the condition under a catch-all provision of the New York law authorizing "any other conditions reasonably related to his [or her] rehabilitation." *Id.* at 148 (quoting New York Penal Laws § 65.10[2][l]). Under the New York statute, rehabilitation "in the sense of that word that distinguishes it from the societal goals of punishment or deterrence" was the "singular focus of the statute." *Id.* at 149. Because the condition's "true design was not to advance defendant's rehabilitation, but rather to 'warn the public' of the threat presented by his presence behind the wheel," *id.* at 149, the court voided the condition. *Id.* at 159; *see also id.* at 149 ("Public disclosure of a person's crime, and the attendant humiliation and public disgrace, has historically been regarded strictly as a form of punishment." (internal citations omitted)). In contrast to the New York scheme, the district court made plain the rehabilitative purpose of the condition. We also note that in the federal system, unlike the New York system, rehabilitation is not the sole legitimate objective. *See* 18 U.S.C. §§ 3583(d), 3553(a).

1

In evaluating probation and supervised release conditions, we have emphasized that the "reasonable relation" test is necessarily a "very flexible standard," and that such flexibility is necessary because of "our uncertainty about how rehabilitation is accomplished." *Id.* at 264. While our knowledge of rehabilitation is limited, we have nonetheless explicitly held that "a public apology may serve a rehabilitative purpose." *Clark,* 918 F.2d at 846; *see also Gollaher v. United States,* 419 F.2d 520, 530 (9th Cir. 1969) ("It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault."). Of course, for Gementera to prevail, introducing mere uncertainty about whether the condition aids rehabilitation does not suffice; rather, he must persuade us that the condition's supposed relationship to rehabilitation is unreasonable.

We considered a similar question in *Clark,* a case involving two police officers convicted of perjury in a civil rights lawsuit they brought against their department. *Clark,* 918 F.2d at 844. In a deposition, the officers lied about a past episode in which they had falsely phoned in sick while actually en route to a vacation. As a probation condition, the court required them to publish a detailed apology in the local newspaper and in the police department newsletter. *Id.* at 845. Though they challenged the condition based upon the First Amendment, we applied the same test applicable here, concluding that "because the probation condition was reasonably related to the permissible end of rehabilitation, requiring it was not an abuse of discretion." *Id.* at 848.

Both *Clark* and *Gementera* involve defendants who seemingly failed to confront their wrongdoing, and the defendants in each case faced public expiation and apology. In *Clark,* the defendants had neither admitted guilt nor taken responsibility for their actions. *Id.* at 848. Here, by contrast, the defendant pled guilty. His plea decision is unremarkable, though, given that he had been apprehended red-handed. Reflecting upon the defendant's criminal history, the court expressed concern that he did not fully understand the consequences of his continued criminality, and had not truly accepted responsibility.[10] The court explained:

> This is a young man who needs to be brought face-to-face with the consequences of his conduct. He's going down the wrong path in life. At age 24, committing this kind of an offense, he's already in a criminal history category 4, two-thirds of the way up the criminal history scale. He needs a wake-up call.

The court also determined that Gementera needed to be educated about the seriousness of mail crimes in particular, given that they might appear to be victimless:

> One of the features of Mr. Gementera's offense is that he, unlike some offenders did not, by the very nature of this offense, come face-to-face with his victims.
>
> He needs to be shown that stealing mail has victims; that there are people who depend upon the

[10] Gementera's post-sentencing, pre-surrender conviction for possession of stolen mail confirms the reasonableness of the district court's observation in this respect. For that conviction, Gementera was sentenced to twenty-four months imprisonment.

> integrity and security of the mail in very important ways and that a crime of the kind that he committed abuses that trust which people place in the mail. He needs to see that there are people who count on the mails and integrity of the mails. How else can he be made to realize that than by coming face-to-face with people who use the postal service? That's the idea.

As with *Clark,* the district court concluded that public acknowledgment of one's offense – beyond the formal yet sterile plea in a cloistered courtroom – was necessary to his rehabilitation.

2

It is true, of course, that much uncertainty exists as to how rehabilitation is best accomplished. *See Consuelo-Gonzalez,* 521 F.2d at 264. Were that picture clearer, our criminal justice system would be vastly different, and substantially improved. By one estimate, two-thirds of the 640,000 state and federal inmates who will be released in 2004 will return to prison within a few years. *The Price of Prisons,* N.Y. Times, June 26, 2004, at A26. *See* Bureau of Justice Statistics, Dep't of Justice, *Recidivism of Prisoners Released in 1994* (2002) (finding 67.5% recidivism rate among study population of 300,000 prisoners released in 1994). The cost to humanity of our ignorance in these matters is staggering.

Gementera and amicus contend that shaming conditions cannot be rehabilitative because such conditions necessarily cause the offender to withdraw from society or otherwise inflict psychological damage, and they would

erect a per se bar against such conditions.[11] *See* Toni Massaro, *Shame, Culture, and American Criminal Law,* 89 Mich. L. Rev. 1880, 1920-21 (1991) ("When it works, it redefines a person in a negative, often irreversible way" and the "psychological core" it affects cannot thereafter be rebuilt.); *see generally* June Price Tagney et al., *Relation of Shame and Guilt to Constructive Versus Destructive Responses to Anger Across the Lifespan,* 70 J. Psych. & Soc. Psych. 797-98 (1996); June Price Tagney et al.,

[11] Even if shaming conditions were sometimes rehabilitative, Gementera also urges that the condition would be psychologically damaging in his specific case, given his "lack of coping skills, his substance abuse, and his unresolved personal issues with his father." Better than public expiation, he contended, would be mandatory substance abuse counseling and vocational training. First, we note that the district court *did* require Gementera to undergo substance abuse counseling and vocational training. Second, the record establishes that the district court fairly considered Gementera's claims that he was somehow particularly vulnerable to the consequences of his crime being publicly exposed. At the hearing, the court asked defense counsel, "is there some feature of his personality that makes him particularly vulnerable that you can substantiate?" The attorney replied, "I can't offer anything but my own personal observations and anecdotal observation based on my almost one-year representation of the defendant and his reaction and his family's reaction to what occurred in court." While not persuaded by the attorney's untutored lay psychological evidence, the district court nonetheless inserted a provision into the condition providing an avenue for Gementera to present more reliable evidence of psychological harm:

> Upon showing by defendant that this condition would likely impose upon defendant psychological harm or effect or result in unwarranted risk of harm to defendant, the public or postal employees, the probation officer may withdraw or modify this condition or apply to the court to withdraw or modify this condition.

No such substantiation was presented. By the terms of the condition, if there were any such evidence, Gementera faces no bar to his presenting it.

Shamed into Anger? The Relation of Shame and Guilt to Anger and Self-Reported Aggression, 62 J. Psych & Soc. Psych. 669-675 (1992). Though the district court had no scientific evidence before it, as Gementera complains, we do not insist upon such evidence in our deferential review.[12] Moreover, the fact is that a vigorous, multifaceted, scholarly debate on shaming sanctions' efficacy, desirability, and underlying rationales continues within the academy. *See, e.g.,* Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines,* 42 J.L. & Econ. 365, 371 (1999) (urging use of stigmatic punishments for white-collar criminals); Stephen P. Garvey, *Can Shaming Punishments Educate?,* 65 U. Chi. L. Rev. 733, 738-39 (1998); Dan M. Kahan, *What Do Alternative Sanctions Mean?,* 63 U. Chi. L. Rev. 591 (1996) (arguing that shaming sanctions reinforce public norms against criminality). By no means is this conversation one-sided.

Criminal offenses, and the penalties that accompany them, nearly always cause shame and embarrassment. *United States v. Koon,* 34 F.3d 1416, 1454 (9th Cir. 1994) ("Virtually all individuals who are convicted of serious crimes suffer humiliation and shame, and many may be ostracized by their communities."). Indeed, the mere fact of conviction, without which state-sponsored rehabilitation efforts do not commence, is stigmatic. The fact that a condition causes shame or embarrassment does not automatically render a condition objectionable; rather,

[12] Nor did the district court have any evidence to the contrary. By not citing these scholarly articles until this appeal, Gementera failed to provide the district court any opportunity to assess their potential value.

such feelings generally signal the defendant's acknowledgment of his wrongdoing. *See Webster's Ninth New Collegiate Dictionary* 1081 (1986) (defining shame as "a painful emotion caused by consciousness of guilt, shortcoming, or impropriety"); *see also Gollaher,* 419 F.2d at 530. We have recognized that "the societal consequences that flow from a criminal conviction are virtually unlimited," and the tendency to cause shame is insufficient to extinguish a condition's rehabilitative promise, at least insofar as required for our flexible reasonable relation test. *Koon,* 34 F.3d at 1454.

3

While the district court's sandwich board condition was somewhat crude, and by itself could entail risk of social withdrawal and stigmatization, it was coupled with more socially useful provisions, including lecturing at a high school and writing apologies, that might loosely be understood to promote the offender's social reintegration. *See* Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law,* 116 Harv. L. Rev. 2186 (2003) (proposing how shaming sanctions may be structured to promote social reintegration most effectively); John Braithwaite, *Crime, Shame and Reintegration* 55 (1989) ("The crucial distinction is between shaming that is reintegrative and shaming that is disintegrative (stigmatization). Reintegrative shaming means that expressions of community disapproval, which may range from mild rebuke to degradation ceremonies, are followed by gestures of reacceptance into the community of law-abiding citizens."). We see this factor as highly significant. In short, here we consider not a stand-alone condition intended solely to humiliate, but rather a comprehensive

set of provisions that expose the defendant to social disapprobation, but that also then provide an opportunity for Gementera to repair his relationship with society – first by seeking its forgiveness and then by making, as a member of the community, an independent contribution to the moral formation of its youth.[13] These provisions,[14] tailored to the specific needs of the offender,[15] counsel in

[13] The dissent faults our analysis for looking beyond the signboard clause to other provisions of the four-part condition. [Dissent at 10792.] Our purpose is not, as the dissent characterizes it, to suggest that an improper condition may be cured merely by setting it alongside proper conditions. Rather, our obligation is to assess whether an individual provision reasonably relates to the purpose of rehabilitation. Where that provision is part of an integrated rehabilitative scheme, we see no bar to looking at other aspects of the scheme in evaluating the purpose and reasonableness of the individual provision at issue. By acting in concert with others, a provision may reasonably relate to rehabilitation, even though the relation existed primarily by virtue of its interaction with complementary provisions in an integrated program. A boot camp, for example, that operates by "breaking participants down" before "building them up again" is not rendered impermissible merely because the first step, standing alone, might be impermissible. Similarly, a program that emphasizes an offenders' separation from the community of law-abiding citizens, in order to generate contrition and an authentic desire to rejoin that community, need not be evaluated without reference to the program's affirmative provisions to reconcile the offender with the community and eventually to reintegrate him into it.

[14] We do not pass here on the more difficult case of the district court's original 100-hour condition, which lacked significant reintegrative aspects.

[15] We do acknowledge that one purpose of the Sentencing Guidelines was to promote greater uniformity in federal sentencing, and that permitting certain conditions of supervised release, as imposed here, may lead to less regularized sentences. As described above, however, we have previously upheld a diverse array of conditions of supervised release, as contemplated by the statute's authorization of "any other condition [the district court] considers to be appropriate." 18 U.S.C. § 3583(d).

favor of concluding that the condition passes the threshold of being reasonably related to rehabilitation.

4

Finally, we are aware that lengthier imprisonment was an alternative available to the court. The court, however, reasoned that rehabilitation would be better achieved by a shorter sentence, coupled with the additional conditions: "It would seem to me that he's better off with a taste of prison, rather than a longer prison sentence, and some form of condition of release that brings him face-to-face with the consequences of his crime." The judge's reasoning that rehabilitation would better be served by means other than extended incarceration and punishment is plainly reasonable, *see* Dan M. Kahan, *What Do Alternative Sanctions Mean?,* 63 U. Chi. L. Rev. 591, 653 n.89 ("It became clear by the middle of the [19th] century that imprisonment was ill suited to rehabilitation. . . . " (internal citations omitted)), particularly in light of the significant economic disadvantages that attach to prolonged imprisonment. *See generally* Jeffrey Kling, Bruce Western, & David Weiman, *Labor Market Consequences of Incarceration,* 47 Crime & Delinquency 410-27 (2001) (reviewing the literature); Jeffrey Grogger, *The Effect of Arrests on the Employment and Earnings of Young Men,* 110 Quarterly J. Economics 51-72 (1995) (finding that incarcerative sentences have substantial effects on earnings in comparison with parole).

5

Accordingly, we hold that the condition imposed upon Gementera reasonably related to the legitimate statutory

objective of rehabilitation.[16] In so holding, we are careful not to articulate a principle broader than that presented by the facts of this case. With care and specificity, the district court outlined a sensible logic underlying its conclusion that a set of conditions, including the signboard provision, but also including reintegrative provisions, would better promote this defendant's rehabilitation and amendment of life than would a lengthier term of incarceration. By contrast, a per se rule that the mandatory public airing of one's offense can *never* assist an offender to reassume his duty of obedience to the law would impose a narrow penological orthodoxy not contemplated by the Guidelines' express approval of "any other condition [the district court] considers to be appropriate." 18 U.S.C. § 3583(d).

III

Gementera also urges that the sandwich board condition violates the Constitution. Claims with respect to the First, Fifth, Eighth, and Fourteenth Amendments are presented.

A

Amicus argues that the condition violates the First, Fifth, Eighth and Fourteenth Amendments. Gementera bases his appeal solely upon the Eighth Amendment, and the government contends that the additional constitutional arguments presented by the amicus have been waived.

[16] In view of this holding, we do not reach the separate issue of whether the condition reasonably relates to the objectives of deterrence and protection of the public.

"Generally, we do not consider on appeal an issue raised only by an amicus." *Swan v. Peterson,* 6 F.3d 1373, 1383 (9th Cir. 1993). The court has considered arguments of a jurisdictional nature raised only by amici, *Stone v. San Francisco,* 968 F.2d 850, 855 (9th Cir. 1992) ("Issues touching on federalism and comity may be considered sua sponte."), and it has addressed purely legal questions when the parties express an intent to adopt the arguments as their own. *United States v. Van Winrow,* 951 F.2d 1069, 1072 (9th Cir. 1991) ("Because [litigant] states in his brief that he wishes to adopt [amicus'] arguments as his own, and because they present pure issues of law, we will consider them here."). *See also Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712, 719 (9th Cir. 2003) ("In the absence of exceptional circumstances, which are not present here, we do not address issues raised only in an amicus brief."); *Russian River Watershed Protection Comm. v. City of Santa Rosa,* 142 F.3d 1136, 1141 (9th Cir. 1998) (declining to address issue raised by amicus for first time on appeal when the appellee did not adopt the amicus' argument in its brief). Gementera did not adopt amicus' constitutional arguments on appeal. Though the government urged in its reply brief that these arguments had been waived, Gementera again declined to incorporate the arguments or otherwise address the waiver argument in its own reply. Accordingly, we decline to address the First, Fifth and Fourteenth Amendment claims.

B

We turn then to the Eighth Amendment, which forbids the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. "The basic concept underlying the Eighth Amendment was nothing less than the dignity of

man." *Trop v. Dulles,* 356 U.S. 86, 100, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) (finding denationalization of military deserters cruel and unusual). Consistent with human dignity, the state must exercise its power to punish "within the limits of civilized standards." *Id.*

A particular punishment violates the Eighth Amendment if it constitutes one of "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford v. Wainwright,* 477 U.S. 399, 405, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986). Shaming sanctions of far greater severity were common in the colonial era, *see, e.g., Smith v. Doe,* 538 U.S. 84, 97-98, 155 L. Ed. 2d 164, 123 S. Ct. 1140 (2003); Lawrence Friedman, *Crime and Punishment in American History* 38 (1993), and the parties do not quarrel on this point.

The Amendment's prohibition extends beyond those practices deemed barbarous in the 18th century, however. *See Stanford v. Kentucky,* 492 U.S. 361, 369-70, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989). "The words of the Amendment are not precise, and [ ] their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop,* 356 U.S. at 100-01; *id.* at 100 ("Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."). In assessing what standards have so evolved, we look "to those of modern American society as a whole," *Stanford,* 492 U.S. at 369, relying upon "objective factors to the maximum possible extent," *Coker v. Georgia,* 433 U.S. 584, 592, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977)

(plurality opinion), rather than "our own conceptions of decency." *Stanford,* 492 U.S. at 369.

The parties have offered no evidence whatsoever, aside from bare assertion, that shaming sanctions violate contemporary standards of decency. But the occasional imposition of such sanctions is hardly unusual, particularly in our state courts. *See, e.g.,* Stephen P. Garvey, *Can Shaming Punishments Educate?,* 65 U. Chi. L. Rev. 733, 734 (1998) (describing proliferation of unorthodox and creative shaming punishments); *infra* at note 18. Aside from a single case presenting concerns not at issue here,[17]

[17] Gementera points to *Williams v. State,* 234 Ga. App. 37, 505 S.E.2d 816 (Ga. App. 1998), in which a defendant convicted of soliciting sodomy was ordered to walk for ten days, between 7 p.m. and 11 p.m. each day, along that portion of the street where the solicitation occurred, holding a large sign stating, "BEWARE HIGH CRIME AREA." The police were to be notified in advance in order to monitor his performance and provide an appropriate level of safety. *Id.* at 817. While the court commended the trial judge for his "initiative" in developing a "new and creative form of sentencing which might very well have a positive effect on [the defendant] and be beneficial to the public," and explained that shaming punishments are not forbidden, it nonetheless found that the condition exposed the defendant to a constitutionally impermissible danger. *Id.* at 818.

The Georgia court relied upon language from *DeShaney v. Winnebago County Dep't of Social Servs.,* 489 U.S. 189, 199-200, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989) (rejecting claim against county social services department for failing to protect child from private violence by his father), in which the Supreme Court held: "When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199-200. The Court explained:

> The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care,

(Continued on following page)

we are aware of no case holding that contemporary shaming sanctions violate our Constitution's prohibition against cruel and unusual punishment.[18]

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and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id. at 200. The condition in *Gementera* does not expose the defendant to any significant risk of danger. By contrast with *Williams,* the *Gementera* signboard is worn during eight hours of daylight during the business day, not at night; in front of a United States Post Office, not a "high crime" neighborhood where criminal solicitation occurs; and the sign's message does not provoke violence by threatening the criminal livelihood of those who illegally trade sex in a red light district, as the *Williams* sign might. Moreover, the district court in *Gementera* explicitly included a provision allowing for withdrawal of the condition upon a showing that the condition would impose a safety risk upon the defendant. Gementera made no such showing.

[18] Numerous state courts have rejected Eighth Amendment challenges to shaming sanctions. *See, e.g., People v. Letterlough,* 205 A.D.2d 803, 804, 613 N.Y.S.2d 687 (N.Y. App. Div. 1994) ("CONVICTED DWI" sign on license plate); *Ballenger v. State,* 210 Ga. App. 627, 436 S.E.2d 793 (Ga. App. 1993) (fluorescent pink DUI bracelet); *Lindsay v. State,* 606 So.2d 652, 656-57 (Fla. App. 1992) (DUI advertisement in newspaper); *Goldschmitt v. State,* 490 So.2d 123, 125 (Fla. App. 1986) ("Convicted DUI – Restricted License" bumper sticker); *cf. People v. McDowell,* 59 Cal. App. 3d 807, 812-13, 130 Cal. Rptr. 839 (Cal. App. 1976) (tap shoes for purse thief who used tennis shoes to approach his victims quietly and flee swiftly). *See also Developments in Law: Alternatives to Incarceration,* 111 Harv. L. Rev. 1944, 1953 (1998) ("Eighth Amendment challenges have also failed to overturn shaming conditions, despite arguments that 'modern scarlet-letter probation conditions constitute punishment in and of themselves' and that certain shaming conditions impose psychological cruelty while yielding no better results than conventional punishments."); *id.* at 1953 ("Courts have simply adopted the reasoning that shaming is not cruel or unusual when the alternative is imprisonment."); Dan M. Kahan, *What Do Alternative Sanctions Mean?,* 63 U. Chi. L. Rev. 591, 646 n.226 (1996) ("Although the doctrine is exceedingly indeterminate, it seems fairly obvious that shaming penalties are not 'cruel and unusual' for purposes

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We do, however, note that *Blanton v. N. Las Vegas,* 489 U.S. 538, 103 L. Ed. 2d 550, 109 S. Ct. 1289 (1989), is instructive, if only indirectly. In *Blanton,* the Court considered whether a Nevada DUI defendant was entitled to a jury trial pursuant to the Sixth Amendment. The inquiry into whether the offense constituted a petty crime not subject to the Sixth Amendment trial provision required the Court to evaluate the severity of the maximum authorized penalty. *Id.* at 541. The statute provided a maximum sentence of six months or, alternatively, forty-eight hours of community service while dressed in distinctive garb identifying the defendant as a DUI offender, payment of a $200-$1000 fine, loss of driving license, and attendance at an alcohol abuse course. *Id.* at 539-40. The Court wrote:

> We are also unpersuaded by the fact that, instead of a prison sentence, a DUI offender may be ordered to perform 48 hours of community service dressed in clothing identifying him as a DUI offender. Even assuming the outfit is the source of some embarrassment during the 48-hour period, such a penalty will be less embarrassing and less onerous than six months in jail.

Id. at 544; *but see id.* at 544 n.10 ("We are hampered in our review of the clothing requirement because the record from the state courts contains neither a description of the clothing nor any details as to where and when it must be worn."). Just as the Court concluded that 48 hours of service dressed in distinctive DUI garb was less onerous than six months imprisonment, it would stretch reason to conclude that eight hours with a signboard, in lieu of

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of the Eighth Amendment, particularly when the alternative is imprisonment.").

incarceration, constitutes constitutionally cruel and unusual punishment.

In the absence of any evidence to the contrary, and particularly in comparison with the reality of the modern prison, we simply have no reason to conclude that the sanction before us exceeds the bounds of "civilized standards" or other "evolving standards of decency that mark the progress of a maturing society." *Trop,* 356 U.S. at 100-01.

AFFIRMED.

DISSENT BY: Michael Daly Hawkins

DISSENT: HAWKINS, Circuit Judge, dissenting:

Conditions of supervised release must be reasonably related to and "involve no greater deprivation of liberty than is reasonably necessary" to deter criminal conduct, protect the public, and rehabilitate the offender. *See* 18 U.S.C. §§ 3553(a)(1)-(2); 3583(d)(2); *United States v. Williams,* 356 F.3d 1045, 1056 (9th Cir. 2004). Clearly, the shaming punishment[1] at issue in this case was intended to humiliate Gementera. And that is all it will do. Any attempt to classify the goal of the punishment as anything

[1] One scholar has defined a "shaming" punishment as "marked by two features: first, there is an attempt to debase, degrade, or humiliate the offender; and second, the degradation occurs before the public eye, often but not always with the aid of the public." Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate,* 54 Vand. L. Rev. 2157, 2178 (Nov. 2001). This condition – requiring Gementera to wear a sandwich board outside a public post office declaring his crime – clearly qualifies as a "shaming" punishment.

other than humiliation would be disingenuous.[2] Because humiliation is not one of the three proper goals under the Sentencing Reform Act,[3] I would hold that the district court abused its discretion in imposing the condition.

There is precious little federal authority on sentences that include shaming components, perhaps indicative of a recognition that whatever legal justification may be marshaled in support of sentences involving public humiliation, they simply have no place in the majesty of an Article III courtroom. Some state courts have reviewed such sentences and the results have been mixed.

People v. Hackler, 13 Cal. App. 4th 1049, 16 Cal. Rptr. 2d 681, 686-87 (Cal. Ct. App. 1993), involved a condition that required a shoplifting offender to wear a court-provided t-shirt whenever he left the house that read: "My record plus two six-packs equals four years" on the front and "I am on felony probation for theft" on the back. Applying a state sentencing regime similar to the federal guidelines – authorizing the imposition of reasonable conditions of probation to foster rehabilitation and to protect public safety – the court struck down the condition. *Id.* at 686. The court held that the relationship between the required conduct (wearing the t-shirt) and the defendant's crime (stealing beer) was so incidental that it was not reasonable and that the true intent behind the condition was to expose Hackler to "public

[2] The district judge was forthright in his statement regarding why he imposed the condition: "[Gementera] needs to understand the disapproval that society has for this kind of conduct, and that's the idea behind the humiliation."

[3] The three goals are deterrence, rehabilitation, and protection of the public. 18 U.S.C. §§ 3553(a)(2).

ridicule and humiliation" and not "to foster rehabilitation." *Id.* at 686-87.

As in Hackler's case, the purpose behind the sandwich board condition was not to rehabilitate Gementera, but rather to turn him into a modern day Hester Prin.[4] This sort of condition is simply improper under the Sentencing Reform Act. *See also Springer v. United States,* 148 F.2d 411, 415-16 (9th Cir. 1945) (invalidating a condition that a convicted draft dodger donate a pint of blood to the Red Cross).

Ballenger v. State, 210 Ga. App. 627, 436 S.E.2d 793 (Ga. Ct. App. 1993), approved a condition that a convicted drunk driver wear a fluorescent pink identification bracelet identifying him as such. By my lights, the dissent in *Ballenger* is far more persuasive. Concluding that the purpose of the condition was clearly to humiliate, Judge Blackburn argued that "a rationale of rehabilitation may not be used to vest . . . authority[to prescribe this type of punishment] in the judiciary." *Id.* at 795-96 (Blackburn, J. dissenting).

Just as in *Hackler* and *Ballenger,* the true intention in this case was to humiliate Gementera, not to rehabilitate him or to deter him from future wrongdoing. When the district court initially imposed the sandwich board condition, the judge explained that Gementera should have to suffer the "humiliation of having to stand and be labeled in front of people coming and going from a post office as somebody who has stolen the mail." Subsequently, Gementera filed a motion to correct the sentence by having

[4] *See* Hawthorne, *The Scarlet Letter; Hackler,* 16 Cal.Rptr.2d at 686.

the sandwich board condition removed. He urged that humiliation was not a legitimate objective of punishment or release conditions. Only at the hearing on Gementera's motion did the district court change its characterization of the shaming punishment, remarking that the punishment was one of deterrence and rehabilitation and not merely humiliation.

Although the majority opinion initially seems to accept the district court's retroactive justification for the punishment, it later as much as concedes that the sandwich board condition amounted to a shaming punishment. Admitting that the condition was "crude" and "could entail risk of social withdrawal and stigmatization," the majority nonetheless finds the condition acceptable because it was "coupled with more socially useful provisions." [Maj. Op. at 10781] Put another way, the majority says that it is not considering "a stand-alone condition intended soley to humiliate, but rather a comprehensive set of conditions." [Maj. Op. at 10782] But the majority cites to no provision in the Sentencing Reform Act and to no case law indicating that conditions on supervised release should be reviewed as a set and not individually, or that humiliation somehow ceases to be humiliation when combined with other punishment. *Cf. United States v. Eyler,* 67 F.3d 1386, 1393-94 (9th Cir. 1995) ("*Any* discretionary condition must meet each of the three broad conditions set forth in [the Sentencing Reform Act]." (emphasis added)). The majority's position seems to be that even if one condition of a sentence manifestly violates the Sentencing Act, it can be cured by coupling the provision with other, proper ones. When such a novel proposition is put forward and no case law is cited to support it, there is usually a reason. At the end of the day, we *are* charged with evaluating a condition

whose primary purpose is to humiliate, and that condition should simply not be upheld.

Although I believe that the sandwich board condition violates the Sentencing Reform Act and we should reverse the district court for that reason, I also believe that this is simply bad policy. A fair measure of a civilized society is how its institutions behave in the space between what it may have the power to do and what it should do. The shaming component of the sentence in this case fails that test. "When one shames another person, the goal is to degrade the object of shame, to place him lower in the chain of being, to dehumanize him."[5]

To affirm the imposition of such punishments recalls a time in our history when pillories and stocks were the order of the day. To sanction such use of power runs the very great risk that by doing so we instill "a sense of disrespect for the criminal justice system" itself. *Ballenger,* 436 S.E.2d at 796 (Blackburn, J. dissenting).

I would vacate the sentence and remand for re-sentencing, instructing the district court that public humiliation or shaming has no proper place in our system of justice.

[5] Markel, supra note 1 at 2179.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
VAUGHN R. WALKER, JUDGE

UNITED STATES OF AMERICA, PLAINTIFF, VS. SHAWN GEMENTERA, DEFENDANT.	NO. CR 01-0454 VRW TUESDAY, FEBRUARY 25, 2003 SAN FRANCISCO, CALIFORNIA

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: KEVIN V. RYAN
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BY: JOHN H. HEMANN,
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ATTORNEY

FOR DEFENDANT: ARTHUR K. WACHTEL,
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94133

ALSO PRESENT: BOBBY LOVE, U.S. PROBATION
OFFICER

REPORTED BY: DIANE E. SKILLMAN,
OFFICIAL COURT REPORTER

COMPUTERIZED TRANSCRIPTION BY ECLIPSE

[2] TUESDAY, FEBRUARY 25, 2003 2:35 P.M.

THE CLERK: CALLING CRIMINAL DOCKET NO. 01-454 UNITED STATES VERSUS SHAWN GEMENTERA.

MR. HEMANN: GOOD AFTERNOON, JOHN HEMANN, FOR THE UNITED STATES.

THE COURT: GOOD AFTERNOON, MR. HEMANN.

MR. WACHTEL: GOOD AFTERNOON, YOUR HONOR, ARTHUR WACHTEL FOR SHAWN GEMENTERA WHO IS PRESENT.

THE COURT: GOOD AFTERNOON, MR. WACHTEL.

PROBATION OFFICER: GOOD AFTERNOON, YOUR HONOR, BOBBY LOVE, U.S. PROBATION.

THE COURT: MR. LOVE.

COUNSEL, THE MATTER IS ON FOR SENTENCING. I HAVE MET WITH THE PROBATION OFFICER, MR. LOVE. I HAVE READ THE GOVERNMENT'S SENTENCING MEMORANDUM. I BELIEVE THERE IS NO SENTENCING MEMORANDUM FROM THE DEFENDANT.

MR. WACHTEL: CORRECT.

THE COURT: I'VE READ AND CONSIDERED THE PRESENTENCE REPORT. IN THE CONVERSATION WITH MR. LOVE, THERE WAS NO INFORMATION

WHICH I OBTAINED THAT IS NOT OTHERWISE REFLECTED IN THE PRESENTENCE REPORT.

I BELIEVE THE FACTUAL RECITALS OF THE PRESENTENCE REPORT ARE WITHOUT CONTROVERSY; IS THAT CORRECT?

MR. WACHTEL: YES, YOUR HONOR.

[3] **MR. HEMANN:** YES, YOUR HONOR.

* * *

[11] **THE COURT:** FIRST, THE COURT FINDS BASED UPON THE FACTUAL RECITALS OF THE PRESENTENCE REPORT WHICH ARE WITHOUT DISPUTE THAT THE TOTAL OFFENSE LEVEL IN THIS CASE IS A FOUR, WITH A CRIMINAL HISTORY CATEGORY OF ROMAN IV. THAT GENERATES A GUIDELINE CUSTODY RANGE OF TWO TO EIGHT MONTHS. THE RECOMMENDATION IS FOR A TWO-MONTH PERIOD OF CUSTODY.

IN THE EVENT THAT MR. GEMENTERA CAME TO COURT WITH A SUBSTANTIALLY LESSER CRIMINAL HISTORY, I WOULD BE STRONGLY INCLINED TO ACCEPT DEFENDANT'S ARGUMENTS THAT HE BE GIVEN HOME CONFINEMENT OR COMMUNITY CONFINEMENT RATHER THAN A PRISON SENTENCE.

I UNDERSTAND THAT HE HAS JUST SERVED TIME IN STATE CUSTODY AND NO DOUBT THAT HAS BEEN A TASTE OF INCARCERATION, BUT I THINK GIVEN THE UNPROMISING ROAD THAT THE DEFENDANT HAS BEEN FOLLOWING, THAT HE NEEDS TO HAVE A TASTE OF FEDERAL [12] CUSTODY, TO BE SURE A BRIEF ONE, BUT HE NEEDS TO

UNDERSTAND THAT IF HE CONTINUES ON THE COURSE THAT HE HAS SET FOR HIMSELF AT HIS AGE HE'S GOING TO BE FACING A LOT MORE SERIOUS CHARGES IN THE FUTURE.

THE CRIME WHICH HE COMMITTED IS A CRIME THAT DISRUPTS THE ORDERLY WORKING OF SOCIETY, THE EXPECTATION OF PEOPLE WHO RELY UPON THE MAILS FOR THEIR BUSINESS AFFAIRS, FOR THEIR PERSONAL AFFAIRS. I DON'T THINK THE RECORD IN THIS CASE REFLECTS THE CONTENT OF THE MAIL THAT THE DEFENDANT STOLE, BUT IT UNDOUBTEDLY OR IN ALL LIKELIHOOD INCLUDED SUCH THINGS AS PEOPLE'S SOCIAL SECURITY PAYMENTS, MEDICARE PAYMENTS, BILLS, RECORDS, ALL SORTS OF THINGS, AND THE DISRUPTION IN PEOPLE'S AFFAIRS AS A RESULT OF THE OFFENSE COMMITTED BY THE DEFENDANT IS SOMETHING WHICH WE WILL NEVER KNOW. AND HE NEEDS TO UNDERSTAND THAT WHEN YOU MESS WITH SOCIETY IN THAT FASHION, THAT THERE ARE CONSEQUENCES TO BE PAID.

SO, I THINK A CUSTODY SENTENCE IS APPROPRIATE. IN ADDITION, HE NEEDS TO UNDERSTAND THE DISAPPROVAL THAT SOCIETY HAS FOR THIS KIND OF CONDUCT, AND THAT'S THE IDEA BEHIND THE HUMILIATION. AND IT SHOULD BE HUMILIATION OF HAVING TO STAND AND BE LABELED IN FRONT OF PEOPLE COMING AND GOING FROM A POST OFFICE AS SOMEBODY WHO HAS STOLEN THE MAIL.

I SUSPECT THAT IN THE COURSE OF THAT, THE DEFENDANT WILL GET A TASTE OF JUST EXACTLY

WHAT THE CONSEQUENCES ARE TO PEOPLE OF THE OFFENSE CONDUCT THAT HE HAS COMMITTED.

[13] **MR. WACHTEL:** YOUR HONOR, YOU KNOW, LET ME JUST SAY THIS BECAUSE I DIDN'T ADDRESS THE POINT. ACTUALLY STANDING BEFORE THE COURT AND LISTENING TO WHAT THE COURT SAYS IS, IN ITSELF, FOR A DEFENDANT QUITE HUMILIATING, AND PERHAPS WHAT I WOULD ASK THE COURT TO DO IS MAKE THE ORDER THAT THE TIME IN FRONT OF THE POST OFFICE BE UP TO 100 HOURS AT THE DISCRETION OF THE PROBATION OFFICER.

THE COURT: IT WILL BE 100 HOURS, MR. WACHTEL.

ACCORDINGLY, PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT IS THE JUDGMENT OF THE COURT THAT THE DEFENDANT SHAWN GEMENTERA IS COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS TO BE IN PRISON FOR A TERM OF TWO MONTHS.

UPON HIS RELEASE – AND HE SHALL HAVE CREDIT FOR THE TIME THAT HE HAS SERVED IN FEDERAL CUSTODY.

UPON HIS RELEASE FROM IMPRISONMENT, THE DEFENDANT SHALL BE PLACED ON SUPERVISED RELEASE FOR A TERM OF THREE YEARS.

WITHIN 72 HOURS OF HIS RELEASE FROM THE BUREAU OF PRISONS, HE SHALL REPORT TO THE PROBATION OFFICE IN THE DISTRICT TO WHICH HE IS RELEASED.

WHILE ON SUPERVISED RELEASE, HE SHALL BE SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

HE SHALL NOT COMMIT ANOTHER FEDERAL, STATE, OR LOCAL CRIME.

HE SHALL COMPLY WITH THE STANDARD CONDITIONS THAT [14] HAVE BEEN ADOPTED BY THE COURT FOR SUPERVISED RELEASE.

HE SHALL PAY ANY FINE OR SPECIAL ASSESSMENT THAT IS IMPOSED BY THIS JUDGMENT.

HE SHALL PARTICIPATE IN A DRUG/ALCOHOL AFTERCARE TREATMENT PROGRAM WHICH MAY INCLUDE TESTING TO DETERMINE WHETHER HE HAS REVERTED TO THE USE OF DRUGS OR ALCOHOL. HE SHALL BE RESPONSIBLE FOR PAYING THE COST OF THAT TREATMENT PROGRAM IN AN AMOUNT NOT TO EXCEED $60 PER SESSION. THE ACTUAL CO-PAYMENT AMOUNT TO BE DETERMINED BY THE PROBATION OFFICER IN CHARGE OF HIS CASE.

HE SHALL PARTICIPATE IN A VOCATIONAL TRAINING PROGRAM AS DIRECTED BY THE PROBATION OFFICER.

HE SHALL SUBMIT HIS PERSON, RESIDENCE, OFFICE, VEHICLE, OR ANY PROPERTY UNDER HIS CUSTODY OR CONTROL TO A SEARCH BY A UNITED STATES PROBATION OFFICER AT SUCH TIMES AND IN SUCH MANNER AS DETERMINED REASONABLE BY THE PROBATION OFFICER.

HE SHALL HAVE NO CONTACT WITH HIS CO-DEFENDANT ANDREW CHOI UNLESS OTHERWISE AUTHORIZED BY HIS PROBATION OFFICER.

HE SHALL NOT POSSESS A FIREARM OR OTHER DANGEROUS WEAPON.

AND HE SHALL PERFORM 100 HOURS OF COMMUNITY SERVICE UNDER THE DIRECTION OF THE PROBATION OFFICER THAT WILL INCLUDE STANDING IN FRONT OF A POSTAL FACILITY IN THE CITY AND COUNTY [15] OF SAN FRANCISCO FOR 100 HOURS WITH A SANDWICH BOARD WHICH IN LARGE LETTERS DECLARES QUOTE: "I STOLE MAIL. THIS IS MY PUNISHMENT."

HE SHALL REPORT IN TO THE POSTMASTER OF THE FACILITY WHO WILL KEEP TIME RECORDS TO MAKE SURE THAT THE DEFENDANT HAS COMPLIED WITH THIS DIRECTIVE.

FINALLY, THE DEFENDANT IS ORDERED TO PAY A $100 SPECIAL ASSESSMENT WHICH IS DUE AND PAYABLE IMMEDIATELY.

IS THE SENTENCE CLEAR, MR. LOVE?

PROBATION OFFICER: YES, YOUR HONOR.

THE COURT: COMPLETE?

PROBATION OFFICER: YES, YOUR HONOR.

MR. HEMANN: YES, YOUR HONOR.

THE COURT: FAIR AND COMPLETE, MR. HEMANN?

MR. HEMANN: YES, YOUR HONOR.

THE COURT: MR. WACHTEL?

MR. WACHTEL: UNDERSTOOD, YOUR HONOR.

THE COURT: VERY WELL. ANYTHING FURTHER?

MR. HEMANN: NO, YOUR HONOR.

MR. WACHTEL: CAN WE HAVE A SELF SURRENDER?

THE COURT: SELF SURRENDER. WHEN CAN THE DEFENDANT SURRENDER?

MR. WACHTEL: AT SUCH TIME AS THE BOP DESIGNATES A FACILITY. I WOULD ASK THE COURT TO RECOMMEND LOMPOC OR A FACILITY AS CLOSE AS POSSIBLE TO THE BAY AREA.

[16] **THE COURT:** LET ME SUGGEST THAT THE DEFENDANT SURRENDER ON OR BEFORE MARCH 31ST AT THE INSTITUTION THAT IS DIRECTED TO HIM. AND IN THE EVENT, MR. GEMENTERA, THAT THE BUREAU OF PRISONS HAS NOT DESIGNATED A FACILITY FOR YOU, YOU SHALL SURRENDER ON MONDAY, MARCH 31ST TO THE MARSHAL'S OFFICE ON THE 20TH FLOOR OF THIS BUILDING ON OR BEFORE 12 MOON [sic] OF THAT DAY.

IS THAT CLEAR?

MR. WACHTEL: YES, SIR.

THE COURT: ANYTHING FURTHER?

MR. WACHTEL: NO, YOUR HONOR.

MR. HEMANN: NO, YOUR HONOR. THANK YOU VERY MUCH.

THE COURT: MR. GEMENTERA, GOOD LUCK.

(PROCEEDINGS ADJOURNED.)

CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN CR-01-0454 VRW, USA V. SHAWN GEMENTERA, PAGES NUMBERED 1 THROUGH 16, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AT THE TIME OF FILING.

THE INTEGRITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON REMOVAL FROM THE COURT FILE.

/s/ Diane E. Skillman
DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

PAGES 1-26

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
VAUGHN R. WALKER, JUDGE

UNITED STATES OF AMERICA,	NO. CR-01-0454-VRW
PLAINTIFF,	TUESDAY, MARCH 4, 2003
VS.	SAN FRANCISCO, CALIFORNIA
SHAWN GEMENTERA,	
DEFENDANT.	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:
KEVIN V. RYAN, ESQUIRE
UNITED STATES ATTORNEY
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102
BY: ANNE-CHRISTINE MASSULLO, ESQUIRE
ASSISTANT UNITED STATES ATTORNEY

FOR DEFENDANT:
LAW OFFICES OF ARTHUR K. WACHTEL
170 COLUMBUS AVENUE, SUITE 100
SAN FRANCISCO, CALIFORNIA 94133
BY: ARTHUR K. WACHTEL, ESQUIRE

REPORTED BY: JOAN MARIE COLUMBINI,
CSR 5435
OFFICIAL COURT REPORTER

COMPUTERIZED TRANSCRIPTION BY ECLIPSE

[2] PROCEEDINGS: TUESDAY, MARCH 4, 2003

THE CLERK: CALLING OUR LAST MATTER, CRIMINAL DOCKET NUMBER 01-454, *UNITED STATES VERSUS SHAWN GEMENTERA.*

MS. MASSULLO: GOOD AFTERNOON AGAIN, YOUR HONOR. ANNE-CHRISTINE MASSULLO FOR THE UNITED STATES.

THE COURT: GOOD AFTERNOON, MS. MASSULLO.

MR. WACHTEL: GOOD AFTERNOON, YOUR HONOR. ARTHUR WACHTEL FOR MR. GEMENTERA.

THE COURT: MR. WACHTEL, GOOD AFTERNOON.

* * *

[6] NOW, YOU MENTIONED THE HUMILIATING IMPACT OF THE CONDITION THAT WE'VE TALKED ABOUT. HUMILIATION IS NOT THE POINT, ALTHOUGH AFTER ALL, ALL CRIMINAL PUNISHMENT IS OR AT LEAST SHOULD BE HUMILIATING. IT SHOULD BE HUMILIATING TO STAND UP IN COURT IN PUBLIC AND ADMIT THAT YOU'VE COMMITTED A CRIME.

I GET THE IMPRESSION THAT WHEN WE GO THROUGH THIS [7] PROCESS IN SUCH A FASHION

TIME AFTER TIME AFTER TIME THAT WE TAKE A LOT OF THAT STING OUT OF THE PROCESS, AND I THINK THAT'S REGRETTABLE. BUT, ULTIMATELY, THE OBJECTIVE HERE IS, ONE, TO DETER CRIMINAL CONDUCT, AND, NUMBER TWO, TO REHABILITATE THE OFFENDER SO THAT AFTER HE HAS PAID HIS PUNISHMENT, HE DOES NOT REOFFEND, AND A PUBLIC EXPIATION OF HAVING OFFENDED IS, OR AT LEAST IT SHOULD BE, REHABILITATING IN ITS EFFECT.

ONE OF THE FEATURES OF MR. GEMENTERA'S OFFENSE IS THAT HE, UNLIKE SOME OFFENDERS DID NOT, BY THE VERY NATURE OF THIS OFFENSE, COME FACE-TO-FACE WITH HIS VICTIMS.

HE NEEDS TO BE SHOWN THAT STEALING MAIL HAS VICTIMS; THAT THERE ARE PEOPLE WHO DEPEND UPON THE INTEGRITY AND SECURITY OF THE MAIL IN VERY IMPORTANT WAYS AND THAT A CRIME OF THE KIND THAT HE COMMITTED ABUSES THAT TRUST WHICH PEOPLE PLACE IN THE MAIL. HE NEEDS TO SEE THAT THERE ARE PEOPLE WHO COUNT ON THE MAILS AND THE INTEGRITY OF THE MAILS.

HOW ELSE CAN HE BE MADE TO REALIZE THAT THAN BY COMING FACE-TO-FACE WITH PEOPLE WHO USE THE POSTAL SERVICE? THAT'S THE IDEA.

NOW, IF THERE'S SOME ALTERNATIVE THAT YOU WANT TO SUGGEST TO THE SPECIFICS, I'LL BE HAPPY TO HEAR SOME ALTERNATIVE THAT YOU WANT TO OFFER. IF YOU HAVE CONCERNS – AND THIS IS A MATTER OF SOME CONCERN. IF YOU HAVE A CONCERN, A LEGITIMATE CONCERN, ABOUT THE

SECURITY OF THE DEFENDANT, [8] I'LL BE HAPPY TO INCLUDE CONDITIONS SO THAT THAT CAN BE ACCOMMODATED, MONITORED EITHER BY THE PROBATION OFFICER OR BY THE POSTMASTER, WHOEVER IS MONITORING THE SITUATION. THOSE ARE LEGITIMATE CONCERNS. BUT THE IDEA IS TO MAKE MR. GEMENTERA REALIZE THAT THERE ARE CONSEQUENCES IN WHAT HE DOES AND WHAT HE DID.

* * *

[24] **THE COURT:** WELL, I'LL GIVE YOU A WRITTEN ORDER.

[25] BUT SINCE WE DO NEED TO DO THIS PROMPTLY, I'M INCLINED TO ACCEPT THE SUGGESTION OF A MODIFIED CONDITION OF PROBATION. I STILL BELIEVE THAT THE DEFENDANT'S EXPOSURE TO POSTAL PATRONS BY BEING IN A PUBLIC AREA IN FRONT OF A UNITED STATES POSTAL SERVICE FACILITY WITH SOME NOTIFICATION THAT HE HAS STOLEN MAIL AND THAT HE IS BEING PUNISHED FOR THAT IS A STRONG DETERRENT FOR FUTURE MISCONDUCT BY THIS DEFENDANT AND A STRONG DETERRENT AGAINST OTHERS COMMITTING A SIMILAR OFFENSE.

I WOULD AGREE TO MODIFY THAT TO A ONE-DAY PERIOD OF EIGHT HOURS STANDING IN FRONT OF A POSTAL FACILITY, AND SINCE THE RINCON CENTER FACILITY DOES HAVE SECURITY PERSONNEL WHO WILL BE ABLE TO MONITOR THE SITUATION, SO IF THERE IS ANY PROBLEM, THEN THE MATTER CAN BE ADDRESSED.

AS TO THE OTHER SUGGESTED ALTERNATIVES IN LIEU OF THE LONGER PERIOD THAT WAS INDICATED IN THE COURT'S ARTICULATION OF A SENTENCE LAST WEEK, I THINK THE RULE 16 SUGGESTION AND A LETTER BY MR. GEMENTERA TO EACH VICTIM IS A USEFUL AND VERY CONSTRUCTIVE ONE. I COMMEND YOU, MR. WACHTEL, ON THAT SUGGESTION.

AND A FIXED NUMBER OF HOURS WATCHING THE LOST AND FOUND WINDOW IS A VERY CONSTRUCTIVE SUGGESTION, AND I THINK MORE THAN ONE HIGH SCHOOL TALK WOULD BE APPROPRIATE. I DON'T KNOW THE EXACT NUMBER, BUT I THINK THREE OR FOUR TALKS BEFORE HIGH SCHOOL STUDENTS IN SAN FRANCISCO, PERHAPS THREE, WOULD BE A CONSTRUCTIVE WAY FOR MR. GEMENTERA TO ARTICULATE TO OTHERS [26] THE CONSEQUENCES OF THE OFFENSE THAT HE HAS COMMITTED, AND HAVING TO ARTICULATE THAT HIMSELF CANNOT HELP BUT BE CONSTRUCTIVE IN HIS OWN REHABILITATION.

SO I WILL GET AN ORDER OUT, AND WE'LL MODIFY THE JUDGMENT ACCORDINGLY.

MR. WACHTEL: THANK YOU FOR YOUR TIME, YOUR HONOR.

THE COURT: THANK YOU.

(PROCEEDINGS ADJOURNED.)

CERTIFICATE OF REPORTER

I, JOAN MARIE COLUMBINI, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN CR-01-0454-VRW, *UNITED STATES OF AMERICA V. SHAWN GEMENTERA*, PAGES NUMBERED 1 THROUGH 26, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AT THE TIME OF FILING.

THE INTEGRITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON REMOVAL FROM THE COURT FILE.

/s/ J M Columbini
JOAN MARIE COLUMBINI
CSR 5435

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,
Plaintiff,
v
SHAWN GEMENTERA,
Defendant.
/

No CR 01-454 VRW

ORDER

(Filed Mar. 4, 2003)

On May 21, 2002, defendant entered a plea of guilty to one count of theft and unlawful possession of stolen mail under 18 USC §1708. See Doc #58. On February 25, 2003, defendant appeared before the court for sentencing. After considering the sentencing alternatives, which included a possible custodial sentence of two to eight months, the court sentenced defendant to the low end of this custody range, two months in the custody of the Bureau of Prisons, three years of supervised release and 100 hours of community service. See Doc #75. Considering the nature of the crime and the criminal history of defendant, the court concluded that in lieu of a longer period in custody, a more appropriate means to effectuate the several goals of the criminal sentencing laws – to punish defendant for the crime committed, to deter future criminal conduct of this kind by defendant and others and to aid defendant in successfully rehabilitating himself – was to fashion special condition of supervised release related directly to the offense conduct defendant had admitted: mail theft. To that end, the court directed that defendant's sentence include a term of 100 hours of a specific kind of community service: that defendant stand in front of a United States Post Office in the city of San Francisco wearing a

two-sided sandwich board-style sign stating, "I stole mail; this is my punishment."

Defendant now moves the court, pursuant to FRCrP 35(a), to correct the community service portion of the sentence, which defendant asserts is neither authorized by federal statute nor permitted by the Eighth Amendment to the United States Constitution. See Doc #76. In order to receive a timely ruling on the motion to correct sentence, defendant has also moved for permission to file his motion *ex parte* and in excess of five pages. For the reasons detailed below, defendant's motion to file an oversized brief *ex parte* is GRANTED.

With the assistance of counsel, the court has been able to craft special conditions of supervision that better accomplish the court's objectives than that originally contemplated and, therefore, directs judgment be entered accordingly. These revised conditions are four: that defendant (1) spend four eight-hour days at a postal facility with a lost and found window observing postal patrons who visit that window to inquire about lost or stolen mail; (2) with the assistance of counsel, examine the Rule 16 discovery materials in the possession of the government to identify the ascertainable victims of his crime, to each of whom defendant will address an individually crafted letter of apology expressing his remorse; (3) deliver three lectures at three San Francisco high schools explaining his crime and the effects it has had on him and others; and (4) spend one eight-hour day in front of a postal facility in San Francisco wearing or bearing a large two-sided sign stating, "I stole mail; this is my punishment."

Because the fourth condition just described is, save for the length of time involved, identical to that challenged by

defendant's motion to correct the sentence, the court now considers the arguments raised by that motion. For the reasons provided below, defendant's motion to correct the sentence to delete the special condition of supervised release that defendant stand before a postal facility with a sign identifying him as a mail thief (Doc #76) is DENIED.

I

Criminal Local Rule 47-3 authorizes the court to permit a party to file a motion *ex parte*. A party filing an *ex parte* motion must nonetheless give reasonable notice of the motion to the opposing party unless "relieved [from this requirement] by these local rules or by order of a Judge for good cause shown * * *." CrLR 47-3(a). By the terms of CrLR 47-3(b), an *ex parte* motion may not exceed five pages. See id.

Federal Rule of Criminal Procedure 35(a), in its newly revised form, provides, "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Id. In its recent decision in *United States v Penna*, 319 F3d 509 (9th Cir 2003), the Ninth Circuit held that "the seven-day requirement in Rule [35(a)] is a jurisdictional requirement." Id. More specifically, the *Penna* court held that a district court that vacates a defendant's sentence within 7 days of sentencing, but fails to resentence that defendant within that same time period lacks jurisdiction later to resentence that defendant under FRCrP 35(a) (formerly FRCrP 35(c)) See id. In other words, the court has jurisdiction to take action to correct a sentence under the authority of FRCrP 35(a) only within the 7 days immediately following sentencing.

Because of the need for immediate action on defendant's motion, defendant has demonstrated good cause to be excused from the notice requirement of CrLR 47-3(a). In order adequately to brief the court on the issues defendant wished to raise, the court agrees that a brief in excess of 5 pages was necessary. Therefore, defendant's motion for leave to file an oversized *ex parte* motion without providing reasonable advance notice to the government is GRANTED.

In any event, at the hearing on defendant's motion, government counsel did appear, acknowledged having received defendant's motion and ably represented the government in opposing defendant's motion. The court accordingly had the benefit of argument from both defendant and the government before ruling on defendant's motion, thereby alleviating any concern the court might otherwise have entertained about hearing defendant's motion *ex parte*.

II

Defendant contends that the court clearly erred in fashioning a special condition of supervised release requiring defendant to stand in front of a United States postal facility wearing a two-sided placard identifying defendant as a mail thief. Although the court has reduced the time that defendant is required to do so from 100 hours to 8, the arguments raised by defendant are equally applicable to the new provision the court adopts herein. Defendant offers two grounds for the contention that this special condition is unlawful: that (1) such a community service provision is not authorized by applicable federal sentencing statutes; and (2) the condition violates the Eighth

Amendment's prohibition of cruel and unusual punishment.

A

"The district court has broad discretion in setting conditions of supervised release, including restrictions that infringe on fundamental rights. *United States v Bee*, 162 F3d 1232, 1234 (9th Cir 1998) (citing *United States v Bolinger*, 940 F2d 478, 480 (9th Cir 1991)). The scope of the court's discretion to place conditions on defendant's supervised release is set forth in 18 USC § 3583. Under the terms of that provision, a court

> may order, as a further condition of supervised release, to the extent such condition – (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D); (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 USC 994(a); * * * any other condition [the court] considers to be appropriate.

18 USC § 3583(d)

The factors identified in § 3583(d) as constraining the court's discretion to fashion "any other condition it considers to be appropriate" include:

- The nature and circumstances of the offense and the history and characteristics of the defendant; 18 USC §3553(a)(1);
- The need to afford adequate deterrence to criminal conduct; 18 USC §3553(a)(2)(B);

- The need to protect the public from further crimes of the defendant; 18 USC §3553(a)(2)(C); and
- The need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; 18 USC § 3553(a)(2)(D)

It is well established that "[t]he guiding principle * * * in construing the Probation Act is that the only permissible conditions are those that, *when considered in context*, can reasonably be said to contribute significantly both to the rehabilitation of the convicted person and to the protection of the public." *United States v Consuelo-Gonzalez*, 521 F2d 259, 264 (9th Cir 1975) (emphasis supplied). "The mere fact that a condition restricts probationer's freedom to perform otherwise lawful activities is not dispositive of the reasonableness of the condition. But if conditions are drawn so broadly that they unnecessarily restrict otherwise lawful activities they are impermissible." *United States v Terrigno*, 838 F2d 371, 374 (9th Cir 1988) (approving a condition that defendant not be allowed to accept payment for speeches regarding her criminal conduct during the period of her probation; internal citations omitted). To fall within the proper scope of the court's discretion, the condition must be reasonably related to the factors identified in the statute. But the court need not demonstrate that all listed factors pertain to the condition imposed. See *United States v Johnson*, 998 F2d 696, 698 (9th Cir 1993) (discussing the relationship between the sentencing guideline factors and the factors codified in 18 USC §§ 3553, 3583).

The Ninth Circuit has approved a supervised release condition that a convicted sex offender "follow all other lifestyle or treatment requirements imposed by [his] therapist," a condition closely related to that defendant's criminal conduct but that would permit far more wide-ranging incursions into the defendant's personal affairs than the condition at issue here. *United States v Fellows*, 157 F3d 1197 (9th Cir 1998). Similarly, a district court can impose as a term of supervised release that a defendant not participate in the activities or continue as a member of a motorcycle club or other organization if doing so has the potential to lead defendant to revert to "a former crime-inducing lifestyle." *Bolinger*, 940 F2d at 480. The court of appeals has also authorized the now familiar condition of drug testing. See *United States v Jackson* 189 F3d 820 (9th Cir 1999). And it has approved a condition that a defendant convicted of maintaining a residence for the purpose of cultivating marijuana not possess a firearm or other dangerous weapon, also a condition now commonly placed on supervised release. See *United States v Chinske*, 978 F2d 557 (9th Cir 1992).

What the foregoing authorities demonstrate is that the legitimacy of any condition imposed by the court on defendant's supervised release mast be analyzed, as the *Consuelo-Gonzalez* court indicated in context, i e, with regard to the nature of the crime committed and the criminal defendant upon whom it is to be imposed.

In challenging the legitimacy of the condition imposed in this case, defendant focuses narrowly and exclusively on the court's use of the word, humiliation, to describe one aspect of the condition of community service. At the time of sentencing, the court, in discussing the goals the court

sought to advance by imposing this special condition of community service, stated that

> [defendant] needs to understand the disapproval that society has for this kind of conduct, and that's the idea behind the humiliation. And it should be humiliation of having to stand and be labeled in front of people coming and going from a post office as some[one] who has stolen mail.
>
> I suspect that in the course of that, the defendant will get a taste of just exactly what the consequences are to people of the offense conduct that he has committed.

Def Mot (Doc #76) at 6 (quoting transcript of proceedings at the 02/25/03 sentencing hearing).

Defendant reads this statement as an assertion that the punishment is intended to "serve[ ] no purpose but to humiliate the defendant," arguing that "[t]he punishment imposed in this case has no place in the modern scheme of rehabilitation and deterrence envisioned by Congress when it created the Sentencing Reform Act and the Guidelines." Id at 11. In so arguing, defendant mischaracterizes what should be one effect of any criminal conviction as an unlawful purpose of the challenged condition. A criminal conviction should by its nature be humiliating to a defendant. An expression of shame is integral to the acceptance of responsibility for criminal conduct. Indeed, the shame a convicted defendant feels and/or expresses is one element of the acceptance of responsibility contemplated by the sentencing guidelines. See Sentencing Guidelines, § 3E1.1. "[A] defendant's remorse or sense of shame is accounted for in the 'acceptance of responsibility' analysis" of the guidelines. *United States v Donatiu*, 720 F Supp 619, 623 n 1 (ND Ill 1989).

More importantly, in the present context, the court's goal in imposing the challenged condition was not, as defendant contends, to subject defendant to humiliation for humiliation's sake, but rather to create a situation in which the public exposure of defendant's crime and the public exposure of defendant to the victims of his crime – to the members of the community who place their trust in the safety and integrity of the mails – will serve precisely the purposes highlighted by the *Consuelo-Gonzalez* court: the rehabilitation of defendant and the protection of the public.

Mail theft is, by its nature, an anonymous crime. The precise identity of its victims usually remains undisclosed both to the court and to a convicted defendant. The purpose of the condition the court placed on defendant's community service was precisely to bring home to defendant that his conduct has palpable significance to real people within his community. As the court discusses below, with the assistance of the able counsel herein, the court has been able to craft special conditions of supervision that are even more directly targeted at bringing defendant in contact with his victims and with the real impact that his criminal conduct has had on them.

The modified conditions of supervision detailed below still call for defendant to stand before a postal facility for one eight-hour day wearing or bearing a sign identifying himself as a mail thief. While humiliation may well be – indeed likely will be – a feature of defendant's experience in standing before a post office with such a sign, the humiliation or shame he experiences should serve the salutary purpose of bringing defendant in close touch with the real significance of the crime he has acknowledged committing. Such an experience should have a specific

rehabilitative effect on defendant that could not be accomplished by other means, certainly not by a more extended term of imprisonment. It will also have a deterrent effect on both this defendant and others who might not otherwise have been made aware of the real legal consequences of engaging in mail theft.

At the hearing on defendant's motion, his counsel made reference to psychological trauma that defendant would suffer from being required to stand in front of a post office identifying himself as a mail thief. Counsel could not, under questioning, substantiate that concern. Government counsel also raised public safety concerns in connection with the condition. The court certainly does not intend to subject defendant to undue risk of trauma or endanger him or the public. Accordingly, defendant's probation officer will be given authority to withdraw or modify this condition or apply to the court to withdraw or modify this condition if these concerns can be substantiated.

Defendant directs the court's attention to several decisions of state courts that he believes should persuade the court to reconsider the condition that defendant be required to wear or bear a sign before a post office identifying himself as a mail thief.

In *People v Hackler*, 16 Cal Rptr 2d 681 (Cal App 1993), a California court of appeal held that a condition of probation requiring the defendant to wear a t-shirt identifying him as a felon on probation for theft at any time stepped outside his residence was impermissibly broad and not reasonably related to a compelling state interest. Id at 686-87. The *Hackler* court took especial notice of the fact that the condition that "Hackler wear the shirt at all

times while he was outside his actual living quarters" was one that "could adversely affect [his] ability to carry on activities having no possible relationship to the offense for which he was convicted or to future criminality." Id at 687. The conditions imposed by the court here do not demonstrate the same defect. They apply to a very limited time of community service to be supervised by defendant's probation officer. They do not touch on any other aspect of defendant's life. The conditions do not require defendant publicly to identify himself as a mail thief at any other time or in any other place, thereby subjecting him to what might well be needless humiliation unrelated to any legitimate rehabilitative or deterrent purposes.

In *People v Johnson*, 528 NE 2d 1360 (Ill App 1988), an Illinois appellate court invalidated a condition of the defendant's probation that she publish an advertisement in the newspaper, including her mug shot and an apology for the conduct that led to her conviction for driving while under the influence of a controlled substance. The court ruled that the condition imposed by the trial court added an impermissible element of "public ridicule" to the defendant's sentence that could, have untold psychological effect on the defendant. Id at 1362. Such an effect, the court held, would be inconsistent with the penal goal of rehabilitation. See id. Again, the conditions imposed by this court do not have the same kind of indiscriminate humiliating effect. Although the conditions do provide for the public exposure of defendant as a mail thief, they do so for a limited time, and in a limited context immediately related to defendant's crime. As already discussed, such exposure directly serves the functions identified by Congress as relevant to the exercise of the court's discretion to fashion

conditions of supervised release: the nature of defendant's criminal conduct, deterrence and rehabilitation.

In *People v Letterlough*, 655 NYS2d 105 (NY 1995), the court held that a condition placed on the defendant's probation that the defendant, who had repeatedly been convicted of driving while under the influence of a controlled substance (DWI), place a fluorescent sign on the bumper of his car stating, "Convicted DWI", was invalid under New York penal law. The *Letterlough* court concluded that "[t]he punitive and deterrent nature of the disputed 'scarlet letter' component of the probationary conditions here overshadows any possible rehabilitative potential that it may generate and thus is out of step with the various other devices specifically authorized by [New York law]." Id at 109. In addition, the *Letterlough* court determined that the trial court had invaded the province of the state legislature in an impermissible manner by fashioning such a remedy. See id. As an initial matter, it is clear that New York state law and federal law differ significantly in the extent to which they afford a trial court discretion to impose a condition on probation not expressly contemplated by the relevant provisions of the respective sentencing statutes. Moreover, the condition at issue in *Letterlough*, like those in *Hackler* and *Johnson*, required the defendant to identify himself as a DWI offender in a range of contexts that would unduly and unnecessarily inhibit his ability to go about his daily life. He would be subject to the stigma attached to his crime not for a limited period of tine in a specific location, as will be the case with defendant at bar, but every time he got behind the wheel of his car. The conditions fashioned by the court in this matter are narrower and targeted at the specific conduct to which defendant has pleaded guilty.

Lastly, defendant contends that his personal history, including a difficult early home life and a recent history of substance abuse, makes it impossible for the condition the court has imposed that defendant stand before a post office with a sign identifying himself as a mail thief to have any kind of rehabilitative or deterrent effect on this particular defendant. See Def Mot (Doc #76) at 9. Defendant argues that this condition would result in "unpredictable psychological effect[s]." Id. On this basis, defendant asserts that the condition is not reasonably related to the statutory criteria identified above. See id. Defendant offers no substantive ground for asserting that any unpredictable psychological effect will attend, if defendant is required to comply with this condition as ordered. Other conditions of defendant's supervised release, including a condition that defendant participate in a drug/alcohol aftercare treatment program, are designed to address those issues and, with luck and hard work by defendant, will do so successfully. The primary goal of the conditions of supervised release set forth below, including the condition contested here, is a different, but related one: to bring defendant face to face with the persons he has harmed and so send a clear message to defendant that mail theft has real consequences for others that he must consider in thinking both about what he has done and what he proposes to do in the future. There has been no indication that those deterrent and rehabilitative purposes will be undermined – or defendant's mental health compromised – by being compelled to comply with that additional condition of his supervised release. And counsel for defendant was unable to provide any substantiation at oral argument for defendant's assertion that he is psychologically unfit to fulfill this condition of his supervised release. As the court has already discussed, if defendant can demonstrate to the

probation officer that such harms are likely to attend the imposition of this condition, the probation officer is authorized to withdraw or modify this condition of defendant's supervised release or apply to the court to withdraw or modify the condition.

Defendant has neither cited a binding authority nor identified a persuasive argument for his contention that the court's imposition of the condition of community service described above exceeds the court's authority under 18 USC §3583.

B

Defendant also asserts that the specific condition that he appear before a postal facility with a sign identifying himself as a mail thief violates his Eighth Amendment right not to be subjected to cruel and unusual punishment. Defendant contends that "[a] punishment that serves no purpose but to humiliate [him] violates the bedrock value of individual dignity upon which the Supreme Court's analysis in *Trot. v Dulles*, 356 US 86 (1958)] rested." Def Mot (Doc #76) at 11. The discussion above identifying the several ways in which the conditions of community service the court will impose on defendant comply with the requirements of the federal sentencing statutes – demonstrates that these conditions are neither cruel nor unusual, but in fact appropriate means to address the goals of rehabilitating defendant, protecting the public and deterring future mail theft. Defendant has failed to support with any authority the contention that these conditions on supervised release violate the Eighth Amendment.

For the reasons stated above, defendant's motion to correct sentence (Doc #76) is DENIED.

III

At oral argument, the court offered defendant the opportunity to suggest an alternative form or forms of community service that would better comport with the aims of the court. After consultation between defense and government counsel, the parties presented several alternatives that satisfy the objectives the court articulated at the sentencing hearing, reiterated above, and that the court has concluded are appropriate. The court commends both defense and government counsel for their creativity in devising the conditions of supervised release that the court adopts herein.

Accordingly, the court ORDERS that special conditions of supervision be entered as follows:

1 The defendant shall not have contact with any co-defendant, in this case namely, Andrew Choi, unless otherwise directed by the probation officer.

2 The defendant shall participate in a drug/alcohol aftercare treatment program, which may include testing to determine whether he has reverted to the use of drugs or alcohol, as directed by the probation officer. The defendant is to pay part or all of the cost of this treatment, at an amount not to exceed sixty dollars ($60.00) per session, as deemed appropriate by the probation officer. Payments shall never exceed the total cost of urinalysis and counseling. The actual

co-payment schedule shall be determined by the probation officer.

3 The defendant shall submit his person, residence, office, vehicle, or any property under his control to a search. Such a search shall be conducted by a United States probation officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a search may be grounds for revocation. The defendant shall warn any residents that the premises may be subject to searches.

4 The defendant shall not own or possess any firearms, ammunition, destructive devices, or other dangerous weapons.

5a The defendant shall, at the direction of the probation officer, spend 4 days of 8 total hours each at a postal facility at which there is a lost and found window, observing postal patrons who visit that window to inquire about lost or missing mail;

5b The defendant shall, with the assistance of counsel, carefully examine all Rule 16 discovery materials in the possession of the United States to determine the identity of all ascertainable victims of the defendant's crime; having identified these persons, the defendant shall compose and address a personal letter to each of these persons individually expressing defendant's remorse for the specific conduct that harmed that person; the defendant shall provide each such victim with the address of his counsel, through

whom any victim who wishes to contact the defendant directly may do so.

5c The defendant shall deliver three educational lectures at three San Francisco high schools, to be identified by the probation officer and under the probation officer's direction, in which the defendant shall describe the crime he has committed, express his remorse for his criminal misconduct and articulate to the students in attendance how his conviction and sentence have affected his life and future plans.

5d The defendant shall perform 1 day of 8 total hours of community service during which time he shall either (i) wear a two-sided sandwich board-style sign or (ii) carry a large two-sided sign stating, "I stole mail; this is my punishment," in front of a San Francisco postal facility identified by the probation officer. For the safety of defendant and the general public, the postal facility designated shall be one that employs one or more security guards. Upon a showing by defendant that this condition would likely impose upon defendant psychological harm or effect or result in unwarranted risk of harm to defendant, the public or postal employees, the probation officer may withdraw or modify this condition or apply to the court to withdraw or modify this condition.

6 The defendant shall participate in a vocational training program as directed by the probation officer.

7 The defendant shall pay any fine and special assessment that is imposed by this judgment.

III

In sum, defendant's motion to file an oversized *ex parte* motion under FRCrP 35 without providing reasonable notice to the government is GRANTED. Defendant's motion to correct sentence (Doc #76) is DENIED. Upon considering the submissions of the parties, the court ORDERS that special conditions of supervision be ENTERED as provided above.

IT IS SO ORDERED.

/s/ Vaughn R. Walker
VAUGHN R WALKER
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHAWN GEMENTERA, Defendant-Appellant.	No. 03-10103 D.C. No. CR-01-00454-VRW Northern District of California, San Francisco ORDER (Filed May 13, 2005)

Before: O'SCANNLAIN, SILER,* and HAWKINS, Circuit Judges.

Judges O'Scannlain and Siler have voted to deny the petition for rehearing, and Judge Hawkins has voted to grant it. Judge O'Scannlain has voted to deny the petition for rehearing en banc and Judge Siler so recommends. Judge Hawkins has voted to grant it.

The full court was advised of the petitions and a judge of this court requested a vote on whether to rehear en banc. The matter failed to receive a majority of the votes of the nonrecused active judges.

The petitions for rehearing are thus **DENIED**.

The mandate shall issue forthwith.

* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

CA No. 03-10103

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	**CA No. 03-10103**
Plaintiff-Appellee,	**D.C. No. CR 01-0454 VRW**
v.	**(N.D. Cal., San Francisco)**
SHAWN GEMENTERA,	
Defendant-Appellant.	

AMICI CURIAE BRIEF OF LAW PROFESSORS SUBMITTED IN SUPPORT OF APPELLANT SHAWN GEMENTERA'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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Attorney for *Amici Curiae*

September 22, 2004

[Names of individual *Amici* are listed inside]

***AMICI CURIAE* STEERING COMMITTEE**
(Law Schools are listed only for identification purposes)

Prof. Erwin Chemerinsky
Duke University School of Law

Prof. Gabriel J. Chin
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James E. Rogers College of Law

Prof. Wayne A. Logan
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Howard University School of Law

Prof. Robert Weisberg
Stanford Law School

Prof. James Q. Whitman
Yale Law School

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IDENTITY AND INTEREST OF THE AMICI CURIAE[1]

The undersigned law professors submit this brief in support of Defendant Shawn Gementera's petition for rehearing with suggestion for rehearing en banc of the decision in, *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004), authored by Judge O'Scannlain over Judge Hawkins' dissent. *Amici* are law professors who teach and publish in the areas of criminal law, criminal procedure, penal policy, as well as American constitutional law. Many of the *amici* have published law review articles on the legality and propriety of shaming punishments, and some of those articles were cited in the underlying decision. The *amici* all agree that the supervised release condition that exposes Shawn Gementera to public shame and humiliation is inconsistent with this Court's precedent, the applicable statute, judicial precedent, and the Constitution. *Amici* therefore support Mr. Gementera's petition for rehearing and/or rehearing en banc.

* * *

[1] No counsel for any party authored this brief in whole or in part. The brief was written by counsel for *Amici Curiae* with the assistance of Sam Daughety, Academic Fellow to Dean Toni Massaro (U. Arizona).

In fact, convincing psychological studies indicate that efforts to humiliate or debase a person actually may thwart the community's interest in rehabilitating or incapacitating the offender.[17] Studies show that the public loss of "face" can inspire anger, defiance, and a transformation of one's sense of belonging in the community in ways that promote, rather than inhibit, further misconduct.[18] A person who is shamed is likely to feel redefined by the experience – a process referred to as "labeling" in some criminal justice literature. *See, e.g.*, Walter R. Grove, *The Labeling of Deviance: Evaluating a Perspective* (2d ed. 1980). Post-labeling, an offender may have little incentive to obey the applicable laws because he or she has already become, in a highly publicized way, identified as a criminal. *See* Charles E. Frazier & Thomas Meinsenholder, *Explanatory Notes on Criminality and Emotional Ambivalence*, 8 Qualitative Sociology 266 (1985). That is, the shamed offender subsequently will have no status or self-conception as a law-abiding citizen, should he recommit

[17] *See* Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 Psych. Pub. Pol. and L. 645, 672 (1997); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733, 757 (1998) (arguing that rehabilitation associated with shaming punishments is largely illusory).

[18] *See, e.g.*, June Price Tangney, Patricia Wagner, Carey Fletcher & Richard Gramzow, *Shamed Into Anger? The Relation of Shame and Guilt to Anger and Self-Reported Aggression*, 62 J. Personality and Social Psych. 669, 673 (1992) (noting that an "initial sense of shame fosters subsequent anger and hostility"); June Price Tangney, Rowland S. Miller, Laura Flicker, & Deborah Hill Barlow, *Are Shame, Guilt and Embarrassment Distinct Emotions?*, 70 J. Personality and Social Psych. 1256, 1267 (1996) (noting that shaming results in an "externalization of blame").

the offense in question.[19] These unintended consequences are greatly exacerbated when, as here, a punishment is designed *precisely to produce this stigma*. Indeed, it is difficult to think of a purpose of the shaming punishment inflicted on Mr. Gementera other than to make him feel debased, much in a way that colonial "stocks" and pillories and the Communist Chinese walls of infamy achieved the same ends.

Oddly, the majority condoned the shaming condition in the absence of empirical support that it is rehabilitative, finding solace in the ongoing scholarly debate over the propriety of shaming sanctions. *See Gementera*, 379 F.3d at 605 (citing Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & Econ. 365, 371 (1999); Stephen P. Garvey, 65 U. Chi. L. Rev. at 738-39; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591 (1996)). The majority's reliance on these sources, however, is misplaced.

First, Kahan and Posner themselves express doubt that the use of shaming sanctions would be consistent with the goals of the current Sentencing Guidelines:

> Devised on a largely ad hoc basis and implemented through state court judges' discretion to set conditions on probation, existing shaming penalties assume a rich diversity of forms. . . . Were individual federal district court judges permitted the same latitude to fashion such *penalties,*

[19] This is not the case with fines or imprisonment because, although those sanctions are matters of public record, the object of such punishments is not ordinarily thrust into the public eye in such a leering fashion.

> shaming could revive the variability in sentencing that the Guidelines were meant to eliminate.

42 J.L. & Econ. at 384 (emphasis added). Second, Kahan and Posner defend shaming punishments expressly as punitive measures, not as rehabilitation. Indeed, they are adamant that any effective shaming alternative must include this public humiliation component to work as a politically feasible alternative to incarceration. *Id.* at 383. While such a goal may be crucial for a shaming punishment to "work" as punishment, it is impermissible as a condition of supervised release, as explained *supra,* because such conditions may not be punitive. Third, they argue that shaming punishments for some offenders are desirable because they offer a cheap way of conveying social condemnation without incurring the steep social costs imposed by incarceration. In other words, shaming is best employed as a substitute for incarceration, not a supplement. Here, Mr. Gementera got both.

The court also relied on Professor Stephen Garvey's article, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733 (1998). But far from endorsing the kind of shaming punishment at issue here, Garvey writes that such a shaming punishment "menaces certain ideals that any morally respectable mode of punishment should honor, not the least of which is human dignity." *Id.* at 739. Instead Garvey defends what have been variously called "guilt punishments" or "educative" punishments.[20] These punishments do not involve public humiliation; rather they can occur in relative privacy and are designed to induce

[20] *See* Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. at 765; Dan Markel, *Are Shaming Punishments Beautifully Retributive?*, 54 Vand. L. Rev. 2157 (2001).

contrition and moral education. In sum, the articles by Kahan, Posner, and Garvey offer little support for the supervised release condition in this case.

The majority's reasoning was similarly flawed when it claimed that the combination of an impermissible shaming sanction with other potentially rehabilitative conditions would somehow suffice to "reintegrate" the offender into society. *Gementera*, 379 F.3d at 606 n.13. The majority fundamentally misunderstood the nature of "reintegrative shaming." According to Professor John Braithwaite, the leading advocate of reintegrative shaming cited by the majority, reintegrative shaming sanctions involve officially imposed rituals for *reintegrating* the offender back into the community. *See* John Braithwaite, *Crime, Shame, and Reintegration* 74 (1989). The majority claimed that coupling Gementera's public shaming with "more socially useful" sanctions, such as the high school lectures and letters of apology, would satisfy this reintegrative requirement. *Gementera*, 379 F.3d at 606.

Braithwaite's position, however, is not that a shaming sanction magically becomes reintegrative merely by coupling it with more proper sanctions. Rather, there must be some positive affirmation *by the community* after the shaming so that the offender once again becomes an integral part of that community. *See* Braithwaite, *Crime, Shame, and Reintegration* at 74. The majority does not explain how the added sanctions will somehow fulfill this affirmative reintegration. This is precisely because there are no such reintegrative rituals in place through which Mr. Gementera can rehabilitate his spoiled reputation after he has served his time with the sandwich board. The letters and lectures are merely further forced "contrition" on the part of the offender; they do not invite or require

the community to once again accept Mr. Gementera as one of them. Indeed, the lectures before adolescents might invite even further scorn, derision, and humiliation. In sum, the shaming condition at issue is illegal because it is not plausibly, let alone reasonably, related to the purpose of rehabilitation.

* * *

Although shaming punishments may have been acceptable in 1791 when the Eighth Amendment was adopted, the Supreme Court has clearly indicated since then that sentences that aim at humiliating offenders in public no longer comport with the dignity of the offender or of society. For example, last year, in *Smith v. Doe*, 538 U.S. 84 (2003), in upholding a state law requiring sex offenders to register, the Supreme Court stressed that it was not adopted with the sole goal being to shame violators. The Court noted that "[s]ome colonial punishments indeed were meant to inflict public disgrace." *Id.* at 97. But the Court said that the registration of sex offenders was different because "the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." *Id.* at 98. The Court concluded that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Id.* at 99.

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA
PROBATION OFFICE

DEBRA K. AASMUNDSTAD
CHIEF U.S. PROBATION OFFICER

[SEAL]

[Address and Phone Number Omitted in Printing]

May 20, 2005

THE HONORABLE VAUGHN R. WALKER
CHIEF UNITED STATES DISTRICT JUDGE

MEMORANDUM

RE: Unites [sic] **States v. Shawn Gementera**
CR 01-0454-02VRW

Your Honor:

On February 25, 2003, Mr. Shawn Gementera was convicted of Theft and Unlawful Possession of Stolen Mail Matter, in violation of 18 U.S.C. § 1708, and sentenced to two (2) months custody, with a three (3) year term of supervised release to follow. Prior to surrendering for his aforementioned two month sentence, Mr. Gementera sustained another arrest for Unlawful Possession of Stolen Mail Matter and Aiding and Abetting, in violation of 18 U.S.C. § 1708 and 2, and on December 2, 2003, he was convicted and sentenced to 24 months custody with a concurrent three year term of supervised release in CR 03-0096-01 VRW. On January 19, 2005, Mr. Gementera was released from custody, and his case was assigned to the undersigned for supervision.

On February 7, 2005, the undersigned advised Your Honor, through a written memorandum, that the probation office

was prepared to execute special condition 5(d) in CR 01-0454-02 VRW, specifically:

> "The defendant shall perform 1 day of 8 total hours of community service during which time he shall either (I) wear a two-sided sandwich board-style sign or (ii) carry a large two-sided sign stating, "I stole mail; this is my punishment," in front of a San Francisco postal facility identified by the probation officer. For the safety of defendant and the general public, the postal facility designated shall be one that employs one or more security guards. Upon showing by defendant that this condition would likely impose upon defendant psychological harm or effect or result in unwarranted risk of harm to defendant, the public or postal employees, the probation officer may withdraw or modify this condition or apply to the court to withdraw or modify this condition."

The undersigned further advised Your Honor that on September 22, 2004, defense counsel, Arthur Wachtel, had filed a petition with the Ninth Circuit Court of Appeals for rehearing and/or rehearing en banc, and in light of this petition, sought guidance from the court as to whether or not to proceed with the execution of the special condition.

Your Honor requested that the undersigned prepare a report advising the court as to the status of the petition in ninety days, or sooner, if the court acts on the petition for rehearing. On May 17, 2005, the undersigned received written notice that the mandate of the United States Court of Appeals for the Ninth Circuit had been filed in USCA No. 03-10103 (U.S. v. Shawn Gementera). On May 19, 2005, the undersigned telephoned the Office of the Clerk of the Court for the Ninth Circuit Court of Appeals, and learned that the court denied petition for rehearing on

May 13, 2005. The undersigned also spoke with defense counsel, Arthur Wachtel, on May 19, 2005, and learned that he is conferring with the government regarding the status of the writ of certiorai [sic] to the U.S. Supreme Court. Mr. Wachtel informed the undersigned that he will be advising Your Honor, in writing, of his application for a writ of certiorai [sic].

In light of the above information, the undersigned seeks continued guidance from the court as to how to proceed.

Respectfully submitted,

/s/ Jennifer J. James
Jennifer J. James
U.S. Probation Officer Specialist

Reviewed by:

/s/ Sheila John
Sheila John
Supervising U.S. Probation Officer

THE COURT ORDERS:

☐ The immediate execution of special condition 5(d) in CR 01-0454-02 VRW.

☒ The delayed execution of special condition 5(d) in CR 01-0454-02 VRW, pending further instruction from the court.

☐ Other:

20 May 2005
Date

/s/ Vaughn R. Walker
Vaughn R. Walker
Chief United States
District Judge

cc: Mr. Arthur Wachtel, Defense counsel
Ms. Anne-Christine Massullo,
Assistant U.S. Attorney