No. 05-227

In the Supreme Court of the United States

SHAWN GEMENTERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a supervised-release condition requiring a defendant to wear a signboard stating "I stole mail; this is my punishment" outside a post office for one day violates either the Sentencing Reform Act, 18 U.S.C. 3583(d), or the Eighth Amendment's prohibition against cruel and unusual punishments.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 379 F.3d 596. The district court's sentencing orders (Pet. App. 32-40, 47-64) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2004. A petition for rehearing was denied on May 13, 2005 (Pet. App. 65). The petition for a writ of certiorari was filed on August 11, 2005. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Northern District of California on one count of mail theft, in violation

of 18 U.S.C. 1708. He was sentenced to two months of imprisonment, to be followed by a three-year term of supervised release, during which he was required to perform community service and to wear or carry a signboard announcing his conviction for one eight-hour period. The court of appeals affirmed. Pet. App. 27.

1. On May 21, 2001, petitioner was arrested in San Francisco, California, after a police officer saw him and co-defendant Andrew Choi stealing letters from several mailboxes along Fulton Street. At the time of his arrest, petitioner had 42 pieces of stolen mail in his possession, including a United States Treasury check in the amount of $1525. PSR ¶¶ 7-8. A federal grand jury charged petitioner with one count of mail theft, in violation of 18 U.S.C. 1708, and one count of receipt of a stolen U.S. Treasury check, in violation of 18 U.S.C. 641. Pet. App. 2.

2. Petitioner pleaded guilty to the mail theft charge; the government dismissed the stolen check charge. The applicable sentencing range under the Sentencing Guidelines was two to eight months' imprisonment. On February 25, 2003, the district court sentenced petitioner to two months of imprisonment, to be followed by three years of supervised release. As a condition of supervised release, the court required petitioner to perform 100 hours of community service consisting of standing in front of a postal facility with a signboard stating "I stole mail. This is my punishment." Pet. App. 3.

On March 3, 2003, the district court modified the conditions of supervised release it had previously imposed. The modified conditions required petitioner to (1) spend four eight-hour days at a post office observing postal patrons inquire about lost or stolen mail at the facility's

lost-and-found window; (2) write letters of apology to the identifiable victims of his crime; (3) deliver three lectures at San Francisco high schools explaining his crime and the effects it had on him and others; and (4) spend one eight-hour day in front of a post office in San Francisco wearing or carrying a "large two-sided sign" with the inscription "I stole mail; this is my punishment." Pet. App. 48. The court stated in its order that, "[u]pon a showing by [petitioner] that this condition would likely impose upon [petitioner] psychological harm or effect or result in unwarranted risk of harm to [petitioner], the probation officer may withdraw or modify this condition or apply to the court to withdraw or modify this condition." *Id.* at 63.[1]

4. Petitioner appealed the legality of the signboard requirement. The court of appeals affirmed. Pet. App. 1-27. The court held that the signboard requirement did not violate the Sentencing Reform Act, 18 U.S.C. 3583(d), because "the record unambiguously established 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." Pet. App. 10. The court further held that the signboard condition, when viewed as one part of a comprehensive set of conditions, was in fact "reasonably related to rehabilitation." *Id.* at 18. The court noted that the mere presence of some discomfort is insufficient to establish that a condition is impermissible, because "[c]riminal offenses, and the penalties

[1] On March 12, 2003, after the imposition of the modified sentence, petitioner was again found by police in possession of stolen mail, and was subsequently rearrested. He again pleaded guilty to mail theft and was sentenced to 24 months of imprisonment to be followed by a three-year term of supervised release. Pet. App. 5 n.4.

that accompany them, nearly always cause shame and embarrassment." *Id.* at 17. The court concluded that, although the district court could have imposed a lengthier prison term instead of the signboard condition, the district court's conclusion "that rehabilitation would better be served by means other than extended incarceration and punishment is plainly reasonable." *Id.* at 20. The court limited its holding, noting that it was "careful not to articulate a principle broader than that presented by the facts of this case." *Id.* at 21.

The court rejected petitioner's argument that the signboard requirement violated the Eighth Amendment. The court noted that petitioner had offered "no evidence whatsoever, aside from bare assertion, that shaming sanctions violate contemporary standards of decency" or that such sanctions are unusual, particularly in the state courts. Pet. App. 24. The court held that "it would stretch reason to conclude that eight hours with a signboard, in lieu of incarceration, constitutes constitutionally cruel and unusual punishment." *Id.* at 26-27.

Judge Hawkins dissented. Although acknowledging that "[t]here is precious little federal authority on sentences that include shaming components," Pet. App. 28, Judge Hawkins stated that imposition of the signboard condition constituted an abuse of discretion under the Sentencing Reform Act of 1984. *Id.* at 28, 31. He also stated his view that the condition in this case "is simply bad policy." *Id.* at 31. Judge Hawkins did not address petitioner's argument that the condition violated the Eighth Amendment.

ARGUMENT

Petitioner renews his argument (Pet. 8-24) that the signboard condition of supervised release violates both

the Sentencing Reform Act, 18 U.S.C. 3583(d), and the Eighth Amendment. That claim lacks merit and does not warrant further review.

1. The signboard condition does not violate the provisions of the Sentencing Reform Act governing supervised release.

a. Conditions of supervised release are authorized by 18 U.S.C. 3583(d). That provision enables a district court to impose as conditions of supervised release those specific conditions authorized by the probation provision, 18 U.S.C. 3563(b)(1)-(10) and (12)-(20). It also grants a sentencing court discretion to impose "any other condition it considers to be appropriate," 18 U.S.C. 3583(d), so long as it 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). 18 U.S.C. 3583(d). Those factors include "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. 3553(a)(1), as well as the need "to afford adequate deterrence to criminal conduct," 18 U.S.C. 3553(a)(2)(B), "to protect the public from further crimes of the defendant," 18 U.S.C. 3553(a)(2)(C), and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. 3553(a)(2)(D).[2]

[2] Petitioner appears to argue (Pet. 6) that, because Section 3583(d) does not specifically authorize a district court to base a condition of supervised release on the need to "provide just punishment for the offense," 18 U.S.C. 3553(a)(2)(A), a condition of supervised release that has a punitive effect is necessarily invalid, even if the condition directly and substantially furthers rehabilitation, deterrence, or public protection. That argument is mistaken. Nothing in the Sentencing Reform Act precludes a court from imposing a condition of supervised release that serves the goals of rehabilitation, deterrence, and protection, merely because the condition's features could be viewed as

A sentencing court therefore has broad discretion in choosing appropriate conditions of supervised release.

The district court here acted well within its discretion. The court correctly stated the applicable law governing conditions of supervised release, Pet. App. 51-52, and explicitly considered the unique nature of mail theft and petitioner's particular characteristics, see *id.* at 54-56, 59-60; see also 18 U.S.C. 3553(a). Taking those factors into account, the court concluded that the challenged condition of supervised release would best serve the purposes of "rehabilitation of [petitioner] and protection of the public." Pet. App. 55. As the district court explained, its purpose "was not * * * to subject [petitioner] to humiliation for humiliation's sake." *Ibid.* Instead, the court found that the condition would be likely to have "a specific rehabilitative effect on [petitioner] that could not be accomplished by other means, certainly not by a more extended term of imprisonment." *Id.* at 55-56. The court also found that requiring petitioner to hold the sign would help protect the public because it "will also have a deterrent effect on both this defendant and others." *Id.* at 56.[3] As the court of appeals found, the district court thus imposed the signboard requirement for permissible reasons. See *id.* at 9-11.

b. Petitioner does not address the district court's conclusions that the signboard condition is permissible under Section 3583(d) because it serves both specific and general deterrent purposes, see 18 U.S.C. 3553(a)(2)(B),

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having a punitive effect as well.

[3] See Pet. App. 43 ("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.").

and thereby helps to protect the public, see 18 U.S.C. 3553(a)(2)(C). Those conclusions are sufficient by themselves to support the validity of the sentence.[4]

Petitioner does argue (Pet. 11) that the signboard requirement could not be "reasonably related to legitimate rehabilitative purposes" because it was humiliating. The mere fact that a sentence may make the defendant feel uncomfortable or embarrassed in public, however, does not by itself establish that it cannot be rehabilitative. Other sentencing provisions involving an element of shaming have been upheld. See, *e.g.*, *United States* v. *Clark*, 918 F.2d 843, 846 (9th Cir. 1990) ("a public apology may serve a rehabilitative purpose"); *Ballenger* v. *State*, 436 S.E.2d 793, 794-795 (Ga. Ct. App. 1993) ("[W]e cannot say that the stigmatizing effect of wearing the bracelet may not have a rehabilitative, deterrent effect on [the defendant]."). Indeed, as the court of appeals recognized, see Pet. App. 17, the mere fact of stigmatization is insufficient to establish that a punishment could not be rehabilitative, since conviction and sentencing themselves almost inevitably carry an element of stigmatization.

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[4] Petitioner does argue (Pet. 9) that the "district court's own statements at [the original] sentencing belied th[e] conclusion" that it imposed the signboard condition "for a rehabilitative purpose, for general deterrence and for the protection of the public." In fact, the district court's very brief comments at the original sentencing referred to the deterrent and protective purposes of the sentence. See Pet. C.A. E.R. 25 (noting that petitioner "needs to understand the disapproval that society has for this kind of conduct"). In any event, as petitioner acknowledges (Pet. 9), when the district court corrected the sentence, it expressly explained the rehabilitative, deterrent, and protective purposes of the signboard condition. It is the validity of the corrected sentence that was before the court of appeals and is challenged in the petition for certiorari.

Moreover, as the court of appeals recognized, "much uncertainty exists as to how rehabilitation is best accomplished." Pet. App. 15. Petitioner's own extensive discussion of the academic commentary (Pet. 14-19) establishes only that the court of appeals was correct when it recognized that "a vigorous, multifaceted, scholarly debate on shaming sanctions' efficacy, desirability, and underlying rationales continues within the academy." Pet. App. 17. Petitioner himself acknowledges (Pet. 11) that, before this case, "no federal court had previously addressed the specific issue of a shaming supervised release condition."

Finally, the court of appeals did not assess the signboard condition in isolation, but evaluated it as part of a package of supervised-release conditions, "including lecturing at a high school and writing apologies, that might loosely be understood to promote the offender's social reintegration." Pet. App. 18. The court found the existence of this combination "highly significant" because it represented a "comprehensive set of provisions" that first exposed petitioner to social disapproval, but then gave him the opportunity "to repair his relationship with society." *Id.* at 18-19. This case therefore does not involve a "stand-alone condition intended solely to humiliate." *Id.* at 18. In those circumstances, further review of the conclusion of the courts below that the signboard condition could serve a rehabilitative purpose on the particular facts of this case would be unwarranted.

2. The signboard condition does not violate the Eighth Amendment.

The Eighth Amendment 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 (1958); see *Roper* v. *Simmons*, 125 S. Ct. 1183, 1190 (2005). A practice violates the Eighth Amendment if it 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 100-101; see *Roper*, 125 S. Ct. at 1190. In determining the prevailing standards of decency, "[t]he beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question." *Id.* at 1192.

As the court of appeals held, petitioner has offered no basis for the conclusion that there is a "national consensus," *Roper*, 125 S. Ct. at 1191, against shaming sanctions. Indeed, he has not even approached the "beginning point" of a claim that the Eighth Amendment prohibits shaming sanctions, because he has not cited any "enactment of [a] legislature[] that ha[s] addressed the question." *Id.* at 1192. Cf. Pet. App. 26 (discussing *Blanton* v. *North Las Vegas*, 489 U.S. 538, 544 (1989), in which this Court addressed a state statute that provided a maximum sentence of six months for a DUI offense, or in the alternative, 48 hours in community service while dressed in clothing identifying the defendant as a DUI offender). Numerous state courts, far from agreeing with petitioner's analysis, have rejected Eighth Amendment challenges to shaming sanctions. See, *e.g.*, *People* v. *Letterlough*, 205 A.D.2d 803, 804 (N.Y. App. Div. 1994) ("CONVICTED DWI" sign on license plate); *Ballenger* v. *State*, 436 S.E.2d at 793 (fluorescent pink DUI bracelet); *Lindsay* v. *State*, 606 So. 2d 652, 656-657 (Fla. Dist. Ct. App. 1992) (DUI advertisement in newspaper); *Goldschmitt* v. *State*, 490 So. 2d 123, 125 (Fla. Dist. Ct. App. 1986) ("Convicted DUI - Restricted License" bumper sticker). See generally Stephen P. Garvey, *Can*

Shaming Punishments Educate?, 65 U. Chi. L. Rev. 733, 734 (1998) (describing proliferation of unorthodox and creative shaming punishments). Although petitioner states (Pet. 20) that the decision in this case rejecting his Eighth Amendment claim "conflicts with other circuits," petitioner cites no other court of appeals that has addressed the issue.[5] Further review of petitioner's Eighth Amendment claim is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioner also is not assisted by *Smith* v. *Doe*, 538 U.S. 84 (2003). Contrary to petitioner's suggestion (Pet. 7), the Court in *Smith* did not indicate that the Eighth Amendment would bar a sentence aimed at public humiliation; rather, *Smith* observed that sex offender notification provisions were not about shaming the defendant, but about disseminating truthful information to inform and protect the public, and thus were not punitive for *ex post facto* purposes. 538 U.S. at 98-99. Even if *Smith* were relevant here, which it is not, the district court in this case had rehabilitative and deterrence objectives in mind, not shaming for its own sake.