04-CM-760
04-CO-1600

DISTRICT OF COLUMBIA COURT OF APPEALS

ELENA RUTH SASSOWER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF PROFESSOR ANDREW HORWITZ *AMICUS CURIAE* ON BEHALF OF ELENA RUTH SASSOWER URGING VACATUR OF THE SENTENCE

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of Professor Andrew Horwitz, Professor of Law and Director of Clinical Programs at Roger Williams University School of Law in Bristol, Rhode Island. Professor Horwitz is duly admitted and licensed to practice law in the states of Rhode Island and New York and in the United States District Court for the Eastern District of New York. He is also a member of the Bar of the Commonwealth of Massachusetts on inactive status.

Professor Horwitz's scholarly agenda has focused on the judicial use and abuse of probation conditions in criminal sentencing. His most recent work in that field, a law review article entitled Coercion, Pop-Psychology and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions, 57 Wash. & Lee L. Rev. 75 (2000), has been cited by courts, lawyers, and legal scholars throughout the United States. See, e.g., State v. Oakley, 629 N.W.2d 200 (Wis. 2001); Petition for Certiorari, Oakley v. Wisconsin, 2001 WL 34116641 (U.S. Apr. 19, 2001) (No. 01-1573) (authored by Professor Laurence H. Tribe); D. Kelly Weisberg & Susan Frelich Appleton, Modern Family Law: Cases and Materials 249 (2d ed. 2002); David B. Wexler, Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer, 17 St. Thomas L. Rev. 743 (2005); Leading Cases: Criminal Law and Procedure, 116 Harv. L. Rev. 252 (2002). Professor Horwitz has a significant interest in the development of the law in this field, not only as an academic, but also as a practicing attorney.

Pursuant to Rule 29(a) of the Rules of the District of Columbia Court of Appeals, Professor Horwitz has authority to file this amicus brief because both of the parties have consented to his doing so. Associate Judge John R. Fisher, who was then the Chief of the Appellate Division for the United States Attorney for the District of Columbia, gave consent on behalf of the government in a telephone conversation with Professor Horwitz on July 29, 2005.

STATEMENT OF FACTS

Appellant Elena Ruth Sassower is the coordinator and co-founder of the Center for Judicial Accountability, Inc., a national, non-partisan, non-profit organization whose purpose is to ensure that the processes of judicial selection are effective and meaningful. A-120.[1] On April 20, 2004, after a contentious trial at which she served as her own counsel and before and during which she made repeated motions for the judge to recuse himself, see, e.g., A-265-342; A-375-463; A-538-39; A-549; A-687-88; A-1046, Ms. Sassower was convicted by a jury of disruption of the United States Congress, D.C. Code § 10-503.16(b)(4), based upon an incident that occurred at a Senate Judiciary Committee hearing. On June 28, 2004, Ms. Sassower appeared in the Superior Court for sentencing, once again representing herself, before Associate Judge Brian F. Holeman.

A Presentence Report prepared by the Court Services and Offender Supervision Agency for the District of Columbia, reproduced in the Appellant's Appendix at A-1601-18, noted Ms. Sassower's view that she did not create any sort of disturbance during the Senate Judiciary Committee hearing at issue in the case. Presentence Report at A-1608. In its Evaluative Summary, that report concluded that Ms. Sassower "emphatically believes that she was unjustly persecuted," that she was "falsely and maliciously charged," and that "as a result, she denies any wrongdoing." Id. at A-1617. The report recommended that Ms. Sassower be sentenced to pay a fine and perform community service. Id. at 1617-18.

The United States Attorney, in a document entitled Government's Memorandum in Aid of Sentencing, reproduced in the Appellant's Appendix at A-1619-22, placed special emphasis

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[1]Relevant pages in the Appellant's Appendix will be cited in this brief as "A-___."

on the fact that Ms. Sassower "describ[es] herself as a wrongfully convicted defendant" and "has shown no remorse whatsoever for her actions." Government's Memorandum at A-1620. The government recommended that Ms. Sassower be sentenced to "five days of incarceration, all suspended, and six months of probation conditioned on completion of an anger-management course." Id. at A-1619.

The trial judge also had before him on the day of sentencing an affidavit filed by Ms. Sassower, reproduced in the Appellant's Appendix at A-1641-75, that reiterated her position that she was "innocent," that she had been "wrongfully convicted," and that she showed "no remorse." Defendant's Affidavit at A-1642, 1665-66. The trial judge specifically noted that he had reviewed Ms. Sassower's affidavit in advance of the sentencing proceeding. Sentencing Transcript at A-1714.

Knowing that Ms. Sassower maintained her innocence and, therefore, felt that she had nothing to be remorseful about, the trial judge declared: "I'm sentencing you to 92 days; I'm going to give you credit for any time served in this case. I'm going to suspend execution as to all the remaining time." Sentencing Transcript at A-1722.[2] The trial judge then announced his intention to impose a two year probationary term. Id. In announcing the terms of probation, the trial judge included a special condition that Ms. Sassower "prepare and forward letters of

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[2]The government maintained below that the trial judge did not actually impose this sentence, calling it a "proposed sentence." See Government's Opposition to Defendant's Motion to Correct an Illegal Sentence (hereafter Government's Opposition) at A-1757. For the purposes of the arguments being advanced in this brief, such a distinction, even if were supported by the record, which it is not, would be devoid of any legal significance. All parties would seem to agree that the eventual sentence was imposed as a direct result of Ms. Sassower's rejection of the terms of probation as announced by the trial judge. See id. at A-1763 (arguing that "this is simply a case where defendant rejected probation and, as a result, the Court imposed an alternate sentence of incarceration").

apology" to six different public figures, most notably including the judicial nominee whose nomination she had opposed at the Senate hearing at issue, with a specific requirement that each letter contain an expression of her "remorse for any inconvenience caused by [her] actions." Id. at A-1727.[3] Ms. Sassower informed the trial judge that she would neither write nor send such letters because she was "not remorseful" and would not "lie." Id. In response, the trial judge imposed, inter alia, a sentence of six months of incarceration – the maximum jail sentence allowed by the statute and essentially double what he had imposed just moments earlier. Id. at A-1728. The trial judge, in rejecting Ms. Sassower's oral request for a stay of sentence pending appeal and ordering the incarceration to begin "forthwith," chastised Ms. Sassower: "Ms. Sassower, once again, your pride has gotten in the way of what could have been a beneficial circumstance for you." Id.

On October 26, 2004, Ms. Sassower, through counsel, filed a Motion to Correct an Illegal Sentence, reproduced in the Appellant's Appendix at A-1739-55. The trial judge denied that Motion in an Order dated November 23, 2004, reproduced in Appellant's Appendix at A-10-15. As a consequence, Ms. Sassower served the full six month jail term. The case is before this Court pursuant to Ms. Sassower's timely notices of appeal of both the original sentence and the denial of the Motion to Correct an Illegal Sentence.

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[3]The trial judge also announced several other special conditions of probation that involved extraordinary restrictions on Ms. Sassower's civil liberties, including a blanket prohibition of travel within the area of the District of Columbia in which much of the federal government is located, a blanket prohibition on communication with a whole host of important governmental officials, and a requirement that she document in increments of one tenth of an hour the substantive content of her work with the Center for Judicial Accountability. Sentencing Transcript at A-1723-27. Although these conditions appear to be just as constitutionally infirm as the letter of apology condition, that argument is beyond the scope of the issues specifically addressed in this brief.

ARGUMENT

I. THE PROBATION CONDITION THAT WOULD HAVE REQUIRED MS. SASSOWER TO MAKE INSINCERE APOLOGIES CONTAINING FALSE EXPRESSIONS OF REMORSE VIOLATED HER CONSTITUTIONAL RIGHTS UNDER THE FIRST AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The probation condition that the trial judge attempted to impose in this case, which would have required Ms. Sassower to write insincere letters of apology containing false expressions of remorse, constituted a significant infringement on her First and Fifth Amendment rights. Because there was no legally adequate justification for this infringement, the probation condition was patently unconstitutional.

As the United States Supreme Court held in Wooley v. Maynard, 430 U.S. 705, 714 (1977), "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." This holding expanded upon a long history of Supreme Court cases suggesting that the First Amendment protects much more than simply the right to free speech. As the Court had noted in an earlier opinion, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 642 (1943). The First Amendment plainly prohibits any governmental official or entity from forcing a person to verbalize a particular opinion or viewpoint, regardless of the subject matter and regardless of whether the person ascribes to that opinion or viewpoint. A judicial requirement that a criminal defendant express remorse for a particular act or for the consequences of that act, therefore, represents exactly what the First

Amendment prohibits. A judicial requirement that a criminal defendant express remorse when it is perfectly clear that the defendant is not remorseful represents a constitutional violation that much worse and precisely what the Court prohibited in Barnette: a public authority compelling an individual to "utter what is not in his mind." Barnette, 319 U.S. at 634.

The Fifth Amendment to the United States Constitution likewise prohibits a court from requiring a criminal defendant to verbalize an apology or an expression of remorse. The United States Supreme Court has recognized that the privilege against self-incrimination contained in the Fifth Amendment "respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." Couch v. United States, 409 U.S. 322, 327 (1973); see also Stanford v. Texas, 379 U.S. 476, 484-85 (1965) (quoting Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting)) (noting that the First, Fourth and Fifth Amendments "are closely related" and designed to safeguard "not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'"). Forcing a criminal defendant to apologize for the commission of a crime – particularly a crime that the defendant feels that he or she did not commit – or forcing a criminal defendant to express remorse when he or she is not remorseful, constitutes the ultimate form of "state intrusion" into the "private inner sanctum of individual feeling and thought" for the proscribed purpose of "extract[ing] self-condemnation." Couch, 409 U.S. at 327.

In the case before this Court, the trial judge attempted to impose a probation condition upon Ms. Sassower that plainly violated her First and Fifth Amendment rights, requiring her to apologize for her actions and to express remorse. He announced his intention to impose a special condition of probation requiring that Ms. Sassower "prepare and forward letters of apology,"

with a specific requirement that each letter contain an expression of her "remorse for any inconvenience caused by [her] actions," Sentencing Transcript at A-1727, despite his knowledge that Ms. Sassower maintained that she was factually innocent of the charge, that she had been wrongfully convicted, and that she, therefore, had no reason to feel or express remorse. To her credit, Ms. Sassower candidly informed the trial judge that she would neither write nor send such letters because she was "not remorseful" and would not "lie." Id. In response, the trial judge imposed the maximum permissible jail sentence of six months of incarceration. Id. at A-1728. The trial judge rejected Ms. Sassower's oral request for a stay of sentence pending appeal, ordering the incarceration to begin "forthwith," and chastised Ms. Sassower for allowing her "pride" to get "in the way of what could have been a beneficial circumstance for [her]." Id.

The trial judge's reference to Ms. Sassower's "pride" goes directly to the heart of the constitutional violations at stake in this case. The record here supports only one possible conclusion with respect to the trial judge's intent in crafting the terms of probation as he did; the trial judge plainly intended to force Ms. Sassower to "swallow her pride" and to say things that she did not believe. Whether the trial judge honestly believed that there might be some useful purpose served by forcing her to espouse views that she did not hold, or whether he simply wanted to break Ms. Sassower's resolve or exert raw power over her for less benevolent reasons, the bottom line remains the same. The First Amendment protects all of us – even those convicted of crimes – from being forced to say things that we do not want to say. Because Ms. Sassower exercised her fundamental constitutional right to refrain from speaking words she did not believe, she was sentenced to serve six months in jail. This Court recognized in United States v. Mahdi, 777 A.2d 814, 819 (D.C. 2001) (quoting United States v. Goodwin, 457 U.S.

368, 372 (1982)), that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Accordingly, this Court must rule that both the probation condition and the trial judge's retaliatory sentence were unlawful on First Amendment grounds.

Likewise, the "private inner sanctum of individual feeling and thought" protected by the Fifth Amendment, Couch, 409 U.S. at 327, would mean very little if a trial judge in a criminal proceeding could lawfully threaten to jail a defendant professing his or her innocence for refusing to "apologize," let alone actually carry out that threat. That is precisely what happened in this case. The trial judge told Ms. Sassower that she would receive a suspended sentence if she wrote letters of apology that expressed remorse. As a direct consequence of her decision to exercise rights that are protected by the Fifth Amendment, she was sentenced to serve six months in jail. This Court must rule that the trial judge's sentence was unlawful on Fifth Amendment grounds.[4]

II. THE PROBATION CONDITION THAT WOULD HAVE REQUIRED MS. SASSOWER TO MAKE INSINCERE APOLOGIES CONTAINING FALSE EXPRESSIONS OF REMORSE WAS UNCONSTITUTIONAL BECAUSE IT WAS NOT NARROWLY TAILORED TO AVOID BEING UNDULY RESTRICTIVE OF HER CONSTITUTIONAL RIGHTS.

A review of local case law suggests that this Court has never had the opportunity to review a direct challenge to a condition of probation that was grounded on the argument that the condition violated the defendant's fundamental constitutional rights. While the law in the District of Columbia is not particularly well developed in the area of permissible probation

[4]A related but somewhat distinct Fifth Amendment argument is advanced in a subsequent section of this brief. See infra at pages 18-22.

conditions generally,[5] this Court has established some minimum guidelines limiting the types of special conditions of probation that may be imposed pursuant to D.C. Code § 16-710(a).[6] As it relates to the scope of constitutional protection afforded to a probationer, however, the issue presented here seems to be one of first impression for this Court.[7] This Court should adopt the standards set out in the American Bar Association Standards for Criminal Justice and the Model Penal Code, as modified and applied by courts in a wide variety of jurisdictions and in a number of statutes, including the United States Code. These standards duly recognize the importance of preserving a probationer's fundamental constitutional rights to the maximum extent possible, allowing those rights to be infringed only when the government can establish that a probation condition is narrowly tailored to meet certain specified ends, is necessary to meet those ends, and is not unduly restrictive of the probationer's rights. The letters of apology probation condition in this case woefully failed to meet these criteria.

The American Bar Association Standards for Criminal Justice provide that probation conditions "should not be unduly restrictive of an offender's liberty or autonomy." ABA Standards for Criminal Justice, § 18-3.13(c)(ii) (3d ed. 1994). Along similar lines, the Model

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[5]The paucity of local case law on the scope of permissible probation conditions is revealed by the lower court documents filed with respect to this issue. See, e.g., Trial Court Order dated November 23, 2004, reproduced in Appellant's Appendix at A-10-15 (citing only one relevant District of Columbia case); Government's Opposition at A-1756-64 (citing only two relevant District of Columbia cases).

[6]For a further discussion and application of this case law, see infra at pages 15-17.

[7]One of the cases cited by the government below, Huffman v. United States, 259 A.2d 342, 346 (D.C. 1969), makes mention of the fact that a probation condition may sometimes restrict a probationer's constitutional rights. While the defendant made constitutional arguments in challenging two probation conditions, the case was ultimately decided on different grounds, with the court holding that the conditions were illegal and impossible to perform.

Penal Code provides that a sentencing court may impose certain specified conditions of probation that it "deems necessary to insure that [the probationer] will lead a law-abiding life" or that would be "likely to assist him to do so." Model Penal Code § 301.1(1) (1962). With respect to special conditions of probation, the Code permits the imposition of "any other conditions reasonably related to the rehabilitation of the defendant" so long as they are "not unduly restrictive of his liberty or incompatible with his freedom of conscience." Id. at § 301.1(2)(l).

Many jurisdictions have expressly adopted this language, prohibiting the imposition of "unduly restrictive" probation conditions. See, e.g., State v. Emery, 593 A.2d 77, 79-80 (Vt. 1991) (quoting ABA Standards for Criminal Justice) (holding that probation conditions may "not be unduly restrictive of the probationer's liberty or autonomy"); Edwards v. State, 246 N.W.2d 109, 111-12 (Wis. 1976) (holding that probation conditions may not be "unduly restrictive of [the probationer's] liberty"); Tenn. Code § 40-35-303(d)(9) (providing that probation conditions must be "related to the purpose of the offender's sentence and not unduly restrictive of the offender's liberty, or incompatible with the offender's freedom of conscience"). Others have used different language to describe a similar concept, holding that a probation condition that restricts the exercise of fundamental rights must be both necessary and narrowly tailored to meet the government's goals. The California Court of Appeal, for example, has held that when "a probation condition requires a waiver of constitutional rights, the condition must be narrowly drawn. To the extent it is overbroad it is not reasonably related to a compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights." People v. Hackler, 16 Cal. Rptr. 2d 681, 686 (Ct. App. 1993). Similarly, the Florida District Court of Appeal has held, in striking down a special condition of

probation, that "where a substantial right is to be delimited it would seem reasonable to require that there are no other available alternative means to accomplish the desired end." Coulson v. State, 342 So. 2d 1042, 1043 (Fla. Dist. Ct. App. 1977). The United States Code permits a trial court to impose special conditions of probation, but to the extent that the trial court wishes to impose a special condition that involves an infringement upon the probationer's constitutional rights, it may impose "only such deprivations of liberty or property as are reasonably necessary" to effectuate retribution, deterrence, incapacitation and rehabilitation. 18 U.S.C. § 3563(b).

As they have been called upon to apply these standards, appellate courts have properly focused on whether the record below supports the government's assertions about the purpose, necessity, and narrow tailoring of special conditions contested on constitutional grounds, suggesting that the burden falls squarely on the shoulders of the government – as it must – to establish the validity of any infringement on constitutional rights. Many courts have held that they will apply "special scrutiny" to conditions that infringe on fundamental constitutional rights in order to show proper respect for the probationer's constitutional rights. See, e.g., United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975) (holding that probation conditions "that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny"); People v. Keller, 143 Cal. Rptr. 184, 192 (Ct. App. 1978) (quoting Consuelo-Gonzalez, 521 F.2d at 265) (holding that when a probation condition "unquestionably restricts otherwise inviolable constitutional rights, it is properly subjected to 'special scrutiny'"); Larson v. State, 572 So. 2d 1368, 1371 (Fla. 1991) (holding that "a condition of probation that burdens the exercise of a legal or constitutional right should be given special scrutiny").

Appellate courts have frequently overturned special conditions of probation when faced

with a record below that is devoid of evidence about the potential impact or efficacy of the special condition. In People v. Johnson, 528 N.E.2d 1360 (Ill. App. Ct. 1988), for example, the court vacated a special condition of probation that would have required a defendant who had entered a plea to driving under the influence to place an advertisement in the local newspaper containing both an apology for her conduct and a photograph of her taken during the booking process. Id. at 253. The court noted that neither it nor the trial court, without "professional assistance," could "determine the psychological or psychiatric effect of the publication." Id. at 254. Moreover, the court noted that an "adverse effect on the defendant would certainly be inconsistent with rehabilitation and with the statutory provision allowing the court to require psychological or psychiatric treatment." Id.

Similarly, the court in State v. Burden, 1994 WL 716262 (Tenn. Crim. App.), aff'd, 924 S.W.2d 82 (Tenn. 1996), struck down a probation condition that would have required a sex offender to post a sign in his front yard, basing its decision primarily on the lack of evidence in the trial record to support the condition:

> Nothing in this record establishes that the condition is reasonably related to rehabilitation. We acknowledge that by using the sign as a free-world jail, the trial court enabled an offender who would otherwise be incarcerated to remain free and to continue his employment. Nonetheless, no consideration was given to the detrimental effect that undermining character and self-esteem has on the rehabilitation effort. Further, nothing in this record establishes any connection between the offense and the condition.

Id. at *5. The court went on to suggest that a probation condition that, like the one at issue in the case, required public disclosure of convictions, could be appropriate under certain circumstances. Specifically, the court wrote that such a condition could be permissible "if it bears a reasonable relationship to a valid sentencing purpose, is reasonably connected to the offense, and does not

unduly undermine other sentencing objectives." Id. But, the court concluded:

> These conclusions must be ascertainable from the record and cannot be left to supposition or assumption. If the record supports a finding that a condition of this kind is reasonably related to a valid sentencing purpose or purposes, is reasonably connected to the offenses, [and] does not undermine others, . . . the court must nonetheless structure the condition to assure that it is not unduly harsh, oppressive, or restrictive.

Id. Finding that the record did not establish that the posting of a sign in the defendant's yard would not "seriously undermine rehabilitation," the court deleted the condition. Id.

Appellate courts have also struck down special conditions of probation when they have found that there is a real possibility that the condition would be counter-productive to the goals of probation, most commonly the rehabilitation of the offender. Generally, the courts have found that these conditions are not "reasonable" on these grounds. In Inman v. State, 183 S.E.2d 413 (Ga. Ct. App. 1971), for example, the Court of Appeals of Georgia deleted a probation condition that required a defendant convicted of marijuana possession to maintain a "short haircut" during the probationary period. The court held that a "condition of probation which invades a person's constitutionally protected right to personal self-expression and which is not related directly to his rehabilitation, cannot meet the test of reasonableness." Id. at 416. As the court explained:

> Limited as their freedom undoubtedly is, probationers are still individuals, not inmates. Having been deemed worthy to stay in society, they must either have the right of a free man to personal self-expression which does not infringe on the rights of others, or the whole concept of rehabilitation through probation goes down the drain.

Id. Other courts have expressed similar sentiments with respect to rehabilitation, often while striking down probation conditions that were either designed to humiliate the offender or had the effect of imposing humiliation. See, e.g., Hackler, 16 Cal. Rptr. 2d at 686 (striking a probation condition requiring an offender to wear a T-shirt declaring his crime, finding that the trial court's

"true intent" was to "brand" the offender and "expose him to public ridicule and humiliation" and that the actual effect of the condition would be to interfere with the offender's efforts to obtain employment); People v. Meyer, 680 N.E.2d 315, 320 (Ill. 1997) (striking a probation condition requiring an offender to post a sign on his property, finding that the sign contained "a strong element of public humiliation or ridicule because it serves as a formal, public announcement of the defendant's crime," that humiliation was not listed in the statute as a permissible condition, and that the sign could have consequences that were "inconsistent with the rehabilitative purpose of probation"); People v. Letterlough, 655 N.E.2d 146, 149-50 (N.Y. 1995) (striking a probation condition requiring an offender to affix a florescent "convicted dwi" sticker to his license plate, finding that the "attendant humiliation and public disgrace" accompanying this public disclosure "overshadows any possible rehabilitative potential that it may generate," that it might even "negate any positive effect derived from the imposition of other therapeutic conditions," and that it was, therefore, "out of step" with legally authorized conditions).

Applying this sort of appellate scrutiny to the probation condition at issue in this case, several critical facts become readily apparent. First, as argued above, the condition plainly infringed in a significant way upon Ms. Sassower's constitutional rights, most notably under the First and Fifth Amendments. In commanding her to say things that she did not believe, the condition was "incompatible with [her] freedom of conscience," Model Penal Code § 301.1(2)(l), and seriously restricted both her "liberty" and her "autonomy." Id.; ABA Standards § 18-3.13(c)(ii).

Second, there is nothing in the record to support the suggestion that requiring Ms. Sassower to send insincere letters of apology that included false assertions of remorse was either

necessary to achieve any legitimate sentencing goal or narrowly tailored to meet such a goal. The trial judge made no findings of fact, nor did he give any indication of what purpose, if any, he intended the condition to serve. The supposition that compelling an insincere apology laden with false assertions of remorse can have any rehabilitative potential is far from self-evident.[8] Just as likely, had Ms. Sassower acquiesced to the condition this public form of compelled submission to authority might have had a detrimental effect on her self-esteem and, therefore, her potential for rehabilitation.

Third, the record supports the conclusion that the trial judge actually harbored a different purpose: that of humiliating Ms. Sassower and forcing her to "swallow her pride." The trial judge's stern rebuke to Ms. Sassower that her "pride" had "gotten in the way," Sentencing Transcript at A-1728, was extremely revealing. This probation condition was not about eliciting a genuine apology or true remorse; the trial judge had ample evidence that neither was forthcoming. Plainly, this condition was not designed to further Ms. Sassower's rehabilitation.[9]

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[8]In its filing before the trial court, see Government's Opposition at A-1760, the government cited Gollaher v. United States, 419 F.2d 520, 530 (9th Cir. 1969), for the proposition that "the first step toward rehabilitation of an offender is the offender's recognition that he was at fault." While the truth of this proposition is open to debate, it has no bearing on the case at bar, in which Ms. Sassower made it abundantly clear that she did not believe that she had been at fault. Requiring her to write and send words to the opposite effect would not have changed the reality of her true feelings.

[9]In its filing below, see Government's Opposition at A-1760, the government inappropriately cited United States v. Clark, 918 F.2d 843 (9th Cir. 1990), for the broad proposition that a mandatory public apology is a permissible probation condition. In that case, the court upheld the condition only after specifically finding based upon the record that "the judge imposed the requirement of a public apology for rehabilitation." Id. at 848. Such a finding cannot be made in this case because it is not supported by the record. Moreover, the defendants in Clark did not raise and the court did not address the Fifth Amendment issues raised by a probation condition requiring an apology. The Illinois court's decision in Johnson, 528 N.E.2d 1360, discussed supra at pages 10-11, is a far better reasoned decision on the issue of a mandated public apology, in large part because it displays an appropriate level of respect for a probationer's

This probation condition was designed solely to force Ms. Sassower to say things that were repugnant to her in a fashion not significantly distinguishable from the playground bully who twists a victim's arm until he or she is made to say something degrading. Like other courts that have come before, this Court should find that this probation condition, which was designed to humiliate, was not a reasonable condition if for no other reason than that it would quite possibly have interfered with Ms. Sassower's prospects for rehabilitation. As the Court of Appeals of Georgia aptly noted when it struck down the probation condition requiring a short haircut, "While few young men would choose to serve a sentence rather than cut their hair, even fewer would finish with a sense of respect for criminal justice." Inman, 183 S.E.2d at 416.

Because the condition of probation that would have required Ms. Sassower to write insincere letters of apology containing false assertions of remorse was unduly restrictive of her liberty, autonomy, and freedom of conscience, and because it was neither necessary nor narrowly tailored to meet a permissible sentencing goal, this Court must find that it was an unconstitutional condition.

III. THE PROBATION CONDITION THAT WOULD HAVE REQUIRED MS. SASSOWER TO MAKE INSINCERE APOLOGIES CONTAINING FALSE EXPRESSIONS OF REMORSE WAS NOT AN AUTHORIZED CONDITION UNDER D.C. CODE § 16-710(a) BECAUSE IT WAS NOT REASONABLY RELATED TO HER REHABILITATION AND TO THE PROTECTION OF THE PUBLIC.

Even if this Court were not to analyze the imposition of the probation condition at issue on constitutional grounds, it must still find that the condition was impermissible on statutory grounds. A sentencing court's authority to impose special conditions of probation derives from

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constitutional rights.

D.C. Code § 16-710(a), which provides that the court may "suspend the imposition of sentence or impose sentence and suspend the execution thereof . . . for such time and upon such terms as it deems best, if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby." This Court has held on several occasions that the authority vested by that statute is "limited by the requirement that the conditions be reasonably related to the rehabilitation of the convicted person and the protection of the public." Gotay v. United States, 805 A.2d 944, 946 (D.C. 2002) (quoting Moore v. United States, 387 A.2d 714, 716 (D.C. 1978)); see also Olden v. United States, 781 A.2d 740, 742 (D.C. 2001) (same); Brown v. United States, 579 A.2d 1158, 1159 (D.C. 1990) (same). The trial court's discretion is further limited by the command that conditions may not be "immoral, illegal or impossible of performance." Basile v. United States, 38 A.2d 620, 622 (D.C. 1944); see also Olden, 781 A.2d at 742; Brown, 579 A.2d at 1159; Huffman, 259 A.2d at 346.

This Court's opinion in Brown is instructive with respect to how this Court has explored an appellate record when a probation condition is challenged on statutory grounds. In that case, the court reviewed the trial judge's imposition of the payment of child support as a condition of probation. After the defendant, a youth offender, entered a plea to attempted possession of cocaine, the trial judge, over defense objection, imposed a condition that the defendant pay fifty dollars each month in child support. Brown, 579 A.2d at 1159. The trial judge reasoned on the record that this condition was reasonably related to the defendant's rehabilitation, particularly in light of his youth, and the appellate court agreed that, in the context of "the kind of comprehensive rehabilitation contemplated by" the Youth Rehabilitation Act, there was a reasonable relationship between the two. Id. at 1161. Nonetheless, the court reversed the order

imposing the condition, finding that:

> [n]othing in the record offer[ed] assurance that the trial judge had sufficient information on which to determine a permissible level of child support. The trial judge made no findings on the relevant circumstances, and the record on appeal does not enable us to determine whether the amount of child support was determined in accordance with the law.

Id. at 1162-63. Noting that a "trial court must make sufficient findings to permit meaningful appellate review," the court vacated the probation condition and remanded the case for further proceedings. Id. at 1163-64 (citing Murville v. Murville, 433 A.2d 1106, 1109 (D.C. 1981)). In doing so, the court stated that, "[e]specially when criminal sanctions may be involved, we have always been careful to surround the proceedings through which the state may deprive a defendant of freedom with safeguards against possible miscarriages of justice." Id. at 1164 (quoting Morgan v. Wofford, 472 F.2d 822, 827 (5th Cir. 1973)).

Just like in Brown, the trial court record in this case is entirely deficient. Unlike the trial judge in Brown, who at least provided a specific reason for the imposition of the probation condition, the trial judge here said nothing about whether he viewed the condition as "reasonably related" to Ms. Sassower's "rehabilitation and to the protection of the public." Perhaps more importantly, he received no evidence and made no findings whatsoever concerning the potential rehabilitative impact of requiring Ms. Sassower to make what he knew to be insincere apologies that contained false statements of remorse. Indeed, it is virtually impossible to imagine that any such connection could exist. It is even harder to imagine that the public would somehow be protected by this condition. If the trial judge harbored such illusions, it was incumbent on him to make sufficient findings to permit meaningful appellate review on the issue. As argued above, the trial judge's comments about Ms. Sassower's "pride" reveal an agenda entirely distinct from

the permissible goals of rehabilitation and protection of the public.

Because there is absolutely no indication in the trial record that the condition of probation that would have required Ms. Sassower to write insincere letters of apology containing false assertions of remorse was reasonably related to Ms. Sassower's rehabilitation and to the protection of the public, this Court must hold that it was not an authorized special condition of probation under the case law interpreting D.C. Code § 16-710(a).

IV. THE TRIAL JUDGE'S IMPOSITION OF A SIX MONTH JAIL SENTENCE WHEN MS. SASSOWER EXERCISED HER RIGHT TO DECLINE PROBATION VIOLATED MS. SASSOWER'S CONSTITUTIONAL AND STATUTORY RIGHTS.

A. It was Constitutionally Impermissible for the Trial Judge to Penalize Ms. Sassower for Refusing to Admit Guilt or Express Remorse.

It is well settled law in the District of Columbia and elsewhere that a sentencing court, while it may reward a defendant for admitting guilt or expressing remorse, may not penalize a criminal defendant for refusing to do so. Because that is precisely what the sentencing court in this case did, imposing and increasing a jail sentence instead of suspending it solely because Ms. Sassower refused to write letters of apology that contained expressions of remorse, the jail sentence imposed below was unconstitutional and must be vacated.

In Miler v. United States, 255 A.2d 497, 498 (D.C. 1969), this Court, in perfectly plain language, held: "A trial judge may not penalize a defendant for not admitting guilt and expressing remorse once the jury has found him guilty. Such an admission might jeopardize his right of appeal or a motion for a new trial." Because the trial judge in that case had commented at the time of sentencing on the defendant's lack of remorse, the court held that "the trial judge may have used improper considerations when he imposed sentence" and remanded the case for

resentencing. Id. at 498-99. In Wilson v. United States, 278 A.2d 461 (D.C. 1971), a case in which the trial court offered a convicted drug offender leniency in exchange for providing the name of his drug supplier, the court distinguished Miler but described the holding of Miler in the following terms: "there we held that requiring remorse from the defendant to avoid a heavier sentence was in effect forcing him to acknowledge guilt, thereby waiving his rights to appeal and to move for a new trial." See also Byrd v. United States, 377 A.2d 400, 404 (D.C. 1977) (citing Miler) (noting that this Court has "specifically condemned the use of threats of heavier sentencing when employed by a trial court to influence a defendant to admit guilt").

In Williams v. United States, 293 A.2d 484, 487 (D.C. 1972), this Court made explicit what it had implied in both Miler and Wilson – that imposing a heavier sentence for the failure to admit guilt or express remorse is patently unconstitutional because it penalizes a defendant "for his refusal to abandon his fifth amendment rights."[10] In that case, the trial judge urged a convicted drug offender at the time of sentencing to reveal the source of his drugs and, after the defendant refused to do so, imposed a jail sentence. Id. at 485-86. The court found it "particularly disturbing" that the trial judge "seem[ed] to have been influenced at least in part by the highly improper consideration of appellant's refusal to disclose the source of the narcotics he had been found guilty of possessing." Id. at 486. The court condemned the trial judge for

[10]In Coles v. United States, 682 A.2d 167, 171 (D.C. 1996), this Court noted that Williams cannot be read to prohibit a trial court from considering a defendant's post-trial refusal to accept responsibility "in deciding whether to show leniency." While the distinction between withholding leniency and imposing an affirmative punishment can sometimes be "elusive, to say the least," id. at 169, that distinction separates the lawful sentence from the unlawful sentence. See, e.g., Ritter v. State, 885 So. 2d 413, 414 (Fla. Dist. Ct. App. 2004) ("Although remorse and an admission of guilt may be grounds for mitigation of sentence, the opposite is not true."). In the case at bar, however, this distinction is not at all elusive, as the record clearly establishes that the trial judge imposed the six month jail sentence as an affirmative punishment in direct response to Ms. Sassower's refusal to acknowledge guilt in the form of several letters of apology.

"apparently fail[ing] to grasp the constitutional import" of what this Court had said in Wilson and Miler and for "simply ignor[ing] the teachings" of Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969), with the result that the defendant "was no doubt penalized for his refusal to abandon his fifth amendment rights." Williams, 293 A.2d at 487. Ultimately, the court held that "the error in the sentencing process was so egregious as to require that the sentence be vacated." Id.

The "teachings" of the Scott decision, written by Chief Judge Bazelon for the District of Columbia Circuit and cited with approval by this Court in Williams, suggest that there are sound and principled policy reasons above and beyond those of constitutional magnitude for prohibiting sentencing courts from penalizing a lack of remorse. As the Scott court noted:

> If the defendant were unaware that a proper display of remorse might affect his sentence, his willingness to admit the crime might offer the sentencing judge some guidance. But with the inducement of a lighter sentence dangled before him, the sincerity of any cries of mea culpa becomes questionable. . . . In fact, a colorable argument can be made that a glib willingness to admit guilt in order to 'secure something in return' may indicate quite the opposite of repentance.

Id. at 271 & n.33. Similarly, Professor Bryan Ward has observed that the use of remorse as a sentencing factor "arguably encourages lying to the court, with every criminal defendant being compelled to exhibit an appropriate level of remorse, no matter how insincere that may in fact be." Bryan H. Ward, A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea, 68 Mo. L. Rev. 913, 921 n.45 (2003). "Surely the system should not encourage defendants to offer false apologies during sentencing merely to avoid a potential sentence enhancement." Id.

The sentencing judge in the case before this Court did in an extraordinarily explicit fashion just what Professor Ward described, encouraging Ms. Sassower to offer false apologies and insincere remorse merely to avoid a potential sentence enhancement. His imposition of a jail sentence for her refusal to do so is certainly no less "egregious" a sentencing error than those

found in Miler and Williams, and likewise requires the sentence to be vacated. The sequence of events at the sentencing proceeding below is clear and beyond dispute. The trial judge explicitly indicated that a 92 day jail sentence, with credit for time served, would be suspended if Ms. Sassower consented to two years of probation. Sentencing Transcript at A-1722. He then specified as a special condition of probation that she was to prepare and send "letters of apology" containing expressions of her "remorse for any inconvenience caused by [her] actions." Id. at 1727. Ms. Sassower indicated that she was "not remorseful," that she would not "lie," and that, for those reasons, she would neither write nor send the letters required by the probation condition. Id. When Ms. Sassower explicitly declined to consent to probation that included the letters of apology condition, the trial judge's immediate response – without offering any explanation – was to impose a six month jail sentence.

One would be quite hard pressed to find a clearer case of a sentencing court doing precisely what this Court prohibited in Miler, 255 A.2d at 498: "penaliz[ing] a defendant for not admitting guilt and expressing remorse once the jury has found [her] guilty." While the government may attempt to split hairs, arguing that Ms. Sassower would have been required to apologize for "any inconvenience caused by [her] actions" rather than make an explicit admission of guilt, as this Court properly recognized in Wilson, 278 A.2d at 462, "requiring remorse from the defendant to avoid heavier sentencing was in effect forcing [her] to acknowledge guilt." Indeed, it would seem an obvious proposition that requiring a letter of "apology" that expresses "remorse" is the functional equivalent of requiring an explicit admission of guilt.[11] Had Ms. Sassower agreed to write insincere letters of apology that

[11]In its filing below, the government appears to have conceded this point, alternatively describing the probation condition as a "requirement that defendant express remorse for her

contained false expressions of remorse, the trial court would have suspended the execution of a 92 day jail sentence; for the sole reason that she refused to do so, the trial court imposed a six month jail sentence, the maximum jail sentence allowed by law. That sentence was plainly violative of Ms. Sassower's rights under the Fifth Amendment as well as under the well developed case law in this jurisdiction that prohibits enhanced sentencing based upon a lack of remorse. As such, the sentence must be vacated.

B. Even if the Letters of Apology Condition Had Been Permissible, it Was Unlawful for the Trial Judge to Punish Ms. Sassower for Exercising her Right to Decline Probation.

Under the specific terms of D.C. Code § 16-710(a), a criminal defendant "may not be put on probation without his consent." Common sense would suggest that, in order for the consent described in the statute to be meaningful, it must be made in a knowing, intelligent, and voluntary fashion. It would seem to follow, therefore, that a decision to decline probation cannot truly be deemed knowing, intelligent, and voluntary unless one knows what the alternative sentence would be. Presumably for these precise reasons, D.C. Code § 16-710(a) permits a trial court to impose a period of probation "only after it has imposed a sentence and suspended its execution." Schwasta v United States, 392 A.2d 1071, 1077 (D.C. 1978). At that stage in the proceedings, a defendant may decline a period of probation knowing full well what sentence might then be imposed.

In its filing below, the government insisted that the 92 day jail sentence in this case was never actually imposed, calling it a "proposed sentence," see Government's Opposition at A-1757, and then argued that the first sentence that was actually imposed was the six month jail

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crime," Government's Opposition at A-1760 n.1, and a requirement that she "apologize for her criminal conduct." Id. at A-1761.

sentence. Id. at 1763. Not only does this argument ignore the clear meaning of the words that the trial judge used at the time of sentencing, but it also elevates form over substance, leading to a result that is both in derogation of the plain statutory intent and palpably absurd.

When he imposed the 92 day jail sentence, the trial judge spoke in the present tense: "Ms. Sassower, I'm sentencing you to 92 days." Sentencing Transcript at A-1722. In his very next sentence, addressing the suspension of that jail term and the imposition of probation, the trial judge switched to the future tense: "I'm going to give you credit for any time served in this case. I'm going to suspend execution as to all the remaining time. I will place you on two years probation." Id. at 1722 (emphasis added). The clear import of this switch in tense is that the 92 day jail sentence was actually imposed, while the credit for time served and the suspension of the remaining jail sentence depended upon Ms. Sassower's consent to probation. Pursuant to the statutory scheme, Ms. Sassower's exercise of her right to decline probation, much like any future violation of the conditions of probation, would subject her to the possibility that the 92 day jail sentence would be executed rather than suspended.

Instead of withdrawing his offer to suspend the execution of the sentence that he had imposed when Ms. Sassower declined probation, the trial judge suddenly, without either warning or explanation, imposed a six month jail sentence, the maximum jail sentence allowed by law and essentially double the sentence that he had just imposed. This enhanced sentence, based upon nothing but Ms. Sassower's decision to decline the trial court's special condition of probation, was clearly unlawful. First, it was an absolutely unauthorized increase in sentence after a previous sentence had already been imposed. Second, it was a "retaliatory sentence" imposed solely because Ms. Sassower declined probation, a practice that other courts have explicitly condemned. See, e.g., People v. Brown, 117 Cal. Rptr. 2d 738, 770 (App. Div. Super. Ct. 2001) (rejecting a claim that the trial judge had imposed a "retaliatory sentence" when the

defendant declined probation because the trial judge's determination that the sentence he imposed was the "appropriate nonprobationary sentence" was communicated to defense counsel, and presumably to the defendant, before the defendant decided to refuse to accept the terms of probation); Commonwealth v. Cotter, 612 N.E.2d 1145 (Mass. 1993) (upholding a jail sentence imposed after the defendant rejected the terms of probation when the sentence was precisely the same as what the trial court had said it would suspend if the defendant had accepted the terms of probation). Third, it was imposed as a punishment for Ms. Sassower's exercise of a right specifically granted by statute, which this Court has described as "'a due process violation of the most basic sort.'" United States v. Mahdi, 777 A.2d 814, 819 (D.C. 2001) (quoting United States v. Goodwin, 457 U.S. 368, 372 (1982)). As such, the six month jail sentence must be vacated.

C. It was Unlawful for the Trial Judge to Increase Ms. Sassower's Sentence to Six Months in Jail When She Faced No More than 92 Days in Jail Had She Consented to and then Violated Probation.

There can be no dispute under the facts of this case that had Ms. Sassower simply consented to the letters of apology condition of probation, knowing at the time that she had no intention of either writing or sending the letters, she ultimately could not have been sentenced to more than 92 days in jail. See Mulky v. United States, 451 A.2d 855, 856 (D.C. 1982) (holding that a sentence imposed upon a revocation of probation may not be more severe than the original sentence). The government would argue, however, that her candor in declaring at the outset that she had no intention of complying with the letters of apology condition would entitle the trial judge to impose a jail sentence essentially twice as long as the jail sentence he had just imposed and then offered to suspend. If this Court were to accept that logic, no rational defendant would ever be candid with a trial judge and refuse to consent to probation, even if he or she had no intention of complying with the proposed conditions, choosing instead to "lock in" a maximum

sentence. Plainly this Court must not uphold an interpretation of the law that would reward disingenuousness and punish candor to the tribunal. Sound public policy requires this Court to hold that a defendant who declines probation can receive no longer a jail term than the suspended sentence that he or she would have otherwise received. At a bare minimum, this Court must find that, under the circumstances of this particular case, the trial judge's imposition of a six month jail sentence when Ms. Sassower declined probation was unlawful and must be vacated.

CONCLUSION

For all of the foregoing reasons, this Court must find that the letters of apology probation condition and the trial judge's subsequent imposition of a six month jail sentence violated Ms. Sassower's constitutional and statutory rights and must, therefore, be vacated.

Respectfully submitted,

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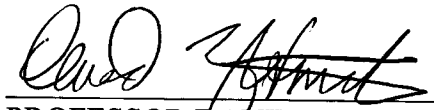
By and through his attorney,



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CERTIFICATION OF SERVICE

I hereby certify that on November 14, 2005, I mailed a copy of this brief via first class mail to the following parties:

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