No. 21-5814

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW DAVID GEORGE,
Petitioner

-v-s-

THE STATE OF OHIO
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENNIS WATKINS
(Ohio Atty. Reg.#0009949)
Prosecuting Attorney, by
CHARLES MORROW
(Ohio Atty. Reg.#0040575)
Assistant Prosecuting Attorney
Trumbull County Prosecutor's Office
160 High Street, N.W.
Administration Building – 4th Floor
Warren, Ohio 44481
Telephone No. (330) 675-2426
Fax No. (330) 675-2431
psmorrow@co.trumbull.oh.us

COUNSEL FOR
THE STATE OF OHIO

SEAN BUCHANAN
931 Franklin Avenue
Kent, Ohio 44240
Telephone No. (330) 554-1265
seancbuchanan@gmail.com

COUNSEL FOR MATTHEW DAVID GEORGE

STATE OF OHIO'S RESPONSE TO MATTHEW DAVID GEORGE'S QUESTION PRESENTED

The Respondent State of Ohio ("State of Ohio") submits to this Court that Petitioner Matthew David George ("George") presents no question worthy of review. Specifically, George asserts that one of his community control conditions, Ohio's term of probation, requiring him to write a letter of apology to the victim in the case violates his First Amendment rights against compelled speech. However, he has not suffered any such violation of constitutional rights. The condition challenged was imposed by the trial court, at George's request, to promote the rehabilitative purposes associated with probation. A court ordered apology has been previously upheld and determined not to violate a defendant's First Amendment Rights when imposed for permissible purposes reasonably related to the rehabilitation of the defendant. *See United States v. Clark*, 918 F.2d 843 (overturned on other grounds); *see also*, *State v. K H-H*, 188 Wash.App. 413, 353 P.3d 661 (Wash. Ct. App. 2015); *see also, United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004). Thus, no compelling reason exists to grant this petition as required by Supreme Court Rule 10.

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CONSTITUTIONAL PROVISION NOT INVOLVED

Petitioner Matthew David George ("George") argues he has suffered a First Amendment violation abridging his freedom of speech. Specifically, George asserts that one of his community control conditions ("probation") requiring him to write a letter of apology to the victim in the case violates his First Amendment rights against compelled speech. However, he has not suffered any such violation of constitutional rights. The condition challenged was imposed by the trial court to promote the rehabilitative purposes associated with probation. A court ordered apology has been previously upheld and determined not to violate a defendant's First Amendment Rights when imposed for permissible purposes reasonably related to the rehabilitation of the defendant. *See United States v. Clark*, 918 F.2d 843 (overturned on other grounds); *see also*, *State v. K H-H*, 188 Wash.App. 413, 353 P.3d 661 (Wash. Ct. App. 2015); *see also, United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004). Thus, no compelling reason exists to grant this petition as required by Supreme Court Rule 10.

STATEMENT OF THE CASE

Petitioner George pleaded of guilty to reduced charges of possessing criminal tools and resisting arrest arising from September 11, 2019, when George used a tire iron to enter into a residence of a former girlfriend. *State v. George*, 11th Dist. Trumbull No. 2020-T-0025, 2021-Ohio-476, ¶5-6. When George was arrested, he resisted and fought with police officers. *Id.* At the sentencing hearing, George spoke on his own behalf and indicated he wanted to "apologize to this courtroom," and explained he had been drinking and let his emotions get the better of him. *Id,* ¶7. His girlfriend had 'dumped' him, and with bad intentions, he used a tire iron to break the window of a house where she and her new boyfriend were. *Id.* On the felony offense of criminal tools, George was sentenced to five years of community control or probation subject to several

conditions. George's request to "apologize to the courtroom," was modified as the trial court imposed a probationary term that he write a letter of apology to the victim. *Id.*, ¶8.

The Eleventh District Court of Appeals affirmed the judgment of the Trumbull County Court of Common Pleas. *Id.*, ¶4. While the appellate court opted not to address the "constitutionality question," it did indicate that George failed to cite any authority in support of his proposition that the apology letter rendered the trial court's sentence "'contrary to basic constitutional law on the most primary of enumerated rights.'" *Id.*, ¶16. George sought discretionary review by the Supreme Court of Ohio, which court declined to accept jurisdiction. *State v. George*, 163 Ohio St.3d 1490, 2021-Ohio-2097, 169 N.E.3d 1271. George now seeks a writ of certiorari with this Court.

REASONS FOR DENYING THE WRIT

I. A condition of community control sanctions requiring a convicted defendant to write an apology letter does not violate the defendant's First Amendment Rights.

George's assertion that a court ordered apology letter is violative of the First Amendment's prohibition against compelled speech is misguided. It is axiomatic that "[t]he First Amendment to the United States Constitution, by incorporation into the Fourteenth Amendment due process clause, prohibits states from 'abridging the freedom of speech.' U.S. CONST. amend. I; *Gitlow v. New York,* 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). The United States Supreme Court has held that '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.' *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). The protection from compelled speech extends to statements of fact as well as of opinion. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 62, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006)." *State v. K H-H, supra*, ¶16.

While the rights enumerated under the First Amendment are indeed fundamental constitutional rights, such rights are not without limitation. Indeed, preferred rights restrictions have been recognized and approved by various courts when reviewed in connection with the terms and conditions of probation in order to achieve the purposes of rehabilitation regarding convicted criminal defendants. *See, State v. Miller*, 175 Wis.2d 204, 210, 499 N.W.2d 215 (Ct.App.1993) (holding that probation condition prohibiting probationer from telephoning any woman not a member of his family without prior permission from his probation officer was a reasonable and not overly broad infringement of probationer's first amendment rights); *United States v. Turner*, 44 F.3d 900, 903 (10th Cir.1995) (asserting that probation condition requiring defendant convicted of obstructing federal court order to refrain from harassing, intimidating, or picketing in front of any abortion family planning services center permissible restriction of First Amendment right of free speech because restriction reasonably related to goal of prohibiting further illegal conduct); and *United States v. Beros*, 833 F.2d 455, 467 (3d Cir.1987) (upholding probation condition that defendant refrain from representing union as elected official or paid employee because significant imposition upon defendant's First Amendment rights "reasonable in light of the offense"). Furthermore, this Court has long held that probation is a privilege, not a right, and that a defendant cannot insist or bargain on which terms and conditions of probation are imposed. *Berman v. United States*, 302 U.S. 211, 213; see also, *Burns v. United States*, 287 U.S. 216, 220. As such, a

Though George attempts to frame his assertion of a constitutional rights violation based upon this Court's opinions in *Wooley v. Maryland*, 430 U.S. 705, and *West Virginia State Board of Education v. Barnetta*, 319 U.S. 624, these cases are not applicable to this matter. In *Maryland, supra*, this Court held that the state could not constitutionally require an individual to participate in disseminating ideological messages by requiring them to display the state moto on their vehicle

license plates. *Id.*, synopsis. Likewise, in *Barnetta, supra*, this Court held that local authorities could not compel students to salute the flag nor say the pledge of allegiance in school as it violated the spirit of the First Amendment. *Id.*, 642. Neither *Wooley, supra,* nor *Barnetta, supra* dealt with criminal law involving sentencing conditions imposed as a portion of a convicted criminal defendant's probationary requirements. Conversely, petitioner's specific challenge herein has been addressed in *Clark, supra, Gementera, supra,* and *K H-H, supra.*

In *Clark, supra*, after a jury trial, two police officers were convicted of perjury and as a condition of their probation were ordered to publish a public apology admitting to their wrongdoings. Id, 845. The Clark court determined that this condition of probation was not an abuse of discretion and did not violate the defendants' first amendment right to refrain from speaking. Id., 848. Specifically, the Ninth District Court of Appeals held that based upon the fact that the defendants never admitted guilt or taken responsibility for their actions, a public apology served a rehabilitative purpose. *Id., citing Gollaher v. United States*, 419 F.2d 520, 530 (9th cir.) ("It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault.") cert. denied, 396 U.S. 960, 90 S.Ct. 434, 24 L.Ed.2d 424 (1969).

The *Clark* Court noted "[t]he test for validity of probation conditions, *even where preferred rights are affected*, is 'whether the limitations are primarily designed to affect the rehabilitation of the probationer or insure the protection of the public.'" *Id.*, 848, *quoting United States v. Consuelo-Gonzales*, 521 F.2d 259, 265 (9th Cir. 1975). (Emphasis added). "To apply this test, [the] 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 States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988)." *Clark, supra*, 848. "'[T]he standard for determining the reasonable relationship between probation conditions and the purposes of

probation is *necessarily very flexible* precisely because 'of our uncertainty about how rehabilitation is accomplished.'" *Clark, supra, quoting Terrigno, supra*, 374, *quoting Consuelo-Gonzalez, supra*, 264. (Emphasis added).

Despite George's contentions, the conclusion reached by the *Clark* court is indeed applicable to general criminal sentencing concerns and is not limited solely to actions committed by public officials. There is zero indication within the Ninth District Court of Appeals' holding that these conditions of probation are only permissible in regards to public officials. In fact, the court conducted their abuse of discretion analysis based upon whether the public apology condition was reasonably related to the purposes of rehabilitation, not whether the defendants held a public office. *Clark, supra*, 848.

Similarly, in *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004), a criminal defendant convicted of mail fraud was placed upon probation with multiple conditions, including he to write letters of apology to any identifiable victims of his crime, as well as wear/carry a sign for eight (8) hours in a postal facility. *Id.*, 598-599. Specifically, the trial court ordered that Gementera hold a sign that stated "I stole mail; this is my punishment." *Gementera, supra*, 599. The Ninth Circuit Court of Appeals again applied the precedent established by *Clark, supra*, and determined that the sign sanction, coupled with the other provisions of his probation, passed the threshold of being reasonably related to the purposes of rehabilitation. *Gementera, supra*, 606. The Circuit Court of Appeals distinguished that this sanction was appropriate despite the fact that the defendant in this matter had pled guilty for his actions. *Gementera, supra*, 604. Similar to *Clark, supra*, the court held that the public acknowledgement of the defendant's offense, beyond the formal plea entered in court, was necessary for rehabilitative purposes. *Id.*

Recently, in *State v. K H-H, supra*, the Washington Court of Appeals determined that a adjudicated delinquent juvenile's First Amendment rights were not violated by the court ordering him to write a letter of apology to his victim as a condition of his probation. *Id.*, ¶15. Indeed, the *K H-H* court was guided by the test articulated in *Clark*, *supra*, and determined that the letter of apology condition imposed was reasonability related to the purpose of rehabilitating the juvenile. *Id.*, ¶21. Specifically, the Washington Court of Appeals held that requiring the juvenile to write an apology letter to the victim of the offense was reasonably related to the rehabilitative purposes of the Juvenile Justice Act, and thus did not violate his First Amendment Rights. *Id.*

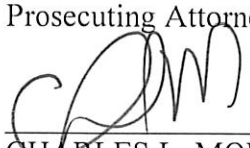
In support of his petition, George urges this Court to adopt the dissent in *K H-H, supra*, even though the majority of the court held that an apology letter did not violate the juvenile's First Amendment Rights. *Id.*, ¶21. Furthermore, the majority's rationale was based upon the holdings of the Ninth District Court of Appeals that similar conditions of probation did not run afoul of the First Amendment. *Id.* Petitioner fails to offer any legal argument, let alone any case law, supporting his claim. Simply disagreeing with those various courts' holdings that apology letters as a condition of probation are constitutional does not warrant review by this Court. This Court should not speculate what arguments Petitioner wishes to advance for rejecting not only the majority's rationale in *K H-H, supra*, but those of *Clark, supra*, and *Gementera*, *supra*.

Therefore, based upon the above precedent, the probation condition imposed upon George requiring him to write an apology letter to the victim in the case does not violate his First Amendment rights as it is reasonably related to the rehabilitative purposes of sentencing convicted criminal defendants.

CONCLUSION

George's sentence requiring him to complete an apology letter as a condition of his probation sentence does not violate the First Amendment. Accordingly, the State of Ohio submits George fails to provide any compelling reason to merit review by this Court as required by U.S. Supreme Court Rule 10. As such, the State of Ohio requests that this Court **DENY** George's petition for certiorari.

Respectfully Submitted,
DENNIS WATKINS (#0009949)
Prosecuting Attorney, by



CHARLES L. MORROW (Ohio Atty. Reg.#0040575)
Assistant Prosecuting Attorney
Trumbull County Prosecutor's Office
160 High Street NW – 4th Floor
Warren, Ohio 44481
Telephone No. (330) 675-2426
Fax No. (330) 675-2431
psmorrow@co.trumbull.oh.us

COUNSEL FOR RESPONDENT,
STATE OF OHIO

PROOF OF SERVICE

I do hereby certify that a copy of the foregoing Brief in Opposition was sent by ordinary U.S. Mail to counsel for Petitioner on this 27th day of October, 2021 to:

Atty. Sean Buchanan (#0084569)
931 Franklin Avenue
Kent, Ohio 44240

CHARLES MORROW (Ohio Atty. Reg.#0040575)
Assistant Prosecuting Attorney