

5-1-2018

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Recommended Citation

Danny Zemel, *Enforcing Statutory Maximums: How Federal Supervised Release Violates the Sixth Amendment Rights Defined in *Apprendi v. New Jersey**, 52 U. Rich. L. Rev. 965 (2022).
Available at: <https://scholarship.richmond.edu/lawreview/vol52/iss4/8>

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ENFORCING STATUTORY MAXIMUMS: HOW FEDERAL
SUPERVISED RELEASE VIOLATES THE SIXTH
AMENDMENT RIGHTS DEFINED IN *APPRENDI V. NEW
JERSEY*

*“I consider [trial by jury] as the only anchor, ever yet imagined
by man, by which a government can be held to the principles of its
constitution.”*

—Thomas Jefferson¹

INTRODUCTION

The Sixth Amendment commands that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”² Trial by a jury of one’s peers is a fundamental American legal right, existing in the earliest colonies before being codified in both Article III of the Constitution and the Sixth Amendment.³ The jury trial right derives from “the mass of the people,” ensuring that “no man can be condemned of life, or limb, or property, or reputation, without the concurrence of the voice of the people.”⁴ In recent decades, the Supreme Court has held the Sixth Amendment commands that the jury find, by proof beyond a reasonable doubt, the facts necessary to raise the minimum or maximum sentences for the criminal conduct the defendant committed.⁵ However, the increasing prevalence of supervised release revocations and reimprisonments has created a work-

1. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 266, 269 (Julian P. Boyd ed., 1958).

2. U.S. CONST. amend. VI.

3. *Id.* art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury”); see *Duncan v. Louisiana*, 391 U.S. 145, 149, 151–53 (1968) (summarizing the history of trial by jury in criminal trials in the colonies and at the founding of the United States).

4. John Q. Adams, *Diary, with Passages from an Autobiography*, 2 *THE WORKS OF JOHN ADAMS* 1, 253 (Little & Brown 1850).

5. See, e.g., *Blakely v. Washington*, 542 U.S. 296, 303–05 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

around to this rule, eroding the importance of the jury in the federal criminal system.⁶

Modern Supreme Court decisions extoll that the importance of the jury in guilt and sentencing at criminal trials—as well as the reasonable doubt standard for all statutory elements of a crime—stems from the Sixth Amendment itself.⁷ Justice Harlan famously described the “beyond a reasonable doubt” standard as being “bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”⁸ Justice Scalia stated:

[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment . . . [as] all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—[which] must be found by the jury beyond a reasonable doubt.⁹

Despite this professed commitment to the guarantees of the Sixth Amendment, the Court has allowed Congress to craft work-arounds to the jury system. This comment will focus on one of the most significant work-arounds: the revocation of federal supervised release.

Federal supervised release violates the “fundamental meaning of the jury-trial guarantee”¹⁰ by taking the power to set the maximum sentence for a crime out of the hands of the jury and legislature, and placing it in the hands of judges and prosecutors. Justice Scalia has warned that “the right of trial by jury is in perilous decline” due to “the repeated spectacle of a man’s going to his death

6. For further discussion of eroding jury trial rights, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133 (1997); William Pizzi, *The Effects of the “Vanishing Trial” on Our Incarceration Rate*, 28 FED. SENT’G REP. 330 (2016); Christine E. Pardo, Note, *Multiple Petty Offenses with Serious Penalties: A Case for the Right to Trial by Jury*, 23 FORDHAM URB. L.J. 895 (1996).

7. See, e.g., *Faretta v. California*, 422 U.S. 806, 819 & n.15 (1975) (“This Court has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process” including the right “to be convicted only if his guilt is proved beyond a reasonable doubt.” (citing *In re Winship*, 397 U.S. 358 (1970))).

8. *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring) (noting “the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials”); see also Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 509–10 (1975).

9. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

10. *Id.*

because a *judge* found that an aggravating factor existed.”¹¹ While supervised release no longer comes with the possibility of death, as it did in the case quoted above,¹² the fear expressed by Justice Scalia still applies. With increasing regularity, men and women spend longer in prison than the statutory maximum for the crime they committed allows, based on a decision made by a federal judge without the standard due process protections of a criminal trial.¹³ Furthermore, the lack of procedural rights in revocation hearings, and the wide range of possible violations, push prosecutors to choose revocation hearings over criminal trials.¹⁴ Supervised release represents “an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.”¹⁵ The supervised release system needs to be updated to conform with the guarantees of the Sixth Amendment, as explained in *Apprendi v. New Jersey*.¹⁶

Part I of this comment will explore how the current system of federal supervised release came to be, as well as the significantly lowered procedural standards applied to revocation hearings. Part II will explore how the lower cost and shorter length of supervised release revocation hearings lead prosecutors to initiate them in lieu of jury trials in the American criminal system. This contributes to the increasing avoidance of jury trials. Part III will show how the federal supervised release system violates the Sixth Amendment.¹⁷ In conclusion, Part IV will propose changes to the system of supervised release to safeguard the jury trial rights chronicled in *Apprendi* and its progeny. Part IV will also explore how the choices of federal prosecutors might change were reform

11. *Id.* at 612.

12. *Id.* at 588 (overruling *Walton v. Arizona*, 497 U.S. 639 (1990), as irreconcilable with *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). In *Walton v. Arizona*, the Supreme Court held as valid Arizona’s sentencing scheme, which permitted a trial judge alone to impose a death penalty sentence. 497 U.S. at 648–49.

13. *See infra* Part III.

14. *See infra* Part II.

15. *Apprendi*, 530 U.S. at 497; *see also* *Blakely v. Washington*, 542 U.S. 296, 313–14 (2004) (“The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to ‘the unanimous suffrage of twelve of his equals and neighbours [sic],’ rather than a lone employee of the State.” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343 (citations omitted))).

16. 530 U.S. at 476–77.

17. This comment will focus exclusively on the federal supervised release system. However, many of the same critiques can be applied to state systems as well.

to take effect, and reforms prosecutors can initiate themselves in the absence of legislative or judicial action.

I. EVOLUTION OF SUPERVISED RELEASE

The Sentencing Reform Act (“SRA”) became law on October 12, 1984,¹⁸ consigning federal parole to history.¹⁹ The SRA contained two express purposes: “to ensure ‘honesty in sentencing’ and to ‘reduce “unjustifiably wide” sentencing disparity.’”²⁰ To achieve those goals, supervised release, unlike parole before it, “is a term of supervision *in addition to*, and following, a term of imprisonment imposed by a court.”²¹ Instead of receiving a five-year sentence with the possibility of parole after three years, an individual could now receive a five-year prison sentence, with an additional three years of supervised release afterwards. This change eliminated the perceived problem of disparate sentences based on the unequal application of parole. However, the radical shift from parole to supervised release created the framework for a work-around to the jury trial right.²²

The SRA gives a court the discretion to include “a term of supervised release after imprisonment” for all cases where it has imposed a term of imprisonment.²³ During a term of supervised release, the releasee is subject to mandatory and optional conditions,²⁴ the most notorious of which is the so-called “catch-all”

18. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

19. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 995–96 (2013). See generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 265–66 (1993).

20. Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 190 (2013) (quoting Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988)).

21. Harold Baer, Jr., *The Alpha & Omega of Supervised Release*, 60 ALB. L. REV. 267, 269 (1996) (emphasis added).

22. Under the Parole Commission and Reorganization Act of 1976, “both the length of time that a defendant may be supervised on parole and the corresponding length of time that a parolee will be reimprisoned for parole violations depends on the length of the original sentence.” Douglas Wickham, *Parole*, 74 GEO. L.J. 897, 898 (1986).

23. 18 U.S.C. § 3583(a) (2012). Additionally, some statutes impose mandatory terms of supervised release for certain crimes. See, e.g., 21 U.S.C. §§ 841(b), 960(b) (2012) (requiring minimum terms for certain drug offenses).

24. 18 U.S.C. § 3583(d) (2012 & Supp. IV 2013–2017). While the general efficacy of these conditions has been questioned, they continue to flourish. See generally Paula Kei Biderman

condition, which holds that a defendant shall “not commit another Federal, State, or local crime during the term of supervision.”²⁵ This sweeping condition leads to many of the constitutional issues associated with the supervised release system. The mandatory catch-all provision creates the possibility of reimprisonment for repeat offenders without due process rights.²⁶ It also creates a revocation option for all new crimes committed by releasees, pushing prosecutors to choose revocation hearings over trials.

The constitutional issues for supervised release began when Congress authorized the sentencing court to “revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release . . . if it finds by a *preponderance of the evidence* that the person violated a condition of supervised release.”²⁷ A later law, the PROTECT Act, eliminated the need to aggregate sequential supervised release violations.²⁸ Prior to the PROTECT Act, judges would factor in previous imprisonments that occurred during that term of supervised release when imposing a new term of imprisonment for a release violation.²⁹ This provided a reasonable limit on how long a person could spend in prison based on supervised release violations originating from one conviction. However, the PROTECT Act eliminated that require-

& Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 FED. SENT'G REP. 204, 204 (1994); Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 441 (2011) (finding a lack of empirical evidence that post-prison supervision aides in reintegration or improves public safety).

25. 18 U.S.C. § 3583(d). This catch-all provision was the sole mandatory condition at the initial passage of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1993, 1999 (codified as amended at 18 U.S.C. § 3563(a)(1) (2012); *id.* § 3583(d) (2012 & Supp. IV 2013–2017)). Other mandatory conditions later added include submitting to drug tests, registering as a sex offender for certain offenses, and mandatory rehabilitation programs for first-time domestic violence offenders. 18 U.S.C. § 3583(d).

26. *See infra* Part III.

27. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 and 21 U.S.C.) (emphasis added). Interestingly, at its initiation supervised release “was not to serve as a punitive measure” and thus could not be revoked. Biderman & Sands, *supra* note 24, at 204. Violations of supervised release were to be treated as criminal contempt, to be used only after “repeated or serious violations of the conditions of supervised release.” S. REP. NO. 98-225, at 125 (1983).

28. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117. Stat. 650 (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

29. Prior to 2003, judges would “subtract the aggregate length” of previous reimprisonment terms due to supervised release violations when imprisoning a releasee. U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 45 n.213 (2010) (quoting *United States v. Knight*, 580 F.3d 933, 939 (9th Cir. 2009)).

ment, leaving no limit on how long an individual may be imprisoned due to supervised release violations based on a single underlying conviction.³⁰

To demonstrate how this lack of aggregation can allow an individual to spend longer in jail than the statutory maximum for the crime they were convicted of, a hypothetical is helpful. Consider a defendant who pleads guilty to being a felon illegally in possession of a firearm, which carries a maximum penalty of ten years in prison.³¹ The plea deal provides for six years in prison and two years of supervised release. Six months after being released from prison, the defendant fails a drug test, her supervised release is revoked, and she receives another two years in prison and two more years of supervised release. Before the PROTECT Act, if the defendant's supervised release was revoked again, the sentencing court would have to consider the previous revocations when imposing a new sentence. However, the current system allows the defendant to be imprisoned in perpetuity, eventually surpassing the ten-year statutory maximum.³² This means that criminal statutes providing for lifetime supervised release, such as those addressing drug-trafficking and sex offenses, provide "no cap on a potential lifetime cycle of reimprisonment for supervised release violations."³³

The supervised release system has grown into an expansive program that affects almost every individual sentenced for a federal crime. The removal of the aggregation requirement left no limitations on the total length of time an individual may be imprisoned due to supervised release violations.³⁴ Even legislatively mandated maximum sentences provide no limit.³⁵ Additionally, the ability to

30. Douglas A. Morris, *FYI: Supervised Release and How the PROTECT Act Changed Supervised Release*, 18 FED. SENT'G REP. 182, 182 (2006).

31. 18 U.S.C. § 924(a)(2) (2012). If a defendant had committed previous violent felonies, the maximum sentence would increase. *Id.* § 924(e)(1).

32. Currently, "upon revocation of the defendant's term of supervised release, the district court can impose a term of imprisonment . . . and then reimpose a lifetime term of supervised release, which can be repeated *ad nauseam*." Morris, *supra* note 30, at 183; *see also* 18 U.S.C. § 3583(b), (h), (j) (2012); *id.* § 3583(k) (Supp. IV 2013–2017).

33. Doherty, *supra* note 19, at 1011. Federal courts have interpreted the removal of the aggregation requirement as applying to all terms of supervised release, despite the narrow focus of the PROTECT Act. *See, e.g.*, *United States v. Epstein*, 620 F.3d 76, 80 (2d Cir. 2010) (relying on a plain text reading of the amendment); *United States v. Lewis*, 519 F.3d 822, 825 (8th Cir. 2008) (relying on a plain reading of the amendment, despite the fact that the header suggests the provision applies only to sex offenders).

34. *See* Morris, *supra* note 30, at 182–83.

35. *See* Doherty, *supra* note 19, at 1011.

use the supervised release system as a way to summarily reimprison repeat offenders creates perverse incentives for federal prosecutors. The next part will explore those incentives and the obligations of federal prosecutors.

II. ETHICAL AND PROFESSIONAL OBLIGATIONS OF FEDERAL PROSECUTORS

Prosecutors occupy a distinct role in the American justice system.³⁶ Much has been written about the unique ethical situation of prosecutors, who do not represent a single client and are, in some aspects, meant to be non-partisan.³⁷ Federal supervised release creates two additional ethical quandaries for federal prosecutors. First, mandatory terms of supervised release impact prosecutorial charging decisions. Second, prosecutors face the choice of whether to bypass a trial by jury for an alleged offender and choose a time- and cost-effective revocation hearing.

A. *How Mandatory Terms of Supervised Release Affect Charging Decisions*

As more federal crimes come with mandatory terms of supervised release—increasingly lifetime terms—federal prosecutors need to consider the potentially extensive terms of supervised release when making charging decisions. Numerous articles have been written about the immense deference given to prosecutors in making charging decisions,³⁸ and how criminal statutes containing

36. See Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Code to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 928 (1996) (“As an advocate for the government, the prosecuting attorney plays a distinctive role . . . she is not only an advocate but also a ‘minister of justice.’”).

37. The American Bar Association’s Model Code of Professional Responsibility provides that the prosecutor should “seek justice.” MODEL CODE OF PROF’L RESPONSIBILITY EC 7–13 (AM. BAR ASS’N 1980).

38. See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) (arguing for a different approach to separation of powers within the criminal context than the administrative context, which would lead to more judicial review of prosecutorial discretion); Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371 (2000) (reviewing the malicious and false prosecution of Rolando Cruz, the current breadth of discretion given to prosecutors, and concluding that more system checks are needed on prosecutorial discretion); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (noting the broad and casual acceptance of prosecutorial discretion and arguing for a more principled and accountable system of discretion).

mandatory minimum sentences shift sentencing discretion from judges onto prosecutors.³⁹ Many federal criminal statutes now contain mandatory terms of supervised release,⁴⁰ and the same critiques can be applied.

The drafters of the SRA foresaw that prosecutorial discretion could have a large impact on the goals of the legislation. As a precaution, Congress enlisted the Department of Justice to instruct prosecutors to cabin their use of discretion to create more uniformity in criminal sentencing.⁴¹ The drafters of the SRA knew that cabining would be required “because prosecutors control the use of the statutes, and the statutes control the [sentencing] guidelines.”⁴² The continual addition of mandatory terms of supervised release to criminal statutes further added to the discretion of federal prosecutors.⁴³ With the passage of the SRA, and its inclusion of complex guidelines and supervised release terms, the discretion that prosecutors have always had now “makes a great deal of difference.”⁴⁴

39. See, e.g., R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981 (2014) (arguing that prosecutors have an ethical obligation to oppose mandatory minimum sentences, as well as noting that mandatory minimums transfer discretion from judges to prosecutors, and proposing a framework to allow prosecutors to act ethically while wielding that discretion); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010) (noting the political realities preventing the repeal of mandatory minimum laws and instead arguing for minimalist changes to the statutory schemes to ameliorate some of the harshest effects); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993) (providing an overview of mandatory minimums and pointing to prosecutorial discretion as one reason why their application is unpredictable, undermining the overall goal).

40. See 18 U.S.C. § 3583(a) (2012) (“[T]he court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).”).

41. Stith & Koh, *supra* note 19, at 262; see H.R. REP. NO. 98-1017, at 35–37, 106, 145.

42. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1511 (1993).

43. 18 U.S.C. § 3583(k) (Supp. IV 2013–2017) includes mandatory supervised release for violations of 18 U.S.C. § 1201 (2012) (kidnapping of a child) and 18 U.S.C. § 2421 (2012 & Supp. IV 2013–2017) (interstate transportation for illegal sexual purposes), among others. See also 21 U.S.C. § 841(b)(1)(D), (b)(1)(E)(i), (b)(1)(E)(iii) (2012) (providing mandatory supervised release for controlled substance offenses).

44. Standen, *supra* note 42, at 1512.

B. *Why Prosecutors Choose Revocation Hearings Over Jury Trials*

Federal prosecutors following the directives of the United States Attorneys' Manual must consider the "time and effort of prosecution."⁴⁵ Revocation hearings provide an easy route for a federal prosecutor to imprison a targeted individual.⁴⁶ To put it mildly, "[t]he revocation hearing is not a formal trial."⁴⁷ Federal Rule of Criminal Procedure 32.1 adopts the minimal due process rights afforded parolees as set down in *Morrissey v. Brewer*⁴⁸ and applies them to supervised release.⁴⁹ At the final revocation hearing, the releasee does have a right to counsel,⁵⁰ however, the government need only prove the alleged violation by a preponderance of the evidence.⁵¹ Due to these drastic differences, revocation hearings necessarily require less time and effort to prosecute.

45. U.S. DEPT OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.230(B) cmt. 9 (2017).

46. However, unlike the decision to initiate a criminal prosecution, which lies solely in the hands of the prosecutor, the prosecutor shares the decision to initiate revocation proceedings with the sentencing court. *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). In fact, the "sentencing court may initiate [revocation] proceedings sua sponte based on information acquired from any source." *United States v. Davis*, 151 F.3d 1304, 1307 (10th Cir. 1998); *see also* *United States v. Mejia-Sanchez*, 172 F.3d 1172, 1175 (9th Cir. 1999). Further, the final authorization to revoke a term of supervised release lies with the sentencing court alone. *See* U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 1 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf.

47. Baer, *supra* note 21, at 287 (citing *United States v. Pratt*, 52 F.3d 671, 676 (7th Cir. 1995)).

48. 408 U.S. 471, 485–87 (1972) (concluding that due process for parolees requires a preliminary hearing and a final revocation hearing); *see also* *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (applying requirements of *Morrissey* to probationers).

49. *See* FED. R. CRIM. P. 32.1 advisory committee's note (1979) (stating the requirements for a preliminary hearing "as developed in *Morrissey* and made applicable to probation revocation cases in *Scarpelli*" and citing *Morrissey* as the authority for why "[t]he hearing required by rule 32.1(a)(2) is not a formal trial; the usual rules of evidence need not be applied"). A defendant accused of violating a condition of his or her supervised release is entitled to a preliminary hearing to determine if probable cause exists sufficient to hold the defendant for a revocation hearing. FED. R. CRIM. P. 32.1(a)(1).

50. The Supreme Court refused to find a right to appointed counsel during a revocation hearing, but Congress provided for it by statute. *See* 18 U.S.C. § 3006A(a)(1)(C), (a)(1)(E) (2012); *see also* *Gagnon*, 411 U.S. at 790.

51. *See* 18 U.S.C. § 3583(e)(3). Additionally, the defendant in the revocation hearing is not entitled to a jury, the right against self-incrimination, or the benefits of the exclusionary rule. *See* 18 U.S.C. § 3006A(a)(1)(C), (a)(1)(E); *see Gagnon*, 411 U.S. at 786, 790. Hearsay may also be introduced against the defendant. *See* *United States v. Grimes*, 54 F.3d 489, 493 (8th Cir. 1995) ("At revocation hearings 'material that would not be admissible in an adversary criminal trial' may be received where appropriate." (quoting *United States v. Bell*, 785 F.2d 640, 642 (8th Cir. 1986))).

A federal prosecutor would be faithfully following directions were she to routinely choose revocations over trials. As one commentator put it, “[a] prosecutor who is merely discharging her duties should almost always opt for the revocation route, because substantially less effort would be required to ‘better serve the public interest’ by obtaining ‘the most severe penalty’ available.”⁵² The mandatory catch-all provision gives prosecutors this option for any crime committed by an individual on supervised release.⁵³ The Supreme Court has acknowledged that revocation hearings are “often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State.”⁵⁴ Thus, the supervised release system encourages prosecutors to be complicit in using the relatively simple revocation process to avoid jury trials.

III. SUPERVISED RELEASE REVOCATIONS VIOLATE THE RIGHT TO A TRIAL BY JURY

The trial by jury, in order to

“guard against a spirit of oppression and tyranny on the part of rulers,” and “as the great bulwark of [our] civil and political liberties,” . . . has been understood to require that “*the truth of every accusation* . . . should . . . be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours.”⁵⁵

The fundamental importance of jury trials to the American legal system necessitated the decision in *Apprendi v. New Jersey*⁵⁶—a decision that registered as a “number 10 earthquake” and “caused

52. Brett M. Shockley, Note, *Protecting Due Process from the PROTECT Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders*, 67 WASH. & LEE L. REV. 353, 387 (2010) (quoting U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL §§ 9-27.300(B) cmt., -27.730(C) (2017)).

53. *See id.*

54. *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972).

55. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (first and fifth alterations in original) (first quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873); then quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343). However, “there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.” *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *see also* *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989) (“[O]ur decision in *Baldwin* established that a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months.” (quoting *Baldwin v. New York*, 399 U.S. 66, 69 (1970))).

56. 530 U.S. at 477 n.3 (stating petitioner “relies entirely on the fact that the ‘due process of law’ that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury” (quoting *Duncan*, 391 U.S. at 154)).

a massive rethinking of sentencing law and policy.”⁵⁷ United States Supreme Court Justice Stevens, writing for the majority, believed “the proscription of any deprivation of liberty without ‘due process of law,’ . . . and the guarantee that ‘[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury’” were at stake in *Apprendi*.⁵⁸ Later cases affirmed the connection between the jury trial guarantee and the right to not have a judge find facts necessary to raise the minimum or maximum potential term of imprisonment.⁵⁹ Federal supervised release violates the principles the *Apprendi* Court identified as “constitutional protections of surpassing importance.”⁶⁰ The federal courts have attempted to explain away this inconsistency in a multitude of contradictory ways.⁶¹ However, they have yet to elucidate a satisfactory justification for why the current system of supervised release does not violate the Sixth Amendment rights enshrined in *Apprendi*, because there is not one.

A. *Jury Trial Rights Enshrined in the Sixth Amendment and Affirmed by Apprendi*

Apprendi v. New Jersey represented a radical shift in the Supreme Court’s approach to how the Sixth Amendment affects the rights of a defendant during sentencing.⁶² In *Apprendi*, the Supreme Court confirmed that the Sixth Amendment commandments apply to sentencing as well as guilt by requiring that a jury find, beyond a reasonable doubt, all the facts used to raise the maximum sentence for a defendant.⁶³ The Court saw the jury of one’s peers setting the limits on criminal sentences as a bulwark against

57. Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 397–98 (2009) (quoting Charles Lane, *Supreme Court to Consider Federal Sentencing Guidelines*, WASH. POST (Oct. 3, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A2962-2004-Oct2.html>).

58. *Apprendi*, 530 U.S. at 476–77 (second alteration in original) (first quoting U.S. CONST. amend. XIV; then quoting *id.* amend. VI).

59. *See supra* Part II.

60. *Apprendi*, 530 U.S. at 476. The Court also noted that “[e]qually well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt.” *Id.* at 478.

61. *See supra* Part II.B.

62. Erwin Chemerinsky, *Supreme Court Review: A Dramatic Change in Sentencing Practices*, TRIAL, Nov. 2000, at 102, 102 (calling *Apprendi* “one of the most important U.S. Supreme Court decisions in years”).

63. *Apprendi*, 530 U.S. at 490; *see infra* Part III.A.1.

tyranny.⁶⁴ *Apprendi*, and a litany of cases along the same line, have affirmed the role of the jury in setting the boundaries of criminal sentences.⁶⁵

On the surface, the decision in *Apprendi* had little effect on the supervised release system. However, seemingly unrelated legislation and Supreme Court cases have combined to place the supervised release system squarely in violation of *Apprendi*. In *Johnson v. United States*, the Supreme Court “attribute[d] postrevocation penalties to the original conviction.”⁶⁶ As discussed in Part I, Congress removed the aggregate imprisonment limit on supervised release revocation penalties around the same time as the *Johnson* decision.⁶⁷ This change allowed individuals to spend longer in prison than the statutory maximum for the crime committed. Because the *Johnson* Court attributed the revocation penalties to the original conviction,⁶⁸ a clear *Apprendi* issue emerged. If revocation penalties are attributed to the original conviction, then defendants are receiving prison terms beyond the statutory maximum for the original conviction, based on facts not proven to a jury. *Haymond v. United States*, a recent Tenth Circuit Court of Appeals decision, cast further doubt on the constitutionality of federal supervised release revocations.⁶⁹ The holding in that case was narrow, but the analysis used can be applied to all forms of federal supervised release.⁷⁰

The manner in which supervised release revocations violate *Apprendi*—and therefore the right to trial by jury—is readily apparent. No aggregation limit exists to prevent the imposition of prison

64. *Apprendi*, 530 U.S. at 477.

65. See, e.g., *Jones v. United States*, 526 U.S. 227, 251–52 (1999) (holding that jury trial guarantees require any increase in maximum penalty for a crime, other than prior conviction, be submitted to the jury); *United States v. Gaudin*, 515 U.S. 506, 509–10 (1995) (affirming that the Fifth and Sixth Amendments “require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged”).

66. 529 U.S. 694, 701 (2000). The Court then determined that “the more plausible reading of [18 U.S.C.] § 3583(e)(3) before its amendment and the addition of subsection (h) leaves open the possibility of supervised release after reincarceration,” which avoided the *ex post facto* issue raised in the case. *Id.* at 713.

67. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2017 (1994) (codified at 18 U.S.C. § 3583(h) (2012)) (permitting an additional term of supervised release after revocation of the initial term).

68. *Johnson*, 529 U.S. at 701.

69. *United States v. Haymond*, 869 F.3d 1153, 1168 (10th Cir. 2017); see *infra* notes 117–23 and accompanying text.

70. See *Haymond*, 869 F.3d at 1160.

time going beyond the statutory maximum.⁷¹ Therefore, upon revocation, a defendant may have her maximum sentence increased based on facts not proven to a jury beyond a reasonable doubt. Instead, a judge has determined her fate based on a preponderance-of-the-evidence standard. This violates the now well-accepted rule of *Apprendi*, most recently refined last year in *Mathis v. United States*, “that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction.”⁷²

1. *Apprendi v. New Jersey*, 2000

In *Apprendi*, the Supreme Court held that “a factual determination authorizing an increase in the maximum prison sentence” must be “made by a jury on the basis of proof beyond a reasonable doubt.”⁷³ The issue presented itself because a New Jersey statute allowed for additional prison time based on findings by a judge, not a jury.⁷⁴ The defendant saw his maximum term of imprisonment increase from ten years to twenty years, based on a finding by the judge that the crime was racially motivated.⁷⁵ The defendant challenged the constitutionality of his twelve-year sentence: arguing that the enhancement statute allowed a judge to raise his maximum sentence based on a finding, by a preponderance of the evidence, that the defendant’s actions were done with the purpose to intimidate.⁷⁶ The Supreme Court invalidated the enhancement statute on constitutional grounds, explaining “that there was no ‘principled basis for treating’ a fact increasing the maximum term

71. See 18 U.S.C. § 3583 (covering supervised release without mentioning aggregation limits).

72. *Mathis v. United States*, 579 U.S. ___, ___, 136 S. Ct. 2243, 2252 (2016).

73. *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000).

74. *Id.* at 470. Without the enhancement, “the maximum consecutive sentences on those counts would amount to 20 years in aggregate; if, however, the judge enhanced the sentence on count 18, the maximum on that count alone would be 20 years and the maximum for the two counts in aggregate would be 30 years.” *Id.*

75. *Id.* at 471.

76. *Id.* Without the hate crime enhancement, *Apprendi* would have received a maximum of ten years in prison. *Id.* at 474. Instead, he received a twelve-year term for that count. *Id.* *Apprendi* pled guilty to three counts in total and received concurrent sentences for the other two counts. *Id.* The Supreme Court pointed out that “[t]he constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count.” *Id.*

of imprisonment differently than the facts constituting the base offense.”⁷⁷ Accordingly, the Court held that any fact increasing the statutory maximum sentence must be one of the statutory elements of the crime submitted to the jury.⁷⁸

2. *Blakely v. Washington*, 2004

In *Blakely v. Washington*, the Supreme Court reversed the conviction of a man who pled guilty to kidnapping, which holds a maximum sentence of fifty-three months, but received a ninety-month sentence due to a judicial determination that he acted with “deliberate cruelty.”⁷⁹ Clarifying *Apprendi*, the Court held that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.”⁸⁰ Anything else would mean the “jury has not found all the facts . . . and the judge exceeds his proper authority.”⁸¹ Without the additional judicial determinations, the defendant Blakely would have been subject to a forty-nine to fifty-three month term of imprisonment.⁸² Similar to the defendant in *Apprendi*, Blakely faced a significantly longer maximum sentence because the judge, not the jury, made an additional factual finding.⁸³

The *Blakely* Court reaffirmed that the right to a trial by jury “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.”⁸⁴ The trial by a jury of one’s peers ensures “the people’s ultimate control . . . in the judiciary.”⁸⁵ In addressing their dissenting colleagues, the majority opinion admitted that many nations leave justice “entirely in the hands of professionals.”⁸⁶ However, regardless of the wisdom, or lack

77. *Alleyne v. United States*, 570 U.S. 99, 106 (2013) (quoting *Apprendi*, 530 U.S. at 476).

78. *Apprendi*, 530 U.S. at 483 n.10.

79. 542 U.S. 296, 298, 314 (2004).

80. *Id.* at 303.

81. *Id.* at 304.

82. *Id.* at 299–300.

83. *Id.* at 303.

84. *Id.* at 305–06.

85. *Id.* at 306.

86. *Id.* at 313 (“One can certainly argue that both these values [of efficiency and fairness of criminal justice] would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course.”).

thereof, of jury trials, “[t]here is not one shred of doubt” that the framers enacted the “common-law ideal of limited state power accomplished by strict division of authority between judge and jury.”⁸⁷ While not about supervised release, the rationale used by the *Blakely* Court to invalidate the deliberate cruelty sentencing enhancement applies equally to federal supervised release.

3. *Johnson v. United States*, 2000

In *Johnson v. United States*, the Supreme Court held that revocation penalties must be attributed to the original offense.⁸⁸ The need to avoid violating the doctrine established in *Apprendi* largely led to that attribution.⁸⁹ *Johnson* placed this question in front of the Court because, if the revocation and reimprisonment were punishment for the original conviction, then a portion of the supervised release statute, 18 U.S.C. § 3583(h),⁹⁰ would have been applied retroactively against this defendant in violation of the Ex Post Facto Clause.⁹¹ To determine whether revocation penalties should be attributed to the original offense, the Court discussed the two theories regarding supervised release revocation penalties that had been proffered by the appellate circuit courts.⁹² The majority of circuits had held that penalties for supervised release violations are penalties for the underlying crime, not for the violation itself.⁹³ In

87. *Id.* The Court also reaffirmed that “every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.” *Id.*

88. 529 U.S. 694, 701 (2000).

89. *Id.* at 713. After determining that revocation penalties are attributable to the original offense, the Court turned to the primary issue of the case and determined that the Ex Post Facto Clause had not been violated because “the more plausible reading of § 3583(e)(3) before its amendment and the addition of subsection (h) leaves open the possibility of supervised release after reincarceration.” *Id.*

90. 18 U.S.C. 3583(h) (2012) (providing that “[w]hen a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment”).

91. *Johnson*, 529 U.S. at 698–99; see U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

92. *Johnson*, 529 U.S. at 699–701.

93. See, e.g., *United States v. Eske*, 189 F.3d 536, 539 (7th Cir. 1999) (noting a court “may not extend the ‘total amount of restraint’ imposed on the defendant” when imposing punishment for supervised release violations (quoting *United States v. Shorty*, 159 F.3d 312, 315 (7th Cir. 1998)); *United States v. Lominac*, 144 F.3d 308, 316 (4th Cir. 1998) (holding “§ 3583(h) disadvantaged [the defendant] by increasing the total . . . time that his liberty could be restrained in violation of the Ex Post Facto Clause”); *United States v. Collins*, 118 F.3d 1394, 1398 (9th Cir. 1997) (holding the “[a]pplication of section 3583 . . . violates the Ex Post Facto Clause”); *United States v. Meeks*, 25 F.3d 1117, 1122 (2d Cir. 1994) (holding that “the original sentence . . . establishes how long the defendant may be required to serve following revocation in the case of both parole and supervised release violations” (quoting

the minority view, the Sixth Circuit determined that a revocation of supervised release “imposes punishment for defendants’ new offenses for violating the conditions of their supervised release.”⁹⁴

The Court began its analysis in *Johnson* by acknowledging the “intuitive appeal” of the Sixth Circuit’s approach.⁹⁵ However, the Court recognized that such a view would raise “serious constitutional questions” because “the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt.”⁹⁶ After cataloging the constitutional issues that would arise if they reached the opposite conclusion, the Supreme Court chose to “attribute postrevocation penalties to the original conviction.”⁹⁷ That attribution solved the blatant constitutional issues with imprisoning a defendant for a noncriminal violation.⁹⁸ It also provided a clear line of demarcation for future ex post facto claims.⁹⁹ However, the decision to attribute the punishment for supervised release violations to the original conviction aided in the erosion of the role of the jury in the federal criminal justice system.¹⁰⁰

United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993))).

94. United States v. Page, 131 F.3d 1173, 1176 (6th Cir. 1997). In *Johnson*, the Supreme Court noted the Sixth Circuit’s “reasoning that the application of § 3583(h) was not retroactive at all, since revocation of supervised release was punishment for Johnson’s violation of the conditions of supervised release.” *Johnson*, 529 U.S. at 698–99.

95. *Johnson*, 529 U.S. at 700. The intuitiveness of the appeal makes sense. The violation occurs after the original conviction, making it seem odd to attribute the revocation for the violation to the original conviction.

96. *Id.*

97. *Id.* at 701. As discussed earlier, a defendant in a revocation hearing enjoys few of the constitutional protections a criminal defendant does: he does not have a right against self-incrimination, the right to not be convicted by evidence that would be considered hearsay in a jury trial, or the protections of the exclusionary rule. *See supra* note 51.

98. However, that attribution also arguably created a double jeopardy question. *See* Ronald J. Bacigal, *The Company of Scoundrels*, 67 WASH. & LEE L. REV. 401, 403 (2010) (“If the initial conviction justified both the original imprisonment for ten years and the potential for life imprisonment following revocation, has the defendant not been sentenced to two terms of incarceration?”).

99. In *Johnson* itself, the Court concluded that “from a purely textual perspective, the more plausible reading of § 3583(e)(3) before its amendment and the addition of subsection (h) leaves open the possibility of supervised release after reincarceration.” *Johnson*, 529 U.S. at 713. Therefore, no ex post facto issues were present.

100. *See* Suja A. Thomas, *The Missing Branch of the Jury*, 77 OHIO ST. L.J. 1261, 1321 (2016) (“Deprived of doctrine legitimizing the jury as a separate power, the jury has lost significance with each decision in which the Court shifted its authority.”).

4. Attempts to Reconcile Supervised Release Revocations and *Apprendi*

Appellate circuit courts have taken different approaches to reconciling *Apprendi* with federal supervised release. Some courts have simply ruled that *Johnson* and other Supreme Court cases “did not change the well-settled rule that a term of supervised release may be imposed in addition to the statutory maximum term of imprisonment.”¹⁰¹ However, one court supported that statement by declaring “*Johnson* did not address this issue,” and no “case from any circuit that supports [the] argument that the reasoning in *Johnson* mandates a finding that [a supervised release] sentence is illegal.”¹⁰² That analysis focuses too narrowly on *Johnson*. As explained above, the *Johnson* decision itself did not invalidate § 3583, the supervised release statute. When read together with *Apprendi* and *Blakely*, the *Johnson* decision places supervised release in violation of the Sixth Amendment by attributing more time in prison to a single conviction than the statute for that conviction allows.

Other appellate circuit courts have determined that the Supreme Court already implicitly ruled on the constitutionality of the current supervised release scheme in the *Booker* decision, which changed the nature of the United States Sentencing Guidelines (“Sentencing Guidelines”) from mandatory to advisory.¹⁰³ However, in making these rulings, neither court considered the issues of supervised release as they relate to *Apprendi*. Rather, both courts were responding to petitioners’ challenge of the constitutionality of supervised release and the SRA as a whole.¹⁰⁴ In ruling that *Booker* reaffirmed the constitutionality of supervised release, both courts relied on the fact that § 3583 was among the sections

101. *United States v. Cenna*, 448 F.3d 1279, 1281 (11th Cir. 2006); *see also* *United States v. Pettus*, 303 F.3d 480, 487 (2d Cir. 2002) (declaring that “punishment for a violation of supervised release, when combined with punishment for the original offense, may exceed the statutory maximum for the underlying substantive offense” (quoting *United States v. Wirth*, 250 F.3d 165, 170 n.3 (2d Cir. 2001))).

102. *Cenna*, 448 F.3d at 1281.

103. *United States v. Faulks*, 195 F. App’x 196, 198 (4th Cir. 2006) (per curiam) (rejecting a petitioner’s assertion that 18 U.S.C. § 3583 is unconstitutional under *Booker*), *cert. denied*, 552 U.S. 809 (2007); *United States v. Coleman*, 404 F.3d 1103, 1104 (8th Cir. 2005) (per curiam) (noting that *Booker* did not completely throw out the Sentencing Reform Act, but rather excised certain sections of the Act).

104. *Faulks*, 195 F. App’x at 198; *Coleman*, 404 F.3d at 1104.

of the SRA the Supreme Court cited after stating that “[m]ost of the statute is perfectly valid.”¹⁰⁵

At first glance, it appears that the Supreme Court in *Booker* ruled on the constitutionality of supervised release, which would explain the circuit courts’ decisions, as discussed above. Upon closer inspection though, the circuit courts’ analyses fail for multiple reasons. First, the Supreme Court provided no additional analysis for why § 3583 should be considered constitutional; it merely listed that section within a list of discretionary sections that did not need to be excised.¹⁰⁶ In fact, in describing § 3583 in a parenthetical, the Court stated only “supervised release,” without further explanation.¹⁰⁷ This makes it “unlikely that the Court intended to convey that it had considered fully the effects of *Apprendi* and *Blakely* on supervised release simply by including it as one of several examples to illustrate a separate proposition.”¹⁰⁸ In *Booker*, the Court solely focused on the “constitutional issues presented” by the fact that the SRA “make[s] the Guidelines binding on district judges.”¹⁰⁹ The decision reached no further than that.

Second, the courts failed to consider the broader context in which the *Booker* Court made its statement about supervised release. *Booker*’s constitutional analysis focused on the mandatory nature of the Sentencing Guidelines.¹¹⁰ The revocation of supervised release has always been discretionary, so the Supreme Court had no reason to include § 3583 in the sections to be excised.¹¹¹ In defending why the Court excised the offending sections as opposed to invalidating the entire SRA, the majority opinion noted that the SRA aimed to “avoid excessive sentencing disparities while maintaining

105. *Faulks*, 195 F. App’x at 198; *Coleman*, 404 F.3d at 1104; see *United States v. Booker*, 543 U.S. 220, 258 (2005). The *Booker* Court listed the following sections of the SRA as examples of those not needing to be excised: § 3551 (describing authorized sentences), § 3552 (regarding presentence reports), § 3554 (regarding forfeiture), and § 3555 (regarding notification to victims). 18 U.S.C. § 3551 (2012 & Supp. IV 2013–2017); *id.* §§ 3552, 3554, 3555 (2012); *Booker*, 543 U.S. at 258.

106. *Booker*, 543 U.S. at 258.

107. *Id.*

108. Shockley, *supra* note 52, at 372.

109. *Booker*, 543 U.S. at 233.

110. *Id.* at 226–27. The Court concluded that “two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated.” *Id.* at 227.

111. See *United States v. Huerta-Pimental*, 445 F.3d 1220, 1224 (9th Cir. 2006) (“[T]he revocation of supervised release and the subsequent imposition of additional imprisonment is, and always has been, fully discretionary . . .”).

flexibility sufficient to individualize sentences where necessary.”¹¹² Since none of the remaining sections “tend[] to hinder, rather than to further, these basic objectives,” the Court found no reason to excise them.¹¹³ The Court turned to which sections to excise only *after* determining that the mandatory sections of the Sentencing Guidelines were unconstitutional.¹¹⁴ The Court aimed to leave, after the excisions, a system that “lack[s] the mandatory features,” yet “retains other features that help to further these objectives [of the SRA].”¹¹⁵ With that aim in mind, the Court had no reason to excise the supervised release section. The Supreme Court in *Booker* remained focused solely on the mandatory nature of the Sentencing Guidelines and eliminating that aspect. The Court did not address the implications of *Apprendi* and its progeny on the system of supervised release when mentioning § 3583 in a list of sections not to be excised from the SRA.¹¹⁶

The manner in which federal supervised release conflicts with the jury trial rights defined in *Apprendi* is becoming increasingly apparent. In *United States v. Haymond*, the Tenth Circuit Court of Appeals recently ruled that “§ 3583(k) is unconstitutional because it changes the mandatory sentencing range to which a defendant may be subjected, based on facts found by a judge, not by a jury, and because it punishes defendants for subsequent conduct rather than for the original crime of conviction.”¹¹⁷ The court made sure to clarify that § 3583(k) differs from other sections of § 3583 because it “imposes a heightened penalty that must be viewed, at least in part, as punishment for the subsequent conduct.”¹¹⁸ Subsection (k), unlike the other subsections of § 3583, calls for a mandatory term of imprisonment, raising the same issues addressed in *Booker*.¹¹⁹ However, unlike the Supreme Court in *Booker*, the Tenth Circuit in *Haymond* found that 18 U.S.C. § 3583(k) “circumvents the protections of the Fifth and Sixth Amendments by expressly imposing an increased punishment for specific subsequent

112. *Booker*, 543 U.S. at 264–65.

113. *Id.* at 265.

114. *Id.* at 258.

115. *Id.* at 264.

116. *Id.* at 258.

117. 869 F.3d 1153, 1160 (10th Cir. 2017); *see* 18 U.S.C. § 3583(k) (Supp. IV 2013–2017) (calling for a mandatory five-year imprisonment for supervised release violations by individuals required to register under the Sex Offender Registration and Notification Act).

118. *Haymond*, 869 F.3d at 1166.

119. *Id.* at 1162.

conduct.”¹²⁰ In other words, certain supervised release revocations violate the Sixth Amendment because a judge imposes additional penalties—possibly beyond the statutory maximum—for “subsequent conduct” not included in the original charged offense.¹²¹ Even if the judge has discretion in imposing a new sentence after a supervised release violation, *Apprendi* issues still arise. The judge retains the ability to imprison a defendant for longer than the statutory maximum based on a preponderance standard for actions that may not even be criminal.

The decision in *Haymond* exposes the fundamental constitutional issues with the supervised release system. Federal supervised release revocation penalties impose a heightened punishment “based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt and for which they may be separately charged, convicted, and punished.”¹²² The *Apprendi* doctrine is violated when punishment for new conduct, combined with an original prison sentence, exceeds the statutory maximum. Supervised release violations do not necessarily involve criminal conduct and only have to be proven by a preponderance of the evidence to a judge.¹²³ Using that process to imprison a defendant for longer than the statutory maximum violates the jury trial rights of the Sixth Amendment.

B. *Supervised Release Violates the Jury Right Principles Enumerated in Apprendi*

When supervised release is revoked, “the term of imprisonment, when combined with the period of time the defendant has already served in prison for the original offense, may exceed the maximum incarceration permissible under the substantive statute.”¹²⁴ The maximum term of imprisonment for many substantive statutes may now be exceeded using supervised release revocation penalties. Legislative enactments, such as the PROTECT Act and the

120. *Id.* at 1165.

121. *Id.*

122. *Id.* at 1162.

123. 18 U.S.C. § 3583(e)(3) (2012).

124. Baer, *supra* note 21, at 292–93; *see also* United States v. Robinson, 62 F.3d 1282, 1286 (10th Cir. 1995) (noting that “the nature of Congress’ plan for supervised release means that one who . . . violates the terms of release may be required to serve a total period of imprisonment greater than the maximum provided under the statute of conviction”).

Anti-Drug Abuse Act, have enabled, or even required, judges to continually revoke a defendant's supervised release while simultaneously sentencing him to another term of imprisonment and supervised release.¹²⁵

Appellate circuit courts post-*Apprendi*, *Johnson*, and *Blakely* have come up with a variety of ways to reconcile the system of supervised release with those holdings.¹²⁶ Regardless of the method by which courts attempt to attribute revocation sanctions in a way that satisfies the letter of *Apprendi*, supervised release violates the conceptual basis and spirit of *Apprendi*. The mere fact that “the Supreme Court has ‘distinguished revocation proceedings from criminal prosecutions on the ground that a probationer *already stands convicted of a crime*’¹²⁷ is not a principled reason to exempt supervised release revocations from the *Apprendi* rule. Repeat offenders do not lose their constitutional protections during a second trial.¹²⁸ Similarly, once a defendant has served the maximum term of imprisonment authorized by the statute by which he was convicted, he should receive constitutional protections before being imprisoned again. As the Supreme Court stated in *Apprendi*, “the

125. See *supra* notes 27–35 and accompanying text.

126. See, e.g., *United States v. Gavilanes-Ocaranza*, 772 F.3d 624, 628 (9th Cir. 2014) (holding that the *Apprendi* line of cases “deals with the imposition of a sentence in the first instance after a criminal conviction; it says nothing about the imposition of additional prison time after a violation of supervised release”); *United States v. McIntosh*, 630 F.3d 699, 703 (7th Cir. 2011) (“A violation of supervised release is not a separate fact creating an additional penalty on top of a defendant’s original sentence that may go beyond the statutory maximum, thereby requiring submission to a jury and proof beyond a reasonable doubt.”); *United States v. Faulks*, 195 F. App’x 196, 198 (4th Cir. 2006) (dismissing constitutional challenges to supervised release because *Booker* “enumerate[d] those portions of the Sentencing Reform Act that were still valid, including the supervised release statute” (citing *United States v. Booker*, 543 U.S. 220, 258 (2005))); *United States v. McNeil*, 415 F.3d 273, 275–77 (2d Cir. 2005) (holding that “[t]hrough supervised release is ‘part of the penalty for the initial offense,’ supervised release ‘is not an enhancement of the original sentence’ and thus does not run afoul of *Blakely* (quoting *Johnson v. United States*, 529 U.S. 699, 700 (2000))); *United States v. Work*, 409 F.3d 484, 490–91 (1st Cir. 2005) (holding that neither the statutory maximum nor *Apprendi* were violated because both portions of the original sentence fell within the ranges provided by the underlying statutes).

127. *United States v. Carlton*, 442 F.3d 802, 809 (2d Cir. 2006) (quoting *United States v. Brown*, 899 F.2d 189, 192 (2d Cir. 1990)). The Second Circuit Court of Appeals concluded that “it is evident that the constitutional rights afforded a defendant subject to revocation of supervised release for violation of its conditions are not co-extensive with those enjoyed by a suspect to whom the presumption of innocence attaches.” *Id.*

128. See Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standards of Proof*, 63 FLA. L. REV. 431, 444–47 (2011) (noting that repeat “defendants are formally assumed ‘innocent until proven guilty,’” but that the practical realities of trial and the rules of evidence prevent that from holding true).

relevant inquiry is . . . does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"¹²⁹ For federal supervised release, the answer to that inquiry is yes. The revocation system directly contradicts the ideal reaffirmed by the Court in *Alleyne v. United States*: "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact . . . must be submitted to the jury."¹³⁰

The elements necessary to prove a supervised release violation could not possibly be submitted to the jury at the original trial. However, even accepting the Supreme Court's attribution of revocation penalties to the original conviction, Sixth Amendment jury trial issues still arise. The defendant in a revocation hearing can receive prison time exceeding the relevant statutory maximum without the charge against them being proven to a jury of their peers.¹³¹ Instead, judicial fact finding increases the maximum sentence a defendant faces. This situation directly conflicts with the *Apprendi* Court's instruction that "the relevant inquiry is one not of form, but of effect."¹³² "The 'effect' of the current regime is to expose defendants to periods of incarceration in excess of the statutory maximum for the offense committed," without proof beyond a reasonable doubt.¹³³ No amount of formalistic distinctions can escape the fact that the supervised release revocation system violates the jury trial rights enshrined in the Sixth Amendment, and affirmed by the Supreme Court in *Apprendi*.

The federal system of supervised release, as it currently stands, allows judges to take on the role of the jury and find facts necessary to raise the statutory maximum term of imprisonment for defendants. Through a series of unconnected legislative acts and expansive interpretations by the federal courts, the system now allows defendants to face revocations and the imposition of new terms of supervised release indefinitely. This is an intolerable work-around

129. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000).

130. 570 U.S. 99, 114–15 (2013). Additionally, "if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment . . ." *Id.* at 115.

131. See *United States v. Cordova*, 461 F.3d 1184, 1186 (10th Cir. 2006) (reading § 3583(e)(3) and FED. R. CRIM. P. 32.1(b) to "permit a judge to revoke a term of supervised release and impose a prison term in its stead based upon findings made by a preponderance of the evidence rather than beyond a reasonable doubt").

132. *Apprendi*, 530 U.S. at 494.

133. Shockley, *supra* note 52, at 377–78.

to the trial-by-jury system and a direct violation of *Apprendi*. Limiting the total time of imprisonment to the statutory maximum would help bring federal supervised release in line with the *Apprendi* decision and restore the right to trial by jury.

IV. APPLYING *APPRENDI* TO SUPERVISED RELEASE TO AMELIORATE SIXTH AMENDMENT ISSUES

The Supreme Court has “[t]reat[ed] postrevocation sanctions as part of the penalty for the initial offense” to avoid the “serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release.”¹³⁴ However, in treating postrevocation sanctions as part of the initial offense, the Supreme Court has allowed Congress to effectively circumvent the Sixth Amendment guarantees and create a work-around to the jury trial. Bringing the supervised release system into compliance with *Apprendi* is the first step to restoring these constitutional protections.

A. *Revocation and Reimprisonment Terms Must Adhere to Statutory Maximums*

Supervised release should not be used to imprison individuals beyond the statutory maximum authorized by the legislature. If a defendant receives the statutory maximum sentence, then reimprisonment based on a supervised release violation should never be possible. Similarly, if a defendant receives a twelve-year sentence out of a statutory maximum of fifteen years, then any reimprisonment due to supervised release violations should be limited to three years in the aggregate. Under this scheme, the supervised release system may continue the way it has been, unless a defendant’s total time in prison exceeds the statutory maximum. This scheme can also be envisioned as a way to enforce the elements and statutory maximums set out by the legislature and found beyond a reasonable doubt by the jury. When the legislature sets a statutory maximum for a crime, it should be honored.

The Supreme Court held in *Apprendi*:

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other

134. *Johnson v. United States*, 529 U.S. 694, 700 (2000).

than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.¹³⁵

In subsequent cases, the Supreme Court has continued to invalidate sentencing schemes that allow a judge to find additional facts and sentence defendants to a greater term of imprisonment than dictated by the statute of the underlying conviction.¹³⁶ The supervised release system allows this situation to happen daily across the country. The need to bring the supervised release system in line with the jury trial right “is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment *substance*.”¹³⁷ Honoring statutory maximums set by the legislature would help to accomplish that preservation.

B. *Changes for Federal Prosecutors if These Reforms Are Applied*

Apprendi's reasoning can be used to prevent supervised release revocations from violating the jury trial right. This could provide prosecutors relief from the perverse incentives discussed in Part II. If the imposition of prison sentences upon the revocation of supervised release cannot exceed the statutory maximum for the original crime of conviction, then prosecutors will encounter fewer cases where they have to decide between revocations and criminal trials. Similarly, fewer individuals would be eligible for revocation and reimprisonment. An inability to exceed the statutory maximum would mean individuals on supervised release would have limited prison terms if a prosecutor pushed for a revocation. This would likely lead prosecutors to choose criminal trials over revocations to imprison the defendant for more than a few years. Limits currently exist for each individual term of imprisonment due to a supervised

135. *Apprendi*, 530 U.S. at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

136. *See, e.g., Alleyne v. United States*, 570 U.S. 99, 103 (2013) (relying on *Apprendi* to overturn *Harris v. United States*, 536 U.S. 545 (2002), which “held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment”); *United States v. Booker*, 543 U.S. 220, 227, 244 (2005) (ending the mandatory nature of the Sentencing Guidelines and reaffirming the holding from *Apprendi* that any fact needed “to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt”); *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (“Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”).

137. *Booker*, 543 U.S. at 237 (emphasis added).

release violation.¹³⁸ However, prosecutors know that, after the defendant's term in prison, she will still be on supervised release and subject to another revocation. If a limit existed on that cycle, prosecutors would be more inclined to seek a jury trial for the increased possible sentences.

C. *Additional Actions Prosecutors Can Take to Alleviate the Issue*

In addition to the changes that Congress and the federal courts may adopt, or in lieu of them, prosecutors should use internal reforms to improve the system. “[T]he role that the modern American prosecutor plays in the administration of [the criminal justice] system is unique, not fully analogous to either a neutral factfinder or a zealous advocate.”¹³⁹ In addition to arguing for a conviction, “prosecutors have special professional obligations to ensure that the system of criminal adjudication is just and procedurally fair.”¹⁴⁰ Two possible internal reforms to achieve fairness involve potential changes to the American Bar Association's Model Rules of Professional Conduct, as well as intra-office policies, used to enforce ethical behavior in prosecutors. The first reform is to place more of a burden on prosecutors to consider the aggregate prison sentences of defendants based on their convictions before seeking the revocation of supervised release. The second reform would be for prosecutors to join the call for a more adversarial revocation system.

The first reform, requiring prosecutors to consider aggregate prison sentences when seeking revocation of supervised release, would take some of the onus off of the sentencing court and allow prosecutors to better fulfill their duty of seeking justice. Federal prosecutors can use the wide latitude afforded to them by the SRA to enforce constitutional principles, including the right to trial by jury. In considering the aggregate sentences, prosecutors will hopefully choose not to initiate a revocation proceeding as often when the violating conduct could also constitute a new criminal

138. The maximum terms of imprisonment are: five years for class A felonies, three years for class B felonies, two years for class C or D felonies, and one year for all other offenses (other than petty offenses). 18 U.S.C. § 3583(b) (2012).

139. Bradley T. Tennis, Note, *Uniform Ethical Regulation of Federal Prosecutors*, 120 *YALE L.J.* 144, 147 (2010).

140. Eric S. Fish, *Prosecutorial Constitutionalism*, 90 *S. CAL. L. REV.* 237, 239 (2017).

charge. In the absence of action from either Congress or the Supreme Court, prosecutors should take it upon themselves to preserve the right to trial by jury. Federal prosecutors can fulfill their duty to seek justice by considering the time an individual has spent in prison for a single conviction before seeking revocation and re-imprisonment.

The second potential reform, the notion of creating a more adversarial revocation system, has existed for a while.¹⁴¹ The process of revocations has been referred to as a “shadow criminal justice system”:¹⁴² a system with procedures “very different than those associated with criminal trials.”¹⁴³ The introduction of increased discovery and procedural rights in revocation hearings could help shine a light on that shadow system. Even if the defendant has an attorney during a revocation hearing, the lack of options for the attorney prevents her from adequately “acting in the role of an advocate.”¹⁴⁴ The revocation system should not be, to use the words of Judge Wyzanski, “a sacrifice of unarmed prisoners to gladiators.”¹⁴⁵

A greater imbalance between the government and defendants during parole hearings has been justified by the fact that parole deprives individuals “only of the conditional liberty properly dependent on observance of special parole restrictions.”¹⁴⁶ However, because supervised release occurs after the term of imprisonment, and can exceed the statutory maximum, those justifications lose force. Office policies and individual prosecutors should aim to level the balance somewhat between the government and a defendant during a revocation hearing to better ensure the goals of the criminal justice system. Prosecutors should seek reform even in the ab-

141. See, e.g., Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 370 (1998) (Souter, J., dissenting) (“In reality a revocation proceeding often serves the same function as a criminal trial . . .”); Esther K. Hong, *Friend or Foe? The Sixth Amendment Confrontation Clause in Post-Conviction Formal Revocation Proceedings*, 66 SMU L. REV. 227, 275 (2013) (“[I]t is arguable that revocation proceedings are a continuation of criminal prosecutions and, therefore, that the Sixth Amendment Confrontation Clause should directly apply in revocation proceedings.”).

142. Daniel F. Piar, *A Uniform Code of Procedure for Revoking Probation*, 31 AM. J. CRIM. L. 117, 118 (2003).

143. *Id.*

144. *Anders v. California*, 386 U.S. 738, 743 (1967).

145. *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975).

146. *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

sence of legislative or judicial action. Office policies can call for earlier and more expansive discovery to be provided to defendants during revocation hearings. Perhaps most importantly, prosecutors can choose to enforce the Fourth Amendment's exclusionary rule themselves, despite the fact that courts have failed to apply the rule in revocation hearings absent a showing of harassment.¹⁴⁷ This choice would ensure a fairer balance between the government and the defendant during a revocation hearing, as well as help to enforce the underlying goals of the exclusionary rule.¹⁴⁸ The above suggestions are not expansive or exclusive by any means, and the goal of greater balance during revocation hearings is admittedly optimistic. However, as stated above, prosecutors have a duty to seek justice, even if that involves relinquishing some of their advantages in this context.

CONCLUSION

The right to a trial by a jury of one's peers, who must find guilt beyond a reasonable doubt, is a fundamental American right.¹⁴⁹ Unfortunately, a series of disjointed laws, combined with the federal judiciary's deference to the legislature, has created a system where prosecutors and judges have more control over the outer boundaries of sentences than the jury and legislature. Further, by twisting its own precedent to match new legislation, the Supreme Court has allowed federal judges and prosecutors to thwart the legislative will by imprisoning a defendant for longer than the statutory maximum of the crime of which he was convicted.

147. See, e.g., *United States v. Hawkins*, 694 F. App'x 462 (8th Cir. 2017) (per curiam) (denying reversal of supervised release in part because the defendant failed to allege harassment); *United States v. Hope*, 609 F. App'x 156 (4th Cir. 2015) (per curiam) (upholding trial court's refusal to apply the exclusionary rule in revocation hearing absent allegation of harassment); *United States v. Charles*, 531 F.3d 637, 640 (8th Cir. 2008) (finding the exclusionary rule inapplicable in a revocation hearing without evidence or allegation of harassment).

148. The exclusionary rule has been referred to as a "judicially created rule [that] is 'designed to safeguard Fourth Amendment rights generally through its *deterrent* effect.'" *Herring v. United States*, 555 U.S. 135, 139–40 (2009) (emphasis added) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

149. *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt . . ."); Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 504 (1986) ("American colonists prized the right to trial by jury as a bulwark against government oppression . . .").

Supervised release has become an integral component of the federal criminal justice system. Disregarding the fundamental differences between supervised release and the parole system that preceded it, legislators and judges have grafted the probation rules on the supervised release program. One byproduct of the haphazard grouping of probation, parole, and supervised release is the violation of the right to trial by jury. A revocation hearing features a judge instead of a jury, a preponderance-of-the-evidence standard instead of a reasonable-doubt standard, and lacks many additional standard criminal procedural protections. Despite that, revocation hearings are used to increase the maximum possible term of imprisonment for a defendant based on conduct that occurs often years or decades after the jury found her guilty. As recently as 2016, the Supreme Court affirmed the rule from *Apprendi* while invalidating Florida's capital sentencing scheme.¹⁵⁰ Despite the Court's supposedly strong and continued belief in the doctrine of *Apprendi*, the supervised release system continues to skirt the boundaries set out in *Apprendi*.

The American notions "of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government."¹⁵¹ These notions drive the jury to be the partner of the legislature in determining the punishment for a crime. The Sixth Amendment principles from *Apprendi* do nothing to prevent the legislature from enacting a statute that constrains judges' discretion in sentencing, because legislators are elected and can be controlled by the people. However, the current system allows the legislature to abdicate its duty in favor of the judiciary and prosecutors, which the Constitution does not allow. The Supreme Court in *Apprendi* attempted "to strengthen the jury trial right, based on the people's historical right to determine all punishment,"¹⁵² and the federal system of supervised release must be reworked to fall in line with that doctrine.

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150. *Hurst v. Florida*, 577 U.S. ___, ___, 136 S. Ct. 616, 619, 621–22 (2016).

151. *Glasser v. United States*, 315 U.S. 60, 85 (1942).

152. Appleman, *supra* note 57, at 446.

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