VIRGINIA LAW REVIEW ONLINE

VOLUME 108 NOVEMBER 2022 297–325

ESSAY

EXPEDIENT IMPRISONMENT: HOW FEDERAL SUPERVISED RELEASE SENTENCES VIOLATE THE CONSTITUTION

*Stefan R. Underhill & Grace E. Powell**

[T]he Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated merely because a guilty man may escape prosecution or for any other expedient reason.

– Kennedy v. Mendoza-Martinez, 372 U.S. 144, 184 (1963)

INTRODUCTION

Each year, more than ten thousand people are imprisoned by federal courts without being charged with a crime, indicted by a grand jury, or found guilty beyond a reasonable doubt by a jury of their peers. Those results are authorized by federal statute, federal rule, and multiple appellate court decisions. The proffered justification: those defendants were convicted of a federal crime and, after serving their full term of imprisonment, failed to comply with a condition of their term of supervised release.

* The authors would like to thank Professor Fiona Doherty for her helpful edits and support, Professor Josh Bowers for his thoughtful feedback, Professor Anne Coughlin for believing in this essay, Julie Jones for her incredible research, Maytte Caldero, Catherine Guerrier, and Shana Hurley for helping us shape the ideas at the foundation of this essay, and the Editorial Board at the *Virginia Law Review*. For disclosure purposes, Judge Underhill authored the dissent in United States v. Peguero, 34 F.4th 143, 167 (2d Cir. 2022).

In this Essay, we argue that the federal supervised release system violates the fundamental constitutional protections guaranteed in the Fifth and Sixth Amendments. We begin with a brief history of supervised release, created in 1984 to replace federal parole. Like a defendant granted release on parole, one on supervised release is required to comply with certain conditions set by the court. Unlike parole, where a defendant could be released early from prison in exchange for a promise to abide by those conditions, supervised release does not replace time spent in prison. Best described as post-confinement surveillance, a term of supervised release can take effect only after a defendant has served the *entire* prison term imposed by a sentencing judge. During that term of supervised release, a defendant accused of failing to comply with any of those conditions may be arrested and sentenced to serve up to five years in federal prison—all without the constitutional protections ordinarily afforded those facing incarceration.

Following an overview of the structure of supervised release, we consider decisions of federal courts, which have repeatedly held that the protections of the Sixth Amendment do not protect defendants serving terms of supervised release and facing imprisonment. We argue that those decisions start from the wrong end of the constitutional analysis by failing to account for the role of the right to indictment enshrined in the Fifth Amendment. More specifically, a defendant accused of violating a condition of supervised release nearly always faces more than a year of imprisonment if convicted—an infamous punishment for purposes of the Fifth Amendment. As a result, we contend that the right to indictment applies to revocation proceedings, and subsequently, the Sixth Amendment rights applicable in a traditional criminal prosecution must also apply. Furthermore, we argue that there is no meaningful distinction, for Sixth Amendment purposes, between a revocation proceeding and an ordinary prosecution, and that decisions concluding otherwise rely on unsupportable legal fictions.

Ultimately, we conclude that the statutory scheme governing supervised release creates an unconstitutional workaround to the fundamental constitutional protections designed to limit the government's power to arbitrarily imprison. Although dodging the demands of the Fifth and Sixth Amendments surely offers a more expedient route to imprisonment, prosecutors and probation officers should not have the discretion to choose a route to imprisonment that bypasses the Constitution.

I. THE HISTORY

We begin with an overview of federal parole, the system supervised release was created to replace. We also touch on federal probation, a form of community supervision similar to parole, before turning to the legislative history of the Sentencing Reform Act of 1984 ("SRA"), the statute that created supervised release.[1]

A. Parole

Congress enacted the first parole statute in 1910, modeling the federal system after state parole systems that had been on the books in the majority of states since the late 1800s.[2] That statute authorized the early release of federal prisoners who had served at least one third of the prison term imposed by the sentencing judge.[3] The decision whether to grant or deny release on parole was committed to the discretion of a federal parole board,[4] and the scope of that discretion was broad: the board could grant parole to any individual who had "observed the rules of [the] institution" in which he was incarcerated so long as release was not "incompatible with the welfare of society."[5] Although allowed to leave prison, a parolee was still considered to be "in the legal custody and under the control of the warden of such prison from which paroled . . . until the expiration of the [prison] term or terms specified in his sentence."[6] In other words, a grant of parole allowed a term of incarceration to be served in the community but did not affect the length of that sentence.

A suspected violation of any parole condition could be punished swiftly and summarily: if any member of a board had "reliable information that the offender . . . violated his parole," the board could

[1] Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.); Fiona Doherty, Indeterminate Sentencing Returns: The Invention of Supervised Release, 88 N.Y.U. L. Rev. 958, 996–97 (2013). Professor Doherty's seminal piece provides a thorough overview of the story of supervised release.

[2] Id. at 983–84.

[3] Id. at 984.

[4] Id. at 985; see also Peter B. Hoffman, History of the Federal Parole System: Part 1 (1910–1972), 61 Fed. Prob. 23, 27 (1997) (explaining that parole decisions were made by the whole board).

[5] Parole Act, ch. 387, §§ 1, 3, 36 Stat. 819 (1910), *repealed by* Sentencing Reform Act of 1984, § 212(a)(2).

[6] Id. § 3.

issue an arrest warrant and require the parolee to be returned to prison.[7] Only then would the parolee be afforded an opportunity to be heard before the board,[8] which could decide either to alter parole conditions or to revoke the grant of parole entirely, sending the parolee back to prison to serve the "remainder of the sentence originally imposed."[9]

In the early days of the federal parole system, courts afforded only limited oversight of the board's decisions to grant or revoke parole.[10] Federal courts set forth a variety of justifications for declining to overturn the board's decisions: some concluded that a parolee remained in the formal custody of the executive branch,[11] while others suggested that parole was an act of grace by a "merciful executive" that could not be demanded as a matter of right.[12] Finally, some courts rejected constitutional challenges to the parole system by reasoning that the parole board's relationship with a parolee was not adversarial in nature, given the "genuine identity of interest . . . in the prisoner's desire to be released and the [b]oard's policy to grant release as soon as possible."[13] Because the relationship between the parolee and the board was not adversarial, the reasoning went, there was simply no need for courts to intervene to safeguard the rights of the parolee.

In 1972, however, the Supreme Court granted certiorari in *Morrissey v. Brewer* to consider whether revocation of parole without a hearing

[7] Hoffman, supra note 4, at 28.

[8] Id.

[9] Id.

[10] E.g., Clark v. Stevens, 291 F.2d 388, 389 (6th Cir. 1961); Hiatt v. Compagna, 178 F.2d 42, 45 (5th Cir. 1949) ("A prisoner sentenced to the penitentiary is turned over by the court to the executive, namely the Attorney General, to have the sentence executed. . . . It is very evident that the whole matter of paroles is left to the informed discretion of the Board. Court action is not made a part of it.").

[11] Comment, The Parole System, 120 U. Pa. L. Rev. 282, 287–88 (1971); see also Anderson v. Corall, 263 U.S. 193, 196 (1923) ("While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term, less allowance, if any, for good conduct. While this is an amelioration of punishment, it is in legal effect imprisonment."); Padilla v. Lynch, 398 F.2d 481, 482 (9th Cir. 1968) (stating that, because parole is a form of custody, a complaint alleging that the denial of parole violated the equal protection clause is insufficient).

[12] Comment, supra note 11, at 286–87; cf. Ughbanks v. Armstrong, 208 U.S. 481, 488 (1908) (describing a state's grant of parole as "the granting of a favor to a convicted criminal confined within one of its prisons").

[13] Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir. 1963) (rejecting Sixth Amendment challenge to parole revocation procedures); see also Comment, supra note 11, at 288–89 (stating that the board and the parolee have a shared interest in rehabilitating the parolee).

violated the constitutional requirements of due process.[14] Noting that a parolee was technically still "in custody" and could therefore claim no entitlement to release on parole, lower courts had answered that question in the negative.[15] The Supreme Court, however, disagreed. Relevant for our purposes, the Court began by explaining that because "the revocation of parole is not part of a criminal prosecution," the "full panoply" of constitutional protections applicable in a criminal prosecution did not apply to a parole revocation proceeding.[16] No real analysis was necessary to reach that conclusion: after all, parole "ar[ose] after the end of the criminal prosecution, including the imposition of sentence"[17] and involved merely a decision about where the balance of that sentence would be served. Revocation of parole deprived an individual of only the "conditional liberty" granted in connection with early release from prison.[18] Accordingly, it would make little sense to require the state to initiate a new prosecution simply to require the parolee to serve out the remainder of the existing sentence.[19]

Although a revocation proceeding differed, for constitutional purposes, from a new prosecution, the Court acknowledged that parole revocation nevertheless inflicted a "grievous loss."[20] As a result, at least some due process protections were required before parole could be revoked.[21] Specifically, due process mandated:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and

[14] 408 U.S. 471, 472 (1972).
[15] Id. at 474–75.
[16] Id. at 480.
[17] Id.
[18] Id.
[19] Id. at 483; see also Jacob Schuman, Supervised Release Is Not Parole, 53 Loy. L.A. L. Rev. 587, 624 (2020).
[20] *Morrissey*, 408 U.S. at 482.
[21] Id.

> (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[22]

Those requirements would eventually be incorporated into Federal Rule of Criminal Procedure 32.1, later made applicable to probation revocation and supervised release proceedings.[23]

B. Probation

Federal probation has a similar origin story. Although the first federal probation statute was not formally enacted until 1925, federal judges, relying on their broad sentencing discretion, would routinely sentence a defendant to a term of imprisonment and then "suspend[]" execution of that sentence "during the good behavior of the defendant."[24] If a defendant failed to comply with restrictions imposed in exchange for granting her leniency in the form of probation, probation could be revoked in favor of imprisonment.[25] As was the case with parole, defendants were afforded little-to-no procedural protections before probation was revoked in favor of prison.

Similar to decisions considering parole revocations, federal courts routinely rejected challenges to the lack of procedural protections available before probation was revoked, on the premise that a grant of probation was a privilege or act of grace afforded by a benevolent court, or suggesting that district courts should have broad discretion over all aspects of probation in order to effectuate the "humane" purpose of probation.[26]

In 1973, shortly after deciding *Morrissey*, the Supreme Court granted certiorari in *Gagnon v. Scarpelli* to consider whether "a previously sentenced probationer is entitled to a hearing when his probation is revoked and, if so, whether he is entitled to be represented by appointed counsel at such a hearing."[27] *Gagnon*, like *Morrissey*, involved a challenge to a probation revocation that had taken place without a hearing

[22] Id. at 489.

[23] Fed. R. Crim. P. 32.1 advisory committee's note to 1979 and 1989 amendments.

[24] Ex parte United States, 242 U.S. 27, 37 (1916); see also Brent E. Newton, The Story of Federal Probation, 53 Am. Crim. L. Rev. 311, 313 (2016) (noting that federal court judges would suspend prison sentences prior to the passing of the Probation Act).

[25] Newton, supra note 24, at 312.

[26] Fiona Doherty, Obey All Laws and Be Good: Probation and the Meaning of Recidivism, 104 Geo. L.J. 291, 330, 335 (2016).

[27] 411 U.S. 778, 779 (1973).

or other procedural protections.[28] Citing to a 1967 decision, *Mempa v. Rhay*, the Court first distinguished a probation revocation hearing from a sentencing proceeding.[29] Pursuant to the unique state statutory scheme at issue in *Mempa*, judges had the authority to defer a sentencing decision in favor of probation; however, if a defendant failed to comply with the conditions of probation, the judge was *required* to sentence her to the statutory maximum for the original crime of conviction.[30] Because that proceeding functioned, in essence, as a sentencing proceeding, the *Mempa* Court concluded that the Sixth Amendment right to counsel applied.[31]

Gagnon, by contrast, involved a different type of revocation proceeding. The petitioner in *Gagnon* had been formally sentenced to fifteen years' imprisonment, but the judge had then suspended the sentence in favor a seven-year term of probation.[32] Like revocation of parole, revocation of probation under that scheme merely triggered the execution of the sentence already imposed, and the *Gagnon* Court therefore concluded that revocation was not a "stage of a criminal prosecution."[33] Further distinguishing the proceeding from a prosecution, the Court noted, was the absence of an adversarial relationship between the state and the defendant. In particular, the state was represented not by a prosecutor, but by a parole officer whose interests were, at least in theory, aligned with those of the probationer.[34] Rather than the full panoply of rights afforded in a traditional criminal prosecution, the Court reasoned that only the limited procedural protections identified by the *Morrissey* Court were required before probation could be revoked.[35]

In so holding, the *Gagnon* Court clarified that whether a revocation proceeding implicates Sixth Amendment rights or merely due process concerns turns on the nature of what the court is deciding. Like in *Morrissey*, the Court in *Gagnon* considered a term of imprisonment that had been imposed by a judge but from which the defendant had been granted a reprieve, either in the form of early release from prison or the opportunity to avoid prison altogether. Revocation of that grant of

[28] Id. at 780.
[29] Id. at 781.
[30] Mempa v. Rhay, 389 U.S. 128, 135 (1967).
[31] Id. at 137.
[32] *Gagnon*, 411 U.S. at 779.
[33] Id. at 782.
[34] Id. at 789.
[35] Id. at 782.

leniency resulted merely in execution of that previously-imposed sentence. *Mempa*, by contrast, involved something akin to an entirely new sentencing proceeding, to which the Sixth Amendment right to counsel applied.

Probation—and the constitutional mandates set forth in *Gagnon*—ultimately survived the sweeping changes made by the SRA. Although the SRA directed judges to treat probation as "a form of sentence with conditions rather than as a deferral of imposition or execution of a sentence,"[36] judges still had broad authority to revoke probation and resentence a defendant for up to the statutory maximum term of imprisonment for the crime of conviction if he or she failed to comply with conditions the judge had imposed in exchange for granting a reprieve from prison.[37]

C. Supervised Release

By the early 1980s, the federal parole system had come under fire from both sides of the political spectrum as creating unwarranted sentencing disparities among federal offenders and sentences of indeterminate length.[38] As part of an attempt to comprehensively reform federal sentencing and in response to widespread criticism of parole, the sponsors of the SRA elected to simply abolish federal parole entirely rather than attempt reforms. In lieu of parole, they created supervised release, a form of post-confinement monitoring that followed—rather than replaced—imprisonment.[39] As the Senate Report accompanying the SRA explained,

[36] S. Rep. No. 98-225, at 59 (1983). Arguably, then, *Mempa* is the only Supreme Court decision that affords constitutional guidance with regard to modern federal probation, which is a sentence in its own right and which requires a judge to engage in a full-blown sentencing proceeding when probation is "revoked."

[37] United States v. Labonte, 520 U.S. 751, 769 (1997) (Breyer, J., dissenting).

[38] Doherty, supra note 1, at 995.

[39] Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, sec. 212(a)(2), § 3583(a), 98 Stat. 1987, 1999 (codified as amended at 18 U.S.C. § 3583(a)) ("The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release *after imprisonment*." (emphasis added)). Imposition of a term of supervised release was required as part of every sentence that imposed imprisonment during the mandatory Sentencing Guidelines era. Since *Booker*, with few exceptions, imposition of supervised release is discretionary. Nonetheless, it is imposed in the vast majority of federal sentences. See Christine S. Scott-Hayward, Shadow Sentencing: The Imposition of Federal Supervised Release, 18 Berkeley J. Crim. L. 180, 186 (2013).

> the court, in imposing a term of imprisonment for a felony or a misdemeanor, [may] include as part of the sentence a requirement that the defendant serve a term of supervised release *after* he has served the term of imprisonment. . . . The term of supervised release would be a separate part of the defendant's sentence, rather than being the end of the term of imprisonment.[40]

As originally designed, supervised release was supposed to afford rehabilitation rather than impose punishment. The punitive portion of a sentence would have been served by the time supervised release commenced, and the primary goal of supervised release was therefore "to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation . . . ."[41] Accordingly, judges were to consider "deterrence and rehabilitation," but not the need for retribution, in determining whether to sentence a defendant to a term of supervised release and in selecting the conditions to impose.[42] One important "condition," however, was mandatory—a judge was required to order that a defendant on supervised release "not commit another Federal, State, or local crime during the term of supervision."[43]

In line with the rehabilitative purpose of supervised release, the SRA initially provided no mechanism for a judge to "revoke" a term of supervised release. Instead, judges were to "treat a violation of the conditions of supervised release as a criminal contempt."[44] In other words, anyone accused of violating a condition of supervised release would be entitled to "trial by jury (for all cases involving a sentence of more than six months), along with all the other procedural protections applicable in a criminal proceeding."[45]

Just before the SRA went into effect, however, Congress passed the Anti-Drug Abuse Act ("ADAA") of 1986, a tough-on-crime statute that increased the penalties for certain drug offenses.[46] Most significantly, the ADAA made what was described as a "technical amendment" to the SRA, authorizing courts to "revoke" a term of supervised release and impose a

[40] S. Rep. No. 98-225, at 123 (1983) (emphasis added).
[41] Id. at 124.
[42] Doherty, supra note 1, at 998.
[43] § 3583(d), 98 Stat. at 1999.
[44] Doherty, supra note 1, at 999–1000.
[45] Id. at 1000.
[46] Id.

new term of imprisonment, pursuant to the procedures set forth in Federal Rule of Criminal Procedure 32.1, "if it [found] by a preponderance of the evidence that the person violated a condition of supervised release."[47] In so doing, the ADAA jettisoned the carefully crafted procedures originally envisioned by the SRA's drafters in favor of the revocation mechanism—and limited procedural protections—developed in the context of parole.[48]

The sparse legislative history of the revocation provision of the ADAA affords little insight into the intent of its drafters; at best, that history suggests that the amendment was not thoroughly considered.[49] The impact of that amendment, however, was dramatic; passage of the amendment restored a key aspect of the old parole system that the SRA's drafters had worked so hard to excise from federal sentencing practice.

II. SUPERVISED RELEASE IS CONSTITUTIONALLY DIFFERENT

Citing principally to the similarities between the procedural protections afforded by statute for supervised release revocations and those governing parole revocations, federal courts analyzing the SRA quickly concluded that, at least for constitutional purposes, the two systems were virtually indistinguishable. More specifically, courts reflexively invoked *Morrissey* and *Gagnon* to conclude that, like revocation of parole or probation, supervised release violation proceedings were distinguishable from a criminal prosecution to which the protections of the Fifth and Sixth Amendments apply.[50]

To be sure, supervised release, parole, and probation share certain similarities—each involves, at one point or another, supervision by a parole or probation officer outside the walls of prison. But we argue that, for constitutional purposes, the differences between parole, probation, and supervised release are more important than their similarities. Most significantly, pursuant to the plain text of the statute governing supervised release, unlike probation or parole, supervised release can take effect only after the full term of imprisonment imposed by a judge has been served and thus cannot afford a reprieve from imprisonment. As a result, when a judge purports to "revoke"[51] a term of supervised release in favor of

[47] Id. at 1001; see 18 U.S.C. § 3583(e)(3); Fed. R. Crim. P. 32.1.
[48] Doherty, supra note 1, at 1002.
[49] Id. at 1001.
[50] Schuman, supra note 19, at 615–16, 615 n.200 (collecting appellate cases).
[51] As United States District Judge Jack Weinstein recognized, even the term "revoke" is a "misnomer" in the context of supervised release. Because supervised release does not replace

imprisonment, what she is actually doing is imposing a *new and additional* term of imprisonment, distinct from the original term of imprisonment imposed as punishment for the underlying crime.[52]

In our view, that distinction is critically important. Consider the structure of a supervised release revocation proceeding. First, a defendant is formally accused—most often by a United States Attorney or United States Probation Officer—of violating a condition of supervised release. After that formal accusation is lodged with a court, a defendant must either plead guilty to the violation conduct, or instead defend against those accusations at a formal hearing where the government attempts to prove her guilt. If the government succeeds, she faces, in some cases, up to five years in prison for each charge. Because revocation of supervised release involves (1) a formal accusation of wrongdoing, (2) followed by an adversarial proceeding to adjudicate a defendant's guilt, and (3) leads to a *new and additional* term of imprisonment, we contend that those proceedings are fundamentally different than those considered by the *Morrissey* or *Gagnon* Courts. Instead, supervised release revocation proceedings are—for constitutional purposes—indistinguishable from a

imprisonment, a judge who "revokes" a term of supervised release is not taking back the freedom she previously bestowed. United States v. Trotter, 321 F. Supp. 3d 337, 346–47 (E.D.N.Y. 2018).

[52] Dissenting in *United States v. Haymond*, discussed further in Part III, Justice Alito posited that supervised release is equivalent to a sentence of parole:

> [A] defendant sentenced to x years of imprisonment followed by y years of supervised release is really sentenced to a maximum punishment of x + y years of confinement, with the proviso that any time beyond x years will be excused if the defendant abides by the terms of supervised release.

139 S. Ct. 2369, 2390 (2019). But that argument ignores the plain text of the statute, which carefully distinguishes between a term of supervised release and imprisonment. It also ignores the legislative history of the SRA, which makes clear that supervised release was designed to serve a different purpose than imprisonment and was not intended to be interchangeable with imprisonment. Finally, there is no evidence that judges *in practice* exchange supervised release for imprisonment by imposing shorter prison sentences when they elect to include a term of supervised release as part of a sentence. Empirical evidence instead suggests that many judges routinely impose prison sentences within the range contemplated by the Sentencing Guidelines—which, of course, similarly do not anticipate that shorter prison terms should be imposed where a judge elects to impose a term of supervised release. See Christine S. Scott-Hayward, supra note 39, at 186 (2013); U.S. Sentencing Commission Guidelines Manual, ch. 5, introductory cmt., pt. A, sent'g tbl; pt. B, introductory cmt., § 5B1.1 cmt. background (2021).

criminal prosecution to which the protections embodied in the Fifth and Sixth Amendments always apply.[53]

To the extent that courts have considered that argument, they have done so through the lens of the Sixth Amendment. On the premise that a revocation proceeding differs from a prosecution, they have concluded that the full panoply of Sixth Amendment rights does not apply. In our view, those decisions fail to account for the role of the right to indictment guaranteed by the Fifth Amendment. More specifically, in nearly all revocation proceedings, a defendant faces a potential sentence of more than a year of imprisonment if convicted—an "infamous" punishment[54] within the meaning of the Fifth Amendment. As a result, the right to indictment applies to such proceedings. And if the right to indictment applies, then a revocation proceeding—at which a defendant's guilt or innocence is adjudicated and that may result in a term of imprisonment—necessarily amounts to a prosecution. In other words, the Sixth Amendment "prosecution" inquiry does not resolve the Fifth Amendment right to indictment issue, but the Fifth Amendment right to indictment inquiry does resolve the Sixth Amendment "prosecution" issue. Furthermore, there are no meaningful differences between "criminal prosecutions" and supervised release violation proceedings for purposes of the Sixth Amendment.

A. The Fifth Amendment

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." [55] Unlike the Sixth Amendment, which protects the "accused," [56] the Fifth Amendment sweeps more broadly—by its terms, it protects "a person,"[57] one who has yet to become formally ensnared in the justice system.[58] Indeed, the right to indictment by a grand jury guards against "an open and public

[53] United States v. Peguero, 34 F.4th 143, 167 (2d Cir. 2022) (Underhill, J., dissenting); see also Rothgery v. Gillespie, 554 U.S. 191, 221–22 (2008) (Thomas, J., dissenting) (discussing elements of a prosecution).

[54] Green v. United States, 356 U.S. 165, 183 (1958).

[55] U.S. Const. amend. V.

[56] U.S. Const. amend. VI.

[57] U.S. Const. amend. V.

[58] Michael J. Zydney Mannheimer, Ripeness of Self-Incrimination Clause Disputes, 95 J. Crim. L. & Criminology 1261, 1321–22 (2005) (noting that the Fifth Amendment protections can apply before a formal prosecution has commenced).

accusation of crime, and from the trouble, expense, and anxiety of a public trial, *before* . . . probable cause is established."[59]

Significantly, the right to indictment is triggered only when one is "held to answer" for a crime.[60] Although the historical record on the meaning of that term at the time the Bill of Rights was drafted is relatively sparse,[61] we can conclude at the very least that one is held to answer when he is required to appear and "explain and justify his conduct" in response to the levying of formal charges in a court with the power to punish him.[62]

By contrast, the definition of "infamous crime," as the term is used in the Fifth Amendment, is well-settled. The Supreme Court has explained that infamous punishments include "sentences of imprisonment in a penitentiary and sentences to hard labor. They do not include ordinary misdemeanor sentences of no more than a year in jail."[63] Pursuant to federal statute, any sentence of more than one year may be served in a penitentiary. Thus, all federal felonies, *i.e.*, crimes punishable by more than one year in prison, expose the defendant to time in a penitentiary and therefore trigger the right to indictment.[64]

By its terms, therefore, the right to indictment attaches to the great majority of revocation proceedings. First, and most significantly, the statute governing supervised release revocations authorizes judges to impose between two and five years of imprisonment for violating a condition of supervised release, depending on the seriousness of the underlying crime giving rise to the term of supervised release.[65] In nearly

[59] Hurtado v. California, 110 U.S. 516, 551–52 (1884) (Harlan, J., dissenting) (cleaned up) (emphasis added).

[60] U.S. Const. amend. V.

[61] Elizabeth T. Lear, Is Conviction Irrelevant?, 40 UCLA L. Rev. 1179, 1230 n.246 (1993); Wilkerson v. Whitley, 28 F.3d 498, 502 (5th Cir. 1994).

[62] Ex parte Wall, 107 U.S. 265, 298 (1882); see also Mahon v. Justice, 127 U.S. 700, 713 (1888) (noting that defendant was "held to answer the indictment" after formal charges were served upon him); United States v. McIntosh, 704 F.3d 894, 903–04 (11th Cir. 2013) (quoting Answer, Oxford English Dictionary, http://www.oed.com/view/Entry/8146 (last visited Dec. 21, 2012)) (observing that "answer" means "to speak in reply or opposition to a charge," a definition recognized when the Fifth Amendment was adopted).

[63] United States v. Smith, 982 F.2d 757, 761 (2d Cir. 1992) (cleaned up) (citing, inter alia, Mackin v. United States, 117 U.S. 348 (1886)). Under federal law, persons sentenced to one year or less cannot serve their terms in a penitentiary without their consent. 18 U.S.C. § 4083.

[64] See also Fed. R. Crim. P. 7(a) (designating that crimes punishable by a term of imprisonment of more than one year must be charged by indictment).

[65] 18 U.S.C. § 3583(e)(3) ("[A] defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if

every revocation proceeding, a defendant found guilty of committing the violation conduct could therefore be made to suffer an infamous punishment within the meaning of the Fifth Amendment. Further, one accused of violating a condition of release is formally charged with committing the violation conduct and must appear in court and either admit to the violation or present a defense[66]—in other words, "held to answer" within the meaning of the Fifth Amendment.[67] Finally, the Fifth Amendment protects a "person," rather than an accused.[68] As a result, even assuming, as some courts have done, that a revocation proceeding cannot be "deemed" a "criminal prosecution" for Sixth Amendment purposes (a proposition with which we disagree, as discussed below), the rights set forth in the Fifth Amendment apply to revocation proceedings.[69]

In contrast to the more robust dispute over whether the Sixth Amendment governs revocation proceedings, the role of the Fifth Amendment in revocation proceedings has been largely ignored. Most courts have simply proceeded from the assumption that, because a revocation proceeding is distinguishable from a prosecution, no right to indictment attaches.[70] As a general matter, we can imagine two possible reasons why the right would not apply: (1) supervised release violations are not crimes to which the right to indictment attaches; or (2) the indictment (or waiver thereof) supporting the underlying conviction for which the term of supervised release was imposed suffices to meet the Fifth Amendment indictment requirement. We consider both options below.

---

such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case.").

[66] See Fed. R. Crim. P. 32.1.

[67] U.S. Const. amend. V.

[68] Id.

[69] Indeed, courts already acknowledge that the Due Process clause enshrined in the Fifth and Fourteenth Amendments applies to revocation proceedings. See, e.g., United States v. Haymond, 139 S. Ct. 2369, 2391 (2019) (Alito, J., dissenting).

[70] E.g., United States v. Peguero, 34 F.4th 143, 157–58 (2d Cir. 2022) (citing exclusively Sixth Amendment cases for the proposition that no right to indictment attaches); United States v. Cordova, 461 F.3d 1184, 1185–90 (10th Cir. 2006) (concluding that there is no Sixth [sic] Amendment right to indictment, and citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)). Although some courts have held that imposing a term of supervised release to follow a prison sentence of less than a year does not transform a misdemeanor conviction into a felony conviction, that does not answer the question whether one facing *more* than a year of imprisonment upon revocation is entitled to be indicted. See, e.g., United States v. Celestine, 905 F.2d 59, 60–61 (5th Cir. 1990) (per curiam); United States v. Purvis, 940 F.2d 1276, 1280 (9th Cir. 1991).

1. Is an Indictment Required to Charge a Supervised Release Violation?

One possible reason the right to indictment does not apply in revocation proceedings is that violating a condition of supervised release is not a "crime" within the meaning of the Fifth Amendment.[71] Although there is no clear definition of a "crime" as used in the Fifth Amendment, the Supreme Court has explained that, at the time of framing, a crime was understood to be an "act[] to which the law affixes . . . punishment" or "the wrong upon which the punishment is based."[72] Of particular importance in determining whether a statute creates a "crime" is the measure and type of punishment that the legislature has elected to impose.[73] In fact, it is the nature and severity of a particular punishment that the Supreme Court has repeatedly used to delineate crimes from civil wrongs.[74]

Consider that definition in the context of a revocation proceeding. To be sure, Section 3583 is not a traditional criminal statute—for example, it does not identify the elements comprising a particular offense for which punishment can or must be imposed. By its terms, however, Section 3583 does "affix[] punishment"[75] to the act of violating a condition of supervised release.[76] Most importantly, the nature and severity of that punishment—incarceration in a federal prison or penitentiary—is indistinguishable from the punishment imposed for committing a felony.[77] As a result, the right to indictment ought to attach.

[71] U.S. Const. amend. V.

[72] Apprendi v. New Jersey, 530 U.S. 466, 510 (2000) (Thomas, J., concurring) (citing 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure § 80, at 51, § 84, at 53 (2d ed. 1872)); see also *Haymond*, 139 S. Ct. at 2376 (describing the concept of a "crime" as broad and linked to punishment); Green v. United States, 356 U.S. 165, 202 (1958) (Black, J., dissenting) ("How can it possibly be any more of a crime to be convicted of disobeying a statute and sent to jail for three years than to be found guilty of violating a judicial decree forbidding precisely the same conduct and imprisoned for the same term?").

[73] *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) (observing that a crime "includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)").

[74] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167 (1963); see also Hudson v. United States, 522 U.S. 93, 99 (1997) (noting that a court must utilize tools of statutory construction to determine whether a law is sufficiently punitive to transform a civil remedy into a criminal penalty).

[75] *Apprendi*, 530 U.S. at 510 (Thomas, J., concurring) (cleaned up) (citing 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure § 80, 51 (2d ed. 1872)).

[76] 18 U.S.C. § 3583(e).

[77] See, e.g., *Mendoza-Martinez*, 372 U.S. at 167 ("[F]orfeiture of citizenship is a penalty for the act of leaving or staying outside the country to avoid the draft. This being so, the Fifth and

2. Can the Indictment Supporting the Underlying Conviction Also Support a Charge of Violating Supervised Release?

A second possibility is that every person serving a term of supervised release for a felony conviction *has* already been indicted—or waived the right to indictment—in connection with the original prosecution. It is therefore at least theoretically possible that the indictment for that original offense could satisfy the right to indictment for any supervised release violation. After all, some courts (again relying on *Morrissey*) have held that any new term of imprisonment imposed following supervised release revocation is authorized by the original *sentence* and, by implication, the original indictment.[78]

Of course, it would be metaphysically impossible for an indictment for the underlying conviction to have actually included charges relating to yet-to-be-committed violation conduct. In addition, the idea that the original conviction somehow authorizes any new punishment imposed after revocation is foreclosed by Supreme Court precedent. Specifically, the Supreme Court has repeatedly held that an indictment must charge the elements of the crime for which an individual is ultimately prosecuted and punished. Indeed,

> [t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to

Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking.").

[78] See infra Part III.A (discussing the "original penalty" rationale). That rationale overlooks the statutes respectively authorizing a sentence of probation and a sentence of imprisonment. Compare 18 U.S.C. § 3564(e) ("A sentence of probation remains *conditional* and *subject to revocation* until its expiration or termination." (emphasis ours)), with id. § 3582(b) ("Notwithstanding the fact that a sentence to imprisonment can subsequently be [modified due to compassionate release or corrected or appealed,] a judgment of conviction that includes such a sentence [of imprisonment] constitutes a final judgment for all other purposes.") and id. § 3582(c) (instructing that with rare exceptions, a "court may not modify a term of imprisonment once it has been imposed").

> prosecution for interference with [conduct] which the grand jury did not charge.[79]

Any substantive charges set forth in that indictment "may not be broadened through amendment except by the grand jury itself."[80] As a result, the original indictment cannot constitutionally cover future conduct unknown to the grand jury at the time it voted to indict.[81]

The constitutional guarantee against double jeopardy also forecloses the argument that the original indictment somehow covers the new punishment. The Double Jeopardy Clause protects not only against multiple prosecutions for the same offense, but also "against multiple punishments for the same offense"[82] unless cumulative punishments are specifically authorized by the legislature.[83] Given that post-revocation penalties are not imposed as part of the original prosecution, any attempt to attribute those penalties to the original conviction runs afoul of the constitutional prohibition against multiple punishments for the same offense.[84]

---

[79] Stirone v. United States, 361 U.S. 212, 218 (1960).

[80] Id. at 215–16; United States v. Simmons, 11 F.4th 239, 268 (4th Cir. 2021) ("[I]ncongruity between the indictment and the conviction that a constructive amendment causes destroys the defendant's substantial right to be tried only on charges presented in the indictment." (cleaned up) (quoting *Stirone*, 361 U.S. at 217)).

[81] Some decisions hold that, when an indictment fails to charge one of the elements of a charged offense, but there is overwhelming evidence in support of the missing element, the right to indictment is not violated. E.g., United States v. Nkansah, 699 F.3d 743, 752 (2d Cir. 2012) (citing United States v. Cotton, 535 U.S. 625, 633 (2002)). Of course, supervised release violation conduct is not an element of any offense actually charged in the underlying indictment, but instead entirely new and separate conduct that can occur years (or even decades) after the original indictment.

[82] North Carolina v. Pearce, 395 U.S. 711, 717 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 798 (1989); see also Ex parte Lange, 85 U.S. 163, 173 (1873) ("[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.").

[83] Missouri v. Hunter, 459 U.S. 359, 368–69 (1983) (Marshall, J., dissenting) ("Where, as here, a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.").

[84] In the Sentencing Reform Act, Congress "forbade the federal courts from 'modify[ing] a term of imprisonment once it has been imposed.'" United States v. Jones, 980 F.3d 1098, 1103–04 (6th Cir. 2020) (quoting Sentencing Reform Act of 1984, Pub. L. No. 98–473, tit. II, ch. 2, § 212(a), 98 Stat. 1987, 1998). To avoid constitutional problems, when courts are authorized to modify sentences, they are limited to *reducing* sentences. See 18 U.S.C. § 3582(c).

In sum, the punishment imposed for violating a condition of supervised release cannot be based on the original prosecution—either the original conviction or the original sentence. As a result, courts cannot constitutionally imprison a person for violating a condition of supervised release unless she has been indicted for that conduct by a grand jury.

B. The Sixth Amendment

The Sixth Amendment proclaims that,

> [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [;] to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[85]

In our view, whether or not the Sixth Amendment applies in revocation proceedings is a question with a straightforward answer—because the right to indictment must apply in revocation proceedings, revocation proceedings necessarily constitute prosecutions. The indictment, in other words, transforms a "person" into "the accused."[86]

But even putting aside the implications of the right to indictment, revocation proceedings have all the earmarks of a traditional prosecution within the meaning of the Sixth Amendment. Although historical records do not offer a precise definition of the term "prosecution" at the time the Sixth Amendment was adopted,[87] we can glean from that record the type of proceedings to which the rights encompassed in the Sixth Amendment were designed to apply and the interests they were designed to safeguard.

First, the Sixth Amendment is distinct from the Fifth in that it protects only "the accused."[88] A prosecution, within the meaning of the Sixth Amendment, necessarily involves the "filing [of] formal charges in a

[85] U.S. Const. amend. VI.

[86] Although the right to a speedy trial may attach before an indictment issues, each of the rights encompassed in the Sixth Amendment attaches by the time an indictment is returned. See United States v. Black, 918 F.3d 243, 256 (2d Cir. 2019).

[87] See, e.g., Rothgery v. Gillespie County, 554 U.S. 191, 219 (2008) (Thomas, J., dissenting) (citing to 4 William Blackstone, Commentaries *289, to discern the Framers' intent); see also Sanjay Chhablani, Disentangling the Sixth Amendment, 11 U. Pa. J. Const. L. 487, 492 (2009) (noting the dearth of early Supreme Court opinions shedding light on the scope of Sixth Amendment protections).

[88] U.S. Const. amend. VI.

court with jurisdiction to try and punish the defendant."[89] The filing of a formal accusation transforms the proceeding into an adversarial one, with the government standing on one side of the courtroom as the accuser and the citizen standing on the other as the accused. That adversarial relationship between citizen and government is a "defining characteristic"[90] of a prosecution; perhaps above all else, the Sixth Amendment was designed to protect a citizen "faced with the prosecutorial forces of organized society."[91] And perhaps most importantly, a prosecution is a proceeding that can result in the infliction of punishment—most significantly, the loss of liberty.[92]

In our view, a supervised release revocation proceeding has all the "defining characteristics"[93] of a prosecution within the meaning of the Sixth Amendment. First, one accused of violating a condition of supervised release is formally accused of committing new, wrongful conduct in a court with the power to adjudicate guilt or innocence and impose punishment. Most significantly—and unlike the petitioners in *Morrissey* and *Gagnon*—a defendant convicted of violation conduct may be sentenced to a *new and additional* punishment, distinct from any punishment inflicted for the original offense. As a result, one facing revocation of supervised release is, for Sixth Amendment purposes, an "accused"[94]—she has been formally charged with committing an act to which the law "affixes punishment" in the form of an additional prison

[89] *Rothgery*, 554 U.S. at 223 (Thomas, J., dissenting); see also United States v. Haymond, 139 S. Ct. 2369, 2376 (2019) (plurality opinion) (describing a prosecution as "the process of exhibiting formal charges against an offender before a legal tribunal" (cleaned up) (quoting Noah Webster, An American Dictionary of the English Language (1st ed. 1828))).

[90] *Rothgery*, 554 U.S. at 234 (Thomas, J., dissenting).

[91] Id. at 198 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)); see also Middendorf v. Henry, 425 U.S. 25, 40 (1976) ("Yet the adversary nature of civilian criminal proceedings is one of the touchstones of the Sixth Amendment's right to counsel."); Williams v. Florida, 399 U.S. 78, 112 (1970) (Black, J., concurring in part and dissenting in part) (noting that the Fifth and Sixth Amendments were designed "to shield the defendant against state power").

[92] Note, An Argument for Confrontation under the Federal Sentencing Guidelines, 105 Harv. L. Rev. 1880, 1889 (1992) (arguing that the Sixth Amendment was "meant to apply" when "the state decides how to punish an individual for criminal behavior"); 4 William Blackstone, Commentaries *301 (defining a prosecution in part as "the next step towards the punishment of offenders"); Search for Collocate "Punish" Within Four Words of "Prosecute", Brigham Young University's Corpus of Founding Era American English, Version 6.1.0, https://lawcorpus.byu.edu/byucoeme/concordances (last visited Oct. 17, 2022) (thirteen hits) (enter query term "prosecute" in main search bar; then enter "punish" under the "collocates" tab below, with "scope left" and "scope right" set to four; then click "apply changes").

[93] *Rothgery*, 554 U.S. at 234 (Thomas, J., dissenting).

[94] U.S. Const. amend. VI.

sentence.[95] Finally, the proceeding convened to adjudicate her guilt—a revocation hearing—is inherently adversarial in nature. Although revocation proceedings may be initiated by a U.S. Probation Officer, a U.S. Attorney, or even the court itself, it is an Assistant U.S. Attorney, with all of the resources made available for prosecuting federal crimes, who generally takes on the burden of proving guilt by a preponderance of the evidence. And at that proceeding, the government—whether represented by a U.S. Probation Officer or a U.S. Attorney—has undoubtedly "committed itself to prosecute" such that "the adverse positions of government and defendant have solidified."[96] In other words, for Sixth Amendment purposes, the proceeding is indistinguishable from a traditional prosecution.

III. THE CONSTITUTIONAL WORK AROUNDS

Unlike with the right to indictment, courts have repeatedly wrestled with the question of whether the Sixth Amendment rights applicable to a traditional criminal prosecution govern supervised release revocation proceedings and have uniformly held that they do not. We consider the primary arguments advanced by those courts below.

[95] United States v. Haymond, 139 S. Ct. 2369, 2376 (2019) (plurality opinion) (cleaned up); see also id. at 2392 (defining the accused as "an individual '[c]harged with a crime, by a legal process'") (Alito, J., dissenting) (quoting Noah Webster, An American Dictionary of the English Language (1828)). Dissenting in *Haymond*, Justice Alito argued that one serving a term of supervised release is no longer the "accused," but has instead been properly convicted of the underlying offense, and that any sanctions imposed for violation conduct merely sanction a breach of the court's trust. Id. at 2392–93. As a result, he argued, the Sixth Amendment was inapplicable. Id. at 2392. But as Justice Alito also recognized, the original prosecution has ended by the time a revocation proceeding begins. Id. at 2393–95. And as discussed further below, there is no statutory support for the idea that revocation sanctions a defendant's breach of the court's trust. Instead, revocation can only reasonably be understood to sanction the new offense conduct—meaning one charged with a supervised release violation stands in the shoes of the "accused," for Sixth Amendment purposes. And although the underlying criminal conviction may certainly deprive one of certain constitutional rights, the right to be indicted and the right to trial by jury for a new prosecution are not among them. Cf. Strunk v. United States, 412 U.S. 434, 437–38 (1973) (acknowledging that defendant had the right to a speedy trial irrespective of the fact that he was incarcerated in a penitentiary on an unrelated charge). As a result, the mere fact that a releasee stands convicted of the crime giving rise to the term of supervised release does not afford the government the right to deprive her of Fifth and Sixth Amendment rights in a *new* prosecution.

[96] *Rothgery*, 554 U.S. at 233 (Thomas, J., dissenting) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

A. Part of the Original Penalty

Shortly after enactment of the ADAA, Congress amended Section 3583 to make it more punitive. Specifically, amendments enacted in 1987 had the effect of increasing the length of the supervised release term a court could impose, and, more importantly, the length of imprisonment a defendant could serve upon revocation.[97] Amendments passed in 1994 *required* "revocation" and imprisonment if a court found by a preponderance of the evidence that a supervisee had violated certain "conditions" of supervised release.[98]

Defendants sentenced pursuant to those amendments quickly began raising *ex post facto* challenges, forcing appellate courts to grapple, for the first time, with what post-revocation penalties were actually punishing.[99] Relying in part on the absence of constitutional protections prescribed by Section 3583(e) before supervised release could be revoked, a majority of appellate courts concluded that post-revocation imprisonment *had* to be part of the original penalty for the underlying crime.[100] In so holding, those courts acknowledged that the alternative interpretation—that the new prison term was punishing the violation conduct itself—was constitutionally problematic. In particular, if that new prison term was punishment for the new conduct, courts were imprisoning people for conduct that often did not constitute a crime and were doing so without any of the procedural protections available in an ordinary prosecution.[101]

The question reached the Supreme Court in *Johnson v. United States*, a case involving yet another *ex post facto* challenge to the application of a particular amendment to Section 3583.[102] Although acknowledging the

[97] Doherty, supra note 1, at 1003.

[98] Id. at 1003–04.

[99] Id. at 1004.

[100] Id. at 1006–07.

[101] E.g., United States v. Beals, 87 F.3d 854, 859 (7th Cir. 1996) (concluding that revocation had to sanction the original offense because "[c]onduct that violates the terms of supervised release, like that of parole violations, is often not criminal"); United States v. Meeks, 25 F.3d 1117, 1123 (2d Cir. 1994) (relying in part on the lack of "fundamental constitutional procedural protections" in a revocation proceeding to conclude that it must be punishing the original offense).

[102] Specifically, *Johnson* concerned a challenge to the application of § 3583(h), which authorized a district court to (1) revoke a term of supervised release; (2) impose a term of imprisonment; and (3) impose a *new* term of supervised release to follow imprisonment. 529 U.S. 694, 696 (2000).

"intuitive appeal"[103] of the idea that revocation sanctioned the violation conduct itself, the *Johnson* Court candidly explained that "construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release" would essentially render the statute unconstitutional.[104] More specifically, if the new term of imprisonment *was* sanctioning the new conduct, there were at least three major constitutional issues: (1) courts were imprisoning people for conduct that was not criminal; (2) courts were imprisoning people based on a finding by a single judge employing a preponderance of the evidence standard; and (3) where the violation conduct was criminal in its own right, courts were punishing people twice—potentially in violation of the Double Jeopardy Clause.[105] In short, if post-revocation penalties were attributable to the new offense conduct, revocation proceedings looked uncomfortably similar to criminal prosecutions, albeit without affording defendants the requisite constitutional protections.[106] Rather than address those constitutional problems, the *Johnson* Court offered a workaround—by calling the new prison term "part of the penalty for the initial offense," the Court suggested those constitutional problems could simply be "avoid[ed]."[107]

Ultimately, the *Johnson* Court also dodged the question whether the application of amendments to Section 3583 violated the Ex Post Facto Clause, rendering its discussion of the constitutionality of post-revocation penalties dicta that might reasonably have been disregarded.[108] Instead, and perhaps because of the dearth of other Supreme Court authority addressed to supervised release, lower courts seized upon that rationale in response to myriad challenges to the constitutionality of Section 3583. Claiming that post-revocation penalties could be "treated" or "deemed"

[103] Id. at 700.

[104] Id.

[105] Id. The double-jeopardy problem the Court identified in *Johnson* involved punishing violation conduct both as a supervised release violation and as the basis for a new prosecution. The Court did not consider the double-jeopardy problems discussed above—the fact that the imposition of an additional penalty for the original crime *also* violates the Double Jeopardy Clause.

[106] *Johnson* did not make that point explicitly; it did, however, cite to *Gagnon* to suggest that revocation was not akin to a prosecution. Id. at 700–01.

[107] Id. at 700.

[108] Id. at 713; see also Jacob Schuman, Criminal Violations, 108 Va. L. Rev. (forthcoming Dec. 2022) (manuscript at 125) (on file with authors) (noting the Court's evasion of that constitutional obstacle and its adoption of the "original offense" doctrine could be seen as dicta).

part of the original penalty—rather than new punishment for new conduct—courts purported to distinguish revocation proceedings from prosecutions. As a result, they determined that defendants in those proceedings were not entitled to "the full panoply of rights that criminal defendants generally enjoy."[109]

B. Conditional Liberty

The second argument invoked to reject Sixth Amendment challenges to revocation proceedings developed in response to *Apprendi v. New Jersey*, a Supreme Court decision issued in 2000.[110] *Apprendi* considered the difference between a sentencing factor and an element of a crime for Sixth Amendment purposes and involved a state sentencing scheme that blurred the lines between the two. Building on its prior precedents, the *Apprendi* Court drew a bright line rule. "Other than the fact of a prior conviction," the Court explained, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[111]

In the wake of *Apprendi* and its progeny,[112] defendants began to argue that, if the sanctions for violations of supervised release exceeded the statutory maximum for the underlying offense, the revocation sentence amounted to a violation of *Apprendi*.[113] Others raised more sweeping

[109] United States v. Peguero, 34 F.4th 143, 160 (2d Cir. 2022); see also United States v. Jackson, 559 F.3d 368, 371 (5th Cir. 2009) ("Post-revocation sanctions are not a separate penalty for purposes of the Double Jeopardy clause—they are part of the penalty for the original offense."); United States v. Gavilanes-Ocaranza, 772 F.3d 624, 627 (9th Cir. 2014) ("The revocation of supervised release is not a criminal prosecution for Sixth Amendment purposes, because the violation 'simply triggers the execution of the conditions of the original sentence.'" (quoting United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993))); United States v. Doka, 955 F.3d 290, 294 (2d Cir. 2020) (noting defendants in supervised release proceedings are not entitled to holding the government to a burden of proof beyond a reasonable doubt or to a trial by jury).

[110] 530 U.S. 466 (2000).

[111] Id. at 490.

[112] The Supreme Court followed up *Apprendi* with *Blakely v. Washington*, in which it clarified 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." 542 U.S. 296, 303 (2004) (emphasis omitted). Relying in part on that holding, the Court then decided *United States v. Booker*, in which it held that § 3553(b), which made the Guidelines mandatory and binding on district courts, was unconstitutional. 543 U.S. 220, 245 (2005).

[113] E.g., United States v. McIntosh, 630 F.3d 699, 702–03 (7th Cir. 2011); see also United States v. Huerta-Pimental, 445 F.3d 1220, 1222–25 (9th Cir. 2006) (holding *Apprendi* has no

challenges to the statutory scheme, claiming that imposing a term of imprisonment based solely on a single judge's findings—made by a preponderance of the evidence—violated the Fifth and Sixth Amendments.[114]

Perhaps because the "original penalty" rationale seemed to run headlong into the holding of *Apprendi* and its progeny, appellate courts confronting *Apprendi*-based challenges to revocation fell back on *Morrissey*, which, of course, is a decision about parole. In particular, courts invoked *Morrissey's* discussion of "conditional liberty" to justify revoking supervised release without affording a defendant's Sixth Amendment rights. One Second Circuit case—*United States v. Carlton*—offers the strongest example. The petitioner in *Carlton*, sentenced by a district court to serve thirty-five months' imprisonment for committing armed bank robbery while on supervised release, challenged his revocation sentence as violative of the Fifth and Sixth Amendments.[115] Recognizing that simply labeling that new punishment part of the original penalty did not satisfactorily resolve the Sixth Amendment problem, the *Carlton* court advanced a new theory. Reasoning that a defendant on supervised release—like one on parole—enjoys only a pared down version of liberty, the *Carlton* court explained that the petitioner was not entitled to the full complement of rights afforded one "to whom the presumption of innocence attaches."[116] In other words, by virtue of the fact that he had been convicted of a crime and sentenced to a term of supervised release, the petitioner had "surrender[ed] . . . certain constitutional rights" such as his "rights to trial by jury and to having accusations against him proved beyond a reasonable doubt."[117] In the wake of *Carlton*, other courts rejected challenges to the revocation scheme premised on *Apprendi* by invoking similar reasoning (and often by citing to *Carlton*).[118]

effect on the imposition of supervised release under § 3583); United States v. Work, 409 F.3d 484, 489–92 (1st Cir. 2005) (rejecting the defendant's argument that the inclusion of a term of supervised release as a part of his original sentence exposed him to additional punishment beyond the statutory maximum).

[114] United States v. Cunningham, 607 F.3d 1264, 1266–67 (11th Cir. 2010); United States v. Carlton, 442 F.3d 802, 807 (2d Cir. 2006).

[115] 442 F.3d at 807.

[116] Id. at 809.

[117] Id. at 809–10.

[118] E.g., *Cunningham*, 607 F.3d at 1267–68.

C. Breach of Trust

Finally, courts have deemed the Sixth Amendment inapplicable in revocation proceedings by concluding that post-revocation penalties merely sanction a defendant's "breach of trust" rather than punish the violation conduct itself. Citing principally to the Sentencing Commission's policy statement on supervision violations,[119] courts have reasoned that any new term of imprisonment imposed punishes the defendant's failure to comply with the judge's order setting conditions of supervised release.[120] Because the punishment imposed is divorced from the new offense conduct, those courts have reasoned, the proceeding is distinguishable from a prosecution.

In *United States v. Haymond*, the Supreme Court's most recent tangle with the constitutionality of Section 3583, the Court (specifically, a controlling concurrence) endorsed that rationale. *Haymond* concerned a challenge to the constitutionality of Section 3583(k), which provided that a judge who finds "by a preponderance of the evidence that a defendant on supervised release committed one of several enumerated offenses, including the possession of child pornography" *must* impose a sentence of at least five years' imprisonment.[121] The petitioner in *Haymond*, who had been sentenced to serve an additional five years in prison for violating a condition of supervised release, challenged his conviction and sentence as violative of the Fifth and Sixth Amendments as interpreted in *Apprendi*. Noting that the petitioner had been subjected to an increased statutory maximum penalty based solely on a judge's findings by a preponderance of the evidence, a plurality of the Supreme Court agreed.[122]

Concurring solely in the judgment, Justice Breyer disagreed with the idea of "transplant[ing] the *Apprendi* line of cases to the supervised-release context."[123] Nevertheless, he agreed that Section 3583(k) was unconstitutional. Unlike an ordinary revocation proceeding, which properly sanctioned "the defendant's 'breach of trust'—his 'failure to follow the court-imposed conditions' that followed his initial conviction," Section 3583(k) was "more like punishment for a new offense, to which

[119] U.S. Sent'g Guidelines Manual ch. 7, pt. A, introductory cmt. 3(b), at 498 (U.S. Sent'g Comm'n 2021).

[120] E.g., United States v. Watters, 947 F.3d 493, 497–98 (8th Cir. 2020).

[121] 139 S. Ct. 2369, 2374 (2019).

[122] Id.

[123] Id. at 2385 (Breyer, J., concurring).

the jury right would typically attach."[124] In other words, the dispositive question, for constitutional purposes, was the *purpose* of the new term of imprisonment: punishment for a breach of trust did not implicate the Sixth Amendment, whereas punishment for new criminal conduct certainly did.[125] Following *Haymond*, courts of appeals rejected a number of Sixth Amendment challenges to the statute by citing to that concurrence, concluding that because revocation punished a defendant's breach of trust—rather than the violation conduct itself—it was constitutionally sound.[126]

IV. THE CONSTITUTIONAL WORK AROUNDS DO NOT WORK

In our view, each of the primary arguments advanced to distinguish revocation proceedings from prosecutions to which the Sixth Amendment applies is without merit. Turning first to the rationale that revocation is part of the original penalty, the idea that, because "a term of supervised release is imposed as part and parcel of the original sentence," post-revocation sanctions are "part of the penalty for the initial offense" certainly has intuitive appeal: supervised release was imposed as part of the original sentence, and the defendant was warned at sentencing of the consequences for violating the conditions set by a judge.[127]

That rationale, however, ignores the plain text and legislative history of the SRA, which carefully delineates a term of supervised release from a term of imprisonment.[128] As the Supreme Court has explained, "[s]upervised release fulfills rehabilitative ends, distinct from those served by incarceration,"[129] and "prison time is 'not interchangeable' with supervised release."[130] Under Section 3583(e), supervised release and

[124] Id. at 2386. In reaching that conclusion, Justice Breyer relied in part on a policy statement from the U.S. Sentencing Guidelines Manual. In our view, such policy statements cannot shed any light on the reach of constitutional rights.

[125] Although Justice Breyer's concurrence appears designed to affirm on the narrowest possible ground, it is arguably a *broader* holding—instead of merely recognizing that revocation proceedings can constitute sentencing proceedings, it recognizes that they can constitute prosecutions.

[126] United States v. Peguero, 34 F.4th 143, 159 n.13 (2d Cir. 2022) (collecting cases).

[127] Id. at 160–61 (quoting Johnson v. United States, 529 U.S. 694, 700–01 (2000)) (citing United States v. McNeil, 415 F.3d 273, 277 (2d Cir. 2005)).

[128] 18 U.S.C. § 3583(a).

[129] United States v. Johnson, 529 U.S. 53, 59 (2000); see also United States v. Aldeen, 792 F.3d 247, 252 (2d Cir. 2015) ("Supervised release is not, fundamentally, part of the punishment; rather, its focus is rehabilitation.").

[130] Mont v. United States, 139 S. Ct. 1826, 1833 (2019) (quoting *Johnson*, 529 U.S. at 59).

imprisonment also serve different goals; Section 3583(e) excludes the need to "provide just punishment" from the factors a judge must consider in deciding whether to impose or to "revoke" supervised release.[131] In short, the punitive part of the sentence has been completed by the time a judge is considering revocation. Any new punishment imposed therefore cannot logically be considered part of the penalty for the original offense or even "part of the whole matrix of punishment which arises out of a defendant's original crimes."[132] Instead, it can only reasonably be understood as new punishment for new conduct,[133] and thus violative of the Grand Jury and Double Jeopardy Clauses of the Fifth Amendment.

Similarly, the argument that revocation merely sanctions a breach of trust is unsupportable. More specifically, a judge who imposes a term of supervised release is not granting a defendant a reprieve from imprisonment in exchange for the defendant's promise to comply with the conditions the judge sets. Instead, that judge is imposing an additional period of surveillance that begins only after the entire prison term she imposes has been served. Supervised release is therefore best understood as the *opposite* of trust.[134] As a result, any post-revocation term of

[131] 18 U.S.C. § 3583(e)(3) (cross-referencing 18 U.S.C. § 3553(a)(2)(B)–(D)); see also Tapia v. United States, 564 U.S. 319, 326 (2011) (noting that a court imposing a term of supervised release "may *not* take account of retribution . . . when imposing a term of supervised release").

[132] United States v. Flora, 810 F. Supp. 841, 842 (W.D. Ky. 1993). Further, to the extent that courts have deemed that rationale binding precedent because of *Johnson*, *Johnson* neither considered nor decided the general applicability of the Fifth and Sixth Amendments in revocation proceedings; it considered instead whether application of amendments to the SRA constituted an ex post facto violation in certain cases. Accordingly, *Johnson* is not controlling with respect to the applicability in revocation proceedings of the Grand Jury and Double Jeopardy Clauses of the Fifth Amendment or of Sixth Amendment rights.

[133] As some courts have pointed out, there is, of course, a statutory connection between the original sentence and the revocation term—§ 3583(e) sets a statutory maximum term of imprisonment based on the class of the original offense. E.g., United States v. Peguero, 34 F.4th 143, 161 n.14 (2d Cir. 2022). As Professor Schuman explains, however, that does not render the term of imprisonment imposed similar to parole because "parole revocation literally restored the defendant's original prison term" whereas "revocation of supervised release results in a new prison term limited by the class of the original conviction, not the original sentence." Schuman, supra note 108, at 172.

[134] As Professor Schuman recognizes,

> [There is] one situation in which revocation of supervised release might be considered punishment for a breach of trust. If a judge sentenced a defendant to a shorter term of imprisonment in exchange for imposing a longer term of supervised release, then that substitution of supervision for imprisonment could be considered an act of trust, and violating a condition could be viewed as a breach of that trust.

imprisonment cannot logically be understood to punish anything other than the new violation conduct.[135]

Moreover, even accepting the premise of the argument that revocation merely punishes failure to follow court orders, federal judges are not all-powerful despots with the authority to summarily imprison a person who disappoints them or breaches their trust. To be sure, judges have the statutory authority to punish persons for criminal contempt and to imprison or fine them for that contempt. But as discussed above, contempt proceedings require nearly all of the fundamental rights applicable to an ordinary prosecution. Therefore, even assuming that a post-revocation penalty merely sanctions the failure to follow a court order, the contempt authority does not justify the summary proceedings currently employed to adjudicate supervised release violations.

Finally, the argument that those on supervised release are entitled only to "conditional liberty" elides the fundamental distinctions between supervised release and parole. To be sure, the liberty of one serving a term of supervised release is "conditional" in one sense—failing to comply with conditions set by the sentencing judge may lead to imprisonment. But that is not the "conditional liberty" described by *Morrissey* or *Gagnon*. Both of those decisions considered systems in which a defendant received a benefit—freedom—in exchange for her promise to abide by certain restrictions. That grant of liberty was "conditioned" on compliance with those restrictions and could be revoked if the defendant failed to hold up her end of the agreement.[136] Supervised release, by contrast, involves no reprieve from prison granted in exchange for a defendant's good behavior. In the context of supervised release, the necessary "condition" never exists. As a result, the "conditional" liberty to which a defendant is subject is distinct from the contractual-like liberty described by *Morrissey* and *Gagnon*.

Schuman, supra note 108, at 174. But, as noted above, judges impose sentences of supervised release in the vast majority of cases, and, furthermore, "[n]either the supervised-release statute nor the sentencing guidelines require courts to exchange incarceration for supervision." Id.; see also Jacob Schuman, Revocation and Retribution, 96 Wash. L. Rev. 881, 908–09 (2021) (arguing mandatory minimum terms of both imprisonment and supervision often make it impossible for judges to reduce one penalty in favor of the other).

[135] Although *Johnson* "treat[s]" supervised release sentences as "part of the penalty for the initial offense," 529 U.S. at 700, that treatment actually *creates* the double jeopardy problem of twice punishing the same offense described above.

[136] See 18 U.S.C. § 3564(e) (sentence of probation is "conditional and subject to revocation").

Furthermore, *Morrissey* did not suggest that an individual on parole somehow forfeited constitutional protections by virtue of being on parole; instead, the Court reasoned that, once the government had successfully prosecuted an individual for a crime, it should not have to go through that burdensome process once again only to reimpose the *same sentence* a judge had previously imposed. Supervised release, by contrast, does not authorize a judge or parole board to afford a reprieve from prison in exchange for compliance with certain conditions. As a result, the "revocation" of supervised release is simply a new punishment, triggered by the commission of new wrongful conduct. To suggest that one on supervised release is entitled to lesser constitutional protections by virtue of having been convicted of the original offense, then, is to say that a criminal conviction cancels a person's right to constitutional protections in any future prosecution. Surely, that cannot be the case.[137]

CONCLUSION

Those who drafted the Fifth and Sixth Amendments did so with the goal of making it difficult for the government to arbitrarily imprison a person. The current supervised release system offers prosecutors and courts what amounts to an end run around those carefully crafted protections, an expedient route to imprisonment that avoids the inconveniences of obtaining an indictment, affording the right to jury trial, and proving guilt beyond a reasonable doubt. In our view, it is that very expediency that violates the Constitution, harming not only those whose constitutional rights are denied, but also eroding—prosecution by prosecution—the constitutional structure put in place by the Framers to protect ordinary citizens from the misuse of government power.

[137] Under that rationale, a supervisee enjoys constitutional rights when indicted in state or federal court, but not when facing a significant term of incarceration for violating supervised release. The limit or grant of constitutional rights therefore would turn entirely on a prosecutor's decision regarding how to pursue imprisonment—by going through the trouble of securing a federal indictment and formally charging a crime, or by simply asking the sentencing judge to revoke the term of supervised release.