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## Protecting Due Process from the PROTECT Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders

Brett M. Shockley

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# Protecting Due Process from the PROTECT Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders<sup>†</sup>

Brett M. Shockley\*

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### *I. Introduction*

Dr. Norman Earl McElheney was born in Atlanta, Georgia, on September 29, 1956.<sup>1</sup> The older of two children, Dr. McElheney was born into the seemingly quintessential All-American family—his father was an engineer, and his mother was an elementary school teacher.<sup>2</sup> Active in both his church and community, he became an Eagle Scout before graduating from high school.<sup>3</sup> Also while a high school student, McElheney joined "Amigos de las Americas" and traveled to Guatemala to help distribute medical vaccines to the country's poor.<sup>4</sup>

After high school, Dr. McElheney attended college at Emory University, majoring in chemistry.<sup>5</sup> He then enrolled at Georgia State University to pursue a Master's Degree in immunology, though he ultimately never completed the program, withdrawing from the school upon his acceptance to the Medical College of Georgia.<sup>6</sup> After finishing in the top ten percent of his graduating class and receiving his degree as a Doctor of Medicine, McElheney completed his residency at the University of California at San Francisco.<sup>7</sup> During this time, he also worked at two children's hospitals.<sup>8</sup>

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1. See *United States v. McElheney*, 524 F. Supp. 2d 983, 992 (E.D. Tenn. 2007) (detailing the background of the defendant).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

In his free time, Dr. McElheney enjoyed going to the lake with his children and relaxing on his farm with his three dogs, as well as exercising at his local health club.<sup>9</sup> He was also a member of numerous professional organizations and provided medical services for many local sports teams.<sup>10</sup> Never losing his charitable spirit, McElheney volunteered his services to a program that provided free health care to the poor and uninsured.<sup>11</sup>

The above description paints a portrait of the ideal role model: an educated and successful professional, an active and caring father, and a compassionate and generous member of society. However, this portrait is incomplete without one final brushstroke—on February 22, 2007, Dr. McElheney pleaded guilty to knowingly receiving child pornography on his computer<sup>12</sup> in violation of federal law.<sup>13</sup> As a first time offender, McElheney was subject to a minimum sentence of five years, with a maximum sentence of up to twenty years.<sup>14</sup> However, for the ease of computation, and for the sake of clarity in examples, the remainder of this Note will proceed as if Dr. McElheney had been charged with merely "possessing" child pornography, an offense that carries a maximum sentence of ten years in prison.<sup>15</sup> Possessing child pornography is considered to be a lesser included offense of knowingly receiving child pornography, and is also considered to be a more "passive" offense.<sup>16</sup>

Under either of these offenses, McElheney is subject to a period of supervised release following his incarceration.<sup>17</sup> In the federal system, the length of the supervised release term is dependent upon the seriousness of the

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9. *Id.* at 992–93.

10. *Id.* at 993.

11. *Id.*

12. *Id.* at 989.

13. See 18 U.S.C. § 2252A(a)(2)(A) (2006) (making it a crime to "knowingly receive" child pornography via interstate communication, including through the use of a computer).

14. *Id.* § 2252A(b)(1).

15. See *id.* § 2252A(a)(5)(B) (making it a crime to possess or access child pornography that has been transported or transferred via interstate communication, including through use of a computer); *id.* § 2252A(b)(2) (providing the statutory maximum sentence of ten years for a violation of subsection (a)(5)).

16. See *United States v. Davenport*, 519 F.3d 940, 947 (9th Cir. 2008) (holding that the Double Jeopardy Clause bars the prosecution of a defendant for both receiving child pornography and the lesser included offense of possessing child pornography); *United States v. McElheney*, 524 F. Supp. 2d 983, 1000 (E.D. Tenn. 2007) ("Possession is passive and receiving is more active.").

17. See 18 U.S.C. § 3583(k) (2006) (authorizing a five-year minimum term of supervised release for those defendants convicted of any crime under § 2252A).

offense.<sup>18</sup> Defendants convicted of Class A felonies (those offenses carrying a maximum penalty of life imprisonment or death) are subject to a maximum of five years of supervised release.<sup>19</sup> However, the PROTECT Act of 2003<sup>20</sup> altered the supervised release statute as it pertains to sexual offenses against minors.<sup>21</sup> Those defendants convicted of crimes included under 18 U.S.C. § 3583(k) face a supervised release period of a *minimum* of five years, with a maximum of lifetime supervision.<sup>22</sup> Unfortunately for Dr. McElheney, both receiving and possessing child pornography are included under this statute, and as a result, McElheney was sentenced to a period of lifetime supervised release following his incarceration.<sup>23</sup>

Congress justified this substantial increase from the general supervised release policy with specific deterrence and rehabilitation arguments:

[18 U.S.C. § 3583(k)] responds to the long-standing concerns of Federal judges and prosecutors regarding the inadequacy of the existing supervision periods for sex offenders, particularly for the perpetrators of child sexual abuse crimes, whose criminal conduct may reflect deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison. The current length of the authorized supervision periods is not consistent with the need presented by many of these offenders for long-term—and in some cases, life-long—monitoring and oversight.<sup>24</sup>

Congress has also expressed its desire to impose harsher penalties on child sex offenders in the Sentencing Guidelines, by stating that "if the instant offense of conviction is a sex offense . . . the statutory maximum term of supervised release is recommended."<sup>25</sup> Under the Sentencing Guidelines, policy statements are to be taken into account by the sentencing judge.<sup>26</sup> While

18. *Id.* § 3583(b).

19. *Id.* § 3583(b)(1); *see also id.* § 3559(a) (classifying each offense according to the letter grade system).

20. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650, 650–95 (2003) (codified as amended in scattered sections of 18 U.S.C.).

21. *See* 18 U.S.C. § 3583(k) (providing for increased supervised release terms for those defendants convicted of specified sexual offenses against minors).

22. *See id.* ("[T]he authorized term of supervised release for any offense [under this section] . . . is any term of years not less than 5, or life.").

23. *See United States v. McElheney*, 524 F. Supp. 2d 983, 1007 (E.D. Tenn. 2007) (imposing a 135-month sentence of imprisonment and lifetime supervised release).

24. H.R. REP. NO. 108-66, at 49–50 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 684.

25. U.S. SENTENCING GUIDELINES MANUAL § 5D1.2(b)(2) (2008).

26. *See* 18 U.S.C. § 3553(a)(5) (2006) (listing "any pertinent policy statement" as a factor to be considered in sentencing).

the Guidelines are no longer mandatory, judges still must consider them before imposing a criminal sentence.<sup>27</sup> Indeed, the previously mentioned policy statement has been used as justification by the courts for imposing periods of lifetime supervised release on defendants convicted of any crime covered by § 3583(k).<sup>28</sup>

It seems that § 3583(k) includes an array of crimes varying substantially with regards to reprehensibility—an argument supported by the wide range of maximum sentences available for the listed offenses.<sup>29</sup> Logically, one would think that the lengthier supervised release periods would be reserved for the more reprehensible crimes and criminals. However, if the policy statement of Congress recommending maximum sentences for all sex offenses is followed literally, each one of these offenses would result in the imposition of the exact

27. See *United States v. Booker*, 543 U.S. 220, 264 (2005) ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.").

28. See, e.g., *United States v. Pugh*, 515 F.3d 1179, 1199 (11th Cir. 2008) (holding that the policy statement urging the imposition of the maximum sentence for sex offenders is consistent with § 3583(k) and is proper justification for imposing a lifetime term of supervised release); *United States v. Allison*, 447 F.3d 402, 407 (5th Cir. 2006) (same).

29. Compare 18 U.S.C. § 2252A(a)(5) (2006) (providing a maximum sentence of ten years for the possession of child pornography, suggesting a lesser degree of culpability), with *id.* § 2245 (providing a maximum sentence of death or life imprisonment for the commission of murder during the course of a sexual offense, suggesting a maximum degree of culpability). But cf. *Pugh*, 515 F.3d at 1198 (finding that Congress "has expanded repeatedly criminal exposure for the possession of child pornography" and "[i]n light of these detailed legislative findings and numerous legislative enactments, we cannot help but underscore the seriousness of this crime"). Many courts have argued that it is necessary to harshly punish passive recipients of child pornography. See, e.g., *id.* ("Although the district court recognized that child pornography is 'a serious crime,' the sentence it imposed did not reflect the seriousness of the crime."). The Seventh Circuit has succinctly explained a common justification for such harsh punishment:

Young children were raped in order to enable the production of the pornography . . . . The greater the customer demand for child pornography, the more that will be produced. . . . Sentences influence behavior, or so at least Congress thought when in 18 U.S.C. § 3553(a) it made deterrence a statutory sentencing factor. The logic of deterrence suggests that the lighter the punishment for downloading and uploading child pornography, the greater the customer demand for it and so the more will be produced.

*United States v. Goldberg*, 491 F.3d 668, 673 (7th Cir. 2007).

While the logic seems sound, it is interesting that the opposite rationale has seemed to prevail in regards to the illicit drug trade. See e.g., John Shepard Wiley, Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1066 (1999) (asserting that a prosecutor that makes a habit of "fixating on [small] fry" as opposed to "big fish" has misguided priorities); Juan Torruella, *The "War on Drugs": One Judge's Attempt at a Rational Discussion*, 14 YALE J. ON REG. 235, 256 (1997) (lamenting "how often the penalties for drug trafficking are imposed on individuals other than those most culpable").

same term of supervised release—life.<sup>30</sup> This would appear to be at odds with Congress's implicit recognition, demonstrated through the enactment of varying statutory maximum sentences for these offenses, that these crimes do not all deserve the same level of punishment.<sup>31</sup> The Sentencing Guidelines explicitly make mention of the need for proportionality in the supervised release sentencing process, suggesting that the implementation of "three broad grades of violations would permit proportionally longer terms for more serious violations and thereby would address adequately concerns about proportionality."<sup>32</sup> Unfortunately for those defendants subject to a term of supervised release under § 3583(k), these "broad grades" do not apply to them. Instead, a "one-size-fits-all" approach—where defendants of all types receive lifetime terms—is employed.<sup>33</sup>

This judicial equalization of all offenses listed under § 3583(k) would not be as troubling if supervised release were more bark than bite. However, the statute provides for not only the imposition of extended periods of supervised release, but also for the revocation of supervised release—resulting in the incarceration of the defendant for the remainder of the period.<sup>34</sup> At a supervised release revocation hearing, a prosecutor must only prove by a preponderance of the evidence that the conditions of supervised release were violated.<sup>35</sup> Under the PROTECT Act, if a defendant who is required to register under the Sex Offender Registration and Notification Act (SORNA)<sup>36</sup> commits one of the listed sexual offenses while on supervised release, "the court *shall* revoke the term of supervised release and require the defendant to serve a term

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30. See 18 U.S.C. § 3583(k) (2006) (authorizing a maximum term of lifetime supervised release).

31. See *supra* note 29 and accompanying text (contrasting the statutory maximums for two different offenses covered by § 3583(k), and suggesting that the disparity reveals Congress's implicit recognition that the offenses have differing degrees of seriousness).

32. U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. A, introductory cmt. (2008).

33. See, e.g., *United States v. Kenrick*, 306 F. App'x 794, 795–96 (3d Cir. 2009) (construing the policy statement advising that sex offenders receive the maximum penalty as recommending lifetime periods of supervised release for those defendants subject to § 3583(k)); *United States v. Daniels*, 541 F.3d 915, 923 (9th Cir. 2008) (same); *United States v. Carpenter*, 280 F. App'x 866, 868 (11th Cir. 2008) (same); *United States v. Washington*, 257 F. App'x 605, 606 (4th Cir. 2007) (same); *United States v. Raftopoulos*, 254 F. App'x 829, 831 (2d Cir. 2007) (same); *United States v. Kennedy*, 499 F.3d 547, 553 (6th Cir. 2007) (same); *United States v. Allison*, 447 F.3d 402, 405 (5th Cir. 2006) (same).

34. See 18 U.S.C. § 3583(e)(3) (authorizing the incarceration of a defendant that violates the terms of supervised release).

35. *Id.*

36. Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, Title I, 120 Stat. 587, 587–611 (2006) (creating a sex offender registry).

of imprisonment."<sup>37</sup> Of course, in the case of a defendant like Dr. McElheney, who received a lifetime term, the revocation of supervised release would result in life imprisonment. This Note will address the constitutional concerns presented by such a scenario.

This Note will leave the policy positions of Congress that have resulted in the increased punishment for sex offenders largely undisputed. However, it would be remiss not to reference briefly a recent study that may, at least, weaken the popular belief that all sex offenders have higher recidivism rates than those criminals convicted of other crimes.<sup>38</sup> The study found that only nine percent of child pornography offenders with no prior criminal history committed a similar crime in the future.<sup>39</sup> This should be compared to the overall recidivism rate of almost fourteen percent for federal offenders with little to no prior criminal history.<sup>40</sup> Based on this study, it would appear that defendants like Dr. McElheney are less likely to re-offend than the average defendant, and thus are arguably less deserving of increased periods of supervised release. This having been said, the remainder of this Note will not contest the arguments and reasoning behind § 3583(k), but will only draw attention to potential constitutional and policy concerns presented by the supervised release scheme. There is no doubt that sexual offenders, especially those who commit a second sex offense while on supervised release, should be punished harshly. However, this punishment should be doled out through the adversarial trial process, and not through the streamlined revocation system.

Part II of this Note will provide a general overview of the supervised release system and the revocation process. These procedures will then be compared to those utilized during a full trial. This Section will establish the relative lack of protection afforded defendants seeking to avoid supervised release revocation and will emphasize the dangers presented by such a drastic increase in the length of supervised release periods.

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37. 18 U.S.C. § 3583(k) (2006) (emphasis added).

38. See Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 201, 208 (2005) ("[O]ur finding does contradict the assumption that all child pornography offenders are at very high risk to commit contact sexual offenses involving children.").

39. *Id.* at 207.

40. UNITED STATES SENTENCING COMMISSION, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 7–8 (2004), available at [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf); UNITED STATES SENTENCING COMMISSION, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES 2 (2004) (defining Criminal History Category I), available at <http://www.ussc.gov/TRAINING/GLOverview04.pdf>.



Part III will focus on the Supreme Court's findings in *Johnson v. United States*.<sup>41</sup> In examining a separate issue, the Court found that the revocation of supervised release is not to be considered punishment for the act that was in violation of the terms of release.<sup>42</sup> Instead, the Court determined that any period of incarceration stemming from revocation should be viewed as part of the punishment for the initial offense.<sup>43</sup>

Part IV will examine a line of cases evolving from *Apprendi v. New Jersey*,<sup>44</sup> which held that "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."<sup>45</sup> Under *Johnson*, the "penalty for the crime" includes any imprisonment stemming from the revocation of supervised release.<sup>46</sup> If, upon his release, Dr. McElheney's supervised release were to be revoked, resulting in lifetime imprisonment, the total penalty attributed to the child pornography charge would be a life sentence—in excess of the ten year maximum authorized for the crime. However, the existence of the violation leading to revocation was neither submitted to a jury, nor proven beyond a reasonable doubt. Therefore, the extended sentence was based on a fact not found in accordance with *Apprendi*. However, the courts of appeals have heard and rejected this argument, primarily reasoning that though "[s]upervised release is imposed as part of the original sentence . . . the imprisonment that ensues from revocation . . . is wholly derived from a different source" and therefore should not be aggregated with the original term of imprisonment for *Apprendi* purposes.<sup>47</sup>

Part V of the Note argues that the findings by the courts of appeals in avoiding the *Apprendi* problem are troublesome. The Supreme Court has justified the lack of due process protections at revocation hearings by finding

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41. See *Johnson v. United States*, 529 U.S. 694, 713 (2000) (holding that § 3583(e)(3) authorized the imposition of a period of supervised release after reincarceration, even before subsection (h) had been added).

42. *Id.* at 700.

43. *Id.* at 701.

44. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that a judge may not enhance a criminal sentence based on any facts other than those decided by the jury beyond a reasonable doubt).

45. *Id.*

46. See *Johnson*, 529 U.S. at 701 ("We therefore attribute postrevocation penalties to the original conviction.").

47. *United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005); see also *United States v. Ellis*, 33 F. App'x 150, 150 (4th Cir. 2002) ("[U]pon revocation of supervised release, the imposition of a term of incarceration is permissible even if the resulting sentence, combined with the sentence already served, exceeds the maximum sentence allowed for the substantive offense.").

revocation to be "part of the penalty for the initial offense."<sup>48</sup> However, the courts of appeals have maneuvered around the *Apprendi* issue by adding qualifiers to the Court's plain statement.<sup>49</sup> The current state of the law suggests that because the incarceration resulting from revocation is authorized by a statute separate from the one providing the statutory maximum for the underlying offense, *Apprendi* is not implicated.<sup>50</sup> This Note will argue that this rationale improperly elevates form over effect, and may have spawned double jeopardy implications.

Part VI will discuss those supervised release issues specific to child sex offenders. While much of the Note pertains to the federal supervised release system as a whole, it is important to remember the drastic punishments awaiting these particular offenders. The increased penalties have led to a variety of policy concerns, largely as a result of the confusing and sometimes contradictory legislative mandates handed down by Congress.

Part VII of this Note will suggest much-needed changes to the supervised release system. While the goals of the legislation mandating enhanced periods of supervised release for child sex offenders may be noble, the "due-process lite" afforded these defendants is disconcerting. The suggestions will aim to incorporate these goals while also attempting to provide increased protections to the accused. Part VII will also highlight the strengths and weaknesses of three separate proposals, and then demonstrate the practical application of each.

This Note will conclude by reexamining the constitutional issues presented by the current supervised release system. It will also emphasize the policy problems created by Congress through its often contradictory legislation. Finally, the Note will end by stressing the need for a coherent framework within which the federal supervised release system may accomplish its legitimate goals without infringing on the rights of the accused.

## *II. A Brief Overview of the Supervised Release Revocation Process*

Supervised release is very similar to probation, in that the subject must abide by certain conditions provided by the sentencing court, and must report to a probation officer whose duty it is to report any violations of those

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

49. *See, e.g., McNeil*, 415 F.3d at 277 (finding that though revocation is punishment for the original conviction, the punishment is separate from the punishment provided by the statute prohibiting the underlying offense).

50. *Id.*

conditions.<sup>51</sup> However, the primary difference between the two systems is that "probation is imposed instead of imprisonment, while supervised release is imposed after imprisonment."<sup>52</sup> According to the Second Circuit, this difference—which, as will soon be demonstrated, is crucial—leads to the ultimate conclusion that "the decision to grant or revoke parole only affects the time served in prison within the parameters of the prison sentence originally authorized by the crime of conviction[, whereas] [i]mprisonment for a violation of supervised release . . . can exceed those parameters."<sup>53</sup>

The revocation process typically begins when the monitoring probation officer files a petition to modify or revoke the terms of release based on an alleged violation.<sup>54</sup> Should the Government seek to detain the defendant while he is awaiting the revocation hearing, a detention hearing must be held unless waived by the defendant.<sup>55</sup> This detention hearing differs from one in the typical pretrial setting in a very significant manner—the *defendant*, not the Government, bears the burden of proof regarding flight risk and threat to the community.<sup>56</sup> To satisfy this burden, the defendant must prove the absence of these factors by clear and convincing evidence.<sup>57</sup>

A hearing will be held "to determine whether there is probable cause to believe that a violation occurred."<sup>58</sup> At this hearing, a defendant has the right to appear, and may request permission to question adverse witnesses.<sup>59</sup> Assuming that the Government satisfies the probable cause standard at the probable cause

51. See Douglas A. Morris, *Representing a Client Charged with Violating Conditions of Supervised Release—Part I*, CHAMPION MAG., Nov. 2006, at 28 (describing the supervised release process and providing general tips for those attorneys that may represent a client at a supervised release revocation hearing).

52. *United States v. Perez-Macias*, 335 F.3d 421, 427 n.13 (5th Cir. 2003), *cert. denied*, 540 U.S. 994 (2003) (citing U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. A, introductory cmt. (2008)).

53. *United States v. McNeil*, 415 F.3d 273, 276–77 (2d Cir. 2005).

54. *Morris*, *supra* note 51, at 28.

55. See *id.* at 29 (detailing the supervised release revocation process) (citing FED. R. CRIM. P. 32.1(a)(1)).

56. Compare FED. R. CRIM. P. 32.1(b)(6) (putting the burden of proof in a detention hearing on the defendant), with *United States v. Perez-Franco*, 839 F.2d 867, 870 (1st Cir. 1988) ("The burden of persuading the court that [the defendant should be detained] . . . rests with the government.").

57. 18 U.S.C. § 3143 (2006).

58. *United States v. Pelnsky*, 129 F.3d 63, 66 n.4 (2d Cir. 1997) (citing FED. R. CRIM. P. 32.1(b)).

59. See FED. R. CRIM. P. 32.1(b)(1)(B)(iii) (requiring the presiding judge to allow the defendant an opportunity to question adverse witnesses, "unless the judge determines that the interest of justice does not require the witness to appear").

hearing, the revocation hearing must be held within a reasonable amount of time.<sup>60</sup>

A defendant subject to a revocation hearing is entitled to several rights. The defendant must receive written notice of the alleged violation of the terms of release, and be notified of the right to retain counsel or to have counsel appointed.<sup>61</sup> Before the hearing, the Government's evidence against the defendant must be disclosed.<sup>62</sup> During a revocation hearing, the defendant must be given the opportunity to appear, present evidence, and question adverse witnesses.<sup>63</sup> However, if the court determines that the interests of justice do not require the appearance of a witness, the defendant may be denied that opportunity.<sup>64</sup>

These statutory rights do not achieve the breadth of protection provided by a guarantee of due process, and, as will be discussed later, the Supreme Court has declined to require full due process protections during revocation hearings.<sup>65</sup> For example, as previously mentioned, a defendant's right to question an adverse witness may be sacrificed if the court finds that the appearance of the witness would not further the interests of justice.<sup>66</sup> In a typical trial setting, this would likely violate the Confrontation Clause.<sup>67</sup> Perhaps most notable, and worrisome, is that a revocation hearing does not include the right to trial by jury.<sup>68</sup> Also disconcerting is the fact that the Government may discharge its burden of proof by satisfying only a preponderance of the evidence standard.<sup>69</sup> To further handicap the defendant,

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60. *Id.* 32.1(b)(2).

61. *Id.* 32.1(b)(2)(A), (D).

62. *Id.* 32.1(b)(2)(B).

63. *Id.* 32.1(b)(2)(C).

64. *Id.*; see also *United States v. Martin*, 382 F.3d 840, 846 (8th Cir. 2004) (finding that the failure to allow the defendant to confront an adverse witness did not violate due process because the Government showed good cause for not presenting the witness).

65. See *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984) (finding that revocation hearings do not require full constitutional procedural protections); see also *infra* Part III (examining the Court's treatment of supervised release in *Johnson v. United States*).

66. FED. R. CRIM. P. 32.1(b)(2)(C); see also *Martin*, 382 F.3d at 846 (finding that if the Government shows good cause, the court may refuse to allow the defendant to confront an adverse witness).

67. See, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: The right physically to face those who testify against him, and the right to conduct cross-examination." (citing *Delaware v. Fensterer*, 474 U.S. 15, 18–19 (1985) (per curiam))).

68. See *Johnson v. United States*, 529 U.S. 694, 700 (2000) (stating that a revocation hearing requires only a bench hearing).

69. See *id.* (finding that supervised release revocation need only be based on a

hearsay evidence may be used in revocation hearings, and its admission does not violate the Sixth Amendment.<sup>70</sup> Compared to a full trial, the Government not only has fewer restrictions, but also a burden of proof that is much easier to satisfy.<sup>71</sup> To use a football analogy, it is as if the Government (playing offense) is able to use twice as many players as the defense, *and* only has to reach the fifty-yard line to score a touchdown. This overwhelming advantage, when viewed in light of the increased penalties under § 3583(k), is particularly troublesome.

### *III. The Supreme Court Speaks on Supervised Release: Johnson v. United States*

The Supreme Court addressed the federal supervised release system in *Johnson v. United States*.<sup>72</sup> While the specific issue in that case is not particularly relevant to the topic of this Note, the Court engaged in a very important general discussion of supervised release.<sup>73</sup> In *Johnson*, the defendant was convicted of a crime in 1993, and a three-year period of supervised release was included as part of the sentence.<sup>74</sup> Upon revocation, the district court ordered that the defendant be incarcerated for eighteen months and imposed an *additional* twelve-month term of supervised release.<sup>75</sup> While this practice is now authorized explicitly under § 3583(h), that section was not added until 1994—after the defendant's conviction.<sup>76</sup> Johnson appealed, arguing that his sentence violated the Ex Post Facto Clause of the Constitution,<sup>77</sup> because

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preponderance of the evidence standard).

70. See *United States v. Kelley*, 446 F.3d 688, 691–92 (7th Cir. 2006) (finding that hearsay evidence is admissible during revocation hearings); see also FED. R. EVID. 1101(d) (declaring that the Federal Rules of Evidence do not apply in revocation hearings).

71. See *supra* Part II (discussing the limited procedural protections given to a defendant at a revocation hearing).

72. See *Johnson v. United States*, 529 U.S. 694, 713 (2000) (holding that § 3583(e)(3) authorized the imposition of a period of supervised release after reincarceration, even before subsection (h) had been added).

73. See *id.* at 699–702 (discussing supervised release).

74. *Id.* at 697.

75. *Id.* at 698.

76. See 18 U.S.C. § 3583(h) (2006) ("When 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."); see also *Johnson*, 529 U.S. at 698 (explaining that subsection (h) was not added to § 3583 until 1994).

77. See U.S. CONST. art. I, § 9 (forbidding Congress from prosecuting a defendant for an act committed before the act had been criminalized by statute).

§ 3583 did not authorize the imposition of an additional term of supervised release upon revocation until subsection (h) was added to the statute.<sup>78</sup> The Sixth Circuit agreed that no other part of the statute authorized the practice, but still upheld the sentence.<sup>79</sup> The court reasoned that there had been no retroactive application of subsection (h), because the revocation of Johnson's supervised release was punishment for his violation of the conditions of supervised release.<sup>80</sup> And because the violation took place after subsection (h) had been added, it was not applied retroactively—and, therefore, there was no ex post facto violation.<sup>81</sup>

The Supreme Court recognized that "this understanding of revocation of supervised release has some intuitive appeal."<sup>82</sup> However, the Court also recognized that if revocation were to be considered punishment for violating the terms of release, many constitutional questions would be raised.<sup>83</sup> The Court described several of these constitutional issues. First, because revocation can be based on conduct that is not actually criminal, it would be impossible to impose a period of incarceration as punishment for that noncriminal behavior.<sup>84</sup> Second, a defendant's right to due process would be violated, as no right to a jury trial is guaranteed at a revocation, and only a preponderance of the evidence standard is used.<sup>85</sup> Should revocation be considered "new punishment," due process would be required.<sup>86</sup> Third, the Court noted that "[w]here the acts of violation are criminal in their own right, they may be the

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78. *Johnson v. United States*, 529 U.S. 694, 698 (2000).

79. *See id.* (explaining that though the Sixth Circuit joined the majority of the federal courts of appeals in finding that § 3583(e)(3) did not authorize a court to impose a new term of supervised release following reincarceration, it would uphold the sentence on different grounds).

80. *Id.* at 698–99.

81. *See id.* at 699 ("With no retroactivity, there could be no Ex Post Facto Clause violation.").

82. *Id.* at 700.

83. *See id.* ("[S]erious constitutional questions . . . would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release.").

84. *Id.* But *see infra* note 269 (providing an analogous example where a defendant may be incarcerated for activity that would typically be considered noncriminal, but becomes criminal when in violation of a judicial order).

85. *See Johnson v. United States*, 529 U.S. 694, 700 (2000) (suggesting that due process violations would occur if revocation were to be considered punishment for the violative acts because there is no jury trial or reasonable doubt standard at revocation hearings).

86. *See United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005) (explaining that because "a violation of supervised release is not a separate basis for criminal punishment," full due process protections are not required).

basis for separate prosecution, which would raise an issue of double jeopardy."<sup>87</sup> If a person is "punished" twice—once by way of revocation, and again through a full prosecution—for the same criminal act, that person would be "twice put in jeopardy of life or limb" for the same offense.<sup>88</sup> Taking these concerns into account, the Court found that "[t]reating postrevocation sanctions as part of the penalty for the initial offense . . . avoids these difficulties," and therefore determined that postrevocation penalties should be attributed to the original conviction.<sup>89</sup>

#### *IV. The Revocation of Supervised Release After Apprendi, Blakely, and Booker*

##### *A. Apprendi v. New Jersey*

In *Apprendi v. New Jersey*, defendant Apprendi was arrested for firing several shots into the home of an African-American family that recently had moved into a previously all-white neighborhood.<sup>90</sup> Apprendi was charged with the "possession of a firearm for an unlawful purpose," classified as a "second-degree" offense under New Jersey law.<sup>91</sup> As a result of this classification, Apprendi faced between five and ten years imprisonment.<sup>92</sup> However, a separate statute provided for an increased term of imprisonment if the trial judge were to find, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity."<sup>93</sup> Under this "hate-crime" provision, Apprendi faced between ten and twenty years for each second-degree offense, or double that which he would have faced otherwise.<sup>94</sup>

Apprendi entered into a plea agreement, under which he pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose,

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87. *Johnson*, 529 U.S. at 700.

88. U.S. CONST. amend. V, cl. 2.

89. *Johnson*, 529 U.S. at 700–01.

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

91. *Id.* at 468 (citing N.J. STAT. ANN. § 2C:39-4(a) (West 1995)).

92. *Id.* (citing N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995)).

93. N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000).

94. *See Apprendi*, 530 U.S. at 469 (explaining the effect of the "hate-crime" provision on the substantive charges facing the defendant) (citing N.J. STAT. ANN. § 2C:43-7(a)(3) (West Supp. 1999–2000)).

as well as one count of a separate third-degree offense.<sup>95</sup> As part of the plea agreement, the State reserved the right to seek increased penalties under the hate-crime provision for one count of the second-degree charge.<sup>96</sup> At the plea hearing, the trial judge found sufficient evidence to accept the guilty pleas for all counts.<sup>97</sup>

If the hate-crime enhancement did not attach, Apprendi faced a statutory maximum of twenty years imprisonment—ten years for each count.<sup>98</sup> However, if the judge were to apply the enhancement, Apprendi faced a maximum of thirty years imprisonment—twenty years for the enhanced count and ten for the other.<sup>99</sup> After an evidentiary hearing to determine Apprendi's purpose for the shooting, in which both parties presented evidence, the judge found by a preponderance of the evidence that the actions were made "with a purpose to intimidate," and thus applied the hate-crime enhancement.<sup>100</sup> Based on these findings, the trial judge sentenced Apprendi to a twelve-year term of imprisonment for the enhanced second-degree offense and shorter terms for the other counts.<sup>101</sup>

Apprendi appealed the sentencing, arguing that due process required a jury to find beyond a reasonable doubt that he possessed the bias upon which his hate crime sentence was based.<sup>102</sup> Upon reaching the Supreme Court, the issue was presented as "whether the 12-year sentence imposed [for the enhanced second-degree offense] was permissible, given that it was above the 10-year maximum for the offense."<sup>103</sup> The Court, one year earlier, had declared that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other 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."<sup>104</sup> Here, the Court concluded that the same due process requirements apply to the

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95. *Id.* at 469–70.

96. *Id.* at 470.

97. *Id.*

98. *See id.* (providing the aggregate maximum sentences under New Jersey law without the hate-crime enhancement). The sentence from the third-degree charge was to run concurrently with the other sentences. *Id.*

99. *See id.* (providing the aggregate maximum sentences under New Jersey law including the hate-crime enhancement).

100. *Id.* at 471.

101. *Id.*

102. *Id.*

103. *Id.* at 474.

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



states under the Fourteenth Amendment.<sup>105</sup> The Court later reiterated and reapplied this holding in other cases, including *Blakely v. Washington*.<sup>106</sup>

### B. *Blakely v. Washington*

Defendant Blakely pleaded guilty to kidnapping his estranged wife, admitting facts that supported a maximum sentence of fifty-three months.<sup>107</sup> Blakely had been diagnosed with various personality disorders, and his wife ultimately filed for divorce.<sup>108</sup> In a misguided attempt to change her mind, Blakely bound her arms with duct tape and forced her into a wooden box in the bed of his pickup truck at knifepoint.<sup>109</sup> Despite the state's recommendation of the maximum sentence of fifty-three months, the trial judge determined that an exceptional sentence of ninety months was warranted.<sup>110</sup> The increase was based on a finding of "deliberate cruelty," a statutorily enumerated ground for departure in domestic violence cases.<sup>111</sup>

Blakely objected to the increased sentence, and the judge then conducted a three-day bench hearing featuring testimony from a variety of witnesses and experts, including Blakely himself.<sup>112</sup> Based on this hearing, the judge confirmed his initial determination that "deliberate cruelty" was satisfied, and that a ninety-month sentence was therefore appropriate.<sup>113</sup> The Supreme Court applied *Apprendi*'s rationale in ruling that this exceptional sentence was unconstitutional.<sup>114</sup>

In reaching this conclusion, the Court stressed 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*

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105. See *id.* (extending to the states, via the Fourteenth Amendment, the *Jones* determination that any fact that could increase the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt).

106. See *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (holding 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") (emphasis omitted).

107. *Id.* at 298.

108. *Id.*

109. *Id.*

110. *Id.* at 300.

111. *Id.* (citing WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii) (2000)).

112. *Id.*

113. *Id.* at 301.

114. See *id.* at 301–02 (reasoning that *Apprendi* clearly applied in this case, and therefore the "deliberate cruelty" element must be submitted to a jury).

by the defendant."<sup>115</sup> By preventing a judge from unilaterally imposing a sentence in excess of the statutory maximum, the Court hoped "to give intelligible content to the right of jury trial," and to "ensure[] the people's ultimate control in the . . . judiciary."<sup>116</sup> To summarize, after *Apprendi* and *Blakely*, trial judges are, during sentencing, without discretion to utilize any fact that was not found by a jury or admitted in a plea agreement by the defendant.

### C. *Blakely in the Supervised Release Context*

The position championed by the Court in these cases seemingly would be quite applicable to supervised release schemes of all types. Using the facts of *Blakely*, a parallel can be drawn easily between that case and one involving supervised release. While the following hypothetical will use similar facts to those in *Blakely*, it is important to keep in mind that the defendants facing the supervised release scheme under 18 U.S.C. § 3583(k) are subject to far more drastic penalties than under the standard supervised release scheme.<sup>117</sup> Assume that *Blakely* had actually been sentenced to the maximum fifty-three month sentence for kidnapping. Next, imagine that the judge imposed an additional thirty-seven month term of supervised release, instead of attempting to enhance the sentence by that length via a finding of "deliberate cruelty," as happened in *Blakely*.<sup>118</sup> Continuing the hypothetical, assume that immediately upon release from the fifty-three month sentence, *Blakely* was accused of violating the terms of his supervised release, and the judge held a bench hearing to determine whether he should be re-incarcerated for the remaining thirty-seven months.

Comparing this hypothetical to the actual facts of *Blakely* described above, one can immediately see several key similarities. In both situations the fifty-three month sentence is uncontested by the defendant—only the potential thirty-seven month addition is challenged as a violation of *Apprendi*.<sup>119</sup> In both

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115. *Id.* at 303 (citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

116. *Id.* at 305–06.

117. See 18 U.S.C. § 3583(k) (2006) (increasing the range of potential supervised release periods for child sex offenders from a maximum of five years to a maximum of life).

118. See *Blakely v. Washington*, 542 U.S. 296, 300 (2004) ("[T]he judge rejected the State's recommendation and imposed an exceptional sentence of 90 months—37 months beyond the standard maximum.").

119. See *id.* at 301–02 (describing *Blakely*'s argument in the language of *Apprendi*). *Blakely* claimed that the judge's "sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." *Id.*; see also *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) ("[U]nder the Due Process Clause of the Fifth Amendment and the . . . jury trial guarantees of the Sixth

cases, the statutory maximum, based upon the facts admitted by the defendant in the plea agreement, was fifty-three months, and in both cases, the defendant faced a potential enhancement of thirty-seven months. And in both situations, the potential enhancement was based upon a fact, either the existence of "deliberate cruelty" or the violation of the terms of release, which would be found by a judge in a bench hearing.

One need not engage in strenuous legal gymnastics to argue that both scenarios should be deemed unconstitutional. After all, in *Blakely*, the Court fervently stressed the importance that a jury determine any fact that would increase a sentence beyond the statutory maximum:

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," rather than a lone employee of the State.<sup>120</sup>

Looking at the hypothetical scenario, the defendant was scheduled to be incarcerated for only fifty-three months, within the acceptable range. However, the problem arises when the supervised release is revoked, and another thirty-seven months of imprisonment is imposed.<sup>121</sup> Granted, the revocation is based on some new act, deemed to be a violation of the terms of release, but the punishment for that act—incarceration—was authorized by the initial sentence.<sup>122</sup> Had that initial sentence not included a term of supervised release, no revocation (and thus no incarceration) would be possible. A situation is presented in which the kidnapping charge, which carries a maximum sentence of only fifty-three months given the facts admitted, has led to ninety months of imprisonment, far more than authorized by the admitted facts, and seemingly in violation of the rationale laid out in *Apprendi* and *Blakely*.

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Amendment, any fact (other 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." (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

120. *Blakely*, 542 U.S. at 313–14 (citing WILLIAM BLACKSTONE, 3 COMMENTARIES 373–74, 379–81).

121. *Cf. id.* at 300 (explaining that *Blakely* did not object to the original fifty-three month sentence, but only to the imposition of the additional thirty-seven month period).

122. *See Johnson v. United States*, 529 U.S. 694, 701 (2000) ("We . . . attribute postrevocation penalties to the original conviction.").

*D. The Courts of Appeals Reject the Apprendi Argument*

Despite the clear commands of *Apprendi* and *Blakely*, not a single circuit has adopted the above reasoning as it pertains to supervised release; in fact, most of the courts of appeals have held the exact opposite—that the revocation of supervised release does not implicate these cases or the concerns expressed therein.<sup>123</sup> Though the Supreme Court has not yet spoken on the constitutionality of supervised release in the aftermath of *Blakely*, it recently refused to grant certiorari in a case where the defendant presented this same issue.<sup>124</sup> However, despite the near unanimity of result, the justifications put forth by the courts of appeals have been scattered and somewhat inconsistent.

Both the Fourth and Eighth Circuits have determined that the Supreme Court already has ruled implicitly on the issue.<sup>125</sup> In *United States v. Booker*,<sup>126</sup> the Court determined that the mandatory Federal Sentencing Guidelines were

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123. See Petition for Writ of Certiorari at 14, *Faulks v. United States*, 128 S. Ct. 38 (2007) (No. 06-999) (claiming that "[e]ight federal courts of appeals have struggled with the constitutionality of Section 3583(e)(3) in light of *Blakely*," but have upheld the statute "[i]n an apparent effort to preserve broad judicial sentencing power").

124. See *id.* at 11–12 (arguing that *Apprendi* and *Blakely* render unconstitutional those supervised release periods in excess of the maximum sentence authorized by the statute for the underlying offense).

125. See *United States v. Faulks*, 195 F. App'x 196, 198 (4th Cir. 2006) (finding that the Supreme Court had found, implicitly, that the federal supervised release system was constitutional); *United States v. Coleman*, 404 F.3d 1103, 1104 (8th Cir. 2005) ("Among the . . . provisions of the Sentencing Reform Act that the Court recognized as constitutionally valid was the supervised release statute.").

126. See *United States v. Booker*, 543 U.S. 220, 227 (2005) (holding that the portions of the Federal Sentencing Guidelines that required mandatory application of the Guidelines must be excised). In *Booker*, the Supreme Court considered the validity of the mandatory Federal Sentencing Guidelines. *Id.* at 226. The Court determined that the mandatory Guidelines were incompatible with its holding in *Blakely* and therefore held that the Guidelines could only be applied in an advisory manner. *Id.* at 245. *Booker*, the defendant, was found to have possessed "at least 50 grams of crack cocaine," based on evidence that he had just over ninety grams—this crime carried a statutory maximum sentence of twenty-one years and ten months. *Id.* at 227. However, the judge found by a preponderance of the evidence during the sentencing hearing that *Booker* actually possessed an additional 566 grams. *Id.* Based on these new findings, the Federal Sentencing Guidelines required a sentence of thirty years to life. *Id.* Because of the mandatory nature of the Guidelines, the judge imposed a thirty-year sentence. *Id.* However, the Court found that *Blakely* applies to the Sentencing Guidelines, and therefore *Booker* could not have been sentenced to more than the term authorized by his conviction—twenty-one years and ten months. *Id.* at 244. The Court went on to find that the Guidelines would be constitutional if they were simply advisory and merely aided a judge in exercising his discretion within the statutory range. *Id.* at 233. Because of this determination, the portions of the Guidelines that called for mandatory application were severed and excised, leaving only an advisory tool for judges. *Id.* at 245.

unconstitutional.<sup>127</sup> To remedy the problem, the Court ruled that the Guidelines could be considered in an advisory capacity, but were no longer to be considered as mandatory.<sup>128</sup> In doing so, the Court stated that "we nevertheless do not believe that the entire statute must be invalidated . . . [as] [m]ost of the statute is perfectly valid."<sup>129</sup> Immediately thereafter, the Court cited several examples of "valid" provisions, including § 3583 pertaining to supervised release.<sup>130</sup>

Based on this general language, the Fourth Circuit matter-of-factly concluded that the Court had considered the constitutionality of supervised release in the wake of *Blakely* and found no violation.<sup>131</sup> This reasoning does not consider adequately the context of the statement in *Booker*. The Court was in the process of excising those parts of the Sentencing Guidelines that were mandatory in nature.<sup>132</sup> Because supervised release has always been discretionary, and not mandatory, the Court had no reason to include § 3583 in those parts of the statute that were to be excised.<sup>133</sup> It seems 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.<sup>134</sup>

127. See *id.* at 226–27 (finding that *Blakely* applies to the Federal Sentencing Guidelines, rendering them unconstitutional). During sentencing, a judge must determine whether certain aggravating or mitigating factors are present. *Id.* Based on these factors, the sentencing range under the Guidelines will increase or decrease accordingly. *Id.* When the Guidelines were mandatory, a judge would be required to impose a sentence within the applicable sentencing range. *Id.* at 233–34. Because the new range may be above the statutory maximum for the offense found by the jury or admitted by the defendant, the Guidelines were often in direct conflict with *Blakely*. *Id.* at 243. To avoid this conflict, the Court ruled that the Guidelines may function only in an advisory capacity. *Id.* at 245.

128. *Id.*

129. *Id.* at 258.

130. See *id.* (listing the supervised release scheme set forth in § 3583 as a part of the statute that is not mandatory, and is thus "perfectly valid").

131. See *United States v. Faulks*, 195 F. App'x 196, 198 (4th Cir. 2006) (employing the language in *Booker* in reaching the conclusion that "there is no basis in law to support the argument" that the supervised release statute is invalid).

132. See *United States v. Booker*, 543 U.S. 220, 246, 259 (2005) (finding that any conflict with *Blakely* will be avoided if the Guidelines function only in an advisory capacity, and asserting that even in this reduced role, the Guidelines will still serve their primary objective—uniformity in sentencing).

133. 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.").

134. See *Booker*, 543 U.S. at 258 (listing portions of the statute that remained unaffected by the determination that the Guidelines were no longer to be considered mandatory). Along with the supervised release system under § 3583, the Court cited 18 U.S.C. §§ 3551, 3552,

Other circuits have put forth different reasons to justify the constitutionality of the supervised release scheme. In *United States v. Huerta-Pimental*,<sup>135</sup> the Ninth Circuit determined that no constitutional violation is present because the revocation of supervised release is authorized by the original conviction.<sup>136</sup> The court found that the statute specifying the statutory maximum for the underlying offense authorizes the trial judge to apply § 3583 and impose a period of supervised release to be served post-incarceration.<sup>137</sup> In that case, for example, the defendant pleaded guilty to attempting to enter the United States illegally and was sentenced to sixty-three months in prison under § 1326.<sup>138</sup> This guilty plea allowed § 3583 to "kick in," authorizing the judge to impose an additional three-year period of supervised release.<sup>139</sup> Upon revocation of his supervised release, the defendant was sentenced to serve another two years in jail, for a total period of eighty-seven months—seemingly in excess of the maximum authorized by his plea arrangement under § 1326.<sup>140</sup> However, the court found that "supervised release . . . is part of the original sentence authorized by conviction."<sup>141</sup> Because the three-year period of supervised release was "a part" of the original sixty-three month sentence, it should not be added to the end of that sentence in determining the length of punishment, and therefore no *Apprendi* violation existed at the time of the original sentencing.<sup>142</sup>

The First Circuit reached the same conclusion as its sister circuits in *United States v. Work*.<sup>143</sup> The court also found that a conviction or guilty plea

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3554, and 3555 as examples of those portions of the Guidelines that did not need to be severed. *Id.* Section 3551 provides a description of authorized sentences, and the others deal with presentence reports, forfeiture, and notification to victims, respectively. *Id.*

135. See *United States v. Huerta-Pimental*, 445 F.3d 1220, 1223–24 (9th Cir. 2006) (holding that *Apprendi* is not implicated by a supervised release period that extends beyond the statutory maximum for the underlying offense, because supervised release is merely a part of the initial sentence).

136. See *id.* (finding no Sixth Amendment violation under *Apprendi* and *Blakely*).

137. See *id.* at 1223 ("Section 3583, one of several statutes that together govern the federal criminal sentencing structure, authorizes the imposition of supervised release upon conviction of a qualifying offense.").

138. *Id.* at 1221.

139. *Id.* at 1222.

140. See *id.* (summarizing the defendant's argument).

141. *Id.* at 1223.

142. See *id.* at 1224 (concluding that the "district court's imposition of supervised release simply fails to engage *Apprendi*" because the defendant was not "exposed . . . to additional punishment above the statutory maximum").

143. See *United States v. Work*, 409 F.3d 484, 486 (1st Cir. 2005) (finding that no *Apprendi* violation occurred).

under a statute would enable a trial judge to attach a period of supervised release under § 3583.<sup>144</sup> In *Work*, the defendant was sentenced to a term of thirty-eight months for an offense that carried a maximum of forty-one months.<sup>145</sup> His supervised release was later revoked, and he was subject to an additional fourteen months of incarceration.<sup>146</sup> The defendant argued that he could only be sentenced to an additional three months, as his conviction authorized a maximum of forty-one months imprisonment.<sup>147</sup> The court rejected this argument.<sup>148</sup> Like the Ninth Circuit, the First Circuit found that "[t]he reference to supervised release as being 'part of the sentence' does not mean that a federal criminal sentence must be aggregated for all purposes."<sup>149</sup> The court then determined that the thirty-eight month sentence was within the forty-one month maximum as provided by the statute, and that the fourteen-month sentence was within the range authorized by § 3583.<sup>150</sup> As such, both sentences need not be aggregated, but may be looked at separately in relation to the statute authorizing that sentence.<sup>151</sup>

The Second Circuit has noticed the potential constitutional issues presented by the supervised release system in light of *Apprendi* and *Blakely*.<sup>152</sup>

144. See *id.* at 489 ("[T]he conviction authorizes the court to 'include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.'" (quoting 18 U.S.C. § 3583(a) (2006))).

145. *Id.* at 488.

146. *Id.*

147. See *id.* (explaining the defendant's argument that the revocation of supervised release would violate *Apprendi*).

148. See *id.* ("This argument is more cry than wool.").

149. *Id.* at 489.

150. See *id.* at 490–91 (finding that because both portions of the original sentence were within the permissible ranges provided by the relevant statute, the statutory maximum was not exceeded and no *Apprendi* violation occurred).

151. See *id.* at 490 ("[W]hen determining whether a sentence exceeds the maximum permissible under the Constitution, each aspect of the sentence must be analyzed separately." (citing *United States v. Barnes*, 251 F.3d 251, 260–61 (1st Cir. 2001))).

152. See *United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005) (discussing the effects of *Blakely* and *Booker* on the federal supervised release system). The Second Circuit noted that "*Blakely* suggests that the discretionary decision to grant or revoke parole is distinct from sentencing and does not suffer from the analogous Sixth Amendment infirmity." *Id.* at 276. However, the court went on to state that this suggestion does not necessarily mean that supervised release is also constitutional under *Blakely*:

[P]arole (unlike supervised release) is an interval during which the defendant could continue to be held in prison based on his original conviction alone; so the decision to grant or revoke parole only affects the time served in prison within the parameters of the prison sentence originally authorized by the crime of conviction.

*Id.* at 276–77.

The court recognized that "the supervised release scheme is in some tension with the rationale of *Blakely* and *Booker*."<sup>153</sup> However, the court ultimately followed the other circuits in refusing to find a constitutional violation.<sup>154</sup> The Second Circuit agreed, albeit hesitantly, that "[t]hough supervised release is 'part of the penalty for the initial offense,' the imposition of supervised release and the sanctions for violation are authorized by a statute . . . that is separate from the regime that governs incarceration for the original offense."<sup>155</sup>

Regardless of the reasoning, it appears that the Supreme Court is satisfied with the results reached by the courts of appeals. In 2007, the Court refused to grant certiorari to a case out of the Fourth Circuit that clearly presented the *Apprendi* issue as it pertains to supervised release.<sup>156</sup> Thus, to summarize the current state of the law, the imposition of supervised release is authorized by the underlying offense.<sup>157</sup> However, a separate statute actually governs the supervised release sentence.<sup>158</sup> Because of this statutory separation, no *Apprendi* violation occurs even if the length of the term of incarceration, when

Because supervised release sentences may affect time outside the scope of these authorized parameters, it presents a different issue. *Id.* at 277. However, despite noticing that "the supervised release scheme is in some tension with the rationale of *Blakely* and *Booker*," and that "if a sentence for violation of supervised release were nothing but a sentencing enhancement, beyond the punishment justified by the conviction, it could be constitutionally infirm," the court chose to follow the other circuits and uphold the constitutionality of the federal supervised release system in the face of *Blakely* and *Booker*. *Id.* at 276–77.

153. *Id.* at 276.

154. *See id.* at 277 ("We are not inclined to extend the sweep of *Booker* and *Blakely* to an area of law [supervised release] that is up to now undisturbed.").

155. *Id.* (citing *Johnson v. United States*, 529 U.S. 694, 700 (2000)).

156. *See* *Faulks v. United States*, 195 F. App'x 196 (4th Cir. 2006), *cert. denied*, 128 S. Ct. 38 (2007) (refusing to review the decision of the Fourth Circuit that held that the supervised release scheme was unaffected by *Blakely*). This came as somewhat of a surprise, as the case was mentioned as a "Petition with a 'Reasonable' Chance of Being Granted" by the website "SCOTUSblog," and the specific issue had garnered attention elsewhere in the blogosphere. Sentencing Law and Policy, June 5, 2007, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2007/06/will\\_scotus\\_tak.html](http://sentencing.typepad.com/sentencing_law_and_policy/2007/06/will_scotus_tak.html) (last visited Jan. 28, 2010) (on file with the Washington and Lee Law Review); Second Circuit Blog, July 21, 2005, <http://circuit2.blogspot.com/search?q=robinson> (last visited Feb. 9, 2010) (on file with the Washington and Lee Law Review).

157. *See* *United States v. Work*, 409 F.3d 484, 489 (1st Cir. 2005) ("[T]he conviction authorizes the court to 'include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.'" (citing 18 U.S.C. § 3583(a) (2006))).

158. *See id.* at 490 (concluding "that when determining whether a sentence exceeds the maximum permissible under the Constitution, each aspect of the sentence must be analyzed separately"); *United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005) ("[T]he imposition of supervised release and the sanctions for violation are authorized by a statute and Guidelines scheme that is separate from the regime that governs incarceration for the original offense.").



combined with the length of the original sentence, exceeds the statutory maximum for the underlying offense on which the conviction was based.<sup>159</sup>

*V. Reconciling Apprendi and Blakely with Johnson—at the Expense of the Defendant*

The importance of *Apprendi*, *Blakely*, and *Johnson*, as well as subsequent decisions by the courts of appeals—and the overall effect they have on the federal supervised release system—cannot be appreciated fully unless viewed together. By viewing these holdings in relation to one another, one can see quite clearly the lengths to which the federal judiciary has gone to avoid declaring the supervised release system unconstitutional. In doing so, the courts have sacrificed the most fundamental rights of criminal defendants.

*A. Revocation is Punishment for the Initial Offense  
(Sort of, Kind of, Maybe)*

In *Johnson*, the Court determined that the revocation of supervised release was not to be considered punishment for violating the terms of release, but as part of the original conviction.<sup>160</sup> This decision was based largely on the desire to "avoid" the constitutional difficulties that would come with a ruling that revocation was indeed punishment for a violative act.<sup>161</sup> The Court provides hardly any legal argument for its finding other than this desire to preserve the system's constitutionality.<sup>162</sup> Certainly, the Court does have a policy of

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159. See *United States v. Ellis*, 33 F. App'x 150, 150 (4th Cir. 2002) ("[U]pon revocation of supervised release, the imposition of a term of incarceration is permissible even if the resulting sentence, combined with the sentence already served, exceeds the maximum sentence allowed for the substantive offense."); *United States v. Cenna*, 448 F.3d 1279, 1281 (11th Cir. 2006) (relying on the "well-settled rule that a term of supervised release may be imposed in addition to the statutory maximum term of imprisonment"); cf. 3 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 536.1 (2004) (explaining that "the term of supervised release . . . does not replace part of the term of incarceration, but is imposed in addition to the incarceration term," and, therefore, may extend beyond the statutory maximum for the original offense).

160. See *Johnson*, 529 U.S. at 701 ("We . . . attribute postrevocation penalties to the original conviction.").

161. See *id.* at 700 (finding that "[t]reating postrevocation sanctions as part of the penalty . . . avoids these [constitutional] difficulties").

162. See *id.* at 700–01 (offering only a 1968 summary affirmance of a district court decision concerning parole as support for the finding that postrevocation penalties should be attributed to the original conviction).

favoring those interpretations that allow for a law to be deemed constitutional.<sup>163</sup> But this policy should not override the constitutional concerns of those defendants facing a loss of liberty at a revocation hearing, especially in the case of defendants facing not just two or three years of reimprisonment, but lifetime reimprisonment.<sup>164</sup> Nonetheless, the Court avoided requiring full due process protections at revocation hearings by simply stating that revocation and reimprisonment are authorized by the original sentence.<sup>165</sup>

Because the *Johnson* Court decided to "attribute postrevocation penalties to the original conviction,"<sup>166</sup> one logically would think that a term of imprisonment imposed as a result of revocation would be added to the length of the original period of imprisonment to determine the total time of incarceration. To put it differently—if the reimprisonment is not punishment for violating supervised release, it must be punishment for the original offense. The *Johnson* Court even stated that postrevocation sanctions should be treated "as part of the penalty for the initial offense."<sup>167</sup> However, after the holding in *Blakely*, this language was not taken at face value.<sup>168</sup> Instead, the courts of appeals determined that because the two periods of incarceration (the initial period and the imprisonment resulting from revocation) were authorized by separate statutes, they could exceed the statutory maximum for the underlying offense when combined.<sup>169</sup>

This result seems to be in friction with the Court's pronouncement that "the relevant inquiry is one not of form, but of effect."<sup>170</sup> The "effect" of the

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163. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 996 (2000) (Thomas, J., dissenting) (arguing that the Court is "bound to first consider whether a construction of the statute is fairly possible that would avoid the constitutional question" (citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 216 (1975))).

164. See 18 U.S.C. § 3583(k) (2006) (requiring that defendants convicted under this section be subject to a minimum of five years supervised release with a maximum of lifetime supervised release, as opposed to a maximum of five years for most other crimes).

165. See *Johnson v. United States*, 529 U.S. 694, 700 (2000) (avoiding the issues of constitutionality by attributing postrevocation penalties to the original conviction).

166. *Id.* at 701.

167. *Id.* at 700.

168. See, e.g., *United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005) (explaining that "[t]hough supervised release is 'part of the penalty for the initial offense,'" the length of the supervised release period is not combined with the length of the original sentence for *Blakely* purposes).

169. See *id.* (finding that "[s]upervised release . . . is wholly derived from a different source" and therefore "imprisonment for violation of supervised release may exceed the time that the defendant could have been jailed on his original conviction" (citing *United States v. Wirth*, 250 F.3d 165, 170 n.3 (2d Cir. 2001))).

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

current regime is to expose defendants to periods of incarceration in excess of the statutory maximum for the offense committed.<sup>171</sup> Remembering from above the hypothetical based on the facts of *Blakely*, one can see that the defendant was subject to only fifty-three months imprisonment based on the guilty verdict.<sup>172</sup> However, after serving the initial term, another thirty-seven months of incarceration could be imposed upon revocation—attributable to the original conviction.<sup>173</sup> The "effect" of this scenario is that the defendant will serve ninety months "as part of the penalty for the initial offense."<sup>174</sup> If the "relevant inquiry is one not of form,"<sup>175</sup> should it matter that incarceration is based on two statutes as opposed to just one?

### *B. Out of the Frying Pan, into the Double Jeopardy Clause?*

Jeopardy does not attach during a revocation hearing.<sup>176</sup> Therefore, if a criminal act is the basis for revocation (as it must be under § 3583(k)),<sup>177</sup> the Government may first seek the revocation of the defendant's supervised release.<sup>178</sup> Because jeopardy does not attach during this process, double jeopardy does not bar the Government from later prosecuting the defendant for the underlying crime that was the basis for revocation.<sup>179</sup>

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171. See, e.g., *McNeil*, 415 F.3d at 274–75 (requiring the defendant to serve forty-eight months in prison where the statutory maximum for the original offense was forty-one months); *United States v. Work*, 409 F.3d 484, 486–87 (1st Cir. 2005) (requiring a defendant to serve a total of fifty-two months in prison where the statutory maximum for the original offense was forty-one months).

172. See *supra* Part IV.C (drawing a parallel between the facts of *Blakely* and a similar situation involving supervised release).

173. *United States v. Johnson*, 529 U.S. 694, 701 (2000) (attributing supervised release revocation to the original conviction).

174. *Id.* at 700.

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

176. See DAVID S. RUDSTEIN, DOUBLE JEOPARDY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 62 (2004) ("[Revocation of supervised release] does not constitute a new criminal prosecution of the offender . . . [which means] an offender facing the revocation of his supervised release . . . is not in 'jeopardy.'").

177. See 18 U.S.C. § 3583(k) (2006) ("If a defendant . . . commits any [applicable] criminal offense . . . the court shall revoke the term of supervised release.").

178. See, e.g., *United States v. Wyatt*, 102 F.3d 241, 244–45 (7th Cir. 1996) (finding that a revocation hearing does not bar a subsequent prosecution for the same act).

179. See RUDSTEIN, *supra* note 176, at 62 ("[A]n offender can be prosecuted for a criminal offense based upon the same act that served as the basis for a hearing to revoke his supervised release.").

However, the federal courts may have worked their way into a different double jeopardy problem while maneuvering around the *Apprendi* issue. Once again, it is important to remember that the Supreme Court has determined that supervised release—both its imposition and revocation—is "part of the penalty for the initial offense."<sup>180</sup> Therefore, revocation is indeed punishment—though it is punishment for the initial offense and not the act that precipitates the revocation hearing.<sup>181</sup>

Consider once again the situation facing Dr. McElheney. The ten-year sentence is clearly punishment for possessing child pornography.<sup>182</sup> If, upon having completed the prison sentence, his lifetime supervised release is revoked, the resulting imprisonment will also be considered punishment for his *initial* possession of child pornography offense.<sup>183</sup> As seen earlier, the courts of appeals have recognized this as fact, while at the same time rejecting the *Apprendi* argument.<sup>184</sup> This rejection is based on the rationale that "the imposition of supervised release and the sanctions for violation are authorized by a statute and Guidelines scheme that is separate from the regime that governs incarceration for the original offense."<sup>185</sup> Therefore, the federal judiciary has recognized that a defendant like Dr. McElheney is punished by

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

181. BLACK'S LAW DICTIONARY 1168 (8th ed. 2004) (defining penalty as "punishment imposed on a wrongdoer").

182. *Id.* (stating that penalties are usually imposed "in the form of imprisonment" for "a wrong to the state").

183. *See Johnson*, 529 U.S. at 701 ("We . . . attribute postrevocation penalties to the original conviction.").

184. *See, e.g., United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005) (relying on the *Johnson* decision in recognizing that supervised release is a part of the punishment for the original crime).

185. *Id.* In *McNeil*, the court justified the division of the initial punishment with three reasons. *Id.* First, as previously mentioned, supervised release is based on a different statute than the penalty for the substantive criminal offense. *Id.* Second, "the imprisonment that ensues from revocation is partly based on new conduct." *Id.* Third, the court found that supervised release serves different interests than those served by the imprisonment for the initial offense. *Id.* However, the last two reasons are inapplicable when dealing with double jeopardy. The Supreme Court has made clear that revocation is not punishment for the "new conduct" and that revocation should be associated only with the initial offense. *See Johnson*, 529 U.S. at 700 (finding that treating revocation as punishment for the violative act would raise serious constitutional concerns, and therefore revocation should be attributed to the original conviction). The Court also has stated explicitly that the differing interests served by two statutes "is of no moment for purposes of the Double Jeopardy Clause, the text of which looks to whether the offenses are the same, not the interests that the offenses violate." *United States v. Dixon*, 509 U.S. 688, 699 (1993). Therefore, for the ensuing double jeopardy discussion, the only relevant reason for the separation of punishments is that they are authorized by separate statutes.

two separate statutes for committing a crime: The statute for the underlying offense and the supervised release statute.<sup>186</sup>

The Double Jeopardy Clause protects not only against multiple prosecutions for the same offense, but also "against multiple punishments for the same offense."<sup>187</sup> To enforce the latter protection, the Court has relied on the "same-elements" test.<sup>188</sup> This test is applied to "determine whether there are two offenses or only one."<sup>189</sup> If there are two separate offenses, two punishments are permissible, but if only one offense was committed, the defendant may be punished only once.<sup>190</sup> In deciding whether the defendant committed one or two offenses, the courts must look to see if the individual statutes each "require[] proof of a fact which the other does not."<sup>191</sup> In *United States v. Dixon*,<sup>192</sup> the Court consolidated two cases, and applied the same-elements test to each. Defendant Foster was found guilty of contempt for violating a restraining order against his wife after the court found that he had assaulted her.<sup>193</sup> The Government was later allowed to prosecute Foster for assault with the intent to kill, because the first offense contained an element that the latter did not (knowledge of the restraining order) and the latter offense required proof of an element (that the defendant possessed the intent to kill) that the first offense did not.<sup>194</sup> This situation passes the same-elements test.<sup>195</sup>

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186. Cf. *Johnson v. United States*, 529 U.S. 694, 700 (2000) (establishing that supervised release is punishment for the initial offense); *McNeil*, 415 F.3d at 277 (explaining that while supervised release is punishment for the initial offense, it is separate from the punishment imposed by the statute for the underlying crime).

187. See *RUDSTEIN*, *supra* note 176, at 155 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by* *Alabama v. Smith*, 490 U.S. 794 (1989)).

188. See *United States v. Dixon*, 509 U.S. 688, 696 (1993) (clarifying that "where the two offenses for which the defendant is punished . . . cannot survive the 'same-elements' test, the double jeopardy bar applies").

189. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

190. See *Dixon*, 509 U.S. at 696 (explaining that double jeopardy prohibits multiple punishments for the same offense).

191. *Blockburger*, 284 U.S. at 304.

192. See *United States v. Dixon*, 509 U.S. 688, 704 (1993) (holding that the *Blockburger* same-elements test is the sole test for determining whether a defendant has been subject to multiple punishments or prosecutions for the same offense).

193. See *id.* at 693 (describing the facts that led to the appeal by respondent Foster, whose case had been combined with respondent Dixon's for review by the Supreme Court).

194. See *id.* at 701–02 (finding that each offense contained elements that the other did not, and therefore punishment was not barred by double jeopardy).

195. See *id.* at 701 ("Applying the *Blockburger* elements test, the result is clear: These crimes were different offenses.").

Defendant Dixon was released from prison on bail awaiting trial for second-degree murder.<sup>196</sup> The conditions of his release provided that he could not commit any crimes while on release; the punishment for a violation of this condition would constitute criminal contempt.<sup>197</sup> While on release, the defendant was arrested and indicted for the possession of cocaine.<sup>198</sup> Based on the indictment, the defendant was found guilty of criminal contempt in an expedited proceeding without a jury, and sentenced to 180 days in jail.<sup>199</sup> The defendant then moved to dismiss the cocaine possession indictment on double jeopardy grounds to prevent any subsequent prosecution for that offense.<sup>200</sup>

The Supreme Court found that the indictment should be dismissed, as a further punishment for the cocaine possession would fail the same-elements test and violate the Double Jeopardy Clause.<sup>201</sup> Here, the criminal contempt statute was triggered because the defendant violated one of the conditions of his release—he committed a crime by possessing cocaine.<sup>202</sup> The same exact elements proven in the contempt proceeding would once again be at issue in any subsequent prosecution for cocaine possession.<sup>203</sup> Basically, the Court found that the defendant committed only one offense—possession of cocaine—and that this offense could justify only one prosecution, for either contempt *or* cocaine possession.<sup>204</sup>

This same reasoning should apply to the supervised release system. The imposition of supervised release is justified by the conviction for the initial offense.<sup>205</sup> This imposition does not require the Government to prove any fact that was not proven during the conviction—only that an offense was committed.<sup>206</sup> With regards to the imposition of Dr. McElheney's lifetime

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196. *Id.* at 691.

197. *Id.*

198. *Id.*

199. *Id.* at 691–92.

200. *Id.* at 692.

201. *See id.* at 700 ("Because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution violates the Double Jeopardy Clause.").

202. *See id.* at 698 ("[T]he contempt sanction [was] imposed for violating the order through commission of the incorporated drug offense.").

203. *See id.* at 700 ("Dixon's drug offense did not include any element not contained in his previous contempt offense.").

204. *See id.* (finding that due to the defendant's previous prosecution for contempt, he could not be prosecuted for cocaine possession because the two statutes failed the same-elements test).

205. *See Johnson v. United States*, 529 U.S. at 694, 701 (2000) (finding that postrevocation penalties are attributed to the original conviction).

206. *See* 18 U.S.C. § 3583(a) (2006) (authorizing a court to impose supervised release as

supervised release, the court did not find any element separate from those needed to conclude that he was guilty of possessing child pornography.<sup>207</sup> The supervised release period was punishment for Dr. McElheney's conviction.<sup>208</sup> Clearly, the ten-year period of incarceration was also punishment for the conviction.<sup>209</sup> These punishments, as the courts of appeals have confirmed, are based on separate statutes.<sup>210</sup> Therefore, it seems that supervised release defendants are subject to two punishments for one offense. This is in clear contradiction of the Court's mandate that the Double Jeopardy Clause "protection applies both to *successive punishments* and to *successive prosecutions for the same criminal offense*."<sup>211</sup>

### VI. Problems Specific to the Child Sex Offender Context

Until now, the issues presented in this Note have related to the federal supervised release system in general. These issues certainly pertain to those defendants, like Dr. McElheney, who are subject to the enhanced terms of supervised release under § 3583(k).<sup>212</sup> Although the issues are equally as constitutionally problematic, they are more problematic in a practical sense for these defendants than for others because of the drastically longer sentences involved.<sup>213</sup> Putting those issues aside, several serious difficulties arise as a result of the "five to life" scheme under subsection (k).

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part of the sentence for any federal conviction). The prosecutor need not prove any fact other than the conviction. *Id.*

207. See *United States v. McElheney*, 524 F. Supp. 2d 983, 996 (E.D. Tenn. 2007) (noting simply that "[t]he offense of conviction carries a maximum term of supervised release of any term of years or life").

208. See *Johnson*, 529 U.S. at 700 (finding that postrevocation sanctions should be treated "as part of the penalty for the initial offense").

209. See *McElheney*, 543 F. Supp. 2d at 986 (finding that an appropriate sentence will, among other things, "provide just punishment").

210. See *United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005) (explaining that supervised release is "wholly derived from a different source" than the punishment for the substantive offense).

211. *United States v. Dixon*, 509 U.S. 688, 696 (1993) (emphasis added) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

212. See 18 U.S.C. § 3583(k) (2006) (authorizing supervised release periods from a minimum of five years to a maximum of life for those defendants convicted of one of the enumerated child sex offenses).

213. Compare *id.* (authorizing periods of supervised release ranging in length from five years to life), with *id.* § 3583(b) (authorizing a maximum term of five years supervised release, except as otherwise provided).

Hopefully, a defendant convicted of a child sex offense will be rehabilitated after the initial prison sentence, and supervised release can simply function as a tool in reintroducing the defendant into mainstream society.<sup>214</sup> Unfortunately, the revocation of supervised release does occur<sup>215</sup>—and if Congress is correct about the high recidivism rates of sexual offenders,<sup>216</sup> one must expect that revocation of these extended terms of supervised release will occur relatively frequently.

For revocation under § 3583(k), a defendant must first have been subject to the extended period of supervised release because of a conviction for one of the enumerated child sex offenses.<sup>217</sup> For instance, Dr. McElheney received a period of lifetime supervised release because of his guilty plea to possession of child pornography.<sup>218</sup> However, revocation cannot occur under this section for a mere violation of the terms of his supervised release—instead, Dr. McElheney would have to again commit a crime enumerated under § 3583(k).<sup>219</sup> It is absolutely inarguable that a second-time sex offender should be punished very harshly—this Note will not dispute that proposition. It does, however, submit that the supervised release system is not the proper vehicle to achieve that objective.

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214. See *United States v. Huerta-Pimental*, 445 F.3d 1220, 1222 (9th Cir. 2006) (characterizing the congressional policy behind supervised release as the desire to provide a mechanism that "improve[s] the odds of a successful transition from the prison to liberty" (citing *Johnson v. United States*, 529 U.S. 694, 696–97 (2000))).

215. See, e.g., *id.* (describing the revocation of Huerta-Pimental's supervised release, and subsequent imposition of imprisonment for twenty-four months); *United States v. Faulks*, 195 F. App'x 196, 197 (4th Cir. 2006) (explaining that the defendant was appealing "the district court's order revoking her supervised release and sentencing her to thirty-six months' imprisonment"); *United States v. Dees*, 467 F.3d 847, 849 (3d Cir. 2006) (describing the revocation of the defendant's supervised release, and the imposition of seventy-two months of imprisonment).

216. See H.R. REP. NO. 108-66, at 49–50 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 684 (justifying the increased periods of supervised release for child sex offenders because these offenders may have "deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison").

217. See 18 U.S.C. § 3583(k) (2006) (requiring revocation of supervised release and imprisonment of not less than five years for any defendant that is "required to register under [SORNA]" and that commits one of the enumerated felony sex offenses).

218. See *supra* notes 14–15 and accompanying text (explaining that while Dr. McElheney actually was charged with "knowingly receiving" child pornography, for the purposes of this Note it will be assumed that he had been charged with "possessing" child pornography).

219. See 18 U.S.C. § 3583(k) (2006) (requiring that "[i]f a defendant [subject to § 3583(k)] . . . commits any [applicable] criminal offense" under this statute, supervised release shall be revoked and imprisonment imposed for not less than five years).



*A. Revocation or Prosecution?: A Problem of Conflicting Statutes*

Assume that Dr. McElheney, upon the completion of his prison sentence, is found in possession of child pornography for a second time. Under 18 U.S.C. § 2252A(b)(2), a second offense for possession is punishable by ten to twenty years imprisonment.<sup>220</sup> In the same act that introduced subsection (k), Congress determined that a maximum of twenty years was the proper punishment for a second-time offender.<sup>221</sup> However, because under § 3583(k) "the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment" equal to the length of the supervised release period, Dr. McElheney could instead spend the rest of his life in prison.<sup>222</sup> By allowing a steeper punishment for a second offense via the revocation process than that intended by Congress, the system undermines legislative intent.

Perhaps Congress never intended defendants such as Dr. McElheney to receive the maximum amount of supervised release. Because the possession of child pornography is one of the least serious crimes included under § 3583(k), it would make sense if the minimum period of supervised release—five years—were the standard punishment.<sup>223</sup> However, because of the Sentencing Guidelines policy statement, many courts are opting to impose a much harsher punishment.<sup>224</sup> Courts now must choose either to follow the policy statement of Congress and impose lifetime supervised release—or to accept Congress's recognition that a repeat offender under § 2252A(b)(2) does not deserve a lifetime in prison.

The twenty-year maximum under § 2252A(b)(2) is in danger of becoming a dead-letter. Even if the Government were to prosecute a defendant successfully under that statute, the resulting conviction would mean that the Government also is virtually assured of a successful revocation.<sup>225</sup> If the

220. *Id.* § 2252A(b)(2).

221. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 103(a)(1)(E)(ii), 117 Stat. 650, 652 (codified as 18 U.S.C. § 2252A(b)(2)) (changing the penalty for a second violation of § 2252A(b)(2) from a maximum of ten years to a maximum of twenty years).

222. 18 U.S.C. § 3583(k) (2006).

223. *See supra* note 29 and accompanying text (suggesting that the offenses included under § 3583 vary in severity, and that the supervised release sentences should reflect the differing degrees of seriousness).

224. *See cases cited supra* note 33 (providing examples of courts using the policy statement to justify lifetime periods of supervised release for relatively less serious offenses under § 3583(k)).

225. *See supra* Part II (explaining how much easier it is for the Government to revoke supervised release than to convict a defendant during a full-scale trial).

revocable term of supervised release is longer than twenty years, § 2252A(b)(2) is essentially superfluous.<sup>226</sup> Basic statutory interpretation insists that "force should be given to those clauses which would make the statute in harmony with the other legislation on the subject, and which would tend most completely to secure the rights of all persons affected by such legislation."<sup>227</sup> Construing the supervised release scheme under § 3583(k) as encouraging lifetime periods of supervised release for second-time possessors of child pornography is not in harmony with the lesser penalties provided by § 2252A(b)(2). And subjecting an offender to an extended period of incarceration without the full due process protections that would be provided at trial is certainly not the most effective way to "secure the rights of all such persons affected" by the statute.<sup>228</sup>

### *B. The Federal Prosecutor's Predicament*

The increased periods of supervised release also pervert the role of the federal prosecutor. Under the standard system, supervised release periods are capped at five years for Class A felonies—those crimes carrying a maximum penalty of life imprisonment or death.<sup>229</sup> Imagine a situation where a defendant, convicted of a Class A felony, serves his initial period of incarceration. After release, and while serving his period of supervised release, the defendant murders another person. In this situation, even if the prosecutor elects to pursue revocation and imprisonment for the five-year term, the prosecutor will almost certainly also prosecute the defendant for murder. Here, the full-blown prosecution would result in a much more serious penalty, likely life imprisonment or death, as opposed to merely five years from revocation.<sup>230</sup>

Compare the above scenario with that presented by § 3583(k). Assume once again that Dr. McElheney was sentenced to ten years for possession of child pornography, and that he also received a period of lifetime supervised

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226. See 18 U.S.C. § 2252A(b)(2) (2006) (providing for a maximum sentence of twenty years for a repeat offender of the statute prohibiting the possession of child pornography). If a defendant is already subject to incarceration for a period of twenty or more years based on the revocation supervised release, there is no additional benefit to prosecuting the defendant under § 2252A.

227. HENRY CAMPBELL BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* 61 (1896).

228. *Id.*

229. See 18 U.S.C. § 3583(b) (2006) (limiting supervised release for Class A felonies to a maximum of five years); see also *id.* § 3559(a)(1) (classifying those offenses punishable by a maximum of life in prison or death as Class A felonies).

230. See *id.* § 1111(b) ("Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life.").

release. If, upon his release, he should again be found in possession of child pornography, the prosecutor has a choice. He could either prosecute Dr. McElheney for a second offense under § 2252A(5) in a full trial, or he could attempt to revoke the lifetime period of supervised release. Unlike the first scenario, a full-blown prosecution would result in a *lighter* sentence—a maximum of twenty years—as opposed to lifetime incarceration resulting from revocation.<sup>231</sup> A prosecutor who is successful in revocation would have no motivation to then seek an actual conviction for the second offense, rendering § 2252A impotent.

The possibility of a harsher sentence would not be the only enticement for a prosecutor to pursue revocation instead of prosecution. As described earlier, the Government has a tremendous advantage over the defendant in supervised release revocation hearings.<sup>232</sup> Having to prove to a judge by a preponderance of the evidence that the defendant committed a crime is much less daunting than having to prove beyond a reasonable doubt to a jury that the same defendant committed that crime.<sup>233</sup> If the Government can send the defendant away for life with little effort, why would it expend additional effort and resources for a completely superfluous punishment? In effect, § 3583(k) will often lead to revocation hearings simply replacing the prosecution of repeat offenders subject to the statute. Deference to the legislature may be admirable in many situations, but certainly not when the statutory scheme put in place by Congress allows for the complete circumvention of the due process protections offered by the tried-and-true adversarial criminal justice system.

The federal prosecutor is not to blame for this predicament. It is not suggested that only a lazy prosecutor looking for a shortcut, or an overzealous prosecutor with a "win-at-all-costs" mentality would opt for revocation instead of prosecution in the above scenario. In fact, any prosecutor who is faithfully following directives would be led down this route. For example, Assistant United States Attorneys (AUSAs) are directed to "[c]onsider the sentence . . . that is likely to be imposed if prosecution is successful, and whether such a sentence . . . would justify the time and effort of prosecution."<sup>234</sup> AUSAs are also instructed to determine if the revocation of probation or parole would

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231. Compare *id.* § 2252A(b)(2) (providing for a maximum sentence of twenty years for a second conviction for possession of child pornography), with *id.* § 3583(k) (authorizing the revocation of the full term of supervised release, which in the case of Dr. McElheney is life).

232. See *supra* Part II (describing the supervised release process, and explaining the Government's advantage over the defendant in revocation hearings).

233. See *supra* notes 65–71 and accompanying text (describing the less-than-complete due process protections available to a defendant during a revocation hearing).

234. UNITED STATES ATTORNEYS' MANUAL, tit. 9, ch. 27.230(B) cmt. 8 (1997).

better serve the public interest than would a new prosecution.<sup>235</sup> Finally, federal prosecutors are advised that "[t]he defendant should be charged with the most serious offense . . . that is readily provable. Ordinarily . . . this will be the offense for which the most severe penalty is provided."<sup>236</sup> As described earlier, the Government would have a much higher chance of "winning" at a revocation hearing than at trial, and the sentence would often be harsher.<sup>237</sup> 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.

### *VII. Where to Go from Here?: Three Potential Solutions*

The supervised release system is not without merit. The noble objective of the system is to "improve the odds of a successful transition [by a prisoner] from the prison to liberty."<sup>238</sup> However, this objective cannot be the rationale behind a supervised release scheme that authorizes—and encourages—lifetime terms of supervised release.<sup>239</sup> If a defendant is never freed from supervision, then supervised release is no longer a method of transition, but is an end in itself. There is no "liberty" at the end of the tunnel for a defendant subject to lifetime supervised release.

So what is the rationale behind the increased terms of supervised release? As mentioned at the beginning of this Note, Congress succinctly described its motivation.<sup>240</sup> The rationale behind § 3583(k) stems from the belief that sex offenders may suffer from "deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison."<sup>241</sup> To respond to

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235. *See id.* ("[T]he prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by commencing a new prosecution.").

236. *Id.* at ch. 27.300(B) cmt.

237. *See supra* Part VI.B (illustrating, in the eyes of a prosecutor, the relative desirability of a revocation hearing as compared to a full-scale prosecution).

238. *United States v. Huerta-Pimental*, 445 F.3d 1220, 1222 (9th Cir. 2006).

239. *See* 18 U.S.C. § 3583(k) (2006) (requiring defendants charged with crimes included under § 3583(k) to serve a minimum of five years, and a maximum of lifetime supervised release).

240. *See supra* note 24 and accompanying text (explaining Congress's belief that sexual offenders often suffer from psychological disorders that are not easily cured, and therefore longer periods of supervised release are appropriate).

241. H.R. REP. NO. 108-66, at 49–50 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 684.

this concern, Congress sought to impose long-term "monitoring and oversight" for these offenders.<sup>242</sup>

Congress, in adding subsection (k), demonstrated its belief that most child sex offenders are not capable of a typical transition from incarceration to freedom.<sup>243</sup> One would be hard-pressed to argue that "long-term . . . monitoring and oversight" is irrational or inappropriate.<sup>244</sup> It is the corollary to this supervision that is problematic—revocation. The problem with revocation is not necessarily that it is punitive—repeat sexual offenders deserve punishment. It is that the supervised release system was not designed with the goal of penalizing offenders.<sup>245</sup> Because the system has been stretched to fill that role, many problems have arisen.

This Note presents three potential solutions to the problems facing the supervised release system, each attempting to balance the competing concerns of Congress and those defendants subject to supervised release. The application of each potential solution to Dr. McElheney's situation will illustrate clearly their respective benefits and drawbacks. For these purposes, it is important to remember that McElheney has been sentenced to ten years in prison for the possession of child pornography.<sup>246</sup> In addition, he is subject to a lifetime period of supervised release.<sup>247</sup> Should McElheney again be found in possession of child pornography, he would face lifetime imprisonment as a result of revocation.<sup>248</sup>

### A. Solution 1

Solution 1 presents a minor adjustment to the supervised release scheme as it applies to child sex offenders, while leaving the larger system unchanged. As previously mentioned, Congress believes that sexual offenders are in need

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242. *Id.*

243. *See id.* (finding that the five-year maximum was not consistent with the need for increased periods of supervision for child sex offenders).

244. *Id.*

245. *See United States v. Huerta-Pimental*, 445 F.3d 1220, 1222 (9th Cir. 2006) (explaining that the primary objective of the supervised release system is to aid defendants in their transition to mainstream society).

246. *See supra* notes 14–15 and accompanying text (explaining that, for the purposes of this Note, it will be assumed that McElheney was sentenced to ten years).

247. *See United States v. McElheney*, 524 F. Supp. 2d 983, 1007 (E.D. Tenn. 2007) (imposing lifetime supervised release).

248. *See* 18 U.S.C. § 3583(k) (2006) (authorizing the revocation of the full period of supervised release under § 3583(e)(3)).

of long-term supervision.<sup>249</sup> The supervised release system is well-equipped to accomplish this goal. Governmental supervision certainly is an encroachment on an offender's liberty<sup>250</sup>—but this encroachment is far preferable to the total deprivation of liberty that accompanies incarceration. For this reason, an extended period of post-release supervision is an entirely appropriate mechanism in which to address the rehabilitative concerns of Congress. However, under the current system, with this extended period of supervision comes the possibility of an extended period of incarceration in the event of revocation.

In the standard supervised release setting, revocation may be based on any violation of the conditions of release, whether or not the violation is criminal in nature.<sup>251</sup> In this setting, revocation is necessary. Without it, there would be no available penalty for violations in which prosecution is not an option, as with violations that are noncriminal. However, the only time revocation arises under § 3583(k) is when the violation is criminal.<sup>252</sup> Therefore, prosecution for the violative act is always a possibility—and revocation is not the only "stick" that may deter violations. In light of the foregoing, it seems that a less punitive supervised release scheme under § 3583(k) may be appropriate, leaving the more serious punishment to the adversarial trial system.

In light of the foregoing, defendants could still be subject to lifetime periods of supervised release. However, because revocation is less necessary as a punishment under § 3583, perhaps the five-year maximum period of postrevocation incarceration should apply. Under this solution, supervision and the conditions of release would still apply for the remainder of a defendant's life. If the defendant violates release by committing another child sex offense, he would be subject to a maximum sentence of five years based on revocation. Because jeopardy does not attach at a revocation hearing, the Government would then be free to prosecute the defendant in a full-trial setting, seeking the harsher penalties that attach to the offense.

Applying Solution 1 to the Dr. McElheney scenario, one initially notes that McElheney's sentence will remain exactly the same. He will serve ten years in prison for the child pornography offense, and will be subject to a lifetime term of supervised release. Upon his release, McElheney will be

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249. H.R. REP. NO. 108-66, at 49–50 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 684.

250. *Cf. Demore v. Kim*, 538 U.S. 510, 562 n.18 (2003) (Souter, J., concurring) ("The alternative to detention, of course, is not unrestricted liberty, but supervised release.").

251. *See Johnson v. United States*, 529 U.S. 694, 700 (2000) ("Although such violations often lead to imprisonment, the violative conduct need not be criminal.").

252. *See* 18 U.S.C. § 3583(k) (2006) (authorizing revocation only as a result of the commission of a crime included under the statute).

subject to the terms of his release for the remainder of his life. This long-term supervision is precisely what Congress sought in passing § 3583(k).

Where Solution 1 differs in relation to the status quo is upon revocation. Under the current system, if Dr. McElheney were found in possession of child pornography for a second time, he would face two consequences. First, a second conviction carries a maximum penalty of twenty years.<sup>253</sup> Second, as previously explained, revocation of supervised release would result in lifetime incarceration. As discussed at length above, most prosecutors, when presented with this situation, would opt to first pursue revocation. However, under Solution 1, this scenario changes substantially. Like before, if McElheney were to be found in possession of child pornography, he would face two consequences. A second conviction would still carry a twenty-year penalty. However, revocation would result in a maximum of five years of incarceration. McElheney would face twenty-five years in prison, and a new period of supervised release after completion of his sentence.<sup>254</sup>

Solution 1 is the least drastic of the presented alternatives, and for that reason, it may be the best. The legitimate concerns of supervision would be addressed, and the defendant would still be subject to a lengthy sentence if found guilty. The five-year maximum sentence resulting from revocation would help to avoid a scenario in which prosecutors are pursuing revocation in lieu of prosecution and would once again give true meaning to statutory maximums like that in § 2252A(b)(2). Defendants would no longer be subject to a lifetime of imprisonment based on a single judge finding a violation by a preponderance of the evidence. In sum, Solution 1 allows for the supervised release system to serve its intended purpose: Monitoring and oversight with the end goal of successful rehabilitation. At the same time, punitive measures may be pursued through the proper vehicle—the adversarial trial system.

Despite this commendable policy result, this solution is still flawed for one substantial reason. Nothing about Solution 1 even attempts to address the constitutional concerns presented throughout this entire Note. Defendants will still be subject to revocation and incarceration without due process, even if for a maximum sentence of "only" five years. While any attempt to argue with this result will almost certainly be fruitless based on the Supreme Court's findings

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253. *Id.* § 2252A(b)(2).

254. Under the current hypothetical, a new period of supervised release would be unnecessary. McElheney would still be subject to the terms of his lifetime supervised release under his first conviction. However, this may not always be the case. Should McElheney have received only twenty years of supervised release after his first conviction, this period would have lapsed by the time he was released from his second conviction. A second prosecution would enable the Government to attach a second period of supervised release, likely for life.

in *Johnson*,<sup>255</sup> the idea that a person's liberty may be extinguished for five full years based on a "more likely than not" standard is too disconcerting to accept.

The *Apprendi* issue will still be present, and courts will still attempt to maneuver around it. Recall the supervised release hypothetical based on the facts of *Blakely*. This hypothetical applied to the supervised release system as a whole, and did not implicate the specific provisions of § 3583(k). Under Solution 1, a defendant would still serve a total of ninety months in prison—fifty-three months for the underlying offense, and thirty-seven months for postrevocation incarceration. This ninety-month period would be in excess of the fifty-three months authorized by the facts admitted in the plea agreement—and would still implicate the *Apprendi* issue.

The courts would continue to avoid the *Apprendi* problem with the same rationale; because the additional imprisonment is based on a statute separate from that authorizing the base imprisonment, the two periods cannot be viewed in the aggregate.<sup>256</sup> This reasoning again implicates the Double Jeopardy Clause and its protection against multiple punishments for the same offense.<sup>257</sup> Essentially, Solution 1, while softening the effects of these constitutional problems, does nothing to address the problems themselves.

### B. Solution 2

Solution 2 attempts to find an alternative answer, one that addresses both Congress's concern that the "deep-seated aberrant sexual disorders" of child sex offenders may not have disappeared by the time of the defendant's release from prison,<sup>258</sup> as well as the underlying constitutional and policy concerns. If the legislature is confident that these sexual offenders have not been rehabilitated by the end of their prison sentences, why not simply increase the statutory maximums for the offenses included under § 3583(k)? By increasing the initial sentences, the offender would be subject to around-the-clock supervision, unable to re-offend. This seems to be the logical response to sentences deemed too short to "cure" the offender—lengthen them.

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255. See *Johnson*, 529 U.S. at 700–01 (observing that full due process protections are not required at revocation hearings).

256. See, e.g., *United States v. Work*, 409 F.3d 484, 489 (1st Cir. 2005) (finding that though supervised release is part of the sentence, it does not have to be aggregated with the initial period of incarceration).

257. See *United States v. Dixon*, 509 U.S. 688, 696 (1993) (explaining that double jeopardy protections prohibit "successive punishments and . . . successive prosecutions for the same criminal offense").

258. H.R. REP. NO. 108-66, at 49–50 (2003), reprinted in 2003 U.S.C.C.A.N. 683, 684.



A substantial increase in the initial sentence gives the judiciary great flexibility in regards to the supervised release system. Possibly the most effective option would be to discard the whole regime. Federal supervised release replaced the federal parole system in 1987.<sup>259</sup> Solution 2 advocates a return to a parole scheme in the federal criminal justice system. The main difference from the current system would be structural. Whereas supervised release "tacks on" a supervision period to be served once the full sentence has been completed, the parole system "carves out" a period of supervision from the length of the original sentence.<sup>260</sup>

Once again, Dr. McElheney's situation will be used to demonstrate the practical implementation of such a system. Under Solution 2, instead of a ten-year sentence for possession of child pornography, McElheney would be sentenced to a substantially longer sentence—perhaps twenty-five years. After serving a substantial portion of this sentence, something in the neighborhood of twenty years, McElheney would be eligible for parole. For the remainder of the sentence, five years, he would be free from incarceration and subject to the exact same supervision as under the current system.

Under this proposal, the oversight concerns are largely satisfied. In the above example, McElheney would be subject to twenty-five total years of supervision—the equivalent of a ten year sentence with fifteen years of supervised release under the current system. Prior to § 3583(k), the defendant would have been subject to only ten years imprisonment, and three years of supervised release.<sup>261</sup> In comparison, twenty-five years of supervision is clearly a large step towards achieving the goal of "long-term monitoring and oversight."<sup>262</sup>

There is no danger of incentivizing the circumvention of repeat offender statutes under this alternative. Of course, should McElheney again be found in possession of child pornography, he would be in violation of his parole, and would serve the remaining five years in prison. The Government would almost certainly prosecute McElheney for his second offense, seeking the maximum of

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259. See *Gozlon-Peretz v. United States*, 498 U.S. 395, 400 (1991) (explaining that the Sentencing Reform Act of 1984 replaced the federal parole system with supervised release, but the changes did not become effective until 1987).

260. See U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A, introductory cmt. (2008) ("Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court.").

261. See 18 U.S.C. § 3559(a)(4) (2006) (classifying those offenses with a maximum of ten years as Class D felonies); *id.* § 3583(b)(2) (limiting supervised release for Class D felonies to a term of not more than three years).

262. H.R. REP. NO. 108-66, at 49–50 (2003).

twenty years.<sup>263</sup> As in Solution 1, the defendant's punishment is the result of a full trial, as opposed to a revocation hearing.

Perhaps the most laudable characteristic of Solution 2 is the fact that no *Apprendi* problems are present. In the above example, the statutory maximum for the first offense was twenty-five years. The defendant served only those twenty-five years. By carving the period of supervision out of the statutory maximum sentence, instead of adding it onto the end of the statutory maximum sentence, the system would avoid *Apprendi* entirely—the sentence is not in excess of the statutory maximum. The period of supervision, as it is under the current system, would be part of the initial penalty. However, the courts would not need to avoid *Apprendi* by dividing the penalty between two statutes. There would simply be one punishment of twenty-five years for the initial offense, and therefore no double jeopardy issues would arise, because there would not be multiple punishments for the offense.

Of course, this would to some extent also deprive the criminal justice system of the primary benefit of supervised release—an effective mechanism to aid offenders in their transition from prison to liberty.<sup>264</sup> In effect, Solution 2 transfers a large portion of a defendant's sentence from supervised release (with a threat of possible revocation) to incarceration. Under the current system, McElheney would serve ten years in prison, with lifetime supervised release. This proposal would double the length of the prison term to twenty years, while greatly reducing the period of post-release supervision. While both incarceration and supervision allow for the monitoring of an offender, only supervised release has the primary objective of rehabilitation. Limiting the length of the supervised release period can hardly be said to "improve the odds of a successful transition from the prison to liberty."<sup>265</sup> Solution 2, while avoiding the constitutional problems of the current system and Solution 1, sacrifices the commendable underlying rationale for supervised release. It would seem, at least to this author, that a constitutional but ineffective scheme is little better than an unconstitutional scheme.

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263. If this proposal were to be implemented, it is likely that the maximum penalty would be far greater than twenty years for a second offense. Because, in this hypothetical, the first offense carried a sentence of twenty-five years, it is likely that a second offense would carry about fifty years.

264. See *United States v. Huerta-Pimental*, 445 F.3d 1220, 1222 (9th Cir. 2006) (stating that the purpose of supervised release is to "improve the odds of a successful transition from the prison to liberty").

265. *Id.*

### C. Solution 3

Solution 3 attempts to find a way to eliminate the constitutional defects in the current system, while still addressing the oversight concerns of Congress and furthering the rehabilitative aims of the supervised release system. Whereas Solution 1 attempted to mitigate the effects of the underlying problems with the current system, and Solution 2 simply attempted to avoid the problems (and the system) altogether, Solution 3 attempts to actually *solve* both the constitutional and policy issues facing the supervised release regime. As mentioned several times throughout this Note, the most troubling aspect of the entire system is the exposure of these defendants to drastically increased prison sentences based on a "guilty" verdict at a revocation hearing with minimal due process protections.<sup>266</sup> Solution 1 attempted to decrease the lengths of incarceration stemming from revocation. Solution 3 will address this problem from a different angle—advocating for increased due process protections at revocation hearings, while leaving the resulting prison sentences largely untouched.

Under this approach, defendants would be entitled to the same due process protections—specifically the reasonable doubt standard and right to a jury trial—at revocation hearings as they are at full-blown prosecutions. As an initial matter, the Government would be less motivated to pursue revocation instead of prosecution because the required effort would be substantially similar in either arena. No longer would revocation hearings be a quick and easy process for the prosecutor. This motivation could be further reduced by tweaking § 3583(k) to provide that a revocation may not result in a period of incarceration longer than the maximum penalty available for the violation through prosecution. This would prevent repeat offender statutes with relatively low statutory maximums from being rendered moot. If the same effort must be expended in a revocation hearing as in a trial, and if the penalties are similar, the danger that trials will be replaced by revocation hearings is avoided.

In *Johnson*, the Supreme Court reasoned that if revocation were to be considered punishment for the violative act, due process would be required.<sup>267</sup> The lack of due process seemed to be the driving force behind the Court's

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266. See *supra* Part II (lamenting the limited due process protections offered to a defendant at a revocation hearing, especially in light of the potentially serious consequences).

267. See *Johnson v. United States*, 529 U.S. 694, 700 (2000) (finding that because of the lack of due process protections afforded to defendants at supervised release hearings, considering revocation to be punishment for the violation of the conditions of release would be constitutionally problematic).

classification of revocation as punishment for the initial offense.<sup>268</sup> Thus, if full due process protections are provided, there is no reason why revocation could not be considered punishment for the violative act, instead of punishment for the original offense.<sup>269</sup> This rationale would, in turn, block any application of *Apprendi*. If revocation is not part of the punishment for the original offense, the resulting incarceration would not be aggregated with the initial period of incarceration—alleviating any *Apprendi* concerns. Likewise, the same-elements test has no applicability if there is only one punishment for the original offense.<sup>270</sup>

Under Solution 3, Dr. McElheney would still serve ten years in prison and be subject to lifetime supervised release. If he were to be found in possession of child pornography for a second time, he would face revocation, just as under the current system. Because the maximum sentence for a second offense under § 2252A(b)(2) is only twenty years,<sup>271</sup> McElheney would face a maximum of twenty years upon revocation. If he were to commit an offense included under § 3583(k) that carries, for example, a life sentence, he would face a maximum sentence of life upon revocation. Essentially, the prosecutor would no longer be induced into pursuing revocation instead of prosecution, as both methods would be on equal footing.<sup>272</sup>

For the reasons stated above, McElheney would have no *Apprendi* argument. The revocation and resulting imprisonment would be deemed

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268. *Id.*

269. In *Johnson*, the Court also suggests that characterizing revocation and the resulting imprisonment as punishment for the violative act could be constitutionally problematic in situations where a noncriminal act led to the revocation. *Id.* at 700. While this situation would never arise under § 3583(k), it would under normal supervised release circumstances. Though it may seem constitutionally questionable to incarcerate a defendant for a noncriminal act (in violation of the conditions of release) at first glance, the federal system already allows similar actions. Under § 2262, if an interstate nexus can be established, a person "with the intent to engage in conduct that violates the portion of a protection order that prohibits . . . contact or communication with, or physical proximity to, another person" is subject to a maximum of five years, even if no other criminal act is committed. 18 U.S.C. § 2262(a)(1), (b)(5) (2006). Simply the violation of the protective order is sufficient justification for the incarceration. *Id.* Similar reasoning would permit the incarceration of a defendant that violates the conditions of his supervised release, even if the violative act were noncriminal.

270. See *United States v. Dixon*, 509 U.S. 688, 696 (1993) (explaining that the double jeopardy protection only applies to multiple punishments or prosecutions for the same offense). If revocation is considered punishment for the act that precipitates the revocation, that leaves only the primary prison sentence as punishment for the initial offense.

271. 18 U.S.C. § 2252A(b)(2) (2006).

272. This is not to say that there will no longer be advantages to pursuing revocation over prosecution. If nothing else, it provides the prosecution with a choice of forums in which to bring the action.

punishment for the second possession offense. While no double jeopardy problem would result from the same-elements test, one may arise in another context. Under Solution 3, the Government would have to choose either revocation *or* prosecution, not both. Because this proposal requires that revocation be viewed as punishment for the violative act, a subsequent prosecution for that same act almost certainly would violate the Double Jeopardy Clause.<sup>273</sup> However, because the Government could choose either revocation or prosecution, they likely would choose the route that leads to the most appropriate punishment.<sup>274</sup>

The primary goal of Solution 3 is to return supervised release to its proper role in the criminal justice system. By changing the revocation process to one that mimics the trial process, the supervised release system loses much of its punitive force, as it will be superfluous in many, if not most, situations. But is that a bad thing? Under this proposal, "punishment" will most often come via prosecution. Thus, the main function of supervised release will be to provide the "long-term . . . monitoring and oversight" sought by Congress.<sup>275</sup> Dr. McElheney would still be subject to life-long supervision, because the changes of Solution 3 only apply to the revocation process. And, in the event that revocation becomes warranted, McElheney would still be subject to a substantial period of incarceration. The changes merely serve to provide adequate protection for the liberty interests of the accused.

#### *D. The Recommended Solution*

Solution 3, while potentially the most expensive in terms of time and resources, is the most desirable proposal. It not only addresses the legitimate concerns of Congress in supervising sexual offenders, but avoids any constitutional infirmities and provides for the punishment of repeat offenders through the proper mechanism. "Due process" was deemed so important by the

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273. See *Johnson v. United States*, 529 U.S. 694, 700 (2000) ("Where the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense.").

274. For example, if the defendant's original sentence included a supervised release term of only ten years, revocation would lead to a maximum of ten years incarceration. But if the violative act carries a thirty-year maximum sentence, it is likely that the Government would choose prosecution. Under this proposal, prosecution will always provide equal or greater punishment, and therefore will often be chosen instead of revocation.

275. H.R. REP. NO. 108-66, at 49-50 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 684.

Founding Fathers that it was included in the Bill of Rights.<sup>276</sup> Why then, has the criminal justice system gone to such great lengths to deny it to those defendants subject to revocation? "No person shall be . . . deprived of life, liberty, or property, without due process of law."<sup>277</sup> Unfortunately, the current supervised release system does not comply with this fundamental maxim, and the courts have gone to great lengths to justify this noncompliance. Those members of society who commit the horrible crimes included under § 3583(k) certainly deserve harsh punishment—but that punishment should be delivered through the proven adversarial system, not the supervised release process.

### VIII. Conclusion

This Note addresses three separate overarching themes. First, it demonstrates the unconstitutionality of the federal supervised release scheme, particularly as it applies to § 3583(k) sexual offenders, by using federal case law. Second, the Note focuses on the troublesome policy problems presented by the current system. Third, it provides several potential solutions to reconcile the legitimate rehabilitative and punitive concerns of the legislature with the liberties of the accused.

The Supreme Court has determined that any imprisonment resulting from the revocation of a period of supervised release is to be considered "part of the penalty for the initial offense."<sup>278</sup> Elsewhere, the Court held that "*any fact* (other 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."<sup>279</sup> For revocation to occur, the Government must show that the defendant violated the terms of supervised release<sup>280</sup>—in other words, the Government must prove *a fact*. If this fact leads to incarceration in excess of the statutory maximum penalty for the initial offense, the defendant should be entitled to a jury trial and reasonable doubt standard.

Unfortunately, the courts of appeals have not followed this reasoning, and instead have rejected the notion that an *Apprendi* problem may be present.<sup>281</sup>

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276. See U.S. CONST. amend. V (requiring that a defendant receive due process before being deprived of "life, liberty, or property").

277. *Id.*

278. *Johnson*, 529 U.S. at 700.

279. *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (emphasis added).

280. See 18 U.S.C. § 3583(e)(3) (2006) (allowing revocation "if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release").

281. See, e.g., *United States v. Huerta-Pimental*, 445 F.3d 1220, 1224 (9th Cir. 2006) ("*Apprendi* has no effect on the imposition of § 3583 supervised release."); *United States v.*

The principal rationale for this finding seems to be the fact that the courts have broken the "penalty for the initial offense" into two components.<sup>282</sup> The first part of that penalty is the initial prison sentence, which must fall below the applicable statutory maximum. The second part of that penalty is the imprisonment resulting from revocation. Each of these components is authorized by a separate statute. The courts have determined that as long as each component penalty falls within the acceptable range for its individual authorizing statute, there is no *Apprendi* problem, regardless of the total amount of prison time served by the defendant.

This reasoning leads the courts into a potential double jeopardy issue. A defendant may not be punished twice for a single offense.<sup>283</sup> The courts, in avoiding *Apprendi*, have ruled that the punishment for the initial crime is based on two separate statutes.<sup>284</sup> When a prosecutor obtains a conviction of a defendant, she need not prove any additional element to secure punishment through the supervised release statute. Effectively, the offender is subject to two separate prison terms, based on two separate statutes, as punishment for a single offense.

Even if the courts have found a way to maneuver around the Constitution successfully, the question still remains—is doing so beneficial? Section 3583(k), when read in tandem with the aforementioned policy statement, results in lifetime periods of supervised release for a substantial number of defendants sentenced under the statute.<sup>285</sup> A "one-size-fits-all" approach to sentencing does not take into account the varying degrees of reprehensibility of the swath of crimes included under § 3583(k).<sup>286</sup> And while the supervision itself is unobjectionable, the revocation and resulting life sentences are quite troublesome. Through the revocation process, repeat offenders are exposed to

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McNeil, 415 F.3d 273, 277 (2d Cir. 2005) ("Under current law, imprisonment for violation of supervised release may exceed the time that the defendant could have been jailed on his original conviction.").

282. See, e.g., *United States v. Work*, 409 F.3d 484, 490 (1st Cir. 2005) ("[W]hen determining whether a sentence exceeds the maximum permissible under the Constitution, each aspect of the sentence must be analyzed separately.").

283. *United States v. Dixon*, 509 U.S. 688, 696 (1993).

284. See *McNeil*, 415 F.3d at 277 ("[T]he imposition of supervised release and the sanctions for violation are authorized by a statute . . . that is separate from the regime that governs incarceration for the original offense.").

285. See *supra* notes 25–28, 30–33 and accompanying text (describing the effect of the policy statement, which recommends that all sex offenders be sentenced to the maximum allowable punishment, on the imposition of supervised release terms).

286. See *supra* note 29 and accompanying text (comparing two crimes with disparate penalties, both of which are included under § 3583(k)).

life sentences even though Congress has explicitly determined that their second offense deserves a lesser punishment.<sup>287</sup> While the supervised release system may have a legitimate role in the criminal justice system, the circumvention of legislative intent and the trial process is not it.

The solutions presented in this Note attempt to resolve these policy problems in a constitutional manner, while still giving effect to the legitimate aims of the supervised release system. Sexual offenders require supervision and deserve punishment. This Note aims only to force punishment back into its proper realm—the realm of the adversarial trial system, replete with due process protections. The Constitution demands nothing less.

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287. See *supra* Part VI.A (demonstrating the conflict by comparing the maximum punishments available through revocation and through § 2252A(b)(2)).



