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Emily Tancer Broach
Emily.Broach@chicagounbound.edu

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Emily Tancer Broach†

INTRODUCTION

Almost 5.1 million people in America, or one in forty-five Americans, were under supervised release[1] at the end of 2008.[2] These people are subject to a number of restrictions, including restrictions on where they may live, where they may travel, and what they may do with their days. They are required to check in with their parole officers, are subject to drug testing, and live with the constant risk that, should they fail to comply with the

† AB 2008, The University of Chicago; JD Candidate 2011, The University of Chicago Law School.

[1] Throughout this Comment, supervised release is used to refer to both probation and parole, unless otherwise noted, since for the purposes of this Comment they are treated identically (except in sentencing procedure). See FRCrP 32.1 (Revoking or Modifying Probation or Supervised Release); 18 USC § 3583; 18 USC § 3563. As defined by the Bureau of Justice Statistics, "[p]robation is a court-ordered period of correctional supervision in the community generally as an alternative to incarceration. In some cases probation can be a combined sentence of incarceration followed by a period of community supervision. Parole is a period of conditional supervised release in the community following a prison term." Bureau of Justice Statistics, *Probation and Parole in the United States, 2008* 1 n 1 (DOJ 2009), online at http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus08.pdf (visited Sept 14, 2010). Congress ended the practice of parole in 1984 for federal crimes committed after November 1, 1987, replacing it with conditional release. Conditional release differs from the older system of parole in that parole meant that after a prisoner served the minimum part of his sentence, a "parole board" would determine whether he was ready to be released. Conditional release, by contrast, means that the prisoner serves a certain predetermined portion of his sentence before being released into conditional release, also for a predetermined period. See notes 4–24 and accompanying text. Every state has some system of conditional release. See generally Bureau of Justice Statistics, *Characteristics of State Parole Supervising Agencies, 2006* (DOJ 2008), online at http://bjs.ojp.usdoj.gov/content/pub/pdf/cspsa06.pdf (visited Sept 14, 2010). Today, almost all prisoners are released on conditional release. For example, in 2008, 683,106 prisoners were released, 505,168 conditionally. Bureau of Justice Statistics, *Prisoners in 2008* Table 4 (DOJ Dec 2009), online at http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf (visited Sept 14, 2010).

[2] Bureau of Justice Statistics, *Probation and Parole in the United States, 2008* at 1 (cited in note 1).

restrictions placed on them, their freedom will be revoked and they will be returned to prison.

These people are often members of at-risk populations. As a result, the current economic recession has hit them especially hard, making it even more difficult for them to comply with the conditions of their release, such as finding and maintaining employment.

Offenders sometimes stay in prison too long as a result of administrative mistakes or substantively or procedurally improper policies made by the Bureau of Prisons. Often these offenders' only recourse is to collaterally attack their sentences in post-conviction proceedings under 28 USC § 2255.[3]

This Comment examines what happens when a prisoner has challenged an administrative action or mistake by the Bureau of Prisons using post-conviction proceedings under 28 USC § 2255, and while that action is pending, the Bureau of Prison releases the prisoner into a term of supervised release. Should the extra time served in prison be "credited" toward the term of supervised release? What is the relationship between imprisonment and supervised release? Can courts hear these claims at all, or are they moot? How should the justiciability doctrines be understood in this context? What result, if any, does the economic recession have on this analysis?

In an effort to answer these questions, this Comment proceeds as follows. Part I outlines the applicable statutes and the justiciability doctrines, with an emphasis on the mootness doc-

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[3] 28 USC § 2255 states:

> A prisoner in custody under a sentence of a court established by an Act of Congress [a federal court] claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 USC § 2255(a). This statute provides federal prisoners a means of access to attack their convictions that is "exactly commensurate" with the writ of habeas corpus under 28 USC § 2241 that was the means by which all prisoners attacked their sentences in post-conviction proceedings until 28 USC § 2255 was enacted. See Larry W. Yackle, *Federal Courts—Habeas Corpus* 87 (Foundation 2d ed 2010); *Hill v US*, 368 US 424, 427–28 (1962) ("A review of the history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum.") (internal citations omitted).

trine. Part II examines cases where a prisoner collaterally attacks his sentence and is released while the collateral attack is pending, looking first at relevant Supreme Court precedent and then examining the contradictory approaches of the federal circuit courts. Part III argues that these cases should not be considered moot, and that the circuits that have taken that approach have misapplied the Supreme Court's (admittedly unclear) jurisprudence on the mootness doctrine. Part III also argues that the mootness doctrine as articulated by the Supreme Court needs to be reformulated, and argues that a prudential, rather than constitutional, approach to the mootness doctrine better fulfills the goals of the justiciability doctrines and better comports with the judicial role in our constitutional framework.

I. SUPERVISED RELEASE, POST-CONVICTION PROCEEDINGS, AND THE MOOTNESS DOCTRINE IN THE FEDERAL COURTS

This Part provides a general background to the system of supervised release in the prison system, examines the ability of inmates to collaterally attack their convictions in post-conviction proceedings using 28 USC § 2255, and defines the justiciability doctrines, with a focus on the mootness doctrine.

A. Supervised Release in the Federal Courts

18 USC § 3583 allows for an inclusion of a term of supervised release after imprisonment to be included in an offender's initial sentence. This period of supervised release may be mandated by statute or may be included at the discretion of the sentencing judge.[4] Depending on the level of the offense, the maximum period of supervised release is one, three, or five years.[5] In considering the inclusion and length of a period of supervised release, a court is to consider the same factors used when determining the length of imprisonment, including the need for the period to reflect the seriousness of the offense, the needs of the public, the characteristics and history of the offender, and the need for consistency in sentencing.[6]

A sentencing court has some discretion in setting out the conditions of the offender's supervised release. Some of the conditions of supervised release are mandatory, including that the

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[4] 18 USC § 3583(a).

[5] 18 USC § 3583(b).

[6] See 18 USC § 3583(c). The factors to be considered are listed in 18 USC § 3553.

offender not commit another crime during his period of supervised release, that he not unlawfully possess a controlled substance, and that he submit to a drug test within fifteen days of release.[7] Other conditions are left to the discretion of the sentencing judge, with the limitation that they be reasonably related to the factors used in sentencing determinations and are consistent with policy statements issued by the United States Sentencing Commission.[8] Potential discretionary conditions of supervised release are listed in the "Conditions of Probation" statute,[9] and can include requirements that the defendant work at suitable employment or pursue education or vocational training,[10] perform community service,[11] report to a probation officer as directed by the court or the probation officer,[12] reside or refrain from residing in specified areas,[13] or remain within the jurisdiction of the court unless allowed to leave by the court or the probation officer.[14] The length of time a person is under supervised release and the conditions imposed may be modified at any time by the court,[15] and a court may terminate a term of supervised release after one year,[16] extend the period of supervised release if less than the maximum was originally imposed,[17] or revoke the period of supervised release.[18]

B. Credits toward Early Release and Bureau of Prisons Programs

There are a number of programs that enable a prisoner to shorten his length of imprisonment. The primary program is codified at 18 USC § 3624(b).[19] This statute allows a prisoner who is serving a term of imprisonment of more than one year to

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[7] See 18 USC § 3583(d).

[8] 18 USC § 3583(d)(1).

[9] See 18 USC § 3583(d)(3); 18 USC § 3563(b).

[10] 18 USC § 3563(b)(4).

[11] 18 USC § 3563(b)(12).

[12] 18 USC § 3563(b)(15).

[13] 18 USC § 3563(b)(13).

[14] 18 USC § 3563(b)(14).

[15] See generally 18 USC § 3583(e).

[16] 18 USC § 3583(e)(1).

[17] See 18 USC § 3583(e)(2).

[18] See 18 USC § 3583(e)(3). There are mandatory revocation provisions as well. See, for example, 18 USC § 3583(g).

[19] 18 USC § 3624(b). See also Federal Bureau of Prisons, *Good Conduct Time under the Prison Litigation Reform Act*, Program Statement P5884.03 (DOJ 2005), online at http://www.bop.gov/policy/progstat/5884_003.pdf (visited Sept 14, 2010).

receive credit toward his release of up to fifty-four days at the end of each year of imprisonment, subject to determination by the Bureau of Prisons that the prisoner has "displayed exemplary compliance with institutional disciplinary regulations."[20] If a prisoner has not satisfactorily complied with institutional regulations, the Bureau is able to grant credit toward the sentence as it sees appropriate, including granting no credit.[21] When calculating credits earned, the Bureau of Prisons considers whether the prisoner is making satisfactory progress toward earning, or has earned, a high school equivalency diploma.[22]

The second primary means by which a prisoner can reduce his term in prison is to undergo treatment for substance abuse while in prison. 18 USC § 3621(e)(2) provides that a prisoner who completes such a program can receive up to a one-year sentence reduction.[23] The Bureau of Prisons has limited this early release credit to inmates convicted of certain nonviolent crimes.[24]

C. Post-Conviction Proceedings

If a prisoner is not eligible to reduce his terms by statutory means, he may still claim that he has a right to be released by the court through post-conviction proceedings.[25] Prisoners can use post-conviction proceedings to attack the length of a sentence or to argue that a sentence was imposed in violation of the Constitution or the laws of the United States.[26] They can also be used to argue any other collateral ground that may move the court to vacate, set aside, or correct the sentence, including administrative actions by the Federal Bureau of Prisons.[27]

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[20] 18 USC § 3624(b)(1).

[21] 18 USC § 3624(b)(2).

[22] 18 USC § 3624(b)(2). The Bureau of Prisons has determined that a prisoner who has not earned, and is not making satisfactory efforts toward earning, his high school equivalency degree can only receive up to forty-two days of good-time credit for each year in prison. See Federal Bureau of Prisons, *Good Conduct Time under the Prison Litigation Reform Act* at 2 (cited in note 19).

[23] 18 USC § 3621(e)(2)(B). See also Federal Bureau of Prisons, *Early Release Procedures under 18 USC § 3621(e)*, Program Statement P5331.02 (DOJ 2009), online at http://www.bop.gov/policy/progstat/5331_002.pdf (visited Sept 14, 2010). The Bureau of Prisons limits the length of the credit received based on the length of the prisoners sentence. See id at 7.

[24] Federal Bureau of Prisons, *Early Release Procedures under 18 USC § 3621(e)* at 3–5 (cited in note 23). For example, prisoners convicted of homicide, kidnapping, or aggravated assault, among other crimes, are not eligible for early release.

[25] See 28 USC § 2255.

[26] 28 USC § 2255.

[27] 28 USC § 2255. See also Nancy J. King and Suzanna Sherry, *Habeas Corpus and*

Under 28 USC § 2255, a motion to vacate, set aside, or correct a federal prisoner's sentence must be filed in the sentencing court.[28] The motion requires that the petitioner be "in custody,"[29] which the Court has defined broadly and includes the petitioner's period of supervised release.[30] Congress has imposed a number of additional procedural requirements on post-conviction proceedings, including a strict one-year statute of limitations to file the claim[31] and a limit on the number of motions that can be filed.[32] Additionally, the Prison Litigation Reform Act of 1995[33] requires that all available administrative remedies be exhausted before a prisoner is able to bring suit.[34] This Comment deals primarily with post-conviction proceedings brought to attack administrative actions by the Bureau of Prisons. Like any court proceeding, post-conviction proceedings are subject to the justiciability doctrines of standing, ripeness, and mootness, defined in more detail below.

D. The Justiciability Doctrines

Article III, Section Two of the Constitution extends the judicial power to all cases and controversies arising under the Constitution or the laws of the United States.[35] For a number of reasons, the Supreme Court has developed a set of doctrines that limit the jurisdiction of the courts, collectively known as the justiciability doctrines.[36] A case is justiciable if the litigants are truly adversarial and the court is capable of providing real relief

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State Sentencing Reform: A Story of Unintended Consequences, 58 Duke L J 1, 2 (2008) (discussing the fact that most collateral attacks are not for the underlying conviction or sentence, but rather for some administrative action taken after the sentence has been imposed).

[28] See 28 USC § 2255.

[29] 28 USC § 2255. See also note 4 and accompanying text.

[30] See *Jones v Cunningham*, 371 US 236, 240–43 (1963) (finding that supervised release imposes enough restraints on a person's liberty and mobility to grant a person serving a term of supervised release access to motions for post-conviction relief).

[31] 28 USC § 2255.

[32] 28 USC § 2255(h). "[S]econd or successive" petitions must be certified by the appropriate court of appeals and must either contain newly discovered evidence that "would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense," 28 USC § 2255(h)(1), or involve a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. 28 USC § 2255(h)(2).

[33] Pub L No 104-134 (codified and amended in various places of the USC).

[34] See 42 USC § 1997(e)(a).

[35] See US Const Art III, § 2.

[36] For further discussion of the justiciability doctrines, see notes 149–64 and accompanying text.

while avoiding encroachment into the legislative sphere through "policy making" or issuing merely "advisory" opinions.[37] These justiciability doctrines include standing, ripeness, and mootness, and each acts as a "gatekeeper" to entry into federal court.[38] Courts and scholars often conflate these doctrines,[39] but each doctrine must be understood as a distinct principle with its own test and application.

1. Standing and ripeness.

Standing is designed to ensure that the proper parties are before the court.[40] To obtain standing, a party must show that (1) she is suffering an injury that is (a) concrete and particularized and (b) actual and imminent; (2) that the injury is traceable to the defendant; and (3) that that injury is likely to be redressed by a favorable decision.[41]

Ripeness is designed to ensure that the party does not bring the case too soon—that is, before it is "ripe."[42] This doctrine is designed to ensure that an actual injury has occurred, rather than allowing cases to be brought every time a party fears an injury.

2. Mootness.

Mootness attempts to ensure that a party does not bring a case too late.[43] Just as ripeness attempts to ensure that an injury has actually occurred, mootness attempts to ensure that that injury can be redressed by a favorable decision.[44]

For many years, mootness was characterized by the Supreme Court as: "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."[45] The Supreme Court has

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[37] See, for example, William A. Fletcher, *The Structure of Standing*, 98 Yale L J 221, 222 (1988). There is some question as to whether Article III mandates these doctrines, particularly the mootness doctrine. See Part III below.

[38] See, for example, Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv L Rev 603, 606 (1992).

[39] See notes 165–70 and accompanying text.

[40] See Lee, 105 Harv L Rev at 606 (cited in note 38).

[41] See *Lujan v Federal Defenders of Wildlife*, 504 US 555, 560–61 (1992).

[42] Lee, 105 Harv L Rev at 606 (cited in note 38).

[43] Id.

[44] For further discussion see notes 165–70 and accompanying text.

[45] *United States Parole Commission v Geraghty*, 445 US 388, 397 (1980).

criticized this definition of mootness as being "not comprehensive,"[46] and efforts have been made by the Court to differentiate standing and mootness.[47] In its current formulation, a case is moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[48] "The underlying concern is that when the challenged conduct ceases such that 'there is no reasonable expectation that the wrong will be repeated,' then it becomes impossible for the court to grant 'any effectual relief whatever' to the prevailing party," thus rendering the decision of the court merely advisory.[49] The mootness doctrine is designed to ensure that the court can actually *do* something, thus preserving judicial resources by only solving actual disputes between defined parties.

There are a number of exceptions to the mootness doctrine, the most important being the collateral consequences exception. The collateral consequences exception holds that a case is only moot "if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."[50] If a person is prohibited from exercising certain rights (such as voting, working in certain industries, serving as a juror, and so on) as a result of his criminal conviction, he suffers from collateral consequences.[51] Disabilities or burdens imposed on a petitioner because of his conviction ensure that he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."[52] The scope of the collateral consequences exception to the mootness doctrine is at the heart of the current circuit split over crediting extra incarceration time toward a period of supervised release.

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[46] See *Friends of the Earth, Inc v Laidlaw Environmental Services*, 528 US 167, 189–90 (2000). This approach was developed by Professor Henry Monaghan. See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L J 1363, 1384 (1973).

[47] *Laidlaw*, 528 US at 189–90. For further discussion see Part III.B.

[48] *City of Erie v Pap's A.M.*, 528 US 277, 287 (2000).

[49] Id (internal citations omitted). The "legally cognizable interest" requirement has also been characterized as a "personal stake" in the outcome, which has been interpreted to mean that "throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actually injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer v Kemna*, 523 US 1, 7 (1998). This formulation of a "personal stake in the outcome," however, is nearly indistinguishable from the test for standing, a convolution of the justiciability doctrine that is problematic. For further criticism of this confusion of standing and mootness, see Part III.B.2.

[50] *Sibron v New York*, 392 US 40, 57 (1968).

[51] See *Carafas v LaVallee*, 391 US 234, 237 (1968).

[52] Id (internal citations omitted).

II. THE MOOTNESS DOCTRINE AND CREDITING EXTRA INCARCERATION TOWARD SUPERVISED RELEASE

Imagine the following scenario: You have been sentenced to a term of imprisonment followed by a term of supervised release. Due to some administrative failure or inaction by the Bureau of Prisons (miscalculation of good-time credits, failure to apply time earned through completion of a substance abuse program, and so on), you are in prison for longer than you should be. You collaterally attack your sentence, asking to be released from prison. While that action is pending, the Board of Prisons releases you into supervised release, and files a petition with the court to declare the post-conviction proceedings moot. The court grants the motion by the Bureau of Prisons.

This would seem to render your case moot: you have been released from prison into supervised release, thereby obtaining the relief you desired when filing your collateral attack. But you appeal the finding of mootness, arguing that a determination of whether you were held in prison too long could persuade the original sentencing court[53] that your period of supervised release should be shortened. This potential for relief, you argue, keeps this controversy "live" for purposes of the mootness doctrine.

Alternatively, you argue in your initial collateral attack both that you have been in prison too long and that that extra time should be credited to your period of supervised release. In the interim, you are released from prison, and the Bureau of Prisons files a petition to render the post-conviction proceeding moot, which is granted by the court. You appeal this decision, arguing that the potential to shorten your period of supervised release keeps the controversy "live."

These are not hypothetical scenarios. They have occurred in nearly every circuit of the federal courts, with vastly different results. This section begins by examining relevant Supreme Court precedent, and then goes on to explore the different approaches taken by (and at times within) the circuits on the question of whether or not scenarios like those described above are moot.

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[53] Note that under 18 USC § 3583, it is the *sentencing court* that has the ability to modify an offender's term of supervised release.

A. The Supreme Court, the Mootness Doctrine, and Supervised Release

The Supreme Court has addressed the applicability of the mootness doctrine toward supervised release in a number of cases. These cases have developed contradictory lines of reasoning regarding whether a case becomes moot when the petitioner is released from prison into a term of supervised release while his motion for collateral review is pending.

1. *Lane v Williams.*[54]

In 1975, Lawrence Williams pleaded guilty to burglary in Illinois state court pursuant to a plea bargain, a charge which at the time carried an indefinite term of imprisonment and a mandatory three-year period of parole.[55] No one informed him of the mandatory period of parole that came with his plea.[56] In May 1976, Williams was released on bail, and in March 1977, he was arrested on other charges and returned to prison as a parole violator.[57] While in custody for his parole violation, Williams collaterally attacked his sentence, alleging that he was not informed of the mandatory term of parole until two months prior to his initial release and was therefore denied his right to due process.[58] While the case was still pending,[59] Williams was released on a special six-month "supervisory release term," which he served in full and was then released from the custody of the Illinois Department of Corrections.[60] Another Illinois man experienced a similar chain of events, and their appeals were joined.[61]

The Court of Appeals concluded that the cases were not moot. While Williams's term of parole had expired, the court concluded that the controversy was still "live" because "there remain[ed] collateral consequences which might have lingering effects"—the parole violation would remain on

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[54] 455 US 624 (1982).

[55] Id at 625.

[56] Id at 626.

[57] Id at 626–27.

[58] *Lane*, 455 US at 627.

[59] While the case was pending because Williams had not been released, the district court had ruled in favor of Williams, agreeing that his right to due process had been violated. He was not immediately released, however, since the district court entered a stay to give the State an opportunity to file a motion for reconsideration. See id.

[60] Id at 627–28.

[61] Id at 628.

Williams's record with "various possible adverse consequences."[62] The State appealed.

On certiorari, the Supreme Court vacated the decision of the appellate court and dismissed the case as moot.[63] Writing that "respondents are no longer subject to any direct restraint as a result of the parole term" and that "[t]heir liberty or freedom of movement is not in any way curtailed by a parole term that has expired," the Court held that the controversy was no longer "live."[64] The majority rejected the collateral consequence argument made by the appellate court, distinguishing prior precedent that held that the expiration of a criminal sentence did not render an attack on a criminal conviction moot.[65]

The dissent, written by Justice Marshall, sharply differed from the majority over whether or not sufficient "collateral consequences" existed to give the respondents a sufficient personal stake in the outcome to keep the controversy "live."[66] Justice Marshall characterized the question in the case as "whether collateral consequences attach to parole violations."[67] This question, Marshall stated, had to be determined by state law, and since collateral consequences did attach to parole violations in Illinois, the respondents (and the state) retained a significant stake in the outcome, preventing the case from being moot.[68] Both this strong dissent and *Lane*'s seeming departure from past precedent created uncertainty in an previously clear area of law, leading to subsequent disagreements in the Supreme Court and among the federal appellate courts.

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[62] *Lane*, 455 US at 629.

[63] Id at 634.

[64] Id at 631.

[65] Id at 632. The cases distinguished by the Court were *Carafas*, 391 US 234, and *Sibron*, 392 US 40. In *Carafas*, the Court held that the civil penalties the convicted faced under New York law "were sufficient to ensure that the litigant had 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.'" *Lane*, 455 US at 632, quoting *Carafas*, 391 US at 237. In *Sibron*, the Court held that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Lane*, 455 US at 632, quoting *Sibron*, 392 US at 57. In this case, the Court said in *Lane*, there might be non-statutory consequences of the parole violation, such as difficulty finding employment or the sentence imposed in future criminal proceedings, but these "discretionary decisions . . . are not governed by the mere presence or absence of a recorded violation of parole." *Lane*, 455 US at 632–33.

[66] *Lane*, 455 US at 634 (Marshall dissenting).

[67] Id at 635.

[68] Id at 636–41.

2. *Spencer v Kemna.*[69]

In 1998, the Supreme Court decided *Spencer v Kemna.*[70] Randy Spencer was convicted of felony stealing and burglary, and in 1990 began serving concurrent three-year sentences.[71] In April 1992 he was granted parole, but in September 1992 his parole was revoked after the parole board determined that Spencer violated three of his conditions of parole.[72] In 1993, six months before his three-year term was set to end, Spencer collaterally attacked his sentence under 28 USC § 2254.[73] While that case was pending, however, he was re-released on parole, and in October of 1993 his term of imprisonment expired, resulting in a dismissal of the post-conviction proceedings by the district court.[74] The district court dismissed because "the sentences at issue here have expired, [hence] petitioner is no longer 'in custody' within the meaning of 28 USC § 2254(a)."[75] The Eighth Circuit affirmed, finding, following *Lane*, that the petitioner's claim became moot because he suffered no "collateral consequences" of the revocation order.[76]

The Supreme Court affirmed. Citing *Sibron v New York*,[77] the Court first recognized that it had been willing, in recent decades, "to presume that a wrongful criminal conviction has continuing collateral consequences."[78] The Court declined to extend this presumption of collateral consequences to parole revocation, however.[79] Instead, a party must demonstrate collateral consequences of parole in order to prevent the case from being found moot.[80]

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[69] 523 US 1 (1998).

[70] Id.

[71] Id at 3.

[72] Id.

[73] *Kemna*, 523 US at 5.

[74] Id at 6.

[75] Id.

[76] *Kemna*, 523 US at 6.

[77] 392 US 40 (1968). See note 51 and accompanying text.

[78] *Kemna*, 523 US at 8.

[79] Id at 12.

[80] See id at 14. The Court seems to have conflated "mootness" with "standing" in this case. See, for example, 523 US at 18–19 (Souter concurring) ("One of Spencer's arguments for finding his present interest adequate to support continuing standing despite his release from custody."). Justice Stevens dissented, finding that the consequences of the parole board's finding were sufficiently tangible to defeat a claim of mootness. Id at 25. He also found that the fact that Spencer was attacking the facts underlying his parole revocation rather than the revocation itself adequately distinguished *Sibron*. Id.

3. *United States v Johnson.*[81]

Ten years later, the Court again addressed the question of whether being released from prison into a term of supervised release renders a motion for post-conviction proceedings moot. Roy Lee Johnson was convicted in 1990 to a sentence of 171 months imprisonment, consisting of three concurrent fifty-one-month terms to be followed by two consecutive sixty-month terms, to be followed by a mandatory three-year term of supervised release.[82] The Court of Appeals concluded that the district court had erred during sentencing and remanded the case to the district court, at which time the district court modified Johnson's sentence to 111 months.[83] After a Supreme Court decision affecting one of his convictions, Johnson filed a collateral attack on his sentence under 28 USC § 2255, seeking to vacate the conviction. Since the Government did not oppose, the District Court granted the motion and modified Johnson's sentence to fifty-one months.[84] Johnson had already served more than fifty-one months, so he was released from prison, at which time his term of supervised release went into effect.[85] Johnson then filed a motion seeking to reduce his period of supervised release by two-and-a-half years, the amount of extra time he had served in prison.[86] The district court denied relief and a divided court of appeals reversed, arguing that awarding "credit for the time served" "would provide meaningful relief because supervised release, while serving rehabilitative purposes, is also 'punitive in nature.'"[87]

The Supreme Court reversed. Relying on a textual reading of 18 USC § 3624(e), which deals with supervised release,[88] the Court held that a period of supervised release is imposed distinctly from a period of imprisonment, and that "supervised release has no statutory function until confinement ends."[89]

While holding that the text dictated the outcome, the Court also noted that its conclusion "accords with the statute's purpose

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[81] 529 US 53 (2000).

[82] Id at 55.

[83] Id.

[84] Id.

[85] *Johnson*, 529 US at 55.

[86] Id.

[87] Id at 55–56.

[88] See 18 USC § 3624(e). See also notes 20–23 and accompanying text.

[89] See *Johnson*, 528 US at 56–59.

and design."[90] The Court stated that incarceration and supervised release serve different ends—that while imprisonment is supposed to be punitive, supervised release was designed to fulfill "rehabilitative ends," helping the released prisoner to transition to life outside of prison.[91] To shorten an offender's period of supervised release with a "credit" from extra time served would undermine those goals.[92]

While holding the statute, "by its own necessary operation," could not reduce the length of supervised release, the Supreme Court noted that Johnson could file for modification of his sentence of supervised release under 18 USC § 3583(e).[93] Furthermore, the Court stated that "[t]here can be no doubt that equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term."[94]

These dueling impulses within *Johnson*—that a textual interpretation mandates that supervised release be thought of as conceptually and temporally distinct from incarceration, and that equitable considerations of great weight exist when a prisoner is incarcerated for longer than is proper—along with the "collateral consequence" line of analysis in earlier cases, have caused much of the resulting disagreement amongst and within the circuits as to whether post-conviction proceedings become moot when the prisoner is released, or whether the possibility that a "credit" can be applied to shorten the prisoner's term of supervised relief is sufficient to keep the controversy "live" for purposes of the mootness doctrine. Currently, the Third and Eighth Circuits hold that a post-conviction proceeding is moot if the prisoner is released; the First, Second, Fourth, Fifth, Seventh, and Ninth Circuits hold that the possibility that a released inmate's term of supervised relief could be shortened keeps the post-conviction proceeding "live" for purposes of the mootness doctrine; and the Sixth and Tenth Circuits are internally split on the question. Each of the circuits' positions is examined below.

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[90] Id at 59.

[91] Id.

[92] Id.

[93] *Johnson*, 529 US at 60. See also notes 5–19 and accompanying text. Note, however, that Johnson would have to serve at least a year of supervised release before being able to petition for a modification, while he would have only had a six-month term of supervised release if the extra two-and-a-half years he spent in prison could be applied as a credit to his period of supervised release.

[94] *Johnson*, 529 US at 60.

B. Release of a Prisoner while Post-Conviction Proceedings Are Pending Moots the Inquiry, Even if the Offender Is Serving a Term of Supervised Release

In 1996, John Burkey was serving a sentence for federal controlled substances conviction.[95] He participated in a drug treatment program, and as a result the Bureau of Prisons determined he was eligible for early release under 18 USC § 3621.[96] While serving his subsequent term of supervised release, Burkey was arrested for another controlled substance crime and was rearrested and sentenced to a fifty-seven-month term of imprisonment, to be followed by a three-year term of supervised release.[97] While in prison for the second time, Burkey once again participated in the drug treatment program, expecting to again qualify for early release.[98] However, the Bureau of Prisons determined that he was ineligible for early release because he previously received early release credit under the statute.[99]

Burkey collaterally attacked his sentence, challenging the Bureau of Prison's determination that he was ineligible to for early release and asking to be released from detention.[100] The magistrate judge who heard the case found the determination to be invalid and recommended that Burkey's request for release be granted.[101] Nine days before Burkey's statutory release date, while the post-conviction proceeding was still pending, the Bureau of Prisons released Burkey and filed a Notice of Suggestion of Mootness, arguing that the case was moot because Burkey, by being released, had achieved the end his post-conviction proceeding sought.[102] Burkey responded by urging that his petition was not moot, because "if the District Court would issue an order approving and adopting the Magistrate Judge's Report and Recommendation, he then would be able to argue to the sentencing court . . . that his supervised release

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[95] *Burkey v Marberry*, 556 F3d 142, 144 (3d Cir 2009). For information relating to 18 USC § 3621, see note 23 and accompanying text.

[96] Id.

[97] Id.

[98] Id.

[99] *Burkey*, 556 F3d at 144–45.

[100] Id at 145. Burkey filed his collateral attack under 28 USC § 2241, which is the method by which prisoners attack their confinement in state prison. Since he was in a federal prison serving a sentence for federal controlled substances convictions, his collateral attack should have been filed under 28 USC § 2255.

[101] Id.

[102] Id.

term should be shortened in light of his having been improperly denied early release from prison."[103] The district court dismissed Burkey's collateral attack as moot, arguing that "to avoid a finding of mootness, Burkey would have to have demonstrated that the delayed commencement of his supervised release term was likely to be redressed by a favorable judicial decision."[104]

On appeal, the Third Circuit affirmed the dismissal.[105] The court started by reasoning that once Burkey was released, a case or controversy no longer existed for purposes of Article III.[106] The case or controversy requirement of Article III, the court wrote, "continues through all stages" of the litigation, and "requires that parties have a personal stake in the outcome."[107] This personal stake requirement, the court elaborated, "means that, throughout the litigation, the plaintiff, 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'"[108]

After stating the requirements of Article III, the court went on to discuss a lack of presumption of injury once a person has been released from imprisonment and is serving his term of supervised release, and the requirement that a person prove some continuing injury, or "collateral consequence" for the action to continue.[109] These collateral consequences, the Third Circuit noted, have been addressed by the Supreme Court "in terms of the 'likelihood' that a favorable decision would address the injury or wrong."[110] The "likely" outcome, the Court explained, was that the sentencing court would not modify Burkey's term of supervised release,[111] and Burkey's case was therefore dismissed as moot.

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[103] *Burkey*, 556 F3d at 145.

[104] Id at 146. In doing so, the district court cited to *Kemna*, 523 US at 7. See id. According to the district court, the Third Circuit relates, "it was pure speculation that a favorable decision from this court would 'likely' result in Burkey's sentencing court reducing or terminating his supervised release term." Id. The district court also cited to *Johnson*, 529 US at 57–58, noting that supervised release and incarceration are designed to serve different functions and should therefore not be considered interchangeable. This, the district court reasoned, would further diminish the likelihood that the sentencing court would modify the term of supervised release. See *Burkey*, 556 F3d at 146.

[105] Id at 151.

[106] Id at 147.

[107] Id.

[108] *Burkey*, 556 F3d at 147, quoting *Kemna*, 523 US at 7.

[109] Id.

[110] Id at 148.

[111] Id at 149 ("From a practical and legal standpoint, we too doubt whether a sentencing judge, having imposed a specific form of imprisonment and supervised release, would alter his view of the propriety of that sentence because the BOP [Bureau of Prisons]

The Eighth Circuit has adopted the *Johnson* approach that holds that the term of imprisonment is distinct from the term of supervised release.[112]

C. The Possibility That the Term of Supervised Release Could Be Shortened Keeps the Case "Live" for Purposes of the Mootness Doctrine

The approach taken by the Third Circuit in *Burkey* sharply contrasts with the approach taken by the First, Second, Fourth, Fifth, Seventh, and Ninth Circuits when addressing similar cases.

In *Gunderson v Hood*,[113] the Ninth Circuit ruled that the possibility that Gunderson could receive relief in the form of a reduced or modified term of supervised release was enough to prevent the case from being moot.[114] Gunderson was admitted to a drug treatment program while serving his period of incarceration, but was not eligible for a sentence reduction under 18 USC § 3621 because of the nature of his conviction.[115] He filed a collateral attack challenging his ineligibility for early release.[116] While noting that it was not possible for the court to provide Gunderson with the relief he sought—early release—because he was not scheduled to complete the program until his scheduled release date, the court stated that its inability to grant Gunderson's requested relief in the form of early release from incarceration did not render his entire case moot because of its decision's possible effect on the length of Gunderson's term of supervised release.[117]

The looser requirement that relief only be "possible," not "likely," is also evident in *Mujahid v Daniels*.[118] The Ninth Circuit explained that "the burden of demonstrating mootness is a heavy one," and that an appeal is only moot "when, by virtue of

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required him to serve it."). For criticism of this position, see Part III.B.

[112] See, for example, *James v Outlaw*, 142 Fed Appx 274 (8th Cir 2005) ("Having carefully reviewed the record, we conclude the case is moot: James was released from prison while the appeal was pending, return of the good-time credits at issue would have no effect on his current term of supervised release, and at this time we see no collateral consequences from the challenged disciplinary action.").

[113] 268 F3d 1149 (9th Cir 2001).

[114] Id at 1153.

[115] Id. See note 23 and accompanying text for more information on the contours of 18 USC § 3621.

[116] *Gunderson*, 268 F3d 1149, 1153 (9th Cir 2001).

[117] Id.

[118] 413 F3d 991 (9th Cir 2005).

an intervening event, a court of appeals cannot grant *any effectual relief whatever* in favor of the appellant."[119]

The Second Circuit expressly adopted *Mujahid* in *Levine v Apkar*,[120] holding that "the fact that the district court might, because of our ruling, modify the length of Levine's supervised release would constitute 'effectual relief.' A case or controversy thus exists."[121] This approach to the "personal stake" aspect of the mootness doctrine, as well as the position that only a "possibility" of success must exist in order for the controversy to remain "live" has also been adopted in the First Circuit,[122] the Fourth Circuit,[123] the Fifth Circuit,[124] and the Seventh Circuit.[125]

D. Intra-Circuit Conflicts

Two circuits have issued inconsistent opinions when dealing with these questions. While the Sixth Circuit has stated that such claims are not moot in unpublished opinions,[126] in *Demis v*

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[119] Id at 994, quoting *Calderon v Moore*, 518 US 149 (1996) (emphasis added).

[120] 455 F3d 71 (2d Cir 2006).

[121] Id at 77.

[122] See, for example, *US v Molak*, 276 F3d 45, 48 (1st Cir 2002) ("Just as a parolee would have a continuing stake in the outcome of a challenge to the underlying conviction and sentence because the restriction imposed by the terms of the parole, so too a convicted defendant who is under an ongoing sentence of supervised release has a continuing stake.") (internal citations omitted); *US v Cruzado-Laureano*, 527 F3d 231, 234 n 1 (1st Cir 2008) ("If Cruzado were to succeed with a claim that his sentence was improperly calculated, his three year period of supervised release could be reduced on demand."), citing *US v Verdin*, 243 F3d 1174, 1178 (9th Cir 2001).

[123] See, for example, *Townes v Jarvis*, 577 F3d 543, 547–48 (4th Cir 2009) (noting that for a claim of mootness to prevail, the claim must lack one of the prongs of standing, and that there must be "no realistic possibility" that a plaintiff could obtain the requested relief in order to fail the redressability requirement, and that in this case Townes is "able and ready" to obtain the a shorter period of parole, the ultimate relief sought).

[124] See, for example, *Johnson v Pettiford*, 442 F3d 917, 918 (5th Cir 2006) ("In this case, the possibility that the district court may alter Johnson's period of supervised release pursuant to 18 USC § 3583(e)(2), if it determines that he has served excess prison time, prevents Johnson's petition from being moot.").

[125] See, for example, *US v Trotter*, 270 F3d 1150, 1152 (7th Cir 2001) ("Unless we are confident that Trotter *cannot* benefit from success on appeal, the case is not moot."); *US v Larson*, 417 F3d 741, 747 (7th Cir 2005) ("Though his imprisonment is over, Larson remains on supervised release, which is a form of custody. Larson correctly points out that the case is not moot if the judge on remand would have discretion to shorten his supervised release.") (internal citations omitted).

[126] See, for example, *US v Wilson*, 87 Fed Appx 553, 555–56 (6th Cir 2004) ("[B]ecause Wilson remains on supervised release, only Wilson's appeal of the expired custodial sentence appears moot as having already been served. . . . The remaining, unexpired term [ ] of appellant's supervised release may be reviewed."); *US v Lewis*, 166 Fed Appx 193, 195 (6th Cir 2006) ("Challenges, however, to Lewis's unexpired term of supervised release are not moot.").

Sniezek[127] the Sixth Circuit expressly rejected the *Mujahid* and *Levine* line of cases, instead finding that "[b]ecause Demis was already transferred to a CCC [Community Correctional Center] and now has been released from custody, no actual injury remains that the Court could redress with a favorable decision in this appeal."[128]

The Tenth Circuit's opinions on the subject are even more contradictory. In *Crawford v Booker*,[129] the Tenth Circuit followed *Johnson*, holding that "based on *Johnson*, even if Mr. Crawford's legal argument was successful, this court could not shorten the length of his supervised release term."[130] In 2003, however, the Tenth Circuit decided *United States v Santiago Castro-Rocha*,[131] which expressly joined the First, Ninth, and Eleventh Circuits in holding "that a defendant's unexpired term of supervised release, which could be reduced by a favorable appellate decision, is sufficient to defeat a claim of mootness."[132] While in 2007 the Tenth Circuit followed this precedent in *Peterson v Lappin*,[133] in 2008 a district court returned to the approach taken in *Crawford*, holding in *Fields v Wiley*[134] that "[i]n light of *Crawford*, even if the Applicant were to prevail in this case, Applicant's good conduct time cannot be applied to his period of supervised release, and does not provide a basis for a collateral consequence."[135]

E. Summary

In sum, there are currently two main lines of analysis used to evaluate the question of mootness for these types of cases in the federal courts. One approach, used most often to find cases moot, requires that it be "likely," rather than merely "possible," that the sentencing court will reduce the term of supervised release originally imposed, and more strictly separates the term of imprisonment from the term of supervised release, relying heavily on *Johnson*.

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127 558 F3d 508 (6th Cir 2009).

128 Id at 513.

129 2000 WL 1179782 (10th Cir).

130 Id at *2.

131 323 F3d 846 (10th Cir 2003).

132 Id at 847.

133 2007 WL 2332083, *1 (10th Cir).

134 2008 WL 1840725 (D Colo).

135 Id at *3.

The other approach, most often used to hold that these types of challenges are not moot simply because a person's term of imprisonment has ended and a term of supervised release has begun, only requires that there be some "possibility," rather than "likelihood," that the petitioner will obtain the relief sought before the sentencing court. Holding that mootness is a heavy burden to prove, this is a more flexible approach to the mootness doctrine.

III. REASSESSING THE MOOTNESS DOCTRINE

This Part seeks to reconcile the circuit split discussed in the previous Part, arguing that the Third, Eighth, and (at times) the Sixth and Tenth Circuits' approach to the question of whether post-conviction proceedings become moot after the petitioner is released into supervised release is incorrect.

These circuits have misapplied the Supreme Court's jurisprudence on the mootness doctrine. The Supreme Court has been willing to take a flexible approach to the "collateral consequences" exception to the mootness doctrine in criminal cases. More importantly, the mootness doctrine, according to the Supreme Court, does not require that the outcome on remand be certain to prevent a case from being moot. Instead, it is enough that a favorable court decision could possibly grant the plaintiff his requested relief.

Additionally, the judiciary's current approach to the mootness doctrine needs to be reformulated. The doctrine as currently articulated has a number of problems, including that the standing and mootness doctrines are convoluted and frequently confused. While the Supreme Court has noted that the mootness doctrine should not merely be considered "standing set in a time frame,"[136] it has not articulated clear guidance as to which factors are to be considered or how mootness should be distinguished from standing.

Finally, this Part argues that the mootness doctrine should be understood as a flexible doctrine rooted in notions of judicial economy and prudential considerations, rather than as mandated by the Article III "cases and controversies" clause. This understanding better comports with the purposes of the justiciability doctrines. To illustrate this point, this Part examines what factors should be considered when a petitioner enters supervised

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[136] See notes 40–49 and accompanying text.

release while his post-conviction proceeding is pending, with an emphasis on how the recession has affected that analysis.

A. The Supreme Court's Precedents Are Being Misapplied

> *Mere release of the prisoner does not mechanically foreclose consideration of the merits by the Court.*[137]

One of the long-recognized exceptions to the mootness doctrine has been the "collateral consequences" exception, which permits adjudication where "under either state or federal law further penalties can be imposed as a result of the judgment."[138]

The Supreme Court has repeatedly recognized that there are collateral consequences of being convicted of a crime.[139] These consequences are now presumed to exist.[140] While some Supreme Court precedent has indicated that supervised release should be thought of as a category separate from incarceration,[141] there is no doubt that legal consequences attach to supervised release.[142] Even though many of the requirements imposed on persons in supervised release are non-legal in subject matter (requirements to obtain and maintain employment, live in certain areas, and so forth), the consequence of failing to comply with those conditions[143]—namely, a return to prison—is legal in nature. Hence, collateral consequences in cases where a prisoner is serving a term of supervised release ought to be presumed, preventing these cases from being moot.[144]

While the presence of collateral consequences should be presumed in all these cases, preventing them from being moot, a further and more serious misapplication of Supreme Court juris-

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[137] *Sibron*, 392 US at 51.

[138] See *Sibron*, 392 US at 53–54, quoting *St. Pierre v US*, 319 US 41 at 43 (1943).

[139] See, for example, *North Carolina v Rice*, 404 US 244, 247 (1971) ("A number of disabilities may attach to a convicted defendant even after he has left prison.").

[140] See, for example, *Spencer*, 523 US at 8 ("In recent decades, we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences (or what is effectively the same, to count collateral consequences that are remote and unlikely to occur).").

[141] See notes 88–92 and accompanying text.

[142] See notes 7–18 and accompanying text. Compare also *US v Trotter*, 270 F3d 1150, 1152 (7th Cir 2001) ("Trotter's imprisonment is over, but he remains on supervised release, a form of custody.") with *Johnson*, 529 US at 59–60 (arguing that supervised custody served rehabilitative ends rather than punitive ones, though not disputing that supervised release is a form of custody).

[143] Sometimes through no fault of their own. See note 178 and accompanying text.

[144] See also *Sibron*, 392 US at 57 ("[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.").

prudence is present in the reasoning of the Third, Eighth, Sixth, and Tenth Circuits. The Supreme Court's jurisprudence on the mootness doctrine does not require that it be certain, or even likely, that a favorable decision by a court redress the petitioner's claim.[145] Instead, the Supreme Court has held that a case should be found moot only if the claimant no longer has a "personal stake" in the outcome—in other words, if the decision of the court can no longer have an effect on the individual.[146]

The Third, Eighth, Sixth, and Tenth Circuits, by basing their decisions that a case is moot on their guess about the likelihood that the petitioner's claim would be successful on remand,[147] do not properly analyze whether the petitioner retains a "personal stake" in the outcome. In fact, in evaluating the claim's likelihood of success on remand, these circuits implicitly acknowledge that the claimants do have a personal stake in the litigation: they recognize that the "unlikely" conclusion would have the effect the petitioner desires, that of reducing his term of supervised release.

Appellate courts often remand cases when they are uncertain of the outcome. The role of these courts is to clarify the law and ensure consistency within their circuits. The role of these courts is not to engage in speculation about outcomes. By failing to acknowledge that the petitioners have retained a "personal stake" in the outcome, these circuits have misapplied the mootness doctrine as currently formulated by the Supreme Court.

B. The Mootness Doctrine Reformulated

This section argues that the mootness doctrine should be reformulated. The doctrine as currently formulated is not only unclear, but creates unnecessary confusion by conflating standing

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[145] This incorrect approach can be traced to the now-discredited idea that mootness be thought of as "standing set in a time frame," which has led some circuits—mistakenly, in my view—to adopt the same three-part test for standing (which does require that redressibilty be likely, rather than merely speculative) to evaluate mootness claims. For further discussion of this confusion of standing and mootness, see notes 165–70 and accompanying text. For a discussion of standing, see notes 40–42 and accompanying text.

[146] See, for example, *Geraghty*, 445 US at 397 ("The 'personal stake' aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving."). See also note 50 and accompanying text, as well as Part III.B.

[147] See, for example, *Burkey*, 556 F3d at 148 ("The 'likely' outcome here is not that the District Court's order will not cause the sentencing court in Ohio to reduce Burkey's term of supervised release.").

with mootness.[148] Instead of being understood as a constitutionally mandated doctrine, the mootness doctrine should be understood as a flexible, prudential doctrine, which would allow it to better serve its purpose of ensuring that courts only hear concrete disputes that are capable of judicial resolution.

1. Theoretical background.

The justiciability doctrines outlined in section I.D. were developed to deal with a number of concerns about the role of the judiciary in America. The judiciary and many scholars root the justiciability doctrines in Article III, which limits the courts to deciding "cases or controversies."[149] This is not a necessary reading, however.[150] Justifications for the justiciability doctrines are generally centered on the maintenance of the separation of powers in our tripartite system of government.[151] The mootness doctrine in particular is based on the idea that courts should not issue advisory opinions or decide abstract or hypothetical questions.[152] The doctrine is also based in part on concerns about judicial economy (that a court should not waste its resources on disputes where there is "nothing" at stake).[153]

The justiciability doctrines have been extensively criticized.[154] Their critics charge that the justiciability doctrines are unprincipled[155] and are nothing more than concealed decisions on the merits[156] that represent judicial preferences rather than legal

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[148] In addition to the discussion in this section, see the text accompanying notes 166–71 for an example of the problems that have arisen as a result of this confusion.

[149] See Article III, § 2. See also Jonathan R Siegal, *A Theory of Justiciability*, 86 Tex L Rev 73, 76 (2008) ("Although the Constitution does not define the terms 'cases' and 'controversies,' the courts have understood these words to impose a constellation of constraints known collectively as doctrines of justiciability."); *Rice*, 404 US at 246.

[150] For further discussion, see notes 154–64 and accompanying text.

[151] See *Lujan*, 504 US at 559–60.

[152] See *Rice*, 404 US at 246 ("Early in its history this court held that it had no power to issue advisory opinions and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.").

[153] See Monaghan, 82 Yale L J at 1383 (cited in note 46).

[154] For a small slice of the literature criticizing the justiciability doctrines, see generally Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 NC L Rev 1741 (1999); Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 Const L Rev 677 (1989); Seigel, 86 Tex L Rev 75 (cited in note 149); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 Cornell L Rev 664 (1977); Gene R. Nichol, Jr., *Rethinking Standing*, 72 Cal L Rev 69 (1984); Corey C. Watson, *Comment: Mootness and the Constitution*, 86 Nw U L Rev 143 (1991).

[155] Watson, 86 Nw U L Rev at 145 (cited in note 154).

[156] See Richard H. Fallon, Jr., *The Linkage between Justiciability and Remedies—and*

principles.[157] The characterization of the mootness doctrine as unprincipled and inconsistent has not been helped by the Court, which has said that its cases "demonstrate the flexible character of the Art. III mootness doctrine," and that "[t]he justiciability doctrine is one of uncertain and shifting contours."[158]

Part of the criticism of the mootness doctrine comes from the lack of clarity as to whether the doctrine is a constitutional imperative or based on prudential considerations.[159] It was not until 1964 that the Supreme Court expressly stated that the mootness doctrine was rooted in Article III, and even then it was done "remarkably casual[ly]."[160] The numerous exceptions to the mootness doctrine have caused some to argue that the doctrine cannot be rooted in the Constitution for these exceptions to remain coherent. Perhaps the most interesting advocate of this position was Chief Justice Rehnquist. In *Honig v Doe*, Chief Justice Rehnquist argued that a "reconsideration of our mootness jurisprudence may be in order."[161] He argued that the mootness doctrine must be understood as prudential, because if the doctrine is constitutionally based, then the exceptions[162] to the mootness doctrine make the doctrine "incomprehensible."[163] He also argued that the mootness doctrine should be relaxed from the perspective of preserving judicial economy, because it makes little sense to spend resources briefing, arguing, and thinking about a case only to find it moot.[164]

Their Connection to Substantive Rights, 92 Va L Rev 633, 634–35 (2006).

[157] See Pierce, 77 NC L Rev at 1742–43 (cited in note 154).

[158] See *Geraghty*, 445 US at 400–01.

[159] This distinction matters because if it a prudential doctrine, Congress and the courts are able to define its contours in a way they cannot do if the doctrine is constitutionally based. See *Honig v Doe*, 484 US 305, 330 (1988) (Rehnquist concurring).

[160] See Lee, 105 Harv L Rev at 611 (cited in note 38). The case was *Liner v Jafco, Inc.*, 373 US 301 (1964).

[161] *Honig*, 484 US at 329 (Rehnquist concurring).

[162] See notes 50–52 and accompanying text. In addition to the collateral consequences exception to the mootness doctrine, there is an exception for instances that are "capable of repetition yet evading review" and for voluntary cessation, where a defendant voluntarily ceases the offensive behavior but is capable of resuming it at any time. Challenges to election laws are often allowed under the "capable of repetition yet evading review" exception even though the election has taken place because the challenged activity is considered likely to occur in a future election and the length of time required for litigation will prevent a full adjudication. See, for example, *Moore v Ogilvie*, 394 US 814, 816 (1969). *Laidlaw*, 528 US at 189, is an example of the voluntary cessation exception. There Justice Ginsburg explained that voluntary cessation would only moot a case if the moving party can meet the "'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again."

[163] *Honig*, 484 US at 329–32.

[164] Id at 332.

2. The conflation of standing and mootness.

The Supreme Court's current articulation of the mootness doctrine is unclear, leading to confusion and inconsistency in the lower courts.

The Court's formulation of mootness as merely "standing set in a time frame"[165] led the courts to examine mootness with the same three-part test used to evaluate standing.[166] While the Supreme Court has deemed this characterization of standing "not comprehensive,"[167] a more complete characterization or understanding has not yet been developed by the Court.

It is understandable that lower courts are attracted to this conception of mootness. The Supreme Court has articulated a clear three-part test for what is required for standing—much more clarity than the other justiciability doctrines have been given. The test gives lower courts clear guidance, always attractive for lower-court judges averse to reversal. Additionally, while the Court has backed away from the formulation of mootness as "standing set in a time frame,"[168] it has neither expressly repudiated that sentiment nor has it more clearly formulated the mootness doctrine.

The problem with the formulation of mootness as "standing set in a time frame," however, is that it fails to recognize the different goals of standing and mootness.[169] While standing is meant to ensure that the proper parties are before the court, mootness ensures that the court can actually do something about the dispute. The focus, then, should be on the capacity of the court to provide some meaningful relief to the parties,[170] not on whether the proper person is before the court. A prudential approach would better serve the primary goal of the mootness doctrine, which is to ensure the court does not waste its resources by guaranteeing that it can provide some meaningful relief to the petitioner.

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[165] See note 46 and accompanying text.

[166] See note 41 and accompanying text. This approach to the mootness doctrine is evident in courts on both sides of the circuit split discussed in Part III. See *Burkey*, 556 F3d at 147; *Townes*, 577 F3d at 546–47, citing *Lujan*, 504 US at 560–61.

[167] See notes 46–47 and accompanying text.

[168] Id.

[169] See notes 40–49 and accompanying text. While these two doctrines are rooted in many of the same concerns, they do target slightly different problems and should be understood as such.

[170] For an argument that the courts are already primarily concerned with remedies, and that this can explain outcomes, see Fallon, 92 Va L Rev 633 (cited in note 156).

3. A prudential approach to the mootness doctrine.

This section argues that a prudential approach to the mootness doctrine better fulfills the ends of the justiciability doctrines and, if properly guided by the Supreme Court, will lead to more consistent results in the courts. This section first examines the arguments in favor of this approach and then examines the factors that should be considered in cases like those outlined in Part II.

a) Arguments in favor of a prudential approach. Accepting that the justiciability doctrines serve valuable ends, including preserving judicial economy and, most importantly, creating and maintaining institutional legitimacy, there are many benefits to adopting a prudential approach to the mootness doctrine.

First, this approach would allow the courts to do openly what they already do in practice without stretching the mootness doctrine to the level of incoherence.[171] Richard Fallon has argued that

> [W]hen the Supreme Court feels apprehensions about the availability or non-availability of remedies, it sometimes responds by adjusting applicable justiciability rules, either to dismiss the claims of parties who seek unacceptable remedies or to license suits by parties seeking relief that the Court thinks it is important to award.[172]

If the justiciability doctrines were grounded in Article III, these sorts of machinations by the Court would render the justiciability doctrines meaningless and would undermine the legitimacy of the judiciary as a whole. Transferring to a prudential approach would more accurately reflect judicial practice and would better maintain the judiciary's legitimacy.

Second, a prudential approach allows Congress to exercise more oversight and control over the jurisdiction of the courts, preserving traditional understandings about the relationship between the legislature and the judiciary.[173] Furthermore, a pru-

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[171] See id; Pierce, 77 NC L Rev 1741 (cited in note 154); Lee, 105 Harv L Rev 603 (cited in note 38); Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GW L Rev 562 (2009); Don B. Kates, Jr., and William T. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 Cal L Rev 1385 (1974).

[172] Fallon, 92 Va L Rev at 636 (cited in note 156).

[173] See Lee, 105 Harv L Rev at 608; 612–15 (cited in note 38).

dential approach is better able to guard against waste of judicial resources by allowing notions of institutional competence to be considered.[174]

A flexible approach to the mootness doctrine, albeit one guided by certain considerations, would allow for case-by-case balancing, hopefully resulting in more nuanced decisions. A prudentially based approach would also prevent courts from hiding behind the justiciability doctrines and force them to resolve cases that they have the ability to effectively adjudicate. This, in turn, would enhance the legitimacy of the court in the eyes of the public.

b) Factors to be considered. The first and most important factor to be considered is whether the court is able to provide meaningful relief. By keeping these petitioner's cases "live," the courts in these cases keep open the possibility that the sentencing court could reduce the petitioner's term of supervised release. This has both meaningful legal and practical consequences, especially in the current economic recession.

The legal effect is apparent: a favorable decision would shorten the petitioner's time in custody (including his term of supervised release). The Court, however, should also acknowledge the practical, real-life difficulties faced by people serving a term of supervised release when examining whether a favorable decision would provide meaningful relief.

Currently, the collateral consequences analysis is restricted to legal consequences and civil penalties.[175] In addition to focusing on these injuries, the prudential approach should examine the practical difficulties suffered by people serving a term of supervised release. People serving a term of supervised release can be subject to, for example, restrictions on their mobility, requirements for obtaining and keeping employment, and requirements to support themselves and others.[176] Additionally, they must also find a place to live and try to rebuild their lives. All the while, the possibility of revocation of supervised release and a return to prison is a background threat.[177]

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[174] See Watson, 86 Nw U L Rev at 152–53 (cited in note 154).

[175] See note 65 and accompanying text.

[176] See notes 7–18 and accompanying text.

[177] For descriptions and data of the difficulties that ex-offenders face as they try to reenter society, see generally Jeremy Travis, Amy L. Sullivan, and Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* (The Urban Institute 2001), online at http://www.urban.org/pdfs/from_prison_to_home.pdf (visited Sept 14, 2010); Marlaina Freisthler and Mark A Godsey, *Going Home to Stay: A Review of*

While offenders often face circumstances that should be considered collateral consequences of supervised release for purposes of determining whether the court could provide meaningful relief, the recession has exacerbated the challenges and collateral consequences of supervised release. Always last in line for jobs, offenders may find it nearly impossible to secure gainful employment during a recession, but such employment is often a requirement of their conditional release.[178] An offender's inability to move freely also affects him disproportionally during a recession, since he cannot move easily to find available jobs.

Another consideration that should be at the forefront of a court's mind when adjudicating these cases is whether the Bureau of Prisons will be able to insulate its policies from review if these cases are not reviewed and resolved because they are declared moot. The cases that make up the circuit split outlined in Part II follow a similar pattern: a prisoner challenges some administrative action of the Bureau of Prisons, alleging that it have made some sort of mistake or its policies violate the law.[179] In many of these cases, either a magistrate judge has issued an advisory opinion agreeing with the position of the prisoner, or the Board of Prisons suspects that it will lose the challenge.[180] In either case, while the petition is pending the Board of Prisons releases the petitioner and files a petition to declare the original action moot. This course of action both insulates actions of the Bureau of Prisons and causes situations where other prisoners can be harmed by the Bureau's mistakes or bad policies. By declaring that the petition is moot as soon as the prisoner is released from prison, the approach of the Third, Eighth, and (at times) Sixth and Tenth Circuits insulates the Board's mistakes and bad policies from judicial review.[181] Such a system should

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Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio, 36 U Toledo L Rev 525 (2004–2005); Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford 2003); Bureau of Justice Statistics, *Probation and Parole in the United States, 2008* (cited in note 1).

[178] See, for example, Associated Press, *Ex-Cons Face Tough Path Back into Work Force*, MSNBC (July 13, 2009), online at http://www.msnbc.msn.com/id/32208419/ns/business-careers/ (visited Sept 14, 2010) ("It's difficult for ex-felons to find steady jobs even in good economic times, with unemployment rates sometimes as high as 75 percent for those one year out of prison. During the worst recession in a quarter century, it can be almost impossible.").

[179] See, for example, *Burkey*, 556 F3d at 145. Burkey challenged the determination of the Bureau of Prisons that a prisoner could only gain credits toward early release the first time he completed a drug treatment program, alleging that the procedure used violated the Administrative Procedure Act (APA).

[180] See, for example, *Burkey*, 556 F3d at 145.

[181] It could also be argued that these cases fall into the "capable of repetition yet evad-

not be encouraged by the courts, and a prudential understanding of mootness, which looks to pragmatic factors and can examine the underlying behavior of the parties, would be much more effective in combating such gamesmanship than a rigid formulation of "cases and controversies."[182]

CONCLUSION

This Comment examined the differing approaches taken by the circuits to the question of whether a prisoner's extra time in custody should be "credited" toward his period of supervised release, or whether the prisoner's move from custody to supervised release renders his case moot. The circuits that have held these cases moot have misapplied the Supreme Court's jurisprudence on the mootness doctrine.

More importantly, however, examination of this circuit split illustrates that the Supreme Court's current formulation of the mootness doctrine is largely unworkable and needs to be reformulated. By conflating standing and mootness, the Court has undermined the different purposes that each justiciability doctrine is meant to serve, and has led to confusion and inconsistency in the application of the mootness doctrine.

The mootness doctrine should be decoupled from the "cases and controversies" requirement of Article III. The mootness doctrine, like all the justiciability doctrines, is judicially created and not strictly mandated by the Constitution. A prudential understanding of the mootness doctrine better serves the goals of the justiciability doctrines, better comports with how courts are actually evaluating these claims, and allows the courts to fulfill their role in our system of government by adjudicating claims worthy of resolution.

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ing review" exception to the mootness doctrine. For further discussion, see note 162 and accompanying text.

[182] It should be noted that I am not arguing for a fundamental change in the procedures imposed by 28 USC § 2255, nor am I denying that post-conviction proceedings take up a huge amount of judicial resources. Casting the mootness doctrine as prudential rather than constitutionally mandated, however, would not "open the floodgates" of collateral attacks by prisoners. Prisoners hoping to collaterally attack their convictions will still be required to clear the high hurdles imposed by Congress. A prudential approach to the mootness doctrine would simply allow those prisoners who are able to clear those procedural hurdles to have their claims heard if the court is able to provide effectual relief.