Western New England Law Review

Volume 19 *19 (1997)*
Issue 2 *SYMPOSIUM: PHYSICIAN-ASSISTED SUICIDE*

Article 8

1-1-1997

CRIMINAL LAW—RETROACTIVE LAW OR PUNISHMENT FOR A NEW OFFENSE?—THE EX POST FACTO IMPLICATIONS OF AMENDING THE STATUTORY PROVISIONS GOVERNING VIOLATIONS OF SUPERVISED RELEASE

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Recommended Citation

Ryan M. Zenga, *CRIMINAL LAW—RETROACTIVE LAW OR PUNISHMENT FOR A NEW OFFENSE?—THE EX POST FACTO IMPLICATIONS OF AMENDING THE STATUTORY PROVISIONS GOVERNING VIOLATIONS OF SUPERVISED RELEASE*, 19 W. New Eng. L. Rev. 499 (1997), http://digitalcommons.law.wne.edu/lawreview/vol19/iss2/8

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CRIMINAL LAW—RETROACTIVE LAW OR PUNISHMENT FOR A NEW OFFENSE?—THE EX POST FACTO IMPLICATIONS OF AMENDING THE STATUTORY PROVISIONS GOVERNING VIOLATIONS OF SUPERVISED RELEASE

INTRODUCTION

Supervised release was created under the Sentencing Reform Act of 1984[1] ("Act") as "a new form of post-imprisonment supervision."[2] The Act authorizes a sentencing court to require a defendant to complete a term of supervised release after completing an actual prison sentence.[3] If a court imposes a term of supervised release, it also establishes the conditions of that release.[4] If a defendant fails to abide by the mandated conditions, the court has several options, which include extending the term, modifying the conditions, or revoking supervised release and imposing another term of imprisonment.[5]

Conflict among the United States courts of appeals has arisen in cases where statutes governing supervised release violations have been amended and then applied to defendants who committed their crimes before these new provisions came into existence. The first of these amendments had the effect of removing judicial discretion in certain supervised release violation cases by requiring courts to impose mandatory prison terms.[6] The second amendment authorized courts to impose, after revoking a defendant's term of supervised release, a sentence consisting of both imprisonment as well as an additional term of supervised release.[7] Because, under the for-

1. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3673 (1994) and 28 U.S.C. §§ 991-998 1994)). For a discussion and evaluation of the Sentencing Reform Act of 1984, see Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83 (1988).

2. U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. A(2)(b) (1995).

3. *See* 18 U.S.C. § 3583 (1994).

4. *See id.* § 3583(d).

5. *See id.* § 3583(e). See *infra* Part I.A for a discussion of the supervised release system.

6. *See id.* § 3583(g). See *infra* note 75 and accompanying text for a discussion of subsection (g).

7. *See id.* § 3583(h). See *infra* note 77 and accompanying text for a discussion of subsection (h).

mer versions of these provisions, violations of release might have resulted in lesser prison time or less time subject to supervision, these defendants argued that the application of the new provisions violated the Ex Post Facto Clause of the Constitution by altering past punishment.[8]

The Court of Appeals for the Sixth Circuit is the only court that did not find an ex post facto violation by reasoning that the amended provision in question provided punishment for a new offense.[9] The Sixth Circuit treated supervised release violations, for purposes of ex post facto analysis, as separate offenses from the crime for which the defendant was originally sentenced. In turn, the court considered the penalties imposed for supervised release violations as separate punishments, having no relation to the original sentence.[10] Every other federal circuit to address this issue has determined that punishment for supervised release violations *was* a part of the punishment for the original offense, and that the application of the new statutory provisions to defendants who were sen-

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8. U.S. CONST. art I, § 9, cl. 3. "No Bill of Attainder or ex post facto Law shall be passed." *Id.* See *infra* Part I.C for a discussion of the Ex Post Facto Clause and the Supreme Court's analysis of potential ex post facto violations.

9. *See* United States v. Reese, 71 F.3d 582 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996); *see also* Hanley v. United States, No. 95-1992, 1996 WL 476404 (6th Cir. Aug. 20, 1996) (adhering to the reasoning in *Reese*). It should be noted that several courts of appeals have held that the application of subsection (h) does not constitute an ex post facto violation, reasoning that the application of this subsection to defendants who committed their crimes before that subsection's enactment did not have the effect of increasing the punishment for the original crime as required under the Supreme Court's ex post facto analysis. *See, e.g.*, United States v. Brady, 88 F.3d 225 (3d Cir. 1996) (holding that the application of subsection (h) did not change the legal consequences of the defendant's original crime); United States v. St. John, 92 F.3d 761 (8th Cir. 1996) (concluding that the imposition of subsection (h) does not disadvantage a defendant sentenced prior to that subsection's enactment); United States v. Sandoval, No. 95-1326, 1995 WL 656488 (1st Cir. Nov. 7, 1995), *cert. denied*, 117 S. Ct. 77 (1996) (finding no ex post facto violation because that circuit had already interpreted subsection (e)(3) to allow what subsection (h) articulates). See *infra* Part I.C for a discussion of the Supreme Court's ex post facto analysis. Only the Court of Appeals for the Seventh Circuit, in *United States v. Beals*, 87 F.3d 854 (7th Cir. 1996), held that the application of subsection (h) constitutes an ex post facto violation. See *infra* notes 144-145 and accompanying text for a discussion of *Beals*.

This Note focuses on those decisions in which courts of appeals have confronted the retroactive nature of the amended statutory provisions governing supervised release violations under ex post facto analysis, which have primarily involved subsection (g). See *infra* note 99 for the definition of "retroactive." Because the Seventh Circuit in *Beals* addressed the issue of retroactivity, in the context of subsection (h), this Note incorporates the Seventh Circuit's reasoning into its analysis. The issues raised in the remaining subsection (h) decisions are outside the scope of this Note.

10. *See Reese*, 71 F.3d at 590 (stating that the defendant was returned to prison to serve time for the supervised release violation, not for the original criminal conduct).

tenced before the enactment of those provisions constituted an ex post facto violation.[11]

This Note considers the arguments that have emerged concerning the ex post facto implications of applying amended supervised release statutory provisions to defendants sentenced before the enactment of those provisions. Part I discusses the Sentencing Reform Act of 1984 and the development of the supervised release system. It discusses the relevant statutory provisions concerning supervised release and supervised release violations, along with the corresponding policy statements issued by the United States Sentencing Commission. In addition, Part I introduces the United States Supreme Court's analytical framework for examining possible ex post facto violations. It also presents the two lines of ex post facto cases that have served as the basis for the courts of appeals' holdings on this issue.

Part II presents the two conflicting arguments that have emerged in the courts of appeals concerning the ex post facto implications that have arisen as a result of applying the amended supervised release provisions. Part III questions the soundness of the arguments asserted by the Court of Appeals for the Sixth Circuit. This Note concludes by suggesting that the Sixth Circuit's reasoning lacks the validity to justify its unique decision.

I. BACKGROUND

The analysis of this issue begins with a brief look at the supervised release system and how this system was developed as part of sentencing reform. This section provides an overview of sentencing reform as well as a discussion of the principal features of supervised

11. *See Beals*, 87 F.3d at 860 (stating that the government only punishes the conduct constituting the supervised release violation because of the defendant's original offense); United States v. Meeks, 25 F.3d 1117, 1121 (2d Cir. 1994) (stating that amendments which alter the consequences of supervised release violations alter an integral part of the punishment for the original offense); United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993) (stating that "[f]or revocation purposes, the conduct [upon which revocation is based] simply triggers the execution of the conditions of the original sentence"); United States v. Parriett, 974 F.2d 523, 527 (4th Cir. 1992) (stating that the alteration of supervised release punishment constitutes a "*post hoc* alteration of the punishment for an earlier offense") (quoting Fender v. Thompson, 883 F.2d 303, 306-07 (4th Cir. 1989)); *see also* United States v. Flora, 810 F. Supp. 841, 843 (W.D. Ky. 1993) (treating revocation of supervised release "as the legal consequence of a defendant's original offense, rather than the sole consequence of acts committed while on supervised release").

release. It also discusses the case law used by the courts of appeals to resolve the ex post facto issue.

A. *The Federal Sentencing Guidelines, the Sentencing Commission and the Advent of Supervised Release*

When Congress enacted the Sentencing Reform Act of 1984,[12] its purpose was to remedy the inadequacies of the existing federal sentencing system.[13] Before the Act, the system was based primarily on a "rehabilitation model," where the Parole Commission's method of determining which prisoners were "rehabilitated" led to disparate results.[14] Under that system, Congress would enact criminal statutes, sentencing judges would then determine what sentences to impose within the permissible statutory range, and the Parole Commission would subsequently determine the actual length of the defendant's sentence.[15] Because sentencing laws provided little guidance, federal sentencing judges were "left to apply

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12. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3673 (1994) and 28 U.S.C. §§ 991-998 (1994)). The Sentencing Reform Act is a chapter of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, 98 Stat. 1976 (1984) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C. §§ 991-998 (1994)).

13. *See* S. REP. NO. 98-225, at 38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221-22 (outlining what the Senate Judiciary Committee considered to be the principal problems with the federal sentencing system as it existed at the time). In reforming the sentencing system, Congress had three basic objectives: (1) to establish a fair and effective system through honest sentencing; (2) to seek reasonable uniformity in sentencing by narrowing the disparity in sentences for similar crimes; and (3) to establish a proportionate sentencing system that imposes appropriate sentences based on the severity of the offense. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A(3) (1995). For a discussion of the history of sentencing reform and the enactment of the guidelines, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993); Weigel, *supra* note 1; Todd L. Newton, Note, *Commentary that Binds: The Increased Power of the United States Sentencing Commission in Light of* Stinson v. United States, *113 S. Ct. 1913 (1993)*, 17 U. ARK. LITTLE ROCK L.J. 155 (1994); *see also* Mistretta v. United States, 488 U.S. 361, 363-70 (1989).

14. *See* S. REP. NO. 98-225, at 38, *reprinted in* 1984 U.S.C.C.A.N. at 3221. Under this "rehabilitation model," sentencing judges would typically impose long prison terms, allowing for parole eligibility after the prisoner had served one-third of the term. The Parole Commission would bear the responsibility of setting a release date upon a determination that the prisoner had been rehabilitated. *See id.* at 40, *reprinted in* 1984 U.S.C.C.A.N. at 3223.

The Supreme Court has stated that "the rationale behind parole was that it was actually possible to rehabilitate the offender, thus reducing the likelihood that he or she would revert to criminal activity upon returning to society." Newton, *supra* note 13, at 160-61 n.54 (citing *Mistretta*, 488 U.S. at 363).

15. *See Mistretta*, 488 U.S. at 365; Newton, *supra* note 13, at 160.

[their] own notions of the purposes of sentencing."[16] This resulted in a wide range of sentences for defendants who had committed very similar crimes, and was identified by Congress as a primary justification for changing the system.[17] Without a structured sentencing system, Congress believed that judges were left with "unfettered discretion" in determining the length of sentences, while the Parole Commission was left to decide to what extent, if any, a period of incarceration had rehabilitated the prisoner.[18]

Congress enacted the Sentencing Reform Act in an effort to formulate a comprehensive statement of federal sentencing law that would provide the desired consistency.[19] The Act eliminated parole, as well as the United States Parole Commission,[20] and created the United States Sentencing Commission ("Sentencing Commission").[21] The Sentencing Commission is an independent agency in the judicial branch composed of seven voting members, appointed by the President with the advice and consent of the Senate, and one non-voting member.[22] The primary duties of the Sentencing Commission are to establish sentencing guidelines ("Guidelines")[23] and policy statements[24] "that will further the basic purposes of criminal

16. S. REP. No. 98-225, at 38, *reprinted in* 1984 U.S.C.C.A.N. at 3221.

17. *See id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3221.

18. *See id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3223.

19. *See id.* at 39, *reprinted in* 1984 U.S.C.C.A.N. at 3222.

20. *See Mistretta*, 488 U.S. at 367; Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1689 (1992); Newton, *supra* note 13, at 162.

21. *See* 28 U.S.C. § 991(a) (1994).

22. *See id.*; U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A(1) (1995). The President appoints each of the voting members after consultation with judges, prosecutors, defense attorneys, and other parties interested in the criminal justice process. *See* 28 U.S.C. § 994(a). The constitutionality of the Sentencing Commission was confirmed against separation of powers attack in *Mistretta*, 488 U.S. 361 (1989). For a discussion of the *Mistretta* decision, see Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of* Morrison *and* Mistretta, 39 DEPAUL L. REV. 299 (1989); Lisa G. Esayian, Note, *Separation of Powers—The Federal Sentencing Commission: Unconstitutional Delegation and Threat to Judicial Impartiality?* Mistretta v. United States, 80 J. CRIM. L. & CRIMINOLOGY 944 (1990); Charles R. Eskridge, III, Note, *The Constitutionality of the Federal Sentencing Reform Act After* Mistretta v. United States, 17 PEPP. L. REV. 683 (1990); Laura Leigh Taylor & J. Richard Neville, Note, Mistretta v. United States, *109 S. Ct. 647 (1989): Upholding the Constitutionality of the Sentencing Guidelines*, 40 MERCER L. REV. 1429 (1989); Kristin L. Timm, Note, *"The Judge Would Then Be the Legislator": Dismantling Separation of Powers in the Name of Sentencing Reform*—Mistretta v. United States, *109 S. Ct. 647 (1989)*, 65 WASH. L. REV. 249 (1990).

23. *See* 28 U.S.C. § 994(a)(1).

24. *See* 28 U.S.C. § 994(a)(2). In *Williams v. United States*, 503 U.S. 193 (1992), the Supreme Court stated that the purpose of policy statements "is limited to interpret-

punishment: deterrence, incapacitation, just punishment, and rehabilitation."[25] Congress believed that the establishment of the Commission and the promulgation of Guidelines would provide the necessary structure needed to ensure fair and consistent sentencing.[26]

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ing and explaining how to apply the Guidelines, and . . . 'provid[ing] guidance in assessing the reasonableness of any departure from the guidelines.'" *Id.* at 212 (quoting U.S. SENTENCING GUIDELINES § 1B1.7). Additionally, in *Stinson v. United States*, 508 U.S. 36 (1993), the Court held that the Sentencing Commission's commentary to the guidelines is authoritative and therefore must be followed by federal courts "unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, [a] Guideline." *Id.* at 38. Thus, as a result of the holdings in both *Williams* and *Stinson*, both the commentary to the Guidelines and the policy statements issued by the Sentencing Commission, at least those which "interpret" Guideline provisions, are equally binding on the courts. For a discussion of the Supreme Court's decision in *Stinson*, *see generally* Newton, *supra* note 13.

In addressing the policy statements contained in Chapter 7 of the Sentencing Guidelines Manual concerning violations of probation and supervised release, courts of appeals have reasoned that because these statements do not *interpret* guidelines, they are merely advisory in nature. These courts have often cited the language used by the Sentencing Commission in Chapter 7 to justify their decisions: "These policy statements will provide *guidance* while allowing for the identification of any substantive or procedural issues that require further review." U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. A(1) (1995) (emphasis added). *See, e.g.*, United States v. Brady, 88 F.3d 225 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 773 (1997); United States v. Hurst, 78 F.3d 482 (10th Cir. 1996); United States v. Caves, 73 F.3d 823 (8th Cir. 1996); United States v. West, 59 F.3d 32 (6th Cir.), *cert. denied*, 116 S. Ct. 486 (1995); United States v. Davis, 53 F.3d 638 (4th Cir. 1995); United States v. Hill, 48 F.3d 228 (7th Cir. 1995); United States v. Milano, 32 F.3d 1499 (11th Cir. 1994); United States v. Anderson, 15 F.3d 278 (2d Cir. 1994); United States v. O'Neil, 11 F.3d 292 (1st Cir. 1993); United States v. Levi, 2 F.3d 842 (8th Cir. 1993).

25. U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A(2) (1995). The Guidelines promulgated by the Sentencing Commission are based on a classification system whereby every offense is categorized and graded based on its relative seriousness. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 2A1.1-2A1.5(1995) (outlining various forms of homicide); *see also* 28 U.S.C. § 994 (outlining the duties of the Sentencing Commission). The Guidelines are designed to provide judges with sentencing ranges, which are determined by the corresponding category of the offense. *See* S. REP. NO. 98-225, at 51 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3234.

26. *See* S. REP. NO. 98-225, at 39, *reprinted in* 1984 U.S.C.C.A.N. at 3222. Although the Sentencing Reform Act was designed to end sentencing disparity, commentators have questioned whether the Act actually achieved that goal. *See, e.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771 (1992); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681 (1992).

For more general discussions of and views on the Sentencing Commission and the Sentencing Guidelines, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); Freed, *supra* note 20; Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines*

Under the Guidelines system, Congress intended for sentencing courts to retain some discretion in imposing sentences.[27] Preservation of discretion is consistent with a primary goal of the Act—to allow sentencing judges to address the needs of individual offenders.[28] Accordingly, sentencing courts can consider the circumstances surrounding each particular case in determining the appropriate sentence.[29]

The supervised release system, created under the Act, evidences an attempt by Congress to preserve the sentencing judge's

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Meeting Congressional Goals?: An Empirical and Case Law Analysis, 40 EMORY L.J. 393 (1991); Jack H. McCall, Jr., *The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 TENN. L. REV. 467 (1993); Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987); W. Crews Lott, Note, *Balancing Burdens of Proof and Relevant Conduct: At What Point is Due Process Violated*, 45 BAYLOR L. REV. 877 (1993); Lisa M. Rebello, Note, *Sentencing Under the Federal Sentencing Guidelines: Five Years of "Guided Discretion"*, 26 SUFFOLK U. L. REV. 1031 (1992); Jonathan Sharff, Comment, *Federal Sentencing Guidelines: Due Process Denied*, 33 ST. LOUIS U. L.J. 1049 (1989); Robert H. Smith, Note, *Departure Under the Federal Sentencing Guidelines: Should a Mitigating or Aggravating Circumstance Be Deemed "Adequately Considered" Through "Negative Implication?"*, 36 ARIZ. L. REV. 265 (1994).

27. *See* S. REP. NO. 98-225, at 39, *reprinted in* 1984 U.S.C.C.A.N. at 3222. Congress stated that sentencing reform legislation "should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case." *Id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3222.

28. *See id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3222.

29. *See* 18 U.S.C. § 3553(a) (1994) (outlining the factors courts must consider in imposing a sentence); *id.* at § 3553(b) (stating that a sentencing court may deviate from established guideline ranges when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described"); *see also* S. REP. NO. 98-225, at 51-52, *reprinted in* 1984 U.S.C.C.A.N. at 3234-35. If the sentencing court elects to depart from the Guidelines, however, it must state its reasons for doing so, and an appellate court may subsequently review the reasonableness of this departure. *See* 18 U.S.C. § 3742; U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A(2) (1995). For discussions of the issue of departure as well as the standard of review under the Sentencing Guidelines, see Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299 (1996); Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1 (1991); Smith, *supra* note 26.

For discussions of the issue of judicial discretion, or lack thereof, under the Sentencing Guidelines, see Freed, *supra* note 20; Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988); Janet Alberghini, Comment, *Structuring Determinate Sentencing Guidelines: Difficult Choices for the New Federal Sentencing Commission*, 35 CATH. U. L. REV. 181 (1985); Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109 (1992).

discretion.[30] A form of post-imprisonment supervision, supervised release replaced the traditional parole system, which Congress viewed as a primary contributor to the inadequate state of the sentencing process in the pre-Act period.[31] Unlike a term of parole, which served to replace a remaining portion of a defendant's prison sentence, supervised release is imposed at the time of initial sentencing as part of the sentence itself.[32] Supervised release does not end a term of imprisonment prematurely, but rather follows a completed term of imprisonment.[33]

A term of supervised release is similar to a term of probation. Both are systems in which a defendant serves a sentence outside of prison, subject to specified conditions.[34] The principal difference between the two systems is that instead of following a term of imprisonment, probation serves as a sentence in and of itself, and is used as an alternative to incarceration.[35] The primary goal of su-

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30. For a detailed summary of the supervised release system, see Harold Baer, Jr., *The Alpha & Omega of Supervised Release*, 60 ALB. L. REV. 267 (1996).

31. *See* S. REP. NO. 98-225, at 38-39, *reprinted in* 1984 U.S.C.C.A.N. at 3221-22; *see also* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A(3) (1995) (stating that the reason for abolishing parole was to assure honesty and fairness in sentencing, as "the sentence imposed by the court [would be] the sentence the offender [would] serve"); see *supra* notes 13-18 and accompanying text for a discussion of the inadequacies of the federal sentencing system prior to the enactment of the Sentencing Reform Act of 1984.

32. *See* 18 U.S.C. § 3583(a) (1994). Under the parole system, a defendant was sentenced to a term of imprisonment with the possibility of being released on some date before the end of the term. Subsequently, the Parole Commission would make a determination as to whether the prisoner could be released and allowed to serve the remaining portion of the sentence on parole supervision. *See* S. REP. NO. 98-225, at 38, *reprinted in* 1984 U.S.C.C.A.N. at 3221. In making this determination, the Parole Commission was allowed to consider a wide variety of variables, which included the history and characteristics of the prisoner, as well as reports from any and all sources. *See id.* at 38, *reprinted in* 1984 U.S.C.C.A.N. at 3221, n.6 (citing 18 U.S.C. §§ 4206, 4207 (1982) (repealed 1984)). This wide discretion was the source of the disparate release dates that Congress set out to eliminate. *See id.* at 38, *reprinted in* 1984 U.S.C.C.A.N. at 3221.

33. *See id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. A(2)(b) (1995).

34. *See generally* 18 U.S.C. §§ 3563, 3583 (1994); U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pts. B, D (1995).

35. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. B, introductory commentary (1995); 18 U.S.C. § 3561(a)(3) (1994) (stating that probation may not be ordered if a term of imprisonment is imposed for the same or a different offense); Baer, *supra* note 30, at 269. The Guidelines authorize the sentencing court to impose a term of probation in place of imprisonment provided that it complies with statutory restrictions. *See* 18 U.S.C. § 3561(a); U.S. SENTENCING GUIDELINES MANUAL, § 5B1.1. Conditions for probation and penalties for violations of those conditions are treated in the same manner as supervised release by the Sentencing Commission. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 7, §§ 5B1.4, 5D1.3 (1995) (governing conditions and violations of probation and supervised release); 18 U.S.C. §§ 3563(a), 3583(d) (1994).

pervised release is to ease a defendant's transition into the community after serving a term of imprisonment.[36]

Supervised release was developed by Congress as a method of tailoring sentences to the needs of particular defendants because it permits the court to evaluate whether, and to what extent, a defendant needs post-imprisonment supervision.[37] Unless the imposition of a term of supervised release has been deemed mandatory by statute, courts consider a variety of factors in determining a defendant's need for supervised release after imprisonment.[38] Additionally, while the maximum lengths of supervised release terms are dependent upon the classification of the defendant's offense, courts have the authority to determine the specific length as long as it falls within the permissible statutory range.[39]

Additionally, the Federal Rules of Criminal Procedure do not distinguish between supervised release and probation for the purposes of revocation procedures. *See* FED. R. CRIM. P. 32.1.

36. *See* S. REP. NO. 98-225, at 124, *reprinted in* 1984 U.S.C.C.A.N. at 3307.

37. *See id.* at 123, *reprinted in* 1984 U.S.C.C.A.N. at 3306. A court may impose a term of supervised release to follow any sentence of imprisonment. *See* 18 U.S.C. § 3583(a). However, a court is required to order a term of supervised release to follow imprisonment if required to do so by statute or if the defendant has been convicted for the first time of a domestic violence crime. *See id.* A court is also required to impose a term of supervised release when a sentence of imprisonment of more than one year is imposed. *See* U.S. SENTENCING GUIDELINES MANUAL, § 5D1.1(a) (1995). However, a court may depart from the Guidelines' requirement as long as it provides reasons for its departure and imposes a reasonable sentence. *See* 18 U.S.C. § 3553(b), (c)(2) (1994). The Sentencing Guidelines also allow a court to depart if it determines that a term of supervised release is not required by statute or is not necessary for the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute. *See* U.S. SENTENCING GUIDELINES MANUAL § 5D1.1, commentary (1995).

38. *See* 18 U.S.C. § 3553(a) (1994) (providing the factors that a court is required to consider in determining whether to impose a term of supervised release). For example, courts are required to consider: the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence imposed to provide adequate deterrence, public protection, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment; as well as any applicable guidelines or policy statements issued by the Sentencing Commission that are in effect on the date the defendant is sentenced. *See id.*

39. *See* 18 U.S.C. § 3583(b) (1994) (providing the authorized terms of supervised release). These terms include: up to five years for a Class A or B felony, up to three years for a Class C or D felony, and up to one year for a Class E felony or for a misdemeanor other than a petty offense. *See id.* Offenses are classified in 18 U.S.C. § 3559. Additionally, unless otherwise required by statute, the Guidelines require a court to include a term of supervised release of three to five years for a Class A or B felony; two to three years for a Class C or D felony; and one year for a Class E felony or a Class A misdemeanor. *See* U.S. SENTENCING GUIDELINES MANUAL, § 5D1.2(a) (1995). A court may depart from the Guideline ranges, but the term of supervised

Terms of supervised release are accompanied by conditions which govern a defendant's conduct while on release.[40] For example, courts must require that the defendant not commit another crime and not possess a controlled substance during the term of supervision.[41] Courts can also impose additional conditions provided that these conditions conform to statutory requirements.[42] After ordering a term of supervised release, courts have the authority to terminate, extend, or modify the conditions depending upon the defendant's subsequent conduct.[43]

B. *Violations of Supervised Release*

1. The Statutory Provisions

In addressing violations of supervised release, courts issue a warrant for the arrest of the defendant.[44] A preliminary hearing is

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release imposed may not exceed the maximum terms stated in 18 U.S.C. § 3583(b). *See* Baer, *supra* note 30, at 275.

In determining the length of the term of supervised release, a court is required to consider the factors provided in 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3583(c); *see also supra* note 38 (discussing these factors). A court may include a term of supervised release in addition to the statutory maximum term of imprisonment. *See* Baer, *supra* note 30, at 275 n.52.

40. *See generally* 18 U.S.C. § 3583(d). When a defendant pleads guilty to an offense, courts must explain to the defendant, in open court, the "effects" of a term of supervised release. *See* FED. R. CRIM. P. 11(c)(1); see also Baer, *supra* note 30, at 283-85 for a discussion of these procedural requirements as well as the consequences of a court's failure to adhere.

41. *See* 18 U.S.C. § 3583(d).

42. *See id.* In determining the conditions of supervised release, a court is required to consider the factors provided in § 3553(a). *See* § 3583(c); *see also supra* note 38 (discussing these factors); U.S. SENTENCING GUIDELINES MANUAL, § 5D1.3(b) (1995). In addition, a court may incorporate any of the conditions recommended as conditions for probation under § 3563(b) as well as any other condition the court deems necessary. *See* 18 U.S.C. § 3583(d).

The Sentencing Commission has also issued policy statements which provide a list of recommended conditions of supervised release and probation. *See* U.S. SENTENCING GUIDELINES MANUAL, § 5B1.4 (1995). The reasonableness of the conditions imposed by the court may be reviewed by an appellate court in a similar manner to appellate review of departures from the Guidelines in sentencing, discussed *supra* note 29. *See also id.* ch. 1, pt. A(2); Baer, *supra* note 30, at 276-82 (discussing issues surrounding conditions of supervised release).

43. *See* 18 U.S.C. § 3583(e)(1)-(2). A court may terminate a term of supervised release at any time after one year based on the defendant's conduct. *See id.* § 3583(e)(1). A court may extend the term of release up to the maximum term that could have been imposed for the defendant's offense. *See id.* § 3583(e)(2). It may also "modify, reduce, or enlarge the conditions of supervised release" provided that the court adhere to Rule 32.1(b) of the Federal Rules of Criminal Procedure. *Id.*

44. *See* 18 U.S.C. § 3606 (1994). This statute reads that the defendant must be "taken without unnecessary delay before the court having jurisdiction over him." *Id.*

then conducted to determine whether there is probable cause to hold the defendant for a revocation hearing.[45] If probable cause is not established, the court must dismiss the defendant.[46] On the other hand, if probable cause is established, the defendant is held for a revocation hearing.[47]

At a revocation hearing, defendants are afforded more rights than at the preliminary hearing.[48] However, a revocation hearing is not a formal trial.[49] For example, defendants are not entitled to a jury nor are they protected against self-incrimination.[50] Courts have been reluctant to require these procedural protections in revo-

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45. *See* FED. R. CRIM. P. 32.1(a). Congress has incorporated the due process requirements of a preliminary hearing and a final revocation hearing, established by the Supreme Court in parole and probation violation cases, into Rule 32.1 of the Federal Rules of Criminal Procedure. *See* Baer, *supra* note 30, at 285 (citing Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); Morrissey v. Brewer, 408 U.S. 471, 485, 487 (1972); FED. R. CRIM. P. 32.1 advisory committee's notes (1979 addition)).

If arrested for violating a condition of supervised release, a defendant must be given:

> (A) notice of the preliminary hearing its purpose and of the alleged violation; (B) an opportunity to appear at the hearing and present evidence in the person's own behalf; (C) upon request, the opportunity to question witnesses against the person unless, for good cause, the federal magistrate decides that justice does not require the appearance of witnesses; and (D) notice of the person's right to be represented by counsel.

See FED. R. CRIM. P. 32.1(a)(1)(A)-(D); *see also* Baer, *supra* note 30, at 286.

46. *See* FED. R. CRIM. P. 32.1(a)(1). The revocation hearing, as its name suggests, establishes whether a defendant has violated the conditions of release and whether the term of release should be revoked. *See* Baer, *supra* note 30, at 287 (citing FED. R. CRIM. P. 32.1(a)(2) advisory committee's notes (1979 addition)).

47. *See* FED. R. CRIM. P. 32.1(a)(1)-(2). Initially, when the supervised release system was first proposed and developed, revocation was not intended to be a consequence of violating conditions of release. Rather, modification of conditions was seen by the Senate Judiciary Committee as the appropriate course of action. *See* S. REP. NO. 98-225, at 125 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3308. The Committee stated that defendants who had violated conditions of their release could be held "in contempt of court." *Id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3308. Additionally, the Committee stated that "[it] did not provide for revocation proceedings for [a] violation of a condition of supervised release because it [did] not believe that a minor violation . . . should result in resentencing of the defendant and because it believe[d] that a more serious violation should be dealt with as a new offense." *Id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3308.

48. *See* FED. R. CRIM. P. 32.1(a)(2)(A)-(E). For example, "(1) the notice of the alleged violation must be written; (2) the evidence against the defendant must be disclosed; and (3) the defendant need not specifically request the opportunity to question adverse witnesses." Baer, *supra* note 30, at 287 (citing FED. R. CRIM. P. 32.1(a)(2)(A)-(E)).

49. *See* Baer, *supra* note 30 at 287.

50. *See id.* at 287-88 (citing *Gagnon*, 411 U.S. at 786). "Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding." Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984).

cation hearings because these hearings have not been considered criminal prosecutions.[51] Nonetheless, as opposed to a probation revocation hearing, in which "a court need only be 'reasonably satisfied' that a probationer has not met the conditions of probation,"[52] the burden of proof at a supervised release revocation hearing is a preponderance of the evidence.[53]

In determining whether to revoke a defendant's term of supervised release, courts are required to consider the factors stated in 18 U.S.C. § 3553(a) as well as the Guidelines and policy statements issued by the Sentencing Commission.[54] If a court decides that revocation is necessary, it has the authority to sentence the defendant to prison for all or part of the term of supervised release that was allowed under the statute for the offense that initially resulted in the term of supervised release.[55] However, in determining the length of the new prison term, the court must adhere to statutory limitations.[56] This term of imprisonment, when combined with the time a defendant has already served in prison for the original offense, may have the cumulative effect of exceeding the maximum term allowed under the statute authorizing the initial imposition of supervised release.[57]

2. The Sentencing Commission's Approach

Under 28 U.S.C. § 994(a)(3), Congress required the Sentencing Commission to issue guidelines or policy statements concerning probation and supervised release violations.[58] When the Commis-

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51. *See* Baer, *supra* note 30 at 289-90.

52. *Id.* at 289 (citing United States v. Goad, 44 F.3d 580, 585 (7th Cir. 1995); United States v. Francischine, 512 F.2d 827, 829 (5th Cir. 1975)).

53. *See* 18 U.S.C. § 3583(e)(3) (1994); Baer, *supra* note 30, at 289-92 (discussing additional procedural protections afforded and not afforded defendants at revocation hearings); *see also infra* note 147.

54. *See* 18 U.S.C. § 3583(e). *See supra* note 38 (discussing these factors).

55. *See id.* § 3583(e)(3). Courts are required to consider the factors stated in § 3553(a), just as they would in deciding whether to revoke a term of release, in determining the length of imprisonment upon revocation. *See id.* § 3583(e).

56. *See id.* § 3583(e)(3). This section states that defendants may not be required to serve more than five years in prison if the offense that resulted in the term of supervised release was a Class A felony; more than three years if the offense was a Class B felony; more than two years if the offense was a Class C or D felony; and no more than one year in any other case. *See id.*

57. *See* Baer, *supra* note 30, at 292-93 (citing United States v. Robinson, 62 F.3d 1282, 1285-86 (10th Cir. 1995)).

58. *See* 28 U.S.C. § 994(a)(3) (1994); U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. A(1) (1995). See *supra* note 24 for a comparison of guidelines to policy statements issued by the Sentencing Commission.

sion first began establishing a system for sanctioning criminal violations of probation and supervised release,[59] it considered two different approaches.[60] The first approach was to consider a violation of probation or supervised release as a "breach of trust." Under this approach, the penalty imposed for the violation would be intended to sanction a defendant for failing to abide by the conditions of release.[61] Only the seriousness of the conduct constituting the violation would be considered, "to a limited degree," in determining the appropriate sanction.[62] The punishment for new criminal conduct would be left to the court responsible for imposing the sentence for that offense.[63]

Under the second approach, the Commission contemplated sanctioning defendants for the particular conduct constituting the violation as if that conduct were being sentenced as a new criminal offense.[64] This option would have called for the application of the Sentencing Guidelines "to any [new] criminal conduct that formed the basis of the [release] violation . . . ."[65] The defendant's criminal history would then have been recalculated to determine the appropriate sanction for violating release.[66]

The Sentencing Commission elected to adopt the first approach and treat a violation of probation or supervised release as a breach of trust, with the court addressing the violation merely taking into account the nature of the most recent conduct as well as the defendant's history in determining the appropriate punishment.[67] The Commission chose this "breach of trust" approach for several reasons, including its belief that the court having jurisdiction over the most recent conduct was the more appropriate body to impose

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59. The Sentencing Commission elected to treat probation and supervised release as "functionally equivalent" for the purposes of establishing policy statements concerning violations of these forms of court-ordered supervision. U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. B, introductory commentary (1995).

60. *See id.* ch. 7, pt. A(3)(b). The debate focused on how to treat these violations, which would constitute violations of release as well new crimes in and of themselves, in determining an appropriate sanction. *See id.*

61. *See id.*

62. *Id.*

63. *See id.*

64. *See id.*

65. *Id.* As would have been the case for any other offense, Chapters Two and Three of the Sentencing Guidelines would have been applied to this new criminal conduct. *See id.*

66. *See id.* Recalculation of the defendant's criminal history would have been done under Chapter Four of the Sentencing Guidelines. *See id.*

67. *See id.*

punishment for that offense.[68] It subsequently drafted policy statements regarding violations of probation and supervised release that reflected the "breach of trust" approach.[69] The statements classify probation and supervised release violations into three grades.[70] Depending on the grade of the violation, the court is instructed as to the appropriate action.[71] Because courts must only *consider* these statements, sentences which do not conform to those recommended by the Commission are not considered departures, and "[t]he sentence will likely be affirmed provided the court considered the Chapter Seven policy statements, the sentence was within the statutory maximum, and the sentence was reasonable."[72]

3. The Relevant Statutory Amendments

Since the inception of supervised release system under the Sentencing Reform Act in 1984, Congress has recognized the need for new statutory provisions governing particular release violations.[73] In 1988, 18 U.S.C. § 3583(g) was added as part of the Anti-Drug

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68. *See id.* The Sentencing Commission also stated that it wanted the sanction imposed for the breach of trust to be in addition to, or consecutive to, the sentence imposed for the new conduct. It concluded that the second approach would have led to duplicated efforts among courts whereby the violation sentence would have often been "subsumed" in the sentence imposed for the new conduct itself. *Id.*

In addition, the Commission concluded that the second option was impractical because it was often quite difficult for the sanctioning court to obtain the necessary facts and witnesses needed if the Guidelines were to be applied to the new offense. *See id.*

69. *See id.* § 7B1.1. The Commission opted to issue policy statements as opposed to guidelines in an effort to first accumulate and later evaluate information and opinions concerning the effectiveness of their sanctions. *See id.* ch. 7, pt. A(1).

70. *See id.* § 7B1.1(a). Grade A violations consist of conduct constituting a federal, state, or local offense punishable by a term of imprisonment exceeding one year that is a crime of violence, is a controlled substance offense, is one which involves possession of a firearm or destructive device, or any other federal, state or local offense punishable by a term of imprisonment exceeding twenty years. Grade B violations consist of conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year. Grade C violations consist of conduct constituting a federal, state, or local offense punishable by a term of imprisonment of one year or less, or conduct constituting a violation of any other condition of supervised release. *See id.* The Commission notes that these grades of violations are only applicable in cases where the defendant has been placed on supervised release for committing a felony or Class A misdemeanor, and do not cover cases in which the defendant was under supervision for a Class B or C misdemeanor or an infraction. Such cases are dealt with under § 1B1.9. *See id.* ch. 7, pt. B, introductory commentary.

71. *See id.* § 7B1.3 (outlining policy statements governing the revocation, modification, and extension of probation and supervised release).

72. Baer, *supra* note 30, at 299 (citing United States v. Mathena, 23 F.3d 87, 93 n.13 (5th Cir. 1994); United States v. Anderson, 15 F.3d 278, 284 (2d Cir. 1994)).

73. See 18 U.S.C. § 3583 (1994) for a chronological list of amendments.

Abuse Act,[74] establishing mandatory revocation of supervised release for possession of controlled substances while on supervised release.[75] Additionally, 18 U.S.C. § 3583(h) was added in 1994 under the Violent Crime Control Act,[76] authorizing the court, upon revoking a term of supervised release and sentencing a defendant to another term of imprisonment, to place the defendant on another term of supervised release following this additional imprisonment.[77]

The ex post facto issue examined in this Note arose as courts began to apply the new provisions to defendants who had already been sentenced to terms of supervised release under the former versions of these statutes. These defendants pointed to the fact that for these same violations, section 3583(g) originally allowed for judicial discretion in determining the lengths of new prison terms.[78] Additionally, before the enactment of section 3583(h), courts differed as to whether they could impose another term of supervised release to follow the new term of imprisonment.[79] The defendants argued that applying the new provisions to their cases constituted an ex post facto violation[80] because it had the effect of altering the terms of their original sentences.[81]

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74. Pub. L. No. 100-690, Title VII, § 7303(b)(2), 102 Stat. 4181, 4464 (1988).

75. *See* 18 U.S.C. § 3583(g) (1988) (amended 1994) (stating that the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release). This statute was later amended to authorize mandatory revocation for possession of a controlled substance, for possession of a firearm in violation of federal law or in violation of a specified condition of supervised release, and for refusal to comply with required drug testing. *See* 18 U.S.C. § 3583(g) (1994). The limitation concerning the imposed term of imprisonment was also amended and instructed the court not to exceed the maximum term of imprisonment authorized under subsection (e)(3). *See id.*

76. Pub. L. No. 103-322, § 110505(3), 108 Stat. 1796 (1994).

77. *See* § 3583(h). This subsection pertains to cases where a term of supervised release is revoked and a defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3). The length of the supervised release term may not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. *See id.*

78. *See* United States v. Reese, 71 F.3d 582 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996); United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994); United States v. Paskow, 11 F.3d 873 (9th Cir. 1993); United States v. Parriett, 974 F.2d 523 (4th Cir. 1992).

79. See *supra* note 9 for examples of cases addressing the effect of subsection (h).

80. See *infra* Part I.C for a discussion of the Ex Post Facto Clause and the Supreme Court's framework for analyzing ex post facto violation claims.

81. See *infra* Part II for a discussion of the cases in which this argument was confronted.

C. *The Ex Post Facto Prohibition*

The United States Constitution prohibits both state and federal legislatures from passing ex post facto laws.[82] *Calder v. Bull*[83] was the first case in which the Supreme Court outlined the elements of a violation of the Ex Post Facto Clause.[84] Since *Calder*, the Clause has been interpreted to prohibit legislative acts that operate to the detriment[85] of a defendant whose alleged crime was committed before the legislative act was enacted.[86]

In *Weaver v. Graham*, the Court provided two explicit purposes for prohibiting ex post facto laws: assuring "that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed,"[87] and preventing "arbitrary and potentially vindictive" legislative acts.[88] The Court stated that "[t]he critical question is whether the law changes the legal

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82. *See* U.S. CONST. art. I, § 9, cl. 3, regarding the federal government, providing that: "No Bill of attainder or ex post facto Law shall be passed." U.S. CONST. art. I, § 10, regarding state governments, providing that: "No state shall . . . pass any Bill of Attainder, [or] ex post facto Law . . . ."

83. 3 U.S. (3 Dall.) 386 (1798).

84. In *Calder*, Justice Chase provided four characteristics of ex post facto laws:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. at 390 (emphasis omitted).

85. *See* Weaver v. Graham, 450 U.S. 24, 29 (1981); Dobbert v. Florida, 432 U.S. 282, 294 (1977); Lindsey v. Washington, 301 U.S. 397, 401 (1937); *Calder*, 3 U.S. (3 Dall.) at 390.

86. *See Weaver*, 450 U.S. at 29. For a general discussion of the ex post facto clauses, see Derek J.T. Adler, *Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 FORDHAM L. REV. 1191, 1192-1201 (1987); *see also* William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539 (1947); Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315 (1922); Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143 (1996); Annotation, *Supreme Court's Views as to What Constitutes an Ex Post Facto Law Prohibited by Federal Constitution*, 53 L. Ed. 2d 1146 (1978).

87. *Id.* at 28-29 (citing *Dobbert*, 432 U.S. at 298; Kring v. Missouri, 107 U.S. 221, 229 (1883); *Calder*, 3 U.S. (3 Dall.) at 387).

88. *Id.* at 29 (citations omitted). *Weaver* involved a new Florida statute which reduced the amount of "good time" credits a prisoner could earn for good conduct. *See id.* at 26. Florida attempted to apply the statute to prisoners sentenced before its enactment. *See id.* at 27. The Supreme Court held that this retroactive application of the new law violated the Ex Post Facto Clause because it made it more difficult for most

consequences of acts completed before its effective date."[89] Additionally, the *Weaver* Court outlined two essential elements needed for a law to violate the ex post facto prohibition. First, "it must be retrospective, that is, it must apply to events occurring before its enactment . . . ."[90] Second, "it must disadvantage the offender affected by it."[91]

The most recent Supreme Court cases concerning the Ex Post Facto Clause have stated the *Weaver* test somewhat differently. In *Collins v. Youngblood*,[92] the Court focused its inquiry on whether the legislation enacted after the defendant's conduct had been committed retroactively altered the definition of the crime or increased the corresponding punishment.[93] Subsequently, in *California Department of Corrections v. Morales*,[94] the Court explicitly stated that *Collins* had correctly expressed the ex post facto analytical framework.[95] The *Morales* Court stated that "[a]fter *Collins*, the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable."[96]

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inmates to accumulate credits. *See id.* at 35-36. The Court stated that the law "constricts the inmate's opportunity to earn early release . . . ." *Id.*

89. *Id.* at 31. The Court also stated that "the *ex post facto* prohibition . . . forbids the imposition of punishment more severe than the punishment assigned by law when the act[s] to be punished occurred." *Id.* at 30.

90. *Id.* at 29.

91. *Id.* (citing Lindsey v. Washington, 301 U.S. 397, 401 (1937); *Calder*, 3 U.S. (3 Dall.) at 390); *accord* Miller v. Florida, 482 U.S. 423, 430 (1987).

92. 497 U.S. 37 (1990).

93. *See id.* at 43. The Court in *Collins* made reference to language used in another Supreme Court ex post facto case, *Beazell v. Ohio*, 269 U.S. 167 (1925). *See id.* at 42. In defining the meaning of the Ex Post Facto Clause, the *Beazell* Court stated that:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Beazell, 269 U.S. at 169-70.

94. 514 U.S. 499 (1995).

95. *See id.* at 504 n.3.

96. *Id.* Although the *Morales* Court made it clear that this prong of the Court's ex post facto test had been refined, it is not clear what impact, if any, the decision actually had on its application. In *Morales*, the defendant was sentenced to a term of imprisonment for the murder of his wife, but was entitled to parole reviews annually thereafter. *See id.* at 503. California subsequently changed its law to authorize the California Board of Prison Terms to defer parole hearings for up to three years for prisoners convicted of more than one offense involving the taking of a life. *See id.* The

Essentially, the Supreme Court's ex post facto analysis attempts to determine whether the law in question has made the penalty for a crime more severe subsequent to the time when that crime was committed. In applying the test to the supervised release cases, the courts of appeals deciding this issue have struggled with the following question: to which "event" is the new law being applied, the original offense or the violation of release? To resolve this question, the courts have had to draw comparisons to other lines of cases confronting similar ex post facto claims. The following section discusses these analogies.

D. *Application of the Ex Post Facto Analysis: Parole Violation and Repeat Offender Statutes*

In examining the supervised release cases under the Supreme Court's ex post facto analysis, the five courts of appeals that have considered this issue have compared their cases to those involving either parole violation or repeat offender statutes.[97] These two lines of cases have involved similar ex post facto violation claims, producing differing results. Consequently, the courts of appeals deciding the supervised release cases, by incorporating the reasoning used in either the parole violation or repeat offender situations, have reached conflicting conclusions.

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defendant was later denied parole and, under the new law, the next review hearing was set for three years later. *See id.*

The Court held that the mere increase in intervals between parole hearings did not constitute an increase in punishment for ex post facto purposes. *See id.* at 1605. It reasoned that the change in parole policies was done merely to avoid needless hearings for prisoners who had "no reasonable chance of being released." *See id.* at 504. The Court reached its conclusion without calling into question the holdings of *Weaver* and *Miller*. Moreover, the Court's re-articulation of the ex post facto analysis involved only the second half of the *Weaver* test, that focusing on whether the law in question "disadvantaged" the defendant. Conversely, the issue examined in this Note does not involve the question of whether the new supervised release provisions disadvantaged the defendants, but whether these provisions were retroactive. Consequently, the retroactivity portion of the analysis, as stated in *Weaver*, remains pertinent to the issue discussed in this Note.

The Supreme Court's most recent application of the ex post facto analysis appears in the case of Lynce v. Mathis, 117 S. Ct. 891 (1997). In *Lynce*, the Court again dealt with the issue of whether a newly enacted state statute "disadvantaged" a defendant by increasing the punishment for the defendant's original crime. *See id.* at 895.

97. The Courts of Appeals for the Second, Fourth, Seventh, and Ninth Circuits have compared the supervised release statutes to those governing parole violations. Only the Court of Appeals for the Sixth Circuit has decided that the repeat offender analogy is more accurate. See *infra* Part II for a discussion of these cases.

1. Statutes Governing Parole Violations

The courts of appeals that have found ex post facto violations to exist in the supervised release cases have compared supervised release to parole.[98] These courts, in identifying similarities between the two systems, have turned to ex post facto cases involving the retroactive[99] application of new parole violation statutes to support their holdings.[100] The parole violation cases prohibited retroactive changes that imposed greater legal obstacles to early release, generally through the forfeiture of "good-time" credits.[101]

The principal case involving the retroactive application of altered parole violation statutes is *Greenfield v. Scafati*,[102] a case from the United States District Court for the District of Massachusetts which the Supreme Court affirmed without opinion. In *Greenfield*, the defendant was sentenced to five to seven years in prison for his original crime.[103] Under Massachusetts law at the time of sentencing, prisoners could accumulate "good-conduct" credits while in

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98. *See* United States v. Meeks, 25 F.3d 1117, 1121 (2d Cir. 1994) (stating that "supervised release, like parole, is an integral part of the punishment for the underlying offense"); United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993) (stating that parole and supervised release "are virtually identical systems" in that under both, "a defendant serves a portion of a sentence in prison and a portion under supervision outside prison walls"); *accord* United States v. Beals, 87 F.3d 854, 860 (7th Cir. 1996).

In *Meeks*, the United States Court of Appeals for the Second Circuit acknowledged that supervised release and probation had been treated as being essentially equivalent by both Congress and the Sentencing Commission. *See Meeks*, 25 F.3d at 1121. The Second Circuit then referred to the Supreme Court's opinion in *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), which stated, under due process analysis that there is no constitutional difference between probation and parole. *See id.* Accordingly, the Second Circuit concluded that there was "no persuasive reason to distinguish between the standards of parole eligibility . . . and the conditions for revocation of supervised release." *Meeks*, 25 F.3d at 1121 (quoting United States v. Parriett, 974 F.2d 523, 526 n.2 (4th Cir. 1992)).

See *infra* Part II.A for a discussion of these and other cases relying on the similarity between parole and supervised release for the purposes of ex post facto analysis.

99. "Retroactive" has been defined as the "[p]rocess of acting with reference to past occurrences." BLACK'S LAW DICTIONARY 1317 (6th ed. 1990). "Retroactive laws" have been defined as "those which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transactions or considerations already past." *Id.*

100. See *infra* Part II.A for a discussion of these cases.

101. *See* Krent, *supra* note 86, at 2148-49 (providing a summary of major case law addressing this issue). "'Good-time' credit is awarded for [an inmate's] good conduct and reduces [the] period of [the] sentence which [the] prisoner must spend in prison although it does not reduce the period of the sentence itself." BLACK'S LAW DICTIONARY 694 (6th ed. 1990).

102. 277 F. Supp. 644 (D. Mass. 1967) (three-judge court), *aff'd mem.*, 390 U.S. 713 (1968).

103. *See Greenfield*, 277 F. Supp. at 644.

prison, thereby advancing the date of release.[104] After the defendant's sentencing, the statute was amended whereby good-conduct credits would be forfeited for parole violations.[105] The defendant subsequently violated his parole, and was required to forfeit his good-conduct credits.[106]

The district court held that the application of the new law violated the Ex Post Facto Clause because it increased the punishment of the defendant's original sentence.[107] As a result, courts have held that statutes forfeiting good-time credits for parole violations cannot be applied to defendants whose original offenses were committed before the statute's enactment.[108]

2. Repeat Offender Statutes

The opposing position taken by the Court of Appeals for the Sixth Circuit held that, for ex post facto purposes, supervised release statutes are more akin to repeat offender, or recidivist statutes, which impose enhanced penalties on individuals who have repeatedly committed crimes.[109] These statutes allow courts to consider crimes committed before the enactment of the recidivist statute.[110] In holding that these statutes do not violate the Ex Post

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104. *See id.*

105. *See id.* at 645.

106. *See id.*

107. *See id.* at 645-46. The district court in *Greenfield* stated that "[d]epriving one of time off to which he was justly entitled as a practical matter results in extending his sentence and increasing his punishment." *Id.* at 645 (quoting Lembersky v. Parole Bd., 124 N.E.2d 521, 524 (Mass. 1955)). The court added that depriving a prisoner of the right to earn good-conduct credits "materially 'alters the situation of the accused to his disadvantage.'" *Id.* at 646 (quoting *In re* Medley, 134 U.S. 160 (1890)); *see also* Warden v. Marrero, 417 U.S. 653, 663 (1974) (holding that parole eligibility is annexed to the original sentence); Williams v. Lee, 33 F.3d 1010, 1013-14 (8th Cir. 1994) (holding unconstitutional the retroactive application of a new statute enhancing the penalties for parole violations); Schwartz v. Muncy, 834 F.2d 396, 398 (4th Cir. 1987) (invalidating the retroactive application of a new parole law which delayed an inmate's ability to earn parole).

108. *See, e.g.*, Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989); Beebe v. Phelps, 650 F.2d 774 (5th Cir. Unit A July 1981) (per curium); Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977).

109. See *infra* Part II.B for a discussion of the argument that supervised release statutes are similar to recidivist statutes for ex post facto purposes.

110. Recidivist statutes have been justified by the Supreme Court as deterring repeat offenders and segregating from the rest of society those individuals who repeatedly commit crimes over an extended period of time. *See* Rummel v. Estelle, 445 U.S. 263, 284-85 (1980) (defining the primary goals of recidivist statutes).

For various discussions of the treatment of repeat offender statutes by courts, see Daniel Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF. L. REV. 99 (1971); Michael Zebendilos Okpala, *Repeat Offender Statutes—Do They Create a Sepa-*

Facto Clause, courts have viewed the increased punishment as attaching only to the defendant's most recent conduct, not the original offense.[111]

The principal case upholding recidivist statutes against ex post facto attack is *Gryger v. Burke*.[112] In *Gryger*, the Supreme Court upheld a life sentence for a defendant who was charged as a fourth-time offender, even though one of these crimes had been committed before passage of the recidivist statute.[113] The Court stated that "[t]he sentence as a fourth offender . . . is not to be viewed as either a new jeopardy or additional penalty for earlier crimes. It is a stiffened penalty for the latest crime . . . ."[114]

Courts have used the foregoing information for guidance in understanding the nature of the supervised release system as well as in addressing the ex post facto implications of applying the new statutory provisions. With a general understanding of supervised release, the ex post facto prohibition, as well as the parole and repeat offender lines of cases, the decisions of the United States courts of appeals can more easily be understood and examined.

II. THE CIRCUIT SPLIT: THE ALTERATION OF SUPERVISED RELEASE STATUTES AND THE EX POST FACTO IMPLICATIONS

The current split in the United States courts of appeals concerning the application of the new supervised release statutes has centered on how to characterize supervised release violation punishments. More specifically, the courts of appeals have struggled with the issue of what the punishment represents—a part of the original sentence or a sentence in and of itself? In deciding this

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rate Offense?, 32 How. L.J. 185 (1989); Jill C. Rafaloff, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?*, 56 FORDHAM L. REV. 1085 (1988); Harold Dubroff, Note, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332 (1965); Note, *Court Treatment of General Recidivist Statutes*, 48 COLUM. L. REV. 238 (1948); Note, *Recidivism and Virginia's "Come-Back" Law*, 48 VA. L. REV. 597, 597-607 (1962).

111. *See e.g.*, United States v. Ykema, 887 F.2d 697 (6th Cir. 1989); United States v. Ilacqua, 562 F.2d 399 (6th Cir. 1977). This reasoning is consistent with early Supreme Court decisions regarding the constitutionality of laws which provided enhanced punishments for repeat offenders. *See, e.g.*, Moore v. Missouri, 159 U.S. 673, 676 (1895) (holding that the increased severity of the punishment is not a second punishment for the same offense, but rather is a more severe punishment for a subsequent offense); *see also* Carlesi v. New York, 233 U.S. 51 (1914); Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901).

112. 334 U.S. 728 (1948).

113. *See id.* at 732.

114. *Id.*

question, the courts of appeals have turned to various sources for assistance, including the Sentencing Commission's policy statements as well as analogous interpretations of the Ex Post Facto Clause in the cases involving parole violation and repeat offender statutes.

A. *Supervised Release Violation Statutes: Continuing Punishment for the Original Offense*

In concluding that the application of the new statutory provisions concerning supervised release violated the Ex Post Facto Clause, a number of courts of appeals have held that sanctions imposed for supervised release violations constitute punishment for the defendant's original crime. As a result, these courts have concluded that the provisions governing supervised release violations cannot be altered after the defendant's original crime has been committed. For example, in *United States v. Paskow*,[115] the defendant pled guilty to conspiracy to receive the proceeds of a bank robbery and receiving the proceeds of a bank robbery, conduct which was committed in May of 1988, and was sentenced to eight months in prison and three years supervised release.[116]

When the defendant committed his crimes, 18 U.S.C. § 3583(e)(4) limited the length of imprisonment that could be imposed upon the revocation of a term of supervised release, with the length of any sentence under the maximum left to the judge's discretion.[117] However, the enactment of the Anti-Drug Abuse Act of 1988[118] brought a new provision, section 3583(g), which required mandatory terms of imprisonment upon revocation of supervised release for possession of a controlled substance.[119] In 1990, the defendant in *Paskow* tested positive for marijuana and cocaine use.[120] As a result, the court revoked the defendant's supervised release and, under the terms of section 3583(g), he was given the mandatory prison sentence of twelve months, one-third of his term of supervised release.[121]

Under the former version of the statute, the sentencing court

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115. 11 F.3d 873 (9th Cir. 1993).

116. *See id.* at 875-76.

117. *See id.* at 876. 18 U.S.C. § 3583(e)(4) was, at the end of 1988, redesignated as 18 U.S.C. § 3583(e)(3) (1994).

118. Pub. L. No. 100-690, § 7303(b)(2), 102 Stat. 4418, 4464 (1988).

119. See *supra* Part I.B.3 for a discussion of § 3583(g).

120. *See Paskow*, 11 F.3d at 876.

121. *See id.*

had the authority to exercise discretion upon revocation, in which case the defendant in *Paskow* could possibly have received a shorter term of imprisonment, or no term at all.[122] Consequently, the defendant argued that the application of section 3583(g) to his conduct violated the Ex Post Facto Clause because it altered the punishment imposed for a crime which had been committed before the statute's enactment.[123]

On appeal, the United States Court of Appeals for the Ninth Circuit agreed for two reasons. First, the court, applying the Supreme Court's ex post facto analysis,[124] stated that application of the amended statute "disadvantaged" the defendant because it changed the defendant's eligibility to receive a lesser sentence.[125] Second, and more importantly, the court concluded that the sanctions imposed for supervised release violations constituted a portion of the sentence for the defendant's original crime and therefore the violation itself could not be considered a new offense for ex post facto purposes.[126] Accordingly, the court held that the application of the terms of the amended statute retroactively applied to conduct committed before the enactment of the statute, thereby violating the Ex Post Facto Clause.[127]

Perhaps the most crucial part of the court's analysis in *Paskow* was the comparison of supervised release to parole.[128] The court relied on *Greenfield v. Scafati*,[129] which struck down a similar application of an amended parole violation statute under the Ex Post Facto Clause.[130] The court in *Paskow* concluded that, for ex post facto purposes, parole and supervised release were equivalent, and therefore *Greenfield* controlled the outcome.[131] The court stressed

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122. *See id.*

123. *See id.*

124. See *supra* Part I.C and accompanying notes for a discussion of the Supreme Court's method of ex post facto analysis.

125. *See Paskow*, 11 F.3d at 877 (citing Lindsey v. Washington, 301 U.S. 397, 401-02 (1937)).

126. *See id.* at 883.

127. *See id.*

128. *See id.* at 877-82.

129. 277 F. Supp. 644 (D. Mass. 1967) (three-judge court), *aff'd mem.*, 390 U.S. 713 (1968). See *supra* Part I.D.1 for a discussion of *Greenfield* and the retroactive application of amended parole violation statutes.

130. *See Paskow*, 11 F.3d at 878.

131. *See id.* at 880. The court stated that the parole and supervised release systems are both forms of post-imprisonment supervision. In both cases, it is the original sentence which determines how long the term will be and establishes the punishment for revocation upon violation. Conduct which violates terms of both supervised release

that the parole cases have consistently recognized parole eligibility as being an inherent part of the original sentence for the original crime because the "terms and conditions [of parole eligibility] are fixed at the moment the underlying offense is complete."[132] Adhering to this reasoning, the *Paskow* court concluded that like the conditions affecting parole eligibility, the terms and conditions of supervised release cannot be retrospectively altered.[133]

Additionally, the *Paskow* court looked to the language of the statute governing supervised release to support the conclusion that terms of supervised release relate to the original sentence. The court stated that section 3583(a), which allowed the sentencing court to impose a term of supervised release, contained the language: "may include *as part of the sentence* the requirement that the defendant be placed on a term of supervised release after imprisonment."[134] The court also considered the language of the Sentencing Guidelines, which treats supervised release as part of the original sentence to be imposed at the time of sentencing.[135]

The *Paskow* court also referred to a previous Fourth Circuit decision, *United States v. Parriett*.[136] In *Parriett*, the court found that the application of section 3583(g) to a defendant who committed his original crime before that section's enactment violated the

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and parole "simply triggers the execution of the conditions of the original sentence." *Id.* at 881.

Not mentioned by the Ninth Circuit in *Paskow* was the case of *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). In *Gagnon*, the Supreme Court stated that "[d]espite the undoubted minor differences between probation and parole, the commentators have agreed that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole." *Gagnon*, 411 U.S. at 782 n.3.

132. *Paskow*, 11 F.3d at 879.

133. *See id.* at 878-79 (citing Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989); Schwartz v. Muncy, 834 F.2d 396 (4th Cir. 1987); Beebe v. Phelps, 650 F.2d 774 (5th Cir. Unit A July 1981); Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977)). In *Beebe*, the Court of Appeals for the Fifth Circuit stated that "[t]he practical effect [of applying the amended parole revocation statute] is a statutory increase in punishment for the first offense, enacted subsequent to the commission of the offense." *Beebe*, 650 F.2d at 776.

134. *Paskow*, 11 F.3d at 882. Section 3583(a) states: "The court, in imposing a sentence to a term of imprisonment for a felony or misdemeanor, may include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment . . . ." 18 U.S.C. § 3583(a) (1994).

135. *See id.* The Sentencing Guidelines state: "A term of supervised release may be imposed by the court as a part of the sentence of imprisonment at the time of initial sentencing." U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. A (1995). See *supra* notes 35-43 and accompanying text for a discussion of the imposition of supervised release.

136. 4 F.2d 523 (4th Cir. 1992).

Ex Post Facto Clause.[137] The *Parriett* court based its decision primarily on the holding of *Fender v. Thompson*,[138] a case in which the application of a revised statute regarding parole eligibility was found to have violated the Ex Post Facto Clause.[139]

The Fourth Circuit in *Paskow* also cited *United States v. Flora*,[140] a case from the United States District Court for the Western District of Kentucky. In *Flora*, the district court relied on the holding in *Parriett*, the language of section 3583 itself, as well as the Sentencing Guidelines in concluding that "supervised release, and the possibility of revocation and additional imprisonment, are as much the consequence of the offender's underlying crime as is the initial term of imprisonment."[141] Thereafter, the court in *Flora* found that the application of section 3583(g) to the defendant would retroactively alter the punishment relating to the original offense, thereby constituting an ex post facto violation.[142]

Both the Second and Seventh Circuits raised another argument for finding an ex post facto violation in the supervised release cases. These courts of appeals found it significant that the conduct constituting supervised release violations is often not criminal and, therefore, punishment for such violations must be a part of the punishment for the original crime.[143] *United States v. Beals*, a Sev-

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137. *See id.* at 526.

138. 883 F.2d 303 (4th Cir. 1989).

139. *See Parriett*, 974 F.2d at 526. In *Fender*, the defendant was found guilty of various crimes and was sentenced to life imprisonment. *See Fender*, 883 F.2d at 304. At the time these crimes were committed, Virginia law allowed the defendant to become eligible for parole after serving fifteen years of the sentence. *See id.* Virginia later amended its parole eligibility statute to declare all persons sentenced to life imprisonment who escape from a correctional facility ineligible for parole. *See id.* The defendant escaped and was later recaptured. *See id.* His parole eligibility was revoked pursuant to the revised statute. *See id.* In finding an ex post facto violation, the Fourth Circuit stated that the application of the revised statute in this case constituted a "*post hoc* alteration of the punishment for an earlier offense." *Id.* at 306-07. The court specifically rejected the argument that no ex post facto violation should be found because the defendant was "on notice" of the change in the law. *See id.* The court reasoned that "the challenged statute nevertheless accomplished an impermissible enhancement of the punishment for an earlier, unrelated crime." *Id.* at 307.

140. 810 F. Supp. 841 (W.D. Ky. 1993).

141. *Id.* at 843.

142. *See id.* at 843-44.

143. *See* United States v. Beals, 87 F.3d 854, 859-60 (7th Cir. 1996) (holding that because a supervised release violation many times will not constitute illegal conduct in and of itself, the punishment imposed for such conduct must be linked to the original offense for ex post facto purposes); *see also* United States v. Meeks, 25 F.3d 1117, 1122 (2d Cir. 1994) (stating that "[i]f the individual may be punished for an action that is not of itself a crime, the rationale must be that the punishment is part of the sanction for the original conduct that was a crime").

enth Circuit case, involved the application of 18 U.S.C. § 3583(h), which authorized the imposition of an additional term of supervised release following revocation and imprisonment, to a defendant sentenced before that statute's enactment.[144] The Seventh Circuit, combining the parole analogy with the non-criminal argument, concluded that punishments imposed for violations of both parole and supervised release are inevitably tied to the defendant's original criminal conduct.[145]

The Second Circuit, in *United States v. Meeks*, also reasoned that proceedings regarding supervised release violations are not subject to the same constitutional protections that would apply if such violations were deemed new criminal offenses.[146] Particularly,

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The *Beals* court identified failure to support dependents, failure to work conscientiously, and failure to undergo medical treatment as examples of non-criminal supervised release violations. *See Beals*, 87 F.3d at 859-60.

144. *See Beals*, 87 F.3d at 856. To demonstrate how the imposition of subsection (h) disadvantaged the defendant, the *Beals* court provided a hypothetical. A defendant is convicted of a felony and is sentenced to a term of imprisonment to be followed by a three-year term of supervised release. The defendant serves his prison time and is released, but one year into his term, he commits a violation. Prior to the enactment of subsection (h), the maximum penalty a court could impose in this situation, under subsection (b)(3), was two years imprisonment. After serving that sentence, the government's supervision of the defendant would end. However, with the enactment of subsection (h), the court has the authority to sentence a defendant to a combination of imprisonment and supervised release over those two years—for example, one year in prison and one year on supervised release. If the defendant subsequently commits a violation during this second term of release, the court has the authority to send the defendant back to prison for up to one year (the two-year maximum less the one-year term of imprisonment already served). Consequently, the defendant's total punishment would equal two and a half years after the initial revocation of supervised release (the one year in prison, the six months on supervised release, and then another year in prison). The *Beals* court concluded that this total was six months longer than that which would have been allowed before the enactment of subsection (h). *See id.* at 858. *But see supra* note 9 for citation of cases in which application of subsection (h) was found not to disadvantage defendants sentenced prior to the enactment of subsection (h).

145. *See Beals*, 87 F.3d at 859-60. The *Beals* court also disposed of the theory that punishment for supervised release violations is identical to situations where punishment is imposed against defendants who have repeatedly committed crimes under recidivist laws. *See id.* at 859. In cases involving repetitive criminal behavior, courts have been allowed to use prior offenses, despite the existence of ex post facto claims, to punish defendants more severely for their most recent crimes. See *supra* Part I.D.2 for a discussion of recidivist statutes. The *Beals* court distinguished these cases in stating that "[t]he increased punishment imposed under a recidivist statute is triggered by subsequent conduct that is itself a crime. The government punishes that conduct because of its nature, not because of the . . . original offense. Therefore, it is logical to link the increased punishment only to the subsequent conduct for *ex post facto* purposes." *Beals*, 87 F.3d at 859.

146. *See Meeks*, 25 F.3d at 1122.

these proceedings are not governed by the right to a jury trial or the beyond a reasonable doubt standard of proof.[147] The *Meeks* court stated that "[these] constitutional protections have been ruled inapplicable because the conduct that violates the conditions of supervised release is not viewed as a separate criminal offense."[148] Because the supervised release violation did not constitute a new offense, the court reasoned that application of new statutory provisions has the effect of changing the legal consequences of acts completed before the statute's effective date to the defendant's disadvantage.[149]

B. *Supervised Release Violation Statutes: Punishment for a New Offense*

The United States Court of Appeals for the Sixth Circuit, contrary to the holdings of four other courts of appeals, held that the application of the new statutory provision governing supervised release violations did not violate the Ex Post Facto Clause because

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147. *See id.* (citing United States v. Grisanti, 4 F.3d 173, 176 (2d Cir. 1993); United States v. Hanahan, 798 F.2d 187, 189 (7th Cir. 1986); Standlee v. Rhay, 557 F.2d 1303, 1305, 1307 (9th Cir. 1977)).

The court's reasoning relies on the fact that, for revocation purposes, violations of supervised release and probation have been treated virtually the same by both Congress and the Sentencing Commission. *See* 18 U.S.C. § 3583(e)(3) (1994) (instructing the court, in determining the need for revocation of supervised release, to adhere to the "Federal Rules of Criminal Procedure applicable to revocation of probation"); *see also* U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. B, introductory commentary (1995) (stating that "[b]ecause these policy statements focus on the violation of the court-ordered supervision, this chapter . . . treats violations of the conditions of probation and supervised release as functionally equivalent"). See *supra* notes 48-53 and accompanying text for a discussion of supervised release revocation hearings. Moreover, probation revocation hearings are not criminal proceedings, and, therefore, not all constitutional procedural protections apply. *See* Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984); *see also* Pennsylvania v. Goldhammer, 474 U.S. 28, 29-30 (1985) (no double jeopardy protection); Gagnon v. Scarpelli, 411 U.S. 778, 787-89 (1973) (stating that probation revocation is not a stage of criminal prosecution); Morgan v. Wainwright, 676 F.2d 476, 478-79 (11th Cir. 1982) (no right to jury determination).

Therefore, the argument maintains that because new crimes require full constitutional protection, the punishments imposed for supervised release violations would also have to be accompanied by the same procedural protections in order to avoid an ex post facto violation. Because supervised release violation proceedings do not require full procedural protection, punishments for supervised release violations must be linked to the original crime. Consequently, amended punishments may not be imposed upon defendants who were sentenced under the former version of the law. *See Meeks*, 25 F.3d at 1122-23.

148. *Meeks*, 25 F.3d at 1123. The court went on to state that "any enhancement of the punishment for the supervised-release violation should be viewed primarily as an enhancement of the penalties for the past acts, rather than for the subsequent acts." *Id.*

149. *See id.* at 1120. *See also Beals*, 87 F.3d at 860.

the violation constituted a new criminal offense, one committed after the statute's enactment. In *United States v. Reese*,[150] the defendant was convicted of participating in a conspiracy to distribute cocaine in November of 1988 and was sentenced to 33 months of imprisonment to be followed by a five year term of supervised release.[151] Like the defendants in the other supervised release cases, terms of imprisonment after revocation were limited under section 3583(e)4).[152] However, after the enactment of section 3583(g), the defendant in *Reese* was subject to the mandatory prison term of not less than one-third of the term of supervised release for any violation involving possession of a controlled substance.[153] From 1991 to 1992, while on supervised release, the defendant repeatedly tested positive for cocaine use.[154] Consequently, applying the new statute, the court revoked the defendant's term of supervised release and sentenced him to the statutory minimum term of imprisonment.[155]

The Sixth Circuit held that the application of section 3583(g) did not violate the Ex Post Facto Clause.[156] In reaching this conclusion, the court challenged the principal arguments relied upon by the other courts of appeals in finding an ex post facto violation. First, the *Reese* court disagreed with the contention that parole and supervised release were equivalent.[157] It stated that unlike parole, terms of imprisonment imposed upon revocation of supervised release were not limited to the terms allowable under the original offense.[158] The court added that "it is possible that an individual will have already served the maximum prison sentence allowed under the guidelines . . . [and] a [subsequent] violation of that supervised release, even in the final days of the release period, could result in

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150. 71 F.3d 582 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996).

151. *See id.* at 584.

152. *See id.* (citing 18 U.S.C. § 3583(e)(4) (1988) (current version at 18 U.S.C. § 3583(e)(3) (1994)).

153. *See id.* (citing 18 U.S.C. § 3583(g) (1988) (amended 1994)).

154. *See Reese*, 71 F.3d at 584.

155. *See id.* The statutory minimum prison term for the defendant in *Reese* was twenty months. *See id.*

156. *See id.* at 591.

157. *See id.* at 587-88.

158. *See id.* at 587. It should be noted that while the court appeared to be contrasting supervised release and parole at this point in its analysis, it used the terms probation and parole interchangeably. *See id.* The court noted that under 18 U.S.C. § 3565 (1994), terms of imprisonment imposed upon revocation of *probation* are limited to the term allowable under the original offense. *See id.* (emphasis added). Thus, it appears that the court's objective was to distinguish supervised release from both parole and probation.

additional prison time."[159] Consequently, the *Reese* court reasoned that violations of supervised release could produce a "cumulative punishment that exceeds the original prison sentence."[160] In support of this conclusion, the court quoted *United States v. Wright*,[161] a prior Sixth Circuit case, for the proposition that "[c]onnecting the resentencing period with the maximum period of incarceration allowed for the original offense would undermine the system of supervised release . . . ."[162]

In finding an "inherent difference" between supervised release and parole, the court dismissed the analogies made by the other circuits.[163] In reaching this conclusion, the court referred to the language of the Sentencing Commission contrasting parole and supervised release.[164] The court also distinguished this case from *Greenfield v. Scafati*,[165] stating that *Greenfield* involved an alteration of the defendant's *original* sentence while the present case involved the alteration of the punishment for a new offense, the violation of supervised release, occurring after the date of alteration.[166]

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159. *Id.* at 588.

160. *Id.* (citing United States v. Smeathers, 930 F.2d 18, 19 (8th Cir. 1991); United States v. Dillard, 910 F.2d 461, 466-67 (7th Cir. 1990)). To demonstrate the difference, the court provided the example of a defendant sentenced to nine years in prison and released on parole after three years. A violation of that parole could result in a maximum term of imprisonment of six years. Under the supervised release system, the defendant could receive additional prison time, regardless of the amount of time already served. *See id.* at 587-88. The court added that if the system was structured otherwise, "a person on supervised release could violate his release conditions with impunity if he had already served his full original sentence." *Id.* at 588; *see also* United States v. Robinson, 62 F.3d 1282, 1285-86 (10th Cir. 1995) (stating that a term of imprisonment imposed upon revocation of supervised release, when combined with the time a defendant has already served in prison, may exceed the maximum prison term allowed under the statute giving rise to the original crime).

161. 2 F.3d 175, 179 (6th Cir. 1993).

162. *Reese*, 71 F.3d at 588. The court in *Wright* added that "[t]he possibility of reincarceration for violation of a condition of supervised release is a cornerstone of the sentencing structure." *Wright*, 2 F.3d at 179 (quoting United States v. Stephenson, 928 F.2d 728, 730-31 (6th Cir. 1991)).

163. *See Reese*, 71 F.3d at 587-88.

164. *See id.* at 587.

165. 277 F. Supp. 644 (D. Mass. 1967) (three-judge court), *aff'd mem.*, 390 U.S. 713 (1968).

166. *See Reese*, 71 F.3d at 590. Specifically, the *Reese* court stated that *Greenfield* stood for the notion that rules governing good-time credits could not be altered and applied to individuals serving a prison sentence for their original crime (which occurred before the enactment of the new rule). The *Reese* court argued that, to the contrary, the defendant in its case was not serving additional time for his original offense under the new statute, but for the violation of release. See *supra* Part I.D.1 for a discussion of *Greenfield*.

Second, the Sixth Circuit found that the penalties imposed for supervised release violations were not connected to the original offense. The court compared the supervised release violation statutes to recidivist laws which have long been upheld against ex post facto attack.[167] The court reasoned that, like recidivist statutes, statutes governing supervised release violations punish the most recent offense, not the original.[168] The punishment which accompanied that new offense was enhanced because of the defendant's prior history.[169] Accordingly, the court held that the alteration and application of statutes governing supervised release violations in these cases did not constitute an ex post facto violation because the new statutory punishment was enacted before the defendant's misconduct had taken place.[170] The court further stated that its reasoning was consistent with the Supreme Court's ex post facto analysis in that the amended statute did not increase the punishment assigned to the original crime.[171]

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167. *See id.* at 588. See *supra* Part I.D.2 for a discussion of recidivist statutes and the Ex Post Facto Clause.

Additionally, the Sixth Circuit was the only court to compare the supervised release cases to a line of cases involving 8 U.S.C. § 1326 (1988) (current version at 18 U.S.C. § 1326 (1994)). *See Reese*, 71 F.3d at 589. In these cases, an illegal alien committed some offense and, as a result, was deported. *See id.* After deportation, Congress enacted a new statute which imposed a greater punishment for any alien who had committed an "aggravated felony" and who later illegally reentered the country. *See id.* The alien would then reenter the country and would be sentenced under the new statute. *See id.* In upholding this law against ex post facto attack, several courts of appeals have held that "the enhanced punishment simply was not 'for the earlier offense' even though the punishment was a 'but for' consequence of that earlier offense." *Reese*, 71 F.3d at 589 (citing United States v. Cole, 32 F.3d 16 (2d Cir. 1994); United States v. Saenz-Forero, 27 F.3d 1016 (5th Cir. 1994); United States v. Arzate-Nunez, 18 F.3d 730 (9th Cir. 1994); United States v. Forbes, 16 F.3d 1294 (1st Cir. 1994)).

The Court of Appeals for the Ninth Circuit, in *Arzate-Nunez*, explicitly distinguished the supervised release statute at issue in *United States v. Paskow*, 11 F.3d 873 (9th Cir. 1993), from the statute at issue in its case. *See Arzate-Nunez*, 18 F.3d at 735. The court stated that an ex post facto violation was found in *Paskow* because of the "integral relationship [between the statute governing supervised release violations and] . . . the defendant's predicate offense." *Id.* It added that the defendant in its case was, "unlike the defendant in *Paskow*, . . . being punished for a new offense, reentering the country." *Id.* It stressed the lack of procedural protection afforded defendants in supervised release violation proceedings as opposed to the protection afforded the defendant in its case. *Id.* The Ninth Circuit in *Arzate-Nunez* concluded that the statute at issue was more analogous to repeat offender laws because the defendant's reentry constituted a new offense "for due process purposes, and also for ex post facto purposes." *Id.*

168. *See Reese*, 71 F.3d at 590.

169. *See id.* at 588.

170. *See id.* at 590.

171. *See id.* at 590-91. The court stated that the defendant was given "fair warn-

The Sixth Circuit in *Reese* also dismissed the argument that the application of the amended supervised release statutes implicated the Ex Post Facto Clause because violations of supervised release were not subject to full constitutional procedural protection.[172] The court stated that no other cases confronting ex post facto violation claims had ever considered this issue in determining the existence of a violation.[173] Additionally, the court stated that similarly relaxed procedural protections currently existed in cases involving prison misconduct punishments, and that courts had not found ex post facto violations to exist where those regulations had been enacted after the defendant's original crime had been committed.[174]

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ing" of the amended statute's effect. In using this language, the court was making reference to the purposes of the Ex Post Facto Clause as outlined in both *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981), and *Miller v. Florida*, 482 U.S. 423, 430 (1987). *See Reese*, 71 F.3d at 590. It also stated that their conclusion was consistent with *Collins v. Youngblood*, 497 U.S. 37 (1990), and *California Dep't of Corrections v. Morales*, 115 S. Ct. 1597 (1995) in that the amended statute did not increase the penalty for the defendant's *original* offense. *See Reese*, 71 F.3d at 590-91. See *supra* Part I.C for a discussion of these cases which outline the Supreme Court's ex post facto analysis and provide the purposes of the Ex Post Facto Clause.

The court clarified its position by stating that the new statutory provisions affected all individuals who had committed the same original offense as the defendant equally. *See Reese*, 71 F.3d at 590. In other words, it was not until the defendant violated his release that the new statutory provision was applied. The court concluded that because the punishment at issue did not reach every prisoner who had committed the same earlier conduct, "it [could] hardly be logically argued that the punishment [was] being imposed 'because of' the earlier conduct." *Id.* See *infra* Part III.C for an analysis of this argument.

172. *See Reese*, 71 F.3d at 589. See *supra* notes 146-149 and accompanying text for a discussion of the procedural protection argument.

173. *See Reese*, 71 F.3d at 589.

174. *See id.* at 590 (citing Gilbert v. Peters, 55 F.3d 237, 239 (7th Cir. 1995); Ewell v. Murray, 11 F.3d 482, 485 (4th Cir. 1993)). Both *Gilbert* and *Ewell* involved the enactment of prison regulations requiring inmates to provide blood samples before final discharge, parole, or release. Failure or refusal to do so would result in a loss of good-time credit. Inmates who were imprisoned before these regulations went into effect argued that requiring them to comply would violate the Ex Post Facto Clause because it would retroactively alter the good-time accumulation system. *See Gilbert*, 55 F.3d at 238; *Ewell*, 11 F.3d at 485.

The United States Courts of Appeals for the Fourth and Seventh Circuits did not find ex post facto violations in these cases. Both courts of appeals held that the statutes in question constituted reasonable prison regulations which were not penal in nature. *See Gilbert*, 55 F.3d at 238-39; *Ewell*, 11 F.3d at 484. "Penal" has been defined as "[p]unishable; inflicting a punishment; containing a penalty, or relating to a penalty." BLACK'S LAW DICTIONARY 1132 (6th ed. 1990). Because the enforcement of these statutes did not constitute additional punishment, they could be applied to all inmates, regardless of when these inmates were sentenced. *See Ewell*, 11 F.3d at 485. In *Gilbert*, the Seventh Circuit stated that "'[c]hanges in conditions of confinement . . . and denials of privileges—matters which every prisoner can anticipate are contemplated by his original admission to prison—are necessarily functions of prison management.'" *Gil-*

The conclusions reached by the varying courts of appeals are a reflection of, for the most part, their opinions as to which analogy is most accurate. Four courts of appeals held that applying the new provisions retroactively alters a defendant's punishment, analogous to the parole cases. Conversely, the Sixth Circuit held that the new statutory provisions regarding supervised release violations provide enhanced punishment for the most recent conduct, the violation. For this reason, the Sixth Circuit concluded that these provisions should be considered the same as recidivist statutes under ex post facto analysis. The following section questions the Sixth Circuit's decision.

III. LEGAL ANALYSIS

The Sixth Circuit's decision in *United States v. Reese* created a circuit split by characterizing supervised release violations as independent offenses for the purposes of ex post facto analysis, separate from the original conduct that gave rise to the imposition of the supervised release term.[175] The court in *Reese* did not accept the interpretation that sanctions imposed for supervised release violations were inherently part of the sentence for the crime that was committed before the statutory amendments went into effect.[176] Rather, the court viewed defendants violating conditions of supervised release as being equivalent to repeat offenders.[177] As a result, the court concluded that the punishment imposed for violations of

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bert, 55 F.3d at 239 (quoting Jones v. Murray, 962 F.2d 302, 309 (4th Cir. 1992)). In *Ewell*, the Fourth Circuit added that prison regulations "are not frozen at the time of each inmate's conduct, but rather, they may be subject to reasonable amendments as necessary for good prison administration . . . without implicating ex post facto concerns." *Ewell*, 11 F.3d at 485-86.

The Fourth Circuit also reasoned that, unlike several of the parole cases involving the alteration of rules governing good-time accumulation, specifically *Weaver v. Graham*, 450 U.S. 24 (1981), the prison regulation statutes did not effect the structure of the good-time system. *See Ewell*, 11 F.3d at 486-87. Rather, the regulations in question would result in a loss of good-time credits only if an infraction were to take place. All such infractions would have occurred after the enactment of the regulations. *See id.* at 487.

From the reasoning used in these cases, the court in *Reese* concluded that "[i]f relaxed standards for punishment . . . could only be justified by being subsumed under the rubric of the original sentence, it would never be possible to impose prison misconduct punishments . . . on prisoners violating rules enacted after the beginning of their sentences, even where they had full notice of proscribed behavior." *Reese*, 71 F.3d at 590.

175. *See Reese*, 71 F.3d at 590.

176. *See id.* at 590-91.

177. *See id.* at 588.

release sanctioned only the defendant's most recent conduct.[178]

At the heart of the Sixth Circuit's decision are two critical findings. First, the court found that the sanction imposed for violating conditions of supervised release did not constitute a component of a defendant's original sentence. Second, the court found that violations of supervised release could be deemed equivalent to the crimes that are subjected to enhanced punishments under repeat offender laws. Because the Sixth Circuit stands alone in its reasoning as well as in its characterization of supervised release violations, this analysis examines these findings as well as the other principal conclusions upon which the court relied. More specifically, this analysis offers reasons to question the Sixth Circuit's holding in *Reese* regarding the ex post facto implications of applying the amended supervised release statutory provisions.

A. *The Supervised Release Violation: A New Offense, A Separate Punishment*

The most prominent assertion made by the Sixth Circuit in its opinion in *United States v. Reese* was that a defendant who has violated a condition of supervised release has committed a new offense and, as a result, receives a new sentence attributable to this most recent conduct.[179] A key fact relied upon by the court regarding this point was that imprisonment and supervised release constitute separate forms of punishment imposed for a defendant's original crime.[180] It added that the punishment imposed for a violation of supervised release can often result in a cumulative prison sentence that exceeds the maximum sentence allowed for the original offense.[181] As a result, the court concluded that the sanction imposed for a violation of release must be connected to that violation only, not to the original crime.[182]

The Sixth Circuit correctly stated that courts impose supervised release in addition to imprisonment and that the length of the prison term imposed for a violation can exceed that of the maximum term allowed for the original offense.[183] However, the court concluded that because defendants, upon violating the terms of

178. *See id.* at 590.
179. *See id.* at 587-88.
180. *See id.* at 587.
181. *See id.* at 588.
182. *See id.*
183. See *supra* notes 30-43 and accompanying text for a discussion of the role of supervised release in sentencing.

their release, could receive more total prison time than that which could have been imposed for their original crimes, the additional prison time had to be linked to a new offense—the violation of release.[184] This conclusion conflicts with the nature of the supervised release as described in the legislative history, as articulated by statute, and also with the views of the Sentencing Commission, all of which suggest that supervised release violations are not to be considered new substantive offenses for purposes of ex post facto analysis.

Although certainly not conclusive, the legislative history of the supervised release system indicates that the Sixth Circuit's characterization of supervised release violations placed much more significance on the conduct constituting the violation than was ever intended. When initially outlining what was to become the new system of supervised release, the Senate Judiciary Committee used the term "contempt" to describe the status of a defendant who had violated release.[185] In fact, originally, the Committee did not intend to establish revocation proceedings for supervised release violations because it believed that "a minor violation of a condition of supervised release should [not] result in resentencing of the defendant and because . . . a more serious violation should be dealt with as a new offense."[186] Instead, courts were to respond to such violations by modifying the conditions of release.[187] Apparently, when Congress developed the supervised release system, it did not intend for the modification of conditions, what it considered to be the appropriate "punishment" for supervised release violations, to be deemed a new sentence—separate and distinct from the one originally imposed. To the contrary, violations of release were intended to bring about a restructuring of the conditions that were established as part of the defendant's original sentence. Thus, in order to attach the punishment imposed under the new provision to the conduct occurring after the enactment of that provision, the Sixth Circuit in *Reese* had to substantially amplify the significance of the conduct constituting the violation.

The language used by Congress in the statute authorizing the imposition of supervised release also suggests that the term of imprisonment imposed for the original crime, combined with the term

184. *See Reese*, 71 F.3d at 588.

185. *See* S. REP. No. 98-225, at 125 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3308.

186. *Id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3308.

187. *See id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3308.

of release, constitutes a single product of the same "event"—the sentencing court's scrutiny of the *original crime*.[188] Because the statute allows the sentencing court to include a term of release "as part of the sentence" for the original crime, it requires the sentencing court to consider many of the same factors that it must also weigh in determining sentences for crimes in general.[189] This language indicates that when a defendant receives a sentence for a crime, consisting of a term of imprisonment to be followed by a term of supervised release, the sentencing court has concluded that the circumstances surrounding the defendant's commission of that crime has created a need for additional punishment—the term of release. Just as the term of release represents a component of the defendant's original sentence, so too does the possibility of reimprisonment for violating a condition of that release. Stated differently, the rules and conditions of supervised release, as well as the attached punishments, flow directly from the sentencing court's determination of the original sentence.[190] Reimprisonment for violating release *does* serve as an enhanced punishment, in a sense, but for the original crime. Consequently, any alteration of the provisions governing the imposition of this punishment, after a defendant has been sentenced for his original crime, has the direct effect of altering the defendant's original sentence.

The Sentencing Commission's view further supports the idea that supervised release violations are not to be considered new substantive offenses for ex post facto purposes.[191] The Commission,

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188. In 18 U.S.C. § 3583(a) (1994), Congress states that "[t]he court, in imposing a sentence to a term of imprisonment for a felony or misdemeanor, may include *as part of the sentence* a requirement that the defendant be placed on a term of supervised release after imprisonment . . . ." *Id.* (emphasis added).

189. *See id.* § 3583(c) (requiring the court, in determining whether to include a term of supervised release, to consider the factors set forth in § 3553(a)). *See supra* note 38 (discussing these factors).

190. Congress stated that a principal reason for developing the supervised release system was to enable sentencing courts to meet the needs of individual defendants. *See* S. REP. No. 98-225, at 124 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 3307. Accordingly, courts have been given the authority to consider the circumstances surrounding the *original crime* in determining the need for a supervised release term. *See id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3307; *see also* 18 U.S.C. § 3583(c) (providing the factors to be considered in including a term of supervised release). It is difficult to reconcile this intent with the Sixth Circuit's assertion that supervised release, and its accompanying provisions, are not connected to the original sentence for ex post facto purposes.

191. The Sentencing Commission's view was first cited by the United States District Court for the Western District of Kentucky in *United States v. Flora*, 810 F. Supp. 841, 843 (W.D. Ky. 1993). See *supra* notes 140-142 and accompanying text for a discussion of *Flora*. Subsequently, the United States Court of Appeals for the Ninth Circuit

after deliberation, concluded that a violation of release should be considered a "breach of trust."[192] The punishment for the breach would be imposed by courts only to sanction the defendant for failing to abide by the release conditions, not to provide punishment for any new criminal conduct.[193] Punishment for new criminal conduct constituting a violation of release would be left to the court having jurisdiction over that offense.[194]

Indeed, the Commission expressly rejected the view that sanctions imposed for supervised release violations and punishment for the new offenses be determined simultaneously.[195] Following the approach selected by the Commission, a defendant's violation of release constitutes a breach of the terms of a trust relationship—a relationship established at the time the defendant's original sentence is determined and imposed. Accordingly, the violation of release, standing on its own as a "breach of trust," does not serve as the basis for a new criminal punishment, as the Sixth Circuit asserts in *Reese*. Conversely, the violation of release, rather than giving rise to new criminal sanctions, serves as a triggering mechanism for a punishment previously established as part of the sentence for the original crime.

B. *Supervised Release Violation Statutes as Repeat Offender Laws*

The Sixth Circuit did not find it necessary to examine the intent of Congress or the views of the Sentencing Commission. Instead, the court invoked an argument that had previously been rejected by other courts.[196] The court concluded that the imposi-

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cited the reasoning of *Flora* in *United States v. Paskow*, 11 F.3d 873, 881 (9th Cir. 1993). See *supra* notes 115-142 and accompanying text for a discussion of *Paskow*.

192. U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. A(3)(b). See *supra* Part I.B.2 for a discussion of the Sentencing Commission's decision to treat violations of supervised release as a "breach of trust." In *Flora*, the district court stated that "[t]he Guidelines therefore suggest that the parolee's misconduct might result not only in revocation of release but also in a subsequent, independent criminal prosecution." *Flora*, 810 F. Supp. at 843.

193. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. A(3)(b).

194. *See id.*

195. *See id.* The Commission's principal reason for rejecting this view was its fear that this practice would lead to duplicated efforts among the different courts whereby the punishment for the violation would have often been subsumed in the sentence imposed for the new conduct itself. *See id.* See *supra* note 68 and accompanying text for a discussion of the reasons the Commission offered for reaching this decision.

196. *See, e.g.*, United States v. Paskow, 11 F.3d 873, 880 (9th Cir. 1993) (rejecting the argument that an "amended statute [did] not increase the penalty for a prior crime, but rather enhance[d] the penalty for the revocation behavior"); Fender v. Thompson,

tion of additional prison time for violations of release mirrored the imposition of more severe punishments under repeat offender laws.[197] According to the court, in both situations, harsher penalties are imposed for a defendant's most recent conduct. This assertion stretches the repeat offender analogy too far.

In comparing the supervised release violation statutes to repeat offender laws, the Sixth Circuit conveyed the notion that a defendant who has yet to be convicted of any crime may be sentenced for a violation as if already deemed guilty of an offense.[198] However, a finding that a defendant has violated conditions of supervised release is not necessarily a finding that that defendant has committed a new crime.[199] Alleged violators of release are not afforded full criminal proceedings.[200] Violation hearings are designed only to determine whether a defendant has violated the terms of release by a preponderance of the evidence. These proceedings do not establish a defendant's guilt in connection with a new crime. They only serve to establish that a defendant has violated the terms of release and therefore requires sanctioning for that violation.[201]

On the other hand, repeat offender laws, upon which the Sixth Circuit heavily relies, impose enhanced punishments for repetitive *criminal* conduct.[202] Under these laws, defendants are convicted of

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883 F.2d 303, 306-07 (4th Cir. 1989) (citing Schwartz v. Muncy, 834 F.2d 396 (4th Cir. 1987) (rejecting the argument that an amended parole statute imposed enhanced punishments in the same manner as recidivist statutes); *see also* United States v. Beals, 87 F.3d 854, 859-60 (7th Cir. 1996) (rejecting the recidivist statute argument asserted by the Sixth Circuit in *Reese*).

197. *See* United States v. Reese, 71 F.3d 582, 588 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996). See *supra* Part I.D.2 for a discussion of repeat offender statutes.

198. The Sixth Circuit asserted that violators of supervised release receive enhanced punishments for their most recent conduct. *See Reese*, 71 F.3d at 590. Again, it is difficult to reconcile this view with the fact that supervised release violations are not "crimes." By deeming supervised release violations as independent, punishable offenses, the Sixth Circuit suggests that criminal penalties may be imposed for conduct not constituting a crime. See *supra* notes 48-53, 146-48 and accompanying text for a discussion of the procedural setting of supervised release violation proceedings.

199. In fact, the conduct constituting a violation of release is often not criminal in and of itself. For example, violations of release can include failing to support dependents or failing to maintain suitable employment. *See Beals*, 87 F.3d at 859-60. See *supra* notes 48-53, 146-48 and accompanying text for a discussion of the nature of supervised release violation proceedings.

200. See *supra* notes 48-53, 146-48 and accompanying text for a discussion of the nature of supervised release violation proceedings.

201. See *supra* notes 48-53, 146-48 and accompanying text for a discussion of the nature of supervised release violation proceedings.

202. The Seventh Circuit in *Beals* emphasized this point. *See Beals*, 87 F.3d at 859. The court in *Beals* stated that "[t]he increased punishment imposed under a recidivist statute is triggered by subsequent conduct that is itself a crime. The government

wholly new crimes and are given enhanced sentences in light of their history of criminal behavior. Courts have not found ex post facto violations in the repeat offender cases because the enhanced punishment is seen as a statutorily authorized punishment for crimes committed after the date of the statute's enactment.[203] As the Supreme Court in *Gryger v. Burke* stated, the enhanced sentence "is a stiffened penalty for the latest *crime*, which is considered to be an aggravated offense because a repetitive one."[204] The Sixth Circuit's comparison of the statutes governing supervised release violations to repeat offender laws ignores the absence of a new, formally established crime. This analogy is flawed because it suggests that supervised release violators may be subjected to new criminal punishment, like repeat offenders, when in fact no new crime has been established through the procedurally relaxed violation proceedings.

The *Reese* court defended its position against this procedural protection argument by raising two points. First, the court generally dismissed the argument by stating that "[n]o previous ex post facto cases have focused on the nature of the procedural protections afforded in hearings or trials on subsequent violations."[205] Second, the court cited to cases involving provisions that were enacted, and subsequently altered, in administrative settings—specifically prison regulations.[206] The court asserted that like supervised release violation proceedings, the proceedings addressing alleged violations of prison regulations have also been governed by similarly relaxed procedural protection.[207] The Sixth Circuit stated that courts have not found ex post facto violations in these cases where the altered prison regulations were applied to inmates imprisoned

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punishes that conduct because of its nature, not because of the defendant's original offense." *Id.* It continued, stating that "[c]onduct that violates the terms of supervised release . . . is often not criminal." *Id.* The court then dismissed the repeat offender analogy, reasoning that "the government punishes [those violations of release] *only* because of the defendant's original offense. For that reason, we must link the punishment imposed for the subsequent conduct to the original offense for *ex post facto* purposes." *Id.* at 860 (emphasis added). See *supra* notes 144-45 and accompanying text for a discussion of *Beals*; see also *supra* Part I.D.2 for a discussion of repeat offender statutes.

203. *See, e.g.*, Gryger v. Burke, 334 U.S. 728 (1948); Carlesi v. New York, 233 U.S. 51 (1914); Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895).

204. *Gryger*, 334 U.S. at 732 (emphasis added).

205. United States v. Reese, 71 F.3d 582, 589 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996).

206. *See id.* at 590.

207. *See id.* (citing Gilbert v. Peters, 55 F.3d 237, 239 (7th Cir. 1995), and Ewell v. Murray, 11 F.3d 482, 485 (4th Cir. 1993)).

before the alterations.[208] A careful review of these cases highlights some important distinctions between administrative provisions, such as prison regulations, and the statutory provisions governing supervised release violations.

The prison regulation cases, in not finding an ex post facto violation, relied heavily on the particular nature of the prison regulations.[209] The courts stated that prison regulations have been classified as "administrative" provisions rather than penal.[210] In other words, these regulations were not designed to impose punishment, but rather to facilitate the achievement of a policy goal.[211] Therefore, as "reasonable" prison regulations, the courts found that these regulations could be applied to all inmates, regardless of when the inmate entered prison.[212] Additionally, the courts have stated that the prisoners' ex post facto claims were without merit because the alteration of prison regulations could reasonably have been anticipated, at the time of sentencing, by every prisoner as a necessary function of prison management.[213]

These distinctions diminish the strength of the Sixth Circuit's use of the prison regulation cases as a defense to the procedural protection argument. Although these cases appear to refute the procedural protection argument posed by the other courts of appeals in response to the repeat offender analogy, the nature of prison regulations and the function they serve in the prison environment does not coincide with the system of supervised release. The supervised release statutes are not designed for an administrative environment.[214] They are also not driven by policy goals (i.e. the

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208. *See id.*

209. *See Gilbert*, 55 F.3d at 238-39; *Ewell*, 11 F.3d at 485-86.

210. *See Gilbert*, 55 F.3d at 238-39; *Ewell*, 11 F.3d at 485-86.

211. A general policy goal has been defined as achieving "good prison administration, safety and efficiency." Jones v. Murray, 962 F.2d 302, 309 (4th Cir. 1992). Emphasizing the importance of allowing prison administrators to adopt new regulations in order to effectuate this policy goal, the court in *Jones* added that the adoption of such regulations is "contemplated as part of the sentence of every prisoner . . . [and subsequent punishment for infractions does] not constitute additional punishment . . . ." *Id.*

212. *See Gilbert*, 55 F.3d at 239; *Ewell*, 11 F.3d at 486.

213. *See Gilbert*, 55 F.3d at 239 (citing *Jones*, 962 F.2d at 309). *See also Ewell*, 11 F.3d at 487 ("[T]he prison regulation ordering inmate compliance with an administrative regulation is reasonably within the administrative structure of prison authority that attends every sentence.").

214. The prison regulations in the aforementioned cases were specifically designed to attain various policy goals. For example, in *Gilbert*, the requirement of a blood sample was designed "for the sole purpose of establishing a data bank which [would] aid future law enforcement." *Gilbert*, 55 F.3d at 239 (quoting *Jones*, 962 F.2d at 309). Such policy goals are absent from the supervised release statutes. Conversely,

collection of blood samples for law enforcement purposes).[215] Conversely, these statutes penalize defendants for violating the conditions of their release. Accordingly, unlike changes in prison regulations, the alteration of the statutory provisions governing supervised release cannot be included under the umbrella of "reasonably anticipated administrative functions" as the Sixth Circuit necessarily did. The supervised release statutes serve to impose penalties for violations of mandatory conditions of release. Consequently, without support for its assertion that the lack of procedural protection afforded defendants in supervised release violation proceedings is insignificant for ex post facto purposes, it is difficult to find merit in the Sixth Circuit's repeat offender analogy.

C. *The New Statutory Provisions Are Only Applicable to Defendants Who Commit a Subsequent Offense*

The Sixth Circuit in *Reese* attempted to clarify its position, at more than one point in its opinion, by stating that the new "disadvantage" imposed under the amended statutory provision did not apply to everyone who had committed the same underlying offense as the defendant. The new provision only applied to those defendants who committed some subsequent offense, after the amendment had gone into effect.[216] As stated by the court, "[a] person on supervised release, situated identically to [the defendant] . . . would have suffered no ill consequences from the passage of the new law . . . ."[217] The court claimed that it would be illogical to "argue[ ] that the punishment is being imposed 'because of' the earlier conduct."[218] This argument essentially maintains that if the defendant in *Reese* did not continue to test positive for drug use while on supervised release, he would have been unaffected by the new statutory provision. Consequently, the Sixth Circuit reasoned that when the terms of the new provision were imposed, they were imposed

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these statutes are designed to sanction individuals for violating the terms of their release. See *supra* Part I.B.1 for a discussion of the statutory provisions governing supervised release violations.

215. This was the policy goal behind the regulations at issue in *Gilbert*, *Ewell* and *Jones*. *See Gilbert*, 55 F.3d at 238-39; *Ewell*, 11 F.3d at 485-86; *Jones*, 962 F.2d at 309-10.

216. *See* United States v. Reese, 71 F.3d 582, 588-91 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996).

217. *Id.* at 590.

218. *Id.* In support of its argument, the Sixth Circuit noted that the most prominent Supreme Court ex post facto cases, those in which ex post facto violations had been found, "involve[d] increases in punishment that appl[ied] to all prisoners, *regardless of later conduct*." *Id.* (emphasis added).

only for the defendant's most recent conduct—the violation of release, or the conduct occurring after the enactment of the new provision.[219]

The court in *Reese* is correct in stating that all similarly situated defendants were affected in the same manner by the enactment of the new supervised release statutory provisions, and that the defendant in its case was not subjected to the new provision until he violated release. Nonetheless, this does little to advance the Sixth Circuit's position, primarily in light of the Supreme Court's affirmation of *Greenfield v. Scafati*.[220]

In *Greenfield*, Massachusetts altered its good-time credit system so that any inmate violating parole would be precluded from accumulating good-conduct credit upon returning to prison. The amendment affected every prisoner who had been sentenced before the amendment equally.[221] Stated differently, if every prisoner in the defendant's position had refrained from violating parole, the new provision would have had no effect on their accumulation of good-time credits.[222] Nonetheless, the Supreme Court affirmed the district court's conclusion that the application of the new statute to inmates imprisoned before its enactment violated the Ex Post Facto Clause.[223] The district court had justified its holding by stating that the new statute prevented these inmates from being released as early as they might have been under the previous version of the statute. The district court reached its conclusion despite the fact that the new provision was triggered by conduct occurring after its enactment.[224] The statutory provisions at issue in the supervised release violation cases operated in the same manner as the provi-

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219. *See id.*

220. 277 F. Supp. 644 (D. Mass. 1967) (three-judge court), *aff'd mem.*, 390 U.S. 713 (1968).

221. *See Greenfield*, 277 F. Supp. at 645. The amendment did not apply to those persons who were already on parole when the amendment went into effect. *See id.*

222. *See id.*

223. *See id.* at 646.

224. *See id.* at 645-46. *See also* Williams v. Lee, 33 F.3d 1010 (8th Cir. 1994) (prohibiting the retroactive application of a new statute enhancing the penalty for parole violations despite the fact that the defendant was on notice of the new provision); Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989) (prohibiting the retroactive application of a new parole eligibility statute enacted after the defendant's original crime but before the parole violation); Beebe v. Phelps, 650 F.2d 774 (5th Cir. Unit A July 1981) (per curiam) (holding that the application of a new statute providing for the forfeiture of good-time credits upon revocation of parole, enacted after the defendant's conviction but before his parole, violated the Ex Post Facto Clause because the forfeiture extended the time remaining to be served on the defendant's original sentence).

sion at issue in *Greenfield*. The new provision at issue in *Reese* was enacted after the commission of the defendant's original offense, but before the violations of release. Nonetheless, when applied, it had the effect of imposing a longer sentence on an individual who, quite possibly, would have received a much shorter term of imprisonment under the version of the statute in place at the time his original crime was committed. In other words, like the altered good-time provisions in the parole cases, the new provision governing supervised release extends the time remaining on the defendant's original sentence. Whether the change takes place before or after the violation of release, the new provisions retroactively alter the punishment for the original offense. The Sixth Circuit failed to consider this point.

The Sixth Circuit did not place any significance on the *Greenfield* line of cases because, in the court's opinion, supervised release is an inherently different system than both parole and probation.[225] In making these distinctions, and thereby refusing to adhere to the reasoning of *Greenfield*, the Sixth Circuit chose not to follow rather convincing precedent.[226] The majority of courts of appeals, rather than comparing supervised release statutes to repeat offender laws, reasoned that supervised release revocation is equivalent to parole revocation for ex post facto purposes.[227] This view offers a sound characterization of the supervised release system.

Under the parole system, the statutes in place at the time of sentencing set forth the manner in which a defendant would earn the right to serve a portion of that sentence outside of prison.[228] In addition, these statutes determined what would have happened had the defendant violated any of the parole conditions. Similarly, under the supervised release system, the statutes in place at the time of sentencing establish, or dictate how a court is to establish, the terms and conditions of release.[229] These provisions also set forth the punishments for release violations.[230] In other words, like the terms governing a prisoner's eligibility for parole, the conditions

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225. *See* United States v. Reese, 71 F.3d 582, 587 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996) ("There is an inherent difference between probation and supervised release."). See *supra* notes 157-64 and accompanying text for a discussion of the Sixth Circuit's comparison of supervised release to parole and probation.

226. See *supra* Parts I.D.1 and II.A for a discussion of cases following the reasoning of *Greenfield*.

227. See *supra* Part II.A for a discussion of these cases.

228. See *supra* note 32 for a brief discussion of the parole system.

229. *See generally* 18 U.S.C. § 3583 (1994).

230. *See id.*

attached to a defendant's term of supervised release are imposed as part of the defendant's original sentence.[231] For this reason, the majority of courts of appeals have accurately compared supervised release to parole for purposes of ex post facto analysis and followed the reasoning used in the *Greenfield* line of cases.[232]

As previously stated, the Sixth Circuit in *Reese* attempted to distinguish the two systems by asserting that, as opposed to terms of imprisonment following parole revocation, terms of imprisonment following supervised release revocation can exceed the maximum allowed for the original offense.[233] Again, this argument ignores the connection between supervised release and the original sentence.[234] It also places great weight on a distinction that has little bearing on the ex post facto issue. The majority of courts of appeals adhered to the nature of the supervised release system as formulated by Congress and the Sentencing Commission.[235] These courts focused on the function of supervised release as a component of a defendant's original sentence. Accordingly, the Seventh Circuit in *United States v. Beals* placed this issue in the proper perspective.[236] In addressing the differences between parole and supervised release, it concluded that "[the] distinction[s] [are] meaningless for purposes of *ex post facto* analysis. Under both systems, a defendant is sentenced for an original offense to a combination of imprisonment and post-imprisonment release."[237]

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231. Several courts of appeals have applied this reasoning. *See, e.g.*, United States v. Beals, 87 F.3d 854 (7th Cir. 1996); United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994); United States v. Paskow, 11 F.3d 873 (9th Cir. 1993).

232. Additionally, given the similarities between supervised release revocation and probation revocation, the comparison of supervised release to parole is further supported by the Supreme Court's view that despite the "undoubted minor differences" between the two systems, there is no constitutional difference between revocation of probation and parole revocation. Gagnon v. Scarpelli, 411 U.S. 778, 782 n.3 (1973). See *supra* note 35 and accompanying text for a discussion of supervised release and probation. Although the Court's assertion in *Gagnon* was made in the context of due process analysis, it indicates that the differences between supervised release and parole, at least for ex post facto purposes, are not as great as the Sixth Circuit in *Reese* suggests. *See* United States v. Meeks, 25 F.3d 1117, 1121 (2d Cir. 1994) (citing *Gagnon* in a comparison of supervised release, probation and parole).

233. *See* United States v. Reese, 71 F.3d 582, 587-88 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996).

234. See *supra* Part III.A for a discussion of the connection between supervised release and a defendant's original sentence.

235. See *supra* Parts I.A-B for a discussion of the development and characteristics of the supervised release system. See *supra* Part II.A for a discussion of courts which relied on this background in reaching their decisions.

236. *See Beals*, 87 F.3d at 859-60.

237. *Id.* at 860.

CONCLUSION

The Sentencing Reform Act of 1984 led to the development of the supervised release system in an effort to replace the much criticized parole system that produced unfair and inconsistent sentencing. Congress justified supervised release as a method of tailoring sentences to the needs of individual defendants based on the nature of the crime committed as well as the characteristics of the particular defendant. The statutes and guidelines in place at the time of sentencing were designed to dictate the administration of supervised release, including the conditions of the term as well as the penalties attached to subsequent violations. The modification of these statutes resulted in a split among the federal courts of appeals concerning the question of whether the application of the amended statutes to defendants sentenced before the amendments gives rise to an ex post facto violation.

Contrary to the weight of precedent, the Sixth Circuit in *United States v. Reese* did not find an ex post facto violation, primarily because that court viewed the punishment for supervised release violations as constituting a separate punishment from the one imposed for the original crime. Accordingly, the court did not see a retroactive application of an altered law. The remaining circuits deciding the issue, however, reached the opposite conclusion. These courts held that sanctions imposed for supervised release violations were inherently part of the original sentence, and that any altered version of those sanctions could not be applied to defendants who had committed their crimes before the alteration was made, at least where the alteration had the effect of increasing the defendant's punishment. The latter view appears to be more consistent with the nature of the supervised release system.

As indicated by Congress and the Sentencing Commission, supervised release is a form of punishment given in addition to a term of imprisonment as part of a defendant's sentence for a crime. While it is a separate form of punishment, it is very much a part of that original sentence. The conditions of supervised release are imposed at the time of sentencing, as are the penalties attached to violations of those conditions. Additionally, violations are not crimes in and of themselves. They are acts deemed punishable under the supervised release provisions only because the defendant committed the original offense. In these respects, supervised release is essentially equivalent to parole, a system in which courts have viewed the application of amended statutes to defendants who

committed their crimes before the amendments to violate the Ex Post Facto Clause. These courts held that restricting a defendant's eligibility for parole essentially alters the punishment for the defendant's original crime. The cases involving supervised release statutes are analogous. The supervised release cases involve the same retroactive application of amended statutory provisions, provisions which, in their previous forms, established the foundation of the defendant's original sentence. This is the very practice that the Ex Post Facto Clause of the Constitution was written to prohibit.

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