Penn State Law Review

Volume 127 | Issue 2 Article 9

1-27-2023

Charging Congress with Change: Applying the Fugitive Tolling Doctrine to Supervised Release

Carey Field

Follow this and additional works at: https://elibrary.law.psu.edu/pslr

Recommended Citation
Field, Carey (2023) "Charging Congress with Change: Applying the Fugitive Tolling Doctrine to Supervised Release," *Penn State Law Review*: Vol. 127: Iss. 2, Article 9.
Available at: https://elibrary.law.psu.edu/pslr/vol127/iss2/9

This Comment is brought to you for free and open access by the Law Reviews and Journals at Penn State Law eLibrary. It has been accepted for inclusion in Penn State Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Charging Congress with Change: Applying the Fugitive Tolling Doctrine to Supervised Release

Carey R. Field*

ABSTRACT

In 1984, Congress passed the Sentencing Reform Act in an effort to bring consistency and certainty to federal sentencing. As part of the Sentencing Reform Act, Congress eliminated federal parole and replaced it with a new form of post-confinement monitoring: supervised release. While Congress created supervised release as a way to solve then-existing issues with federal parole and to help Congress achieve its overall goal in reforming federal sentencing, this new form of supervision did not accomplish everything that Congress hoped it would.

When Congress created supervised release, it did not address the fugitive tolling doctrine. Under the fugitive tolling doctrine, a term of supervised release tolls, or pauses, when defendants flee from supervision and become fugitives. After defendants are apprehended, they must serve the time that they were not under supervision. Congress's decision not to address the doctrine has resulted in a circuit split over whether the fugitive tolling doctrine should apply to supervised release, creating the very inconsistencies in sentencing that Congress sought to avoid. While one circuit court of appeals has held that the doctrine does not apply to supervised release, five have held that the doctrine does apply to supervised release. Furthermore, the United States Supreme Court has declined to consider the issue.

This Comment discusses federal sentencing before and after the Sentencing Reform Act, including the creation of supervised release. Then, this Comment introduces the issues surrounding the fugitive tolling doctrine and the resulting circuit split. Ultimately, this Comment recommends that Congress should create a fugitive tolling provision for supervised release that would allow for consistency across all federal courts.

* J.D. Candidate, The Pennsylvania State University, Penn State Law, 2023.

Table of Contents

I. INTRODUCTION 600
II. BACKGROUND 602
A. *Inconsistency and Uncertainty: Sentencing and the Federal Criminal Justice System* 603
B. *The Sentencing Reform Act of 1984: Congress's Solution for Consistency and Certainty* 604
C. *The Creation of Supervised Release: Congress's Elimination and Replacement of Parole Through the Sentencing Reform Act of 1984* 606
D. *The United States Courts of Appeals Split Over a New Issue: Should a Term of Supervised Release be Tolled when a Defendant Obtains Fugitive Status?* 608
1. The Lone Dissenter: The First Circuit Holds that the Fugitive Tolling Doctrine Does Not Apply 609
2. The Majority: Five Circuits Hold that the Fugitive Tolling Doctrine Does Apply 611
a. The Ninth Circuit: Fugitives Should Not Be Rewarded 611
b. The Fourth Circuit: Congress Did Not Intend to Preclude the Fugitive Tolling Doctrine 612
c. The Second Circuit: Defendants Should Not Benefit from Their Own Misconduct 614
d. The Third Circuit: Tolling for Fugitive Status Compared to Imprisonment and Deportation 616
e. The Fifth Circuit: Tolling Furthers Congress's Purpose 618
III. ANALYSIS 619
A. *A Fugitive Tolling Provision: Furthering Congress's Sentencing Scheme and Holding Defendants Accountable* 620
B. *Incorporating a Tolling Provision into 18 U.S.C. § 3583(e)* 622
IV. CONCLUSION 625

I. INTRODUCTION

There are currently 208,000 individuals serving time in federal prison.[1] When released from prison, most of those individuals also serve a term of supervised release, a form of federal post-confinement monitoring.[2] In fact, 72.9% of individuals convicted of a federal offense are sentenced to a term of supervised release that follows their term of

1. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://bit.ly/3A4uwj9.
2. *See* United States v. Buchanan, 638 F.3d 448, 451 (4th Cir. 2011).

imprisonment.[3] Currently, 112,849 individuals—89% under federal post-conviction supervision[4]—are serving a term of supervised release.[5]

Congress created supervised release when it passed the Sentencing Reform Act of 1984 ("SRA").[6] Supervised release replaced parole and was designed to be part of a defendant's sentence to promote rehabilitation and reentry into society rather than a separate sentence imposed to further punish the defendant.[7] While Congress intended the SRA and the introduction of supervised release to provide clarity and guidance in the sentencing process,[8] issues persist.

Many of the United States courts of appeals have struggled with whether the fugitive tolling doctrine applies to supervised release.[9] While defendants are on supervised release, they often abscond from supervision, becoming fugitives.[10] When defendants abscond, the fugitive tolling doctrine provides that their term of supervised release pauses until supervision resumes.[11] The defendants must then complete the period of supervision for which they absconded, even if it extends beyond the term's original expiration date.[12]

Several United States courts of appeals have considered whether the fugitive tolling doctrine applies to supervised release. However, the courts have struggled to do so because the current supervised release statutes fail to explicitly address the doctrine.[13] Because the United States

---

3. *See* CHARLES R. BREYER ET AL., U.S. SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 67 (2020), https://bit.ly/3r155ea; *see also* CHARLES DOYLE, CONG. RSCH. SERV., RL31653, SUPERVISED RELEASE (PAROLE): AN OVERVIEW OF FEDERAL LAW 1 (2021), https://bit.ly/3EZnYTp; *see also* GLENN R. SCHMITT & AMANDA RUSSELL, U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES 10 (2021), https://bit.ly/3G1TLEx.

4. *See Post-Conviction Supervision — Judicial Business 2020*, U.S. CTS., https://bit.ly/34inDP6 (last visited Aug. 16, 2022).

5. *See id.*

6. *See* COURTNEY R. SEMISCH ET AL., U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 1 (2020), https://bit.ly/39mq8iJ.

7. *See id.* at 7.

8. *See* LISA M. SEGHETTI & ALISON M. SMITH, CONG. RSCH. SERV., RL32766, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS 13 (2007).

9. *See* United States v. Hernandez-Ferrer, 599 F.3d 63, 68 (1st Cir. 2010); United States v. Murguia-Oliveros, 421 F.3d 951, 955 (9th Cir. 2005); United States v. Buchanan, 638 F.3d 448, 455 (4th Cir. 2011); United States v. Barinas, 865 F.3d 99, 109 (2d Cir. 2017); United States v. Island, 916 F.3d 249, 254 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 405 (2019); United States v. Cartagena-Lopez, 979 F.3d 356, 363 (5th Cir. 2020).

10. *See Murguia-Oliveros*, 421 F.3d at 953–54 (defining a fugitive as someone who "fail[s] to contact [their] probation officer as required").

11. *See Buchanan*, 638 F.3d at 451.

12. *See id.*

13. *See Hernandez-Ferrer*, 599 F.3d at 67; *Murguia-Oliveros*, 421 F.3d at 953; *Barinas*, 865 F.3d at 109; *Island*, 916 F.3d at 255; *Cartagena-Lopez*, 979 F.3d at 360.

Supreme Court has refused to resolve the resulting circuit split,[14] this Comment discusses the need for Congress to fix the issue by adding a tolling provision to the supervised release statutes created by the SRA.

Section II of this Comment discusses the issues that previously existed in federal sentencing[15] and how Congress sought to address those issues through the SRA.[16] Section II then addresses the implications of the SRA[17] and introduces the problem giving rise to a circuit split: whether the fugitive tolling doctrine applies to supervised release.[18]

Section III of this Comment explores the need for a tolling provision for supervised release and how that provision supports Congress's original intent in passing the SRA.[19] Finally, Section III recommends that Congress should create and place a tolling provision within the supervised release statutes to resolve the issue among the courts.[20]

II. BACKGROUND

Congress passed the SRA to solve an array of issues that pervaded the federal criminal justice system.[21] In doing so, Congress created supervised release, a form of post-confinement monitoring.[22] However, creating this new form of supervision did not solve all the issues Congress hoped it would.[23] Instead, supervised release created a new issue that courts have been unable to resolve with unity: whether the fugitive tolling doctrine applies to supervised release.[24]

---

14. *See generally* Island v. United States, 140 S. Ct. 405 (2019) (denying a petition for a writ of certiorari).
15. *See* discussion *infra* Section II.A.
16. *See* discussion *infra* Section II.B.
17. *See* discussion *infra* Section II.C.
18. *See* discussion *infra* Section II.D.
19. *See* discussion *infra* Section III.A.
20. *See* discussion *infra* Section III.B.
21. *See* S. REP. NO. 98-225, at 1 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3184.
22. *See* SEMISCH ET AL., *supra* note 6, at 1.
23. *See* United States v. Hernandez-Ferrer, 599 F.3d 63, 68 (1st Cir. 2010); United States v. Murguia-Oliveros, 421 F.3d 951, 955 (9th Cir. 2005); United States v. Buchanan, 638 F.3d 448, 455 (4th Cir. 2011); United States v. Barinas, 865 F.3d 99, 109 (2d Cir. 2017); United States v. Island, 916 F.3d 249, 254 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 405 (2019); United States v. Cartagena-Lopez, 979 F.3d 356, 363 (5th Cir. 2020).
24. *See Hernandez-Ferrer*, 599 F.3d at 68; *Murguia-Oliveros*, 421 F.3d at 955; *Buchanan*, 638 F.3d at 455; *Barinas*, 865 F.3d at 109; *Island*, 916 F.3d at 254; *Cartagena-Lopez*, 979 F.3d at 363.

A. Inconsistency and Uncertainty: Sentencing and the Federal Criminal Justice System

Before 1984, sentencing in the federal criminal justice system followed an indeterminate model[25] and was based on rehabilitation.[26] Under the indeterminate sentencing model, a statute specified the maximum penalty that could be imposed on a federal criminal defendant but gave the judge discretion to decide the terms for the type and length of the defendant's sentence.[27] To impose a sentence, the judge stated a range of years that the defendant would serve in prison.[28] However, judges did not have clear statutory guidance for imposing sentences.[29] This lack of guidance led to judges imposing "wide ranges of sentences [on defendants] with similar histories, convicted of similar crimes, committed under similar circumstances."[30] In addition to the inconsistencies during sentencing, there was uncertainty about the defendant actually serving the sentence.[31]

After the defendant served the minimum sentence,[32] the United States Parole Commission ("Parole Commission")[33] determined the defendant's actual release date from prison.[34] The Parole Commission had discretion to determine whether the defendant was rehabilitated and could be released after serving the minimum sentence, or, if the defendant was not rehabilitated, whether the defendant could be released at a point closer to or at the end of the maximum sentence.[35] The Parole

25. *See* Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 188 (2013).

26. *See* S. REP. NO. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221; *see also* Mistretta v. United States, 488 U.S. 361, 363 (1989) (stating that the goal of the rehabilitation model was to "rehabilitate the inmate and . . . minimize the risk that he would resume criminal activity upon his return to society").

27. *See* Scott-Hayward, *supra* note 25, at 188; *see also* S. REP. NO. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

28. *See* Scott-Hayward, *supra* note 25, at 188.

29. *See* S. REP. NO. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

30. *Id.*; *see also* Scott-Hayward, *supra* note 25, at 190.

31. *See* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 996 (2013).

32. *See* Scott-Hayward, *supra* note 25, at 188 (explaining that a minimum sentence is the minimum number of years imposed by the judge).

33. For an explanation of the history and purpose of the Parole Commission, see *Organization, Mission and Functions Manual: United States Parole Commission*, U.S. DEP'T OF JUST. (Oct. 27, 2021), https://bit.ly/3lmNw6l.

34. *See* Scott-Hayward, *supra* note 25, at 188–89; *see also* S. REP. NO. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

35. *See Scott-Hayward, supra* note 25, at 189; *see also* S. REP. NO. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

Commission's ability to use discretion created uncertainty as to how long a defendant would *actually* spend in prison before being released.[36]

After the Parole Commission determined that a defendant was rehabilitated and could be released from prison, a parole officer would supervise the defendant within the community until the defendant served their maximum sentence.[37] In effect, the defendant served parole in the place of a portion of their imposed term of imprisonment.[38] The parole system, as part of the indeterminate sentencing system, was based on rehabilitating defendants.[39]

In the 1970s, many people criticized the indeterminate system and rehabilitation model.[40] Evidence showed that "rehabilitation programs were ineffective and failed to reduce recidivism."[41] Furthermore, there were two main issues with the federal sentencing system: judges imposed inconsistent sentences,[42] and the Parole Commission made prison release dates for defendants uncertain.[43]

B. The Sentencing Reform Act of 1984: Congress's Solution for Consistency and Certainty

By the 1980s, Congress sought to address the issues existing within the federal sentencing system.[44] This effort led to legislation that would

---

36. *See* Scott-Hayward, *supra* note 25, at 190; *see also* Doherty, *supra* note 31, at 996; United States v. Montenegro-Rojo, 908 F.2d 425, 433 (9th Cir. 1990). In *United States v. Montenegro-Rojo*, the Ninth Circuit stated the following:

> [U]nder the parole system . . . [a] situation could arise whereby a defendant in great need of post-incarceration supervision would get little whereas a defendant who did not need such supervision would get a great deal. Indeed, this disparity was almost assured by the parole system: better-behaved inmates, who presumably could handle life outside of prison on their own reasonably well, left prison sooner than worse-behaved inmates, but as a consequence were supervised for longer periods on the outside.

Id.

37. *See* Scott-Hayward, *supra* note 25, at 189.

38. *See* DOYLE, *supra* note 3, at 1.

39. *See* Scott-Hayward, *supra* note 25, at 189.

40. *See id.*

41. *Id.*

42. *See* cases cited *supra* note 23.

43. *See* Scott-Hayward, *supra* note 25, at 188; *see also* Mistretta v. United States, 488 U.S. 361, 366 (1989) ("[T]he indeterminate-sentencing system had two 'unjustifi[ed]' and 'shameful' consequences[:] . . . great variation among sentences imposed by different judges upon similarly situated offenders[] . . . [and] uncertainty as to the time the offender would spend in prison." (citation omitted) (quoting S. Rep. No. 98-225, at 38, 65 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221, 3248)).

44. *See* S. REP. NO. 98-225, at 1 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3184.

not just change sentencing guidelines, but would overhaul the entire federal criminal justice system: Senate Bill 1762.[45]

The Senate tasked the Committee on the Judiciary to "make comprehensive reforms and improvements in the federal criminal laws and procedures."[46] The Senate Committee on the Judiciary outlined four purposes that it believed sentencing should serve and modeled the reformation based on those purposes.[47] First, a sentence should reflect the seriousness of the offense, promote respect for the law, and provide a just punishment.[48] Second, sentencing should deter defendants from future criminal conduct.[49] Third, sentencing should protect the public from the defendant.[50] Lastly, sentencing should still help to rehabilitate the defendant by providing training, care, or other treatment.[51] According to the Senate Committee on the Judiciary, a judge must consider these four purposes before imposing a sentence.[52]

After incorporating the four purposes for sentencing through several versions of the bill, the Senate Committee on the Judiciary sent an original committee bill, Senate Bill 1762, to the Senate for a vote. Senate Bill 1762 represented the "first comprehensive sentencing law for the federal system."[53] The bill became law when Congress passed the SRA as part of the Comprehensive Crime Control Act of 1984.[54]

Congress's primary goal in passing the SRA was to eliminate the inconsistencies and uncertainties that existed in federal sentencing.[55] One of the ways Congress met this goal was by abolishing indeterminate

45. *See* S. REP. NO. 98-225, at 37 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3220.

46. S. REP. NO. 98-225, at 1 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3184.

47. *See* S. REP. NO. 98-225, at 50 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3233.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See* S. REP. NO. 98-225, at 52 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3235; 18 U.S.C. § 3553(a)(2)(A)–(D) (stating that when determining the sentence to be imposed, a court must consider the four "need[s]" for imposing a sentence).

53. S. REP. NO. 98-225, at 37 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3220.

54. *See* Comprehensive Crime Control Act of 1984, ch.II, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551 et seq.); *see also* SEGHETTI & SMITH, *supra* note 8, at 14.

55. *See* SEGHETTI & SMITH, *supra* note 8, at 14; *see also* Scott-Hayward, *supra* note 25, at 190 ("[T]he SRA had two purposes: to ensure 'honesty in sentencing' and to 'reduce "unjustifiably wide" sentencing disparity.'" (quoting Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988))).

sentencing.[56] The SRA created the United States Sentencing Commission ("Sentencing Commission") and tasked it with creating guidelines for sentencing.[57] Congress intended for the Sentencing Commission to make federal sentences determinate by establishing ranges "based on categories of offenses and characteristics of defendants."[58]

C. The Creation of Supervised Release: Congress's Elimination and Replacement of Parole Through the Sentencing Reform Act of 1984

In addition to creating the Sentencing Commission, Congress eliminated parole and replaced it with a new form of post-confinement monitoring: supervised release.[59] Prior to the SRA, judges could impose either probation or parole at sentencing.[60] Probation "functioned as a stay of the imposition or execution of a sentence" of imprisonment,[61] while parole constituted a portion of the defendant's sentence of imprisonment.[62]

However, the SRA changed both probation and parole.[63] Congress made probation a sentence in itself that is subject to terms and conditions and available as an alternative to incarceration.[64] Additionally, Congress eliminated parole altogether, creating supervised release to take its place.[65]

Supervised release is similar to probation.[66] For example, defendants on supervised release are supervised by a probation officer

56. *See* Scott-Hayward, *supra* note 25, at 190; *see also* Mistretta v. United States, 488 U.S. 361, 367–68 (1989).

57. *See* SEGHETTI & SMITH, *supra* note 8, at 14; *see also* Mistretta v. United States, 488 U.S. 361, 367 (1989).

58. Scott-Hayward, *supra* note 25, at 190; *see also* SEGHETTI & SMITH, *supra* note 8, at 14.

59. *See* United States v. Armstrong, 187 F.3d 392, 394 (4th Cir. 1999) ("Congress designed supervised release as the successor to parole in the federal criminal system[] because it believed that the parole system provided inadequate supervision.").

60. *See* Johnson v. United States, 529 U.S. 694, 711 (2000).

61. SEMISCH ET AL., *supra* note 6, at 1.

62. *See* DOYLE, *supra* note 3, at 1.

63. *See* SEMISCH ET AL., *supra* note 6, at 1–7.

64. *See* SEMISCH ET AL., *supra* note 6, at 5; *see also* S. REP. NO. 98-225, at 88 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3271 (treating probation as a form of sentence with conditions rather than "a suspension of the imposition or execution of sentence").

65. *See* SEMISCH ET AL., *supra* note 6, at 1; *see also* Scott-Hayward, *supra* note 25, at 190; DOYLE, *supra* note 3, at 1; Doherty, *supra* note 31, at 960; United States v. Buchanan, 638 F.3d 448, 451 (4th Cir. 2011); United States v. Armstrong, 187 F.3d 392, 394 (4th Cir. 1999).

66. *See* SEMISCH ET AL., *supra* note 6, at 1 n.4.

through the probation department.[67] However, unlike probation, supervised release does not replace imprisonment; it begins after the defendant's full term of imprisonment has been served.[68] Under the SRA, a federal court may require that a defendant be placed on a term of supervised release after imprisonment.[69] The length of this supervised release term can vary depending on the severity of the offense.[70]

Additionally, a court may not impose supervised release as a form of punishment or incapacitation because those purposes are already served through the term of imprisonment.[71] In comparison to probation, supervised release serves more of a rehabilitation function and is imposed "to facilitate [a defendant's] reentry into society following a term of imprisonment."[72]

When a court imposes a term of supervised release, the court sets certain terms and conditions that defendants must follow while on supervised release.[73] Some of these terms and conditions are mandated by the supervised release statutes.[74] For example, it is a mandatory condition that defendants may not commit another crime during a term of supervision, or they will be found to have violated the terms and conditions of their supervised release.[75]

---

67. *See* 18 U.S.C. § 3583(f); *see also* S. REP. NO. 98-225, at 125 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3308.

68. *See* DOYLE, *supra* note 3, at 1 ("[S]upervised release begins only after full service of the original term[.]").

69. *See* 18 U.S.C. § 3583(a); *see also* United States v. Montenegro-Rojo, 908 F.2d 425, 432 (9th Cir. 1990) (explaining that Section 3583(a) "giv[es] a sentencing court the option to tack a period of supervised release onto any term of imprisonment authorized by a substantive criminal statute, even a term near or at the maximum").

70. *See Buchanan*, 638 F.3d at 451; *see also* 18 U.S.C. § 3583(a)-(b) (stating that misdemeanors and Class E felonies can incur a term of supervised release of no more than one year; Class C and D felonies can incur terms of supervised release of not more than three years; and Class A and B felonies can incur a term of supervised release of not more than five years). For definitions of each class of offense, see 18 U.S.C. § 3559(a).

71. *See Buchanan*, 638 F.3d at 451 (citing S. REP. NO. 98-225, at 122 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3305); *see also Montenegro-Rojo*, 908 F.2d at 433 ("Congress did not want the period of supervised release to be related to the term of imprisonment.").

72. SEMISCH ET AL., *supra* note 6, at 7; *see Buchanan*, 638 F.3d at 451 ("Supervised release 'is not a punishment in lieu of incarceration.' Rather, it 'is a unique method of post-confinement supervision' that 'fulfills rehabilitative ends, distinct from those served by incarceration[.]'" (citations omitted) (quoting United States v. Granderson, 511 U.S. 39, 50 (1994); Gozlon-Peretz v. United States, 498 U.S. 395, 407 (1991); United States v. Johnson, 529 U.S. 53, 59 (2000))); *see also* Johnson v. United States, 529 U.S. 694, 708–09 (2000) ("The congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from the prison to liberty[.]").

73. *See* 18 U.S.C. § 3583(d).

74. *See id.*; *see also Buchanan*, 638 F.3d at 451.

75. *See* S. REP. NO. 98-225, at 124 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3307.

A court may also impose discretionary conditions, often considered "standard" conditions.[76] Standard conditions include requiring defendants to report to their probation officers regularly or prohibiting defendants from leaving the supervising jurisdiction without obtaining permission from their probation officers.[77]

If defendants on supervised release violate either mandatory or standard terms and conditions of their release, then the court can revoke the defendants' supervised release and require them to serve "all or part of the[ir] term[s] of supervised release"[78] in prison.[79] Defendants often violate a common condition of supervised release that requires them to report to their probation officer.[80] This particular violation frequently requires courts to decide whether to apply the fugitive tolling doctrine.[81]

D. The United States Courts of Appeals Split Over a New Issue: Should a Term of Supervised Release be Tolled when a Defendant Obtains Fugitive Status?

The creation of supervised release has resulted in a new problem: should a court pause, or toll, a term of supervised release when a defendant obtains fugitive status?[82] Courts have grappled with whether to apply the fugitive tolling doctrine[83] to supervised release, especially because the SRA is silent as to whether the fugitive tolling doctrine applies to supervised release.[84] Several United States courts of appeals

76. *See* United States v. Barinas, 865 F.3d 99, 107 (2d Cir. 2017).

77. *See id.*

78. *Buchanan*, 638 F.3d at 451; *see also* 18 U.S.C. § 3583(e)(3).

79. *See Buchanan*, 638 F.3d at 451; *see also* 18 U.S.C. § 3583(e)(3).

80. *See* SEMISCH ET AL., *supra* note 6, at 11; *see also* United States v. Hernandez-Ferrer, 599 F.3d 63, 67 n.3 (1st Cir. 2010) (citing United States v. Murguia-Oliveros, 421 F.3d 951, 953–54 (9th Cir. 2005)); *see also Buchanan*, 638 F.3d at 457 (citing United States v. Ignacio Jaurez, 601 F.3d 885, 890 (9th Cir. 2010)).

81. *See Hernandez-Ferrer*, 599 F.3d at 68; *Murguia-Oliveros*, 421 F.3d at 955; *Buchanan*, 638 F.3d at 455; *Barinas*, 865 F.3d at 109; United States v. Island, 916 F.3d 249, 254 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 405 (2019); United States v. Cartagena-Lopez, 979 F.3d 356, 363 (5th Cir. 2020).

82. A fugitive is one who absconds from supervised release, meaning the individual fails to report to the Probation Office, cannot be located, and therefore cannot be properly supervised. *See Murguia-Oliveros*, 421 F.3d at 953–54; *see also Buchanan*, 638 F.3d at 457 (citing *Ignacio Jaurez*, 601 F.3d at 890); *see also* discussion *supra* Section I.

83. When a defendant becomes a fugitive, the term of supervised release pauses until the individual is located and the Probation Office can resume supervision. *See Buchanan*, 638 F.3d at 457; *see also* discussion *supra* Section I. The defendant must make up the time spent as a fugitive and away from supervision, extending the individual's expiration date for release from supervision beyond the original expiration date. *See Buchanan*, 638 F.3d at 457; *see also* discussion *supra* Section I.

84. *See Hernandez-Ferrer*, 599 F.3d at 64; *Murguia-Oliveros*, 421 F.3d at 955; *Buchanan*, 638 F.3d at 455; *Barinas*, 865 F.3d at 109; *Island*, 916 F.3d at 254; *Cartagena-Lopez*, 979 F.3d at 363–64.

have taken up the issue, resulting in a split among the courts.[85] Only one court of appeals has held that the doctrine does *not* apply to supervised release,[86] while five courts of appeals have held that the doctrine *does* apply to supervised release.[87]

1. The Lone Dissenter: The First Circuit Holds that the Fugitive Tolling Doctrine Does Not Apply

The First Circuit is currently the only United States court of appeals to hold that the fugitive tolling doctrine does not apply to a term of supervised release.[88] The First Circuit addressed the fugitive tolling doctrine in *United States v. Hernandez-Ferrer*,[89] a case where the defendant absconded with only four months of his three-year supervision term remaining.[90] The defendant was found when he was arrested on drug charges one day after his supervision expired.[91] The district court applied the fugitive tolling doctrine and found that the defendant's term of supervised release was "still alive"[92] at the time the defendant committed the drug crime and was arrested.[93] The district court's finding resulted in revoking the defendant's supervised release.[94] On appeal, the First Circuit had to decide whether the fugitive tolling doctrine applied and the defendant's supervised release continued to run at the time of his arrest, or whether the doctrine did not apply and the defendant's supervision expired the day before his arrest.[95] The First Circuit held that the fugitive tolling doctrine did not apply.[96]

85. *See Hernandez-Ferrer*, 599 F.3d at 64; *Murguia-Oliveros*, 421 F.3d at 955; *Buchanan*, 638 F.3d at 455; *Barinas*, 865 F.3d at 109; *Island*, 916 F.3d at 254; *Cartagena-Lopez*, 979 F.3d at 363–64.

86. *See Hernandez-Ferrer*, 599 F.3d at 64 ("[T]here can be no tolling of the period of supervised release on the basis of fugitive status[.]").

87. *See Murguia-Oliveros*, 421 F.3d at 955; *Buchanan*, 638 F.3d at 455 ("[A] term of supervised release is tolled when a defendant absconds from supervision."); *Barinas*, 865 F.3d at 109; *Island*, 916 F.3d at 254 (holding that the Third Circuit "join[s] the majority of circuits to have considered the question and recognize a supervised release term tolls while a defendant is of fugitive status"); *Cartagena-Lopez*, 979 F.3d at 363–64 (joining the "Second, Third, Fourth, and Ninth Circuits in adopting the fugitive tolling doctrine in the context of supervised release").

88. *See Hernandez-Ferrer*, 599 F.3d at 64; *see also* Bernie Pazanowski, *Fugitive Tolling Doctrine Applies to Supervised Release Term*, BLOOMBERG L. (Nov. 2, 2020, 3:52 PM), https://bit.ly/3qxTmor ("Only the First Circuit found the doctrine inapplicable in the context of supervised release[.]").

89. *See Hernandez-Ferrer*, 599 F.3d at 64.

90. *See id.* at 64–65.

91. *See id.* at 65.

92. *Id.*

93. *See id.*

94. *See id.*

95. *See id.* at 67.

96. *See id.* at 64.

To determine whether the fugitive tolling doctrine applied to a term of supervised release, the First Circuit relied on the statutory provisions for supervised release.[97] The court found that the provisions did not address the fugitive tolling doctrine.[98] Furthermore, the court found that Congress chose to include only *one* tolling provision for supervised release: 18 U.S.C. § 3624(e).[99] This provision provides that an individual's term of supervised release tolls if they are imprisoned for 30 days or more because of a different crime.[100]

With this singular tolling provision in mind, the First Circuit applied the cannon of statutory construction known as *expressio unius est exclusio alterius*, meaning "the expression of one thing is the exclusion of other things."[101] The court reasoned that because Congress explicitly included a tolling provision for a particular circumstance—defendants who are imprisoned for 30 days or more—Congress did not intend for tolling to apply in other circumstances, including fugitive status.[102]

The First Circuit rejected the argument that refusing to toll a term of supervised release would reward defendants who maintain fugitive status until their term expires.[103] The court explained that tolling is unnecessary because the statute already provides a remedy for defendants who abscond from supervision before their term expires: 18 U.S.C. § 3583(i).[104] The court determined that § 3583(i) provides a reasonable amount of time after the expiration of a term of supervised release for violations occurring before that expiration to be brought and addressed before the district court, meaning defendants are not rewarded and are still held accountable.[105]

---

97. *See id.* at 67.

98. *See id.*

99. *See Hernandez-Ferrer*, 599 F.3d at 67.

100. *See id.*; 18 U.S.C. § 3624(e) ("A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days.").

101. *Hernandez-Ferrer*, 599 F.3d at 67.

102. *See id.* at 67–68; *see also* United States v. Island, 916 F.3d 249, 257 (3d Cir. 2019) (Rendell, J., dissenting) ("If Congress incorporated an exception to the rule, and in doing so would have considered other exceptions, but failed to include them, then we should presume Congress intended to exclude them."), *cert. denied*, 140 S. Ct. 405 (2019).

103. *See Hernandez-Ferrer*, 599 F.3d at 69 (citing United States v. Murguia-Oliveros, 421 F.3d 951, 951 (9th Cir. 2005)).

104. *See id.*

105. *See id.*; *see also* 18 U.S.C. § 3583(i). 18 U.S.C. § 3583(i) states:

> The power of the court to revoke a term of supervised release for violation of a condition of supervised release . . . extends beyond the expiration of the term of supervised release for any period *reasonably necessary* for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such violation.

Because Congress did not expressly authorize fugitive tolling and only provided for a single tolling provision that does not relate to fugitive defendants, the First Circuit found that there is no tolling for supervised release on the basis of fugitive status.[106] The court was further persuaded by the presence of § 3583(i) as a remedy designed to address violations by the defendant presented after the expiration of the defendant's supervision, even though it was not explicitly designed to address fugitive defendants.[107] The First Circuit therefore held that the fugitive tolling doctrine does not apply to supervised release.[108]

2. The Majority: Five Circuits Hold that the Fugitive Tolling Doctrine Does Apply

While the First Circuit held that the fugitive tolling doctrine does not apply to a term of supervised release,[109] five circuits have held that the fugitive tolling doctrine does apply to a term of supervised release.[110]

a. The Ninth Circuit: Fugitives Should Not Be Rewarded

The Ninth Circuit was the first United States court of appeals to hold that the fugitive tolling doctrine applies to a term of supervised release.[111] The Ninth Circuit addressed the fugitive tolling doctrine in *United States v. Murguia-Oliveros*,[112] a case where the defendant absconded from supervision with eight months of his three-year supervision term remaining.[113] Federal authorities found and arrested the defendant two months after his term of supervised release expired.[114] The district court applied the fugitive tolling doctrine and revoked the defendant's supervised release, sentencing him to a term of imprisonment.[115] On appeal, the Ninth Circuit had to determine whether the fugitive tolling doctrine applied to the defendant's term of supervised

---

Id. (emphasis added).

106. *See Hernandez-Ferrer*, 599 F.3d at 64.

107. *See id.*

108. *See id.*

109. *See id.*

110. *See* United States v. Murguia-Oliveros, 421 F.3d 951, 955 (9th Cir. 2005); United States v. Buchanan, 638 F.3d 448, 455 (4th Cir. 2011); United States v. Barinas, 865 F.3d 99, 109 (2d Cir. 2017); United States v. Island, 916 F.3d 249, 254 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 405 (2019); United States v. Cartagena-Lopez, 979 F.3d 356, 363 (5th Cir. 2020).

111. *See Murguia-Oliveros*, 421 F.3d at 955.

112. *See id.*

113. *See id.* at 952.

114. *See id.* at 953.

115. *See id.*

release.[116] The Ninth Circuit held that the fugitive tolling doctrine did apply.[117]

Like the First Circuit, the Ninth Circuit acknowledged that no current statutory provisions expressly provide for tolling during fugitive status for supervised release.[118] However, the court relied upon its previous finding in *United States v. Crane*,[119] which determined that specific statutory language providing for the tolling doctrine is not required.[120] In *Crane*, the Ninth Circuit found that refusing to toll a fugitive defendant's term of supervised release would "reward those who flee from bench warrants and maintain their fugitive status until the expiration of their original term of supervised release."[121] Relying on its former holding in *Crane*, the Ninth Circuit, in *Murguia-Oliveros*, found that tolling is necessary to avoid rewarding defendants who violate the terms and conditions of their supervised release and avoid arrest until their terms expire.[122]

Relying next on its public policy argument that defendants should not be rewarded for their wrongdoing, the Ninth Circuit held that the fugitive tolling doctrine applies to supervised release, even if the doctrine is not expressly provided for by statute.[123] The Ninth Circuit was the first of many courts of appeals to hold that the fugitive tolling doctrine applies to supervised release.[124]

b. The Fourth Circuit: Congress Did Not Intend to Preclude the Fugitive Tolling Doctrine

The Fourth Circuit was the third court of appeals to join the circuit split, agreeing with the Ninth Circuit that "a term of supervised release is tolled when a defendant absconds from supervision."[125] The Fourth Circuit applied the fugitive tolling doctrine in *United States v. Buchanan*,[126] where the defendant absconded after one year of

116. *See id.*
117. *See id.* at 955.
118. *See id.* at 953.
119. *See* United States v. Crane, 979 F.2d 687, 691 (9th Cir. 1992).
120. *See id.*
121. *Murguia-Oliveros*, 421 F.3d at 953.
122. *See id.* at 954 ("A person on supervised release should not receive credit against his period of supervised release for time that, by virtue of his own wrongful act, he was not in fact observing the terms of his supervised release.").
123. *See id.* at 953–55.
124. *See, e.g.*, United States v. Buchanan, 638 F.3d 448, 455 (4th Cir. 2011); United States v. Barinas, 865 F.3d 99, 109 (2d Cir. 2017); United States v. Island, 916 F.3d 249, 254 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 405 (2019); United States v. Cartagena-Lopez, 979 F.3d 356, 363 (5th Cir. 2020).
125. *Buchanan*, 638 F.3d at 455.
126. *See id.*

supervision and remained a fugitive until he was finally arrested over ten years after his supervision expired.[127] During the defendant's time as a fugitive, he committed several crimes and other violations, both before and after his supervised release expired.[128]

The district court found that the defendant's supervised release was tolled while he was a fugitive.[129] Accordingly, the court held the defendant accountable for violations of his supervision that he committed while a fugitive after his supervision expired.[130] The district court revoked the defendant's supervised release and sentenced him to a term of imprisonment.[131] On appeal, the issue before the Fourth Circuit was whether the fugitive tolling doctrine applied to the defendant's supervised release.[132] The Fourth Circuit held that the doctrine did apply.[133]

Like the First and Ninth Circuits, the Fourth Circuit also acknowledged that there are no supervised release provisions that address the issue of fugitive tolling.[134] However, unlike the First and Ninth Circuits, the Fourth Circuit focused on congressional intent.[135] The court considered that supervised release constitutes part of defendants' original criminal sentences and that Congress intended for defendants to serve their full term of supervised release.[136] The Fourth Circuit found that defendants who are fugitives should not be credited for time during which they did not actually serve their criminal sentences.[137] According to the court, to hold otherwise would "thwart congressional intent"[138] and reward absconders for their misconduct.[139]

Unlike the First Circuit, which asserted that Congress intended to *exclude* a fugitive tolling provision for supervised release because it *included* § 3624(e),[140] the Fourth Circuit noted that "congressional silence on an issue is not always indicative of congressional intent."[141] The court further explained that Congress makes its intent known when it wants to change the way a judicially-created concept—like the doctrine

127. *See id.* at 449.
128. *See id.* at 449–50.
129. *See id.* at 450.
130. *See id.*
131. *See id.*
132. *See id.* at 451.
133. *See id.* at 455.
134. *See id.* at 452.
135. *See Buchanan*, 638 F.3d at 455.
136. *See id.*
137. *See id*.
138. *Id.*
139. *See id.*
140. *See id.* at 456 (allowing tolling for a defendant who is imprisoned for more than 30 days); *see also* 18 U.S.C. § 3624(e).
141. *Buchanan*, 638 F.3d at 456.

of fugitive tolling—is interpreted.[142] The court determined that Congress did not indicate that it wanted to preclude the fugitive tolling doctrine's application to supervised release.[143]

The Fourth Circuit added that the fugitive tolling doctrine should apply to a term of supervised release because a defendant's abscondment prevents supervision by the probation department as well as the sentencing court.[144] According to the court, tolling a defendant's term of supervised release "ensure[s] that, upon being apprehended, the defendant will be subject to judicial supervision for a complete term."[145] The court reasoned that applying the fugitive tolling doctrine prevents a fugitive defendant from being rewarded for his misconduct.[146]

Because Congress intended for defendants to serve their full sentences and to not be rewarded for wrongdoing, and because Congress did not expressly preclude fugitive tolling, which ensures that defendants serve their full sentences, the Fourth Circuit joined the Ninth Circuit and held that the fugitive tolling doctrine applies to supervised release.[147]

c. The Second Circuit: Defendants Should Not Benefit from Their Own Misconduct

The Second Circuit joined the Ninth and Fourth Circuits in holding that the fugitive tolling doctrine applies to supervised release.[148] The Second Circuit addressed the issue in *United States v. Barinas*,[149] where the defendant absconded from supervision for 16 years, making him a fugitive beyond the expiration of his supervision and at the time he committed another crime.[150] The district court revoked the defendant's supervised release and sentenced him to a term of imprisonment.[151] On appeal, the Second Circuit considered the issue of whether the defendant's supervision should be tolled and held that it should be because the fugitive tolling doctrine applies.[152]

The Second Circuit declined to follow the First Circuit's holding, citing reasons similar to those of the Ninth and Fourth Circuits.[153] The Second Circuit determined that tolling should apply because defendants

142. *See id.* (citing Midatlantic Nat'l Bank v. N.J. Dep't of Env't Prot., 474 U.S. 494, 501 (1986)).
143. *See id.*
144. *See id.* at 458.
145. *Id.*
146. *See id.*
147. *See id.* at 448.
148. *See* United States v. Barinas, 865 F.3d 99, 109 (2d Cir. 2017).
149. *See id.*
150. *See id.* at 102.
151. *See id.* at 103.
152. *See id.* at 103–04.
153. *See id.* at 106.

are no longer actually serving their sentences when they become fugitives.[154] The court stressed that defendants should not benefit from their own misconduct by being allowed to serve their sentence without supervision.[155] To demonstrate, the Second Circuit provided other instances in which fugitives are not allowed to benefit from their own misconduct.[156] For example, a fugitive cannot invoke a statute-of-limitations defense.[157] Defendants who become fugitives during the pendency of their appeal may also be punished by having the appeal dismissed.[158] Furthermore, in the case of defendants serving a term of imprisonment, those who escape and become fugitives are not entitled to credit for time served for the period during which they abscond.[159]

While the supervised release statutes do not expressly provide for the tolling of a term of supervised release based on a defendant's fugitive status, the Second Circuit rejected the First Circuit's argument that Congress's inclusion of § 3624(e) demonstrates Congress's intent to exclude the tolling of a defendant who absconds from supervised release.[160] Instead, the Second Circuit reasoned that allowing a defendant who absconds from supervision to be treated as having satisfied his supervised release, even while a fugitive, negates Congress's intent.[161] Furthermore, following the Fourth Circuit's reasoning, the Second Circuit determined that Congress would make its intention to "override such longstanding precepts as the principle that a fugitive should not profit by his unlawful or contumacious conduct"[162] much clearer if that were the case.[163]

Therefore, focusing on the "traditional principle" that defendants should not benefit from their own misconduct and that Congress did not intend to alter this traditional principle,[164] the Second Circuit joined the majority of circuits in holding that the fugitive tolling doctrine applies to supervised release.[165]

154. *See id.*

155. *See id.* ("[T]olling is consistent with the traditional principle that an absconder should not benefit from his fugitivity[.]").

156. *See id.* at 107.

157. *See id.*; 18 U.S.C. § 3290 ("No statute of limitations shall extend to any person fleeing from justice.").

158. *See Barinas*, 865 F.3d at 107; Ortega-Rodriguez v. United States, 507 U.S. 234, 239 (1993) ("It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal.").

159. *See Barinas*, 865 F.3d at 108.

160. *See id.* at 109.

161. *See id.*

162. *Id.*

163. *See id.*

164. *See id.*

165. *See id.*

d. The Third Circuit: Tolling for Fugitive Status Compared to Imprisonment and Deportation

Not long after the Second Circuit, the Third Circuit joined the majority of circuits in holding that the fugitive tolling doctrine applies to supervised release.[166] The Third Circuit addressed the doctrine in *United States v. Island*,[167] where the defendant absconded from supervision nine months before the expiration of his supervised release.[168] Two days after the defendant's supervised release expired, the defendant, while still a fugitive, committed another crime and federal authorities arrested him soon after.[169] The district court, applying the fugitive tolling doctrine, revoked the defendant's supervised release and sentenced the defendant to a term of imprisonment.[170] On appeal, the Third Circuit considered whether the fugitive tolling doctrine applied to the defendant's supervised release.[171] The Third Circuit held that the doctrine did apply.[172]

The Third Circuit found that the fugitive tolling doctrine reflects "two key principles"[173] that align with the purposes of supervised release.[174] First, Congress's goal for supervised release was to rehabilitate defendants.[175] The court reasoned that this goal is not furthered by the mere passage of time.[176] When a defendant absconds, the "supervising court cannot offer postconfinement assistance or ensure compliance with the terms of release."[177] The court reasoned that the fugitive tolling doctrine reflects Congress's goal of rehabilitating defendants because it encourages them to abide by the terms and conditions of their supervised release.[178] Second, it is a settled principle that defendants should not be "credited for misdeeds,"[179] such as refusing to comply with terms or conditions of supervised release.[180] The court

166. *See* United States v. Island, 916 F.3d 249, 251 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 405 (2019).
167. *See id.*
168. *See id.*
169. *See id.* at 252.
170. *See id.*
171. *See id.*
172. *See id.*
173. *Id.* at 253.
174. *See id.*
175. *See id.*
176. *See Island*, 916 F.3d at 254 ("Fugitive tolling . . . recognizes the goals of supervised release are not served when defendants deliberately fail to follow its conditions.").
177. *Id.* at 253.
178. *See id.* at 254.
179. *Id.* at 253.
180. *See id.*

reasoned that the doctrine reflects this goal because the fugitive tolling doctrine holds defendants accountable.[181]

The Third Circuit continued its analysis by comparing tolling for fugitives with tolling in deportation cases.[182] The court found that supervised release does not toll when a defendant is deported as a condition of supervised release because deportation is a "statutorily-contemplated condition of supervised release."[183] However, the court explained that in the case of imprisonment, the defendant's term of supervised release does toll.[184] Imprisonment, unlike deportation, is caused by a defendant's own actions.[185] The Third Circuit therefore concluded that tolling for defendants' fugitive status is similar to imprisonment because defendants' absence from supervision is the result of their own misconduct.[186]

Further, while Congress expressly addressed both deportation and imprisonment, the Third Circuit noted that Congress did *not* expressly address fugitive tolling.[187] However, the Third Circuit, agreeing with the majority of circuits, found that a clearer expression from Congress is necessary to preclude fugitive tolling.[188] Because the court failed to find such an expression in the SRA, it concluded that Congress did not intend to preclude fugitive tolling.[189]

Overall, the Third Circuit concluded that not allowing tolling for fugitives fails to achieve Congress's goals for supervised release.[190] Therefore, the Third Circuit joined the majority of circuits to hold that the fugitive tolling doctrine applies to supervised release.[191]

After the Third Circuit's holding in *Island*, the defendant submitted a petition for writ of certiorari to the United States Supreme Court.[192] However, the Supreme Court denied certiorari, refusing to take up the case and settle the issue of whether fugitive tolling applies to supervised release.[193] The split among the circuit courts therefore remains unsettled.

---

181. *See id.* at 254 ("A defendant cannot count toward his sentence time spent out of the court's supervision as a consequence of his own doing [and] . . . remains responsible for his violating conduct.").

182. *See id.*

183. *Id.* at 253; *see* 18 U.S.C. § 3583(d) ("If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States.").

184. *See Island*, 916 F.3d at 254.

185. *See id.* at 254–55.

186. *See id.* at 255.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.* at 253.

192. *See* Island v. United States, 140 S. Ct. 405, 405 (2019).

193. *See id.* (denying a petition for a writ of certiorari).

e. The Fifth Circuit: Tolling Furthers Congress's Purpose

The Fifth Circuit is the most recent circuit to hold that the fugitive tolling doctrine applies to supervised release.[194] The Fifth Circuit addressed the doctrine in *United States v. Cartagena-Lopez*,[195] where the defendant absconded from his three-year term of supervision as soon as it began.[196] The defendant was arrested for other offenses almost one year after the expiration of his supervised release while still a fugitive.[197] The district court, applying fugitive tolling, revoked the defendant's supervised release and sentenced him to a term of imprisonment.[198] On appeal, the Fifth Circuit addressed whether fugitive status tolls a term of supervised release,[199] and held that it does.[200]

To resolve the issue, the Fifth Circuit began by analyzing the statutory provisions for supervised release, and, like the other circuits, recognized that no express provisions provided for fugitive tolling.[201] The Fifth Circuit turned to two provisions that prior circuits also analyzed: 18 U.S.C. §§ 3583(i) and 3624(e).[202] The court found that § 3583(i) provided no guidance on fugitive tolling but did not bar the doctrine either.[203] The court also found that § 3624(e) did not bar the doctrine.[204] Unlike the First Circuit, the Fifth Circuit found that § 3624(e) is not an exclusive tolling provision because serving time as a prisoner is not the same as serving time as a fugitive.[205] Therefore, the court reasoned that an express provision for the tolling of one does not mean that Congress sought to exclude the tolling of the other.[206]

The Fifth Circuit reasoned that while "a statute's text is supreme, its purpose can inform 'which of the various textually permissible meanings should be adopted.'"[207] The Fifth Circuit additionally reasoned that Congress's purposes for supervised release are furthered by the fugitive tolling doctrine.[208] The Fifth Circuit, like many other circuits,

---

194. *See* United States v. Cartagena-Lopez, 979 F.3d 356, 359 (5th Cir. 2020).
195. *See id.*
196. *See id.*
197. *See id.* at 360.
198. *See id.*
199. *See id.*
200. *See id.* at 359.
201. *See id.* at 360.
202. *See id.* at 360–61.
203. *See id.* at 361 (finding that § 3583(i) "extends the district court's power to revoke a defendant's supervised release based on conduct that occurred during the period of supervision[,]" but is not a tolling provision).
204. *See Cartagena-Lopez*, 979 F.3d at 361.
205. *See id.*
206. *See id.*
207. *Id.* at 363 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012)).
208. *See id.*

emphasized that "defendants should not benefit from their own wrongdoing."[209] Furthermore, the Fifth Circuit recognized that Congress's purpose for supervised release was to rehabilitate defendants.[210] Congress wanted to reduce recidivism by helping defendants undergo the transition from prison back into the community.[211]

However, the Fifth Circuit acknowledged that Congress's purpose for rehabilitation can only be fulfilled if defendants participate in their supervision.[212] The Fifth Circuit determined that the fugitive tolling doctrine advances Congress's statutory scheme.[213] Because tolling furthers Congress's purposes for sentencing and supervised release, the Fifth Circuit joined the majority to become the fifth and final United States court of appeals to apply the fugitive tolling doctrine to supervised release.[214]

III. ANALYSIS

Courts need clear guidance on whether to apply the fugitive tolling doctrine to supervised release. Approximately three out of four defendants who commit a federal offense are placed on supervised release.[215] Furthermore, technical violations, such as absconding from supervision,[216] make up over half of all supervision violations.[217] Therefore, a defendant becoming a fugitive is a common problem for probation officers in every circuit, and fugitives under supervision in different circuits should not receive different treatment. Congress sought to create uniformity and consistency for federal sentencing when it passed the SRA and created supervised release,[218] but the current situation reflects an asymmetry among circuit courts' attempts to achieve these goals.[219]

When Congress tasked the Senate Committee on the Judiciary with reforming federal sentencing, the Senate Committee on the Judiciary laid out four purposes for sentencing and changed the system accordingly.[220]

---

209. *Id.* ("[A]llowing defendants to get credit toward their supervised release while imprisoned for another crime advantages further criminal conduct.").

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.*

214. *See Cartagena-Lopez*, 979 F.3d at 363.

215. *See supra* note 3 and accompanying text.

216. *See* SEMISCH ET AL., *supra* note 6, at 11.

217. *See id.* at 31.

218. *See* discussion *supra* Section II.B.

219. *See* discussion *supra* Section II.D.

220. *See* discussion *supra* Section II.B (explaining that sentencing should (1) reflect the seriousness of the offense, promote respect for the law, and provide just punishment;

However, supervised release poses unforeseen challenges that must be addressed because they do not satisfy the Senate Committee on the Judiciary's purposes for sentencing. As demonstrated by the divide among the circuit courts[221] and the Supreme Court's refusal to address the issue,[222] Congress should establish a clear rule for fugitive tolling.

A. *A Fugitive Tolling Provision: Furthering Congress's Sentencing Scheme and Holding Defendants Accountable*

Congress should codify the fugitive tolling doctrine because tolling aligns with Congress's overall sentencing scheme.[223] Fugitive tolling also meets each of the Senate Committee on the Judiciary's four purposes for sentencing.[224] Additionally, public policy and the split among the circuit courts support tolling.[225]

First, holding defendants accountable for their offenses by requiring that they serve the entirety of their supervised release term reflects the seriousness of the offense, promotes respect for the law, and provides a just punishment.[226] A lack of fugitive tolling indicates to defendants that their original offense and subsequent sentence is not serious because their term of supervised release is not actually enforced if they abscond. When offenses are not taken seriously due to a lack of punishment, defendants do not learn to respect the law.

Second, tolling affords adequate deterrence to criminal conduct.[227] Without tolling, defendants may act inconsistently with their sentence without repercussions.[228] If defendants remain fugitives long enough to ride out their term of supervised release, they never have to comply with any of their terms and conditions or face punishment for violating those terms and conditions, so long as they can avoid being arrested or otherwise apprehended before their term expires.[229] This reality

---

(2) deter future criminal conduct; (3) protect the public from the defendant; and (4) rehabilitate the defendant).

221. *See* discussion *supra* Section II.D.

222. *See generally* Island v. United States, 140 S. Ct. 405 (2019) (denying a petition for a writ of certiorari).

223. *See* United States v. Island, 916 F.3d 249, 253 (3rd Cir. 2019), *cert. denied*, 140 S. Ct. 405 (2019); *see also* United States v. Cartagena-Lopez, 979 F.3d 356, 363 (5th Cir. 2020).

224. *See* discussion *supra* Section II.B.

225. *See* United States v. Murguia-Oliveros, 421 F.3d 951, 954 (9th Cir. 2005); United States v. Buchanan, 638 F.3d 448, 455 (4th Cir. 2011); United States v. Barinas, 865 F.3d 99, 109 (2d Cir. 2017); *Island*, 916 F.3d at 253; *Cartagena-Lopez*, 979 F.3d at 363.

226. *See* discussion *supra* Section II.B.

227. *See* discussion *supra* Section II.B.

228. *See Island*, 916 F.3d at 253–54.

229. *See id.*; *see also Murguia-Oliveros*, 421 F.3d at 954.

contradicts Congress's intent by allowing fugitives to escape accountability.[230]

Third, holding defendants accountable for their actions while they are fugitives protects the public.[231] For example, Congress imposed a mandatory condition that defendants may not commit another crime while on supervised release.[232] Tolling ensures that defendants are punished if they commit a crime while absconding from supervision. Such punishment includes courts revoking defendants' supervision and sentencing them to more time in prison.[233]

Lastly, supervised release is intended to help defendants transition back into the community.[234] This goal cannot be achieved if defendants can abscond from supervision without punishment. A probation officer cannot aid in a defendant's transition if the officer cannot locate the defendant. Through tolling, probation officers and courts can ensure that defendants complete their full term of supervision to help those defendants reintegrate back into society, satisfying the Senate Committee on the Judiciary's purpose for supervised release.[235]

In addition to the Senate Committee on the Judiciary's purposes for sentencing, public policy also favors tolling. Defendants should not be rewarded for their misconduct.[236] When defendants willfully abscond from supervision, tolling should apply to ensure that they do not receive credit for the time they do not actually serve.[237] Furthermore, the circuit split weighs heavily in favor of tolling, which supports applying the doctrine to supervised release.[238]

Because tolling aligns with Congress's overall sentencing scheme, meets the purposes of sentencing, and is supported by public policy and the majority of circuit courts of appeals, the fugitive tolling doctrine should apply to supervised release. Congress should be the body tasked with solving the issue and implementing the doctrine. If Congress takes

230. *See Island*, 916 F.3d at 253–54.

231. *See* discussion *supra* Section II.B.

232. *See* 18 U.S.C. § 3583(d).

233. *See id.* § 3583(e)(3).

234. *See* S. REP. NO. 98-225, at 50 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3233.

235. *See* United States v. Buchanan, 638 F.3d 448, 458 (4th Cir. 2011); *see also* United States v. Murguia-Oliveros, 421 F.3d 951, 954 (9th Cir. 2005); *see also* United States v. Bowe, 309 F.3d 234, 240 (4th Cir. 2002) ("Congress has manifested an intent to require full service of supervised release for rehabilitative purposes.").

236. *See Murguia-Oliveros*, 421 F.3d at 954; *Buchanan*, 638 F.3d at 455; United States v. Barinas, 865 F.3d 99, 109 (2d Cir. 2017); United States v. Island, 916 F.3d 249, 253 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 405 (2019); United States v. Cartagena-Lopez, 979 F.3d 356, 363 (5th Cir. 2020).

237. *See Murguia-Oliveros*, 421 F.3d at 954; *see also* discussion *supra* Sections II.D.2.a–II.D.2.c.

238. *See* discussion *supra* Section II.B.

action, then it can resolve the inconsistencies and uncertainty it sought to prevent, creating clear guidance for courts and defendants alike.

B. Incorporating a Tolling Provision into 18 U.S.C. § 3583(e)

Congress should solve the tolling dispute and can do so by including a provision for fugitive tolling within one of the supervised release statutes. To create a fugitive tolling provision, Congress must determine which committee should create the provision, where the new provision will be placed within the supervised release statutes, and what the language of the provision will be.

First, Congress must determine which committee would handle creating and proposing a bill that would include the tolling provision. There are two main committees within Congress that oversee criminal justice. Either the House Committee on the Judiciary: Subcommittee on Crime, Terrorism, and Homeland Security ("House Committee on the Judiciary")[239] or the Senate Committee on the Judiciary: Subcommittee on Crime and Terrorism ("Senate Committee on the Judiciary")[240] could adequately draft the bill.

The House Committee on the Judiciary oversees sentencing, parole, and prisons,[241] while the Senate Committee on the Judiciary oversees the Bureau of Prisons, the U.S. Parole Commission, the U.S. Sentencing Commission, and detention-related policy—including corrections, rehabilitation, and re-entry.[242] However, the Senate Committee on the Judiciary was the original committee tasked with reforming the federal criminal justice system which resulted in the SRA.[243] Accordingly, the Senate Committee on the Judiciary has more knowledge of supervised release and is better equipped to address the fugitive tolling doctrine than the House Committee on the Judiciary. The Senate Committee on the Judiciary should therefore be tasked with adding to the supervised release statutes passed through the SRA to provide for fugitive tolling.

Next, the Senate Committee on the Judiciary must determine where the tolling provision should be placed within the current federal statutes. The provision could be added to either 18 U.S.C. §§ 3624 or 3583. While both provisions address supervised release, the tolling provision should be placed in § 3583 rather than § 3624.

---

239. *See Crime, Terrorism, and Homeland Security*, HOUSE COMM. ON THE JUDICIARY, https://bit.ly/3lFDexb (last visited Aug. 16, 2022).

240. *See Subcommittee on Crime and Terrorism*, SENATE COMM. ON THE JUDICIARY, https://bit.ly/2VXE7IP (last visited Aug. 16, 2022).

241. *See Crime, Terrorism, and Homeland Security*, *supra* note 239.

242. *See Subcommittee on Crime and Terrorism*, *supra* note 240.

243. *See* S. REP. NO. 98-225, at 1 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3184.

Section 3624 deals with a prisoner's release, and § 3624(e), in particular, addresses post-release supervision.[244] Section 3624(e) states that a defendant's sentence of supervised release begins after the defendant's release from the Bureau of Prisons, and this section also includes an express tolling provision for a defendant who is subsequently imprisoned for more than 30 days while on supervision.[245] The fugitive tolling provision would not fit into this section and subsection because, overall, § 3624 is about incarceration and the release of a prisoner from incarceration.[246] Only a small subsection regarding the availability of supervised release is included in this section.[247] Furthermore, the tolling provision that exists within subsection (e) is also about incarceration.[248]

A tolling provision based on fugitive status would be better placed in § 3583, which specifically addresses supervised release. Section 3583 discusses the basics of supervised release, including situations when it may be imposed; terms, conditions, and modifications of conditions; and revocation and delayed revocation.[249] Specifically, § 3583(e) addresses the modification of conditions or revocation.[250] Currently, § 3583(e)(1) states the conditions for the termination of a term of supervised release and the discharge of the defendant from supervision.[251] Section 3583(e)(2) discusses how a term of supervised release may be extended as well as how the conditions may be modified, reduced, or enlarged.[252] Section 3583(e)(3) allows for the revocation of a term of supervised release and reimprisonment of the defendant if certain conditions are met.[253] Lastly, § 3583(e)(4) allows a court to order the defendant to comply with monitoring and remain at the defendant's place of residence at all times.[254]

Because the fugitive tolling doctrine pauses a term of supervised release for defendants who abscond from supervision and therefore fail to comply with their terms and conditions of supervised release, the doctrine subjects defendants to a longer amount of time under supervision or revocation of that supervision and reincarceration. Therefore, the fugitive tolling doctrine should be included in § 3585, and § 3583(e)(2) should become the new tolling provision. This addition will

244. *See* 18 U.S.C. § 3624(e).
245. *See id.*
246. *See generally* 18 U.S.C. § 3624.
247. *See id.* § 3624(e).
248. *See id.*
249. *See id.* § 3583.
250. *See id.* § 3583(e).
251. *See id.* § 3583(e)(1).
252. *See id.* § 3583(e)(2).
253. *See id.* § 3583(e)(3).
254. *See id.* § 3583(e)(4).

allow the provisions to be listed in order of severity, re-listing the other three provisions as §§ 3583(e)(3)–(5), respectively.

The last issue with adding the tolling provision is determining the provision's language. The new fugitive tolling provision should be worded similarly to the other tolling provision Congress has already included: 18 U.S.C. § 3624(e).[255] The language of § 3624(e) is clear, and courts agree that § 3624(e) is a tolling provision.[256]

At a minimum, the fugitive tolling provision should read: "A term of supervised release does not run during any period in which the person has absconded from their term of supervised release." The tolling provision's language should be more detailed, though, to provide clarity about what actually happens if a defendant absconds and what it actually means for a term of supervised release to toll when a defendant absconds. 28 C.F.R. § 2.204, applicable to supervised release in the District of Columbia, provides a more detailed tolling provision:

> If you abscond from supervision, you will stop the running of your supervised release term as of the date of your absconding and you will prevent the expiration of your supervised release term. But you will still be bound by the conditions of release while you are an absconder, even after the original expiration date of your supervised release term. We may revoke the term of supervised release for a violation of a release condition that you commit before the revised expiration date of the supervised release term (the original date plus the time you were an absconder).[257]

This tolling provision clearly states the consequences if a defendant absconds from supervised release.

The new fugitive tolling provision should therefore be modeled after the language quoted above to provide clarity for courts, probation officers, and defendants. With a federal provision modeled after 28 C.F.R. § 2.204, all defendants would know the penalties of absconding from supervision.

A definition of the term "abscond" should also be included within § 3583 or within a general definitions section to ensure the term is not ambiguous. The definition could read: "A person who has failed to contact their probation officer according to the terms and conditions of

---

255. *See id.* § 3624(e) ("A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days.").

256. *See* United States v. Hernandez-Ferrer, 599 F.3d 63, 67 (1st Cir. 2010); *see also* United States v. Cartagena-Lopez, 979 F.3d 356, 363 (5th Cir. 2020).

257. 28 C.F.R. § 2.204(e) (2019).

his or her supervised release and cannot be located is deemed to have absconded from supervised release."

Tasking the Senate Committee on the Judiciary with creating a bill to include a fugitive tolling provision within 18 U.S.C. § 3583(e), modeled after 28 C.F.R. § 2.204, will provide all federal courts with necessary and clear guidance for defendants who abscond from supervision. Including a tolling provision will create consistency among the courts, satisfy the Senate Committee on the Judiciary's original four purposes in sentencing, comport with public policy, and resolve the circuit split.

IV. CONCLUSION

When Congress passed the SRA in 1984, it likely did not anticipate that the introduction of supervised release would create just as many questions as it did answers. A circuit split has developed among the United States courts of appeals over whether a defendant's term of supervised release tolls when they abscond from supervision and become a fugitive.[258] The United States Supreme Court has refused to consider the issue, leaving the circuit split unresolved.[259] While the majority of circuit courts to address the issue have found that the fugitive tolling doctrine applies to supervised release,[260] it is likely that the split among the courts will grow. An unresolved circuit split causes the very inconsistencies that Congress intended to avoid when it passed the SRA and created supervised release.[261]

Therefore, Congress should be tasked with resolving the issue.[262] The Senate Committee on the Judiciary should amend the SRA to include a fugitive tolling provision within 18 U.S.C. § 3583(e), resolving the circuit split and creating uniformity and consistency among federal courts.[263]

---

258. *See* discussion *supra* Section II.D.

259. *See generally* Island v. United States, 140 S. Ct. 405 (2019) (denying a petition for a writ of certiorari).

260. *See* discussion *supra* Section II.D.2.

261. *See* discussion *supra* Section II.B.

262. *See* discussion *supra* Part III.

263. *See* discussion *supra* Part III.