No. 10-

IN THE

SUPREME COURT OF THE UNITED STATES

R. Scott Cunningham — PETITIONER
(Your Name)

VS.

United States of America — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

11th Circuit - pursuant to 18 U.S.C. § 3006A (Criminal Justice Act);

U.S. District Court, Northern District of Georgia - same

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

No. -

IN THE

SUPREME COURT OF THE UNITED STATES

R. SCOTT CUNNINGHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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August 26, 2010

QUESTION PRESENTED

Whether a federal judge may, consistent with the Fifth and Sixth Amendments, sentence an individual to an additional term of imprisonment and an additional period of supervised release based solely on the judge's disputed factual finding, by a preponderance of the evidence, that the individual violated a condition of his supervised release.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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The opinion of the United States Court of Appeals for the Eleventh Circuit is published at 607 F.3d 1264 and is reproduced at Petition Appendix (Pet. App.) 1a. The order of the United States District Court for the Northern District of Georgia is unpublished, and is reproduced at Pet. App. 11a.

JURISDICTION

The Court of Appeals entered its opinion and judgment on May 28, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor [shall] be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

Section 3583(e)(3) of Title 18 of the United States Code provides:

> Modification of conditions or revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)–
>
> * * *

> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the court, pursuant to Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case. . . .

18 U.S.C. § 3583(e)(3).

INTRODUCTION

Section 3583(e)(3) of Title 18 of the United States Code provides that a federal judge may impose an additional term of imprisonment upon an individual who is on supervised release if the judge determines "by a preponderance of the evidence" that the individual has committed a separate federal criminal offense and thus violated a condition of his or her release. 18 U.S.C. § 3583(e)(3). This additional punishment, meted out unilaterally by a judge without trial by jury or proof beyond a reasonable doubt, unquestionably contravenes the bright-line rule announced by this Court in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and reaffirmed in *Blakely*

v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005), that under the Fifth and Sixth Amendments "any fact that increases the penalty for a crime beyond [a] prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Nevertheless, and despite recognizing that their holdings are in "tension" with this Court's precedent, *e.g.*, *United States* v. *Carlton*, 442 F.3d 802, 808-09 (2d Cir. 2006), nearly all of the federal courts of appeals that have examined the issue have held, on varying, inconsistent, and inadequate grounds, that these additional penalties do not violate a defendant's constitutional rights.

This case squarely presents the issue. Petitioner R. Scott Cunningham, after serving his original term of imprisonment, was subsequently sentenced to an additional four months in prison and a new two-and-a-half year term of supervised release, based not on facts found by a jury beyond a reasonable doubt, but on a factual finding by a district judge by a preponderance of the evidence. In fact, far from a mere factual finding, the judge determined that Mr. Cunningham had committed a separate federal crime of making false statements to his probation officer in violation of 18 U.S.C. § 1001 and associating with a person engaged in criminal activity. On the basis of this judicial adjudication of guilt—and on no other basis—Mr. Cunningham was sentenced to a significant additional sentence. See *Gall* v. *United States*, 552 U.S. 38, 48 (2007) (recognizing that a term of supervised release involves a "substantial restriction of freedom").

This process is directly at odds with this Court's jurisprudence addressing the rights to proof beyond a reasonable doubt and to a jury trial guaranteed

under the Fifth and Sixth Amendments. *Blakely*, 542 U.S. at 305 (explaining that a sentence is constitutionally deficient where "the jury's verdict alone does not authorize the sentence" but rather, the judge's authority to impose the sentence is dependent "upon [his] finding some additional fact"). Review by this Court is necessary to resolve a persistent violation that can and does occur in courts all over the country. In the federal system alone, for example, over 100,000 individuals are currently serving a term of supervised release.

STATEMENT OF THE CASE

R. Scott Cunningham served a term of imprisonment for convictions on two counts of conducting monetary transactions over $10,000 in criminally derived property, and one count of conspiracy to commit money laundering. Pet. App. 3a. He was also sentenced to a three year term of supervised release, which began when Mr. Cunningham was released from custody by the Bureau of Prisons on April 5, 2008. *Id.*

More than a year later, in June 2009, a United States probation officer filed a petition asking the District Court to impose an additional sentence of imprisonment and supervised release based upon allegations that Mr. Cunningham violated federal and state laws different from those under which he was originally convicted, thereby violating the conditions of his supervised release. *Id.* at 11a. None of these allegations had been presented to a grand jury, and no indictment was ever returned.

Citing *Apprendi* and *Blakely*, as well as *United Mine Workers of America* v. *Bagwell*, 512 U.S. 821 (1994), Mr. Cunningham filed a motion challenging the constitutionality of 18 U.S.C. § 3583(e)(3), the

revocation of supervised release statute. He requested a jury trial at which the allegations alleged in the petition would be required to be proven to a jury beyond a reasonable doubt in accordance with the Fifth and Sixth Amendments to the United States Constitution. Pet. App. 4a.

This motion was denied, as was the demand for trial by jury. On July 31, 2009, the same federal judge who had presided over Mr. Cunningham's initial trial and sentencing held a revocation of supervised release hearing. *Id.* at 11a-13a. Mr. Cunningham resolutely denied the allegations against him and, thereafter, evidence and testimony were presented to the District Court. *Id.* at 4a. At the conclusion of the hearing, the District Court found, by a preponderance of the evidence, that Mr. Cunningham had made false statements regarding his employment in violation of 18 U.S.C. § 1001 and had associated with a person engaged in criminal activity. *Id.* On the basis of these disputed factual findings, the District Court sentenced Mr. Cunningham to a new term of four months' imprisonment to be followed by 30 months of supervised release. *Id.* at 4a, 12a.

Mr. Cunningham appealed, arguing that the District Court's imposition of additional punishment based on facts not found by a jury beyond a reasonable doubt violated the clear mandates of *Apprendi* and *Blakely*. *Id.* at 6a. In affirming, the Eleventh Circuit held that, because Mr. Cunningham had been convicted of the underlying offenses of money laundering and conspiracy, he was entitled only to "limited procedural safeguards" under § 3583(e)(3). *Id.* at 9a.

REASONS FOR GRANTING THE PETITION

This case presents an issue that is of significant constitutional import and that is fully ripe for this Court's review: whether a judge may sentence a defendant to additional punishment after determining, by a preponderance of the evidence, that the defendant violated a condition of his or her supervised release.

I. REVIEW IS WARRANTED BECAUSE THE DECISIONS OF THE COURT BELOW AND OTHER FEDERAL CIRCUITS CONFLICT WITH THIS COURT'S PRECEDENT.

Relying on 18 U.S.C. § 3583(e)(3), the Eleventh Circuit approved a process whereby the District Court unilaterally made factual findings without affording Mr. Cunningham his Fifth Amendment right to proof beyond a reasonable doubt and his Sixth Amendment right to a jury trial, "[the] fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306. That holding is squarely contrary to this Court's precedent.

1. In a series of cases, starting with *Apprendi* and running through *Blakely* and *Booker*, this Court has consistently held that the Fifth and Sixth Amendments establish a "bright line rule" under which "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. *Apprendi* struck down a state criminal provision, *id.* at 497; *Blakely* rejected a state sentencing scheme, 542 U.S. at 314; and *Booker* held unconstitutional the mandatory federal guidelines system, 543 U.S. at 235. None of these cases has suggested that these fundamental

constitutional guarantees depended in any way on the procedural posture of the case, or the particular forum in which it arose. To the contrary, the Court has repeatedly emphasized that, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 231 (quoting *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002)).

The decision below contravenes this clear principle. It allows a judge to impose additional punishment based on a finding that the defendant committed a *separate* crime and thus violated a term of his or her supervised release. Pet. App. 9a-10a. This finding—in all but title a "conviction" of a separate offense—is made without the involvement of a jury and without the traditional guarantee of proof beyond a reasonable doubt. Indeed, to the extent these "convictions" are often obtained without witnesses and based only on supervised release reports, they exemplify precisely the constitutional concern raised in *Blakely*: that punishment should be imposed "based [] on facts proved to a [defendant's] peers beyond a reasonable doubt," and "[not] on facts extracted . . . from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." 542 U.S. at 311-12. Such an "arbitrary exercise of power," *Apprendi*, 530 U.S. at 550, is exactly what this Court has warned against, resulting when one person is "solely responsible for identifying, prosecuting, adjudicating, and sanctioning" a defendant's conduct. *United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 824, 831 (1994).

The only way the Eleventh Circuit could justify its holding was by artificially limiting the *Apprendi* rule to initial sentencing proceedings—meaning that,

according to the court of appeals, that rule does not apply to sentencing proceedings which occur later in the supervised release context. Pet. App. 9a. This limitation appears nowhere in this Court's precedents, and in fact contradicts the very principles on which those decisions were based. In all of this Court's decisions, it is the *punishment* actually imposed—not the label superficially applied—that is constitutionally relevant. *Blakely*, 542 U.S. at 303. Any fact necessary to punishment—"whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring* v. *Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). Just as the state cannot evade constitutional guarantees by classifying an issue as a "sentencing factor," nor may it do so by classifying the proceeding in which the issue is addressed as a "supervised release hearing."

The practical effect of § 3583(e)(3) is that courts are now authorized to circumvent constitutional protections that this Court has consistently guaranteed to all criminal defendants. Indeed, allegations that a defendant violated conditions of his or her supervised release were initially addressed through criminal contempt proceedings, at which the Fifth and Sixth Amendments rights were guaranteed. See *Bagwell*, 512 U.S. at 826. In keeping with the Court's mandate to apply *Apprendi* in a "principled way," *Ring*, 536 U.S. at 613 (Kennedy, J., concurring), it stands to reason that the same constitutional protections should apply in *all* instances where a defendant is alleged to have violated the terms of supervised release, whether the forum is a criminal contempt proceeding or, as here, a revocation of supervised release hearing. The holding below attempts to avoid the historical principles recognized

in *Bagwell* by using the term "revocation" rather than "criminal contempt" to authorize Mr. Cunningham's additional punishment. This Court, however, has explained that "[l]abels do not afford an acceptable answer" to the constitutional issues that arise when judicial factfinding is the basis of a defendant's punishment. *Apprendi*, 530 U.S. at 494.

In light of these principles, the new terms of imprisonment and supervised release that Mr. Cunningham received pursuant to § 3583(e)(3) cannot withstand scrutiny. Mr. Cunningham served his original sentence in federal prison. More than a year later, the same judge who presided over Mr. Cunningham's previous trial imposed a new four month term of imprisonment and 30 months of supervised release based entirely on that judge's disputed factual finding that Mr. Cunningham had violated the law. Mr. Cunningham never had the opportunity to present his case to "the unanimous suffrage of twelve of his equals and neighbors." *Blakely*, 542 U.S. at 313-14. This right to a jury trial is not merely a "procedural formality," *id.* at 306, but is an essential constitutional right that Mr. Cunningham was never afforded.

2. The federal circuit courts have offered scattered and inconsistent rationales in an attempt to resolve the unquestionable "tension," *Carlton*, 442 F.3d at 808, between the revocation of supervised release provision and this Court's holdings in *Apprendi*, *Blakely*, and *Booker*.

a. Three circuits have held that this Court's decision in *Johnson* v. *United States,* 529 U.S. 694, 700 (2000), forecloses the argument that the right to a jury trial under the Sixth Amendment applies to revocation proceedings. See *United States* v. *Dees,* 467 F.3d 847, 853 (3d Cir. 2006); *United States* v.

Hinson, 429 F.3d 114, 119 (5th Cir. 2005); *United States* v. *Work*, 409 F.3d 484, 491 (1st Cir. 2005). In particular, the Fifth Circuit has characterized *Johnson* as broadly holding that "a violation of supervised release may be found by a judge applying a preponderance of the evidence standard." *Hinson*, 429 F.3d at 118.

Johnson is, however, clearly inapposite. That decision was issued before *Apprendi* and *Blakely*, and addressed only the narrow issue of whether an amendment to § 3583 violated the Ex Post Facto Clause of the Constitution. See *Johnson*, 529 U.S. at 696. Because the defendant in *Johnson* admitted that he had violated the terms of his supervised release, the Court had no reason to consider a Sixth Amendment challenge (much less a Fifth Amendment challenge) to the new term of imprisonment imposed following revocation of his term of release, and thus the rule announced in *Apprendi* was not applicable. See *Hinson*, 429 F.3d at 119 ("The Sixth Amendment right to trial by a jury was not at issue in *Johnson*."). Contrary to these courts' broad reading, *Johnson* is not controlling here.

b. Three circuits have relied on dictum in this Court's opinion in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), as a basis for rejecting the "bright line rule" of *Apprendi* in the supervised release context. See *Carlton*, 442 F.3d at 807; *United States* v. *Huerta-Pimental*, 445 F.3d 1220, 1225 (9th Cir. 2006); *Work*, 409 F.3d at 491. *Morrissey* held that the constitutional guarantee of due process required that a defendant be afforded a hearing prior to the revocation of parole; in dicta, the Court explained that "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to

parole revocations." 408 U.S. at 480. The First, Second, and Ninth Circuits have relied on this language in determining that the revocation of a defendant's term of supervised release absent a jury trial does not violate the Fifth or Sixth Amendments.

These opinions read far too much into *Morrissey*'s dicta. This Court merely noted, in the course of its opinion, that "the full panoply of rights due a defendant in [a criminal prosecution] does not apply to parole revocations." *Id.* It did not suggest that *none* of these rights apply in parole proceedings, and in fact acknowledged that the constitutional guarantee of due process offers certain protections even during these proceedings. See *id.* There is certainly no reason to assume, as have these circuit courts, that *Morrissey* intended to set forth a wholesale bar against any assertion of constitutional rights by any defendant who is on supervised release—a holding that would in any event be flatly contrary to subsequent holdings of this Court. *E.g.*, *Gagnon* v. *Scarpelli*, 411 U.S. 778, 781-82 (1973); see also *Pa. Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 362-64 (1998). Whatever the precise meaning of *Morrissey*'s statement, it certainly cannot bear the overbroad interpretation given by these courts, particularly in light of the unambiguous bright-line rule later announced in *Apprendi*.

More fundamentally, these decisions ignore that "supervised release" and "parole" are not one and the same for *Apprendi* purposes. Parole is granted as a matter of executive grace, allowing a defendant to avoid serving a term of imprisonment *already imposed*, if consistent with penological goals as determined by the relevant authority. See, *e.g.*,

Morrissey, 408 U.S. at 477-80.[1] A defendant whose parole is revoked, and who must return to prison, is thus not being sentenced to a "new" term of imprisonment but is rather being directed to serve the remainder of his or her original sentence. *E.g.*, *United States* v. *Granderson*, 511 U.S. 39, 50 (1994); *Morrissey*, 408 U.S. at 477-80.

In contrast, supervised release is not a matter of grace, or an early release from an otherwise-applicable term of imprisonment, but rather is a form of punishment in and of itself. *Granderson*, 511 U.S. at 50-51. A defendant who is found to have violated a term of supervised release, and sentenced to a term of imprisonment, is thus exposed to new penalties, beyond the original sentence. *Id*. at 48. This distinction between "parole" and "supervised release"—with only the latter involving new "punishment"—makes all the constitutional difference for purposes of *Apprendi*. See 530 U.S. at 479-81 (any fact that exposes the defendant to "greater or additional punishment" must be submitted to a jury and proved beyond a reasonable doubt).

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[1] *See United States* v. *Granderson*, 511 U.S. 39, 46 (1994) ("Probation and imprisonment are not fungible; they are sentences fundamentally different in character."); United States Sentencing Guidelines Manual, Chapter 7, Part A (2009) ("Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court."); United States Sentencing Commission, *Federal Offenders Sentenced to Supervised Release*, at 1 (July 2010), available at http://www.ussc.gov/general/20100722_Supervised_Release.pdf (describing the "significant differences" between supervised release and parole).

Under the rule adopted by these courts (and others), a defendant found to have violated the conditions of release could be sentenced to an additional term of imprisonment even if the cumulative punishment would then *exceed* the statutory maximum to which he or she could have been sentenced upon conviction. Indeed, under that standard, an individual could conceivably spend his or her entire life in prison or on supervised release without ever seeing a second grand jury, and without ever having the allegations against him or her presented to a jury or proved beyond a reasonable doubt. This is flatly contrary to *Apprendi*, and the constitutional problem is neither answered, avoided, nor even addressed by the dicta in *Morrisey*.

c. Finally, four circuits have relied on dictum in *Booker*—noting that, although provisions of the Sentencing Reform Act mandating application of the Guidelines are unconstitutional and must be excised, "[m]ost of the [Act] is perfectly valid"—as reflecting this Court's belief that judicial factfinding pursuant to § 3583(e)(3) is constitutional. *United States* v. *Faulks*, 195 F. App'x 196, 198 (4th Cir. 2006); *United States* v. *Coleman*, 404 F.3d 1103, 1104 (8th Cir. 2005) (per curiam); *Hinson*, 429 F.3d at 117; *United States* v. *McNeil*, 415 F.3d 273, 276 (2d Cir. 2005). This reliance is plainly misguided.

Booker made only a passing reference to § 3583, and never even mentioned § 3583(e)(3), the specific provision at issue here. Nor was there any reason for the Court to address the issue: the constitutional concern in *Booker* was the *mandatory* provisions of the Sentencing Guidelines, see 543 U.S. at 233; in contrast, supervised release is, and has always been, discretionary under the Guidelines, see U.S.S.G. § 5F1.1. *Booker* thus never considered whether

§ 3583(e)(3) poses a separate constitutional problem, see *United States* v. *Echarte*, 136 F. App'x. 347, 348 (11th Cir. 2005) ("the Supreme Court had no instance [in *Booker*] to address the Sixth Amendment implications of 18 U.S.C. § 3583(e)"), and that opinion offers no support for upholding judicial factfinding under that provision—particularly given such factfinding squarely conflicts with *Booker*'s actual holding that facts that increase the punishment to which a defendant is exposed must be submitted to a jury and proved beyond a reasonable doubt. 543 U.S. at 244.

* * *

The decisions of the federal circuits that have examined § 3583(e)(3) thus diverge radically with this Court's sentencing jurisprudence, on rationales that are demonstrably flawed. These courts' efforts to exempt supervised release revocation from the Fifth and Sixth Amendments have led to a peculiar result: a judge is prohibited from imposing additional imprisonment based on judicial factfinding when a defendant is *initially* sentenced; yet the same judge may do just that in a subsequent proceeding. Such inconsistent outcomes contravene the Court's mandate to "preserve [the] substance," *Booker*, 543 U.S. at 237, of the constitutional guarantees afforded to criminal defendants under the Fifth and Sixth Amendments, and compel the Court's review.

II. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

Perhaps no sentencing issue since *Booker* has been of so much importance to so many people. Between 2005 and 2009 alone, more than 350,000 federal offenders were sentenced to terms of supervised

release, with an average term of 35 months. See United States Sentencing Commission, *Federal Offenders Sentenced to Supervised Release*, at 1, 4, 52 (July 2010), *available at* http://www.ussc.gov/general/20100722_Supervised_Release.pdf. During this time frame, federal courts imposed supervised release in 99.1 percent of cases where supervised release was not even statutorily required. *Id.* at 4. Approximately one-third of defendants on supervised released were found to have violated a condition of their supervised release, and they were sentenced, on average, to an additional prison term of 11 months. *Id.*

The number of federal inmates has more than doubled since 1995, making it certain that the number of individuals serving terms of supervised release will continue to swell. See The PEW Center on the States, *Prison Count 2010: State Population Declines for the First Time in 38 Years* (2010), *at* http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf. Moreover, recent legislation authorizes a life term of supervised release for a broad array of offenses, and empowers judges to imposer longer terms of imprisonment following revocation. See Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 101, 117 Stat. 670 (2003); see also Douglas A. Morris, *FYI: Supervised Release and How the PROTECT Act Changed Supervised Release*, 18 Fed. Sent. Rep. 182, 182-84 (2006).

Under the Eleventh Circuit's flawed holding, every individual serving a term of supervised release is at risk of a substantial deprivation of liberty based solely on the probation officer's allegations and the factual findings of a single member of the federal

judiciary. Thousands of federal criminal defendants should not be robbed of their constitutional protections under the Fifth and Sixth Amendments based on allegations that they have violated the conditions of their supervised release. Constitutional questions surrounding the judicial imposition of new punishment under § 3583 will only continue to arise as more and more federal defendants are sentenced to terms of supervised release upon conviction.

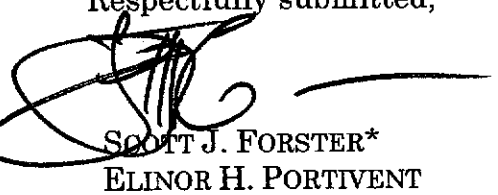
* * *

Over 40 years ago, this Court remarked that the interest of the individual not to "be subjected to serious criminal punishment without the benefits of all the procedural protections worked out carefully over the years" is "fundamental to our system of justice." *Bloom* v. *Illinois*, 391 U.S. 194, 208 (1968). The Court's decisions in *Apprendi*, *Blakely*, and *Booker* have reaffirmed consistently that principle. Despite the Court's unambiguous precedent, the court of appeals in this case as well as at least seven other federal circuit courts have held that supervised release revocation proceedings are exempt from the protections of the Fifth and Sixth Amendments, thereby depriving thousands of federal criminal defendants of those constitutional guarantees. This case presents a unique opportunity for the Court to resolve the irrefutable "tension," *Carlton*, 442 F.3d at 808-09, between § 3583(e)(3) and the constitutional protections affirmed in *Apprendi*, *Blakely*, and *Booker*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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* Counsel of Record

August 26, 2010

RULE 33.1(h) CERTIFICATE OF COMPLIANCE

No. 10 -

R. Scott Cunningham,

Petitioner,

v.

United States of America,

Respondent.

As required by Supreme Court Rule 33.1(h), I, Jeffrey T. Green, certify that the Petition for a Writ of Certiorari in the foregoing case contains 4,265 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 26, 2010.

JEFFREY T. GREEN
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CERTIFICATE OF SERVICE

No. 10 -

R. Scott Cunningham,

Petitioner,

v.

United States of America,

Respondent.

I, Jeffrey T. Green, do hereby certify that, on this twenty-sixth day of August, 2010 I caused one copy of the Petition for a Writ of Certiorari in the foregoing case to be served by first class mail, postage prepaid on the following parties:

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Acting Solicitor General
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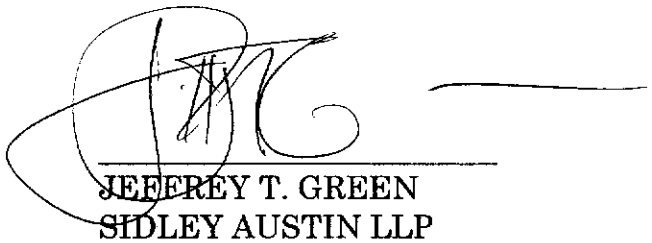

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PETITION APPENDIX

United States Court of Appeals

For the Eleventh Circuit

No. 09-13989	FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
District Court Docket No. 04-00067-CR-HLM-2-4	May 28, 2010 JOHN LEY CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

R. SCOTT CUNNINGHAM,

Defendant-Appellant.

A True Copy - Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit
By: _____
Deputy Clerk
Atlanta, Georgia

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: May 28, 2010
For the Court: John Ley, Clerk
By: Gilman, Nancy

ISSUED AS MANDATE
JUN 28 2010
U.S. COURT OF APPEALS
ATLANTA GA

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 28, 2010
JOHN LEY
CLERK

No. 09-13989

D. C. Docket No. 04-00067-CR-HLM-2-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

R. SCOTT CUNNINGHAM,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(May 28, 2010)

Before BLACK, HULL and ANDERSON, Circuit Judges.

PER CURIAM:

R. Scott Cunningham raises two issues on appeal. Only one issue warrants our substantial consideration.[1] The constitutionality of 18 U.S.C. § 3583(e)(3) is a matter of first impression in our Circuit. Other Courts of Appeals considering the issue have upheld § 3583(e)(3) as constitutional. We agree and hold § 3583(e)(3) is constitutional under the Fifth and Sixth Amendments.

I. BACKGROUND

In 2005, Cunningham was convicted by a federal jury of two counts of conducting monetary transactions over $10,000 in criminally derived property, in violation of 18 U.S.C. §§ 1957 and 2, and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. §§ 1956 and 2. The district court sentenced him to 24 months' imprisonment followed by 3 years' supervised release as to each count, to run concurrently. After serving his sentences, Cunningham was released from custody in April 2008. His projected date for completion of supervised release was April 2011.

In June 2009, a United States probation officer sought revocation of Cunningham's supervised release pursuant to § 3583(e)(3), alleging Cunningham violated the terms and conditions of his release by engaging in unapproved

[1] One issue is meritless. Cunningham argues the district court judge who presided over both his criminal trial and his revocation hearing was inappropriately privy to evidence barred by Federal Rule of Evidence 404(b) during his trial and that the judge relied on this evidence in revoking his supervised release. His claim is unsupported by the record.

employment, giving false statements and reports to his probation officer, and associating with an individual engaged in criminal activity. Cunningham filed a motion seeking a jury trial and argued § 3583(e)(3) was unconstitutional because it resulted in a term of imprisonment unauthorized by facts found by a jury beyond a reasonable doubt.

At the commencement of the revocation hearing, the district court denied Cunningham's motion for a jury trial. During the hearing, three witnesses, one of whom was called by Cunningham, testified about his conduct during his term of supervised release. Cunningham's counsel cross-examined the Government's witnesses and questioned his own witness on direct examination. The district court found by a preponderance of the evidence that Cunningham made false statements to a probation officer regarding his employment, which constituted a violation of 18 U.S.C. § 1001 and a Grade B violation of his supervised release. Based on this violation and Cunningham's criminal history category of I, the district court noted an advisory guidelines range of 4 to 10 months' imprisonment was recommended. After considering arguments from both parties and the 18 U.S.C. § 3553(a) factors, the district court imposed a 4-month sentence followed by 30 months' supervised release.[2]

[2] Although Cunningham broadly challenges the district court's power to revoke supervised release and impose a sentence, he does not specifically challenge his 4-month

II. STANDARD OF REVIEW

We generally review a district court's revocation of supervised release for an abuse of discretion. *United States v. Frazier*, 26 F.3d 110, 112 (11th Cir. 1994). However, "[c]hallenges to the constitutionality of a statute are reviewed *de novo*." *United States v. Rozier*, 598 F.3d 768, 770 (11th Cir. 2010) (per curiam).

III. DISCUSSION

Section 3583(e)(3) permits a district court to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release" upon a finding "by a preponderance of the evidence that the defendant violated a condition of supervised release." 18 U.S.C. § 3583(e)(3). Cunningham argues additional imprisonment imposed under § 3583(e)(3) constitutes a violation of due process under the Fifth Amendment and the right to a jury trial under the Sixth Amendment, as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

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sentence as excessive. Therefore, this issue is abandoned. *See United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003) (deeming an issue abandoned when a defendant merely provides passing references to an alleged error in his brief).

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. at 2362–63. *Blakely* clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. at 303, 124 S. Ct. 2537. Cunningham contends there is no principled basis to exempt § 3583(e)(3) from *Apprendi*'s mandates because the revocation of supervised release commonly results in substantial terms of incarceration unsupported by a jury's findings. Therefore, according to Cunningham, the district court violated the principles set forth in *Apprendi* and *Blakely* because this new term of imprisonment was not based on facts found by a jury beyond a reasonable doubt.

Pre-*Apprendi*, the Supreme Court held "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply." *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S. Ct. 2593, 2600 (1972). In *Johnson v. United States*, the Supreme Court reiterated that the Sixth Amendment right to a jury trial is not applicable during revocation proceedings because revocation of supervised release is treated "as part of the penalty for the initial offense." 529 U.S. 694, 700, 120 S. Ct. 1795, 1800 (2000). The *Johnson* Court went on to note that although violations of the conditions of

supervised release often lead to reimprisonment, "the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.*

Neither the Supreme Court nor this Court has addressed whether, under *Apprendi* and *Blakely*, an individual is entitled to a jury trial and the reasonable-doubt standard of proof on the issue of whether he violated the conditions pertaining to his supervised release. Six other Courts of Appeals have considered the matter and declined to expand the rule of *Apprendi* and its progeny to supervised release revocation hearings.

As to the scope of one's Fifth and Sixth Amendment rights during the supervised release revocation process, the First Circuit has reasoned that although an individual who is subject to additional imprisonment pursuant to such revocation "must be accorded a suitable panoply of due process protections[,] . . . [t]he process that is due . . . does not encompass the full sweep of the Sixth Amendment's prophylaxis (such as a right to a jury trial on the facts of the alleged violation)" or the beyond-the-reasonable-doubt standard. *United States v. Work*, 409 F.3d 484, 492 (1st Cir. 2005).

The Second Circuit agreed, noting that "[b]ecause revocation proceedings generally have not been considered criminal prosecutions, they have not been

subject to the procedural safeguards, including the rights to trial by jury and to accusations proved beyond a reasonable doubt, associated with a criminal trial." *United States v. Carlton*, 442 F.3d 802, 807 (2d Cir. 2006). The Second Circuit acknowledged some tension between § 3583 and the Sixth Amendment rights articulated in *Apprendi* and *Blakely* due to "the unusual nature of a sentence imposed pursuant to § 3583(e)(3)—a sentence which is 'partly based on new conduct' yet authorized by the underlying conduct and conviction." *Id.* at 808-809. Despite this tension, the Second Circuit held the full panoply of procedural safeguards, including those due process rights articulated in *Apprendi* and *Blakely*, "does not attach to revocation proceedings because the Supreme Court has distinguished revocation proceedings from criminal prosecutions on the ground that a probationer *already stands convicted of a crime*." *Id.* at 809 (quotations omitted).

The Third, Fifth, Ninth, and Tenth Circuits have also rejected the argument that, based on *Apprendi* and its progeny, § 3583(e)(3) violates a defendant's rights to a jury trial and proof of his guilt beyond a reasonable doubt. *See United States v. Dees*, 467 F.3d 847, 854-55 (3d Cir. 2006) (holding defendant's rights under the Fifth Amendment's Due Process Clause were not violated by the use of the preponderance-of-the-evidence standard in finding a violation of his supervised

release); *United States v. Cordova*, 461 F.3d 1184, 1187-88 (10th Cir. 2006) (quoting *Carlton*, 442 F.3d at 809–810, in rejecting a Sixth Amendment challenge to § 3583(e)(3)); *United States v. Huerta-Pimental*, 445 F.3d 1220, 1225 (9th Cir. 2006) (affirming that there is no right to a jury trial or the reasonable-doubt evidentiary standard during supervised release revocation proceedings); *United States v. Hinson*, 429 F.3d 114, 119 (5th Cir. 2005) (holding the defendant was not entitled to a jury trial or the beyond-a-reasonable-doubt standard in proceedings to revoke supervised release).

In contrast to the defendants in *Apprendi* and *Blakely*, Cunningham stands already convicted of the underlying offenses of money laundering and conspiracy, and was granted only conditional liberty, the existence of which depends on Cunningham's observation of the limits of his supervised release. *See Cordova*, 461 F.3d at 1187-88; *Carlton*, 442 F.3d at 810; *Work*, 409 F.3d at 491–492. Cunningham was properly accorded the limited procedural safeguards to which he was entitled under § 3583(e)(3). *See Morrissey*, 408 U.S. at 488–89, 92 S. Ct. at 2604 (stating due process in revoking parole includes, *inter alia*, notice of the revocation hearing by a neutral decision maker and of what violations have been alleged, the parolee's right to speak on his own behalf and provide documentation or witnesses, the right to question adverse witnesses, and the right to receive

written reasons for the revocation); *United States v. Mitsven*, 452 F.3d 1264, 1266 n.1 (11th Cir. 2006) (explaining the analysis of the revocation proceedings relating to probation and supervised release is essentially the same). Cunningham was not entitled to a jury trial or to the beyond-a-reasonable-doubt standard at his revocation hearing.

Therefore, we hold § 3583(e)(3) does not violate the Fifth or Sixth Amendments because the violation of supervised release need only be proven by a preponderance of the evidence, and there is no right to trial by jury in a supervised release revocation hearing.

AFFIRMED.

A True Copy - Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit
By: _____
Deputy Clerk
Atlanta, Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL ACTION**
V.	:	**NO. 4:04-CR-67-02-HLM**
	:	
R. SCOTT CUNNINGHAM	:	

ORDER REVOKING SUPERVISED RELEASE JUDGMENT AND COMMITMENT

On the 31st day of July 2009, came the attorney for the government, and the defendant who appeared in person with counsel, Scott Forster, Esq.

A United States Probation Officer of this Court has moved to revoke the supervised release heretofore imposed on the defendant the 12th day of April 2006, by the Honorable Harold L. Murphy, United States District Judge, sitting in the United States District Court for the Northern District of Georgia, Rome Division.

Upon the evidence presented as to the allegations contained in the petition, the Court finds that defendant violated the terms and the conditions of his supervised release, it is hereby

ORDERED BY THE COURT that the supervised release be, and the same is hereby REVOKED.

IT IS ADJUDGED that the defendant, having been found guilty of said offense, is hereby committed to the custody of Bureau of Prisons for a term of Four(4) months, to be followed by a term of Thirty (30) months supervised release. While on supervised release, the defendant shall comply all the previously imposed conditions of supervised release and with the following additional special conditions:

1. **The defendant shall make a full and a complete disclosure of his finances and shall submit to an audit of his financial documents, at the request of the United States Probation Officer.**

2. **The defendant shall not incur new credit charges or open additional lines of credit without the approval of the United States Probation Officer and unless the defendant is in compliance with the installment payment schedule.**

3. **The defendant shall not own, possess or have under his control any firearm, dangerous weapon or other destructive device.**

4. **The defendant shall submit to a search of his person, property, both real or personal, residence, place of business or employment, and vehicle at the request of the United States Probation Officer. The defendant shall permit confiscation and/or disposal of any material considered contraband or any other item which may be deemed to have evidentiary value related to violations of supervision .**

The defendant is allowed to voluntarily surrender to his assigned institution as directed by the United States Marshal.

The Clerk is directed to deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officers and that copy will serve as the commitment of the defendant.

SO ORDERED, this 3rd day of August 2009.

HAROLD L. MURPHY
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA

-vs-

Case No. 4:04-CR-67-02-HLM

R. SCOTT CUNNINGHAM

Defendant's Attorney:
DONALD F. SAMUEL, ESQ.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty by jury on **Count(s) Fifty-four (54), Fifty-seven (57) and One Hundred Twenty-one (121) of the Indictment.**

Accordingly, the defendant is adjudged guilty of such count(s) which involves the following offense:

Title & Section	Nature of Offense	Count No.
18 U.S.C. 1957 and 2	**Conducting Monetary Transactions Over $10,000.00 in Criminally Derived Property**	**54 & 55**
18 U.S.C. 1956(h) and 2	**Money Laundering**	**121**

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) Fifteen (15) through Fifty-three (53) .

It is ordered that the defendant shall pay the special assessment of **$ 300.00** which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

The Court finds that the defendant does not have the ability to pay a fine and cost of incarceration. The Court will waive the fine and the cost of incarceration in this case.

Defendant's Soc. Sec. No. 2561
Defendant's Date of Birth: 1951
Defendant's Mailing Address:
Cohutta, Georgia 30710

Date of Imposition of Sentence:
April 12, 2006

Signed this the 13th day of April 2006.

HAROLD L. MURPHY
UNITED STATES DISTRICT JUDGE

4:04-CR-67-02-HLM : R. SCOTT CUNNINGHAM

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **Twenty-four (24) months** as to Counts Fifty-four (54) and Fifty-five (55), to run concurrently with each other and **Twenty-four (24) months** as to Count One Hundred Twenty-one (121), to run concurrently with Counts Fifty-four (54) and Fifty-five (55), for a total sentence of **Twenty-four (24) months.**

The defendant shall surrender for service of his sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Three (3) years**. This term consists of three (3) years as to each count with all counts to run concurrently.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard and special conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. The defendant shall pay restitution in the amount of **One Hundred Fifty Thousand and no/100 Dollars ($150,000.00)**. This restitution shall be paid jointly and severally with the co-defendants, Alvin Jasper, Abraham Kennard, Laboyce Kennard and Jannie Trammel, in accordance with the attached list (Attachment A) of detailed losses submitted by the government for restitution purposes, which sums are due immediately.

3. The restitution ordered by the Court shall be paid in monthly payments of no less than two hundred and 00/100 dollars ($200.00) per month over a period of thirty-six (36) months to commence thirty (30) days after the defendant's release from custody. The restitution payment schedule may be modified by the United States Probation Officer based upon the defendants financial status during the term of supervised release.

4. The defendant shall notify the United States Attorney for this district within thirty (30) days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

5. The defendant shall submit to one (1) drug urinalysis within fifteen (15) days after being placed on supervision and at least two (2) periodic tests thereafter.

6. The defendant shall perform **One Hundred (100)** hours of community service as directed by the United States Probation Officer.

7. The defendant shall make a full and complete disclosure of his finances and submit to an audit of his financial documents at the request of the United States Probation Officer.

8. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the United States Probation Officer.

9. The defendant shall not own, possess or have under his control any firearm, dangerous weapon, or other destructive device.

10. The defendant shall submit to a search of his person, property, both real and personal, residence, place of business or employment and vehicle at the request of the United States Probation Officer.

11. The defendant's right, title and interest to the property identified in the Order of Forfeiture, incorporated herein by reference, is hereby approved and the property is hereby forfeited.

12. The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Officer, if the collection of such a sample is authorized pursuant to §3 of the DNA Analysis Backlog Elimination Act of 2000.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer within **72** hours of any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **72** hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION

The defendant shall pay restitution in the amount of **One Hundred Fifty Thousand and no/100 Dollars ($150,000.00)**. This restitution shall be paid jointly and severally with the co-defendants, Alvin Jasper, Abraham Kennard, Laboyce Kennard and Jannie Trammel, in accordance with the attached list (Attachment A) of detailed losses submitted by the government for restitution purposes, which sums are due immediately.

The restitution ordered by the Court shall be paid in monthly payments of no less than two hundred and 00/100 dollars ($200.00) per month over a period of thirty-six (36) months to commence thirty (30) days after the defendant's release from custody. The restitution payment schedule may be modified by the United States Probation Officer based upon the defendants financial status during the term of supervised release.

The defendant shall notify the United States Attorney for this district within thirty (30) days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.