

“WHAT NEVER BEGINS CANNOT END”:
TOLLING SUPERVISED RELEASE FOR PRISONERS IN CIVIL
DETENTION

*Nate Nieman**

INTRODUCTION

Thousands of criminal defendants are sentenced to federal prison every year.¹ Each defendant’s sentence by law may include a term of supervised release,² which is a form of community supervision that is meant to assist a defendant in transitioning from the prison environment to the free world.³ For most defendants, that term of supervised release begins when physical confinement in prison ends.⁴ But for other defendants, physical confinement in prison ends, but their term of supervised release never begins.⁵

This article considers a subset of defendants who finish their prison sentences only to then enter civil detention in the same prison, where

* Nate Nieman is a criminal defense lawyer whose practice focuses on federal offenses. He received his B.A. from the University of Northern Iowa and his J.D. from Northern Illinois University. He would like to thank the George Mason Civil Rights Law Journal staff for their helpful assistance during the publication phase of this article.

¹ See, e.g., U.S. SENT’G COMM’N, 2022 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 64, tbl.13 (2022) (showing that 59,070 defendants were sentenced to federal prison in fiscal year 2022).

² 18 U.S.C. § 3583(a).

³ See *United States v. Trotter*, 321 F. Supp. 3d 337, 345–46 (E.D.N.Y. 2018) (quoting Mica Moore, *Escaping from Release: Is Supervised Release Custodial under 18 USC § 751(a)?*, 83 U. CHI. L. REV. 2257, 2263 (2016) (“Supervised release is not an alternative to incarceration, but a separate and additional period of monitoring concerned with facilitating the *reintegration of the defendant into the community* . . . supervised release must follow imprisonment; it cannot be imposed on its own. These differences reflect the rehabilitative character of release by fully disaggregating the punitive and transitional phases of a defendant’s sentence.” (emphasis in original)); *Johnson v. United States*, 529 U.S. 694, 708–09 (2000) (noting that “[t]he 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”).

⁴ See 18 U.S.C. § 3624(e) (“The term of supervised release commences on the day the person is released from imprisonment.”).

⁵ See, e.g., *United States v. Turner*, 689 F.3d 1117, 1119 (9th Cir. 2012); *United States v. Mosby*, 719 F.3d 925, 926 (8th Cir. 2013); *United States v. Neuhauser*, 745 F.3d 125, 125–26 (4th Cir. 2014); *United States v. Maranda*, 761 F.3d 689, 690 (7th Cir. 2014).

their term of supervised release can be tolled for years while awaiting civil commitment proceedings.⁶ Many of these defendants are never actually civilly committed and receive no credit towards any sentence during the years in which they are civilly detained.⁷ Some courts have recognized the potential unconstitutionality of this practice.⁸ But despite an intractable circuit split over the issue,⁹ the Supreme Court has never weighed in on whether a term of supervised release should begin to run when a defendant has served his sentence of imprisonment but has not yet been released from government confinement.¹⁰ This article argues that it should.

This article first discusses the statutory provisions relating to supervised release—including its “tolling” and “commencement” provisions—and how they operate, both for typical prisoners and those prisoners who have entered civil detention after their prison terms have ended. Under these statutes, a term of supervised release commences when a prisoner is “released from imprisonment.”¹¹ But defining precisely when someone is “released from imprisonment,” particularly when the government has civilly detained them, has been challenging. This article discusses how the term “released from imprisonment” in the commencement provision has been construed in different contexts and how the Supreme Court has applied that term differently when considering pre-adjudication confinement and post-adjudication confinement.

The article then discusses civil commitment proceedings under the Adam Walsh Child Protection and Safety Act of 2006 (“the AWA”)¹²

⁶ See, e.g., *Turner*, 689 F.3d at 1119 (prisoner waited over four years for his hearing); *Mosby*, 719 F.3d at 928 (prisoner waited three years for his hearing); *Neuhauser*, 745 F.3d at 126 (prisoner waited four-and-a-half years for his hearing); *Maranda*, 761 F.3d at 691–92 (prisoner waited more than four years for his hearing).

⁷ See, e.g., *Turner*, 689 F.3d at 1119; *Mosby*, 719 F.3d at 926; *Neuhauser*, 745 F.3d at 126; *Maranda*, 761 F.3d at 692.

⁸ See, e.g., *Turner*, 689 F.3d at 1125.

⁹ Compare *id.* at 1126 (holding that supervised release continues to run in civil confinement), and *United States v. Garcia-Rodriguez*, 640 F.3d 129, 134 (5th Cir. 2011) (same); with *Mosby*, 719 F.3d at 930 (holding that supervised release does not continue to run in civil confinement), *Neuhauser*, 745 F.3d at 131 (same), and *Maranda*, 761 F.3d at 698 (same).

¹⁰ See, e.g., *Mosby v. United States*, 571 U.S. 1133 (2014); *Neuhauser v. United States*, 574 U.S. 1062 (2014), *Maranda v. United States*, 574 U.S. 1099 (2015) (denying certiorari in cases where courts have held that supervised release does not run while a prisoner is civilly detained).

¹¹ 18 U.S.C. § 3624(e).

¹² 34 U.S.C. § 20901.

and the circuit split that has developed over whether a prisoner is “released from imprisonment” while awaiting civil commitment proceedings under the AWA. If a prisoner is not considered “released from imprisonment” while in civil detention, his supervised release is tolled.¹³ On the other hand, if a prisoner is considered “released from imprisonment” in civil detention, then his supervised release begins to run.¹⁴ This article examines how the circuits have disagreed on this issue and discusses how most courts, which have held that supervised release is tolled while a prisoner is in civil detention, have needlessly created constitutional issues that can be avoided by holding that supervised release does not run while a prisoner is awaiting civil commitment proceedings under the AWA.

This article examines how tolling supervised release when a defendant is awaiting his civil commitment hearing extends a prisoner’s sentence beyond that which the district court originally imposed, in contravention of well-established case law. The article also discusses how doing so converts that civil detention into imprisonment, which is also at odds with prior Supreme Court precedent. Lastly, the article considers whether the constitutionality of civil commitment schemes themselves is called into doubt by tolling supervised release while a prisoner is awaiting his civil commitment hearing.

The majority position among circuit courts is that supervised release should not run while a prisoner is awaiting adjudication under the AWA.¹⁵ But this position is unsound because the Supreme Court differentiated between pre-adjudication and post-adjudication confinement after these decisions.¹⁶ This article argues that allowing supervised release to commence while a defendant is civilly detained awaiting AWA proceedings, as the minority position in the circuit split holds,¹⁷ largely avoids the constitutional problems that tolling supervised release for prisoners in civil detention presents. Even though some policy goals of supervised release would be frustrated by allowing supervised release to commence while a prisoner is awaiting AWA proceedings in a prison, courts have an overriding

¹³ See, e.g., *Mosby*, 719 F.3d at 930; *Neuhauser*, 745 F.3d at 131; *Maranda*, 761 F.3d at 698.

¹⁴ See, e.g., *Turner*, 689 F.3d at 1126; *Garcia-Rodriguez*, 640 F.3d at 134.

¹⁵ See, e.g., *Mosby*, 719 F.3d at 930; *Neuhauser*, 745 F.3d at 131; *Maranda*, 761 F.3d at 698.

¹⁶ See *Mont v. United States*, 139 S. Ct. 1826, 1834 (2019) (differentiating between time spent in pre-trial detention versus post-sentencing incarceration).

¹⁷ See, e.g., *Turner*, 689 F.3d at 1126; *Garcia-Rodriguez*, 640 F.3d at 134.

duty to construe statutes as constitutional where they can. This article concludes that existing Supreme Court precedent requires courts to hold that supervised release commences while a prisoner is awaiting adjudication under the AWA to preserve the constitutionality of the AWA's tolling provision.

BACKGROUND

This section discusses a general overview of federal supervised release and its operative statutes. It mainly focuses on 18 U.S.C. § 3624(e), which provides when a term of supervised release begins and when it is tolled. This section then turns to how courts have subsequently interpreted the terms “released” and “imprisonment” within § 3624(e), which is necessary to resolving the circuit split over whether supervised release should be tolled during civil commitment proceedings under the AWA. When the debate in the circuits is considered against the backdrop of these refined definitions, the majority position that supervised release should be tolled during civil commitment proceedings should be reconsidered.

I. OVERVIEW OF FEDERAL SUPERVISED RELEASE

Over 88 percent of federal sentences result in a term of imprisonment,¹⁸ as authorized by 18 U.S.C. § 3581, a statute that also limits the maximum term of imprisonment that a court may impose.¹⁹ A district court may include, as part of a sentence imposed, a requirement that a defendant be placed on a term of supervised release to follow that term of imprisonment.²⁰ Most federal convictions require the court to impose a term of supervised release.²¹ Thus most terms of imprisonment imposed by federal courts are followed by a term of supervised release.²²

¹⁸ U.S. SENT'G COMM'N, FISCAL YEAR 2021 OVERVIEW OF FEDERAL CRIMINAL CASES 8 (2022).

¹⁹ 18 U.S.C. § 3581(b).

²⁰ 18 U.S.C. § 3583(a).

²¹ See U.S. SENT'G COMM'N, PRIMER ON SUPERVISED RELEASE 2 (2020).

²² Carey R. Field, Comment, *Charging Congress with Change: Applying the Fugitive Tolling Doctrine to Supervised Release*, 127 PENN STATE L. REV. 599, 600–01 (citing U.S. SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 67 (2020)) (“72.9% of individuals convicted of a federal offense are sentenced to a term of supervised release that follows their term of imprisonment.”).

A term of supervised release, while a component of a criminal sentence, is not intended as a form of additional punishment to accompany a term of imprisonment.²³ Rather, it is intended to provide an on-ramp for a newly released defendant to integrate into free society under the supervision of the federal government.²⁴ While it is true that defendants who violate the terms of their supervised release could be subjected to further terms of imprisonment,²⁵ this consequence is collateral to the stated purpose of easing a defendant into a law-abiding life.²⁶ It makes sense then that a term of supervised release should begin when a defendant walks out of the prison gates and into society²⁷ and has been understood to end when he completes the required term of supervision imposed by the sentencing court.²⁸ But in some situations supervised release does *not* begin at the prison gates and end with a defendant’s total freedom. Rather, in these situations, defendants are stuck in limbo for an indeterminate amount of time waiting for their supervised release to even begin.

²³ *United States v. Buchanan*, 638 F.3d 448, 451 (4th Cir. 2011) (first citing *United States v. Granderson*, 511 U.S. 39, 50 (1994); then citing *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991); then citing *United States v. Johnson*, 529 U.S. 53, 59 (2000); then quoting *Johnson v. United States*, 529 U.S. 694, 708–09 (2000); and then citing *United States v. Bowe*, 309 F.3d 234, 240 (4th Cir. 2002)) (“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. 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, and Congress has manifested an intent to require full service of supervised release for rehabilitative purposes” (internal quotations omitted)).

²⁴ *United States v. Armour*, 804 F.3d 859, 870 (7th Cir. 2015) (citing *Johnson*, 529 U.S. at 709) (“[*Johnson*] describe[s] supervised release as the decompression stage between prison and full release and noting that defendants may need help achieving successful reintegration.” (internal quotations omitted)).

²⁵ 18 U.S.C. § 3583(e)(3).

²⁶ *See United States v. Albertson*, 645 F.3d 191, 197 (3d Cir. 2011) (quoting U.S. SENT’G COMM’N, *FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE* 8–9 (2010)) (“[T]he primary purpose of supervised release is to facilitate the integration of offenders back into the community rather than to punish them.”).

²⁷ 18 U.S.C. § 3624(e) (“The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release.”).

²⁸ *Mont v. United States*, 139 S. Ct. 1826, 1836 (2019) (Sotomayor, J., dissenting) (“In the normal course, a supervised release term ends after the term specified by the district court.”); *see also United States v. Cross*, 846 F.3d 188, 190 (6th Cir. 2017) (“[T]he district court’s supervisory authority continues until the defendant’s supervised release terminates or expires.”).

A. *Section 3624(e)'s "Tolling" Provision*

The United States Code provides a tolling provision that pauses a term of supervised release “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.”²⁹ When supervised release is tolled under 18 U.S.C. § 3624(e), a defendant stops accruing credit towards the completion of his or her term of supervised release.³⁰ The Supreme Court has construed this tolling provision to apply to defendants who are in pretrial custody on unrelated charges³¹ and circuit courts have invoked this tolling provision under the “fugitive tolling doctrine,”³² which applies to defendants who have absconded from federal supervision.³³

B. *Section 3624(e)'s "Commencement" Provision*

This article primarily examines a related provision of § 3624(e) called the “commencement provision,” which provides that “[t]he term of supervised release commences on the day the person is released from imprisonment.”³⁴ The commencement provision, while performing a different function than the tolling provision,³⁵ has been interpreted in

²⁹ 18 U.S.C. § 3624(e).

³⁰ See *United States v. Murguia-Oliveros*, 421 F.3d 951, 954 (9th Cir. 2005) (citing *United States v. Rodriguez*, 682 F.2d 827, 829 (9th Cir.1982)) (“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.”).

³¹ See *Mont*, 139 S. Ct. at 1835.

³² See *Field*, *supra* note 22, at 601 (“While defendants are on supervised release, they often abscond from supervision, becoming fugitives. When defendants abscond, the fugitive tolling doctrine provides that their term of supervised release pauses until supervision resumes. The defendants must then complete the period of supervision for which they absconded, even if it extends beyond the term’s original expiration date” (internal citations omitted)).

³³ See, e.g., *United States v. Cartagena-Lopez*, 979 F.3d 356, 363 (5th Cir. 2020) (“Nothing about [18 U.S.C.] § 3624(e), or any of the other statutes governing supervised release, conflicts with the general rule that defendants cannot benefit from their own wrongdoing, or its application via the fugitive tolling doctrine.”); *United States v. Barinas*, 865 F.3d 99, 109–10 (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. Buchanan*, 638 F.3d 448, 454 (4th Cir. 2011); *Murguia-Oliveros*, 421 F.3d at 955. *But see* *United States v. Hernandez-Ferrer*, 599 F.3d 63, 67 (1st Cir. 2010) (refusing to apply the fugitive tolling doctrine).

³⁴ 18 U.S.C. § 3624(e).

³⁵ *United States v. Turner*, 689 F.3d 1117, 1126 (9th Cir. 2012) (Smith, J., dissenting) (citing 18 U.S.C. § 3624(e)); *Tobey v. United States*, 794 F. Supp. 2d 594, 600 (D. Md. 2011) (“The

civil commitment contexts in much the same way—delaying the service of a term of supervised release when the defendant is unable to submit to supervision by a federal probation officer.³⁶ But unlike fugitive tolling cases, where a defendant’s act of absconding has disrupted his federal supervision,³⁷ defendants awaiting civil commitment proceedings are prevented from commencing their term of supervised release by actions of the government, independent of any actions taken by the defendant.³⁸

II. CASE LAW INTERPRETING SECTION 3624(e)’S TOLLING AND COMMENCEMENT PROVISIONS

Because “[a] term of supervised release commences on the day the person is released from imprisonment,”³⁹ it is essential to first determine whether someone is “released from imprisonment” to know when that person’s term of supervised release begins. Defining this phrase necessarily requires defining both “release” and “imprisonment.”

A. Defining “release” under § 3624(e)

Defining “release” within § 3624(e) has proved difficult for courts because defendants do not always walk free after serving their terms of imprisonment.⁴⁰ Many defendants satisfy their initial prison terms, only to then enter some other form of government confinement—either criminal or civil in nature—to satisfy a sentence from another sovereign,

commencement and tolling provisions of 18 U.S.C. § 3624(e)) are distinct. They work in different ways and contain different statutory requirements.” (internal quotations omitted)); *United States v. Mosby*, 719 F.3d 925, 930 (8th Cir. 2013) (agreeing with Judge Smith’s dissent in *Turner*).

³⁶ See *Mosby*, 719 F.3d at 930; *United States v. Neuhauser*, 745 F.3d 125, 131 (4th Cir. 2014); *United States v. Maranda*, 761 F.3d 689, 698 (7th Cir. 2014).

³⁷ See, e.g., *Murguía-Oliveros*, 421 F.3d at 955 (9th Cir. 2005) (involving the defendant becoming a fugitive).

³⁸ 18 U.S.C. § 4248(a) (“[T]he Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined. . . . A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.”).

³⁹ 18 U.S.C. § 3624(e).

⁴⁰ See, e.g., *United States v. Carter*, 16 F.3d 1221 (Table), No. 93–3858, 1994 WL 43428, at *1 (6th Cir. Feb. 11, 1994) (defendant released to state detainer after serving a federal sentence); *United States v. Williams*, 369 F.3d 250, 251 (3d Cir. 2004) (defendant released into immigration custody after serving his term of imprisonment); *Turner*, 689 F.3d at 1119 (defendant entered civil commitment proceedings two minutes after completing a term of imprisonment).

submit to deportation, or as discussed below, enter civil commitment proceedings.⁴¹ However, in the 2000 case *United States v. Johnson*, the Supreme Court defined “release” to delineate when the end of an initial term of imprisonment ended,⁴² which provides a starting point for analyzing whether a new period of detention is a merely a continuation of the old one or something else entirely.

The defendant in *Johnson* was sentenced to 171 months’ imprisonment and three years of supervised release after being convicted of drug and firearm crimes.⁴³ The district court later reduced Johnson’s term of imprisonment to 51 months’ after he successfully challenged two of his convictions.⁴⁴ Johnson had already served that amount of time in prison, so he was immediately released to begin his term of supervised release, which he would later challenge.⁴⁵

Johnson filed a motion asking the district court to reduce his term of supervised release by 2.5 years, which reflected the excess time that he spent in prison resulting from his unlawful convictions and sentences.⁴⁶ The district court denied the motion, determining that supervised release did not begin under § 3624(e) until a respondent was actually released from incarceration.⁴⁷ The district court reasoned that granting Johnson sentencing credit would subvert Congress’s objective of using supervised release to transition a prisoner to public life.⁴⁸ A divided panel of the Sixth Circuit reversed, holding that Johnson’s supervised release term began when his prison sentence expired—not when he actually left the prison.⁴⁹ The Sixth Circuit majority reasoned that crediting the defendant for the time he spent in prison towards his term of supervised release would be appropriate because supervised release was both rehabilitative and punitive.⁵⁰ The Supreme Court granted certiorari because circuits were divided on the issue.⁵¹

⁴¹ See, e.g., *supra* cases cited in note 40.

⁴² 529 U.S. 53, 56–57 (2000).

⁴³ *Id.* at 54–55.

⁴⁴ *Id.* at 55.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *United States v. Johnson*, 529 U.S. 53, 55 (2000).

⁴⁹ *Id.* at 55–56.

⁵⁰ *Id.* at 56.

⁵¹ *Id.* (comparing *United States v. Blake*, 88 F.3d 824, 825 (9th Cir. 1996) (holding that supervised release commences on the date defendants should have been released, rather than

The Supreme Court began its analysis in *Johnson* by looking to § 3624(e)’s commencement provision, which provided that a “supervised release term does not commence until an individual ‘is released from imprisonment.’”⁵² The Court found that there was “little question about the meaning of the word ‘release’ in the context of imprisonment,”⁵³ stating that “the ordinary, commonsense meaning of release is to be freed from confinement. To say respondent was released while still imprisoned diminishes the concept the word intends to convey.”⁵⁴

The *Johnson* court reasoned that § 3624(e)’s first sentence supported its construction: “A term of supervised release comes after imprisonment, once the prisoner is released by the Bureau of Prisons [(BOP)] to the supervision of a probation officer.”⁵⁵ Therefore, supervised release could not run while someone was in the custody of BOP.⁵⁶ Section 3624(e)’s second sentence supported the Court’s interpretation, too: “the phrase ‘on the day the person is released’ suggests a strict temporal interpretation, not some fictitious or constructive earlier time.”⁵⁷ The statute does not read “on the day the person is released or on the earlier day when he should have been released.”⁵⁸ The third sentence, which “admonishes that supervised release does not run during any period in which the person is imprisoned,” also supported the Court’s reading.⁵⁹

The *Johnson* court noted that § 3624(e) provided for supervised release to run concurrently with “probation, parole, or with other, separate terms of supervised release,” but it did not specifically allow supervised release to run concurrently with “prison sentences,” unless the prison sentence was “less than 30 days in length.”⁶⁰ The *Johnson* court indicated that Congress did not permit courts to create new

on the dates of their actual release), with *United States v. Jeanes*, 150 F.3d 483, 485 (5th Cir. 1998) (holding that supervised release cannot run during any period of imprisonment); *United States v. Joseph*, 109 F.3d 34 (1st Cir. 1997) (same); *United States v. Douglas*, 88 F.3d 533, 534 (8th Cir. 1996) (same)).

⁵² *Id.* at 57.

⁵³ *Id.*

⁵⁴ *United States v. Johnson*, 529 U.S. 53, 57 (2000).

⁵⁵ *Id.* (internal quotations omitted).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* (internal quotations omitted).

⁶⁰ *United States v. Johnson*, 529 U.S. 53, 57–58 (2000).

exceptions just because the statute contained existing ones.⁶¹ Congress considered the exceptions that it made and limited those to the ones found in the statute.⁶² The *Johnson* court therefore held that “[t]he statute’s direction is clear and precise. Release takes place on the day the prisoner in fact is freed from confinement.”⁶³

B. *Defining “imprisonment” under § 3624(e)*

Johnson held that § 3624(e)’s “direction is clear and precise. Release takes place on the day the prisoner is fact freed from confinement.”⁶⁴ But *Johnson* only defined the word “release” in the phrase “released from imprisonment.” What is not “clear and precise” is whether *Johnson*’s pronouncement that “[r]elease takes place on the day the prisoner is in fact freed from confinement” resolves the question that circuit courts would later confront when determining whether a prisoner is “released from imprisonment” while civilly detained and awaiting proceedings under the AWA. That is because *Johnson* only defines the word “release” in § 3624(a)’s phrase “released from imprisonment” without *also* defining “imprisonment”—an important term that should alter the analysis in these cases.

The Fifth Circuit recognized the definitional void that *Johnson* left behind in *United States v. Garcia-Rodriguez*, decided in 2011—over ten years after *Johnson*.⁶⁵ The defendant in *Garcia-Rodriguez* had been found guilty of unlawful reentry to the United States and was sentenced to 37 months’ imprisonment and three years of supervised release.⁶⁶ Garcia was released from BOP custody into Immigration and Customs Enforcement (ICE) custody sometime between October 17 and 28, 2005.⁶⁷ Nearly three years later, on October 11, 2008, he was arrested in Houston for trespassing, and a revocation warrant was filed on October 24, 2008.⁶⁸ Garcia moved to dismiss the revocation warrant because he maintained that his supervised release commenced under

⁶¹ *Id.* at 58.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 58.

⁶⁵ 640 F.3d 129, 132 (5th Cir. 2011) (citing *Johnson*, 529 U.S. 53).

⁶⁶ *Id.* at 130.

⁶⁷ *Id.*

⁶⁸ *Id.*

§ 3624(a) on October 17, 2005, when he was released into ICE custody.⁶⁹ Therefore, he argued, his three-year term of supervised release terminated approximately one week before the revocation warrant was filed on October 24, 2008.⁷⁰ Garcia raised the issue again on appeal after his supervised release was revoked and he was resentenced to prison.⁷¹

The Government argued on appeal that Garcia was not “released from imprisonment” under § 3624(a) because he continued to be confined in ICE custody.⁷² The Government relied on the Supreme Court’s decision in *Johnson* and the Fifth Circuit’s decision in *United States v. Jackson* to argue that Garcia’s supervised release commenced when he was deported on October 28, 2005, which would have been less than three years from the date on which the revocation warrant issued.⁷³

The Fifth Circuit observed that while *Johnson* defined “release” within the meaning of § 3624(a), the Supreme Court did not decide whether other types of “confinement” qualified as “imprisonment” under § 3624(e).⁷⁴ Nor did *Johnson* decide whether civil “confinement” qualified as “imprisonment” under § 3624(e).⁷⁵ The Fifth Circuit, finding no circuit authority directly on point, concluded that “a straightforward reading of the applicable statute shows that administrative detention by ICE is not the same as imprisonment by the BOP.”⁷⁶

The *Garcia-Rodriguez* court found that the statutory text of subsections 3624(a) and 3624(e) made four things clear:

First, imprisonment ends upon a prisoner’s release from the custody of the Bureau of Prisons. Second, any other term of imprisonment must be in connection with a [separate] conviction for a crime if such imprisonment is to toll the term of supervised release. Third, the release shall be made to the supervision of a probation officer. And finally, only the specific terms “imprisonment” or “imprisoned” are

⁶⁹ *Id.* at 130–31.

⁷⁰ *Id.* at 131.

⁷¹ *United States v. Garcia-Rodriguez*, 640 F.3d 129, 131 (5th Cir. 2011).

⁷² *Id.* at 132.

⁷³ *Id.* (citing *United States v. Johnson*, 529 U.S. 52 (2000); *United States v. Jackson*, 426 F.3d 301 (5th Cir. 2005)).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

used, not the term administrative detention or other specific types of custody.⁷⁷

The court therefore concluded that Garcia “was released from BOP custody the moment he was transferred to ICE custody” and that any supervision that a probation officer could provide would have “been inactive supervision while he was in ICE custody and then after he was deported.”⁷⁸

The Fifth Circuit observed that

[w]hile the Supreme Court in *Johnson* did state that being released from imprisonment meant being “freed from confinement,” it also specifically mentioned a defendant remaining in BOP custody, and it continued to use only the statutory term “imprisonment” and not the term administrative detention or any other possible variation of the term “confinement.”⁷⁹

The court indicated that just because Garcia was confined in ICE detention did not mean that he was “imprisoned” there.⁸⁰ While the defendant’s administrative detention and later deportation may have been related to the same crime, “that relationship does not turn such detention into ‘imprisonment’ as contemplated by § 3624(e).”⁸¹ The *Garcia-Rodriguez* court thus held “that administrative detention by ICE does not qualify as imprisonment and that, for purposes of § 3624(e), Garcia was ‘released from imprisonment’ the moment he was transferred from BOP custody to ICE custody to await deportation.”⁸²

Nearly twenty years after the Supreme Court defined “release” in *Johnson*, it sought to define “imprisonment” in *Mont v. United States*, decided in 2019.⁸³ The defendant in *Mont* was sentenced to 120 months (later reduced to 84 months) in prison and five years of supervised release.⁸⁴ Mont’s supervised release, which he violated by committing

⁷⁷ *United States v. Garcia-Rodriguez*, 640 F.3d 129, 133 (5th Cir. 2011) (citing 18 U.S.C. § 3624(a, e)) (internal quotations omitted).

⁷⁸ *Id.* (internal quotations omitted) (citing *United States v. Brown*, 54 F.3d 234, 239 (5th Cir. 1995) (finding that supervised release continues after deportation and citing a probation manual which specifies that the supervision will simply be “inactive” until the expiration date)).

⁷⁹ *Id.* (citing *United States v. Johnson*, 529 U.S. 52, 57 (2000)).

⁸⁰ *Id.*

⁸¹ *Id.* at 134.

⁸² *Id.*

⁸³ 139 S. Ct. 1826, 1829, 1833 (2019) (citing *Johnson*, 529 U.S. 52 at 59–60).

⁸⁴ *Id.* at 1829.

new state drug crimes, was scheduled to end on March 6, 2017—five years after he was released from prison.⁸⁵ Mont challenged the jurisdiction of the district court at the revocation hearing because his five years of supervised release was scheduled to expire a month before the hearing.⁸⁶ But the district court held that it retained jurisdiction, revoked Mont’s supervised release, and re-sentenced him to prison.⁸⁷ Mont appealed.⁸⁸

The *Mont* court acknowledged that a term of supervised release is tolled under § 3624(e) “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.”⁸⁹ The issue in *Mont* was whether the time that Mont spent in pretrial custody awaiting proceedings for the new state drug crimes was “imprisonment in connection with a conviction . . . under § 3624(e).”⁹⁰ The Sixth Circuit concluded that it was and held that Mont’s time in pretrial custody on the new state drug crimes tolled his term of supervised release.⁹¹ Therefore, Mont was still on supervised release when the government filed its revocation petition in the federal case.⁹² Circuit courts were split on “whether § 3624(e) tolls supervised release for periods of pretrial detention lasting longer than 30 days when that incarceration is later credited as time served on a conviction,” so the Supreme Court granted certiorari to resolve the question.⁹³

But before it could decide whether Mont’s imprisonment was “in connection with a conviction,” the Court had to first decide whether Mont’s pretrial detention on the state charges constituted “imprisonment” under § 3624(e). To do so, it started by consulting

⁸⁵ *Id.*

⁸⁶ *Id.* at 1830–31.

⁸⁷ *Id.* at 1831.

⁸⁸ *See id.*

⁸⁹ *Mont v. United States*, 139 S. Ct. 1826, 1831 (2019) (emphasis in original) (quoting 18 U.S.C. § 3624(e)).

⁹⁰ *Id.* at 1832.

⁹¹ *Id.* at 1831.

⁹² *Id.*

⁹³ *Id.* (comparing *United States v. Ide*, 624 F.3d 666, 667 (4th Cir. 2010) (holding that the supervised-release period tolls); *United States v. Molina-Gazca*, 571 F.3d 470, 474 (5th Cir. 2009) (same); *United States v. Johnson*, 581 F.3d 1310, 1312–13 (11th Cir. 2009) (same); *United States v. Goins*, 516 F.3d 416, 417 (6th Cir. 2008) (same), with *United States v. Marsh*, 829 F.3d 705, 709 (D.C. Cir. 2016) (holding that the supervised-release period does not toll); *United States v. Morales-Alejo*, 193 F.3d 1102, 1106 (9th Cir. 1999) (same)).

dictionaries, which variously defined the term “imprison” as “to put in a prison, to incarcerate, to confine a person, or restrain his liberty, in any way.”⁹⁴ The Court found that “[t]hese definitions encompass pretrial detention . . . despite the dissent’s reliance on a narrower definition.”⁹⁵ The *Mont* Court held that “pretrial detention later credited as time served for a new conviction is ‘imprisonment in connection with a conviction’ and thus tolls the supervised-release term under § 3624(e).”⁹⁶ The *Mont* Court concluded that its holding was consistent with the policy rationale underlying its prior decision in *Johnson*.⁹⁷

The *Mont* Court discussed in *dicta* that it did not want “to give a defendant the windfall of satisfying a new sentence of imprisonment and an old sentence of supervised release with the same period of pretrial detention.”⁹⁸ Crediting a defendant for time spent in pretrial custody against a term of supervised release would “deprive the Government of its lawfully imposed sentence of supervised release while the defendant is serving a separate sentence of incarceration.”⁹⁹ However, importantly, the Court found that time in pretrial detention counts towards supervised release “only if the charges against the defendant are dismissed or the defendant is acquitted.”¹⁰⁰ This would honor the lawfully imposed sentencing judgment without punishing a defendant “for conduct he might not have committed.”¹⁰¹

C. Applying These Definitions to § 3624(e)

When *Johnson* and *Mont* are read together, the meaning of § 3624(e)’s commencement provision becomes clearer than it was before the Fifth Circuit decided *Garcia-Rodriguez*. Under the plain text of § 3624(e), “[t]he term of supervised release commences on the day the person is released from imprisonment.”¹⁰² *Johnson* states that

⁹⁴ *Id.* at 1832 (internal quotations omitted) (quoting *Imprison*, BLACK’S LAW DICTIONARY 681 (5th ed. 1979); 5 OXFORD ENGLISH DICTIONARY 113 (1933); *Imprison*, BLACK’S LAW DICTIONARY 875 (10th ed. 2014)).

⁹⁵ *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019).

⁹⁶ *Id.*

⁹⁷ *Id.* at 1833–34.

⁹⁸ *Id.* at 1834.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Mont v. United States*, 139 S. Ct. 1826, 1834 (2019).

¹⁰² 18 U.S.C. § 3624(e).

a prisoner is “released from imprisonment” when he is “freed from confinement.”¹⁰³ The *Mont* majority defined “imprisonment” as “to put in a prison, to incarcerate, to confine a person, or restrain his liberty, in any way.”¹⁰⁴ Because the *Mont* majority considered “imprisonment” to include being put in prison, being incarcerated, or being confined, the phrase “released from imprisonment” in § 3624(e) can be fairly defined as being “freed from confinement” of “any kind.” Indeed, the *Mont* majority stated that “if imprisonment referred only to confinement that is the result of a penalty or sentence, then the phrase ‘in connection with a conviction’ would become entirely superfluous.”¹⁰⁵

III. CIVIL COMMITMENT UNDER THE ADAM WALSH ACT (AWA)

“Imprisonment” is commonly understood to occur in a federal or state penitentiary, where prisoners are incarcerated behind prison walls after committing crimes.¹⁰⁶ But not every person behind these walls is detained there for a criminal offense—some are being held for some other purposes, often civil in nature.¹⁰⁷ The examples that are specifically addressed in this article include civil commitment proceedings under the AWA and immigration detention, but civil confinement is not limited to just these two categories.¹⁰⁸

¹⁰³ *United States v. Johnson*, 529 U.S. 52, 57 (2000).

¹⁰⁴ *Mont*, 139 S. Ct. at 1832 (internal quotations omitted) (quoting *Imprison*, BLACK’S LAW DICTIONARY 681 (5th ed. 1979); 5 OXFORD ENGLISH DICTIONARY 113 (1933); *Imprison*, BLACK’S LAW DICTIONARY 875 (10th ed. 2014)).

¹⁰⁵ *Id.* (internal quotations omitted) (quoting *United States v. Goins*, 516 F.3d 416, 421 (6th Cir. 2008)).

¹⁰⁶ See *Corpuz v. Holder*, 697 F.3d 807, 812 (9th Cir. 2012) (citing *United States v. Miller*, 547 F.3d 1207, 1213 (9th Cir. 2008) (holding that incarceration in county jail work release program constituted part of defendant’s term of imprisonment where defendant remained under the authority of the Bureau of Prisons); *United States v. Gonzales*, 506 F.3d 940, 948 (9th Cir. 2007) (en banc) (Ikuta, J., concurring in part and dissenting in part) (arguing that under the Sentencing Guidelines, “when a court sentences a defendant to 30–days jail time, it is a ‘term of imprisonment’”); *United States v. Morgan*, 390 F.3d 1072, 1074 (8th Cir. 2004) (observing that the Sentencing Guidelines “define . . . a sentence of imprisonment as a sentence of incarceration”) (“The common meaning of ‘imprisonment’ is incarceration in a prison, jail, or other penal institution.”).

¹⁰⁷ See *United States v. Hernandez-Arenado*, 571 F.3d 662, 666 (7th Cir. 2009) (noting that “the categories of persons [in BOP physical custody] is vast, including those housed in BOP facilities as material witnesses, under civil contempt orders, on writs of habeas corpus ad testificandum, or under contract with other sovereigns—such as state or local governments—to house sensitive prisoners”).

¹⁰⁸ See *id.*

Congress passed the AWA in response to a slate of high-profile violent crimes against children.¹⁰⁹ The AWA was intended to curb increasing violence towards children and strengthen laws to protect them.¹¹⁰ The AWA established national child abuse and sex offender registries, increased punishments for federal crimes against children, and provided grants to states to start and operate civil commitment programs for sexually dangerous people.¹¹¹ Section 302 of the AWA, entitled the Jimmy Ryce Civil Commitment Program, lays out the procedures for the potential lifetime commitment of sexually dangerous people.¹¹²

A. AWA Procedures

Civil commitment proceedings under the AWA are initiated by the Attorney General or the Director of the Bureau of Prisons (BOP) certifying a prisoner as a “sexually dangerous person” and then transmitting that certification to the district court where the person is confined.¹¹³ Once the Government files the certification, the district court holds an evidentiary hearing to determine whether the prisoner is a sexually dangerous person under the AWA.¹¹⁴ If the district court

¹⁰⁹ Emily A. White, *Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?*, 65 WASH. & LEE L. REV. 1783, 1786–87 (2008) (citing Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 325–26 (2006) (“Registration of sex offenders and community notification statutes gain prominence following tragic circumstances that befell two children . . . Jacob Wetterling . . . and seven-year-old Megan Kanka.”)).

¹¹⁰ *United States v. Campbell*, 309 F. Supp. 3d 738, 747 (D.S.D. 2018) (citing H.R. Rep. 109–218(I) (2005)).

¹¹¹ *United States v. Shields*, 522 F. Supp. 2d 317, 322 (D. Mass. 2007).

¹¹² *Id.* (citing 18 U.S.C. § 4248(a)).

¹¹³ 18 U.S.C. § 4248(a). When the AWA first went into effect, the Government filed these certifications in district courts across the country, depending on the location of the prisoner. *United States v. Timms*, 664 F.3d 436, 439 (4th Cir. 2012). But BOP soon began transferring “potential candidates” for civil commitment under the AWA to FCI-Butner in Butner, North Carolina. *Id.* BOP chose FCI-Butner “as the facility for § 4248(a) commitments based on an established sex offender treatment program for BOP inmates, with existing staff and other resources for the development of the § 4248 civil commitment treatment program.” *Id.* at 439 n.2. FCI-Butner then “established a Commitment and Treatment Program for Sexually Dangerous Persons, which oversees § 4248 commitments, from pre-certification evaluations to post-commitment treatment and ongoing evaluation.” *Id.* Now, “nearly all § 4248 civil commitment actions nationwide are now filed and adjudicated in the Eastern District of North Carolina,” and then appealed to the Fourth Circuit. *Id.* at 439.

¹¹⁴ 18 U.S.C. § 4248(a).

determines that the prisoner is a sexually dangerous person, he is committed to the custody of the Attorney General, who must release the prisoner to an “appropriate official of the state” or to a treatment facility in his home state for “custody, care, and treatment.”¹¹⁵ While there, if the treatment facility director determines that the prisoner is no longer sexually dangerous to others, the facility director transmits a certificate to the district court that ordered commitment, and another hearing may be held to determine if the prisoner should be released with conditions.¹¹⁶ If a prisoner violates the conditions on which he is released, he can be arrested and civilly committed again to a treatment facility after a hearing.¹¹⁷

Evidentiary hearings under the AWA do not happen instantaneously. A defendant may wait years before he receives a hearing to determine whether he is a sexually dangerous person.¹¹⁸ Meanwhile, “the release of the person” awaiting the hearing is stayed by § 4248(a) of the AWA, a tolling provision similar to, but separate from, the tolling provision applicable to all federal prisoners under § 3624(e).¹¹⁹ Because “the release of the person” is stayed under § 4248(a) during the pendency of the civil commitment proceedings, the Fourth, Seventh, and Eighth Circuits have determined that his term of supervised release cannot commence under § 3624(e) because, under that section, “The term of supervised release commences on the day the person is released from imprisonment.”¹²⁰ However, reading the commencement and tolling provisions of § 3624(e) as a whole, the Ninth Circuit came to the opposite conclusion by holding that the tolling provision in § 3624(e) only applied to defendants who had committed new criminal offenses while on

¹¹⁵ 18 U.S.C. § 4248(d).

¹¹⁶ 18 U.S.C. § 4248(e).

¹¹⁷ 18 U.S.C. § 4248(f).

¹¹⁸ See *United States v. Turner*, 689 F.3d 1117, 1119 (9th Cir. 2012) (concerning a prisoner who waited four years for his hearing); *United States v. Mosby*, 719 F.3d 925, 928 (8th Cir. 2013) (concerning a prisoner who waited three years for his hearing); *United States v. Neuhauser*, 745 F.3d 125, 126 (4th Cir. 2014) (concerning a prisoner who waited four-and-a-half years for his hearing); *United States v. Maranda*, 761 F.3d 689, 692 (7th Cir. 2104) (concerning a prisoner who waited more than four years for his hearing).

¹¹⁹ Compare 18 U.S.C. § 4248(a) (“A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.”), with 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.”).

¹²⁰ See *Mosby*, 719 F.3d at 930; *Neuhauser*, 745 F.3d at 131; *Maranda*, 761 F.3d at 698.

supervision, as opposed to defendants who had been subjected to civil commitment for conduct committed prior to their imprisonment.¹²¹ Thus, circuits have splintered on the question of whether supervised release is tolled while civil commitment proceedings under the AWA are pending.

B. *Circuits are Split on How the AWA's Tolling Provision Operates*

If actions of the Government—such as the initiation of civil commitment proceedings under the AWA—prevent a defendant from beginning his term of supervised release, as opposed to actions taken by the defendant, should he suffer the same consequences as a defendant who has become a fugitive, even when he remains in government detention? Circuit courts cannot agree on an answer to this question, and resolving it involves untangling a web of decisions examining the meaning of terms like “imprisonment” that evade common definition due to the many forms of physical restraint—both criminal and civil—that the government can impose on a person.¹²²

1. The Ninth Circuit: *United States v. Turner*

The Ninth Circuit was the first circuit to consider this issue in *United States v. Turner*.¹²³ The defendant in *Turner* was convicted of distributing child pornography and was sentenced to 46 months’ imprisonment and 36 months of supervised release.¹²⁴ Turner was released from FCI Butner to begin his supervised release, which he violated.¹²⁵ Turner returned to FCI Butner after being re-sentenced to serve a new eight-month term of imprisonment and a 22-month term of supervised release.¹²⁶ Turner’s prison sentence was to expire at noon on

¹²¹ See *Turner*, 689 F.3d at 1126.

¹²² “Imprisonment” is considered a traditional form of custody, *Gupta v. U.S. Att’y Gen.*, 485 F. App’x 386, 388 (11th Cir. 2012), and the two terms are often used interchangeably. See, e.g., *Campillo v. Sullivan*, 853 F.2d 593, 595 (8th Cir. 1988) (“The writ of habeas corpus functions to grant relief from unlawful custody or imprisonment.”). “[T]he term ‘custody’ will have different meanings in different contexts.” *United States v. Hernandez-Arenado*, 571 F.3d 662, 666 (7th Cir. 2009) (citing *Rumsfeld v. Padilla*, 542 U.S. 426, 438 (2004)); see also *Ramsey v. Brennan*, 878 F.2d 995, 996 (7th Cir.1989) (“The word ‘custody’ is a chameleon.”)).

¹²³ 689 F.3d 1117, 1118 (9th Cir. 2012).

¹²⁴ *Id.* at 1118–19.

¹²⁵ *Id.* at 1119.

¹²⁶ *Id.*

September 7, 2007.¹²⁷ Two minutes after Turner completed his term of imprisonment, he was admitted to prison again for “Adam Walsh Act Review.”¹²⁸ That same day, the Government filed a sexually dangerous person certificate in the district court.¹²⁹ Turner’s release from prison was stayed under § 4248(a), and Turner remained in civil detention until his commitment hearing in February of 2012—over four years after his revocation sentence expired.¹³⁰

Turner filed a motion to terminate his supervised release on May 17, 2010, while he was still detained under the AWA.¹³¹ That motion was denied.¹³² On February 27, 2012—nearly five years after his revocation sentence had expired—the district court in North Carolina held an evidentiary hearing on the civil commitment action and found that Turner was not a sexually dangerous person under the AWA.¹³³ Turner was ordered released and appealed the district court’s order denying his May 2010 motion to terminate his supervised release, arguing on appeal that his supervised release had expired while awaiting civil commitment proceedings.¹³⁴

Resolving the issue on appeal required the *Turner* court to consider the relationship between the AWA’s stay provision, the statutory definition of “term of imprisonment,” and the supervised release statute.¹³⁵ The court observed that under § 3624(a), “a prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner’s term of imprisonment,”¹³⁶ which “dovetails” with 18 U.S.C. § 3621(a), providing that “a person who has been sentenced to a term of imprisonment shall be committed to the custody of the Bureau of Prisons *until the expiration of the term imposed*.”¹³⁷ The *Turner* court found that “term of imprisonment,” as used in § 3624(a), “refers to the sentence imposed by the sentencing judge”¹³⁸ because under that

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *United States v. Turner*, 689 F.3d 1117, 1119 (9th Cir. 2012).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 1118–19.

¹³⁵ *United States v. Turner*, 689 F.3d 1117, 1118 (9th Cir. 2012).

¹³⁶ *Id.* at 1120 (quoting 18 U.S.C. 3624(a)).

¹³⁷ *Id.* (emphasis in original).

¹³⁸ *Id.* (citing *Barber v. Thomas*, 560 U.S. 474, 483 (2010)).

section a prisoner is normally released from BOP custody “on the date of the expiration of the prisoner’s *term of imprisonment*, less any time credited.”¹³⁹

The Ninth Circuit also noted that when imposing a term of imprisonment the sentencing court may require the defendant to serve a term of supervised release after his term of imprisonment under § 3583(a).¹⁴⁰ If supervised release is ordered, the prisoner “shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court.”¹⁴¹ That term of supervised release “commences on the day the person is released from imprisonment.”¹⁴²

But the *Turner* court observed that § 3624(e) contains a tolling provision stating that “[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.”¹⁴³ The Ninth Circuit had previously held in *United States v. Morales-Alejo* that “[a] plain reading of this language suggests that there must be an imprisonment resulting from or otherwise triggered by a criminal conviction.”¹⁴⁴

The *Turner* majority acknowledged that Turner’s supervised release was tolled under § 3624(e) until noon on September 7, 2007 because Turner was “imprisoned in connection with a conviction.”¹⁴⁵ The Government conceded that civil commitment under the AWA was not “imprisonment,” so if Turner had been civilly committed, his term of supervised release would have begun to run when he completed his prison sentence.¹⁴⁶ But Turner was not ultimately civilly committed

¹³⁹ *Id.* (emphasis in original) (quoting 18 U.S.C. § 3624(a)).

¹⁴⁰ *Id.* (citing 18 U.S.C. § 3583(a)).

¹⁴¹ *United States v. Turner*, 689 F.3d 1117, 1120 (9th Cir. 2012) (quoting 18 U.S.C. § 3624(e)).

¹⁴² *Id.* (quoting 18 U.S.C. § 3624(e)).

¹⁴³ *Id.* at 1121 (emphasis in original) (citing 18 U.S.C. § 3624(e)).

¹⁴⁴ 193 F.3d 1102, 1105 (9th Cir. 1999); *Turner*, 689 F.3d at 1121; *accord* *United States v. Garcia-Rodriguez*, 640 F.3d 129, 133 (5th Cir. 2011) (“[A]ny other term of imprisonment must be ‘in connection with a separate conviction’ for a ‘crime’ if such imprisonment is to toll the term of supervised release.”).

¹⁴⁵ *Turner*, 689 F.3d at 1121.

¹⁴⁶ *Id.*

under the AWA, so the question was whether Turner’s supervised release began to run in the years leading up to his commitment hearing.¹⁴⁷

The Ninth Circuit concluded that Turner was not “imprisoned in connection with a conviction for a crime” while awaiting his commitment hearing, which was required under § 3624(e) to toll a term of supervised release.¹⁴⁸ The *Turner* majority questioned the Government’s “anomalous posture” that supervised release should run during civil commitment but not “during the almost five years it took to determine that Turner *should not be civilly committed*.”¹⁴⁹ The *Turner* majority found that “[n]either the statutory text nor common sense supports this bifurcated approach.”¹⁵⁰

The *Turner* majority observed that the stay provision in the AWA does not distinguish between prisoners who have not yet been committed and those who have.¹⁵¹ The AWA’s stay provision operates to stay release “pending completion of *procedures contained in this section*,” which reach even beyond civil commitment to discharge after rehabilitation.¹⁵² Therefore, the *Turner* majority found that “[t]he false dichotomy offered by the government belies textual and practical sense,” concluding that “[t]he only common sense interpretation of § 4248(a) is that the Adam Walsh Act precludes the *release* of a person deemed ‘sexually dangerous’ *into society* until a court has ultimately resolved that he is not or is no longer a danger to others.”¹⁵³ If Congress had intended for the stay-of-release provision to apply to prisoners awaiting a hearing, the *Turner* majority reasoned, it would not have made the stay provision applicable to all “procedures” in § 4248.¹⁵⁴

The *Turner* majority also found that a contrary reading of § 4248 would contradict § 3624(e), which “suggests that there must be an imprisonment resulting from or otherwise triggered by a criminal conviction.”¹⁵⁵ Because Turner’s detention resulted from a civil action,¹⁵⁶

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citing *Morales-Alejo*, 193 F.3d at 1104–05).

¹⁴⁹ *Id.* at 1121–22 (emphasis in original).

¹⁵⁰ *Id.* at 1122.

¹⁵¹ *United States v. Turner*, 689 F.3d 1117, 1122 (9th Cir. 2012).

¹⁵² *Id.* (emphasis in original) (citing 18 U.S.C. § 4248(a, c, e)).

¹⁵³ *Id.* (emphasis in original).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1122–23 (quoting *U.S. v. Morales-Alejo*, 193 F.3d 1102, 1105 (9th Cir. 1999)).

¹⁵⁶ *Id.* at 1123 (citing *United States v. Comstock*, 560 U.S. 126, 129 (2010) (characterizing § 4248 as a “civil-commitment statute”); *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (“[A]n

his prolonged confinement did not stem from any criminal sentence imposed by a court and long surpassed any sentence that would have been originally imposed.¹⁵⁷

The *Turner* majority found that Turner's case was distinguishable from *Johnson*, where the Court held that § 3624(e) "directs that a supervised release term does not commence until an individual is released from imprisonment."¹⁵⁸ The *Turner* court acknowledged that *Johnson* suggested that supervised release could not begin to run when a defendant was in BOP custody,¹⁵⁹ but found that Turner's case was different because, unlike Johnson, who was "imprisoned in connection with a conviction," Turner was not.¹⁶⁰ *Johnson*, the *Turner* court noted, did not address "a person who has completed a prison sentence and is then placed in *civil* detention, even if the civil detention happens to be overseen by the Bureau of Prisons."¹⁶¹ When deciding whether detention constituted "imprisonment" under § 3624(e), Ninth Circuit case law was clear that the "nature of the custody," not the custodian, controls.¹⁶² The *Turner* majority concluded that holding that pretrial

individual detained under civil process—like an individual accused but not convicted of a crime—cannot be subjected to conditions that amount to punishment.”).

¹⁵⁷ *United States v. Turner*, 689 F.3d 1117, 1123 (9th Cir. 2012) (citing 18 U.S.C. § 3583(e) (3) (stating that a defendant whose term of supervised release is revoked “may not be required to serve on any such revocation more than . . . 2 years in prison if such offense is a class C or D felony”)).

¹⁵⁸ *Id.* (internal quotations removed) (quoting *United States v. Johnson*, 529 U.S. 53, 60 (2000)).

¹⁵⁹ *Id.* at 1123–24 (citing *Johnson*, 529 U.S. at 57 (“Supervised release does not run while an individual remains in the custody of the Bureau of Prisons. . . . [T]he ordinary, commonsense meaning of release is to be freed from confinement”)).

¹⁶⁰ *Id.* at 1124.

¹⁶¹ *Id.* (emphasis in original).

¹⁶² *Id.* at 1124–25 (citing *United States v. Morales-Alejo*, 193 F.3d 1102, 1106 (9th Cir. 1999) (holding that pretrial detention is not “imprisonment” under 3624(e)); *United States v. Sullivan*, 504 F.3d 969, 970 (9th Cir. 2007) (holding that detention at a community treatment center does not toll supervised release). The Ninth Circuit’s approach is consistent with the Seventh Circuit’s interpretation of the term “custody” contained in the Act. The Seventh Circuit has observed that, “under an interpretation based on physical custody alone, the categories of persons included is vast, including those housed in BOP facilities as material witnesses, under civil contempt orders, on writs of habeas corpus ad testificandum, or under contract with other sovereigns—such as state or local governments—to house sensitive prisoners.” *United States v. Hernandez-Arenado*, 571 F.3d 662, 666 (7th Cir. 2009).

detention awaiting a civil commitment hearing was “imprisonment” would raise serious constitutional questions about the AWA itself.¹⁶³

Circuit Judge Milan Smith, Jr. filed a dissenting opinion, arguing that the Supreme Court’s decision in *Johnson* controlled.¹⁶⁴ Judge Smith concluded that *Johnson*’s language that “[s]upervised release *does not run while an individual remains in the custody* of the Bureau of Prisons” was determinative.¹⁶⁵ Judge Smith maintained that “[t]he question is not, as the majority contends, whether a term of supervised release was tolled. The issue is whether a term of supervised release *began* when an individual was not free to leave a prison.”¹⁶⁶ Relying on *Johnson*, Judge Smith would have held “that binding authority dictates that supervised release cannot begin until one is physically released from prison.”¹⁶⁷

Judge Smith argued that the commencement and tolling provisions of § 3624(e) are “distinct . . . work in different ways, and contain different statutory requirements.”¹⁶⁸ “Unlike the tolling provision,” Judge Smith observed, “the commencement provision does not contain any requirement that imprisonment be ‘in connection with a conviction,’” meaning that “a prisoner’s term of supervised release cannot begin to run until he or she is allowed to physically leave the prison.”¹⁶⁹ The

¹⁶³ *United States v. Turner*, 689 F.3d 1117, 1125 (9th Cir. 2012) (citing *Stogner v. California*, 539 U.S. 607, 612 (2003) (including among ex post facto laws “every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed”); *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (holding that “the State must establish insanity and dangerousness by clear and convincing evidence in order to confine an insane convict beyond his criminal sentence, when the basis for his original confinement no longer exists”); *Hill v. United States*, 298 U.S. 460, 464 (1936) (“The only sentence known to the law is the sentence of judgement entered upon the records of the court.”)). The *Turner* court observed that “adopting the government’s position would mean that an extension of Turner’s term of imprisonment by four and a half years beyond that imposed by the district court is within the bounds of congressional authority in passing a *civil* confinement statute. Congress certainly did not express any intention to reach such a result.” *Id.* (emphasis in original).

¹⁶⁴ *Id.* at 1126 (Smith, J., dissenting) (citing *Johnson*, 529 U.S. at 57).

¹⁶⁵ *Id.* (citing *Johnson*, 529 U.S. at 57).

¹⁶⁶ *Id.* (emphasis in original).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (internal quotations omitted) (citing 18 U.S.C. § 3624(e); *Tobey v. United States*, 794 F.Supp.2d 594, 600 (D. Md. 2011)).

¹⁶⁹ *United States v. Turner*, 689 F.3d 1117, 1126–27 (Smith, J., dissenting) (citing 18 U.S.C. § 3624(e)).

reason for the prisoner being in physical custody was inconsequential.¹⁷⁰ Rather, his “physical confinement” was determinative.¹⁷¹

Judge Smith accused the majority of “simply ignor[ing] § 3624(e)’s clear command in the commencement provision that a term of supervised release can neither begin nor end while an individual physically remains in the Bureau of Prisons’s custody.”¹⁷² *Johnson* interpreted the phrase “released from imprisonment” within § 3624(e) to mean, “not whether a person’s sentence ends, but whether a person is physically released from confinement.”¹⁷³ A person may not be “released from imprisonment” while still physically confined.¹⁷⁴ Therefore, Turner’s supervised release could not commence while he was still physically confined in civil detention.¹⁷⁵

Judge Smith acknowledged that the Supreme Court interpreted § 3624(e) before the AWA (and its stay provision) became law.¹⁷⁶ The AWA requires a person to be “physically confined in prison despite completing his or her sentence.”¹⁷⁷ When the AWA is read in conjunction with *Johnson*’s interpretation of § 3624(e), Judge Smith conceded that it produces “an admittedly disquieting result: a person’s term of imprisonment may end without him or her being freed from confinement, thereby preventing the commencement of a term of supervised release.”¹⁷⁸ Judge Smith observed “that this result, at first glance, does not seem fair,” and that it could not have been foreseen by the Supreme Court when it decided *Johnson*, but it was not the court’s place to re-write the law.¹⁷⁹ Judge Smith concluded that *Johnson*

¹⁷⁰ *Id.* at 1127 (citing 18 U.S.C. § 3624(e)) (“Whether the physical confinement is imposed pursuant to a sentence or otherwise in connection with a conviction is irrelevant; the purpose of and reasons for the prisoner’s confinement do not matter.”).

¹⁷¹ *Id.* (citing 18 U.S.C. § 3624(e)).

¹⁷² *Id.* (citing *United States v. Johnson*, 529 U.S. 53, 57 (2000)).

¹⁷³ *Id.* (citing *Johnson*, 529 U.S. at 57 (defining “release” in the context of imprisonment as “meaning to loosen or destroy the force of; to remove the obligation or effect of; hence to alleviate or remove; to let loose again; to set free from restraint, confinement, or servitude; to set at liberty; to let go” (internal quotations omitted))).

¹⁷⁴ *Id.* (citing *Johnson*, 529 U.S. at 57) (“Because ‘the ordinary, commonsense meaning of release is to be freed from confinement,’ a person may not be released while still imprisoned.”).

¹⁷⁵ *United States v. Turner*, 689 F.3d 1117, 1128 (Smith, J., dissenting).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

is binding until the Supreme Court decides that § 3624(e) permits a defendant’s term of supervised release to run while in prison.¹⁸⁰

Judge Smith further believed that the policy consequences of the majority’s opinion were “troubling” because its conclusion “defeats the purpose of supervised release,” which is to “assist individuals in their transition to community life,” fulfilling “rehabilitative ends, *distinct from those served by incarceration*.”¹⁸¹ Finding that supervised release expired while Turner was in physical custody of a prison would provide him “no favors” because it eliminated assistance that he might receive when released from prison, which could increase his risk of recidivism.¹⁸²

Judge Smith observed that most courts confronted with the issue have held that supervised release does not run while a person is awaiting procedures under the AWA.¹⁸³ He argued that the fact that most other courts have rejected the position taken by the *Turner* majority exposes the deficiencies in its reasoning and holding.¹⁸⁴ Judge Smith opined that “[i]f the past is any guide to the future, it seems likely that most circuit courts, and perhaps our own court, sitting en banc, will also reject the majority’s position when presented with the issue in this case.”¹⁸⁵

¹⁸⁰ *Id.* (citing *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (“Needless to say, only this Court may overrule one of its precedents.”); *United States v. Qualls*, 172 F.3d 1136, 1138 (9th Cir.1999) (en banc) (recognizing the Supreme Court’s interpretation of the federal felon-in-possession statute as binding); *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir.1996), *vacated*, 522 U.S. 3 (1997) (stating that a Supreme Court decision should be overruled, but following it, and noting that “the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court; we are to leave the overruling to the Court itself.”)).

¹⁸¹ *United States v. Turner*, 689 F.3d 1117, 1131 (Smith, J., dissenting) (emphasis in original) (quoting *United States v. Johnson*, 529 U.S. 53, 59 (2000)).

¹⁸² *Id.* at 1131–32 (citing *United States v. Hanrahan*, 508 F.3d 962, 971 (10th Cir. 2007) (“It is well-established that the purpose of supervised release is to provide enough supervision to prevent recidivism on the part of the offender.”); Marcus T. Boccaccini et al., *Field Validity of the Static-99 and MNSOST-R Among Sex Offenders Evaluated for Civil Commitment as Sexually Violent Predators*, 15 Psychol. Pub. Pol’y & L. 278, 307 (2009) (discussing “findings suggest[ing] that mandatory supervision may be an effective mechanism for reducing reoffending”)).

¹⁸³ *Id.* at 1130 (citing *United States v. Revland*, No. 02–CR–4025–DEO–1, 2011 WL 6780868, at *1–2 (N.D. Iowa Dec. 27, 2011); *Tobey v. United States*, 794 F. Supp. 2d 594, 601 (D. Md. 2011); *United States v. Francis*, No. 03–166–KSF, 2011 WL 1642571, at *3 (E.D. Ky. May 2, 2011); *United States v. Combe*, No. 1:04–CR–51 TS, 2011 WL 976892, at *2 (D. Utah Mar. 18, 2011); *United States v. Bolander*, No. 01–CR–2864–L, 2010 WL 5342202, at *2–3 (S.D. Cal. Dec. 21, 2010), *rev’d*, 487 F. App’x 349 (9th Cir. 2012); *United States v. Wilkinson*, No. 1:CR–93–158, 2010 WL 598609, at *5 (M.D. Pa. Feb. 17, 2010)).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

Because the Government did not petition for rehearing en banc in *Turner*, Judge Smith's theory went untested in the Ninth Circuit. But his prediction that other circuits would reject the *Turner* majority's decision proved to be correct.

2. The Eighth Circuit: *United States v. Mosby*

The Eighth Circuit considered the same issue one year later in *United States v. Mosby*, where the defendant had been sentenced to 15 years of imprisonment followed by five years of supervised release.¹⁸⁶ The Government filed a sexually dangerous person certificate seeking to civilly commit Mosby just prior to the expiration of his prison sentence on September 14, 2007.¹⁸⁷ Over three years later, the Government dismissed Mosby's civil commitment case, and Mosby was released from the BOP on October 15, 2010.¹⁸⁸ Two years later, in October of 2012, Mosby filed a motion seeking to terminate his supervised release, arguing that his five-year term of supervision imposed at sentencing began to run in September of 2007, when his prison term expired.¹⁸⁹ The motion was denied, and he appealed.¹⁹⁰

The *Mosby* court held that under § 3624(e) Mosby's supervised release "commenced on the day he was released from imprisonment," or as the Supreme Court stated in *Johnson*, the day that he was "freed from confinement."¹⁹¹ Therefore, "Mosby's term of supervised release did not begin until he was 'freed from confinement' on November 15, 2010,"¹⁹² even though his term of imprisonment ended in September of 2007.¹⁹³ The *Mosby* court found that "[i]t would be contrary to the plain language of § 3624(e) and the Supreme Court's holding in *Johnson* for us to adopt Mosby's position that his term of supervised release began before he was released from federal custody."¹⁹⁴ In *dicta*, the *Mosby* court also agreed with Judge Smith that § 3624(e)'s commencement and tolling provisions were "'distinct' and serve different statutory

¹⁸⁶ 719 F.3d 925, 927 (8th Cir. 2013).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 928.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 929 (citing *United States v. Johnson*, 529 U.S. 53, 57 (2000)).

¹⁹² *United States v. Mosby*, 719 F.3d 925, 929 (8th Cir. 2013) (citing *Johnson*, 529 U.S. at 57).

¹⁹³ *Id.* at 926.

¹⁹⁴ *Id.* at 929.

functions,”¹⁹⁵ and that its conclusion was consistent with the transitional and rehabilitative goals described in *Johnson*.¹⁹⁶

3. The Fourth Circuit: *United States v. Neuhauser*

Nine months after *Mosby* was decided, the Fourth Circuit reached the same conclusion in *United States v. Neuhauser*.¹⁹⁷ Jeffrey Neuhauser was convicted of child sex offenses and was sentenced to 109 months’ imprisonment and five years of supervised release.¹⁹⁸ Two weeks before his scheduled release date of June 6, 2007, the Government filed a sexually dangerous person certificate under the AWA, which triggered a stay of his release.¹⁹⁹ On Neuhauser’s scheduled release date, BOP processed him under “review” for the AWA and transferred him to a different housing unit in the same prison.²⁰⁰ Neuhauser remained there for the next four-and-a-half years while awaiting his evidentiary hearing, where he was ultimately declared not to be a sexually dangerous person.²⁰¹ Neuhauser was released from BOP on February 3, 2012.²⁰² Five months later, he moved to terminate his supervised release, arguing that his five-year term of supervised release began on his original release date of June 6, 2007.²⁰³ The district court denied the motion, and Neuhauser appealed.²⁰⁴

The issue in *Neuhauser*, as it was in *Turner* and *Mosby*, was whether “his confinement beyond his scheduled release date qualifies as ‘imprisonment’ under § 3624.”²⁰⁵ The *Neuhauser* court found that dictionary definitions did not necessarily link “imprisonment” to “criminal punishment.”²⁰⁶ Moreover, the *Neuhauser* court found that

¹⁹⁵ *Id.* at 930 (quoting *United States v. Turner*, 689 F.3d 1117, 1126–27 (Smith, J., dissenting)).

¹⁹⁶ *Id.* at 929 (citing *Johnson*, 529 U.S. at 59).

¹⁹⁷ 745 F.3d 125, 130 (4th Cir. 2014) (citing *id.* at 930).

¹⁹⁸ *Id.* at 126.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *United States v. Neuhauser*, 745 F.3d 125, 126–27 (4th Cir. 2014).

²⁰⁴ *Id.* at 127.

²⁰⁵ *Id.* at 127–28.

²⁰⁶ *Id.* at 128 (“On the contrary, to ‘imprison’ someone is simply to ‘put [a person] in prison.’ *Webster’s New Collegiate Dictionary* 572 (1979). As Judge Chasanow has recently noted, numerous dictionaries confirm that the term ‘imprisonment’ ‘focuses on the nature of . . . confinement,’ not the reason for its imposition. *Tobey v. United States*, 794 F. Supp. 2d 594, 598

the structure of § 3624(e) suggested that the commencement provision and the tolling provision, read together, divorced “imprisonment” from punishment.²⁰⁷ The *Neuhauser* court also determined that a broad reading of “imprisonment” within § 3624(e) comported with the same policy goals of supervised release articulated in *Johnson*.²⁰⁸

The *Neuhauser* court concluded that its analysis was in step with *Johnson*.²⁰⁹ Nonetheless, the court found that *Johnson* did not strictly control because *Neuhauser* presented a different argument: “that detention pursuant to a civil statute does not constitute ‘imprisonment’ in any sense of the term.”²¹⁰ But the *Neuhauser* court observed that *Johnson* equated “imprisonment” to “confinement” and underscored the importance of reading § 3624(e) in light of its rehabilitative purpose, a view that had been adopted by other courts, like in *Mosby*.²¹¹

The *Neuhauser* court criticized the Ninth Circuit’s decision in *Turner* as conflating the commencement provision and tolling provision of § 3624(e).²¹² “The commencement provision specifies the date on which supervised release *begins*,” the *Neuhauser* court observed, “while the tolling provision describes periods of time during which supervised release is *suspended*.”²¹³ The *Turner* majority’s conflation of the two provisions was “particularly problematic because

(D. Md. 2011) (quoting *Imprisonment*, BLACK’S LAW DICTIONARY 681 (9th ed. 2009) (defining ‘imprisonment’ as ‘the state of being confined; a period of confinement’); *Oxford English Dictionary* (2d ed. 1989) (defining ‘imprisonment’ as ‘detention in a prison or place of confinement; close or irksome confinement’)).

²⁰⁷ *Id.* at 128–29 (citing *Scott v. United States*, 328 F.3d 132, 139 (4th Cir. 2003)) (“According to the statute, a term of release begins when a person is ‘released from imprisonment,’ while a term of release is tolled when a person ‘is imprisoned *in connection with a conviction*.’ The distinction between ‘imprisonment,’ on the one hand, and ‘imprisonment in connection with a conviction,’ on the other, belies *Neuhauser*’s suggestion that ‘imprisonment’ *must* involve a conviction. If *Neuhauser* were correct, and ‘imprisonment’ necessarily related to punishment, there would be no need for Congress to qualify the term ‘imprisonment’ in the statute’s tolling provision. Under *Neuhauser*’s definition, ‘imprisonment’ would *always* be ‘in connection with a conviction,’ and the inclusion of that phrase in the tolling provision would be entirely unnecessary. To avoid an interpretation of the statute that would ‘render its terms meaningless or superfluous,’ the word ‘imprisonment’ must mean something broader than detention ‘in connection with a conviction.’” (emphasis in original).).

²⁰⁸ *Id.* at 129.

²⁰⁹ *United States v. Neuhauser*, 745 F.3d 125, 129 (4th Cir. 2014).

²¹⁰ *Id.* at 129–30.

²¹¹ *Id.* at 130 (citing *United States v. Mosby*, 719 F.3d 925, 930 (8th Cir. 2013); *United States v. Johnson*, 529 U.S. 53, 57, 59 (2000)).

²¹² *Id.*

²¹³ *Id.* (emphasis in original).

... suspension and commencement are triggered by different events”—tolling when a person is “imprisoned *in connection with a conviction*,” and commencing when a person is “released from *imprisonment*.”²¹⁴ “[A]ny imprisonment,” whether in connection with a conviction or not, prevents supervised release from commencing, according to the *Neuhauser* court.²¹⁵ The Fourth Circuit therefore concluded that *Turner*, which relied on the tolling provision and not the commencement provision of § 3624(e), was wrongly decided.²¹⁶

4. The Seventh Circuit: *United States v. Maranda*

The last circuit to confront the issue was the Seventh Circuit in *United States v. Maranda*, decided several months after *Neuhauser*.²¹⁷ Darrin Maranda was convicted of possessing child pornography and was sentenced to 40 months’ imprisonment and five years of supervised release.²¹⁸ His supervised release was later revoked, and he was resentenced to an additional 30 months’ imprisonment and two years of supervised release.²¹⁹ Six days before he was to be released from FCI Butner on his revocation sentence, the Government filed a sexually dangerous person certificate, automatically staying Maranda’s release from prison.²²⁰ More than four years later, the district court found at an evidentiary hearing that Maranda was not a sexually dangerous person under the AWA.²²¹ Maranda was released from FCI Butner on December 21, 2012.²²²

The Government filed a petition to revoke Maranda’s supervised release in October of 2013.²²³ Maranda moved to dismiss the petition on jurisdictional grounds, arguing that his term of supervised release began on March 16, 2008—the date on which his 30-month term of imprisonment ended.²²⁴ The district court denied the motion, sentenced

²¹⁴ *Id.* at 130–31 (emphasis in original) (citing 18 U.S.C. § 3624(e)).

²¹⁵ *United States v. Neuhauser*, 745 F.3d 125, 131 (4th Cir. 2014) (emphasis in original).

²¹⁶ *Id.*

²¹⁷ 761 F.3d 689, 690–91 (7th Cir. 2014) (citing *id.*).

²¹⁸ *Id.* at 691.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 691–92.

²²² *Id.* at 692.

²²³ *United States v. Maranda*, 761 F.3d 689, 692 (7th Cir. 2014).

²²⁴ *Id.* at 693.

him to credit-for-time-served, and ordered an additional term of 26 months of supervised release.²²⁵ Maranda appealed.²²⁶

The *Maranda* court interpreted “released from imprisonment” in the commencement provision “to refer to the defendant’s physical release from confinement,” as the Supreme Court interpreted the phrase in *Johnson*.²²⁷ Even though the *Maranda* court found that *Johnson* did not “squarely control here,” it nonetheless found no reason to depart from the Supreme Court’s interpretation of the phrase “released from imprisonment” in that case.²²⁸ The *Maranda* court acknowledged that Maranda’s “detention was not meant to be punitive” and did not accept that “imprisonment” necessarily “implies a connection to criminal punishment.”²²⁹ The Seventh Circuit determined that even if “imprisonment” is normally associated with punishment, the commencement provision, read in conjunction with the tolling provision that followed it, did not necessarily imply this.²³⁰

The *Maranda* court also adopted *Johnson*’s reasoning and held that Maranda’s reading of the statute would undermine the underlying purposes of supervised release.²³¹ Furthermore, the court found that many of the standard conditions of supervised release would be rendered unnecessary if a person was in physical custody.²³² Others—such as prohibitions against communicating with felons—would be impossible to comply with.²³³ Thus, the *Maranda* court joined *Neuhauser*, *Mosby*, and Judge Smith’s dissent in *Turner*, finding that “we need to determine the circumstance that causes a term of supervised release to *commence* . . . [r]ather than analyzing the circumstances that will *toll* an ongoing term of supervised release.”²³⁴ After all, quoting Judge Smith, “[w]hat

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 695 (citing *United States v. Johnson*, 529 U.S. 53 (2000)).

²²⁸ *Id.* at 696.

²²⁹ *United States v. Maranda*, 761 F.3d 689, 696–97 (7th Cir. 2014) (citing *Kansas v. Hendricks*, 521 U.S. 346, 361–65; *United States v. Neuhauser*, 745 F.3d 125, 131 (4th Cir. 2014)).

²³⁰ *Id.* at 697.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 698 (emphasis in original) (citing *Neuhauser*, 745 F.3d at 131; *United States v. Mosby*, 719 F.3d 925, 930 (8th Cir. 2013); *United States v. Turner*, 689 F.3d 1117, 1126–27 (9th Cir. 2012) (Smith, J., dissenting)).

never begins cannot end,’ . . . and . . . what never begins cannot be tolled.”²³⁵

ANALYSIS

The Fourth, Seventh, and Eighth Circuits relied on *Johnson*’s holding that a prisoner is “released from imprisonment” to begin his supervised release only after he is “freed from confinement.”²³⁶ But as the Fifth Circuit pointed out in *Garcia*—before *Mosby*, *Neuhauser*, and *Maranda* were decided—we must necessarily know what constitutes “confinement” to determine whether someone has been released from it.²³⁷ *Mont* confronted that question, differentiating between pre-adjudication confinement, where someone merely stands accused of something, and post-adjudication confinement, where a court has determined that the Government has proven its accusation.²³⁸ *Mosby*, *Neuhauser*, and *Maranda*, which were decided before *Mont*, fail to make this crucial distinction, instead painting “confinement” broadly and treating pre-adjudication confinement and post-adjudication confinement as one in the same.²³⁹

But *Mont* taught us that prisoners in pre-trial detention who only stand accused by the Government should not be treated the same as prisoners against whom the Government has proven its accusations.²⁴⁰ This comports with our nation’s longstanding tradition of presuming innocence.²⁴¹ After all, the Government may not meet its burden at trial or it may abandon the case by dismissing it. Why, then, should prisoners who only stand accused by the Government in AWA proceedings be treated differently than criminal defendants who stand accused of committing crimes? As in criminal cases, the Government does not always meet its burden of proof in AWA proceedings or

²³⁵ *United States v. Maranda*, 761 F.3d 689, 698 (7th Cir. 2014) (quoting *Turner*, 689 F.3d at 1127).

²³⁶ *Neuhauser*, 745 F.3d at 129; *Maranda*, 761 F.3d at 695–96; *Mosby*, 719 F.3d at 929.

²³⁷ *United States v. Garcia-Rodriguez*, 640 F.3d 129, 133 (5th Cir. 2011).

²³⁸ *Mont v. United States*, 139 S. Ct. 1826, 1834 (2019).

²³⁹ See *Neuhauser*, 745 F.3d at 129–30; *Maranda*, 761 F.3d at 696; *Mosby*, 719 F.3d at 929.

²⁴⁰ *Mont*, 139 S. Ct. at 1834.

²⁴¹ See *United States v. Kaiser*, 58 M.J. 146, 150 (C.A.A.F. 2003) (citing *United States v. Washington*, 57 M.J. 394, 402 (C.A.A.F. 2002) (Baker, J., concurring)) (“The presumption of innocence is a longstanding feature of both military and civilian law. It is a critical part of our tradition of justice and deeply imbedded in our culture as well as our systems of justice.”).

abandons cases by dismissing them. That is in fact what happened in *Mosby*, *Neuhauser*, and *Maranda*.²⁴² Yet the majority position as it stands holds that these prisoners should *not* enjoy the same rights as criminal defendants who have, like them, only been accused by the Government.²⁴³ This disparate treatment is unconstitutional, and courts have a duty to avoid it.

I. *MOSBY, NEUHAUSER, AND MARANDA ARE WRONGLY DECIDED IN LIGHT OF MONT*

Judge Smith began his dissent in *Turner* by acknowledging that *Johnson* was decided before the enactment of the AWA,²⁴⁴ which is important because when the Supreme Court was construing the phrase “released from imprisonment” in *Johnson*, it was only considering defendants who had been released from BOP custody.²⁴⁵ The *Turner* majority acknowledged as much.²⁴⁶ Nonetheless, Judge Smith and the Fourth, Seventh, and Eighth Circuits relied on *Johnson*’s holding that a prisoner is not “released from imprisonment” until he is “freed from confinement” to hold that supervised release did not commence while a prisoner was awaiting proceedings under the AWA.²⁴⁷

But before any of these cases were decided, the Fifth Circuit, when similarly considering whether supervised release commenced while a person was awaiting deportation proceedings, identified a key problem with this approach: while *Johnson* may have defined “release” under § 3624(e), it did not define “imprisonment.”²⁴⁸ Nearly five years later, though, the Supreme Court did define that term in *Mont* when considering whether a defendant in pretrial custody for a state offense was “imprisoned” within the meaning of § 3624(e).²⁴⁹ The *Mont* court

²⁴² *Neuhauser*, 745 F.3d at 126; *Maranda*, 761 F.3d at 692; *Mosby*, 719 F.3d at 927.

²⁴³ See, e.g., *Neuhauser*, 745 F.3d at 131; *Maranda*, 761 F.3d at 699; *Mosby*, 719 F.3d at 931.

²⁴⁴ *United States v. Turner*, 689 F.3d 1117, 1128 (9th Cir. 2012) (Smith, J., dissenting).

²⁴⁵ See *United States v. Johnson*, 529 U.S. 53, 54 (2000) (“The question becomes whether the excess prison time should be credited to the supervised release term, reducing its length.”).

²⁴⁶ See *Turner*, 689 F.3d at 1123–24 (majority opinion) (“Although there is language in *Johnson* suggesting that supervised release can never begin when an individual remains in the custody of the Bureau of Prisons, this language must be read against the backdrop of the facts of that case.”).

²⁴⁷ See *Mosby*, 719 F.3d at 929–30 (citing *Johnson*, 529 U.S. 53); *Neuhauser*, 745 F.3d at 130 (same); *Maranda*, 761 F.3d at 696 (same).

²⁴⁸ *United States v. Garcia-Rodriguez*, 640 F.3d 129, 132 (5th Cir. 2011).

²⁴⁹ *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019).

held that Mont was imprisoned after defining “imprisonment” as “to put in a prison, to incarcerate, to confine a person, or restrain his liberty, in any way.”²⁵⁰

When *Johnson* and *Mont* are therefore read together, the phrase “released from imprisonment” in § 3624(e) can be defined as being “freed from confinement” of “any kind.” This broad definition, at first glance, would not seem to help prisoners like *Turner*, because “confinement of any kind” would encompass civil detention just as it would pretrial detention in state court. But the *Mont* majority made a crucial distinction between defendants who are absolved of guilt after their pretrial detention versus those who were not.²⁵¹ This distinction should alter the analysis of courts that have considered whether pre-commitment civil detention should be considered “released from imprisonment” because the government, as in cases of dismissal or acquittal in criminal cases, may be unable to prove that these prisoners are sexually dangerous.

The *Mont* majority opined that

time in pretrial detention constitutes supervised release only if the charges against the defendant are dismissed or the defendant is acquitted. This ensures that the defendant is not faulted for conduct he might not have committed, while otherwise giving full effect to the lawful judgment previously imposed on the defendant.²⁵²

While a certification filed by the Government is not a “charge,” it can, as in *Mosby*, be dismissed.²⁵³ And while a prisoner subject to commitment proceedings under the AWA cannot be “acquitted,” he can, as in *Turner*, *Neuhauser* and *Miranda*, be found by a court not to be sexually dangerous.²⁵⁴

In both the criminal pre-trial context and the civil pre-commitment hearing context, the prisoner stands accused of something (either a criminal offense or an allegation that he is sexually dangerous), which may ultimately go unproven. If that is so, then in both scenarios, the

²⁵⁰ *Id.* (internal quotations omitted) (quoting *Imprison*, BLACK’S LAW DICTIONARY 681 (5th ed. 1979); 5 OXFORD ENGLISH DICTIONARY 113 (1933); *Imprison*, BLACK’S LAW DICTIONARY 875 (10th ed. 2014)).

²⁵¹ *Id.* at 1834.

²⁵² *Id.*

²⁵³ *United States v. Mosby*, 719 F.3d 925, 927 (8th Cir. 2013).

²⁵⁴ See *United States v. Neuhauser*, 745 F.3d 125, 126 (4th Cir. 2014); *United States v. Maranda*, 761 F.3d 689, 691–92 (7th Cir. 2014); *United States v. Turner*, 689 F.3d 1117, 1119 (9th Cir. 2012).

prisoner's supervised release should continue to run in pre-dispositional detention, which safeguards the defendant against being punished for accusations that the Government may not ultimately be able to prove while still respecting the lawfully imposed sentence originally ordered by the district court.²⁵⁵

The *Turner* court recognized the distinction between pre-commitment detention and post-commitment detention—a crucial distinction that was glossed over by the Fourth, Seventh, and Eighth Circuits because these courts did not have the benefit of *Mont*.²⁵⁶ These cases relied on *Johnson*, which focused solely on post-sentencing imprisonment after a finding of guilt had been made.²⁵⁷ However, *Mont*, which also relied on *Johnson*, considered the more nuanced scenario of pre-trial custody, where a defendant is detained before any determination of guilt has been made.²⁵⁸ In distinguishing between defendants whose cases are dismissed or who are later acquitted and defendants who have been convicted and sentenced, *Mont* undermines the decisions in the circuit split that failed to make this distinction. These decisions, which treat pre-disposition detention the same as post-disposition commitment fail to capture this nuance and unconstitutionally authorize an additional sentence to be imposed on defendants who have been absolved of the allegations levied by the government.

II. TOLLING SUPERVISED RELEASE DURING CIVIL COMMITMENT RAISES SEVERAL CONSTITUTIONAL ISSUES

Holding that supervised release does not run while in prison awaiting civil commitment proceedings under the AWA, as most courts have held, is unconstitutional in light of the Supreme Court's decision in *Mont*. The majority's position runs the risk of punishing prisoners who have merely been accused and ensures that these prisoners serve a prolonged sentence that is unauthorized by law. Treating civil confinement as "imprisonment" extends the prisoner's sentence beyond that which the sentencing judge originally imposed, raising double

²⁵⁵ See *Mont*, 139 S. Ct. at 1834.

²⁵⁶ Compare *Turner*, 689 F.3d at 1122, with *Neuhauser*, 745 F.3d at 128, *Maranda*, 761 F.3d at 695, and *Mosby*, 719 F.3d at 929.

²⁵⁷ See *Neuhauser*, 745 F.3d at 129 (citing *United States v. Johnson*, 529 U.S. 53 (2000)); *Maranda*, 761 F.3d at 695 (same); *Mosby*, 719 F.3d at 929 (same).

²⁵⁸ See *Mont*, 139 S. Ct. at 1833, 1835 (citing *Johnson*, 529 U.S. at 59–60).

jeopardy concerns. It also calls into question the constitutionality of civil detention regimes where a defendant may be detained without receiving credit towards the service of any sentence.

A. *Double jeopardy concerns*

If a prisoner in civil detention is not considered “released from imprisonment” under § 3624(e), as the Fourth, Seventh, and Eighth Circuits have held,²⁵⁹ the converse must be true—that he remains “imprisoned” there serving an unconstitutionally prolonged prison sentence. The Supreme Court has observed that “[a] judgment of conviction that includes a sentence of imprisonment constitutes a final judgment and may not be modified by a district court except in limited circumstances.”²⁶⁰ A court may only modify a sentence after it has been imposed under the “compassionate release” provision of § 3582(c),²⁶¹ pursuant to Rule 35 of the Federal Rules of Criminal Procedure, or if the sentence was imposed “outside the guideline range” of the United States Sentencing Guidelines, if the sentence was appealed.²⁶² None of these circumstances permit a court to *increase* a defendant’s sentence after a judgment becomes final. In fact, increasing a defendant’s sentence after it has been imposed is generally barred by double jeopardy principles.²⁶³ Yet that is what the Fourth, Seventh, and Eighth Circuits have authorized in cases of defendants who are awaiting civil commitment proceedings under the AWA.

The Fifth Amendment’s double jeopardy clause provides that no person shall be “subject for the same offense to be twice put in jeopardy of life or limb.”²⁶⁴ This serves to protect “against multiple punishments for the same offense,”²⁶⁵ which, “[a]mong other things . . . prevents a court from increasing a defendant’s sentence once he has

²⁵⁹ See *Neuhauser*, 745 F.3d at 131; *Maranda*, 761 F.3d at 698; *Mosby*, 719 F.3d at 929.

²⁶⁰ *Dillon v. United States*, 560 U.S. 817, 824 (2010) (internal quotations omitted) (quoting 18 U.S.C. § 3582(b)).

²⁶¹ See *United States v. Jenkins*, 50 F.4th 1185, 1206–07 (D.C. Cir. 2022) (describing why 18 U.S.C. § 3852(c) is called “compassionate release”); *United States v. Escajeda*, 58 F.4th 184, 186 (5th Cir. 2023) (same).

²⁶² 18 U.S.C. § 3582(b).

²⁶³ *United States v. Fogel*, 829 F.2d 77, 90 (D.C. Cir. 1987).

²⁶⁴ U.S. CONST. amend. V, cl. 2.

²⁶⁵ *Ward v. Williams*, 240 F.3d 1238, 1242 (10th Cir. 2001) (quoting *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980)).

a ‘legitimate expectation of finality in his original sentence.’”²⁶⁶ The Supreme Court has recognized that “[a] defendant may not have a legitimate expectation in the finality of his sentence where the law explicitly provides for the possibility that a sentence may be later increased . . . but a defendant *does* have a legitimate expectation of finality with respect to the portion of a sentence already satisfied.”²⁶⁷

Courts have found a number of circumstances in which a defendant does not have a legitimate expectation in the finality in his sentence.²⁶⁸ But none of those would apply to a defendant like Turner, who was placed in civil commitment proceedings two minutes after his prison sentence expired.²⁶⁹ Unlike defendants who receive notice that their sentences may be increased under the “special dangerous offender” statute prior to trial,²⁷⁰ defendants who are subjected to AWA commitment after their criminal sentences conclude do not receive notice until *after* the Government moves to civilly commit them.²⁷¹ Therefore, a defendant like Turner who is serving a typical prison sentence has a legitimate expectation of finality in his prison sentence that prevents a court from increasing it under the double jeopardy clause.²⁷² Upsetting Turner’s expectation of finality in his sentence by detaining him beyond his sentence’s expiration date was therefore impermissible under the double jeopardy clause.

Judge Robert Bork squarely confronted the issue of whether a defendant’s sentence could be increased after he had begun serving it in the D.C. Circuit case of *United States v. Fogel*.²⁷³ Fogel was convicted of

²⁶⁶ *Id.* (citing *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992)).

²⁶⁷ *United States v. Norwood*, 49 F.4th 189, 211 (3d Cir. 2022) (emphasis in original) (citing *DiFrancesco*, 449 U.S. at 137; *North Carolina v. Pearce*, 395 U.S. 711, 718–19), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 803 (1989)).

²⁶⁸ *See, e.g., DiFrancesco*, 449 U.S. at 139 (1980) (holding that there is no expectation of finality in sentence when government has the right to appeal); *Pasquarille v. United States*, 130 F.3d 1220, 1222 (6th Cir. 1997) (holding that there is no expectation of finality in sentence when defendant appealed his sentence); *Williams v. Travis*, 143 F.3d 98, 99 (2d Cir. 1998) (holding that there is no expectation of finality in sentence when sentence is illegal).

²⁶⁹ *United States v. Turner*, 689 F.3d 1117, 1119 (9th Cir. 2012).

²⁷⁰ *See, e.g., DiFrancesco*, 449 U.S. at 124 (“Prior to the first trial, the Government, in accordance with § 3575(a), filed with the trial court a notice alleging that respondent was a dangerous special offender.”).

²⁷¹ *See, e.g., United States v. Perez*, 752 F.3d 398, 406 (4th Cir. 2014) (“In light of these procedural safeguards inherent in § 4248 proceedings, receipt of a copy of the certificate initiating commitment proceedings suffices to provide notice to the respondent.”).

²⁷² *See United States v. Fogel*, 829 F.2d 77, 90 (D.C. Cir. 1987).

²⁷³ *Id.* at 79.

embezzlement and was sentenced to 12 months of house arrest, a \$5,000 fine, and \$350 in restitution.²⁷⁴ After Fogel reported to probation and paid the fine in full, the court advised Fogel that his sentence would be changed and that he needed to be resentenced.²⁷⁵ The judge told Fogel at the resentencing hearing that he mistakenly imposed the original sentence, vacated the house arrest sentence, and then sentenced Fogel to a suspended prison sentence and three years of probation, in lieu of house arrest.²⁷⁶ The remainder of the sentence remained unchanged.²⁷⁷ Fogel appealed, arguing that the double jeopardy clause prevented the court from increasing his original sentence.²⁷⁸

The issue on appeal was “whether the double jeopardy clause prohibits a district court from increasing a defendant’s sentence after service has begun when an increase in the sentence is not necessary to cure a defect in the original sentence.”²⁷⁹ Resolving this issue came down to whether the defendant “had a legitimate expectation of finality in the severity of the sentence originally imposed by the district court.”²⁸⁰ The *Fogel* court held that the defendant had such an expectation and that there was nothing in his case that would defeat that.²⁸¹ Fogel’s sentence was statutorily compliant.²⁸² The sentencing statute did not provide that the court could increase his sentence.²⁸³ The increase in the sentence was not due to anything Fogel did.²⁸⁴ And Fogel did not appeal his conviction or challenge his original sentence.²⁸⁵ In fact, Fogel “proceeded to serve the sentence as if it were final in all respects. [Fogel] paid the fine in full, reported to a probation officer, and executed the terms and conditions of his probation.”²⁸⁶ The court therefore found that Fogel “had no reason to believe that the district court could, on its own motion and without explanation, increase the length of his

²⁷⁴ *Id.* at 79–80.

²⁷⁵ *Id.* at 80.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *United States v. Fogel*, 829 F.2d 77, 81 (D.C. Cir. 1987).

²⁷⁹ *Id.* at 83.

²⁸⁰ *Id.* at 88.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *United States v. Fogel*, 829 F.2d 77, 89 (D.C. Cir. 1987).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

sentence.”²⁸⁷ The *Fogel* court concluded that district court’s act of increasing Fogel’s sentence after he began serving it violated the double jeopardy clause.²⁸⁸

Prisoners like Turner and the defendant in *Fogel* both had an expectation of finality in the original sentence imposed at the time of sentencing. Both defendants’ original sentences were statutorily compliant, neither defendants’ statute of conviction provided for a later increase in sentence, neither defendant took any post-sentencing action that would warrant a sentencing increase, neither defendant challenged their convictions or appealed their sentences, and both defendants began serving their sentences as ordered.²⁸⁹ Therefore, neither defendant would have reason to believe that a district court would increase their sentences after they began serving them.²⁹⁰ It follows that if the increase in sentence in *Fogel* was barred by the double jeopardy clause, then the time that Turner and other similarly situated prisoners spent in pre-disposition custody under the AWA, which has now been characterized as “imprisonment,”²⁹¹ should also be barred by the double jeopardy clause. But the only court to have confronted whether the double jeopardy clause applied to civil commitment proceedings—the Fourth Circuit—found that it did not.²⁹²

The Fourth Circuit held in *United States v. Timms* that § 4248 “creates civil—not criminal—proceedings,” so criminal constitutional protections like the double jeopardy clause did not apply.²⁹³ The Fourth Circuit later reaffirmed that in *Matherly v. Andrews*.²⁹⁴ Civil commitment proceedings under the AWA were “not intended to and do not punish an inmate for prior criminal offenses,” the Fourth Circuit opined.²⁹⁵ Citing *Timms* and the Supreme Court’s decision in *Kansas v. Hendricks* (which held that criminal protections did not apply in

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 90.

²⁸⁹ *See id.* at 88–89; *United States v. Turner*, 689 F.3d 1117, 1118–19 (9th Cir. 2012).

²⁹⁰ *See Fogel*, 829 F.2d at 90.

²⁹¹ *See United States v. Mosby*, 719 F.3d 925, 930 (8th Cir. 2013); *United States v. Neuhauser*, 745 F.3d 125, 131 (4th Cir. 2014); *United States v. Maranda*, 761 F.3d 689, 699 (7th Cir. 2014).

²⁹² *United States v. Timms*, 664 F.3d 436, 455–56 (4th Cir. 2012).

²⁹³ *Id.* at 456.

²⁹⁴ *Matherly v. Andrews*, 817 F.3d 115, 118 (4th Cir. 2016) (citing *Timms*, 664 F.3d at 456).

²⁹⁵ *Id.*

proceedings under Kansas’s Sexually Violent Predator Act),²⁹⁶ the *Matherly* court reiterated that “the Double Jeopardy and Ex Post Facto Clauses do not provide an avenue for release” in civil commitment proceedings under the AWA.²⁹⁷

But the Fourth Circuit decided that double jeopardy protections did not apply in civil commitment proceedings under the AWA before *Mont* was decided. *Mont* does not concern civil commitment cases or double jeopardy principles, but it draws an important distinction between defendants being confined before a final adjudication and defendants confined after a final adjudication.²⁹⁸ The *Mont* court held that defendants in pre-trial detention whose cases were dismissed or who were later acquitted should receive credit towards completion of their supervised release to “ensure[] that the defendant is not faulted for conduct he might not have committed.”²⁹⁹ *Mont*’s holding reflects the Court’s concern with protecting the rights of the merely *accused* as opposed to the convicted, which is different from considering the rights of the committed detainees in *Timms*, *Matherly*, and *Hendricks*.

The rationale underpinning *Hendricks*’ determination that civil commitment was civil as opposed to criminal was that involuntary confinement under such civil commitment regimes was not punitive because “commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence.”³⁰⁰ But the *Hendricks* court phrased the two primary objectives of criminal punishment in the disjunctive: “retribution *or* deterrence.”³⁰¹ It is true that incarcerating a prisoner while awaiting a civil commitment hearing has no retributive purpose “because it does not affix culpability for prior criminal conduct,”³⁰² so one of the primary objectives of criminal punishment would not be satisfied by

²⁹⁶ Courts discuss Kansas’ civil commitment statute interchangeably with the AWA. *See, e.g.*, *United States v. Wilkinson*, 646 F. Supp. 2d 194, 198 (D. Mass. 2009) (“The language of the Adam Walsh Act indicates that it was adopted in an effort to conform to the Supreme Court’s decisions concerning the parameters of permissible civil commitment of sexually dangerous individuals, particularly *Kansas v. Crane* and *Kansas v. Hendricks*.” (internal citations omitted)).

²⁹⁷ *Matherly*, 817 F.3d at 118 (citing *Timms*, 664 F.3d at 455–56; *Kansas v. Hendricks*, 521 U.S. 346, 370–71 (1997)).

²⁹⁸ *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019).

²⁹⁹ *Id.* at 1834.

³⁰⁰ *Hendricks*, 521 U.S. at 361–62, 369 (“We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive.”).

³⁰¹ *Id.* at 362 (emphasis added).

³⁰² *Id.*

placing someone in civil confinement. But, because the twin objectives are phrased in the disjunctive, courts must also consider the objective of deterrence.

The *Hendricks* court's deterrence analysis, focusing on the "mental abnormality" or a "personality disorder" of the *committed* prisoner, assumes that a court has already made such a finding in court.³⁰³ The same cannot be said of prisoners who have only been *accused*, as opposed to committed, for suffering from such disorders.³⁰⁴ Under the AWA, a court cannot make such a finding until it holds an evidentiary hearing.³⁰⁵ It is only there that a court can determine if a prisoner "(1) 'has engaged or attempted to engage in sexually violent conduct or child molestation' and (2) currently 'suffers from a serious mental illness, abnormality, or disorder' (3) that would cause him 'serious difficulty in refraining from sexually violent conduct or child molestation if released.'"³⁰⁶

The *Hendricks* court observed that the conditions of confinement under the Kansas law did not serve a punitive purpose.³⁰⁷ The *Hendricks* court took the State for its word that a prisoner detained for civil commitment under the Kansas law did not experience the same conditions of confinement that defendants in a prison did; rather, these detainees lived in similar conditions to those who were involuntarily committed to a state mental facility.³⁰⁸ The same cannot be said of prisoners awaiting an evidentiary hearing under the AWA. Unlike the state prisoners committed under Kansas's law, the accused prisoners awaiting a hearing under the AWA *are* in fact subject to the more restrictive conditions placed on other federal prisoners because they are merely moved from one prison unit to another after the Government files its certification under the AWA.³⁰⁹

³⁰³ See *id.* ("Those persons *committed* under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior." (emphasis added)).

³⁰⁴ See *id.*

³⁰⁵ 18 U.S.C. § 4248(d) ("If, *after* the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General." (emphasis added)).

³⁰⁶ *United States v. Shea*, 989 F.3d 271, 276 (4th Cir. 2021) (citing 18 U.S.C. § 4247(a)(5–6)).

³⁰⁷ *Hendricks*, 521 U.S. at 363.

³⁰⁸ *Id.*

³⁰⁹ See, e.g., *United States v. Neuhauser*, 745 F.3d 125, 126 (4th Cir. 2014).

Prisoners like Turner waited years after the expiration of their prison sentence before they even received an evidentiary hearing to determine whether they suffered from a “serious mental illness, abnormality, or disorder.”³¹⁰ Most, if not all, of these prisoners awaited this determination in the same prison in which they had been serving their prison sentence.³¹¹ And none of the prisoners in *Turner*, *Mosby*, *Neuhauser*, or *Maranda* were found to be “sexually dangerous persons” under the AWA, so none of them were actually civilly committed, like the prisoners in Kansas’ civil commitment program were.³¹²

Because none of the prisoners in *Turner*, *Mosby*, *Neuhauser*, or *Maranda* were ever civilly committed,³¹³ they were never placed in the circumstance that the *Hendricks* court was analyzing.³¹⁴ *Hendricks* only analyzed the constitutionality of civil commitment, not pre-civil commitment.³¹⁵ This critical distinction undermines the argument that constitutional criminal protections do not apply *carte blanche* to prisoners awaiting civil commitment when the time that Turner, Mosby, Neuhauser, and Maranda spent in BOP custody awaiting their hearing was virtually indistinguishable from their time spent in BOP custody awaiting release from their term of imprisonment. The court, as it did in *Mont*, must distinguish between prisoners who have been civilly committed by a court and prisoners who languish in prison standing accused by the government of being sexually dangerous.

It is during that period in limbo that these prisoners’ terms of supervised release—imposed at their original sentencing hearings—would normally begin running.³¹⁶ But for prisoners awaiting their civil commitment hearings, their supervised release is tolled simply by the Government filing a certificate alleging that they are sexually dangerous

³¹⁰ *United States v. Turner*, 689 F.3d 1117, 1119 (9th Cir. 2012).

³¹¹ *See, e.g., Turner*, 689 F.3d at 1119; *Neuhauser*, 745 F.3d at 126; *United States v. Maranda*, 761 F.3d 689, 691–92 (7th Cir. 2014).

³¹² *Compare Turner*, 689 F.3d at 1119 (failing to find a prisoner a “sexually dangerous person”), *United States v. Mosby*, 719 F.3d 925, 927 (8th Cir. 2013) (same), *Neuhauser*, 745 F.3d at 126 (same), and *Maranda*, 761 F.3d at 692 (same), with *Hendricks*, 521 U.S. at 355–56 (civilly committing a prisoner after a jury found that he was a sexually violent predator).

³¹³ *Turner*, 689 F.3d at 1119; *Mosby*, 719 F.3d at 927; *Neuhauser*, 745 F.3d at 126; *Maranda*, 761 F.3d at 692.

³¹⁴ *See Hendricks*, 521 U.S. 346, 362 (“Those persons *committed* under the Act are, by definition, suffering from a ‘mental abnormality’ or a ‘personality disorder’ that prevents them from exercising adequate control over their behavior.” (emphasis added)).

³¹⁵ *See id.*

³¹⁶ *See* 18 U.S.C. § 3624(e).

persons.³¹⁷ This is distinguishable from cases involving the fugitive tolling doctrine where defendants abscond from their supervised release after being convicted and sentenced.³¹⁸ Fugitive cases involve defendants engaging in affirmative acts *after* they are sentenced—cases involving civil detainees do not.³¹⁹

Recall that the *Mont* majority sought to prevent defendants from receiving “the windfall of satisfying a new sentence of imprisonment and an old sentence of supervised release with the same period of pretrial detention.”³²⁰ Stated another way, the Court did not want to reward a defendant for unlawful actions taken while on supervised release. But the *Mont* majority also recognized that “pretrial detention constitutes supervised release only if the charges against the defendant are dismissed or the defendant is acquitted” so that defendants are “not faulted for conduct [they] might not have committed.”³²¹ The *Mont* majority implicitly recognized that it was unfair to punish a defendant for merely being accused of something that the Government could not eventually prove. The same should hold true for prisoners who have been accused of being a sexually dangerous person and then are later released after a district court determines that the Government has not proven that they are, in fact, sexually dangerous.

While disagreeing with the majority’s holding, Justice Sotomayor agreed with the majority in her dissent in *Mont* that pretrial detention and post-judgment imprisonment are different. For instance, she stated that “[u]nlike a term of imprisonment following a conviction, the duration of pretrial confinement is uncertain at its outset.”³²² The same is certainly true of pre-hearing confinement under the Act, where prisoners have no right to a speedy disposition.³²³ Justice Sotomayor

³¹⁷ See 18 U.S.C. § 4248(a).

³¹⁸ See, e.g., *United States v. Barinas*, 865 F.3d 99, 109–10 (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. Buchanan*, 638 F.3d 448, 454 (4th Cir. 2011); *United States v. Murguia-Oliveros*, 421 F.3d 951, 955 (9th Cir. 2005); *United States v. Cartagena-Lopez*, 979 F.3d 356, 359 (5th Cir. 2020).

³¹⁹ Compare *supra* cases cited in note 318, with *supra* cases cited in note 313.

³²⁰ *Mont v. United States*, 139 S. Ct. 1826, 1834 (2019).

³²¹ *Id.*

³²² *Id.* at 1840 (Sotomayor, J., dissenting).

³²³ See *Camrony v. Mayberg*, No. CIV S-07-2793-FCD-TJ, 2010 WL 3958648, at *10 (E.D. Cal. Oct. 8, 2010) (citing *Allen v. Illinois*, 478 U.S. 364, 371–72 (1986) (holding full panoply of rights afforded criminal defendants under Constitution are not applicable to civil commitment proceedings); *United States v. Perry*, 788 F.2d 100, 118 (3d Cir. 1986) (“The speedy trial clause deals with the timeliness of criminal prosecutions, not civil commitment proceedings.”); *United States*

observed that “[i]f pretrial detention lasts longer than 30 days, the uncertainty will continue until a judgment of conviction is entered and credit for pretrial detention is computed.”³²⁴ This is why Justice Sotomayor found that “the term ‘imprisoned’ most naturally means imprisonment following a conviction And seen from the point at which a person is detained and awaiting a verdict, his confinement is not ‘in connection with’ a conviction that has not happened and may never occur.”³²⁵ The same can be said of prisoners awaiting their evidentiary hearing under the AWA.

Justice Sotomayor also observed that the purposes of post-trial incarceration and pre-trial detention are different.³²⁶ The purpose of pretrial detention is “to ensure that an alleged offender attends trial and is incapacitated if he or she is a danger to the community, not to punish the offender for a conviction.”³²⁷ The same holds true for defendants awaiting their civil commitment proceedings under the AWA.³²⁸ This echoes the Fifth Circuit’s observation in *Garcia-Rodriguez* that “[w]hile Garcia’s administrative detention and subsequent deportation by ICE may be related to a crime that he previously committed, that relationship does not turn such detention into ‘imprisonment’ as contemplated by § 3624(e).”³²⁹

The situation for prisoners in civil detention is even more unfair than the scenario the Court confronted in *Mont*. Under the majority’s view in *Mont*, defendants who are later absolved of criminal responsibility for their intervening criminal cases at least *may* receive credit towards their prior sentence.³³⁰ In contrast, defendants who are absolved after

v. Budell, 187 F.3d 1137, 1141 (9th Cir.1999) (noting because commitment hearing is civil matter, constitutional rights to which defendant in criminal trial is entitled do not adhere to commitment hearing)) (“The speedy trial argument fails because no Supreme Court authority establishes the right to a speedy trial in civil commitment proceedings.”).

³²⁴ *Mont*, 139 S. Ct. at 1840 (Sotomayor, J., dissenting).

³²⁵ *Id.* at 1841.

³²⁶ *See id.* at 1842.

³²⁷ *Id.* (citing *United States v. Morales-Alejo*, 193 F.3d 1102, 1105 (9th Cir. 1999)).

³²⁸ *See Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (“Nothing on the face of the Act suggests that [Congress] sought to create anything other than a civil commitment scheme.”).

³²⁹ *United States v. Garcia-Rodriguez*, 640 F.3d 129, 134 (5th Cir. 2011).

³³⁰ *See Mont*, 139 S. Ct. at 1834 (majority opinion) (“Under our view . . . time in pretrial detention constitutes supervised release only if the charges against the defendant are dismissed or the defendant is acquitted. This ensures that the defendant is not faulted for conduct he might not have committed, while otherwise giving full effect to the lawful judgment previously imposed on the defendant.”).

waiting several years for their hearing under the AWA receive credit for nothing.³³¹ Instead, they are merely placed on supervised release after years of serving a prison sentence that they were not sentenced to and for which they received no credit.³³² Instead of receiving credit that would ultimately reduce their sentences, these prisoners' sentences were actually *extended*,³³³ which is more intolerable than the situation recognized by *Mont*.³³⁴

B. *Creating Uncertainty About the Civil Nature of Walsh Act Commitment*

Much has been written about the constitutionality of civil commitment schemes that seek to detain allegedly sexually dangerous prisoners beyond the expiration of their prison sentences.³³⁵ The general constitutionality of those statutes is beyond the scope of this article, which concerns the narrower issue of whether supervised release should run while a person is awaiting civil commitment proceedings under the AWA, regardless of whether the AWA itself is constitutional.

However, the approach that courts have taken to this issue so far in staying terms of supervised release while proceedings under the AWA are pending imperils the fine line that the Supreme Court has drawn between civil commitment proceedings and criminal punishment.³³⁶ Courts have found that supervised release is tolled during proceedings

³³¹ See, e.g., *supra* cases cited in note 313.

³³² See, e.g., *supra* cases cited in note 313.

³³³ See, e.g., *supra* cases cited in note 313.

³³⁴ See *Mont*, 139 S. Ct. at 1836 (Sotomayor, J. dissenting).

³³⁵ See, e.g., Brian G. Bodine, *Washington's New Sexual Offender Civil Commitment System: An Unconstitutional Commitment System and Unwise Policy Choice*, 14 SEATTLE U. L. REV. 105 (1990); Kimberly A. Dorsett, *Kansas v. Hendricks: Marking the Beginning of a Dangerous New Era in Civil Commitment*, 48 DEPAUL L. REV. 113 (1998); Mari M. Presley, *Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act: Replacing Criminal Justice with Civil Commitment*, 26 FLA. ST. U. L. REV. 487 (1999); Michael Zolfo, *Commitment Through Fear: Mandatory Jury Trials and Substantive Due Process Violations in the Civil Commitment of Sex Offenders in Illinois*, 93 CHI.-KENT L. REV. 593 (2018).

³³⁶ See *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997) (deeming the statute civil, in part, because it did not implicate two goals of criminal punishment: retribution or deterrence); cf. *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) (noting the concern that “[i]f the civil system is used simply to impose [additional] punishment” after the state in the criminal proceeding has settled on another, “then it is not performing its proper function”); *Hendricks*, 521 U.S. at 381 (Breyer, J., dissenting) (finding the lack of treatment as “distinguish[ing] between a basically punitive and a basically nonpunitive purpose”).

under the Act by reading sections 4248(a) and 3624(e) *in pari materia*,³³⁷ even though sections 4248(a) and 3624(e) address different subjects and different forms of detention. While § 3624(e) concerns release from imprisonment and commencement of supervision (the transition from imprisonment to freedom), § 4248(a) concerns the initiation of civil commitment proceedings (the transition from imprisonment to civil detention).³³⁸ Yet the “release” provisions in these two statutes have been construed as if they are the same,³³⁹ even though sections 4248(a) and 3624(e) perform different functions.

Because these two statutes do not pertain to the same subject matter and differ markedly in their purposes and application, their common words cannot be presumed to have a similar meaning.³⁴⁰ If the two statutes are read *in pari materia*, the distinction that the court made in *Hendricks* between civil and criminal proceedings³⁴¹ begins to unravel. When that distinction blurs, pre-hearing civil confinement becomes just what the circuit courts have called it: imprisonment. If that period of imprisonment—which often numbers in years—is neither imposed by a court nor authorized by statute, serious questions are raised about the civil nature of the AWA itself.

III. ALLOWING SUPERVISED TO RELEASE TO COMMENCE IN CIVIL DETENTION WOULD AVOID THESE CONSTITUTIONAL PROBLEMS

In the Ninth Circuit, Judge Smith found that reading the Act and *Johnson*’s interpretation of § 3624(e) *in paria materia* produced “an admittedly disquieting result” that “at first glance, does not seem fair.”³⁴² In the same case, Judge Smith opined that “[i]t arguably raises serious constitutional concerns, as the majority argues, and could not have been foreseen when the Supreme Court decided *Johnson*,” but

³³⁷ See *United States v. Mosby*, 719 F.3d 925, 930 (8th Cir. 2013); *United States v. Neuhauser*, 745 F.3d 125, 131 (4th Cir. 2014); *United States v. Maranda*, 761 F.3d 689, 698 (7th Cir. 2014).

³³⁸ See 18 U.S.C. § 3624(e); 4248(a).

³³⁹ See *Mosby*, 719 F.3d at 930; *Neuhauser*, 745 F.3d at 131; *Maranda*, 761 F.3d at 698.

³⁴⁰ *Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972) (declining to read two parts of the same comprehensive federal legislative effort *in pari materia* because the statutes differed in the roles that they played in the process); cf. *Estate of Sanford v. Comm’r of Internal Revenue*, 308 U.S. 39, 44 (1939) (statutes that pertain to the same subject “must be construed together”).

³⁴¹ See *Hendricks*, 521 U.S. at 361–62.

³⁴² *United States v. Turner*, 689 F.3d 1117, 1128 (9th Cir. 2012) (Smith, J., dissenting).

“it is not within our authority to rewrite the law, as interpreted by the Supreme Court, as we see fit, however laudable our policy concerns.”³⁴³ Judge Smith also stated in his dissent that “[t]he Supreme Court upheld Congress’s power under the Constitution to enact the Adam Walsh Act in *Comstock*, and has never revised its construction of § 3624(e) in *Johnson*.”³⁴⁴ While true at the time, the Court did revisit its construction of § 3624(e) in *Mont* by distinguishing between prisoners who are held before adjudication and prisoners who are not.³⁴⁵ That material distinction impacts the analysis of the majority position because those decisions were decided with post-adjudication detention in mind.

Courts must construe statutes, “if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”³⁴⁶ The *Turner* majority referenced this doctrine when it found that “*Johnson* does not command a different analysis, as the entirety of the custody at issue in that case was criminal in nature,” stating that “[t]o hold otherwise and consider § 4248’s ‘stay-of-release’ provision as extending *Turner*’s term of imprisonment raises serious constitutional questions.”³⁴⁷ The constitutional questions identified above can be avoided if courts distinguish between pre-commitment detention and post-commitment detention, as the majority did in *Turner*³⁴⁸ and the Supreme Court did in *Mont*.³⁴⁹

To see how this would potentially work in practice, it is worth pivoting back to the immigration context that the Fifth Circuit discussed in *Garcia-Rodriguez*, where the court held “that administrative detention by ICE does not qualify as imprisonment and that, for purposes of § 3624(e), *Garcia* was ‘released from imprisonment’ the moment he was transferred from BOP custody to ICE custody to await deportation.”³⁵⁰ The *Garcia-Rodriguez* court noted that “[a]ny supervision by a probation officer would have simply been ‘inactive’ supervision while

³⁴³ *Id.*

³⁴⁴ *Id.* (citing *United States v. Comstock*, 560 U.S. 126, 149 (2010); *United States v. Johnson*, 529 U.S. 53, 57 (2000)).

³⁴⁵ *Mont v. United States*, 139 S.Ct. 1826, 1834 (2019).

³⁴⁶ *Almendarez-Torres v. United States*, 523 U.S. 224, 237–38 (1998) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

³⁴⁷ *Turner*, 689 F.3d at 1125 (majority opinion) (citing *Almendarez-Torres*, 523 U.S. at 237).

³⁴⁸ *See id.* at 1122.

³⁴⁹ *See Mont*, 139 S. Ct. at 1834.

³⁵⁰ *United States v. Garcia-Rodriguez*, 640 F.3d 129, 134 (5th Cir. 2011).

he was in ICE custody and then after he was deported,” citing its prior decision in *United States v. Brown*.³⁵¹

The Fifth Circuit recognized in *Brown* that “a term of supervised release remains intact after an alien’s deportation.”³⁵² It does not “terminate after a defendant is deported.”³⁵³ The federal supervised release statute “expressly provides, as a condition of supervised release, that the defendant be deported and remain outside the United States.”³⁵⁴ Several courts have made this a condition of supervised release, requiring that “if the defendant is deported, he remain outside of the United States during his term of supervised release.”³⁵⁵ To the *Brown* court, this was “a clear indication that a term of supervised release remains in effect after the defendant is deported.”³⁵⁶ The *Brown* court found that

the Probation Manual supports this conclusion because it directs that[] Officers should provide supervision to offenders subject to deportation until the person actually leaves the United States. Officers should then verify deportation through the [INS] before making the case inactive until the scheduled expiration date. . . .

³⁵¹ *Id.* at 133 (citing *United States v. Brown*, 54 F.3d 234, 239 (5th Cir. 1995) (finding that supervised release continues after deportation and citing a probation manual which specifies that the supervision will simply be “inactive” until the expiration date)).

³⁵² *Brown*, 54 F.3d at 238; *see also* *United States v. Soto-Olivas*, 44 F.3d 788 (9th Cir. 1995) (concerning a defendant who was deported, violated the terms of his supervised release began after his imprisonment, and was subsequently resentenced to imprisonment); *United State v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir. 1992) (concerning a defendant who, when deported, was subject to a district court ruling that, if he was arrested again while on supervised release, his supervision would be converted to imprisonment).

³⁵³ *Id.* at 238–39 (citing *United States v. Tuangmaneeratmun*, 925 F.2d 797, 802 n.6 (5th Cir.1991) (holding that the standard conditions of supervised release which should be explained to a defendant include, among other things, that, if deported, he is not to return to the United States while on supervised release); *United States v. Osiemi*, 980 F.2d 344 (5th Cir.1993) (affirming a district court order which required that if deported while on supervised release, defendant would not illegally reenter the United States); *United States v. Cardenas-Alvarez*, 987 F.2d 1129 (5th Cir.1993) (affirming a district court sentencing of a defendant to a term of imprisonment of 100 months and order not to reenter the United States illegally during a three year term of supervised release); *United States v. Ramirez*, 948 F.2d 66 (1st Cir.1991) (conditioning supervised release, on the defendant if ordered deported, remaining outside the United States during that time)).

³⁵⁴ *Id.* at 239 (citing 18 U.S.C. § 3583(d)).

³⁵⁵ *Id.*

³⁵⁶ *Id. But see* *United States v. Biyaga*, 9 F.3d 204, 205–06 (1st Cir.1993) (involving a reviewing court approving of the district court’s practice, when sentencing illegal aliens, to suspend supervised release from the time the defendant was deported until, and if, he returned to the United States).

*An offender reentering the country prior to expiration of supervision should be supervised.*³⁵⁷

The Fifth Circuit doubted that Congress “intended for one branch of the government to extinguish a lawfully imposed sentence of another branch without specifically so providing,” so it held that the defendant’s term of supervised release was not extinguished when he was deported.³⁵⁸

Even though the Fifth Circuit had previously held “that a term of supervised release does not terminate after a defendant is deported,”³⁵⁹ it also acknowledged that “at least two cases have held that the defendants had to serve their supervised release in the United States due to the practical difficulties inherent in supervising their release abroad.”³⁶⁰ Therefore, the Fifth Circuit acknowledged that supervised release continued to run for deported defendants, even though those defendants could not actually be supervised.³⁶¹ This implicitly recognizes that supervised release should continue to run even if some of the benefits of supervised release do not accrue, allaying the most significant policy concern that motivated the *Johnson* decision and the circuit court cases that relied on it.³⁶²

Justice Sotomayor observed in her dissent in *Mont* that “the goals of supervised release can be fulfilled to some degree even when an offender is detained.”³⁶³ And while there may be a greater risk of recidivism if the prisoner does not complete supervised release in free

³⁵⁷ *Id.* (emphasis in original) (citing X PROBATION MANUAL, GUIDE TO JUDICIARY POLICIES AND PROCEDURES IV, § 18).

³⁵⁸ *United States v. Brown*, 54 F.3d 234, 239 (5th Cir. 1995).

³⁵⁹ *Id.* at 238–39.

³⁶⁰ *Id.* at 237 (citing *United States v. Porat*, 17 F.3d 660, 671 (3rd Cir. 1994) (“[T]he court and the probation office have the responsibility to see that [defendant] complies with the terms of his sentence. In order to maintain the required supervision, we hold that [defendant] must serve his complete sentence in the United States.”), *cert. granted and judgment vacated*, 515 U.S. 1154 (1995); *United States v. Pugliese*, 960 F.2d 913, 916 (10th Cir. 1992) (“The district court’s order and its remarks . . . mean that the structure needed to support defendant’s rehabilitative supervision is absent outside the United States, [more specifically, in Thailand], and we agree with that assessment.”)).

³⁶¹ *See id.*

³⁶² *See United States v. Johnson*, 529 U.S. 53, 59 (2000); *see also, e.g., United States v. Mosby*, 719 F.3d 925, 929–30 (8th Cir. 2013); *United States v. Neuhauser*, 745 F.3d 125, 130 (4th Cir. 2014); *United States v. Maranda*, 761 F.3d 689, 697 (7th Cir. 2014).

³⁶³ *Mont v. United States*, 139 S. Ct. 1826, 1841 (2019) (Sotomayor, J., dissenting).

society, as Judge Smith observed,³⁶⁴ this concern would be mitigated by the fact that the prisoner would remain in official custody, where he cannot recidivate, for several additional years after his term of imprisonment ends.

The first sentence of § 3583(d), which sets forth mandatory conditions of supervised release, states that

[t]he court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance.³⁶⁵

This condition’s placement in the first sentence outlining mandatory terms of supervised release underscores the importance that Congress placed on preventing defendants on supervised release from committing new crimes while on supervision. A deported defendant can still comply with this condition because, if he has been deported, he cannot commit new crimes or use drugs (at least in the United States)—but he can still fulfill other parts of his sentence like paying restitution. The same is true of defendants awaiting AWA proceedings.

If supervised release continues to run even after a defendant has been removed from the country, where he would be completely out of the grasp of the federal government, it should logically follow that supervised release should continue to run when a defendant is awaiting civil confinement proceedings under the AWA in a BOP facility. Not only can BOP ensure that the defendant does not commit new crimes, but it can also ensure that he pays restitution, participate in domestic violence or drug abuse programming, be required to register as a sex offender, cooperate in the collection of DNA, submit to drug testing, and submit to searches—nearly all of the mandatory supervised release conditions set forth in § 3583(d).³⁶⁶ Even though the transitional goals of supervised release are not achieved by permitting supervised release to run in civil detention, a prisoner can still comply with the same statutory conditions that an otherwise freed prisoner must adhere

³⁶⁴ *United States v. Turner*, 689 F.3d 1117, 1131 (Smith, J., dissenting).

³⁶⁵ 18 U.S.C. § 3583(d).

³⁶⁶ *Id.*

to without raising the separation-of-powers issues that concerned the *Brown* court.³⁶⁷

CONCLUSION

From *Turner* to *Mont*, courts have consistently recognized the implicit unfairness of indefinitely detaining someone before an adjudication without awarding them credit toward a court-imposed sentence.³⁶⁸ Courts have been rightfully skeptical of this practice because, as this article has set forth, there are several serious constitutional issues that arise when doing so. Courts can—and must—interpret statutes in a manner that seeks to preserve a statute’s constitutionality.³⁶⁹ In circumstances where a defendant has been detained under the AWA and held for years awaiting an evidentiary hearing, courts should interpret § 3624(e)’s commencement provision to permit supervised release to run during this period, which would preserve the constitutionality of the AWA.

Doing so admittedly does not confer the transitional benefits that supervised release normally provides, but neither does it confer those benefits on deported defendants, whose supervised release continues to run when they been removed from the country.³⁷⁰ And while a defendant may not receive the transitional benefits that supervised release normally affords, he is still able to comply with most of the mandatory conditions that other, free defendants must adhere to.³⁷¹ Chief among those is refraining from committing new law violations, which benefits both the defendant and society. Therefore, permitting supervised release to run while a defendant is awaiting civil proceedings under AWA is the most constitutional solution, even if it does not achieve every policy goal of supervised release.

³⁶⁷ *United States v. Brown*, 54 F.3d 234, 239 (5th Cir. 1995) (“It is doubtful that Congress intended for one branch of the government to extinguish a lawfully imposed sentence of another branch without specifically so providing.”).

³⁶⁸ *See, e.g., Turner*, 689 F.3d at 1118; *Mont*, 139 S. Ct. at 1843 (Sotomayor, J., dissenting).

³⁶⁹ *See Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998).

³⁷⁰ *See Brown*, 54 F.3d at 238.

³⁷¹ *See* 18 U.S.C. § 3583(d).