2019 UPDATE MEMORANDUM

For

THE LAW AND POLICY OF SENTENCING
(Tenth Edition)

And

THE LAW AND POLICY OF SENTENCING
AND CORRECTIONS (Ninth Edition)

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UPDATE MEMORANDUM – 2019

THE LAW AND POLICY OF SENTENCING (10th Edition)

and

THE LAW AND POLICY OF SENTENCING AND CORRECTIONS (9th Edition)

Preface

The purpose of this Update Memorandum is to apprise the reader of some particularly significant sentencing-related decisions rendered by the Supreme Court since publication of the tenth edition of The Law and Policy of Sentencing and correctional-law-related decisions rendered by the Court since publication of the ninth edition of The Law and Policy of Sentencing and Corrections. Among the cases spotlighted are four from the Court’s most recent term:

• *Garza v. Idaho*, which addressed the question whether a defense attorney provided ineffective assistance of counsel by failing to file a notice of appeal requested by a defendant whose plea agreement had included an appeal waiver;

• *United States v. Haymond*, which resulted in a splintered opinion on the issue whether a statute directing the imposition of a five-year mandatory-minimum sentence upon revocation of supervised release for certain violations of release conditions abridges the constitutional right to have a jury determine whether a fact elevating the “floor” of a sentencing range has been proven beyond a reasonable doubt;

• *Madison v. Alabama*, a case in which the Court held that although a person on death row could not, due to dementia, remember murdering a police officer, his execution would still be constitutional if he had a “rational understanding” of why he was being executed; and

• *Bucklew v. Precythe*, a case involving an as-applied Eighth Amendment challenge to a state’s lethal-injection protocol.

It also bears noting that the tenth edition of The Law and Policy of Corrections will be available for classroom use beginning in the fall term of 2020.

Lynn S. Branham
July 2019
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*The Law and Policy of Sentencing and Corrections* (9th Edition)

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4A. As discussed later in this chapter, some plea agreements include a provision waiving the defendant’s right to appeal. See note 7 on page 80. In Garza v. Idaho, 139 S.Ct. 738 (2019), the Supreme Court considered whether an attorney’s failure to file a notice of appeal upon the request of a defendant who had signed an appeal waiver constituted the constitutionally proscribed ineffective assistance of counsel. The Court held that disregarding the defendant’s explicit request to file the appeal was, from a constitutional perspective, deficient performance of the attorney’s responsibilities. The Court furthermore held that this failure to bring the requested appeal was, despite the appeal waiver, presumptively prejudicial. The Court noted that “no appeal waiver serves as an absolute bar to all appellate claims.” Id. at 744. For example, all courts have concurred that a defendant can challenge the validity of the appeal waiver on appeal, contesting its voluntariness or whether it was entered knowingly. For additional examples of claims that courts have held are not relinquished by an appeal waiver, see note 7, infra.

1A. Consider whether the defendant’s Sixth Amendment and due-process rights were violated in the following scenario. A jury found the defendant guilty of possessing child pornography, a federal crime punishable by a prison sentence of zero to ten years and a period of supervised release for a minimum of five years and maximum of life. The defendant was sentenced to thirty-eight months in prison plus ten years on supervised release. Following the defendant’s release from prison, though, a judge revoked his supervised release after finding, by a preponderance of the evidence, that he had knowingly downloaded pornographic images of children onto his computer. A federal statute, 18 U.S.C. § 3583(k), required that when a person violates the conditions of supervised release by committing this crime, the judge must revoke the supervised-release term and sentence the defendant to an additional period of imprisonment. The additional prison term must be for a minimum of five years. In this case, the judge imposed the mandatory-minimum sentence of five years, confiding that he would have sentenced the defendant to two more years in prison or less had it not been for the mandatory-minimum sentence § 3583(k) required him to impose.

1B. The Supreme Court was deeply divided in United States v. Haymond, 139 S.Ct. 2369 (2019) on the question whether the judicial fact-finding recounted above that had led to the additional five-year mandatory-minimum sentence abridged the defendant’s constitutional rights. The plurality opinion, written by Justice Gorsuch and in which three other Justices (Ginsburg, Sotomayor, and Kagan) joined, noted that a jury must find beyond a reasonable doubt any facts that trigger a mandatory-minimum prison sentence, including one imposed following the revocation of supervised release.

The four dissenting Justices (Alito, Roberts, Thomas, and Kavanagh) rejoined that the revocation of supervised release is not a part of the “criminal prosecution” to which the Sixth Amendment extends
its protections, including the right to a jury trial. A criminal prosecution ends, the dissenters argued, upon the imposition of the original sentence. As support for this conclusion, the dissenting opinion cited Supreme Court cases holding that parole- and probation-revocation proceedings are not a stage of the criminal prosecution. One of those cases was Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972), which can be found on page 416 of the casebook. In that case, which dealt with the procedural safeguards that due process requires be afforded during parole-revocation proceedings, the Supreme Court had said that “the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.” Id. at 480, 92 S.Ct. at 2600.

The plurality opinion responded that the “criminal prosecution” to which the Sixth Amendment limits its protections continues until the imposition of the “final sentence,” including the sentence for violating a supervised-release condition. Id. at 2379. Otherwise, the plurality opinion noted, “Congress could require anyone convicted of even a modest crime to serve a sentence of supervised release for the rest of his life. At that point, a judge could try and convict him of any violation of the terms of his release under a preponderance of the evidence standard, and then sentence him to pretty much anything.” Id. at 2380. The plurality opinion also underscored what it considered a critical distinction between the revocation of parole and the revocation of supervised release under the provision in § 3583(k) that triggers a mandatory-minimum sentence: When parole is revoked, the defendant is returned to prison to serve no more than the balance of the original prison sentence, a sentence authorized by the jury’s verdict. By contrast, the defendant in this case was subject to an increase in the sentencing range – a higher mandated “floor” (a minimum of five years in prison instead of zero) – not authorized by the jury’s verdict. The revocation of the defendant’s supervised release that triggered a mandatory-minimum sentence was based on a fact found by a judge, not a jury, under a standard of proof less exacting than proof beyond a reasonable doubt.

Justice Breyer cast the deciding vote in Haymond, concurring in the judgment. He agreed with the plurality that the provision in § 3583(k) that sparked imposition of a mandatory-minimum sentence upon the revocation of supervised release was unconstitutional. However, his reasons for this conclusion differed from the plurality’s. Unlike the plurality, Justice Breyer did not view the mandatory-minimum sentence imposed following the revocation of supervised release as punishment for the original crime of which the defendant had been convicted. Instead, he opined that the contested provision in § 3583(k) meted out what seemed more like punishment for a new crime, in this case the possession of the child pornography while the defendant was on supervised release. Justice Breyer cited three reasons why the contested provision in § 3583(k) was distinctive from “ordinary revocation”: (1) the provision only applied to violations of delineated federal crimes; (2) it deprived the judge of the discretion to decide whether the violation of a supervised-release condition warrants reprimand; and (3) it furthermore limited the judge’s discretion by mandating imposition of a prison sentence of a prescribed minimum length – five years.

Page 197 of The Law and Policy of Sentencing (10th ed.) – Add the following at the end of the page:

QUESTIONS AND POINTS FOR DISCUSSION

1. As mentioned earlier, statutes are also a source of procedural rights in the sentencing context. Title 18 U.S.C. § 3553(c) is one such statute. That statute states that a federal district judge “shall state
in open court the reasons for [the] imposition of the particular sentence.” By contrast, you will recall, the Constitution does not, according to most courts, usually require a statement of reasons for a sentence.

2. Beyond the question whether there is a statement-of-reasons requirement in the sentencing context, whether emanating from a statute, the Constitution, or some other source, is the question of what will satisfy that requirement. In Rita v. United States, 551 U.S. 338, 127 S.Ct. 2456 (2007), the defendant had argued that various facts, including his health, fear of retaliation while in prison, and military record, warranted imposition of a sentence outside the federal-guidelines range. The district court, however, imposed a sentence within, though at the bottom, of that range, stating only that this sentence was “appropriate.” The Supreme Court held that the asserted reason for the sentence, though brief, was adequate under § 3553(c). Basing its decision on the whole record in the case, the Court observed: “Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively.” Id. at 359, 127 S.Ct. at 2469.

Quoting from its decision in Rita, the Supreme Court recently reiterated that reciting the reasons for a sentence is a “sound judicial practice” that promotes the public’s trust in courts by demonstrating that judge’s decisions are “reasoned.” See Chavez-Meza v. United States, 138 S.Ct. 1959, 1964 (2018). In your view, what purposes are advanced when a judge delineates the reasons for a sentencing decision? Were those purposes met by the statement of reasons the Court found sufficient in Rita?

Chapter 7. THE DEATH PENALTY.

Page 338 of The Law and Policy of Sentencing (10th ed.) – Add new note 2A after note 2:

2A. In Madison v. Alabama, 139 S.Ct. 718 (2019), a prisoner sentenced to death for murdering a police officer could not, due to dementia, remember his crime. He argued that the Eighth Amendment therefore barred his execution. The Supreme Court, however, said that the question was not what he remembered but what he understood. If, despite his dementia, he had a “rational understanding” of why he was being executed – of, for example, the retribution being exacted for the crime, his execution would not transgress the Constitution. On the other hand, if his disease robbed him of the ability to have that understanding, he could not constitutionally be executed.

Page 354 of The Law and Policy of Sentencing (10th ed.) – Add new note 3A after note 3:

3A. In Bucklew v. Precythe, 139 S.Ct. 1112 (2019), a prisoner on death row contended that due to an extremely rare medical disease that caused tumors to grow in his throat, following the state’s lethal-injection protocol when executing him would subject him to cruel and unusual punishment. The gist of the prisoner’s claim was that the sedative employed during the execution process would not render him unconscious quickly enough, making him feel for a prolonged period – up to four minutes – like he was suffocating. The prisoner pointed to an alternative execution method that the state could utilize – lethal gas (nitrogen hypoxia) that, he contended, would avert this suffering. Two states’ studies on implementing the death penalty had reported that this execution method is “simple and painless.” Id. at 1142 (Breyer, J., dissenting).
Splitting 5-4, the Supreme Court held, though, that the prisoner had not demonstrated that this alternative could, as required by the *Baze-Glossip* test, be “readily implemented”:

He has presented no evidence on essential questions like how nitrogen gas should be administered (using a gas chamber, a tent, a hood, a mask, or some other delivery device); in what concentration (pure nitrogen or some mixture of gases); how quickly and for how long it should be introduced; or how the State might ensure the safety of the execution team, including protecting them against the risk of gas leaks.

Id. at 1129. If you were crafting a response to this argument, what would you say?

Another of the reasons why the Supreme Court concluded that the state had not acted unconstitutionally in refraining to adopt the proposed alternative execution method was that the state had a “legitimate” reason for not doing so. Noting that there was “no track record” of the nitrogen gas’s “successful use,” the Court observed: “[C]hoosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it.” Id. at 1130. If you were writing in dissent, how would you respond to this argument?

Chapter 8. CRUEL AND UNUSUAL PUNISHMENT AND NONCAPITAL CASES.

Pages 388 of *The Law and Policy of Sentencing* (10th ed.) – Add the following sentence after the first sentence in note 4 and then start a new paragraph:

Like the bar on cruel and unusual punishments, the proscription of excessive fines is a protection incorporated into the Fourteenth Amendment’s Due Process Clause and thereby applicable to the states. *Timbs v. Indiana*, 139 S.Ct. 682 (2019).

II. THE LAW AND POLICY OF SENTENCING AND CORRECTIONS (9th Edition)

Chapter 11. FIRST AMENDMENT RIGHTS

Pages 539-40 – Replace notes 5 and 6 and add new note 6A:

5. Under both RFRA and RLUIPA, prison officials have the burden of proving, not only that a restriction imposing a substantial burden on a prisoner’s exercise of his or her religion furthers a compelling governmental interest, but that the restriction is the least restrictive means of effectuating that goal. Practices at other “well-run” correctional facilities are relevant, though not dispositive, when assessing whether the prison officials have met the least-restrictive-alternative requirement. *Holt v. Hobbs*, 135 S.Ct. 853, 866 (2015). As one court of appeals noted, “the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.” *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir.2005).

RFRA and RLUIPA also contemplate that exempting a prisoner or group of prisoners from a generally applicable rule may in some instances be a viable and less restrictive means of furthering a
compelling governmental interest. See 42 U.S.C. § 2000bb-1(a); id. § 2000cc(2)(A); id. § 2000cc-3(e).
Thus, when applying RFRA and RLUIPA, the Supreme Court has rejected what it termed “the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.” See Holt v. Hobbs, 135 S.Ct. at 866; Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436, 126 S.Ct. 1211, 1224 (2006).

6. Courts have struggled with questions concerning the extent to which prison officials must accommodate the religious practices of inmates. One frequently litigated question has concerned the extent to which prison officials must accommodate prisoners’ requests, founded on their religious beliefs, for a special diet, such as a kosher diet for Jewish inmates or a vegetarian diet for Buddhist inmates. In some cases, courts have held that prison officials must provide prisoners with a diet that comports with their religious beliefs, while in other cases, the courts have found no constitutional or statutory obligation to provide the prisoners in question with a special diet. See DeHart v. Horn, 227 F.3d 47, 60 n.8 (3d Cir.2000) (listing First Amendment cases and emphasizing that the differing outcomes reflect a “contextual, record-sensitive analysis”). What facts should bear on the resolution of this question? Should it matter whether prison officials at a prison are providing special meals to prisoners for medical reasons or how many of those health-prescribed meals are served each day?

6A. A number of prisoners have claimed that, due to their religious convictions, they have a First Amendment right, as well as a federal statutory right, to grow a beard or have long hair. How would you resolve these constitutional and statutory claims?

In Holt v. Hobbs, 135 S.Ct. 853 (2015), the Supreme Court held that a prison policy generally barring inmates from growing beards violated the RLUIPA rights of a Muslim inmate who wanted, for religious reasons, to grow a half-inch beard. The Court first expressed doubt that the policy, as required by RLUIPA, furthered a compelling governmental interest. The Court agreed with a magistrate judge that it was “almost preposterous” to believe contraband could be hidden in such a short beard. The Court was also skeptical of the prison officials’ expressed concern that prisoners could disguise their identities by shaving off their beards, enabling them to more readily escape from the prison or enter a restricted area within it. The Court noted that the prison’s policies allowed prisoners to grow moustaches, hair much more than half an inch long, and, for medical (dermatological) reasons, quarter-inch beards. According to the Court, the prison officials had failed to demonstrate how the risk of prisoners disguising their identities by shaving off their half-inch beards was any greater than the risk posed when prisoners cut their hair or shaved off their moustaches or quarter-inch beards in an effort to disguise themselves.

The Supreme Court next concluded that even assuming the general beard ban promoted a compelling interest, prison officials had failed to prove the ban was the least restrictive means of furthering that interest. Prison officials could search the half-inch beards for contraband, as they do hair and clothing, or they could require the prisoners who had beards for religious reasons to run a comb through them to unearth hidden contraband. And to guard against any security problems arising from a prisoner’s altered appearance upon shaving, photographs could be taken, as they are in many other prison systems, of the prisoner both with and without a beard.
Chapter 17. CRUEL AND UNUSUAL PUNISHMENT

Page 814 – Replace the last full paragraph in note 4 with the following:

When determining whether the force applied to a pretrial detainee was unconstitutionally excessive, an objective standard applies. Kingsley v. Hendrickson, 135 S.Ct. 2466 (2015). The question is whether a reasonable correctional officer would have recognized the force used was unreasonable. Examples of relevant factors to be considered when answering this question include: the connection between the need for force and the amount of force used; the severity of the detainee’s injury; efforts the correctional officer made to limit the amount of force employed; the actual seriousness of the security problem confronting the officer; the severity of the threat the officer reasonably believed existed; and whether the detainee was “actively resisting.” Id. at 2473.

In refusing to apply the subjective Hudson test to the excessive-force claims of pretrial detainees, the Supreme Court pointed out in Kingsley that due process bars the “punishment” of pretrial detainees while the Eighth Amendment prohibits only “cruel and unusual punishments.” Do you believe the same or different tests apply to the excessive-force claims of pretrial detainees and convicted prisoners?

Chapter 18. THE MECHANICS OF LITIGATING INMATES’ § 1983 SUITS

Page 824 – Add after the first full paragraph:

The Supreme Court has said that courts should exercise “caution” before allowing a Bivens action to be brought in a “new context.” Correctional Services Corp. v. Malesko, 534 U.S. 61, 74, 122 S.Ct. 515, 523 (2001). For a case detailing the factors that bear on whether a case is being brought in a new context and a critique of those factors, see the majority and dissenting opinions in Ziglar v. Abbasi, 137 S.Ct. 1843, 1860 (2017); id. at 1881-82 (Breyer, J., dissenting). In that case, the Supreme Court held that noncitizens detained on immigration charges after the terrorist attacks on September 11, 2001 could not bring a Bivens action for damages stemming from alleged excessive force used against them and other violations of their constitutional rights during their detention.

Page 826 – Add the following at the end of the first paragraph in section 5:

These installment payments are assessed on a per-case basis. Bruce v. Samuels, 136 S.Ct. 627 (2016). Thus, if an inmate has filed two § 1983 suits in forma pauperis, the monthly assessment rises to 40% of the inmate’s income during the preceding month.

Page 827 – Add the following paragraph after the first paragraph in subsection 6:

Even if the third dismissal for one of the reasons spelled out in the three-strikes provision is being challenged on appeal, the prisoner is barred from filing any new lawsuits in forma pauperis while the appeal is pending, unless the prisoner is in imminent danger of serious physical injury. The Supreme Court has left unresolved the question whether an indigent prisoner can appeal in forma pauperis from such a third-time dismissal. Coleman v. Tollefson, 135 S.Ct. 1759 (2015).
Page 834 – Add the following after the third sentence in the subsection on the sovereign immunity of the United States:

In addition, the United States can be sued for certain intentional torts, such as battery, committed by designated government officials, including correctional officers, when acting within the scope of their employment. See id. § 2680(h); Millbrook v. United States, 569 U.S. 50, 133 S.Ct. 1441 (2013) (FTCA allows claims against United States for sexual assaults of prisoners by correctional officers employed by the federal government).

Page 840 – Delete the first sentence in note 4 and add the following:

The Supreme Court varies the language it employs when describing the requirements for qualified immunity. At times, for example, the Court has said that for a constitutional right to be “clearly established,” “existing precedent” must have rendered the constitutional question “beyond debate.” See, e.g., Plumhoff v. Rickard, 572 U.S. 765, 779, 134 S.Ct. 2012, 2022 (2014).

Page 845 – Add the following after the first paragraph in section 4:

“Special circumstances” will not excuse a prisoner’s failure to exhaust administrative remedies. Ross v. Blake, 136 S.Ct. 1850, 1856 (2016). But exhaustion is not required if an administrative remedy was not, in fact, “available” to a prisoner. In Ross, the Supreme Court described three instances when an administrative procedure should be considered unavailable: one, when there is no potential for relief, either because correctional officials lack the authority to grant relief or are “consistently unwilling” to do so; two, when the administrative structure is “so confusing” that no “ordinary prisoner” could navigate through it; and three, when correctional officials make threats or misrepresentations or engage in “game-playing” to obstruct a prisoner’s pursuit of an administrative remedy. Id. at 1859, 1862.

Chapter 19. REMEDIES

Page 879 – Add after the second full paragraph:

In Murphy v. Smith, 138 S.Ct. 784 (2018), the Supreme Court elaborated on the meaning of the PLRA provision mentioned above that directs that “a portion of the [prisoner’s] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant.” 42 U.S.C. § 1997e(d)(2). Some courts of appeals had construed this provision as vesting a district court with discretion to select the percentage of the judgment to be allocated towards payment of the fee award (though subject to the proviso that the prevailing prisoner-plaintiff could not be required to contribute any more than 25% of the judgment towards the fees award). Under this interpretation, a court might require that 1%, 10%, 25%, or some other fraction (25% or lower) of the judgment be remitted towards payment of the attorney’s fees awarded the plaintiff. In Murphy v. Smith, the Supreme Court disagreed with this interpretation, holding that courts have no discretion to determine what portion of a monetary judgment must be applied to pay awarded attorney’s fees. Thus, a court must exact 25% of a monetary judgment to pay a fee award before a defendant can be required to pay any of those attorney’s fees.